CASE No. ______

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER MARLOWE

Applicant,

v.

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; JAMES W. LEBLANC, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE LOUISIANA DPSC; DR. RAMAN SINGH, IN HIS OFFICIAL CAPACITY AS THE FORMER MEDICAL AND MENTAL HEALTH DIRECTOR AT THE LOUISIANA DPSC; DR. PAM HEARD, IN HER OFFICIAL CAPACITY AS THE FORMER INTERIM MEDICAL AND MENTAL HEALTH DIRECTOR AT THE LOUISIANA DPSC; DR. JOHN MORRISON, IN HIS OFFICIAL CAPACITY AS THE MEDICAL AND MENTAL HEALTH DIRECTOR AT THE LOUISIANA DPSC; WARDEN TIMOTHY HOOPER, IN HIS OFFICIAL AND PERSONAL CAPACITIES AS THE WARDEN OF ELAYN HUNT CORRECTIONAL CENTER [EHCC], A FACILITY OWNED AND OPERATED BY DPSC; DEPUTY WARDEN STEPHANIE MICHEL, IN HER OFFICIAL AND PERSONAL CAPACITIES AS THE DEPUTY WARDEN OF MEDICAL CARE AT EHCC; ASSISTANT WARDEN MORGAN LEBLANC, IN HIS OFFICIAL AND PERSONAL CAPACITIES AS THE FORMER ASSISTANT WARDEN RESPONSIBLE FOR MENU DEVELOPMENT AND MEAL PLANNING AT EHCC; ASSISTANT WARDEN DARRYL CAMPBELL, IN HIS OFFICIAL AND PERSONAL CAPACITIES AS AN ASSISTANT WARDEN RESPONSIBLE FOR MENU DEVELOPMENT AND MEAL PLANNING AT EHCC; DR. PREETY SINGH, IN HER OFFICIAL AND PERSONAL CAPACITIES AS THE MEDICAL DIRECTOR AT EHCC; GAIL LEVY, IN HER INDIVIDUAL AND OFFICIAL CAPACITIES AS THE FOOD MANAGER AT EHCC; POLLY SMITH, IN HER INDIVIDUAL AND OFFICIAL CAPACITIES AS A FORMER NURSE PRACTITIONER AT EHCC; FALLON STEWART, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES AS A FORMER EMERGENCY MEDICAL TECHNICIAN AT EHCC; ELIZABETH GAUTHREAUX, IN HER INDIVIDUAL AND OFFICIAL CAPACITIES AS AN EMT AT EHCC; JONATHAN TRAVIS, IN HIS OFFICIAL AND PERSONAL CAPACITIES AS A PHARMACIST AT EHCC; MASTER SGT. ANGEL HORN, IN HER OFFICIAL AND PERSONAL CAPACITIES AS A CORRECTIONAL OFFICER WORKING AT THE PILL CALL WINDOW AT EHCC; MASTER SGT. ROLANDA PALMER, IN HER OFFICIAL AND PERSONAL CAPACITIES AS A CORRECTIONAL OFFICER WORKING AT THE PILL CALL WINDOW AT EHCC; AND SGT CHERMAINE BROWN, IN HER OFFICIAL AND PERSONAL CAPACITIES AS A CORRECTIONAL OFFICER WORKING AT THE PILL CALL WINDOW AT EHCC

Respondents.

EMERGENCY APPLICATION TO JUSTICE ALITO TO VACATE STAY PENDING APPEAL OF PRELIMINARY INJUNCTION ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court and Circuit Justice for the Fifth Circuit:

Plaintiff-Applicant, a diabetic prisoner in Louisiana, filed the underlying motion for a temporary restraining order to require prison officials to provide safeguards against further COVID-19 contamination in his prison, which has already experienced a widespread outbreak of the virus. After a truncated evidentiary hearing, the district court found that Plaintiff made a sufficient showing of deliberate indifference to support a narrowly tailored preliminary injunction necessary to protect his health and possibly his life. On April 27, 2020, the U.S. Court of Appeals for the Fifth Circuit stayed that preliminary injunction over Plaintiff's objection and in contravention of the district court's factual findings. The COVID-19 pandemic is a serious public health crisis. The virus which causes COVID-19 is shown to rapidly spread in confined conditions at an alarming rate. Every day that the state refuses to implement appropriate hygiene and social distancing measures at Rayburn Correctional Center, as required by the District Court's injunction, Applicant is at risk of irreparable harm. Applicant's diabetes makes him extremely susceptible to serious, potentially fatal, complications should he contract COVID-19. This Court's intervention is urgently needed. Applicant therefore respectfully requests that the Fifth Circuit's stay be vacated.

The Fifth Circuit relied on its precedent in *Valentine v. Collier*, No. 20-20207, 2020 WL 1934431 (5th Cir. Apr. 22, 2020) to issue its stay in Applicant's case. The plaintiffs in *Valentine*, like the Applicant here, have sought intervention from this Court to vacate the Fifth Circuit's stay. In turn, the Applicant's legal argument reflects many of the issues currently raised in the Emergency Application to Vacate Stay in *Valentine v. Collier*, Case No. 19A1034 (2020).

STATEMENT

Most of the United States, including the Justices and employees of this Honorable Court, are now staying working from home and living under a stay-at-home order in a nationwide attempt to curb the rapid spread of COVID-19. Meanwhile, an unprecedented humanitarian disaster is unfolding in prisons across the United States as the COVID-19 is infecting these vulnerable populations living in compact spaces across the country. *See, e.g.* Cary Aspinwall and Joseph Neff, *These Prisons are Doing Mass Testing for COVID-19 – And Finding Mass Infections,* The Marshall Project (Apr. 25, 2020), https://www.themarshallproject.org/2020/04/24/these-prisons-are-doing-mass-testing-for-covid-19-and-finding-mass-infections (last visited May 12, 2020) [hereinafter *Finding Mass Infections*] (stating that Ohio's Marion Correctional Institution has "reported four deaths…[and] more than 2,000 [prisoners] and at least 160 staffers…have tested positive[.]").

The devastating impact of coronavirus on the prison population is no different in Louisiana. As of May 13, 2020, three hundred and seventy-four (374)prisoners and one hundred and thirty-four (134) Louisiana Department of Corrections ("DOC") staff have contracted the virus. COVID-19 Inmate Positives, https://doc.louisiana.gov/doc-covid-19-testing/ (last visited May 13, 2020) [hereinafter *Inmate Positives*]. Ten prisoners and three staff have died. *Id*. Respondent Department of Corrections ("DOC") reports that all the prisoners who have died had underlying health conditions. *Id*. As of this filing, the numbers of confirmed COVID-19 prisoners in Louisiana's DOC continues to increase every day, demonstrating that the curve has yet to be flattened inside the state's correctional system.

This case concerns one of the Plaintiff's most basic human right—the ability to protect himself from grave danger, and whether his desire to socially distance himself from others should be prohibited simply because he is incarcerated.

Respondent James LeBlanc, DOC Secretary, has himself publicly observed "we are all at risk to the virus." *Two DOC employees test positive for COVID-19*, KATC3 (Mar. 26, 2020), https://www.katc.com/news/covering-louisiana/two-doc-employees-test-positive-for-covid-19 (last visited May 11, 2020).

B.B. Rayburn Correctional Center ("Rayburn"), where Mr. Marlowe is housed, is now a hot spot of infections with 38 confirmed infections (35 prisoners and 3 staff).[1] *See Inmate Positives*, *supra* p. 1. **Alarmingly, this number has dramatically increased from 2 to 35 since Plaintiff first filed for emergency relief on April 1, 2020**. *See e.g.*, Pet App. 16(a) (indicating that when the district court issued its injunction twenty-three Rayburn prisoners had tested positive for COVID-19); *see also Inmate Positives, supra* p. 1. Additionally, at the April 7, 2020, evidentiary hearing, Warden Robert Tanner indicated that only one unit at Rayburn – the Rain Unit – was under quarantine due to exposure to the coronavirus. Pet. App. 461(a). However, since that evidentiary hearing, a whole additional unit – the Snow Unit – is now also under quarantine. *See* Pet. App. 701(a). There are approximately 1,300 prisoners at Rayburn. *Id*. With two units under quarantine, at least half of the prison has been directly exposed to COVID-19. *Id*.

According to a sworn statement provided by Rayburn's Warden, the facility has implemented some "new" policies surrounding COVID-19. *See* Pet. App. 536(a). In addition, Respondents attached to their post-hearing brief an exhibit entitled "COVID-19 FAQ

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[1] DOC notes that "staff COVID-19 test results are self-reported." *See Inmate Positives*.

Guidance to Prison Facilities." *See* Pet. App. 497(a)-533(a). Notably, this document is dated Apr. 6, 2020 (one day prior to the evidentiary hearing in this matter). *Id*. at 497(a). The Warden failed to testify at both the hearing and in the accompanying declaration to the Respondent's post-hearing brief as to how Rayburn will implement these new policies. *See, e.g*. Pet. App. 538(a).

The Applicant, however, presented additional testimony following the post-hearing brief demonstrating how the existing policies at Rayburn remain both constitutionally deficient and out of step with the Centers for Disease Control and Prevention's ("CDC") guidelines.

For example, there is no prison-wide policy requiring that prisoners—especially those with a higher risk of contracting COVID-19 due to age or medical conditions—distance themselves from one another. As Applicant explained at the evidentiary hearing,

> Q: Do prisoners self – or socially distances themselves in the day room?
>
> A: No a lot of prisoners take this as a Joke
>
> . . .
>
> Q: Have the staff at Rayburn instructed you all about the importance of social distancing?
>
> A: No. At one time somebody painted X's on the sidewalk, and then the Warden had them removed the next day.
>
> Q: What do you mean by x's
>
> A: They had social distance X's. One officer decided to put them down on the sidewalk, and the next day they were removed.

Q: Have you received any kind of memorandum from the institution about social distancing?

A: No.

Q: Have you received any kind of memorandum about them taking additional hygiene measures?

A: They put the CDC "wash your hands" poster on an eight-by-eleven piece of paper on our bulletin board.

Q: Does that piece of paper indicate to wash your hands because of Covid-19?

A: I don't know. I think it's just the regular "wash your hands" thing.

Q: Has there been any additional instruction about how to keep yourself safe during COVID-19?

A: No.

Pet. App. 481(a)-482(a).

In the Applicant's case, there are about 78 prisoners are confined in his dormitory. *Id*. at 427(a). These 78 prisoners sleep in beds within a few feet of one another. *Id*. The only water fountain is about five feet from Applicant's head in his bed. *Id*. The Warden admitted that there is no social distancing requirement when prisoners use the bathroom, *Id*. at 443(a), where they share a shower stall and five sinks. *See* Pet. App. 68(a). There is just a single soap dispenser that is shared by all 78 prisoners. *Id*. More alarmingly, there is no access to hand sanitizer or towels with which to dry their hands. *See* Pet. App. 68(a).

There are no social distancing protocols in place when prisoners go to the cafeteria. The Applicant described an environment where he waits in line for food "toe to heel" with other prisoners. *See* Pet. App. 479(a). Those serving and preparing food "sometimes" wear personal protective equipment ("PPE") and other times do not. *Id.* At the time of the April 7, 2020, evidentiary hearing, the Applicant was still sitting "four to each table" where his tray was touching the corners of the others at his table. *Id.* Following the evidentiary hearing, Rayburn instituted a policy where only two prisoners sat together at the cafeteria, but even then Applicant was only three feet from the other individual sitting and eating at the three by three foot table. *See* Pet. App. 661(a).

No COVID-19 cleaning protocols have been established. Applicant described a scenario where he had no cleaning supplies to disinfect common surfaces such as the microwave, ice chest, telephones, and email kiosk "computer." Pet. App. 482(a)-483(a). Following the evidentiary hearing, Warden Tanner provided an affidavit stating that a spray bottle with a bleach solution would be provided for prisoners to clean common surfaces. *See* Pet. App. 536(a). The Applicant provided testimony following the hearing that this bottle has never been full when he returns from work. *See* Pet. App. 664(a). The evidence presented from the Respondents is void of any prison policy instructing prisoners to clean high-contact areas between personal uses.

Testing is also inadequate. DOC policy is to test only those prisoners who exhibit a cough and fever of 100 degrees Fahrenheit or more. *See* Pet. App. 499(a). The evidence presented by the Respondents is void of any policy requiring testing of prisoners who may be exhibiting other well-known symptoms of COVID-19, such as shortness of breath, chills, muscle pain, sore throat or new loss of taste or smell. *See Symptoms of Coronavirus,*

Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last visited May 12, 2020) (listing common symptoms of COVID-19). It is also well known that asymptomatic individuals can carry the virus. Yet, at Rayburn, the Warden admitted that only prisoners with a "high fever" are tested. *See* Pet. App. 455(a)-456(a).[2]

After considering all of this evidence, on April 23, 2020, the District Court issued a carefully reasoned preliminary injunction on April 23, 2020, that only required the Respondents to submit to the Court:

> **a Plan to ensure the implementation of proper hygiene practices in the dormitory in which Plaintiff is assigned, and to implement social distancing practices to limit the spread of COVID-19, as recommended by the Center For Disease Control** and other public health authorities, in Plaintiff's immediate living area, for the protection of the Plaintiff. Defendants shall also submit a Plan to minimize Plaintiff's exposure to possible infected persons while visiting the infirmary and cafeteria areas of the prison.

Pet. App. 25(a) (emphasis added). The District Court came to this decision after reviewing documentary evidence submitted by both Applicant and Respondents; as well as taking

[2] In contrast, an Ohio prison is "testing everyone — including those who are not showing symptoms — we are getting positive test results on individuals who otherwise would have never been tested because they were asymptomatic." *See Finding Mass Infections, supra* p. 1. That prison reported that 73% of its prison population tested positive for COVID-19. *See 73% Of Inmates At An Ohio Prison Test Positive for Coronavirus*, NPR (April 20, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/04/20/838943211/73-of-inmates-at-an-ohio-prison-test-positive-for-coronavirus (last visited May 12, 2020). Likewise, officials at a different Louisiana prison have tested everyone demonstrating that eighty-five percent of the prisoners tested positive for COVID-19. *See* Lea Skene, *85% of inmates in St. Gabriel women's prison got coronavirus – but most showed no symptoms*, THE ADVOCATE (May 6, 2020), https://www.theadvocate.com/baton_rouge/news/coronavirus/article_2c551b72-8fbb-11ea-849a-e390bbc57059.html (last visited May 13, 2020).

testimony from the Applicant and limited testimony from Warden Robert Tanner[3] at an evidentiary hearing.

This preliminary injunction did not dictate or impose the District Court's opinion as to how the Respondents should provide relief to the Applicant. Rather, it only required the Respondents to develop an appropriate and constitutional plan that would comply with the CDC Guidance as to how they would implement life-saving social distancing and personal hygiene measures to protect Applicant from imminent harm.

Respondents first filed an Emergency Motion to Stay Enforcement of the TRO. (Rec. Doc. 115) Pending Appeal in the District Court on Friday, April 24, 2020. *See* Pet. App. 665(a). Over Applicant's opposition, the Fifth Circuit granted the Stay. Accordingly, the preliminary injunction is not currently in effect. *See* Pet. App. 1(a)-11(a).

REASONS TO VACATE THE STAY

A Circuit Justice or the full Court has jurisdiction to vacate a stay entered by a court of appeals "regardless of the finality of the judgment below." *W. Airlines v. Teamsters*, 480 U.S. 1301, 1304 (1987) (O'Connor, J., in chambers); see, e.g., *June Med. Servs., L.L.C. v. Gee*, 136 S. Ct. 1354 (2016) (vacating Fifth Circuit's stay of a district court's injunction pending appeal). An application to vacate a stay should be granted "where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed [by this Court] upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted

[3] The Court excused Warden Tanner even though the Plaintiff was not done with questioning because he had a doctor's appointment scheduled prior to the setting of the evidentiary hearing in this matter. *See* Pet. App. 458(a).

standards in deciding to issue a stay." *W. Airlines*, 480 U.S. at 1305 (quoting *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)); *see also Reynolds v. Int'l Amateur Athletic Fed'n*, 505 U.S. 1301, 1301–02 (1992) (Stevens, J., in chambers).

This case meets all of those requirements. The stay pending appeal risks imposing the very harm that Applicant sought to prevent: infection and possible death from COVID-19 on Respondents' watch. The stay effectively acts as a pocket veto of the district court's well-supported findings. In rejecting those findings, the stay panel strayed from the governing standards—requiring deference to the district court's fact findings—and instead did what the Fifth Circuit itself regards as improper, "simply [ ] substitute[ing] its judgment for the trial court's." *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985). The stay panel also misapplied this Court's precedent in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 124 (1984) by reframing the preliminary injunction as enforcement of state law, even though the injunction was grounded in the Eighth Amendment. If the merits panel reverses the preliminary injunction on these grounds, the Court is likely to grant review to correct this fundamental deviation in appellate review and constitutional law. For these reasons, Plaintiff requests that the stay be vacated.

I. The Stay Imposes a Risk of Serious and Irreparable Harm to Applicant

COVID-19 is already widespread inside Rayburn Correctional Center, having infected at least thirty-five prisoners and three staff members, presenting a serious risk to Applicant's life. *See Inmate Positives, supra* p. 1. The District Court correctly determined that,

> the exponential growth of the novel coronavirus has resulted in emergency declarations by the President and the Governor . . . [d]ue to the nature of this

> virus, the Court finds that the risk of contracting the virus in a prison environment, where at least 23 inmates have already tested positive, poses a sufficiently high risk, rendering this matter ripe for adjudication . . . .

Pet. App. 16(a). If the current stay is left in place, the already spiking rates of COVID-19 at Rayburn will likely overwhelm the facility, just as has occurred at prisons across the country. *See Finding Mass Infections, supra* p. 1. According to Respondents' own self-reporting system, already over three hundred and seventy-four (374) prisoners have contracted COVID-19 – thirty-five (35) of them at Applicant's facility. *See Inmate Positives supra* p. 1.

The district court recognized all of this and, based on the largely unchallenged medical and factual evidence, simply ordered that the Respondents provide the court a Plan as to how they will "ensure the implementation of proper hygiene practices in the dormitory . . . and to implement social distancing practices to limit the spread of COVID-19, as recommended by the Center for Disease Control and other public health authorities, in Plaintiff's immediate living area, for the protection of the Plaintiff." Pet. App. 25(a). The current stay puts Applicant at extreme risk of contracting COVID-19, and potentially developing irreparable injuries because he has diabetes. Additionally, the Fifth Circuit's demonstrable misapplication of the stay factors requires this Court to vacate the stay.

II. The Stay Panel's Application of the Stay Factors Was Demonstrably Wrong

In determining whether to grant the stay, the panel looked at,

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

Pet. App. 3(a) (citing *Nken v. Holder*, 556 U.S. 418, 426 (2009). The stay panel's application of these factors was demonstrably wrong because it failed to apply the governing "abuse of discretion" standard for review of a preliminary injunction. The stay panel reached its decision on likelihood of success and harm by consistently rejecting or ignoring the district court's findings. Therefore, the stay panel failed to apply the clearly erroneous standard and give deference to these fact findings of the district court. The stay panel also committed legal error by misapplying this Court's precedent in *Pennhurst*, effectively creating new law forbidding injunctive relief for constitutional violations as long as Defendants have a policy in place, regardless of what they do in practice. Under the correct legal framework, and giving proper deference to the district court's well-supported fact findings, none of the stay factors are met. Because the stay panel did not follow these standards, its stay should be vacated.

A. The Stay Panel Applied Incorrect Standards and Ignored the District Court's Fact Findings to Conclude that Respondents Are Likely to Prevail on Appeal

To be likely to prevail on an appeal, Respondents were required to make a strong showing that the district court abused its discretion in entering the preliminary injunction. *Enter. Int'l, Inc.*, 762 F.2d at 472 ("The district court's decision to grant or deny a preliminary injunction lies within its discretion, and may be reversed on appeal only by a showing of abuse of discretion.") (internal quotations omitted). This requires showing that the district court committed an error of law or based its injunction on erroneous fact finding. *Atchafalaya Basinkeeper v. United States Army Corps of Engineers*, 894 F.3d 692, 696 (5th Cir. 2018) ("Factual determinations within the preliminary injunction analysis

are reviewed for clear error, and legal conclusions within the analysis are reviewed de novo.").

The stay panel did not recite these standards, and wrongfully determined that the district court "made few (if any) factual findings." Pet. App. 5(a). Without relying on any standard to review the district court's decision, the stay panel concluded that Respondents were likely to prevail for two reasons: (1) *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), prohibits the district court's injunction; and (2) the district court's analysis fell short of satisfying "either the objective or subjective requirements of *Farmer v. Brennan*, 511 U.S. 825 (1994)." *Id.* at 4-5. Both of these reasons are legally incorrect.

1. The Stay Panel Improperly Overruled the District Court's Fact Findings on Harm Without Finding Clear Error

Since the suit started, Respondents have made several changes at Rayburn. Nevertheless, these changes still do not comply with CDC guidelines for prisons. The stay panel conducted its *Pennhurst* and *Farmer* analysis without any determination that the district court had erred in its fact finding. Moreover, the stay panel appeared to make its determination largely on a post-hearing declaration submitted by Rayburn's Warden, but failed to account for any of the post-hearing declarations provided by the Applicant. Pet. App. 5(a).

The district court, however, made several important factual determinations that the stay panel simply ignored. In fact, the district court specifically stated:

> Plaintiff's credible testimony paints a very different picture [from the measures presented by the Respondents]. For example, Plaintiff testified that the common water fountain in his dormitory is not wiped clean after each use by the inmates. He also testified that telephones in the dormitory are spaced a mere 12 inches apart and that no prisoner separation procedures have been implemented in the area of the telephones. The microwave ovens made available to the offenders are not regularly cleaned and disinfected. Also, no

> procedures have been implemented to avoid chokepoints in the walkways in the dormitory. According to the Plaintiff, foot traffic often results in offenders and staff "almost touching" each other. During mealtimes, inmates allegedly stand in line in the cafeteria in a heel-to-toe fashion to receive meals. After receiving their meals, inmates sit directly next to one another at tables in the cafeteria. More troubling is the Plaintiff's testimony that the inmates who serve the food only occasionally wear face masks in a proper manner while serving food. And the computers used by the inmates to communicate with family members and attorneys are not cleaned or sanitized after each use.
>
> Plaintiff contends that Rayburn has struggled to sufficiently execute its own policies. Plaintiff's uncontroverted testimony has adequately demonstrated that, under the circumstances, his Eighth Amendment claim will likely prevail on the merits.
>
> . . .
>
> Of particular concern to the Court is the fact that there remain several instances in which Plaintiff is seemingly unable to properly protect himself from infection, despite efforts currently being taken by the facility. For example, Plaintiff testified that while in his bunk, he is capable of touching his bunk neighbor if he reaches to his left. (Doc. 110-1, at p. 55). Also, as a diabetic, he must frequently visit the infirmary for testing and treatment. He alleges that he is required to wait in line at the infirmary in a "shoulder-to-shoulder" manner, thereby increasing the risk of contracting COVID-19. Id, at 69.
>
> . . .
>
> On April 13, Plaintiff reported that he had received a spray-bottle to clean high-touch surfaces as contemplated. *See* (Doc. 112). However, a few days later, Plaintiff notified the Court that the bottle was often empty. (Doc. 113, at p. 3). He also informed the Court of several other shortcomings. For example, he alleges that two medical orderlies who work in the infirmary that he regularly visits have not worn the proper personal protective equipment recommended for protection of themselves or others who utilize the services of the infirmary. *Id*. Plaintiff has also allegedly witnessed officers and cafeteria workers wearing PPE incorrectly with their noses exposed from the masks. *Id*.

Pet. App. 20(a)-22(a). This detailed factual finding goes much farther than the stay panel's determination that the district court "made few (if any)" factual findings in its "laconic analysis." Pet. App. 5(a). Consequently, the stay panel improperly overruled the district

court's preliminary injunction because it failed to find clear error in the district court's factual findings.

2. The Stay Panel Improperly Overruled the District Court's Fact Findings on Deliberate Indifference

The stay panel determined that the Respondents were likely to prevail on appeal because the Applicant failed to satisfy *Farmer*'s requirements. Pet. App. 5(a)-6(a). The stay panel relied on its finding in *Valentine* in determining that district court treated inadequate measures as dispositive of the Respondents' mental state. *Id*. at 6(a). As the applicants in *Valentine* explained to this Court in their Request to Vacate Stay, this framing misunderstands the issue. It was not legal error for the district court to consider Defendants' own actions when making a fact finding on their subjective intent. As this Court noted in *Farmer*, circumstantial evidence will often be the basis of finding subjective intent. 511 U.S. at 842 ("Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence . . . .").

The very act of having policies to combat COVID-19 shows Respondents were subjectively aware of the excessive risk the virus poses to prisoners like Applicant. *See* Pet. App. 23(a) (stating Respondents' "failure to implement their own internal protective policies may itself entitle Plaintiff to relief from the Court. *See Johnson v. Epps*, 479 F. App'x 583, 590 (5th Cir. 2012) (holding that an inmate sufficiently stated a claim for deliberate indifference where prison officials adopted a policy mandating more sanitary procedures, but failed to enforce the policy)."). The district court's further finding that Respondents' refusal to actually follow those policies shows that they were deliberately indifferent to the known risk of that failure. Pet. App. 22(a). (stating that the "Court finds

it troubling that DOC officials, at least at Rayburn, have apparently disregarded the importance of social distancing in preventing the spread of this unique disease, when numerous public health officials, and the Governor of Louisiana, have consistently urged the residents of the state to observe such measures to slow the spread of the illness."). Just as the district court surmised, the failure of Rayburn's staff to follow DOC policy is evidence (rather than an independent claim) of the Respondents' deliberate indifference to Applicant's serious medical needs and constitutional rights.

The stay panel again does not claim that the district court's findings were clearly erroneous, nor is there a basis to do so given the circumstantial evidence. It implies that relying on circumstantial evidence at all was improper. That was legally incorrect as this Court explained in *Farmer*, 511 U.S. at 842. The district court was not required to take Defendants at their word and ignore the obvious. *Id*. Nor was it required to have a direct admission from Defendants that they knew their conduct was inadequate as the stay panel implied—a requirement that would bleed into intentional, rather than reckless, conduct. Under *Farmer*, the district court could properly consider the circumstantial evidence and make a fact finding on Defendants' subjective intent. It did, and that fact finding can only be overturned if it is clearly erroneous. *Atchafalaya*, 894 F.3d at 696. Because the stay panel did not use that standard, just as it did not in *Valentine*, its application of the likelihood of success factor was demonstrably wrong and its stay must be vacated. *W. Airlines*, 480 U.S. at 1305.

B. The Stay Panel Overruled the District Court's Fact Findings on the Remaining Elements Despite Not Finding them Clearly Erroneous

As with its findings on likelihood of success, the stay panel did not apply the clearly erroneous standard to the district court's factual findings that: (1) Plaintiff would be

irreparably harmed; (2) that there was no evidence of harm to Defendants beyond a generalized institutional injury; and (3) that the balance of the harms and the public interest weighed in favor of an injunction. Accordingly, the stay panel's application of these factors was demonstrably wrong.

1. The District Court's Finding of Irreparable Harm to Applicant Was Not Clearly Erroneous

In its Memorandum and Order, the district court determined that the Applicant has "demonstrated a sufficiently substantial threat of irreparable injury if relief is not immediately ordered. The threatened injury that he has proven outweighs any harm that may result to the State if the injunction is not granted, and the injunction contemplated herein will not disserve the public." Pet. App. 23(a). Consequently, the district court found that the Applicant met the requirements necessary for injunctive relief. *Id*.

On review, the stay panel again relied on *Valentine* and stated: "But the question is whether Plaintiff[] has shown that [he] will suffer irreparable injuries even after accounting for the [DPSC's] protective measures. Neither the Plaintiff[] nor the district court suggest the evidence satisfies that standard." Pet. App. 8(a)-9(a).

The stay panel erred in this determination. The Applicant actually presented, and the district court considered, undisputed evidence in this regard. For example, it was uncontroverted that because the Applicant is diabetic he is at high risk to develop serious medical complication or even die should he contract COVID-19. Based on this evidence, the district court explicitly determined that Applicant will suffer irreparable harm if contracts the virus due to the Respondents' failure to implement and enact appropriate social distancing and hygiene policies to protect him. In turn, the district court simply ordered that within five days the Respondents must

> submit to the Court a Plan to ensure the implementation of proper hygiene practices in the dormitory in which Plaintiff is assigned, and to implement social distancing practices to limit the spread of COVID-19, as recommended by the Center For Disease Control and other public health authorities, in Plaintiff's immediate living area, for the protection of the Plaintiff. Defendants shall also submit a Plan to minimize Plaintiff's exposure to possible infected persons while visiting the infirmary and cafeteria areas of the prison.

Pet. App. 25(a). Thus, at best, the stay panel made its determination without reviewing the district court's reasoned opinion or the underlying testimony upon which it relied. In any case, the stay panel failed to conduct the required inquiry, and in light of the underlying record, the stay panel's determination cannot stand.

2. There is No Evidence in the Record to Suggest that the Respondents Will Suffer Any Harm to Factor into the Balance of Equities

In weighing the equities, the stay panel determined that the "harm to Louisiana's interests [was] 'particularly acute because the district court's order interferes with the rapidly changing . . . approach that [DPSC] has used to respond to the pandemic so far.' *Valentine*, 2020 WL 1934431, at * 5." Pet. App. 8(a). This finding was not based on any evidence presented in the case before the Court, but rather simply recites the finding from *Valentine*. In fact, Respondents offered no explanation of why the specific relief requested would be overly burdensome or difficult to implement. The stay panel highlights DPSC's statewide policy, Pet. App. 9(a), which it believes will be interfered with, but the case concerns only the Applicant and Rayburn's failures to protect him.

C. Respondents' Unproven PLRA Defense Does Not Justify A Stay

After concluding its analysis of the stay factors, the stay panel separately noted that Applicant's failure to exhaust administrative remedies demonstrated the Respondents' likelihood to succeed on appeal. Pet. App. 7(a). This issue, however, did not warrant

staying the preliminary injunction. As an affirmative defense, Respondents' had the burden of showing an unexhausted yet available remedy, and they wholly failed to do so. Further, the requirements of the district court's preliminary injunction were the least-restrictive means based on the evidence. Therefore, the PLRA exhaustion requirement was not grounds to stay the injunction.

The PLRA only requires prisoners to exhaust "such administrative remedies as are available" before bringing suit. 42 U.S.C. § 1997e(a); *see also Ross v. Blake*, 136 S. Ct. 1850, 1855 (2016). The Court has held that this exhaustion requirement is an affirmative defense, subject to the normal standards of pleading and proof. *Jones v. Bock*, 549 U.S. 199, 216 (2007).

The district court found there was no remedy available to Applicant under the circumstances because "of the nature of COVID-19, especially considering its ability to spread with great rapidity among densely populated communities, like prisons, the Court must reject Defendants plea and find that the interests of justice demand action by the Court on an emergency basis." Pet. App. 18(a). The district court heard evidence from the Respondents that COVID-19 is rapidly circulating at Rayburn. Therefore, it was not erroneous for the district court to conclude that the grievance process was not "capable of use," when there was no evidence it could be completed before Plaintiff suffered harm. *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173 (7th Cir. 2010) ("[T]here is no duty to exhaust, in a situation of imminent danger, if there are no administrative remedies for warding off such a danger.").

In reaching its conclusion, the stay panel flipped the burden – faulting the district court for not finding that Plaintiff "makes no effort to explain the impact of [the

Governor's and DPSC's Secretary's orders suspending grievance deadlines] on his refusal to file a grievance or on the way in which it would have been processed." Pet. App. 7(a). But it was the Respondents' affirmative defense and their burden to show an "available" yet unexhausted remedy. *Ross*, 136 S. Ct. at 1855.

In addition to improperly flipping the burden, the stay panel's wait-and-see approach requires Applicant to have his grievance become moot, through infection or even death, before being allowed to bring suit. This is not a requirement for injunctive relief, nor would it be justified in this unique pandemic situation where the potential harm is death. *Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("It would be odd to deny an injunction to inmates who plainly prove an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them."). The district court was not required to let the months-long grievance period run its course—and potentially allow irreparable harm to Applicant—to make its determination. It is common knowledge that it is currently unsafe, and possibly life-threatening, during the COVID-19 pandemic to be within six feet of others, which is why CDC is calling for social distancing measures. The available evidence supported the district court's finding that no remedy was available to the Applicant,, and therefore exhaustion did not bar the preliminary injunction.

III. The Court Would Likely Grant Review

Finally, it is also appropriate to vacate the stay because this Court "could and very likely would" review the court of appeal's merits decision as to the preliminary injunction. *W. Airlines*, 480 U.S. at 1305. Just as in *Valentine*, this case presents a question of particular national importance at this time when courts across the county are addressing how to respond to violations of state and federal inmates' rights in connection with the

COVID-19 pandemic.[4] In circumstances as time-sensitive and pressing as these, any conflicts on these questions among the lower courts would warrant granting certiorari. *See* Sup. Ct. R. 10; *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (granting certiorari "[b]ecause of the 'imperative public importance' of the issue" and "the disarray among the Federal District Courts"). The stay panel's misapplication of this Court's *Pennhurst* decision and failure to assess the district court's factual findings under the correct clearly erroneous standard of review would also warrant review, as a similar decision by the Fifth Circuit merits panel would "conflict with the relevant decisions of this Court" and other courts of appeals. Sup. Ct. R. 10(c).

CONCLUSION

For these reasons, Applicant respectfully requests that the stay entered by the United States Court of Appeals for the Fifth Circuit be vacated.

Respectfully submitted,

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[4] *See*, *e.g.*, *Mays v. Dart*, Case No. 1:20-cv-02134 (N.D. Ill. filed Apr. 3, 2020); *Cullors v. County of Los Angles*, Case No. 2:20-cv-03760 (C.D. Cal. filed Apr. 24, 2020); *Martinez-Brooks v. Easter*, Case No. 3:20-cv-00569 (D. Conn. filed Apr. 27, 2020); *Abrams v. Chapman*, Case No. 2:20-cv-11053 (E.D. Mich. filed Apr. 29, 2020); *Fernandez-Rodriguez v. Licon-Vitale*, Case No. 1:20-cv-03315 (S.D.N.Y. filed Apr. 28, 2020).