No. 19A1039

In the Supreme Court of the United States

CHRISTOPHER MARLOWE

APPLICANT

VERSUS

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

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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INTRODUCTION

Petitioner has failed to carry his heavy burden of proof demonstrating any of the requirements to undo the stay issued by the Fifth Circuit. That is because the injunction imposed by the District Court is both procedurally and substantively defective. The Fifth Circuit properly stayed the injunction in accordance with applicable law, and the Plaintiff's request to vacate the stay should be denied.

STATEMENT OF THE CASE

Procedural History of Petitioner's Request for an Injunction

Plaintiff's lawsuit, originally filed in 2018, claims the nutritional value of the food he was given at the Elayn Hunt Correctional Center (Hunt) in St. Gabriel, Louisiana, caused him to develop diabetes. He further alleges Hunt medical staff acted with deliberate indifference to his medical condition. Plaintiff's lawsuit has nothing to do with COVID-19 or the conditions of confinement at the Rayburn Correctional Center in Angie, Louisiana, where he is currently housed. The operative superseding Second Amended Complaint was filed May 17, 2019. Resp. Exh. A at 1. The Second Amended Complaint pertains only to Hunt. Applicant was transferred from Hunt to Rayburn in January 2019. Resp. Exh. 1, ¶13.

Nevertheless, Plaintiff–on April 1, 2020, two years after filing his original complaint and nearly a year after filing his Second Amended Complaint–filed a "Motion for Temporary Restraining Order" in which he demanded immediate release from custody due to risks allegedly posed to him by COVID-19. The *only* relief he requested was release from custody. The Defendants opposed the Motion.

The District Court conducted a hearing at which counsel presented arguments regarding the authority, or lack thereof, of the district court to order Plaintiff's release from custody under the circumstances.

Additionally, Plaintiff "admits that he did not exhaust administrative remedies and did not file a request to initiate the Administrative Remedy Procedure (ARP) related to this claim until April 7, 2020, after filing the instant Motion." App. 17a. Plaintiff's ARP was filed the same day Defendants opposed Plaintiff's Motion for release from custody on grounds that included his failure to exhaust administrative remedies. App. 375a. In a post-hearing sur-reply, Plaintiff argued, for the first time, he should be excused from the exhaustion mandate. App. 546a.

In this post-hearing-sur-reply brief he demanded, for the first time, an injunction directing broad changes to the protective measures implemented at Rayburn. App. 548a. And as the Fifth Circuit observed, "[t]he district court latched on to this eleventh-hour request." App. 003a. On April 23, 2020, sixteen (16) days after the evidentiary hearing on the Motion for TRO, the District Court entered the injunction at issue herein. App. 012a.

Identities of the enjoined Defendants

The District Court broadly enjoined "the Defendants." App. at pp. 24a-25a. "The Defendants" are the Louisiana Department of Public Safety and Corrections (DPSC), its Secretary James LeBlanc, DPSC Medical Director John Morrison, two former DPSC Medical directors, and thirteen current and former officers or staff members of the Elayn Hunt Correctional Center (Hunt) in St. Gabriel, Louisiana, where Petitioner does not reside.

DPSC is an arm of the State of Louisiana for purposes of sovereign immunity under the Eleventh Amendment. *See Champagne v. Jefferson Par. Sheriff's Office*, 188 F.3d 312, 314 (5th Cir. 1999). As such, DPSC is not a "person" who can be enjoined by a federal court under 42 U.S.C. §1983. *Washington v. Louisiana*, 425 F. App'x 330, 333 (5th Cir. 2011) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63–71 (1989)) (citations omitted). A Motion to Dismiss based, in part, on sovereign immunity, was filed in October 2019, and remains pending before the District Court.

Dr. John Morrison, Dr. Raman Singh, and Dr. Pam Heard, are Defendants who are sued in their official capacities as, respectively, current and former DPSC medical directors. Clearly, as former DPSC employees, Dr. Singh and Dr. Heard are powerless to implement the terms of any injunction. But additionally, as medical directors, they have no authority or ability to execute the injunction because the injunction does not direct medical care. Similarly, Morgan LeBlanc, Polly Smith, and Fallon Stewart are named as Defendants in their respective former official capacities as an Assistant Warden, nurse practitioner, and emergency medical technician. As former DPSC employees, they also are powerless to implement terms of an injunction.

Finally, Defendants Hunt Warden Timothy Hooper; Deputy Warden over Hunt medical care Stephanie Michel; Assistant Warden Darryl Campbell, who is responsible for menu development and meal planning at Hunt; Dr. Preety Singh, the Medical Director at Hunt; Gail Levy, the food manager at EHCC; Elizabeth

Gauthreaux, an EMT at Hunt; Jonathan Travis, a Pharmacist at Hunt; Master Sgt. Angel Horn, a Correctional Officer working at the pill call window at Hunt; Master Sgt. Rolanda Palmer, a Correctional Officer working at the pill call window at Hunt; and Sgt Chermaine Brown, a Correctional Officer working at the pill call window at Hunt, all lack the authority and ability to implement the injunction imposed against them in any manner would redress *any* problem as to this Plaintiff because Plaintiff is not incarcerated at Hunt anymore. He was transferred to Rayburn in January 2019, before he even filed the Motion for TRO or his procedurally-defective sur-reply memo.

In sum, assuming *arguendo* that any proper request for relief was presented at all over which the district court had jurisdiction, DPSC Secretary LeBlanc is the only Defendant who could possibly be enjoined and mandated to implement administrative and logistical changes to the COVID-19 response at Rayburn. But Plaintiff did not sue Secretary LeBlanc about the COVID-19 response at Rayburn.

The Ruling of the District Court

Although the Plaintiff's Original and subsequent Amended Complaints arose from his diet and medical treatment at Hunt, he named Defendants who were almost all exclusively Hunt officials or former DPSC officials, and he never filed a motion seeking this injunctive relief, the district court nevertheless exercised what he described as "sweeping jurisdictional authority and power," App. 466a:20. The district court granted relief Petitioner was neither requested in his operative Complaint nor his Motion, mandating actions by individuals who have no

connection with the facility where Petitioner is currently housed and by some who do not even work for DPSC any longer.

The District Court then enjoined DPSC, the only named Defendant mentioned in the Order, and all other "Defendants" *in globo*, without regard to their ability to implement its terms. App. 24a-25a. The injunction was purportedly issued under 42 U.S.C. §1983, yet it compels DPSC and other Defendants to follow state law and their own internal policies in violation of the Eleventh Amendment. In violation of the PLRA, the injunction was issued in favor of a prisoner who initiated the administrative grievance process but made no showing that the prison will not or cannot respond to it and belatedly asked that he be excused from completing it.

Finally, unlike the situation Justice Sotomayor described in a statement respecting denial of the application in *Valentine v. Collier*, --- S.Ct ----, No. 19A1034, 2020 WL 2497541 (U.S. May 14, 2020), the district court here found, "[t]he officials at Rayburn have taken numerous steps to implement policies to contain the spread of COVID-19 during these challenging times. While the number of infected inmates has grown, so too have the protective measures implemented at Rayburn by the DOC in response." App. 019a. Counsel for Petitioner even conceded, "Everyone here is trying their very, very best to make sure that nobody gets sick at Rayburn." App. 428a:4-6.

The district court, however, was dissatisfied with the "very very best" efforts of non-party officials at Rayburn.

The Fifth Circuit panel–the same panel that issued the stay in *Valentine*–found that this matter was controlled by its legal analysis in that case and issued the Stay. App. 003a. Some two weeks later, with no explanation for the delay, Petitioner filed this application to vacate the stay.

ARGUMENT

DPSC and the prison officials at Rayburn have and continue to dynamically and reasonably respond to the evolving risks and circumstances of COVID-19, "even if the harm ultimately was not averted." *Farmer v. Brennan*, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982–83, 128 L. Ed. 2d 811 (1994).

The injunction entered by the district court should remain stayed because the Petitioner has failed to meet the "high bar" necessary to undo a stay. *Valentine v. Collier*, No. 19A1034, 2020 WL 2497541, at *1 (U.S. May 14, 2020) (Sotomayor, J. respecting denial of application to vacate stay). First, the Applicant must show his rights "may be seriously and irreparably injured by the stay," *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers), which Petitioner has failed to demonstrate Second, he must show the Fifth Circuit was "demonstrably wrong in its application of accepted standards in deciding to issue the stay," *id.,* which he has also failed to demonstrate. Third, he must show the case "could and very likely would be reviewed here upon final disposition in the court of appeals," *id,* which he cannot show

The Petitioner's application fails to make any of the required showings. First, the subject matter of the injunction was never properly before the district court and the order is both procedurally and jurisdictionally defective. It was issued without

any hearing and Defendants were not afforded any opportunity to respond when the district court entered a surprise injunction that was requested, for the first time, in a post-hearing sur-reply memorandum that was procedurally improper. Second, the Fifth Circuit's ruling is grounded upon the district court's legal errors and, in any event, Petitioner has not demonstrated the Fifth Circuit's ruling was demonstrably wrong. And third, Petitioner did not demonstrate how he will suffer irreparable harm in the absence of an injunction. Indeed, he cannot do so because this is not a case where the plaintiff submitted "unrebutted" evidence or evidence was adduced of "inexplicable failures," *see Valentine*, No. 19A1034, 2020 WL 2497541, at *1, to follow the facilities own policies. Petitioner concedes prison officials are doing their "very very best."

I. THE SUBJECT MATTER OF THE INJUNCTION WAS NEVER PROPERLY BEFORE THE DISTRICT COURT.

The injunction directs the administrative and logistical response to COVID-19 at the Rayburn Correctional Center (Rayburn) in Angie, Louisiana. But no claims are pleaded in the operative complaint regarding the conditions of confinement at Rayburn amidst the COVID-19 pandemic. *See* Ex. 1. Petitioner did not seek to amend his Complaint; instead, he filed a motion related to Hunt, exclusively seeking his release. Petitioner never filed a motion requesting administrative and logistical changes be made to Rayburn's response to COVID-19. Plaintiff's motion requested one thing–immediate release from custody. The injunction entered by the District Court is therefore procedurally and jurisdictionally defective.

A. Plaintiff's lawsuit is not about COVID-19 or the conditions of confinement at Rayburn amidst the pandemic.

Issuance of a preliminary injunction presupposes "that it may be found and adjudged that the [Plaintiff] has stated a cause of action in its complaint." *De Beers Consol. Mines v. United States*, 325 U.S. 212, 219 (1945). "Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 677-78 (2009). Where a plaintiff's "motion raises issues different from those presented in the complaint, the court has no jurisdiction over the motion." *Booker v. McDuffie*, 2019 WL 3937225, *2 (N.D. Tex 7/22/2019) (cleaned up).

Plaintiff's lawsuit alleges *food* at Hunt (caused him to develop diabetes, which condition was allegedly met with deliberate indifference by officers of the Hunt medical department. The Second Amended Complaint, which pertains only to Hunt, was filed May 17, 2019. See Resp. Ex. B, but Petitioner was transferred from Hunt to Rayburn in January 2019. Resp. Ex. B, ¶13. The operative Complaint is primarily brought against staff at Hunt with no authority or ability to implement changes to COVID-19 measures implemented at Rayburn.

No Rayburn administrators or staff have been sued by the Plaintiff. Nevertheless, the district court broadly enjoined all "Defendants," even though all but one of the Defendants are completely powerless to implement it terms and jurisdiction over DPSC is barred by sovereign immunity. Further evidencing the lack of meaningful attention to the either the operative Complaint or the Defendants named in it, the injunction applies to a number of former DPSC

employees sued in their supposed "official capacities" as former employees with no authority or ability to implement terms of the injunction.

The District Court improperly also imposed an injunction that "is not of the same character, and deals with a matter lying wholly outside the issues in the suit." *Kaimowitz v. Orlando, Fla.*, 122 F.3d 41, 43 (11th Cir. 1997) (citing *DeBeers Consold. Mines*, 325 U.S. at 220). Thus, the subject matter of the injunction was never properly before the District Court.

In addition to being about a completely different prison and different prison officials, the operative Complaint neither addresses the outbreak of COVID-19 nor the conditions of confinement at Rayburn. Resp. Exh. 2. The underlying lawsuit challenges the nutritional value of meals and medical treatment Petitioner received at Hunt. But the injunction does not even pertain to medical care or food at either facility. Thus, the injunction is jurisdictionally and procedurally defective. For these reasons, Petitioner cannot show the stay was clearly wrong and this Court is unlikely to review any final ruling of the Fifth Circuit which vacates the injunction.

B. The injunction violated notice requirements of Rule 65.

Plaintiff's Motion requested the District Court, "[e]nter an Order authorizing [Plaintiff's] temporary supervised release with or without location monitoring until spread of the COVID-19 virus is no longer a threat within the Louisiana Department of Corrections system." App. at 27a. Insofar as the Plaintiff requested an immediate release from prison, the district court correctly denied the Motion. But not content with denying the only relief Petitioner actually sought, albeit improperly, the district court "granted" a "request," only submitted by the Plaintiff

in his post-hearing sur-reply memorandum, for an injunction to direct the response to COVID-19 at Rayburn. Defendants were neither offered a hearing nor any opportunity to respond to that new demand.

The injunction, therefore, violated the notice requirements of Rule 65(a) of the Federal Rules of Civil Procedure. Rule 65(a)(1) provides that [n]o preliminary injunction shall be issued without notice to the adverse party." The Fifth Circuit has previously interpreted the notice requirement of Rule 65(a)(1) to mean that "where factual disputes are presented, the parties must be given a fair opportunity and a meaningful hearing to present their differing versions of those facts before a preliminary injunction may be granted." *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) (internal citations omitted). If no factual dispute is involved, however, no oral hearing is required; but under such circumstances the parties still need to be afforded "ample opportunity to present their respective views of the legal issues involved." *Id.* That did not happen. Defendants were denied their right to notice and an opportunity to be heard when the district court entered a surprise injunction that was requested, for the first time, by the Plaintiff in a post-hearing sur-reply memorandum. For this additional reason, the preliminary injunction is procedurally defective, the Fifth Circuit was not demonstrably wrong issuing a stay, and the ruling is unlikely to be reviewed by this Court.

II. THE FIFTH CIRCUIT WAS NOT DEMONSTRABLY WRONG IN DECIDING TO ISSUE THE STAY.

Petitioner also fails to meet his heavy burden of showing the Fifth Circuit was demonstrably wrong because the Fifth Circuit was entirely correct when

staying the injunction. The injunction violates the sovereign immunity of the State of Louisiana. Furthermore, the injunction is substantively deficient because the supposed basis of the injunction is contrary to *Farmer v. Brennan* and violates the principles of comity enshrined in the PLRA.

A. The Fifth Circuit was not demonstrably wrong in finding the injunction violates Louisiana's Sovereign Immunity.

"The Eleventh Amendment prohibits federal courts from enjoining state [officials] to follow state law." *Valentine*, 2020 WL 1934431, at *4, (citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 103-23 (1984)). The district court ordered "Defendants must comply with the Governor's recommendations and their own internal policies […]." But Petitioner argues the Fifth Circuit misapplied *Pennhurst* "by reframing the preliminary injunction as enforcement of state law, even though the injunction was grounded in the Eighth Amendment." App. at 8. The plain language of the injunction requires State officials to comply with State law. The Fifth Circuit committed no error, or at a minimum is not demonstrably wrong, in finding the injunction violates the Eleventh Amendment.

B. The Fifth Circuit was not demonstrably wrong in the standard of review it applied.

Petitioner further argues the Fifth Circuit erred in its application of governing legal standards by failing to grant appropriate deference to the findings of fact of the district court. App. at 8. But that argument misconstrues the Fifth Circuit's ruling, which stayed the injunction based on legal errors of the district court. Errors of law are reviewed *de novo* on appeal. See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991). *See also* App. at 10-11, citing *Atchafalaya*

Basinkeeper v. United States Army Corps of Engineers, 894 F.3d 692, 696 (5th Cir. 2018).

The Fifth Circuit first found the injunction violates the Eleventh Amendment, which is a legal finding. Second, the Fifth Circuit found the District Court legally erred in analyzing the two elements of deliberate indifference. *Id*., citing *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L.Ed.2d 811 (1994). Third, the Fifth Circuit found, "the district court's exhaustion analysis under the Prison Litigation Reform Act runs counter to Supreme Court precedent." *Id*.

Regarding exhaustion of administrative remedies, the PLRA mandates prisoners exhaust available administrative remedies prior to filing suit. 42 U.S.C. §1997e(a). Plaintiff filed an Administrative Remedy Procedure grievance a few days after filing his Motion for immediate release from prison. The Fifth Circuit panel unanimously "agree[d] that the Appellants have demonstrated a substantial likelihood of success on their claim that Marlowe failed to exhaust his administrative remedies." App. 010a (Higginson, J. concurring).

Applicant did not prove, and the District Court did not find, that Louisiana's Administrative Remedy Procedure is not available. Thus there was no finding of fact by the district court which was owed deference. Instead, the district court made a legal finding that the prisoner should be *excused* from the exhaustion requirement because the requirement is inefficient and would not serve the interests of justice. Pet'r Appx. at 17a-18a. The panel found the district court's decision to excuse the

Plaintiff from the exhaustion requirement was contrary to precedent of this Court. Pet'r Appx. at 7a.

The Fifth Circuit conducted a similar *de novo* review of the legal conclusions made by the District Court regarding the Eighth Amendment.

C. The Fifth Circuit was not demonstrably wrong in its application of the deliberate indifference analysis.

Notably, the Fifth Circuit found the District Court in this case committed the same legal errors as the District Court in the *Valentine* case. The injunction in *Valentine* was stayed by the same motions panel which stayed the injunction here. The Fifth Circuit in this case determined it was bound by its analysis in *Valentine*, a ruling this Court has declined to vacate. Pet'r Appx. at 3a

The Plaintiff in this case makes essentially the same arguments in favor of emergency review as were made in *Valentine*. *See* Pet'r App. at p. *iv*. This Court should also deny Plaintiff's application to vacate the stay entered in this case.

Applicant alleges the Fifth Circuit erred by failing to grant proper deference to the findings of fact of the district court regarding deliberate indifference. However, the Fifth Circuit found the district court committed legal errors when conducting the deliberate indifference analysis. Thus, the Fifth Circuit correctly reviewed the District Court's legal analysis and conclusions *de novo*.

With regard to the first element of the deliberate indifference analysis, substantial risk of harm, the Fifth Circuit was not demonstrably wrong when it found the district court committed legal error in its analysis. The Fifth Circuit explained:

> [T]he question here is whether the Eighth Amendment requires RCC to do more than it has already done to mitigate the risk of harm. The district court's laconic analysis provides little basis for concluding that RCC's mitigation efforts are insufficient. Indeed, because the district court made few (if any) factual findings, it left no reviewable basis to conclude that the measures implemented by Defendants are constitutionally deficient. Plaintiff cites no precedent supporting a contrary conclusion, and we are aware of none.

Pet'r Appx at 6a (footnote omitted). Assuming, *arguendo*, that anything involving Rayburn was properly before the district court at all, the Plaintiff has still cited no precedent to support the conclusion that the numerous measures implemented at Rayburn "are constitutionally deficient."

Rayburn Warden Robert Tanner, who is not a party to this lawsuit, testified at the preliminary injunction proceeding and additionally submitted an affidavit in connection with the post-hearing memorandum filed by the Defendants. Warden Tanner explained the steps that were being taken at the time the affidavit was signed, as well as steps being taken for the future, to protect offenders from contracting COVID-19. App. 535a-539a. Based on the Warden's testimony and affidavit, the district court found:

> The officials at Rayburn have taken numerous steps to implement policies to contain the spread of COVID-19 during these challenging times. While the number of infected inmates has grown, so too have the protective measures implemented at Rayburn by the DOC in response. Indeed, the demands made upon corrections officials in their effort to contain the spread of this pandemic within their facilities is unprecedented.

Pet'r Appx. at 019a. The district court then found, in his view, specific deficiencies in protective measures but, no Eighth Amendment precedent was cited to support

the conclusion that the supposed deficiencies are tantamount to cruel and unusual punishment. .

Furthermore, the District Court wholly bypassed the subjective component of the deliberate indifference analysis. The Fifth Circuit found "the District Court cited no evidence establishing that Defendants subjectively believed that the measures they were (and continue) taking were inadequate." Pet'r Appx at 6a-7a. The Fifth Circuit explained:

> The district court's analysis resembles the analysis we condemned in *Valentine*, where the district court had treated inadequate measures as dispositive of the defendants' mental state. "Such an approach," we explained, "resembles the standard for civil negligence, which *Farmer* explicitly rejected." *Valentine*, 2020 WL 1934431, at *4.

The Fifth Circuit was not demonstrably wrong by condemning application of a civil negligence standard to a purported Eighth Amendment claim. Thus, Petitioner's Application to vacate the stay should be denied.

III. APPLICANT FAILS TO MEET HIS BURDEN OF SHOWING A LIKELIHOOD HE WILL SUFFER IRREPARABLE HARM UNLESS THE STAY IS IMMEDIATELY LIFTED.

In addition to failing to show the Fifth Circuit was demonstrably wrong, Petitioner fails to demonstrate the stay will cause him serious or irreparable injury. *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976). The Applicant argues he will suffer serious or irreparable injury if he contracts COVID-19. But he does not argue, let alone prove, he will contract the virus unless the stay is lifted. Furthermore, the urgency of the Application is belied by the Applicant's litigation conduct.

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, the Applicant must show he will suffer irreparable harm "in the absence of an injunction." *Id.* The Applicant does not explain why, considering the numerous measures that have been and continue to be implemented at Rayburn, he is more likely to contract the virus, than if the stay is lifted and the Defendants are required to fulfill the vague terms of the injunction imposed by the district court.

Furthermore, the Applicant sought no expedited relief in the Fifth Circuit and waited over two full weeks (from April 27, 2020, the date the Fifth Circuit stayed the injunction, until May 13, 2020, the date the Application was filed) to seek supposedly-emergency relief from this Court. Applicant fails to explain the reason for his excessive delay in seeking relief from this Court. Indeed, the timing and substance of Petitioner's arguments, which are virtually identical to those submitted to this Court in Valentine's application for a stay, appear to simply opportunistically be seeking to take advantage of whatever relief Valentine might have obtained. It cannot be concluded that Plaintiff faces a true emergency that only this Court can resolve on an expedited basis. *Cf. 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) and *California v. Texas*, No. 19-840 (U.S.) (Jan. 21, 2020) (denying motion for expedited consideration after petitioners waited 16 days after adverse decision to seek Supreme Court relief). Applicant fails to meet his burden of

showing irreparable harm and the injunction should remain stayed. Finally, it must be noted that Louisiana's efforts to protect the prison population and DPSC staff have been aggressive, dynamic, and ongoing. Indeed, additional steps have been taken at Rayburn to protect the health and safety of the Plaintiff, the other 1300+ offenders housed there, and the staff. No offenders at Rayburn have died from COVID related illnesses. And, Plaintiff's hyperbole about Rayburn being a "hot spot" is misleading at best. Only *35* of over *1,300* offenders have tested positive and, of those, only 19 offenders are *currently* positive. Fifteen offenders are being treated in a step-down unit and 13 have recovered. https://doc.louisiana.gov/doc-covid-19-testing/ (updated 5/19/2020 at 11:00 AM CST). Considering the number of offenders in recovery or who have recovered exceeds the number of current positives, Rayburn seems to be past its peak of infections. That statistic shows the officials at Rayburn have responded reasonably to the risks of COVID-19. *Farmer*, 511 U.S. at 845.

CONCLUSION

Considering the foregoing, the Petitioner has failed to carry his heavy burden of proof to vacate the Fifth Circuit stay and this Court need not intervene in this matter. The stay of the injunction should remain in place.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that, on May 20, 2020, this document was electronically filed with the clerk of the Court and served, by electronic mail on all counsel of record in this case.

s/Elizabeth Murrill
ELIZABETH MURRILL
SOLICITOR GENERAL