CASE No. 19A1039

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.

REPLY IN SUPPORT OF 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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TABLE OF CONTENTS

INTRODUCTION..1

ARGUMENT..1

I. THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION TO ISSUE A PRELIMINARY INJUNCTION..1

A. The Applicant's Pleadings Were Sufficient for the District Court to Order Injunctive Relief..1

B. Respondents' Procedural Rights Under Fed. R. Civ. P. 65 Were Not Violated..4

II. THE FIFTH CIRCUIT'S FACTUAL AND LEGAL FINDINGS ARE DEMONSTRABLY WRONG..6

A. The District Court's Injunction Does Not Violate the Eleventh Amendment..6

B. The Fifth Circuit Erred In Its Deliberate Indifference Analysis..8

C. The Grievance Process in Louisiana is Not Available...........10

CONCLUSION..13

TABLE OF AUTHORITIES

Page(s)

<u>CASES</u>

Bd. of Trs. V. Garrett, 531 U.S. 356 (2001)....................3

CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642 (2016)....................6

De Beers Consol. Mines v. United States, 325 U.S. 212 (1945)....................1, 2

Farmer v. Brennan, 511 U.S. 825 (1994)....................8, 10

Fletcher v. Menard Corr. Ctr., 623 F.3d 1171 (7th Cir. 2010)....................11

Helling v. McKinney, 509 U.S. 25 (1993)....................3, 10

Hinojosa v. Livingston, 807 F.3d 657 (5th Cir. 2015)....................8, 10

Johnson v. Epps, 479 F. App'x 583 (5th Cir. 2012)....................7

Jones v. Bock, 549 U.S. 199 (2007)....................11

Pa. Dep't of Corrs. V. Yeskey, 524 U.S. 206 (1998)....................3

Palmer v. Johnson, 193 F.3d 346 (5th Cir. 1999)....................8

Ross v. Blake, 136 S. Ct. 1850 (2016)....................11

Valentine v. Collier, Case No. 19A1034, WL 2497541 (May 14, 2020)....................9, 11

<u>OTHER AUTHORITIES</u>

COVID-19 Inmate Positives, https://doc.louisiana.gov/doc-covid-19-testing/....................1

Louisiana Coronavirus Map and Case Count,
https://www.nytimes.com/interactive/2020/us/louisiana-coronavirus-cases.html....12

INTRODUCTION

As of the filing of this Reply Memorandum, the total number of prisoners at Rayburn Correctional Center who have tested positive with COVID-19 has increased to 37. *See COVID-19 Inmate Positives*, https://doc.louisiana.gov/doc-covid-19-testing/ (last visited May 22, 2020).

The Appellee's Opposition relies on the following three arguments as to why this Court should not vacate the Fifth Circuit's stay: 1) the district court's injunction violated the federal rules of civil procedure; 2) the Fifth Circuit was not demonstrably wrong in issuing the stay; and 3) the Applicant cannot meet his burden of showing a likelihood of harm if the stay is not lifted. As outlined below, these flawed arguments should not prevent this Honorable Court from vacating the Fifth Circuit's stay of the District Court's narrowly tailed injunction.

ARGUMENT

I. THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION TO ISSUE A PRELIMINARY INJUNCTION

A. The Applicant's Pleadings Were Sufficient for the District Court to Order Injunctive Relief

The Respondents' argument that the district court did not have subject matter jurisdiction to issue an injunction is not legally sound. The Respondents cite only a magistrate judge's report and recommendation in support of their position, relying on that court's opinion that if a "motion raises issues different from those presented in the complaint, the court has no jurisdiction over the motion." Resp. Opp. at 8. They also rely on *De Beers Consol. Mines v. United States*, 325 U.S. 212 (1945), which is not dispositive here. *Id*. at 9. In *De Beers*, this Court determined that the preliminary injunction issued in

that matter dealt with "property[,] which in no circumstances can be dealt with any final injunction that may be entered. It is not a form of seizure of property used in offending against the statute, for *the property is not such as might be seized under § 6 of the Sherman Act, or under § 76 of the Wilson Act*" *Id.* at 220 (emphasis added). Therefore, this Court determined that the district court had acted outside of its subject matter jurisdiction because it had issued an injunction "not authorized either by statute or by the usages of equity." *Id.* at 223.

In this case, however, the Applicant's underlying lawsuit deals with the conditions of his confinement as a diabetic prisoner in the custody and control of Respondent Secretary LeBlanc. *See* Resp. Opp. Ex. A. As outlined in his Second Amended Complaint, Applicant's complaint brings allegations of civil rights violations under 42 U.S.C § 1983 and the Americans with Disabilities Act, Americans with Disabilities Amendment Act, and Rehabilitation Act ("ADA"). *Id.* Resp. Opp. Ex. A. The Applicant's complaint seeks, *inter alia*, injunctive relief against Respondent LeBlanc to provide him with appropriate medical care as a diabetic prisoner. *Id.* Respondent LeBlanc is a named party to this litigation and has been sued in his official capacity. *Id.* at 4.

Based on the facts before him, the district court judge correctly determined that "[a]n enhanced risk of contracting COVID-19 due to his condition, while not foreseeable at the time Plaintiff originally filed his lawsuit, stems from the same factual nexus as the original and amended Complaints." Petitioner's Appendix 15(a). Notably, the Fifth Circuit's stay was expressly not based on this legal issue. *See* Pet. App. 8a at fn 3 (stating "Defendants also argue that they are likely to succeed on appeal 'because the claims upon

which the injunctive relief were granted are not pleaded in this lawsuit.' We offer no opinion on this argument at this stage of the appeal.").

The district court here had the authority to issue this type of equitable relief under § 1983 and the ADA related statutes. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) (stating "it would be odd to deny an injunction [under § 1983] to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them."); *also Bd. of Trs. V. Garrett*, 531 U.S. 356, fn 9 (2001) (Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by . . . private individuals in actions for injunctive relief under *Ex parte Young*" (citation omitted)); *Pa. Dep't of Corrs. V. Yeskey*, 524 U.S. 206, 213 (1998) (stating "the plain text of Title II of the ADA unambiguously extends to state prison inmates.").

The Applicant's lawsuit concerns alleged violations of his civil rights as a diabetic prisoner that are protected by § 1983 and the ADA. As authorized by these statutes, he requested injunctive relief to remedy these violations. While the lawsuit was originally filed in 2018, and mostly concerns conduct by defendants at Elayn Hunt Correctional Center ("Hunt"), Applicant also made specific allegations in his Second Amended Complaint against Respondent Secretary LeBlanc in his official capacity.

At the evidentiary hearing, the district court heard un-rebutted testimony from Respondent LeBlanc's counsel and Warden Tanner that Respondent LeBlanc is intimately involved in the decisions of Applicant's conditions of confinement during the COVID-19 pandemic. *See* Pet. App. 439(a) (DOC attorney stating "an email came out from the secretary's office this morning, because the CDC and I believe (inaudible) some updated [sic] with additional guidance and suggestions for how facilities . . . would approach, I

guess, this emergency"); *also* Pet. App. 442(a) (Warden Tanner stating "we met almost daily, but for sure we meet Monday, Wednesday and Friday teleconference [sic] with the secretary and the – and his staff and other wardens from other facilities."). Therefore, the district court properly determined that it had subject matter jurisdiction to order this Respondent to produce a plan as to how it would provide constitutionally compliant social distancing and hygiene measures to the Applicant. This injunction is factually and legally related to the previously pled injunctive claims brought against Respondent LeBlanc in the underlying complaint.

B. Respondents' Procedural Rights Under Fed. R. Civ. P. 65 Were Not Violated

The Applicant's primary request for injunctive relief was temporary placement to supervised release with or without location monitoring. Pet. App. 27(a). However, the Applicant also requested "other relief as the Court deems just and proper." *Id*. The Respondents incorrectly represent in their Opposition that the Applicant did not request the relief granted by the district court until a "post-hearing sur-reply memorandum." Resp. Opp. at 9-10. This is categorically not true.

In a reply memorandum filed prior to the Apr. 7, 2020 evidentiary hearing, the Applicant specifically pled:

> In the alternative, even if this Court determines that 18 U.S. Code § 3626(g)(4) does apply, the Court still has the authority to issue an injunction pursuant to 18 U.S. Code § 3626(a)(3) that recognizes the following: 1) as a diabetic prisoner, Mr. Marlowe's current conditions of confinement violate his constitutional rights and pose a threat of irreparable harm should he contract COVID-19 at Rayburn; 2) in order to remedy Mr. Marlowe's unconstitutional conditions of confinement, Defendant Leblanc must furlough him pursuant to La. R.S. 15:833 or immediately remedy the unconstitutional conditions at Rayburn in order to protect Mr. Marlowe's life – preferably within the next twenty-four hours.

Pet. App. 408(a). The Applicant brought this form of relief up again at the evidentiary hearing:

> In the alternative, what I would suggest to this Court, after . . . reviewing all the pleadings and reviewing this law, is that based on the testimony that you've heard, based on the exhibits that have been entered into the record, and what we all know about COVID-19, that we encourage this Court to issue a ruling that declares that as a diabetic prisoner, Mr. Marlowe's health [sic] conditions of confinement do violate his constitutional right and pose a threat of irreparable harm should he contract COVID-19. And that we would also ask you to issue an injunction asking that Rayburn remedy these particular – this particular situation [of his] condition[s] by either furloughing prisoners under 15:833 or providing some other forms of housing to people like Mr. Marlowe. Then if the Defendants are unable to meet that injunction, Mr. Marlowe can come back and ask for a three-judge panel for his release. [] We make that as an alternative argument in this particular matter.

Pet. App. 467(a)-468(a).

The district court judge specifically indicated that with regards to the Applicant's Reply Memorandum, that it would give the Respondents an "an opportunity to review it and to file into the record a reply, a response." *Id.* at 433(a). The district court also set a briefing schedule at the Apr. 7, 2020 evidentiary hearing, allowing both the Respondents and Applicant to file a post-hearing brief. *Id.* at 488(a). Despite the opportunity to raise any concern about a notice issue, the Respondents' brief did not make any mention of a notice failure pursuant to Rule 65(a), as a reason why the district court could not issue an injunction based on the unconstitutional conditions of confinement at Rayburn during the COVID-19 outbreak.

In their Opposition, the Respondents argue that the district court's injunction violated their notice rights under Fed. R. Civ. P. 65(a). Resp. Opp. at 10. This is the first time the Respondents have raised this point as legal reason in support of their stay. *See* Pet. App. 665(a)-686(a). Consequently, this Court should not consider this legal issue that

the Respondents have just now raised for the first time because it "is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance." *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1653 (2016).

In addition, this argument is a red herring because a significant portion of the parties' briefing, exhibits, and testimony at the evidentiary hearing was about the conditions of Mr. Marlowe's confinement, and how as a diabetic prisoner these conditions present an undue risk of irreparable injury during the COVID-19 pandemic. The Respondents filed briefs and exhibits about their efforts at Rayburn during COVID-19. In turn, they have had every opportunity to present evidence and rebut the Applicant's testimony in this case.

II. THE FIFTH CIRCUIT'S FACTUAL AND LEGAL FINDINGS ARE DEMONSTRABLY WRONG

The Respondents argue that the Fifth Circuit appropriately reviewed the district court's "legal determinations" *de novo* and that there should be no deference provided to the district court's factual findings. *See* Resp. Opp. at 11. As already briefed and presented in his Application, Applicant disagrees with this position and argues that the Fifth Circuit did grant appropriate deference to the district court's factual findings.

Alternatively, the Fifth Circuit's legal determinations, as presented by the Respondents, are erroneous, requiring that this Court vacate the current stay in this matter.

A. The District Court's Injunction Does Not Violate the Eleventh Amendment

There is nothing in the district court's injunction that orders the Respondents to follow their own policies. Rather, the district court specifically wrote:

> The prison has also failed to meaningfully implement social-distancing procedures and other measures aimed at thwarting the spread of the coronavirus. Although the DOC policy defines "social distancing," it does not require that it be implemented at Rayburn or any other DOC facilities. 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 . . . .

Pet. App. 22(a) (citation omitted). The district court then indicated that,

> Defendants' 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).

Pet. App. 23(a). Importantly, the wording of the district court's actual order does not require the Respondents to follow their own internal policies:

> **IT IS FURTHER ORDERED** that Defendants shall 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.
> **IT IS FURTHER ORDERED** that Defendants shall submit the Plan herein ordered within 5 days of the date of this Order.

Pet. App. 25(a). The plain language of the district court's ruling and order is therefore not a violation of the Eleventh Amendment. What the district court indicates is that the fact that the Respondents have enacted a policy on the pandemic demonstrates their knowledge of the potential risk and their judgment on the measures necessary to mitigate that risk. The failure to follow policy this policy not an independent claim, but evidence of the Respondents' deliberate indifference to Applicant's serious medical needs and constitutional rights.

B. The Fifth Circuit Erred In Its Deliberate Indifference Analysis

The Fifth Circuit was demonstrably wrong in determining that "the district court's analysis falls woefully short of satisfying either the objective or subjective requirements of *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994)." Pet. App. 6(a). A claim that prison officials' conduct violates the Eighth Amendment must meet two conditions. First, the deprivation or violation at issue must be "sufficiently serious'; a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities.'" *Palmer v. Johnson*, 193 F.3d 346, 352 (5th Cir. 1999) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). Second, the official must have the requisite culpable state of mind: in this case, "one of deliberate indifference to inmate health or safety." *Palmer*, 193 F.3d at 352 (citing *Farmer*, 511 U.S 834). To establish this state of mind, a plaintiff must show that the officials "(1) were aware of facts from which an inference of an excessive risk to the prisoner's health or safety could be drawn and (2) that they actually drew an inference that such potential form harm existed." *Palmer*, 193 F.3d at 352 (quoting *Bradley v. Pucket*, 157 F.3d 1022, 1025 (5th Cir. 1998)).

Although the test involves officials' *subjective* knowledge of the risks at issue (such that merely failing to notice a significant risk may not establish liability), the required knowledge can be *shown* by inference from circumstantial evidence, as well as the straightforward fact that the risk was obvious. *Hinojosa v. Livingston*, 807 F.3d 657, 665 (5th Cir. 2015) (citing *Farmer*, 511 U.S. at 842-43). Such a finding is particularly appropriate where, as here, "the circumstances suggest that the defendant official had been exposed to information concerning the risk and thus 'must have known' about it . . . ." *Id*. Consequently, a plaintiff need not delve into an official's internal thoughts to establish

a culpable state of mind: he only needs to present the Court with sufficient evidence that the official must have known of the excessive risk.

Therefore, the relevant objective inquiry is only whether Defendants' response to COVID-19 is objectively reasonable, or whether the Eighth Amendment "requires [Defendants] to do more" than they already have to mitigate the risk of harm. *See* Pet. App. 6(a). In a similar case to Applicant's, Justice Sonia Sotomayor stated, "I write separately to highlight the disturbing allegations" presented by the prisoner plaintiffs, and that "as the circumstances of this case make clear, the stakes could not be higher." *Valentine v. Collier*, No. 19A1034, 2020 WL 2497541 at *2,8 (May 14, 2020) (mem. op.) (statement of Sotomayor, J.). Justice Sotomayor went on to discuss how the "prison had inexplicably discarded its own rules and, in doing so, evinced deliberated indifference to the medical needs of its inmates." *Id*. at *6.

In this matter, the record demonstrates an objective showing of deliberate indifference. Specifically, the district court determined that it was objectively unreasonable to have "failed to meaningfully implement social distancing procedures and other measures aimed at thwarting the spread of the coronavirus." Pet. App. 22(a). It is also objectively unreasonable to provide a "spray bottle" to clean common surfaces like the microwave and telephone, but to not keep it filled; or "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*.

Additionally, given the circumstantial evidence, the district court properly determined that the subjective requirement is also met in this matter. This subjective

factor is "determined in light of the prison authorities' current attitudes and conduct." *Id.* at 845 (quoting *Helling v. McKinney*, 509 U.S. 25, 36 (1993)). Applicant does not need to show that the Respondents have a culpable state of mind, but rather that "the circumstances suggest that the defendant official had been exposed to information concerning the risk and thus 'must have known' about it . . . ." *Hinojosa*, 807 F.3d at 665.

As the district court correctly concluded, Respondents know that prisoners face a substantial risk of serious harm from COVID-19. The Fifth Circuit correctly concluded that "COVID-19 presents a risk of serious harm to those confined in prisons, [and] that Plaintiff, as a diabetic, is particularly vulnerable to the virus's effects." Pet. App. 6(a). Defendants also admittedly know about the CDC guidelines for prisons. *See* Pet. App. 439(a) (stating "that specifically an email came out from the Secretary's Office this morning, because the CDC and I believe (inaudible) some [sic] updated with additional guidance and suggestions for how facilities . . . should approach, I guess, this emergency."). The only dispute, then, is whether Defendants have "disregarded that risk by failing to take reasonable measures to abate it." *Farmer*, 511 U.S. at 847. The evidence here shows that Defendants have more than negligently disregarded the risks posed by COVID-19. Defendants have consistently failed to implement even basic social distancing and cleaning protocols in their evolving COVID-19 policies in the face of mounting evidence—and their own knowledge—that prisons are an epicenter for COVID-19 outbreaks.

C. The Grievance Process in Louisiana is Not Available

As already briefed in his Application, Louisiana's grievance process is not available to the Applicant. The Prison Litigation Reform Act requires that an inmate exhaust all "administrative remedies as are available" before bringing an action under 42 U.S.C. §

1983 with respect to prison conditions. 42 U.S.C. § 1997e(a). The exhaustion requirement is an affirmative defense, subject to the normal standards of pleading and proof. *Jones v. Bock*, 549 U.S. 199, 216 (2007). "[T]he ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'" *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016) (quoting *Booth v. Churner*, 532 U.S. 731, 737-38 (2001) (quoting Webster's Third New International Dictionary 150 (1993))) (some internal quotation marks omitted).

The Applicant correctly stated he could not file a grievance because he does not have access to paperwork or a computer. Pet. App. 415(a). Undersigned counsel had to submit both a request for an administrative grievance and a request for reasonable accommodations on behalf of Applicant. Pet. App. 416(a), 658(a). The grievance process in Louisiana is two-step. *See* Pet. App. 525(a)-526(a). The timing to complete these two steps is eighty-five (85) days. *Id*. Consequently, DOC's grievance procedure is not "available" to remedy the constitutional violations experienced by Plaintiff under these pandemic circumstances. The grievance process would force the Applicant to wait nearly three months in the face of a rapidly spreading pandemic for its completion.

Applicant has therefore "established that the prison grievance procedures at issue are utterly incapable of responding to a rapidly spreading pandemic like Covid–19, the procedures may be "unavailable" to meet the plaintiff's purposes, much in the way they would be if prison officials ignored the grievances entirely." *Valentine*, No. 19A1034 at *3; *also 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.").

III. THE APPLICANT WILL SUFFER IRREPARABLE HARM IF THE STAY IS NOT VACATED

The district court's injunction simply required the Respondents to provide a plan as to how they would implement social distancing and hygiene measures to protect the Applicant. It is nothing short of common knowledge at this point that the easiest way to "flatten the curve" and thwart the spread of COVID-19 is through social distancing and increased sanitation practices. The district court properly determined that Rayburn is not doing enough along these lines to comply with the Eighth Amendment. By failing to provide Applicant with the ability to socially distance himself from others and practice increased hygiene, Respondents are exposing the Applicant to undue risk and irreparable harm.

Respondents claim that Applicant excessively waited to seek relief in this Court, but fails to account for the fact that we are living and working under restrictions. Undersigned counsel, a solo practitioner, is doing her best to represent her client in these trying times. She is working without access to her law office and with a young child at home because schools are closed in Louisiana.

While the Respondents try to downplay the seriousness of this matter, the reality is nearly three percent of the prison population at Rayburn has contracted the virus (37 of 1300 prisoner equals 2.84%); *cf*. to the fact that in New Orleans, a major hotspot in the U.S., 1.77% of the population has contracted COVID-19, *see Louisiana Coronavirus Map and Case Count*, https://www.nytimes.com/interactive/2020/us/louisiana-coronavirus-cases.html (last visited May 22, 2020) (stating that there are 1,772 cases per 100,000 residents in New Orleans, Louisiana). These numbers speak for themselves. The district

court understood the severity of the situation Applicant faces and issued a narrowly tailored injunction that addresses the constitutional deficiencies at the facility.

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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CERTIFICATE OF SERVICE

I certify that, on May 22, 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/ *Emily H. Posner*
EMILY H. POSNER