Exhibit 4

No. 20-20525

In the United States Court of Appeals for the Fifth Circuit

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

v.

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

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

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

KEN PAXTON
Attorney General of Texas

RYAN L. BANGERT
Deputy First Assistant
Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

KYLE D. HAWKINS
Solicitor General

MATTHEW H. FREDERICK
Deputy Solicitor General
Matthew.Frederick@oag.texas.gov

JASON R. LAFOND
Assistant Solicitor General

Counsel for Defendants-Appellants

Certificate of Interested Persons

No. 20-20525

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

v.

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

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

/s/ Matthew H. Frederick
Matthew H. Frederick
Counsel of Record for
Defendants-Appellants

Table of Contents

Page

Introduction and Nature of Emergency

Earlier this year, the district court entered an unlawful preliminary injunction against the Texas Department of Criminal Justice (TDCJ), Executive Director Bryan Collier, and Warden Robert Herrera, finding that Defendants were deliberately indifferent to the risk posed by the COVID-19 pandemic despite their extensive and continuing efforts to prevent the spread of the novel coronavirus among inmates and staff at the Pack Unit. This Court stayed the district court's preliminary injunction, finding that Defendants were likely to succeed on appeal because Plaintiffs failed to exhaust administrative remedies and because the district court failed to apply governing Eighth Amendment precedent. *Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020) (per curiam) (*Valentine I*). The Supreme Court refused to vacate that stay. *Valentine v. Collier*, 140 S. Ct. 1598 (2020); *cf. Barnes v. Ahlman*, 140 S. Ct. 2620 (2020) (granting stay of a similar injunction). This Court then vacated the preliminary injunction without disturbing the holding in *Valentine I*, concluding that Defendants were substantially complying despite the stay. *Valentine v. Collier*, 960 F.3d 707 (5th Cir. 2020) (per curiam) (*Valentine II*).

The district court has now entered a permanent injunction that suffers from the same flaws as its preliminary injunction. This Court should stay the permanent injunction pending appeal because there has been no relevant change since *Valentine I*.

Like the preliminary injunction, the district court's permanent injunction violates the Prison Litigation Reform Act (PLRA) by excusing Plaintiffs' admitted failure to exhaust administrative remedies. The district court again deemed the TDCJ grievance process "too lengthy to provide timely relief, and therefore incapable of

use and unavailable under the special circumstances of the COVID-19 crisis." *Valentine I*, 956 F.3d at 804-05. That conflicts directly with *Ross v. Blake*, 136 S. Ct. 1850 (2016), and it defies this Court's controlling decision in *Valentine I*.

And like the preliminary injunction, the permanent injunction rests on a fundamental legal error: the district court collapsed the objective and subjective components of the deliberate-indifference test, finding that Defendants were deliberately indifferent because they were initially unable to prevent the spread of COVID-19 in the Pack Unit. To bolster that conclusion, the district court denigrated every measure taken by Defendants to fight the pandemic, either criticizing them for failing to do more or discounting their efforts as mere litigation posturing.

The resulting injunction is impermissible on the merits and irreparably harmful because it forces Defendants to implement certain measures—most of which are already in place—subject to the threat of contempt, while forbidding them to adapt to evolving medical advice or newly available information or resources. Ultimately, the injunction strips Defendants of discretion to allocate scarce resources to respond to the still-evolving COVID-19 pandemic. There could not be a clearer example of the "usurp[ation of] the state's authority to craft emergency health measures" that this Court has declared "patently wrong." *In re Abbott*, 954 F.3d 772, 778 (5th Cir. 2020).

Defendants respectfully request that the Court enter a stay by 5:00 p.m. on October 12, 2020, and Defendants respectfully request a temporary administrative stay to prevent irreparable harm to Defendants during the Court's consideration of this motion. *E.g.*, *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 2616080 (5th Cir. May 20, 2020) (per curiam); *In re Abbott*, 954 F.3d at 781.

Background

Plaintiffs are prisoners housed in the Wallace Pack Unit, a TDCJ facility in Grimes County, Texas. Plaintiffs filed a complaint in the Southern District of Texas, Houston Division, on behalf of themselves, a putative class of similarly situated inmates, and a putative subclass of high-risk inmates. *See* Exh. 1.[1] The complaint alleged that Plaintiffs and putative class members face a heightened risk from the COVID-19 outbreak because of their age and medical condition, that the individual Defendants had violated Plaintiffs' rights under the Eighth Amendment, and that TDCJ had violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act. *See id.* ¶¶ 51-63, 82.

The district court entered a preliminary injunction ordering Defendants to adopt numerous measures it viewed as necessary to address the risk caused by COVID-19. Exh. 2. This Court stayed that preliminary injunction, concluding that Defendants were likely to succeed on appeal. The Court held, among other things, that, "accounting for the protective measures TDCJ has taken, the Plaintiffs have not shown a 'substantial risk of serious harm' that amounts to 'cruel and unusual punishment,'" because "the evidence shows that TDCJ has taken and continues to take measures—informed by guidance from the CDC and medical professionals—to abate and control the spread of the virus." *Valentine I*, 956 F.3d at 801-02. The Court further held that Plaintiffs had failed to exhaust administrative remedies, *id.* at 804-

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

05, rejecting Plaintiffs' argument that administrative remedies were not "available" due to the risk of COVID-19:

> All parties agree that the TDCJ administrative process is open for Plaintiffs' use. And Plaintiffs do not argue that TDCJ is incapable of providing *some* (albeit inadequate) relief. Nor do they contend that TDCJ always declines to exercise its authority, that the scheme is unworkably opaque, or that administrators thwart use of the system. Therefore, according to the standards the Supreme Court has given us, TDCJ's grievance procedure is 'available,' and Plaintiffs were required to exhaust.

Id. at 804 (cleaned up).

Defendants succeeded on appeal of the district court's preliminary injunction. This Court vacated the district court's judgement and remanded:

> The preliminary injunction entered by the district court is VACATED. Based on facts that have been reported to us by the parties since the district court's judgment was entered, we are persuaded that the Texas Department of Criminal Justice . . . has substantially complied with the measures ordered by the district court in its preliminary injunction.

Valentine II, 960 F.3d at 707. The facts reported by the parties included several updates on TDCJ's efforts to control the spread of COVID-19 and the progress of the disease in the Pack Unit.

Beginning on July 13, the district court held an 18-day trial. On September 29, the district court issued findings of fact and conclusions of law and entered a permanent injunction against Defendants. The district court's order certified a new subclass of mobility-impaired inmates. Exh. 3 at 51. It found that the PLRA did not bar Plaintiffs' claims despite their failure to exhaust administrative remedies because "the existing grievance process, designed for run-of-the-mill requests in ordinary

times, was 'utterly incapable of responding to a rapidly spreading pandemic like Covid-19, . . . much in the way they would be if prison officials ignored the grievances entirely.'" *Id.* at 61 (quoting *Valentine*, 140 S. Ct. at 1600–01 (Sotomayor, J., respecting denial of application to vacate stay)). And it concluded that Plaintiffs had proven a violation of the Eighth Amendment, *id.* at 62-74, and the Americans with Disabilities Act, *id.* at 74-77.

The district court enjoined "Defendants, their agents, representatives, and all persons or entities acting in concert with them" to do the following:

- Provide unrestricted access to hand soap and clean (regularly washed) or disposable hand towels to facilitate frequent handwashing;
- Provide members of the Mobility-Impaired Subclass access to hand sanitizer that contains at least 60% alcohol;
- Provide sufficient cleaning supplies for each housing area, including bleach-based cleaning agents and CDC-recommended disinfectants; provide additional cleaning supplies as requested by inmate janitors; train janitors on additional cleaning practices to be carried out in light of COVID-19;
- Provide new (either disposable or washed) gloves and masks each time inmates perform new tasks, such as beginning a janitorial shift or working in the laundry exchange;
- Create a plan to allow for regular cleaning of common surfaces with bleach-based cleaning agents;
- Create a plan to allow for regular cleaning of the cubicles of inmates who are physically unable to do so themselves;

- Enforce social distancing and the wearing of PPE among TDCJ staff;
- Mark common spaces with red tape to denote safe social distancing practices;
- Create a plan for inmates to sleep head-to-foot with exceptions for legitimate concerns by individual inmates;
- Use common spaces for temporary housing of inmates without disabilities;
- Limit transportation of inmates in and out of the Pack Unit other than for medical appointments or release from custody;
- Create a comprehensive weekly testing program using tests that are approved by the FDA for asymptomatic testing and with a turnaround time for results of 48 hours or less, and document that plan in writing;
- Continue weekly testing until the pandemic is brought under control within the state of Texas, even if multiple weeks pass with zero positive cases;
- Quarantine inmates who are awaiting test results from individuals who are known to have tested negative;
- Create a written plan to implement contact tracing when an inmate or staff member tests positive;
- Document in writing all TDCJ policies in response to COVID-19; and
- Institute a regular audit and compliance program to ensure compliance with the measure[s] in this injunction and other written policies in response to COVID-19.

Id. at 82-83. The district court ordered its injunction to take effect on October 14, 2020. *Id.* at 83.

Defendants moved the district court to stay the injunction pending appeal, Exh. 6, but the district court refused for the reasons that it granted permanent injunctive relief, Exh. 5. Defendants now seek a stay in this Court under Federal Rule of Appellate Procedure 8(a)(2). Defendants respectfully request a ruling by 5:00 p.m. on October 12, 2020, as well as a temporary administrative stay pending this Court's consideration of the motion to stay pending appeal.

Statement of Jurisdiction

This Court has appellate jurisdiction over the district court's permanent injunction under 28 U.S.C. § 1291.

Argument

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

I. Defendants Are Likely to Succeed on Appeal.

Defendants are likely to succeed on appeal for two reasons. First, Plaintiffs are not entitled to relief because they failed to exhaust their administrative remedies under the PLRA. Second, regardless of Plaintiffs' failure to exhaust, the district court's findings of liability under the Eighth Amendment and the ADA depend on multiple errors of law and fact.

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

The district court had no basis to grant injunctive relief because Plaintiffs failed to exhaust administrative remedies. The PLRA imposes a strict exhaustion requirement: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); *see Jones v. Bock,* 549 U.S. 199, 218 (2007). Mandatory exhaustion statutes like the PLRA foreclose judicial discretion. *Ross*, 136 S. Ct. at 1857 (citing *McNeil v. United States,* 508 U.S. 106, 111 (1993)). "[U]nexhausted claims cannot be brought in court." *Jones*, 549 U.S. at 211. If an inmate fails to properly exhaust, his suit must be dismissed under section 1997e. *See Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012) (per curiam) ("District courts have no discretion to waive the PLRA's pre-filing exhaustion requirement").

This Court has already found that administrative remedies were available and that Plaintiffs failed to exhaust them. *Valentine I*, 956 F.3d at 804. That holding is law of the case and law of the circuit. When Plaintiffs filed their complaint, neither had filed a grievance related to Defendants' efforts to address the COVID-19 pandemic. *See Valentine I*, 956 F.3d at 804; *id.* at 806 (Higginson, J., concurring). The Court held that "according to the standards the Supreme Court has given us, TDCJ's grievance procedure is 'available,' and Plaintiffs were required to exhaust." *Id.* at 804. And it rejected the district court's conclusion that TDCJ's grievance

process was "too lengthy to provide timely relief, and therefore incapable of use and unavailable under the special circumstances of the COVID-19 crisis." *Id.* at 804-05.

In its permanent injunction, the district court deemed administrative remedies "unavailable" for the same reasons this Court rejected in *Valentine I*. It concluded that the record contained "insufficient evidence to find that TDCJ was in fact responsive to grievances filed in the systemic way that would be required to render the process available to provide relief during the pandemic." Exh. 3 at 59-60. And it found that "[t]he grievance process also operated too slowly, given the risk to human life posed by COVID-19." *Id.* at 60. According to the district court, "[a]n administrative process is not available if there is a likelihood the inmate will die or suffer severe illness while waiting for a response." *Id.* It concluded that "in light of these extraordinary times, the regular TDCJ grievance process was simply incapable of use by inmates whose lives were threatened by—and in some tragic instances, claimed by—the COVID-19 pandemic." *Id.* at 61.

But as this Court has already explained, the district court's concern "that TDCJ has not acted speedily enough . . . was an exception to exhaustion under the old § 1997e(a), not the current one." *Valentine I*, 956 F.3d at 805. Courts may not engraft a "special circumstances" exception onto the PLRA's exhaustion requirement. *Ross*, 136 S. Ct. at 1862. But that is exactly what the district court attempted to do. According to the district court, the PLRA "cannot be understood as prohibiting judicial relief while inmates are dying." Exh. 3 at 81 n.13. The district court then turned Plaintiffs' failure to exhaust against Defendants, discounting their extensive efforts as "ad hoc steps in response to litigation proceedings." Exh. 3 at 13.

Nothing in the record undermines this Court's holding in *Valentine I* that administrative remedies were available. In fact, Plaintiff Valentine affirmatively testified that administrative remedies were available to him through TDCJ's grievance process. Exh. 13 at 1-211:16-212:2; *see also* Exh. 11 at 42-46. Because Plaintiffs failed to exhaust administrative remedies, the PLRA bars their claims. The district court erred as a matter of law and abused its discretion by granting injunctive relief. On this basis alone, Defendants are likely to prevail on appeal.

B. Plaintiffs did not prove an Eighth Amendment violation.

Defendants' response to the COVID-19 pandemic does not violate the Eighth Amendment. To prove an Eighth Amendment violation, a prisoner must prove that officials acted with deliberate indifference to a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Deliberate indifference requires a showing of "subjective recklessness" as used in criminal law. *Id.* at 839. This is a subjective standard; it requires proof of a prison official's "sufficiently culpable state of mind." *Id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)). "[D]eliberate indifference is a stringent standard of fault," *Connick v. Thompson*, 563 U.S. 51, 61 (2011), which precludes liability unless a prison official "knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837.

A prison official's mere failure to avoid harm or eliminate a risk does not violate the Eighth Amendment. "[I]ncidence of diseases or infections, standing alone," does not "imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks." *Shepherd v. Dallas Cty.*, 591 F.3d 445, 454 (5th Cir. 2009). Thus, deliberate indifference may not be "inferred merely from

a negligent or even a grossly negligent response to a substantial risk of serious harm." *Thompson v. Upshur County*, 245 F.3d 447, 459 (5th Cir. 2001). The Eighth Amendment is violated only if "the official's response indicates the official subjectively intended that harm occur." *Id.*

Defendants have not been indifferent to the risks posed by COVID-19, let alone deliberately indifferent. *See* Exh. 11 at 4-42. Their efforts go far and above what this Court has already concluded did not violate the Eighth Amendment. *Valentine I*, 956 F.3d at 801. They go far and above what *would* satisfy the Eighth Amendment according to the district court's preliminary injunction. *See* Exh. 2; *cf. Valentine II*, 960 F.3d at 707 (concluding that Defendants substantially complied with the district court's preliminary injunction). And they go far and above what other courts have found adequate to satisfy the Eighth Amendment. *See*, *e.g.*, *Barnes*, 140 S. Ct. 2620 (staying injunction)[2]; *Williams v. Wilson*, No. 19A1047, 2020 WL 2988458 (U.S. June 4, 2020) (same); *Cameron v. Bouchard*, 815 F. App'x 978, 988 (6th Cir. 2020) (reversing injunction); *Wilson v. Williams*, 961 F.3d 829, 840-44 (6th Cir. 2020) (same); *Swain v. Junior*, 961 F.3d 1276, 1286-89 (11th Cir. 2020) (vacating injunction); *Foster v. Comm'r of Corr.*, 146 N.E.3d 372, 392-96 (Mass. 2020) (refusing injunction); *People ex rel. Carroll v. Keyser*, 184 A.D.3d 189, 194-96 (N.Y. App. 2020).

[2] "[E]very maxim of prudence suggests that we should decline to take the aggressive step of ruling that the plaintiffs here are in fact likely to succeed on the merits right upon the heels of the Supreme Court's stay order necessarily concluding that they were unlikely to do so." *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 230 (4th Cir. 2020).

The district court held otherwise by applying an improper objective standard, finding deliberate indifference based on the occurrence of infections and death at the Pack Unit. Citing "the magnitude of the impending outbreak at the Pack Unit," the district court explained:

> the Court is now confronted with the "dramatically changed" and sobering reality that 20 men have died and over 40% of the inmates held at the Pack Unit have tested positive—undoubtedly, a "human tragedy." *See Valentine II*, 960 F.3d at 707 (Davis, J., concurring in judgment). This makes the infection rate and the overall death rate at the Pack Unit significantly higher than that of Texas or the United States as a whole. The Court's analysis is grounded in these grim statistics.

Exh. 3 at 64. As the district court put it, "the scale of death that has struck the Pack Unit is not something this Court dismisses lightly, and it ultimately frames these conclusions of law." *Id.*

The district court relied primarily on two factors to find deliberate indifference: "(1) Defendants' lack of a systematic and sustainable approach to slow the spread of COVID-19"; and "(2) a failure to abide by basic public health guidance including but not limited to the steps outlined in Policy B-14.52." *Id.* at 66. That analysis is riddled with clear factual errors, and it confirms that the district court held Defendants to a standard that bears no resemblance to deliberate indifference.

1. Addressing the lack of a "systematic and sustainable approach," the district court broadly criticized Defendants because "the process of designing Policy B-14.52 indicates that it was not responsive to the needs of individual units or TDCJ facilities in general," *id.*, and because "the overall guidance was not modified for the Pack Unit whatsoever." *Id.* at 65. But while Policy B-14.52 was designed for application in

all units, it is not true that Defendants failed to implement measures specific to the Pack Unit. For example, TDCJ provided masks to each inmate at the Pack Unit by April 16. Exh. 12 at 9-208:24-209:3. The Pack Unit also created a social-distancing plan, Exh. 3 at 20, though it was largely superseded by a precautionary lockdown in mid-April, *id.* at 21. And TDCJ conducted "strike team" testing of all inmates at the Pack Unit in May, *id.* at 37, then created a long-term testing plan for the Pack Unit "based on the CDC's guidance for mass testing of COVID-19 in nursing homes," *id.* at 39-40.

The district court nevertheless faulted Defendants for failing "to document the long-term testing plan in writing." *Id.* at 67. But focusing on the lack of a comprehensive written plan disregards the plan that Defendants implemented, which has reduced the number of infections and prevented another outbreak. Roughly 500 inmates at the Pack Unit tested positive for COVID-19 since the pandemic began, *id.* at 15, but the number of active cases had fallen to 4 at the time of the permanent injunction, *id.* at 16, 78.

The district court also faulted Defendants for "multiple lapses in implementing both written and unwritten policies," *id.* at 68, relying solely on anecdotal evidence from class members that individual prison employees sometimes failed to wear PPE or practice social distancing. The district court cited no evidence that Collier or Herrera failed to take corrective action after being made aware of specific lapses by prison staff. And it ignored testimony from class members that officers generally complied with safety measures and corrected any lapses when notified by inmates. Tr. 2-64:5-12; 2-182:11-22; 3-35:3-12. The district court had no basis to conclude that

Collier and Herrera themselves, as opposed to unnamed "prison officials," "ignored" any complaints or demonstrated "a wanton disregard for any serious medical needs." Exh. 3 at 68-69.

2. The district court's description of TDCJ's supposed failures to follow public-health guidelines only highlights the district court's legal errors. The district court repeatedly faulted Defendants for failing to implement certain measures, but it cited no evidence that those measures would have been possible. In many instances, the evidence showed that such measures were impossible, either because resources were not available or because Defendants had no legal authority to act.

The district court's extensive criticism of COVID-19 testing at the Pack Unit provides the clearest example. The district court faulted Defendants for failing to commence mass testing until May 12, *id.* at 69, but there is no evidence that they could have done so any earlier. Initial targeted testing in April was conducted through the University of Texas Medical Branch, a non-party medical provider, and was limited to 54 inmates in a single dorm. Exh. 3 at 36, 70. The district court also faulted Defendants for having "no plans to retest individuals following the first round of mass testing." *Id.* at 70. But the district court itself acknowledged that Defendants repeatedly retested individuals at the Pack Unit. *E.g.*, *id.* at 10. And Plaintiffs' own expert and CDC guidance endorsed TDCJ's practice of retesting "only those inmates who had previously tested negative." *Id.*; *see* Exh. 20 at 6-49:8-11; Exh. 22 at 3.

The district court also disparaged the Pack Unit's long-term testing plan for using supposedly "defective tests," among other complaints. It found that the tests

used by TDCJ "were only approved under the FDA's Emergency Use Authorization and had not been approved for testing of asymptomatic individuals." Exh. 3 at 70-71. But no COVID-19 test has been fully approved by the FDA. Exh. 20 at 5-111:24-112:2. To the extent the FDA has approved COVID-19 tests, it has done so only under Emergency Use Authorization. Exh. 23 at 9-42:9-18. And none of the tests authorized for emergency use is approved for use on asymptomatic individuals. *Id.* at 43:25-44:7. The district court thus charged Defendants with deliberate indifference for failing to use tests that do not exist.

The district court also concluded that "TDCJ ignored the most basic steps to increase social distancing" because "at no point did TDCJ ever even potentially consider using authorized early release as a means to increase social distancing." Exh. 3 at 72. But Defendants have explained they have no authority to provide "early release," Exh. 21, and the district court cited no such authority. Failing to effect an unauthorized release of prisoners does not show deliberate indifference.

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

Defendants are likely to prevail on Plaintiffs' ADA claim because the ADA does not apply in exigent circumstances, and the ADA does not require that prison officials give convicted criminals intoxicants and fire accelerants. *See* Exh. 3 at 74-77.

"A prisoner's rights are diminished by the needs and exigencies of the institution in which he is incarcerated. He thus loses those rights that are necessarily sacrificed to legitimate penological needs." *Elliott v. Lynn*, 38 F.3d 188, 190-91 (5th Cir. 1994) (holding that prisoners' Fourth-Amendment rights gave way during prison emergency). Plaintiffs' ADA claim fails at the outset because an ADA "claim is not

available under Title II under" "exigent circumstances." *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000); *accord Wilson v. City of Southlake*, 936 F.3d 326, 331 (5th Cir. 2019). The COVID-19 pandemic has created exigent circumstances in every area of life and government. Plaintiffs themselves recognize the immense scale of the risk to everyone posed by COVID-19. Exh. 1 ¶ 13. The COVID-19 pandemic leaves no room for courts, under the guise of the ADA, to micromanage the State's response "in a continuously evolving environment." *Roell v. Hamilton County*, 870 F.3d 471, 489 (6th Cir. 2017) (citing *Hainze*).

The district court found *Hainze* "inapposite" because the facts of this case differ. Exh. 3 at 75. But the district court was required to apply the *rule* announced by this Court's precedent, not simply compare facts. *See United States v. Williams*, 679 F.2d 504, 509 (5th Cir. 1982). Prison officials must react daily to constantly evolving science and conditions within the prison during an unprecedented pandemic. The district court said these circumstances were not exigent, Exh. 3 at 75, but provided no cogent reason why. *Cf.* Special Order H-2020-23, *In re Court Operations in the Houston and Galveston Divisions Under the Exigent Circumstances Created by the Covid-19 Pandemic* (S.D. Tex. Sept. 17, 2020). Its only reasoning was circular: Circumstances cannot be exigent because that would mean the ADA doesn't apply. Exh. 3 at 75.

The district court's order requiring Defendants to provide hand sanitizer to inmates is also an unreasonable accommodation. *See Tennessee v. Lane*, 541 U.S. 509, 532 (2004). "The difficulties of operating a detention center must not be underestimated by the courts." *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 326 (2012). Courts "are required, as a matter of both common sense and law, to accord prison

administrators great deference and flexibility in carrying out their responsibilities to the public and to the inmates under their control, including deference to the authorities' determination of the reasonableness of the scope, the manner, the place and the justification for a particular policy." *Elliott*, 38 F.3d at 191 (quotations omitted). "The judiciary is ill-equipped to manage decisions about how best to manage any inmate population" and "the concern about institutional competence is especially great where, as here, there is an ongoing, fast-moving public health emergency." *Money v. Pritzker*, 453 F. Supp. 3d 1103, 1129 (N.D. Ill. 2020).

The district court gave *no* deference to prison officials' weighing the risks and benefits of providing convicted criminals alcohol-based hand sanitizer—an intoxicant and fire accelerant. It simply concluded that because some other prison officials in other States had weighed things differently, defendants should have also. Exh. 3 at 76. But different officials making different choices is precisely what deference allows. The district court also surmised, without any evidence, that "hand sanitizer could surely be provided to members of the Mobility-Impaired Subclass in daily, incremental quantities too small for misuse." *Id.* at 75. Prison officials—who deal with prisoners every day, unlike the district court—concluded otherwise. The district court's speculation is insufficient to overcome the deference owed to Defendants.

II. Defendants Will Be Irreparably Harmed Absent a Stay.

The district court's injunction threatens irreparable injury because it thwarts Defendants' ability to maximize safety and security in Texas prisons. A State suffers an "institutional injury" from the "inversion of . . . federalism principles." *Texas v. United States Envt'l Protection Agency*, 829 F.3d 405, 434 (5th Cir. 2016); *see Moore v.*

Tangipahoa Par. Sch. Bd., 507 F. App'x 389, 399 (5th Cir. 2013) (per curiam) (finding that a State suffers irreparable harm when an injunction "would frustrate the State's program"). "[I]t is 'difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.'" *Woodford v. Ngo*, 548 U.S. 81, 94 (2006) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973)). Especially during a public-health crisis, Defendants must have discretion to use their professional judgment in operating the Pack Unit.

Defendants have worked diligently to address the harms posed by COVID-19 in exceedingly difficult circumstances, with available information and medical guidance changing on a daily basis. Indeed, Defendants currently employ almost all of the measures in the permanent injunction. To the extent the injunction orders Defendants to carry out existing policies, it is both unnecessary and improper. *Valentine I*, 956 F.3d at 802 (citing *Pennhurst St. Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)). And it is far from clear that the additional measures required by the injunction will be any more effective against the COVID-19 pandemic than the measures already in place. But if they turn out to be ineffective, or if more effective measures become available, Defendants cannot change course. They are now tied to specific measures mandated by a permanent injunction and backed by the threat of contempt. Removing Defendants' discretion to adapt their efforts to changing circumstances is an irreparable injury in itself, and it will inflict further injury by making their response to the COVID-19 pandemic less effective.

III. The Remaining Factors Favor a Stay.

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

A stay pending appeal will not threaten Plaintiffs with irreparable harm because it maintains the status quo, and Plaintiffs face no imminent threat of harm from the absence of an injunction. An injunction requires a showing of "irreparable harm" that is *likely*, not merely speculative. *See, e.g.*, *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008) (instructing that the lower court's "'possibility' standard is too lenient"); 11A Wright & Miller, Federal Practice & Procedure § 2948.1. And the threatened harm must be "imminent." *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975); *accord, e.g.*, *Allied Home Mortg. Corp. v. Donovan*, 830 F. Supp. 2d 223, 227 (S.D. Tex. 2011) (same). Plaintiffs have not shown that existing measures are so deficient that they threaten imminent harm. Indeed, Defendants' existing measures are consistent with almost every element of the injunction.

B. The public interest strongly favors a stay.

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

Conclusion

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

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Ryan L. Bangert
Deputy First Assistant
Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Kyle D. Hawkins
Solicitor General

/s/ Matthew H. Frederick
Matthew H. Frederick
Deputy Solicitor General
Matthew.Frederick@oag.texas.gov

Jason R. LaFond
Assistant Solicitor General

Counsel for Defendants-Appellants

Certificate of Compliance with Rule 27.3

I certify the following in compliance with Fifth Circuit Rule 27.3:

- Before filing this motion, counsel for Appellant contacted the clerk's office and opposing counsel to advise them of Appellant's intent to file this motion.
- The facts stated herein supporting emergency consideration of this motion are true and complete.
- The Court's review of this motion is requested as soon as possible, but **no later than Monday, October 12, at 5:00 p.m**. The Secretary respectfully requests an immediate temporary administrative stay while the Court considers this motion.
- True and correct copies of relevant orders and other documents are attached in the Appendix to this motion, filed separately.
- This motion is being served at the same time it is being filed.

/s/ Matthew H. Frederick
Matthew H. Frederick

Certificate of Conference

On October 5, 2020, Matthew H. Frederick, counsel for Appellants, conferred by telephone with Jeff Edwards, counsel for Appellees, who stated that Appellees oppose the relief requested in this motion.

/s/ Matthew H. Frederick
Matthew H. Frederick

Certificate of Service

On October 5, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Matthew H. Frederick
Matthew H. Frederick

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,181 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Matthew H. Frederick
Matthew H. Frederick

Exhibit List

1. Complaint and Application for a Temporary Restraining Order
2. Preliminary Injunction Order
3. District Court's Finding of Fact and Conclusions of Law and Permanent Injunction
4. Notice of Appeal
5. Order Denying Motion to Stay Pending Appeal
6. Defendants' Motion to Stay Pending Appeal
7. Plaintiffs' Opposition to Defendants' Motion to Stay Pending Appeal
8. Plaintiffs' Proposed Findings of Fact and Conclusions of Law (to be filed under seal)
9. Plaintiffs' Exhibits in Support of Proposed Findings of Fact and Conclusions of Law – Part 1 (to be filed under seal)
10. Plaintiffs' Exhibits in Support of Proposed Findings of Fact and Conclusions of Law – Part 2 (to be filed under seal)
11. Defendants' Proposed Findings of Fact and Conclusions of Law
12. Testimony of Bryan Collier
13. Testimony of Laddy Valentine
14. Testimony of Richard King
15. Valentine Grievances
16. King Grievances
17. August 21, 2020 Declaration of Bobby Lumpkin
18. Testimony of Roger Beal
19. Testimony of Jon Reynolds
20. Testimony of Dr. Jeremy Young
21. Defendants' Memorandum Regarding Lack of Authority for Release of Offenders to Reduce Inmate Population
22. Plaintiffs' Trial Exhibit 99 – Covid-19 Testing Guidelines for Nursing Homes
23. Testimony of Dr. Chad Zawitz