

In the Supreme Court of the United States

LADDY CURTIS VALENTINE AND RICHARD ELVIN KING,
INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED,
Applicants,

v.

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

On Application to Vacate the Stay of the
United States Court of Appeals for the Fifth Circuit

RESPONSE TO APPLICANTS' SUPPLEMENTAL BRIEF REGARDING EMERGENCY APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION

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Consistent with their previous statement to this Court, Resp. 18, on May 11, Defendants provided the Fifth Circuit with updated information about the Pack Unit. Plaintiffs now suggest that Defendants' report is somehow proof of wrongdoing, alluding to "critical facts not previously disclosed," Supp. Br. 1, and "late-revealed information," Supp. Br. 2. That suggestion is baseless. Defendants provided up-to-date information—current as of 11:00 a.m. on the date of the report—when the Fifth Circuit ordered them to provide it.

Plaintiffs' suggestion that the new information supports their attempt to vacate the Fifth Circuit's stay is equally baseless. Defendants' report does not show that the stay is "causing irreparable harm to the inmates that will continue unless the injunction is reinstated." Supp. Br. 2. Plaintiffs continue to assume, without foundation, that any incidence of COVID-19 at the Pack Unit is caused by the absence of the preliminary injunction. The Eleventh Circuit exposed the flaw in Plaintiffs' logic in a published opinion issued last week:

The question is not whether COVID-19 presents a danger to the inmates—we do not dismiss the risk of harm that COVID-19 poses to everyone, including the inmates The question is instead whether the plaintiffs have shown that they will suffer irreparable injuries that they would not otherwise suffer in the absence of an injunction.

Swain v. Junior, ___ F.3d ___, 2020 WL 2161317, *4 (11th Cir. May 5, 2020) (per curiam). Plaintiffs have not made that showing here. They do

not explain, for instance, how contact tracing would make a difference, *see* Supp. Br. 1, when the entire Pack Unit has been on precautionary lockdown, Resp. 8, and dorms with inmates testing positive for COVID-19 have been placed on medical restriction, Resp. 9. Plaintiffs cannot show that the Fifth Circuit’s stay creates a risk of irreparable harm that would not exist under the preliminary injunction. *See* Resp. 19-21.

Nor does the new information show that Defendants have been deliberately indifferent. To the contrary, it confirms that Defendants have continued to adapt their response to the COVID-19 pandemic to changing circumstances in an effort to prevent the spread of COVID-19 in the Pack Unit. That Defendants have not managed to protect every inmate and staff member from infection is not proof of subjective deliberate indifference. *See* Resp. 34-35. If it were otherwise, then prison officials in virtually every State would be guilty of deliberate indifference, as almost every State has experienced coronavirus infection in correctional facilities. Again, the Eleventh Circuit’s recent decision highlights Plaintiffs’ legal error. It explained that the district court improperly “treated the increase in COVID-19 infections as proof that the defendants deliberately disregarded an intolerable risk,” thereby violating this Court’s “admonition that resultant harm does not establish a liable state of mind.” *Swain*, 2020 WL 2161317, at *4 (citing *Farmer v. Brennan*, 511 U.S. 825, 844 (1994)). Plaintiffs and the district court have made the same mistake here.

Defendants' report does not change any of the factors relevant to Plaintiffs' application to vacate the Fifth Circuit's stay. If anything, it underscores that the Fifth Circuit continues to monitor the status of the Pack Unit pending oral argument on June 4. Given that continuing oversight, this Court's involvement is especially unwarranted.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that this document has been filed with the clerk of the Court and served by electronic mail and Federal Express on May 12, 2020, on counsel of record in this case.

/s/ Kyle D. Hawkins
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