No. 20A______

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.

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

JEFF EDWARDS
SCOTT MEDLOCK
DAVID JAMES
The Edwards Law Firm
The Haehnel Building
1101 East 11th Street
Austin, Texas 78702

BASHEER GHORAYEB
Winston & Strawn LLP
2121 N. Pearl Street, Suite 900
Dallas, TX 75201

JOHN R. KEVILLE
DENISE U. SCOFIELD
MICHAEL T. MURPHY
BRANDON DUKE
Counsel of Record
ROBERT L. GREEN III
CORINNE STONE HOCKMAN
Winston & Strawn LLP
800 Capitol Street, Suite 2400
Houston, Texas 77002
(713) 651-2600
bduke@winston.com

Counsel for Applicants

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

This Court should vacate the Fifth Circuit's stay of a permanent injunction to protect the inmates at a Texas geriatric prison that the district court found, after an eighteen-day trial, was one of the worst hit by COVID-19 due to its administrators' deliberate indifference. The stay is dangerous and merits this Court's vacatur for at least three reasons.

First, without even considering the full trial record, the stay panel set aside the district court's factual findings that the prison will continue to knowingly place Plaintiffs-Applicants, a class of prisoners, at a serious risk of irreparable harm without this injunction. Indeed, the Fifth Circuit previously stayed a preliminary injunction in this case when only two inmates had been infected, one of whom had died. During that stay, the prison kept ignoring necessary COVID-19 prevention measures—despite mounting deaths and infections—while misrepresenting its efforts to the Fifth Circuit and the district court. Now, over 500 men have been infected with COVID-19 they contracted while incarcerated at this prison during the pendency of this case, leading to dozens of hospitalizations and 19 more deaths. By ignoring the district court's findings, the Fifth Circuit again leaves the almost 1200 prisoners at the facility—as well as prison staff and the surrounding community—at unnecessary risk of continued infection, hospitalization, and death from COVID-19 due to Defendants' deliberate indifference.

Second, the stay panel also ignored the reality that, as the district court found, the prison's grievance procedure is not capable of providing relief for COVID-19-

related requests—the prison rejects grievances that are not narrowly drawn, fails to treat grievances as emergencies, and does not respond quickly enough to protect inmates from COVID-19. Indeed, the facts at trial established that the prison's grievance procedure operated as a "simple dead end" and was unable to provide any relief to inmates. Multiple inmates were infected with COVID-19 while their grievances remained pending, and at least one class member became infected and died days after submitting his COVID-19 grievance and before receiving any answer.

Third, this case will present issues for this Court's review on the merits due to the national importance of inmates' rights in connection with the COVID-19 pandemic, an issue that has divided the lower courts.

The Fifth Circuit's stay should be vacated.

Statement

Plaintiffs Laddy Valentine (age 69) and Richard King (age 73) are elderly inmates in the Pack Unit, a prison in Grimes County, Texas for geriatric and medically compromised prisoners—a high-risk population for COVID-19. Plaintiffs filed this lawsuit because Defendants' deliberately indifferent response to the spread of COVID-19 in the Pack Unit has resulted in intolerable and patently unconstitutional prison conditions. Although the entire country felt the impact of the virus, it hit prisons particularly hard, and prisoners in the Pack Unit are particularly vulnerable because of their age and underlying health issues.[1] Indeed, between the

[1] *See Studies spotlight high COVID-19 infection rate in US prisons*, Univ. of Minn. Center for Infectious Disease Research and Policy, Aug. 21, 2020,

time the preliminary injunction in this case was stayed in April and the time the district court entered its now-also-stayed permanent injunction in September, more than 500 inmates and 59 staff members at the Pack Unit became infected with the deadly virus. Ex. 2, D. Ct. Findings of Fact and Conclusions of Law ("FOF/COL"), at 14–15; *see also* Ex. 1, Stay Op. at 2. In all, at least 20 inmates lost their lives. As the district court explained, "the scale of death that has struck the Pack Unit" does not "control the analysis," but cannot be "dismisse[d] lightly." Ex. 2, D. Ct. FOF/COL, at 64.

Defendants understood these "grim statistics" well. Ex. 2, D. Ct. FOF/COL, at 64. At no point in this litigation did Defendants "contest that COVID-19 poses a substantial risk to individuals incarcerated at the Pack Unit, a fact that is indisputable given the number of inmates who have died and that there continue to be active cases at the unit." *Id.* The district court expressly found that Defendants "were and are aware of that risk." *Id.* Despite this knowledge, Defendants did not take the measures they knew were necessary to protect this most vulnerable inmate population.

At trial, Defendants' case centered on one system-wide policy—Policy B-14.52—that they created and allegedly implemented in response to the COVID-19 outbreak. But having a policy on the books is no defense when that policy is

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https://www.cidrap.umn.edu/news-perspective/2020/08/studies-spotlight-high-covid-19-infection-rate-us-prisons (noting a trio of studies have found "alarmingly high infection rates" in prisons and "much higher infection rate[s] among incarcerated people than is seen in the general public").

disregards known risks and is not followed or enforced. And that is exactly what the district court found after an eighteen-day trial with twenty witnesses. Plaintiffs proved that Policy B-14.52 was a general prison policy that was "not modified for the Pack Unit whatsoever" and so did not address the heightened risk facing its geriatric and medically compromised population. Moreover, Plaintiffs also proved Defendants did not follow even their own deficient policy. Ex. 2, D. Ct. FOF/COL, at 64–67. Text messages among TDCJ officials evidenced widespread confusion regarding the policy, and the district court found that TDCJ made certain modifications for the Pack Unit only "just in time for trial in order to look more favorable." *Id.* at 65] The court also noted that it was "skeptic[al] that Defendants are in fact consistently implementing many of the procedures and policies that they claim to be." *Id.* at 65–66.

Unsurprisingly, Defendants' half-hearted protective measures allowed the spread of COVID-19 through the Pack Unit to continue unabated. Severe illness and death resulted from Defendants' obstinate refusal to take universally accepted steps to protect the lives charged to their care. *See Brown v. Plata*, 563 U.S. 493, 510 (2011) ("A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."). That is why after trial, the district court found that "Defendants' conduct has demonstrated deliberate indifference to Plaintiffs and the class members' medical needs by recklessly disregarding obvious and known risks to inmate health and safety." Ex. 2, D. Ct. FOF/COL, at 66. The district court entered a permanent injunction that required Defendants to take reasonable actions "tailored to the matter

at hand, based on extensive trial testimony including from public health experts, yet allows for latitude in implementation while aligning Defendants' conduct with their constitutional obligations." *Id.* at 81. The district court was sensitive to perceived micro-management of prison authorities, but it determined that, based on Defendants' conduct, the lack of a permanent injunction requiring compliance with the Constitution "could easily translate into more lives lost and more inmates sickened." *Id.* at 82.

The day before the permanent injunction was set to take effect, however, the Fifth Circuit stepped in and stayed the injunction pending appeal, on Defendants' motion and over Plaintiffs' opposition. *See* Ex. 1, Stay Op. The stay panel predicated its decision largely on the premise that Defendants have a strong interest in administering Texas's prisons and that the injunction "interferes with TDCJ's ability to perform its statutory duties." *Id.* at 14. No doubt prison administration is an important state interest that generally deserves deference. But where there is "substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations," courts should not accord them deference. *Bell v. Wolfish*, 441 U.S. 520, 548 (1979).

Defendants' sweeping claim that any injunction would be inappropriate is an exaggerated response to the practical realities of prison administration and is grossly disproportionate to any concerns supported by the record. In fact, the record offers no indication that any of the protective measures that the district court determined were essential after an eighteen-day bench trial would interfere with prison

administration. *See* Ex. 2, D. Ct. FOF/COL, at 80 ("[A]t trial, Defendants did not provide evidence of budgetary or financial concerns with the relief requested by Plaintiffs."); *see also id.* at 76 (discussing Defendants' text messages admitting they could provide hand sanitizer safely).

Defendants' sweeping, unsupported, and self-serving representations about the demands of prison administration are particularly dubious because the trial record is replete with evidence of Defendants' lack of credibility. The district court devoted an entire section of its findings of fact to Defendants' credibility issues. Ex. 2, D. Ct. FOF/COL, at 9–14. The district court determined TDCJ could not be trusted to "continue to carry out policies that are appropriate to safeguard inmates' health and safety." *Id.* at 78.

"[B]ased on Defendants' past conduct as well as representations made during trial about future conduct," the court found that "the risk to inmates at the Pack Unit is continuing and imminent." Ex. 2, D. Ct. FOF/COL, at 77. Mercifully, COVID-19 infection rates across the country began to decline in late summer and early fall. The stay panel relied too heavily on the recent and likely temporary decrease in COVID-19 cases in the Pack Unit. Ex.1, Stay Op. at 15. The Fifth Circuit itself acknowledged this type of result-based analysis is improper when it incorrectly claimed that the district court engaged in such analysis.[2] *Id.* at 10 ("[T]he Eighth Amendment inquiry

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[2] The district court was clear that its opinion was not based on the raw infections or deaths, as the Fifth Circuit incorrectly claimed. Ex. 2, D. Ct. FOF/COL, at 64 ("To be sure, the deliberate indifference inquiry is subjective, not objective, so these statistics in and of themselves do not control the analysis.").

concerns TDCJ's state of mind, not the scope of the injury."). Further, the Court should not be lulled into a false sense of security by brief dips in the numbers. "The number of new coronavirus cases in the United States is surging once again after growth slowed in late summer," and the United States is on the precipice of a third peak of the pandemic.[3] As the virus takes hold again, significant protective measures are needed to prevent the virus from being "repeatedly brought in to prisons from the community by staff members, visitors, and new prisoners."[4] And the geriatric prisoners here are particularly vulnerable. Without the permanent injunction in place to hold Defendants to their constitutional duty, the facts of this case have already shown that the pandemic's resurgence threatens to cause untold harm in the Pack Unit before further judicial intervention is possible.

Given the toll that COVID-19 has already taken on the Pack Unit inmates' health and safety, Plaintiffs have done everything in their ability to expedite this appeal. All Plaintiffs are asking now is for this Court to put the district court's permanent injunction back in place until the conclusion of the appeal on the merits in the Fifth Circuit. This is a matter of months at most, because the Fifth Circuit has sharply expedited the appeal to allow for briefing to be completed in a matter of weeks. *See* Ex. 3, 5th Cir. Order (setting expedited schedule with Defendants' opening

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[3] *U.S. Virus Cases Climb Toward a Third Peak*, N.Y. Times, Oct. 15, 2020, https://www.nytimes.com/interactive/2020/10/15/us/coronavirus-cases-us-surge.html.

[4] *Studies spotlight high COVID-19 infection rate in US prisons*, Univ. of Minn. Center for Infectious Disease Research and Policy, Aug. 21, 2020, https://www.cidrap.umn.edu/news-perspective/2020/08/studies-spotlight-high-covid-19-infection-rate-us-prisons.

brief due November 6, Plaintiffs' response brief due November 16, and the reply brief due November 20). But in those months, for the prisoners, their lives and health are at stake. Almost 1200 elderly and infirm inmates currently reside at the Pack Unit; almost half have been infected but at least another 600 inmates, in addition to prison guards, prison staff, and the surrounding community, remain at risk. The past has already shown what danger the Pack Unit faces without an injunction—dozens more may be hospitalized or die while this case remains pending—whereas the district court found that Defendants' concerns about judicial interference with prison administration were exaggerated and unsupported by record evidence. This Court accordingly should vacate the court of appeals' stay so that the appellate process can run its course on an expedited timeframe.

Reasons to Vacate the Stay

A Circuit Justice or the full Court has jurisdiction to vacate a stay entered by a court of appeals "regardless of the finality of the judgment below." *W. Airlines v. Teamsters*, 480 U.S. 1301, 1304 (1987) (O'Connor, J., in chambers); *see*, *e.g.*, *June Med. Servs., L.L.C. v. Gee*, 136 S. Ct. 1354 (2016) (vacating Fifth Circuit's stay of a district court's injunction pending appeal). An application to vacate a stay should be granted "where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed [by this Court] upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue a stay." *W. Airlines*, 480 U.S. at 1305 (quoting *Coleman v. Paccar Inc.*, 424 U.S. 1301,

1304 (1976) (Rehnquist, J., in chambers)); *see also Reynolds v. Int'l Amateur Athletic Fed'n*, 505 U.S. 1301, 1301–02 (1992) (Stevens, J., in chambers).

This case meets each requirement for the Court's intervention. After an eighteen-day bench trial, the district court made extensive and well-supported findings of fact and conclusions of law in an 84-page opinion. The court found, in sum, that the Plaintiffs did not need to fully exhaust their administrative remedies before initiating this lawsuit because the existing grievance system was a "dead end" and not "capable of use" for the purpose of obtaining emergency redress to prevent the spread of COVID-19 within the prison. Ex. 2, D. Ct. FOF/COL, at 57–61. The district court further found that Defendants were deliberately indifferent to the substantial risk of serious harm that COVID-19 posed to the Pack Unit inmates. Finally, the district court determined that a permanent injunction was necessary to protect the inmates' constitutional right to adequate medical care.

Without reviewing the full trial record, a motions panel of the Fifth Circuit rejected the district court's findings and stayed the permanent injunction, putting inmates' lives at risk while the appeal proceeds on the merits.

In granting a stay, the panel did precisely what the Fifth Circuit itself says it must not do: "The appellate court is not simply to substitute its judgment for the trial court's, else that court's announced discretion would be meaningless." *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985). The injunction was grounded in detailed factual findings supporting an Eighth Amendment violation, yet the stay panel did not determine that any of the district

court's factual findings were clearly erroneous. Indeed, the stay panel found "it unnecessary to parse an 18-day trial record on an expedited motion for temporary relief." Ex. 1, Stay Op. at 14. The stay panel was demonstrably wrong in conducting a de novo review of selectively chosen facts and in substituting its judgment for that of the trial court. Moreover, the appeal has been sharply expedited, so any impact on the Defendants will be both limited and short-term, whereas the absence of the injunction threatens the Plaintiffs with the irreparable harms of death or serious illness. Finally, the Court is likely to grant review of any decision by the merits panel due to a circuit split on questions of national importance related to the risk of COVID-19 in carceral settings. For these reasons, Plaintiffs request the stay be vacated.

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

The history of this case illustrates the danger of leaving in place the court of appeals' stay of the permanent injunction pending appeal. When this case was last before the Court on Plaintiffs' application to vacate the Fifth Circuit's stay of the preliminary injunction, COVID-19 had just begun to take hold in the Pack Unit. Only a handful of inmates were infected, and only one had died. While the preliminary injunction was stayed and the case proceeded to a trial on the merits, hundreds of inmates became infected and nineteen lives were lost. Now Plaintiffs are again stripped of the protections that they won in the district court after a lengthy trial based on the facts on the ground and are left exposed to a heightened risk of serious illness and death in the absence of the permanent injunction.

On appeal, a district court's factual findings on irreparable harm are not to be disturbed unless clearly erroneous. *Women's Med. Ctr. of Nw. Houston v. Bell*, 248

F.3d 411, 419 (5th Cir. 2001). The stay panel did not grapple with the district court's irreparable harm findings, which culminated in its finding that "the inmates at the Pack Unit continue to be at risk of irreparable harm in the form of serious illness or death, and a permanent injunction is warranted." Ex. 2, D. Ct. FOF/COL, at 79. There is a grave risk to Plaintiffs' health and safety if the injunction is stayed.

Despite those record findings of a concrete and substantial threat of irreparable harm to the Plaintiffs in the absence of a permanent injunction, the panel determined that "a stay will not substantially harm Plaintiffs." Ex. 1, Stay Op. at 15. That ruling not only overlooks the district court's factual findings, but also was based on Defendants' self-serving representations that the number of active COVID-19 cases was decreasing in recent weeks. *Id*. at 15 (citing *Valentine v. Collier*, 2020 WL 5797881, at *7–8) (S.D. Tex. Sept. 29, 2020) ("*Valentine V*"). Setting aside the numerous issues with Defendants' credibility in this respect, Ex. 2, D. Ct. FOF/COL, at 9–11, a temporary decrease in COVID-19 cases is not a valid basis to stay the permanent injunction. The pandemic is now resurging across the country and thus threatens to spike again in the Pack Unit as well without the permanent injunction to hold the Defendants to their constitutional obligations.[5] The Pack Unit houses geriatric and medically compromised inmates—the most vulnerable prison population—and any resurgence of COVID-19 presents an immediate and serious risk of sickness and death. Even if the current number of infections in the Pack Unit

[5] *See U.S. Virus Cases Climb Toward a Third Peak*, N.Y. Times, Oct. 15, 2020, https://www.nytimes.com/interactive/2020/10/15/us/coronavirus-cases-us-surge.html.

is comparable to what it was before the last stay, there would still be an imminent risk of irreparable harm. Hundreds of geriatric prisoners in the Pack Unit have never been infected with COVID-19, and without significant protective measures its spread can be both rapid and devastating.

II. The Stay Panel Misconstrued the PLRA's "Availability" Exception and Ignored the District Court's Factual Findings on Administrative Exhaustion

The stay panel erred by narrowing the PLRA's administrative exhaustion requirement and disregarding the district court's extensive factual findings. This Court has "made it clear that lower courts are better positioned to make factual findings regarding the actual availability of administrative remedies under the PLRA." *Shumanis v. Lehigh Cty.*, 675 F. App'x 145, 148–49 (3d Cir. 2017) (citing *Ross v. Blake*, 136 S. Ct. 1850, 1862 (2016)). That is because whether administrative relief is available depends on the "facts on the ground." *Ross*, 136 S. Ct. at 1859. Instead of deferring to the district court's findings about the facts on the ground, the stay panel developed a narrow interpretation of availability that can never be satisfied, making the facts on the ground irrelevant.

The PLRA requires prisoners exhaust only "available" administrative remedies before bringing suit. 42 U.S.C. § 1997e. "Available" administrative remedies are only those grievance procedures that are "capable of use" to obtain "some relief for the action complained of." *Ross*, 136 S. Ct. at 1859 (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)). The district court's detailed factual findings demonstrate that TDCJ's grievance process was not available because it operated as a "simple dead

end" that was "unable . . . to provide any relief to aggrieved inmates." *Id.*; Ex. 2, D. Ct. FOF/COL, at 58.

TDCJ's grievance process has three steps—one informal step and two formal steps. Inmates must first "pursue an informal resolution with staff" before engaging in the formal grievance process. Ex. 2, D. Ct. FOF/COL, at 46. Formal grievances can be rejected if an inmate does not attempt informal resolution first. *Id.* Then, at Step 1 of the formal process, TDCJ grievance staff may take up to 40 days to respond to a formal Step 1 grievance and may extend its own deadline by an additional 40 days. *Id.* at 47. Inmates may then appeal a Step 1 decision by filing a Step 2 grievance within 15 days of receipt of the Step 1 response. *Id.* Similarly, TDCJ grievance staff may take up to 40 days to respond to a Step 2 grievance and may again extend its own deadline by an additional 40 days. *Id.* Altogether, just the formal two-step grievance process may take up to 160 days to exhaust. And even though TDCJ had an emergency grievance process with shortened timeframes for some medical issues, there was no way to obtain an emergency or otherwise expedited remedy for the kind of concern at issue here. For example, Plaintiff Valentine expressly labeled his grievance as an "EMERGENCY" and asked to expedite it, but under the grievance system it was recategorized as a non-emergency concern about "sanitation" to be addressed in the ordinary (slow) timeframes. Ex. 2, D. Ct. FOF/COL, at 47. Even worse, "TDCJ deemed other emergency grievances filed by inmates relating to COVID-19 as presenting issues that were 'not grievable.'" *Id.* at 60–61.

The fact that Plaintiffs attempted to use the grievance system but failed to obtain any kind of timely remedy further confirms that it was not capable of use for the purpose of obtaining emergency protections against the rapid spread of COVID-19 within the Pack Unit. *Ross*, 136 S. Ct. at 1859. For example, although Valentine started the grievance process before filing this lawsuit,[6] he tested positive for COVID-19 before TDCJ ever responded to his initial grievance. Ex. 2, D. Ct. FOF/COL, at 48. Multiple other inmates similarly tested positive for COVID-19 while their grievances were pending. *Id.* As just one tragic example, Norris died of COVID-19 less than a week after filing a COVID-related grievance—which TDCJ ignored—complaining TDCJ staff were not wearing PPE. *Id.* 60. "Defendants provided no evidence that any steps were taken to address Mr. Norris's grievance in the interim." *Id.* What is more, Defendants subsequently acknowledged that their then-existing grievance process was inadequate in light of COVID-19 and implemented a new set of procedures to deal with this emergency. *Id.* at 59. Simply, "[t]he grievance process also operated too slowly, given the risk to human life posed by COVID-19." *Id.* at 60; *cf. Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173 (7th Cir. 2010) ("[A]dministrative remedies

[6] At trial it was established that Plaintiffs in fact began the grievance process before filing suit, which was not in the record at the time of the preliminary injunction appeal. *See Valentine v. Collier*, 956 F.3d 797, 806 (5th Cir. 2020) ("*Valentine I*") (Higginson, J., concurring) (noting, based on the record at the time, that Plaintiffs "did not submit any grievance request to prison authorities before filing this lawsuit"). As the district court found, TDCJ requires that inmates "attempt informal resolution of conflicts before filing a Step 1 grievance." Ex. 2, D. Ct. FOF/COL, at 46. TDCJ may reject a formal grievance solely because the inmate did not first attempt informal resolution. *Id.* Valentine initiated informal resolution of his pandemic-related grievance on March 27, 2020, but did not obtain a timely remedy. *Id.* He filed the instant lawsuit on March 30, 2020.

that offer no possible relief in time to prevent the imminent danger from becoming an actual harm can't be thought available.").

The stay panel dismissed the district court's findings regarding the "facts on the ground," misconstruing case-specific analysis as an effort to create a "special circumstances" exception foreclosed by *Ross*. Ex. 1, Stay Op. at 7. But the district court did not create a special circumstances exception. Instead, the district court squarely placed its ruling within *Ross* by finding that, although a grievance system existed, it was not "available" under the facts of this case because it was a "dead end" and not "capable of use" for the purpose of obtaining emergency protections against the spread of COVID within the Pack Unit. Ex. 2, D. Ct. FOF/COL, at 57–61. By treating those factual findings as irrelevant, the stay panel effectively "reject[ed] the possibility that grievance procedures could ever be a 'dead end' even if they could not provide relief before an inmate faced a serious risk of death." *Valentine v. Collier*, 140 S. Ct. 1598, 1600 (2020) (Sotomayor, J.).

The panel committed further error by inferring availability from TDCJ's unilateral actions outside the grievance process, stating that "TDCJ's conduct shows that it was capable of providing 'some relief for the action complained of,' which is enough to render the grievance process 'available' under the PLRA." Ex. 1, Stay Op. at 8–9. But the PLRA requires exhaustion when grievance procedures—not defendants—are capable of providing relief. *Ross*, 136 S. Ct. at 1859. *Defendants'* capability to act unilaterally when they choose says nothing about *Plaintiffs'*

capability to obtain "some relief" from Defendants' illegal choices through the grievance process. Ex. 1, Stay Op. at 8–9.

Moreover, the whole point of the Plaintiffs' grievances here is that they believed (and the district court found) that the Defendants' own unilateral responses were inadequate and indeed deliberately indifferent to the unique risks that inmates face in the Pack Unit. The question is whether the grievance system was available for the purpose of providing redress for those specific concerns, and the district court's findings correctly establish under *Ross* that the answer is no. Accordingly, under the PLRA, Plaintiffs did not need to pursue their grievances pointlessly through a system that was a simple "dead end."

The stay panel's reasoning would make every grievance process available—even an opaque process that is practically impossible to navigate and that prison administrators misrepresent—unless a defendant was actually incapable of offering even some relief. *Contra Ross*, 136 S. Ct. at 1859–60 (holding administrative unavailable when opaque or misrepresented). And in any case where a defendant was incapable of offering even some relief, plaintiffs would lack standing: Plaintiffs' injuries would not be fairly traceable to the acts of a defendant who was powerless to prevent them in the first place and would not be redressed by a judicial ruling against a defendant who was powerless to do anything about them. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (holding that standing requires traceability and redressability). Thus, the stay panel effectively read the availability exception out of

the statutory text, holding that it can only be satisfied where a plaintiff lacks standing.

Because the stay panel misconstrued the PLRA's availability exception and ignored the district court's factual findings on administrative exhaustion, its stay must be vacated.

III. The Stay Panel Disregarded Supreme Court Precedent and Inappropriately Reweighed Evidence on Deliberate Indifference

The stay panel acknowledged that the district court "articulated the right legal standard" and "made detailed factual findings about TDCJ's response to COVID-19," but claimed it disagreed with the district court's application of law to facts. Slip op. at 10. To the contrary, it is the stay panel that misapplied the deliberate indifference standard.

Instead of evaluating evidence on Defendants' state of mind with respect to the specific risks in this case, the panel suggested that the Eighth Amendment is satisfied in the context of infectious disease as long as some testing and treatment takes place. Ex. 1, Stay Op. at 11–12. In doing so, the panel relied on prior decisions about a much different disease, tuberculosis, ignoring the district court's findings about COVID-19 and this Court's instruction that each case must be evaluated on its specific factual record because "objective reasonableness turns on the facts and circumstances of each particular case." *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015) (quotation marks and citation omitted).

Moreover, the stay panel did not apply the deliberate indifference standard to the facts as established at trial and found by the district court. Instead, it selectively

reweighed the evidence. Ex. 1, Stay Op. at 10–11. For example, the stay panel weighed Defendants' claim that they "require[] social distancing and the use of cloth face masks at all times," *id.* at 11, more heavily than the extensive testimony on which the district court found Defendants were "well aware" that "staff non-compliance with regard to wearing PPE and social distancing were regular, daily features of life in the Pack Unit" that "cannot be described as 'occasional' or merely negligent," Ex. 2, D. Ct. FOF/COL, at 68–69. The stay panel also weighed Defendants' claim to have "devised a long-term testing plan" before trial, Ex. 1, Stay Op. at 11, more heavily than trial testimony on which the District Court found the plan appeared not to have been finalized, had not been communicated to Warden Herrera, and had not been followed, Ex. 2, D. Ct. FOF/COL, at 39–40. These are two examples of the stay panel setting aside the district court's detailed and thorough findings, which were probative of deliberate indifference, to conduct a de novo review of cherry-picked evidence.

This reweighing of evidence is particularly troubling because it sets aside the district court's repeated findings that Defendants lacked credibility. *See, e.g.*, Ex. 2, D. Ct. FOF/COL, at 9 ("At the outset, the Court is concerned about the credibility of Defendants' representations and experts."); *id.* at 12 ("Defendants' credibility is further undermined by actions and modifications to TDCJ's practices that were made right before, and in apparent response to, hearings before this Court or the trial itself."); *id.* at 13 ("Defendants have misrepresented certain facts."); *id.* at 78 ("[A]lthough the Court comes to this conclusion with the utmost regret, the credibility

of the representations made by certain TDCJ officials and witnesses has been placed in doubt."). In fact, the district court cited Defendants' claims about their testing plan and social-distancing measures to illustrate their lack of credibility. *Id.* at 12–13. By emphasizing Defendants' self-serving claims above the countervailing evidence of deliberate indifference, the stay panel not only reweighed trial evidence but also overturned the district court's credibility determinations without explanation. *Contra United States v. Mathes*, 151 F.3d 251, 252 (5th Cir. 1998) ("As an appellate court, it is not our task to weigh the evidence or determine the credibility of witnesses.").

The Court should vacate the stay panel's decision both because it impinged on the prerogative of the finder of fact and because it treated the Eighth Amendment as mandating a single, standardized response to any infectious disease instead of recognizing that reasonableness turns on the facts and circumstances of each particular case.

IV. The Balance of Harms and Public Interest Favor Vacating the Stay of the Permanent Injunction

The stay panel's alleged balancing of harms relied on platitudes about Defendants' interest in prison administration while ignoring Plaintiffs' risk of serious illness and death. Though they emphasize the State's interest in prison administration, Defendants do not argue that any specific measure required by the injunction is burdensome, impractical, or otherwise injurious. *See* Ex. 2, D. Ct. FOF/COL, at 80 ("[A]t trial, Defendants did not provide evidence of budgetary or financial concerns with the relief requested by Plaintiffs."); *cf. Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) ("tremendous costs" could constitute irreparable injury). To

the contrary, Defendants claim they "currently employ almost all of the measures in the permanent injunction," Ex. 4, Defs. Stay Mot. 18, and they disclaim any concern about the time it would take to come into full compliance. The district court found Plaintiffs' risk of serious illness or death outweighs this alleged harm to Defendants, Ex. 2, D. Ct. FOF/COL, at 80, and there was nothing clearly erroneous about that finding.

Additionally, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) (collecting cases). There is also a strong public interest in "safeguarding public health." *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 471–72 (5th Cir. 2017). Both interests weigh heavily in favor of Plaintiffs and vacating the Fifth Circuit's stay. Moreover, any impact on the Defendants is temporary and short-term, because the Fifth Circuit has expedited the appeal, whereas the prisoners here face the irreparable harms of serious illness and death.

V. The Court Would Likely Grant Review

Finally, it is also appropriate to vacate the stay because this Court "could and very likely would" review the court of appeal's merits decision as to the preliminary injunction. *W. Airlines*, 480 U.S. at 1305. This case presents questions of particular national importance at this time when courts across the county are addressing how to respond to violations of state and federal inmates' rights in connection with the COVID-19 pandemic. *See Roman v. Wolf*, 2020 WL 6040125, at *6 (9th Cir. Oct. 13, 2020) (collecting cases and noting "our sister circuits have reached a variety of conclusions when presented with cases about COVID-19 risks in carceral settings").

And the Fifth Circuit's cramped view of the PLRA's exhaustion requirement is particularly problematic, because it forecloses prisoners from obtaining *any* redress even when the internal grievance system is a "dead end." In circumstances as time-sensitive and pressing as these, any conflicts on these questions among the lower courts would warrant granting certiorari. *See* Sup. Ct. R. 10; *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (granting certiorari "[b]ecause of the 'imperative public importance' of the issue" and "the disarray among the Federal District Courts").

Conclusion

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

Respectfully submitted,

s/ Brandon W. Duke

JOHN R. KEVILLE
DENISE U. SCOFIELD
MICHAEL T. MURPHY
BRANDON DUKE
Counsel of Record
ROBERT L. GREEN III
CORINNE STONE HOCKMAN
Winston & Strawn LLP
800 Capitol Street, Suite 2400
Houston, Texas 77002
(713) 651-2600
bduke@winston.com

JEFF EDWARDS
SCOTT MEDLOCK
DAVID JAMES
The Edwards Law Firm
The Haehnel Building
1101 East 11th Street
Austin, Texas 78702
(512) 623-7727

BASHEER GHORAYEB
Winston & Strawn LLP
2121 N. Pearl Street, Suite 900
Dallas, TX 75201
(214) 453-6500

Certificate of Service

I, Brandon W. Duke, a member of the bar of this Court, certify that on October 21, 2020, a copy of the foregoing and the attached exhibits were served on all parties by email and first class mail to the individuals listed below:

KYLE D. HAWKINS, SOLICITOR GENERAL
MATTHEW HAMILTON FREDERICK
JASON R. LAFOND
CHRISTIN COBE VASQUEZ
Office of the Attorney General for the State of Texas
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
kyle.hawkins@oag.texas.gov
matthew.frederick@oag.texas.gov
jason.lafond@oag.texas.gov
christin.vasquez@oag.texas.gov

s/ Brandon W. Duke
BRANDON W. DUKE
Counsel of Record

List of Exhibits

1. Court of Appeals Order Granting Defendants' Motion to Stay the Permanent Injunction (5th Cir. Oct. 13, 2020)

2. District Court's Findings of Fact and Conclusions of Law (S.D. Tex. Sept. 29, 2020)

3. Court of Appeals Order Granting Motion to Expedite Appeal (5th Cir. Oct. 16, 2020)

4. Defendants' Opposed Emergency Motion to Stay Injunction Pending Appeal