UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OSCAR SANCHEZ, MARCUS WHITE, TESMOND MCDONALD, MARCELO PEREZ, ROGER MORRISON, KEITH BAKER, PAUL WRIGHT, TERRY MCNICKELS, and JOSE MUNOZ, on their own and on behalf of a class of similarly situated persons, *Plaintiffs/Petitioners,* v. DALLAS COUNTY SHERIFF, MARIAN BROWN, in her official capacity; DALLAS COUNTY, TEXAS; STATE OF TEXAS; GOVERNOR OF TEXAS; and ATTORNEY GENERAL OF TEXAS, *Defendants/Respondents.*	§	Case No. 3:20-cv-00832-E

Notice of Supplemental Authority

We write to alert this Court to the Fifth Circuit's decision from yesterday in *Marlowe v. LeBlanc*, — F.3d —, No. 20-30276 (5th Cir. Apr. 27, 2020) (slip opinion attached). While this Court has already denied Plaintiffs' requested relief (and *Marlowe* does not change that result), State Intervenors bring this binding authority to this Court's attention because it forecloses several of Plaintiffs' attempts to distinguish *Valentine v. Collier*; therefore, providing further support for the Court's forthcoming written opinion.

Respectfully submitted.

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[1] Exempted from admission to practice requirement pursuant to Local Rule 83.11.

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2020, a true and correct copy of the foregoing document was transmitted using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/Adam Arthur Biggs
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United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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CLERK

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April 27, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 20-30276 Christopher Marlowe v. James LeBlanc, Secretary, et al
USDC No. 3:18-CV-63

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa Mattingly

By: _____
Melissa V. Mattingly, Deputy Clerk
504-310-7719

Ms. Phyllis Esther Glazer
Mr. Michael L. McConnell
Ms. Suzanne Quinlan Mooney
Ms. Emily Henrion Posner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-30276

CHRISTOPHER MARLOWE,

Plaintiff - Appellee

v.

JAMES M. LEBLANC, SECRETARY, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; RAMAN SINGH, Doctor; TIMOTHY HOOPER, Warden; STEPHANIE MICHEL, Deputy Warden; MORGAN LEBLANC, Assistant Warden; PREETY SINGH, Doctor; GAIL LEVY; POLLY SMITH; FALLON STEWART; ELIZABETH GAUTHREAUX; JONATHAN TRAVIS; STATE OF LOUISIANA THROUGH THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; PAM HEARD, Doctor; DARRYL CAMPBELL, Assistant Warden; JOHN MORRISON; ANGEL HORN, Master Sergeant; ROLANDA PALMER, Master Sergeant; CHERMAINE BROWN, Sergeant,

Defendants - Appellants

Appeal from the United States District Court
for the Middle District of Louisiana

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

This appeal concerns the efforts of Louisiana's Department of Public Safety and Corrections ("DPSC") to respond to the rapidly evolving COVID-19 pandemic on behalf of one prisoner in one unit. On April 23, 2020, the United States District Court for the Middle District of Louisiana issued an injunction requiring Defendants to comply with their own internal policies and submit a

plan to ensure proper social distancing and hygiene practices. Dist. Ct. Order at 13–14. This order came just one day after this court stayed a similar injunction against the Texas Department of Criminal Justice. *Valentine v. Collier*, No. 20-20207, 2020 WL 1934431 (5th Cir. Apr. 22, 2020). We conclude that *Valentine*'s reasoning controls here and accordingly stay the district court's injunction pending appeal.

BACKGROUND

Plaintiff, a prisoner currently detained at the Rayburn Correctional Center ("RCC"), originally filed suit against Defendants in 2018, alleging they exhibited deliberate indifference toward his medical needs by providing a constitutionally deficient meal service that resulted in his developing diabetes and then failing to adequately treat his illness. On April 1, 2020, Plaintiff filed a motion tangential to the ongoing dispute, requesting a temporary restraining order authorizing his supervised release until spread of the COVID-19 virus is no longer a threat within the Department of Corrections. Defendants opposed the motion on the basis of jurisdictional obstacles, Plaintiff's failure to exhaust administrative remedies, and the deficiency of Plaintiff's constitutional claim on its merits.

The district court conducted a telephonic evidentiary hearing on April 7. Following the evidentiary hearing, Defendants submitted a memorandum updating the district court on the numerous procedures taken at RCC to contain the spread of COVID-19. Plaintiff responded that these procedures were "woefully inadequate" and "deliberately indifferent" to his medical needs. He also suggested, for the first time, that, in lieu of temporary release, the court could order that RCC create conditions that allow for proper social distancing to protect him. The district court latched on to this eleventh-hour request. After determining that Plaintiff was likely to prevail on the merits of

his deliberate indifference claim, it ordered Defendants to "comply with the Governor's recommendations and their own internal policies concerning disinfection of common areas and the wearing of masks by staff and certain categories of offenders." Dist. Ct. Order at 13. It further ordered Defendants to "submit to the [c]ourt a [p]lan 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." *Id.* at 14. The Defendants were ordered to submit said plan within five days, i.e. by Tuesday, April 28. *Id.*

Defendants, relying heavily on this court's just-issued *Valentine* decision, requested that the district court stay enforcement of the injunction. The district court has yet to rule on that motion. Defendants then appealed to this court, requesting a stay pending appeal.

ANALYSIS[1]

Four well established factors govern the propriety of a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426, 129 S. Ct. 1749, 1761 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119 (1987)). "The first two factors . . . are the most critical." *Id.* at 434.

[1] Plaintiff contends that the district court's order is a TRO, governed by Fed. R. Civ. P. 65(b) and normally unappealable. *See Faulder v. Johnson*, 178 F.3d 741, 742 (5th Cir. 1999). However, precedent makes clear that when a court holds a hearing on a preliminary motion and the motion is strongly contested, its resulting order constitutes an injunction appealable under 28 U.S.C. § 1291(a)(1). *See Sampson v. Murray*, 415 U.S. 61, 87, 94 S. Ct. 937, 951 (1974) ("[W]here an adversary hearing has been held, and the court's basis for issuing the order strongly challenged, classification of [a] potentially unlimited order as a temporary restraining order seems particularly unjustified.").

We begin by considering Defendants' likelihood of success on appeal. In making this assessment, we are bound by a decision in which this court recently resolved a motion for stay raising nearly identical issues. *See Valentine v. Collier*, No. 20-20207, 2020 WL 1934431 (5th Cir. Apr. 22, 2020). Although *Valentine*'s facts are slightly different from the facts of this case, we might have expected the district court to at least mention *Valentine*. Perhaps Defendants did not apprise the district court of our decision before the issuance of its injunction. *Valentine* was decided just one day earlier. But Defendants repeatedly cite *Valentine* in their motion to stay enforcement of the injunction pending appeal. And yet, for whatever reason, the district court has not ruled on that motion. Regardless of the basis for the district court's decision, we must consider Defendants' arguments in light of *Valentine*, and, for three independent reasons, conclude that Defendants are likely to succeed on appeal.

First, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900 (1984), prohibits the injunction imposed by the district court. As this court explained in *Valentine*, a district court cannot enjoin a state facility to follow state law. *Valentine*, 2020 WL 1934431, at *4. Yet that is exactly what the district court did here. It concluded that "Defendants do not appear to be following" their own policy statements. Dist. Ct. Order at 10. For instance, "despite taking some steps to deter the spread of the virus, [RCC] has not effectively implemented the [Department of Correction] policies that require staff members and orderlies to wear masks and other [personal protective equipment] to protect the prison population, including the Plaintiff." *Id.* at 11. The court further determined that RCC "failed to meaningfully implement social-distancing procedures and other measures aimed at thwarting the spread of the coronavirus." *Id.* The court therefore ordered Defendants to comply with "their own internal policies" and "implement social

distancing practices to limit the spread of COVID-19." *Id.* at 13–14. *Pennhurst* forbids this.

Plaintiff contends the court's injunction does not run afoul of *Pennhurst* because it is intended to correct constitutionally deficient medical care. The court did not so express itself, and in any event, the essence of *Pennhurst* is that a federal court lacks jurisdiction to sit as a super-state executive by ordering a state entity to comply with its own law.

Second, 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). We do not question that COVID-19 presents a risk of serious harm to those confined in prisons, nor that Plaintiff, as a diabetic, is particularly vulnerable to the virus's effects. But, for purposes of resolving Plaintiff's Eighth Amendment claim, we are not tasked with resolving whether, absent RCC's precautionary measures, the COVID-19 pandemic presents a substantial risk of serious harm to prisoners like Plaintiff. Rather, the question here is whether the Eighth Amendment requires RCC to do more than it has already done to mitigate the risk of harm. The district court's laconic analysis provides little basis for concluding that RCC's mitigation efforts are insufficient. Indeed, because the district court made few (if any) factual findings, it left no reviewable basis to conclude that the measures implemented by Defendants are constitutionally deficient.[2] Plaintiff cites no precedent supporting a contrary conclusion, and we are aware of none.

Even assuming that Plaintiff's testimony somehow satisfies *Farmer*'s objective requirement, the district court cited no evidence establishing that

[2] Warden Robert Tanner, the Warden of RCC, offered a declaration that blunts many (if not all) of Plaintiff's concerns, giving us further cause to doubt that Plaintiff has come close to satisfying the "extremely high standard" of deliberate indifference. *Cadena v. El Paso Cty.*, 946 F.3d 717, 728 (5th Cir. 2020).

Defendants subjectively believed that the measures they were (and continue) taking were inadequate. If anything, the record proves just the opposite. Defendants point to a plethora of measures they are taking to abate the risks posed by COVID-19, from providing prisoners with disinfectant spray and two cloth masks to limiting the number of prisoners in the infirmary lobby and painting markers on walkways to promote social distancing. Plaintiff's own counsel conceded at the April 7 evidentiary hearing that "everyone here is trying their very, very best to make sure that nobody gets sick at [RCC]." The district court's analysis resembles the analysis we condemned in *Valentine*, where the district court had treated inadequate measures as dispositive of the defendants' mental state. "Such an approach," we explained, "resembles the standard for civil negligence, which *Farmer* explicitly rejected." *Valentine*, 2020 WL 1934431, at *4.

In opposing this stay, Plaintiff now asserts, contrary to the above-quoted statement, that RCC's measures in fact demonstrate deliberate indifference. Plaintiff's evidence is no different, however, and indeed, Defendants have been heightening their efforts to contain the virus. Although the virus has spread within RCC, given the many prevention measures RCC has taken, an increase in infection rate alone is insufficient to prove deliberate indifference.

Third, the district court's exhaustion analysis under the Prison Litigation Reform Act runs counter to Supreme Court precedent. The district court acknowledged that Plaintiff failed to exhaust administrative remedies. It nonetheless excused Plaintiff, reasoning that "the interests of justice" compelled it to act on an emergency basis. *See Johnson v. Ford*, 261 F. App'x 752, 755 (5th Cir. 2008). As this court explained in *Valentine*, such an approach is out-of-step with Supreme Court precedent, *see Valentine*, 2020 1934431, at *6–7, and this court has disavowed the "interests of justice"

exception embraced in *Johnson*, *see Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012) (holding that *Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998), which *Johnson* relied on, was "tacitly overruled and is no longer good law to the extent it permits prisoner lawsuits challenging prison conditions to proceed in the absence of pre-filing administrative exhaustion"). It must be acknowledged that Superintendent LeBlanc issued an order on March 23 temporarily suspending the administrative deadlines for replying to grievances, and such order may have affected the "availability" of exhaustion. But Plaintiff makes no effort to explain the impact of that order on his refusing to file a grievance or on the way in which it would have been processed. The record, moreover, indicates that grievances are currently being processed within 48 hours. Dist. Ct. Order at 6 n.3.

For at least these three, independent reasons,[3] we conclude that Defendants have demonstrated a substantial likelihood of success on the merits.

Turning to the second stay factor, Defendants have shown that they will be irreparably injured absent a stay. "When the State is seeking to stay a preliminary injunction, it's generally enough to say '[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Valentine*, 2020 WL 1934431, at *4 (quoting *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012)). The Louisiana Legislature assigned the prerogatives of prison policy to DPSC. *See* LA. STAT. § 36:401. "The district court's injunction prevents the State from

[3] 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.

effectuating the Legislature's choice and hence imposes irreparable injury." *Valentine*, 2020 WL 1934431, at *4.[4]

As if that weren't enough, the Supreme Court has repeatedly warned that "it 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, 126 S. Ct. 2378, 2388 (2006) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491–92, 93 S. Ct. 1827, 1837 (1973)). Here, the district court invaded Louisiana's interests by requiring Defendants to create a plan within five days "to ensure the implementation of proper hygiene practices in the dormitory in which Plaintiff is assigned," "to implement social distancing practices to limit the spread of COVID-19," and "to minimize Plaintiff's exposure to possible infected persons while visiting infirmary and cafeteria areas of the prison." Dist. Ct. Order at 14. The harm to Louisiana's interests is "particularly acute because the district court's order interferes with the rapidly changing . . . approach that [DPSC] has used to respond to the pandemic so far." *Valentine*, 2020 WL 1934431, at *5. In light of these concerns, the second factor weighs in Defendants' favor.

The remaining two factors—balance of the harms and the public interest—likewise weigh in favor of staying the district court's injunction. COVID-19 unquestionably poses risks of harm to all Americans—particularly those like Plaintiff who have underlying health conditions. "But the question

[4] *See also In re Abbott*, 954 F.3d 772, 792 (5th Cir. 2020) ("As *Jacobson* repeatedly instructs, . . . if the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authorities. 'It is no part of the function of a court or a jury to determine which one of two modes [i]s likely to be the most effective for the protection of the public against disease.' . . . Such authority properly belongs to the legislative and executive branches of the governing authority." (second alteration in original) (quoting *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 30, 25 S. Ct. 358, 363 (1905))).

is whether Plaintiff[] has shown that [he] will suffer irreparable injuries *even after* accounting for the [DPSC's] protective measures . . . . Neither the Plaintiff[] nor the district court suggest the evidence satisfies that standard. And '[b]ecause the State is the appealing party, its interest and harm merge with that of the public.'" *Id.* (emphasis in original) (quoting *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017)).

Because Defendants have satisfied all four stay factors, their motion to stay the preliminary injunction pending appeal is **GRANTED**.

STEPHEN A. HIGGINSON, Circuit Judge, concurring in the judgment:

I concur in the court's stay order because I agree that the Appellants have demonstrated a substantial likelihood of success on their claim that Marlowe failed to exhaust his administrative remedies. It is undisputed that Marlowe did not file a grievance with the prison until several days *after* he filed his motion with the district court. *See Valentine v. Collier*, -- F.3d --, No. 20-20207, 2020 WL 1934431, at *7 (5th Cir. Apr. 22, 2020) (Higginson, J., concurring in judgment). Though Marlowe now argues that Appellants' suspension of the grievance deadline process renders the prison's administrative remedies "unavailable," the district court was apparently presented with this evidence and still came to the conclusion that the prison is required to adjudicate Marlowe's grievance by May 7, 2020. In their request for a stay, the Appellants do not dispute that May 7, 2020 is the deadline for their response. Should the prison fail to adjudicate Marlowe's grievance by May 7, 2020, there may well be an argument that the administrative grievance process is "unavailable." *See Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016).

Finally, this order does not foreclose Marlowe, a diabetic, from continuing to seek relief through other appropriate channels, such as the state parole process. Marlowe's September 2019 application for commutation, which

appears to be pending, includes over 100 pages of exhibits and letters that purport to show that he has been a model prisoner while in the custody of the Louisiana Department of Corrections.[5]

[5] Although we respect that it is the exclusive prerogative of the Louisiana Pardon and Parole Board to conclude if this evidence demonstrates that he is entitled to relief, all judges on this panel concur that the clemency petition appears well-supported.