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America's New Death Sentence: Lack of Action to Protect Incarcerated People from Covid-19 Amounts to Cruel and Unusual Punishment

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AMERICA'S NEW DEATH SENTENCE: LACK OF ACTION TO PROTECT INCARCERATED PEOPLE FROM COVID- 19 AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT

JANE MANWARRING*

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**More information about prison conditions and COVID-19 can be found here: <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>

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I. INTRODUCTION

Laddy Curtis Valentine is a 69-year-old man suffering from high blood pressure, hypertension, nerve damage from a stroke, atrophy and weakness in the upper-left extremity, and limited ability to grip with his left hand.¹ Richard Elvin King is a 73-year-old man with diabetes, high blood pressure, chronic kidney failure, hyperlipidemia, and kidney disease.² Mr. Valentine and Mr. King are just two of the 1,132 men imprisoned in the Wallace Pack Unit (“the Pack Unit”) in Grimes County, Texas.³ Like Mr. Valentine and Mr. King, approximately 800 incarcerated men housed in the Pack Unit are over the age of sixty-five, and the majority of them have serious medical conditions.⁴

Between April and September 2020, twenty people incarcerated in the Pack Unit died after being infected with COVID-19, representing more than eleven percent of COVID-19 deaths in the entire Texas Department of

1. *See Valentine v. Collier*, 490 F. Supp. 3d 1121, 1128 (S.D. Tex. 2020) (listing Mr. Valentine's health conditions).

2. *See id.* (listing Mr. King's health conditions).

3. *See id.* at 1131 (stating there were 1,132 people incarcerated at the Pack Unit as of June 29, 2020).

4. *See id.* (stating the majority of those incarcerated in the Pack Unit are elderly and/or have health problems); *see also Valentine v. Collier*, 455 F. Supp. 3d 308, 314-15 (S.D. Tex. 2020) (explaining that the Pack Unit is a Type-1 Geriatric Prison, which means that its population is “predominantly and disproportionately elderly and ill”).

Criminal Justice (“TDCJ”).⁵ Since the first positive case in April 2020, over 500 people incarcerated in the Pack Unit have tested positive for the virus.⁶ Because the Pack Unit is a dormitory-style facility, it is difficult to remain six feet apart at all times, as recommended by the Centers for Disease Control and Prevention (“CDC”).⁷ However, there are several ways the administrators of the unit could create more space between people, such as requiring those incarcerated to sleep head-to-foot to increase the distance between their faces in neighboring cubicles while they sleep.⁸ TDCJ first adopted a written policy to address COVID-19 on March 20, 2020, and has updated it six times since its first version, which initially did not include all of the CDC’s guidelines.⁹ Although the Pack Unit put an initial social distancing plan in place, it did not address every potential issue, including the fact that people remained less than six feet apart when sleeping.¹⁰

Even with a written COVID-19 policy in place, Pack Unit officials did not enforce several aspects of the policy, most significantly the social distancing requirements.¹¹ For example, the policy stated that the people would be fed one dorm at a time to allow just one person to eat per table, but when mealtimes began “taking too long,” the Pack Unit went back to seating three or four people per table.¹² In addition, multiple dormitories share a community shower at the prison.¹³ Although only one dormitory was allowed to shower at a time, the showerheads are all directly next to each

5. See *Valentine*, 490 F. Supp. 3d at 1121, 1172 (stating there were twenty total COVID-19 deaths in the Pack Unit as of Sept. 29, 2020); see also *COVID-19 Updates*, TEX. DEP’T OF CRIM. JUST. (last updated Sept. 21, 2021), <https://tdem.maps.arcgis.com/apps/dashboards/2ff5d30a425345938e2806eef44c3cbf> (stating that eighty-six TDCJ inmates died from COVID-19 and 101 TDCJ inmates presumably died from COVID).

6. See *Valentine*, 490 F. Supp. 3d at 1135 (stating that at least 505 of those incarcerated in the Pack Unit tested positive as of Sept. 29, 2020).

7. See *id.* at 1131 (explaining that most men incarcerated in the Pack Unit live in small cubicles next to each other with only waist-high walls).

8. See *id.* at 1138-40 (detailing different ideas for spreading inmates out throughout the Pack Unit).

9. See *id.* at 1137 (explaining that Policy B-14.52 applies to all TDCJ institutions, including the Pack Unit).

10. See *id.* at 1138 (stating that TDCJ official never instructed inmates to sleep head-to-foot, nor spread inmates out when there were empty cubicles).

11. See *id.* at 1139 (stating that different dorms frequently overlapped during shower times and officials only “sometimes” enforced social distancing in the hallways).

12. See *id.* at 1138 (explaining that with two or more inmates sitting at a table, it is impossible to stay six feet apart).

13. See *id.* at 1131, 1139 (stating that multiple dorms share one shower).

other, making it impossible for people to remain six feet apart when the community shower is full.¹⁴ In addition, TDCJ did not give incarcerated people extra toilet paper or soap when requested despite the policy requiring otherwise.¹⁵ Incarcerated people in the Pack Unit did not receive access to a greater supply of cleaning materials than they had before the pandemic—which was not enough even then.¹⁶

This Comment argues that the conditions of confinement in the Pack Unit during the COVID-19 pandemic violated the Eighth Amendment to the United States Constitution because TDCJ officials were deliberately indifferent to a substantial risk of serious harm.¹⁷ Part II describes the spread of COVID-19 and its prevalence in the United States, the basis for Eighth Amendment challenges, and the deliberate indifference requirement.¹⁸ Part III argues that the prison's disregard of CDC guidelines in a global health crisis amounts to deliberate indifference, and therefore should be considered cruel and unusual punishment under the Eighth Amendment.¹⁹ Part III also argues that the Fifth Circuit's deliberate indifference test is inadequate to address prison conditions during a global pandemic because it does not effectively hold prison officials accountable.²⁰ Finally, Part IV recommends modifying the Prison Litigation Reform Act ("PLRA") to allow more flexibility amid a deadly pandemic.²¹

14. *See id.* at 1139 (detailing the lack of space in the showers).

15. *See id.* at 1141 (stating that inmates are supposed to be able to request more soap and toilet paper than what they get in their usual weekly allotment, but many inmates have said officers deny their requests).

16. *See id.* at 1143-44 (stating that cleaning supplies for inmates who work as janitors typically run out halfway through a shift, and extra supplies are not available when requested).

17. *See* *Valentine v. Collier*, 978 F.3d 154, 158 (5th Cir. 2020) (granting TDCJ's motion to stay a permanent injunction that required prison officials to implement basic safety measures); *see also* U.S. CONST. amend. VIII (stating the government cannot inflict cruel and unusual punishment).

18. *See infra* Part II (discussing COVID-19, the Eighth Amendment, and how different circuits have defined deliberate indifference).

19. *See infra* Part III (arguing the Pack Unit officials effectively ignored the Pack Unit inmates' medical needs by taking action they knew would be inadequate).

20. *See id.* (arguing the Fifth Circuit's test allows officials to take any action to satisfy constitutional requirements, without considering whether the officials took the right or best action).

21. *See infra* Part IV (discussing the need for flexibility in the wake of COVID-19 to avoid an even greater loss of life).

II. BACKGROUND

A. *COVID-19 in the United States*

COVID-19 has killed over 614,000 people in the United States, a number that grows each day.²² The Centers for Disease Control and Prevention (“CDC”) identified several practices that reduce the risk of spreading and contracting COVID-19; including wearing a face mask, staying at least six feet from others, avoiding crowds and poorly ventilated indoor spaces, and regularly washing hands or using hand sanitizer.²³ Although these actions may be easy for the average person to implement, people who are incarcerated have no control over their daily lives—including the ability to practice basic hygiene.²⁴ In addition, the lack of personal space, coupled with the overcrowding of U.S. facilities as a result of mass incarceration, has caused COVID-19 to spread rapidly within prisons, creating a dire situation for people incarcerated.²⁵ There have been at least 398,627 positive cases of COVID-19 and 2,715 deaths resulting from COVID-19 among people incarcerated in state and federal prisons.²⁶ These high rates of infection and death have led to several lawsuits alleging unconstitutional conditions, but many have been unsuccessful.²⁷

22. See *CDC COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated August 7, 2021 12:26 PM), https://covid.cdc.gov/covid-data-tracker/#cases_totaldeaths (demonstrating the rapid rate of infection from the SARS-CoV-2 virus, also known as the Coronavirus disease or COVID-19, throughout the U.S.).

23. See *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated July 26, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>, (explaining that the risk of COVID-19 exposure grows with the number of people a person is around).

24. See, e.g., Olivia Rizzo & Brianna Sohl, *Cruel and Unusual Punishment: Incarceration in a Pandemic*, IN-TRAINING (June 15, 2020), <https://in-training.org/cruel-and-unusual-punishment-incarceration-in-a-pandemic-19868> (describing prison practices that spread disease, including alcohol-based hand sanitizer bans and inmate transfers across facilities).

25. See *id.* (stating that U.S. prisons are over-capacity); see also *Valentine v. Collier*, 455 F. Supp. 3d 308, 315 (S.D. Tex. 2020) (explaining the “congregative nature” of prisons).

26. See generally Katie Park & Tom Meagher, *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT (last updated July 1, 2021, 1:00 PM), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (demonstrating the disproportionate impact COVID-19 has had on state and federal incarcerated people as compared to the general population).

27. See, e.g., *Wilson v. Williams*, 961 F.3d 829, 844 (6th Cir. 2020) (holding that prison officials did not violate the Eighth Amendment because they responded reasonably to COVID-19); see also *Swain v. Junior*, 961 F.3d 1276, 1289 (11th Cir.

The CDC has determined that people age sixty-five and older are at a significantly increased risk of becoming seriously ill or dying as a result of contracting COVID-19.²⁸ The CDC has also identified medical conditions that contribute to a higher risk of a person with COVID-19 experiencing severe illness or death, including kidney disease, diabetes, and high blood pressure.²⁹ As a Type-1 Geriatric unit, the Pack Unit's incarcerated population is primarily comprised of elderly people, with over seventy percent over the age of sixty-five and the majority with serious health problems.³⁰ As of September 2020, the Pack Unit housed forty-nine incarcerated people using wheelchairs.³¹ Using a wheelchair makes it more difficult to maintain clean hands because touching the tires of the wheelchair necessarily exposes a person's hands to germs from the floor.³² Due to all of these factors, incarcerated people in the Pack Unit are not only at a higher risk of contracting the virus just from being incarcerated, but the vast majority of them are also at a much higher risk of becoming very sick or dying if they contract COVID-19.³³ Even if a person survives COVID-19, if severe symptoms accompany their infection, they are at a higher risk of developing long-term health issues.³⁴ These health issues continue beyond

2020) (holding that prison officials' actions passed constitutional muster).

28. See *Older Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Dec. 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (stating eight out of ten COVID-19 deaths have been adults sixty-five years old and older).

29. See *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Dec. 29, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (detailing the medical conditions that create a higher risk of becoming severely ill from COVID-19).

30. See *Valentine v. Collier*, 490 F. Supp. 3d 1121, 1131 (S.D. Tex. 2020) (explaining the Pack Unit has a high population of elderly and/or ill inmates, and 800 out of 1,132 total inmates in the Pack Unit are over the age of sixty-five).

31. See *id.* (stating that when the trial began, the Pack Unit housed forty-nine incarcerated people using wheelchairs and eighty-seven incarcerated people who used walkers).

32. See *id.* at 1142 (explaining that providing access to hand sanitizer is even more crucial for mobility-impaired inmates, whose hands are exposed to germs from the floor when they touch the tires of their wheelchairs).

33. See *Valentine v. Collier*, 455 F. Supp. 3d 308, 315 (S.D. Tex. 2020) (stating the majority of the Pack Unit's inmates are elderly and have medical issues).

34. See, e.g., *Long-Term Effects of COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Nov. 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html> (stating that while the CDC is still learning about the long-term effects of COVID-19, some patients have symptoms lasting for months after recovering from acute illness).

the virus itself and include chest pain, shortness of breath, joint pain, and a persisting cough.³⁵

B. The Eighth Amendment

1. Basis for Eighth Amendment Challenges

The Eighth Amendment prohibits the government from requiring excessive bail, imposing excessive fines, and inflicting cruel and unusual punishments on criminal defendants.³⁶ The Supreme Court has held that an incarcerated person's treatment and living conditions are subject to scrutiny under the Eighth Amendment.³⁷ The proscription against cruel and unusual punishment requires prison officials to provide incarcerated people with humane conditions of confinement.³⁸ Although the Constitution does not require prisons to be "comfortable," officials are required to provide those incarcerated with basic human needs, including adequate medical care.³⁹ Officials must take reasonable measures to ensure safety.⁴⁰

To demonstrate a violation of a person's Eighth Amendment rights, an incarcerated plaintiff must prove that (1) they were exposed to a substantial risk of serious harm and that (2) prison officials either acted with deliberate indifference to the risk or failed to act at all.⁴¹ Both factors are necessary to prove a violation of the Eighth Amendment's prohibition of cruel and unusual punishment.⁴² The Supreme Court has held that to demonstrate the

35. *See id.* (listing the potential long-term effects that can result from a COVID-19 infection).

36. *See* U.S. CONST. amend. VIII (establishing the right to not be subjected to cruel and unusual punishment from the government).

37. *See* *Helling v. McKinney*, 509 U.S. 25, 31-32 (1993) (holding that an incarcerated person's treatment is subject to an Eighth Amendment analysis).

38. *See* *Farmer v. Brennan*, 511 U.S. 825, 832, 834 (1994) (stating that officials have a duty to provide humane conditions of confinement); *but see* *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993) (holding that it is constitutional to require incarcerated people to work when there is no deliberate indifference to their physical conditions).

39. *See* *Rhodes v. Chapman*, 452 U.S. 337, 347-49 (1981) (explaining that prisons do not need to be comfortable because the conditions "are part of the penalty that criminal offenders pay for their offenses against society"); *see also* *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (establishing that deliberate indifference to the medical care of incarcerated people violates the Constitution).

40. *See, e.g.,* *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984) (stating that prison administrators have an obligation to guarantee incarcerated peoples' safety).

41. *See* *Farmer*, 511 U.S. at 834 (explaining the two-part test to determine whether there has been an Eighth Amendment violation).

42. *See id.* (stating that plaintiffs cannot allege constitutional liability every time an incarcerated person is injured; the two requirements must be met to find an Eighth

exposure of a substantial risk of serious harm, a plaintiff must show that a prison official's act or omission denied them their life's necessities.⁴³ When an official's failure to prevent harm is the basis of a claim, the plaintiff must show that his current conditions of incarceration pose a substantial risk of serious harm.⁴⁴ The fact that the harm has not yet happened is irrelevant to the analysis.⁴⁵ While demonstrating exposure to a substantial risk of serious harm is relatively straightforward, deliberate indifference is much more challenging to prove because it requires assessing a person's state of mind.⁴⁶ The Supreme Court in *Farmer v. Brennan* held that for a court to hold a prison official liable for violating the Eighth Amendment, the official must both know of and disregard a substantial risk to an incarcerated person's health or safety.⁴⁷

The Supreme Court has found Eighth Amendment violations where prison officials demonstrate deliberate indifference to an incarcerated person's serious medical needs.⁴⁸ To demonstrate deliberate indifference in the context of medical needs, the Fifth Circuit has said the plaintiff must show that an official denied him medical treatment, knowingly gave him incorrect medical treatment, or otherwise demonstrated a wanton disregard for his

Amendment violation).

43. See *Rhodes*, 452 U.S. at 347 (explaining conditions that are "minimal civilized measure of life's necessities," are cruel and unusual); see also *Deshaney v. Winnebago Cty. Dep't of Soc. Serv.*, 489 U.S. 189, 200 (1989) (including safety as a basic human need).

44. See *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (stating that when inmates prove an unsafe, life-threatening condition, "a remedy for unsafe conditions need not await a tragic event").

45. See *id.* (rejecting the argument that only current health problems create liability for prison officials); see also *Gomez v. Warner*, No. 94-60530, 1994 WL 612371, at *3 (5th Cir. Oct. 20, 1994) (finding deliberate indifference where sharing razors put an inmate at risk of contracting HIV/AIDS).

46. See *Farmer*, 511 U.S. at 834-37 (holding that, to find that an official violated the Eighth Amendment, he must know of and disregard a substantial risk of serious harm to an incarcerated person's health or safety); see also *Wilson v. Seiter*, 501 U.S. 294, 299 (1991) (finding that Eighth Amendment cases require inquiry into a prison official's mind); cf. *Domino v. Texas Dep't. of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001) (quoting, "deliberate indifference is an extremely high standard to meet").

47. See *Farmer*, 511 U.S. at 837 (holding that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference").

48. See *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (reasoning that, because people who are incarcerated can rely only on the prison to treat their medical needs, prisons have an obligation to do so).

serious medical needs.⁴⁹ An innocent mistake, wrong diagnosis, or mere negligence does not rise to the level of deliberate indifference.⁵⁰ Although deliberate indifference requires the official's knowledge of the risk, the Supreme Court has held that courts may infer the official's knowledge from a situation where the risk is sufficiently apparent.⁵¹ The Eighth Amendment does not impose liability on officials simply because incarcerated people are living in poor prison conditions; the prison official's mental state is a necessary component in determining whether he was acting with deliberate indifference.⁵²

2. *The Case Against the Pack Unit*

In response to the aforementioned conditions in the Pack Unit, Mr. Valentine and Mr. King brought suit under 42 U.S.C. § 1983, alleging that the defendants' failure to implement adequate protection against COVID-19 amounts to cruel and unusual punishment under the U.S. Constitution.⁵³ The United States District Court for the Southern District of Texas granted the plaintiffs' motion for a preliminary injunction, which the defendants appealed.⁵⁴ The Fifth Circuit Court of Appeals granted the defendants' motion to stay the preliminary injunction pending appeal, vacated the injunction, and remanded the case to the district court for proceedings on the

49. *See Domino*, 239 F.3d at 756 (citing *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985)) (stating that incorrect diagnosis, failure to alleviate risk, or difference in medical opinion does not amount to deliberate indifference).

50. *See id.* (holding that an official's failure to determine that an inmate was suicidal was not deliberate indifference, even though he subsequently committed suicide); *see also Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993) (holding that negligent medical care is not deliberate indifference).

51. *See Hope v. Pelzer*, 536 U.S. 730, 730-31 (2002) (finding obvious risk to an incarcerated person who was handcuffed to a post in the sun for seven hours with only two water breaks); *but see Farmer*, 511 U.S. at 844 (holding that an official charged with deliberate indifference can prove that he did not have knowledge of the risk by showing that he was unaware of facts creating danger).

52. *See Wilson v. Seiter*, 501 U.S. 294, 298-99 (1991) (stating that, to constitute cruel and unusual punishment, conduct must amount to more than a simple lack of due care).

53. *See Valentine v. Collier*, 490 F. Supp. 3d 1121, 1174 (S.D. Tex. 2020) (alleging that defendants violated the Constitution by acting with deliberate indifference to inmate health); *see also* 42 U.S.C. § 1983 (1996) (providing a cause of action to allege constitutional violations).

54. *See Valentine*, 490 F. Supp. 3d at 1175 (granting plaintiffs' request for an injunction, which put certain requirements in place that defendants must adhere to, including providing unrestricted access to soap and hand sanitizer, enforcing social distancing, and documenting all COVID-19 policies in writing).

permanent injunction.⁵⁵ The district court granted the permanent injunction requiring TDCJ to, among other measures, provide hand sanitizer to mobility-impaired people, enforce social distancing and the wearing of personal protective equipment (“PPE”) among staff, and institute a regular audit program to ensure compliance with the injunction and other COVID-19 policies.⁵⁶ TDCJ appealed the district court’s decision and moved for a stay of the permanent injunction pending appeal, which the Fifth Circuit granted.⁵⁷ The Supreme Court subsequently denied an application to vacate the stay.⁵⁸

In deciding whether to stay a district court’s order, the Supreme Court has instructed courts to consider four factors: (1) whether the 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 the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.⁵⁹ Courts give the first two factors the most weight.⁶⁰

In granting TDCJ’s motion to stay the permanent injunction, the Fifth Circuit analyzed the merits of the plaintiffs’ Eighth Amendment claim, as well as their compliance with the Prison Litigation Reform Act (“PLRA”).⁶¹ The Fifth Circuit stated that the Eighth Amendment claim would likely fail on its merits and, in addition, the plaintiffs’ lack of adherence to the PLRA was “fatal” to their case.⁶² The court also determined that TDCJ would be

55. See *Valentine v. Collier*, 956 F.3d 797, 806 (5th Cir. 2020) (granting TDCJ’s motion to stay the preliminary injunction); *Valentine v. Collier*, 960 F.3d 707, 707 (5th Cir. 2020) (vacating the preliminary injunction and remanding the case to the district court for proceedings on the permanent injunction).

56. See *Valentine*, 490 F. Supp. 3d at 1174 (granting the plaintiffs’ request for a permanent injunction).

57. See *Valentine v. Collier*, 978 F.3d 154, 166 (5th Cir. 2020) (granting defendants’ motion to stay the permanent injunction pending appeal).

58. See *Valentine v. Collier*, 141 S. Ct. 57, 57 (2020) (denying the application to vacate the stay).

59. See *Nken v. Holder*, 556 U.S. 418, 425-26 (2009) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)) (describing the “traditional” standard for a court to grant a stay).

60. See *id.* at 434-35 (explaining that whether the stay applicant has made a strong showing that he is likely to succeed and whether he will be irreparably injured without the stay are the two most critical factors for consideration).

61. See *Valentine*, 978 F.3d at 160 (establishing that the court’s first step was to analyze TDCJ’s likelihood of success on appeal by looking at the plaintiffs’ compliance with the PLRA and the merits of their Eighth Amendment claim).

62. See *id.* at 160, 162 (explaining the PLRA requires inmates to exhaust

irreparably injured if it did not grant the stay.⁶³ The Fifth Circuit reasoned that the permanent injunction would interfere with the facility's ability to perform its statutory duties and unfairly control how it allocates its resources.⁶⁴ Since the Supreme Court considers the first two factors the most important in deciding whether to stay a permanent injunction pending appeal, the Fifth Circuit did not provide significant analysis of the last two factors in its opinion.⁶⁵ The Fifth Circuit reasoned that, because the instances of COVID-19 in the Pack Unit have reduced over time without court intervention, the stay would not substantially harm the plaintiffs and would align with the public interest.⁶⁶

3. *Contrasting the Eleventh Circuit's Deliberate Indifference Test with the Fifth Circuit's Deliberate Indifference Test*

The Fifth Circuit's test to find deliberate indifference does not permit the court to examine the context of outside factors, such as a global pandemic, when evaluating the prison's response.⁶⁷ In analyzing TDCJ's response to COVID-19, the Fifth Circuit criticized the district court for focusing too much on the scope of the injury and not enough on TDCJ officials' actual states of mind.⁶⁸ Because the Supreme Court has held that a prison official may be free from liability even if they did not avert the substantial risk, courts focus instead on whether the official responded reasonably to the risk.⁶⁹ In

administrative remedies before challenging prison conditions in court and stating the court found the plaintiffs did not do so before bringing a lawsuit).

63. *See id.* at 165 (finding irreparable injury where an injunction required a prison to furnish the district court with a plan beyond what the Constitution requires) (citing *Ruiz v. Estelle*, 650 F.2d 555, 572-73 (5th Cir. Unit A June 1981)).

64. *See id.* (stating the permanent injunction "lays claim to TDCJ's resources, commanding how it must allocate its time, funding, and facilities").

65. *See id.* at 165-66 (assessing the last two factors in just one short paragraph).

66. *See id.* at 166 (reasoning that "the public interest favors having politically accountable officials—not federal judges—determine how to allocate resources").

67. *Compare* *Valentine v. Collier*, 978 F.3d 154, 163-64 (5th Cir. 2020) (finding whether actions were constitutional does not require analyzing the actions as they relate to the public health crisis), *with* *Walker v. Shult*, 717 F.3d 119, 130 (2d Cir. 2013) (stating that each complaint from an incarcerated person alleging a constitutional violation must be analyzed in light of the particular facts and context surrounding the situation).

68. *See Valentine*, 978 F.3d at 163 (commenting, "[w]e share the district court's alarm at the toll of the virus. But the Eighth Amendment inquiry concerns TDCJ's state of mind, not the scope of the injury").

69. *See Farmer v. Brennan*, 511 U.S. 825, 844-85 (1994) (holding that prison officials cannot be found liable under the Eighth Amendment when they respond reasonably to a risk).

this case, the Fifth Circuit found that TDCJ reacted reasonably to the risk of COVID-19.⁷⁰ Although the district court viewed TDCJ's actions as "the most basic steps [officials] could have taken," the Fifth Circuit opined that the *bare minimum* was enough to satisfy the Eighth Amendment.⁷¹ The Fifth Circuit relied on two prior cases where it determined that incarcerated people exposed to tuberculosis had not suffered cruel and unusual punishment, as those cases were the only instances where the Fifth Circuit had previously considered an Eighth Amendment challenge in the context of infectious disease.⁷²

Like the Fifth Circuit, the Eleventh Circuit held that a prison official cannot be liable under the Eighth Amendment when they try but fail to fix an unconstitutional prison condition.⁷³ However, the Eleventh Circuit also clarified the official is deliberately indifferent if they know of, but disregard, an appropriate and sufficient alternative to fix the condition.⁷⁴ In other words, the official will be held liable when they take action to address an unconstitutional conditions if they ultimately know the action was not the most effective option available.⁷⁵ The Eleventh Circuit's interpretation of deliberate indifference thus requires officials to take the *best* course of action, rather than just *any* course of action, if the plaintiff can prove that the official had subjective knowledge of a means to "cure" the condition.⁷⁶

70. See *Valentine*, 978 F.3d at 163-64 (stating the court's "precedent in the context of infectious disease, though limited, instructs that TDCJ met its constitutional obligations").

71. Compare *id.* (stating that TDCJ's basic steps were constitutional), with *Valentine v. Collier*, 490 F. Supp. 3d 1121, 1165 (S.D. Tex. 2020) (calling TDCJ's actions "the most basic steps" they could have taken), and *LaMarca v. Turner*, 995 F.2d 1526, 1536 (11th Cir. 1993) (holding that an official is deliberately indifferent when he knows of and disregards an appropriate alternative).

72. E.g., *Valentine*, 978 F.3d at 164 (stating that officials met constitutional requirements in the tuberculosis cases); see *Gibbs v. Grimmette*, 254 F.3d 545, 550 (5th Cir. 2001) (finding officials were not deliberately indifferent because they did not know of cases of tuberculosis that the plaintiff would have been around); see also *Wallace v. Dallas Cty., TX*, No. 94-11034, 1995 WL 153406 at *4 (5th Cir. 1995) (finding that testing and treating people in contact with a tuberculosis-positive inmate was sufficient).

73. See *LaMarca*, 995 F.2d at 1536 (holding that simply failing to fix an unconstitutional condition is not enough to amount to deliberate indifference).

74. See *id.* (explaining that the official who tries and fails is not deliberately indifferent "unless he knows of, but disregards, an appropriate and sufficient alternative").

75. See *id.* (requiring plaintiffs to prove a prison official purposely declined to take actions that would have improved or solved an unconstitutional prison condition).

76. See *id.* (reasoning that if an official has both the knowledge of the unconstitutional condition, as well as the ability to cure the condition, a refusal to prevent

When the Eleventh Circuit faced the issue of COVID-19 in prison, it did not find deliberate indifference in prison officials' response to the virus.⁷⁷ In *Swain v. Junior*, pretrial detainees in Miami brought a constitutional challenge to the institution's handling of COVID-19, arguing that officials responded inadequately and violated the Fourteenth Amendment.⁷⁸ When pretrial detainees raise a Fourteenth Amendment claim, courts evaluate the claim as if it were brought under the Eighth Amendment by an incarcerated person.⁷⁹ As such, the analysis is the same, and deliberate indifference is still necessary to find that officials violated pretrial detainees' constitutional rights.⁸⁰ In *Swain*, the Eleventh Circuit held that prison officials were not deliberately indifferent to unconstitutional conditions because the only reason they did not enforce social distancing was because it was impossible to do so.⁸¹ The Eleventh Circuit ultimately concluded that failing to do what is impossible cannot amount to a constitutional violation, so the officials did not violate the Constitution.⁸²

4. *Cruel and Unusual Punishment with Contagious Diseases*

In cases where incarcerated people were exposed to contagious disease, the Fifth Circuit previously held that prison officials satisfied the Constitution as long as they tested and treated those incarcerated.⁸³ In assessing the plaintiffs' case, the Fifth Circuit used its contagious disease precedent to find that the Pack Unit's conditions did not violate the Eighth

that harm is inferred).

77. *See Swain v. Junior*, 961 F.3d 1276, 1294 (11th Cir. 2020) (holding that the plaintiffs were not able to demonstrate that officials were deliberately indifferent to COVID-19 conditions).

78. *See id.* at 1280-81 (describing the plaintiffs' allegations of officials inadequately addressing the COVID-19 crisis inside their facility).

79. *See id.* at 1285 (citing *Dang ex rel. Dang v. Sheriff, Seminole Cty. Fla.*, 871 F.3d 1272, 1279 (11th Cir. 2017)) (explaining that pretrial detainees' claims are evaluated under the same standard as an incarcerated person's Eighth Amendment claim).

80. *See id.* (citing *Lane v. Philbin*, 835 F.3d 1302, 1307 (11th Cir. 2016)) (stating the Eighth and Fourteenth Amendments are both violated when an official is deliberately indifferent to an incarcerated person's substantial risk of serious harm).

81. *See id.* at 1287 (finding that social distancing was impossible).

82. *See id.* (explaining that "failing to do the 'impossible' doesn't evince [deliberate indifference]").

83. *See Gibbs v. Grimmette*, 254 F.3d 545, 550 (5th Cir. 2001) (holding officials were not required to test incarcerated people when unaware of active cases); *see also Wallace v. Dallas Cty., TX*, No. 94-11034, 1995 WL 153406 at *4 (5th Cir. Mar. 29, 1995) (holding that officials were not liable; they tested exposed inmates).

Amendment.⁸⁴ The Fifth Circuit's precedent for infectious disease in prisons concerned tuberculosis.⁸⁵ In comparing COVID-19 and tuberculosis, the Fifth Circuit acknowledged that COVID-19 poses a greater health risk.⁸⁶ However, the court did not quantify how much greater COVID-19's risk actually is.⁸⁷

In *Gibbs v. Grimmette*, the Fifth Circuit explained that, unlike COVID-19, tuberculosis is only contagious when it is active.⁸⁸ A person who tests positive for tuberculosis may not show any symptoms, making their case of the disease inactive and non-contagious.⁸⁹ In *Gibbs*, when the jail identified an active case of tuberculosis, officials tested only the people who came in contact with the contagious person because it was unnecessary to test everyone else.⁹⁰ Ultimately, the Fifth Circuit held that the officials' response to tuberculosis was constitutional.⁹¹

84. See *Valentine v. Collier*, 978 F.3d 154, 163-64 (5th Cir. 2020) (explaining TDCJ was not deliberately indifferent because it took affirmative steps); *but see* *Carlucci v. Chapa*, 884 F.3d 534, 536 (5th Cir. 2018) (finding deliberate indifference despite the prison providing basic care).

85. See *Valentine*, 978 F.3d at 163-64 (stating that testing and treating incarcerated people with tuberculosis was constitutional); *see also* *Gibbs*, 254 F.3d at 550 (finding that officials were not required to test incarcerated people when unaware of active cases).

86. Compare *Valentine*, 978 F.3d at 164 (stating that COVID-19 is riskier), with *Tuberculosis: Data & Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION <https://www.cdc.gov/tb/statistics/default.htm> (last reviewed Oct. 29, 2020) (stating there were 8,916 reported tuberculosis cases in 2019 in the United States), and *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Jan. 26, 2021, 7:52 AM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (showing there were 10,432 new COVID-19 cases in March 2020).

87. See *Valentine*, 978 F.3d at 164 (classifying COVID-19 as riskier than tuberculosis). Compare Terence Chorba, *Peace, Liberty, Mycobacteria, and Tuberculosis Mortality*, 24 EMERGING INFECTIOUS DISEASES 611, 612 (2018) (stating the U.S. tuberculosis mortality rate was <0.1 deaths per 100,000 people in 2018), with *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Aug. 7, 2021), https://covid.cdc.gov/covid-data-tracker/#cases_deathsper100k (stating the U.S. COVID-19 mortality rate from Jan. 21, 2020 to Aug. 7, 2021 was 185 deaths per 100,000 people).

88. See *Gibbs*, 254 F.3d at 549 (stating that tuberculosis is only contagious when active).

89. See *id.* (explaining that separating a person is only necessary if he has symptoms in addition to a positive test).

90. See *id.* at 550 (stating that nurses tested incarcerated people who came into contact with the person who had tuberculosis, but it was unnecessary to test everyone in the jail).

91. See *id.* at 551 (holding that prison officials did not demonstrate deliberate indifference to incarcerated peoples' medical needs by failing to mandate tuberculosis

Similarly, in *Wallace v. Dallas Cty., TX*, an incarcerated man alleged that prison officials acted with deliberate indifference when he was not screened and treated for tuberculosis after someone housed in a different tank was diagnosed with the disease.⁹² The plaintiff argued that officers should have screened and treated him for the disease because there was a foreseeable danger that he would contract tuberculosis.⁹³ The Fifth Circuit rejected this argument and held that the prison officials' actions were constitutional because it was enough for them to test and treat the people actually housed in the tank where tuberculosis was discovered.⁹⁴

III. ANALYSIS

A. Lack of Adherence to CDC COVID-19 Guidelines Constitutes Cruel and Unusual Punishment Under the Eighth Amendment Because Following the Guidelines is the Minimum Reasonable Response Required

The Fifth Circuit's decision in *Valentine v. Collier* reflects the common opinion that a certain level of poor living conditions is expected when a person is incarcerated.⁹⁵ Courts impliedly accept cruel and unusual punishment without classifying it as such, instead finding that living in these conditions is simply part of the debt that people convicted of crimes must pay to society.⁹⁶ This attitude is demonstrated in the Fifth Circuit's *Valentine* opinion when it explained that the Eighth Amendment does not require

skin tests for everyone); *but see* *Hutto v. Finney*, 437 U.S. 678, 682-83 (1978) (holding that mixing inmates with contagious diseases and inmates without contagious diseases violated the Eighth Amendment).

92. *See* *Wallace v. Dallas Cty., TX*, No. 94-11034, 1995 WL 153406 at *1 (5th Cir. Mar. 29, 1995) (describing the plaintiffs' allegations of cruel and unusual punishment).

93. *See id.* at *1, *4 (stating the plaintiff believed he was being exposed to germs and hazardous materials in the air).

94. *See id.* at *4 (holding that prison officials did not disregard an excessive risk to the plaintiff's health because they tested and treated the incarcerated people who were housed with the tuberculosis-positive person).

95. *E.g.*, *Baughman v. Seale*, 761 F. App'x 371, 381-82 (5th Cir. 2019) (stating there was no deliberate indifference where a diabetic incarcerated person did not receive requested finger pricks); *see* *Fennell v. Quintela*, 393 F. App'x 150, 157 (5th Cir. 2010) (explaining the risk must be excessive); *see also* *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993) (holding that negligent care for an incarcerated person's injury was not deliberate indifference).

96. *See* *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (stating, "the Eighth Amendment does not outlaw cruel and unusual 'conditions' . . . [but] 'punishments'"); *see also* *Wilson v. Seiter*, 501 U.S. 294, 299-301 (1991) (holding the Eighth Amendment cannot declare officials liable solely from objectively inhumane conditions).

officials to adhere to CDC guidelines when responding to COVID-19.⁹⁷ In doing so, the Fifth Circuit impliedly suggested that following CDC guidelines would somehow create comfortable or pleasant living conditions for incarcerated people, which is obviously not required under the Eighth Amendment.⁹⁸ However, in following CDC guidelines, the prison would simply be meeting its constitutional requirement of keeping incarcerated people safe and creating humane living conditions.⁹⁹ No matter what level of discomfort courts may view as constitutionally acceptable for incarcerated people to experience, the high number of deaths and the rapid rate of COVID-19's spread in the Pack Unit demonstrate that the conditions were unacceptable for any human being.¹⁰⁰

Elementary schools, restaurants, colleges, and various businesses have used the CDC's COVID-19 guidelines to determine the safest way for people to be in one place without spreading COVID-19.¹⁰¹ The country's widespread reliance on CDC guidelines demonstrates that information from the CDC must be used as an important guide to evaluate prison officials' actions, particularly during a pandemic that the world is still learning about as it continues to spread.¹⁰² When analyzing the reasonableness of TDCJ's actions through the lens of the CDC's COVID-19 recommendations, it is clear that TDCJ's efforts fell short, despite the Fifth Circuit's decision that

97. See *Valentine v. Collier*, 978 F.3d 154, 164 (5th Cir. 2020) (opining the lower court focused on TDCJ's adherence to CDC guidelines rather than TDCJ's adherence to the Constitution).

98. See *Valentine v. Collier*, 490 F. Supp. 3d 1121, 1154, 1175 (S.D. Tex. 2020) (establishing that enforcing social-distancing and providing masks and extra soap are some of the steps prisons should take); see also *Rhodes v. Chapman*, 452 U.S. 337, 347-49 (1981) (holding that prison officials do not have to ensure comfortable living conditions for people who are incarcerated).

99. See *Valentine*, 490 F. Supp. 3d at 1165 (stating that designing a policy, while implementing only some of the measures within the policy, does not satisfy TDCJ's constitutional obligations).

100. See *id.* at 1135 (stating that as of July 24, 2020, almost 500 men in the Pack Unit had tested positive for COVID-19, seventy-four of them had been hospitalized due to the virus, and nineteen of them died).

101. See generally *COVID-19: Community, Work, and School*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated July 9, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/index.html> (providing resources for reducing the risk of spreading COVID-19).

102. See *COVID-19: What You Need to Know About Variants*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Aug. 6, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html> (explaining that information about new variants of COVID-19 is released frequently, as the virus changes and mutates over time).

the prison took enough “affirmative steps” to overcome allegations of deliberate indifference.¹⁰³

To find an Eighth Amendment violation, a court must first determine that an incarcerated person was exposed to a substantial risk of serious harm.¹⁰⁴ It is indisputable that the people incarcerated in the Pack Unit were exposed to a substantial risk of serious harm.¹⁰⁵ Even if TDCJ officials had taken every precaution possible, the Pack Unit inmates were necessarily exposed to a substantial risk of serious harm simply by being incarcerated during a global pandemic of a highly contagious and deadly virus.¹⁰⁶ Because of that, the Fifth Circuit impliedly concluded that the incarcerated people in the Pack Unit were exposed to a substantial risk by moving directly to the deliberate indifference analysis and discussing the seriousness of COVID-19.¹⁰⁷

After finding that an incarcerated person was exposed to a substantial risk of serious harm, a court must then determine that prison officials acted with deliberate indifference in response to the risk, or failed to act at all, to hold that the officials violated the Eighth Amendment.¹⁰⁸ A prison official cannot be deliberately indifferent to a risk they are unaware of, so the court must first determine that he had knowledge of the risk, whether actual or inferred.¹⁰⁹ Given that all prison officials have a duty to protect people who are incarcerated, if any official has knowledge of a substantial risk of serious harm, he is liable under the Eighth Amendment if he is deliberately

103. See *Valentine v. Collier*, 978 F.3d 154, 164 (5th Cir. 2020) (stating that TDCJ’s affirmative steps are enough to overcome a claim of deliberate indifference); *but see Valentine*, 490 F. Supp. 3d at 1165 (finding that TDCJ’s approach was not systematic and failed to abide by basic public health guidance).

104. See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (establishing that an incarcerated person cannot show an Eighth Amendment violation unless he demonstrates that he was incarcerated in conditions that posed a substantial risk of serious harm).

105. See *Valentine*, 978 F.3d at 161 (stating, “the spread of COVID-19 in the Pack Unit is an emergency that demands prison officials’ full attention”).

106. See *Valentine*, 490 F. Supp. 3d at 1130-31 (establishing that COVID-19 is highly communicable, that it spreads easily through close proximity, and that the Pack Unit’s set-up requires close proximity between incarcerated people).

107. See *Valentine*, 978 F.3d at 162-64 (summarizing the test to determine an Eighth Amendment violation and beginning its analysis by discussing TDCJ’s response to COVID-19).

108. See *Farmer*, 511 U.S. at 834 (establishing that a prison official must have a culpable state of mind amounting to deliberate indifference to have violated the Eighth Amendment).

109. See *id.* at 842-43 (explaining that a court may infer a prison official’s knowledge of a risk where the risk would have been obvious to a reasonable person).

indifferent to that risk.¹¹⁰ Despite the fact that the virus spread quickly in the U.S., CDC guidelines for containing COVID-19 were clear from the beginning, and updates on its spread were impossible to escape from the news cycle.¹¹¹ Because of that widespread information, its effects proven further by the fact that TDCJ implemented a COVID-19 plan, TDCJ officials were not only aware of COVID's risk and how they may be able to lessen it, but they were also aware that the Pack Unit did not take sufficient actions to combat that risk.¹¹²

Since the risk of COVID-19 is obvious, particularly in a geriatric prison, TDCJ officials are unable to, and did not, claim that they were unaware of the substantial risk the Pack Unit was facing.¹¹³ The officials in the Pack Unit had both actual and inferred knowledge that the incarcerated people were exposed to a substantial risk of harm in contracting COVID-19.¹¹⁴ Even if TDCJ officials somehow missed the news of a pandemic or did not understand the gravity of the risk, the employees quickly learned the risk when the first incarcerated person in the Pack Unit died from COVID-19 in April 2020.¹¹⁵

After finding that a prison official knew a substantial risk of serious harm, the court must determine whether the official acted with deliberate indifference to the risk.¹¹⁶ The first version of TDCJ's COVID-19 policy

110. *See id.* at 833-34 (explaining that a prison official violates the Eighth Amendment when a person is incarcerated in a condition that poses a substantial risk of serious harm and the prison official's state of mind is one of deliberate indifference to the incarcerated person's health or safety).

111. *See Valentine*, 490 F. Supp. 3d at 1130-31 (establishing there were obvious precautionary public health measures officials could have taken and that knowledge of these precautionary measures was widespread).

112. *See id.* at 1150-52, 1154 (citing multiple text messages among TDCJ officials in which it was clear they were unaware of case numbers and had no written procedure for contact-tracing in place as late as July 4, 2020. The text messages also indicated the TDCJ Executive Director felt they were not doing everything they could do to prevent the spread of COVID-19).

113. *See id.* at 1164-65 (finding that defendants were aware of the risk of COVID-19 within the Pack Unit); *cf. Gomez v. Warner*, No. 94-60530, 1994 WL 612371, at *3 (5th Cir. Oct. 20, 1994) (discussing a plaintiff's claim regarding the prison's practice of sharing razors, "it is hardly delusional, fanciful or fantastic for inmates to challenge a prison procedure which might place them at a very real risk of catching [HIV/AIDS]").

114. *See Valentine*, 490 F. Supp. 3d at 1164-65 (stating that TDCJ does not contest that COVID-19 poses a substantial risk to people incarcerated in the Pack Unit).

115. *See id.* at 1134 (stating that Leonard Clerkly, the first incarcerated person in the Pack Unit to test positive for COVID-19, died on April 11, 2020, and TDCJ confirmed his death was caused by viral pneumonia he contracted as a result of COVID-19).

116. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (establishing a prison official

("Policy B-14.52") was adopted on March 20, 2020, giving the wardens of each TDCJ prison the responsibility of ensuring the policy would be implemented.¹¹⁷ In addition to Policy B-14.52, Warden Herrera created a social distancing plan specifically for the Pack Unit.¹¹⁸ However, those incarcerated in the Pack Unit gave undisputed testimony that several crucial aspects of both Policy B-14.52 and the social distancing plan went unenforced.¹¹⁹ For example, the social distancing plan required only one dorm to be fed at a time in the dining hall.¹²⁰ However, those incarcerated in the Pack Unit testified that two dorms were regularly fed at the same time, meaning two or more people had to be seated at the same table.¹²¹

The actions of TDCJ officials in response to COVID-19 went beyond simple negligence in enforcing Policy B-14.52.¹²² A crucial component of the claim against TDCJ, which the Fifth Circuit largely ignores, is the attitude that officials in the Pack Unit had toward incarcerated people who requested help or that greater precautions be taken.¹²³ A staff member told one incarcerated person working as a custodian, "[w]e get what we're going to get," in response to a request for more cleaning supplies to disinfect the facility.¹²⁴ Additionally, incarcerated people in wheelchairs were forced to work as custodians, despite the difficulty of using a mop or broom effectively while navigating a wheelchair.¹²⁵ Both factors contributed to the Pack Unit

must have a sufficiently culpable state of mind to violate the Eighth Amendment).

117. *See Valentine*, 490 F. Supp. 3d at 1137 (stating that Policy B-14.52 applies to all TDCJ institutions, including the Pack Unit, and has been updated six times since its adoption).

118. *See id.* at 1138 (stating that Warden Herrera created a social distancing plan, outside of Policy B-14.52, specifically to guide the Pack Unit's social distancing).

119. *See id.* at 1138-39, 1147 (detailing inmate testimony about aspects of Policy B-14.52 that officials in the Pack Unit did not regularly enforce, including the requirement that staff wear PPE at all times).

120. *See id.* at 1138 (explaining that the policy required one dorm to be fed at a time in the dining hall).

121. *See id.* (stating that two dorms were fed at a time despite the policy requiring otherwise, which forced at least two people to sit at the same table while eating).

122. *See id.* at 1167 (concluding the Pack Unit's "consistent non-compliance with basic public health protocols" cannot be classified as negligence).

123. *See id.* (explaining there was a pattern of TDCJ officials speaking harshly and/or ignoring concerns from incarcerated people regarding compliance with the COVID-19 policy).

124. *See id.* at 1144 (demonstrating the prison's lack of concern with providing cleaning supplies).

125. *See id.* at 1169 (describing how one staff member suggested that a disabled person could "put a broom against his neck and push it with a wheelchair" to clean the

not being cleaned as thoroughly as it should have been.¹²⁶ In another instance, when an incarcerated person pointed out that staff members were not wearing gloves when handing out meals, the staff member responded that if he did not like it, to “put it on paper,” suggesting that he should file a formal complaint.¹²⁷ Further still, when an incarcerated person expressed concern that officers were not wearing face masks while in the dorms, a lieutenant told him to “shut up and go back to [his] bunk.”¹²⁸

If ignoring and using disparaging language in response to a person who is rightfully concerned for his health and safety does not amount to deliberate indifference in the Fifth Circuit’s view, it is difficult to imagine what level of behavior could pass that threshold.¹²⁹ Taken together, these actions cannot be characterized simply as negligent because they demonstrate a consistent and purposeful disregard for the policies adopted to protect the health of those incarcerated.¹³⁰ Understanding the measures that need to be taken to avert a severe risk to inmate health, while simultaneously choosing not to take those measures, clearly amounts to a wanton disregard of a serious medical need.¹³¹

In *Helling v. McKinney*, the Supreme Court added to its deliberate indifference inquiry by holding that prison authorities cannot ignore a condition of confinement that is very likely to cause serious illness and

unit).

126. *See id.* (explaining that custodians with disabilities had trouble cleaning the dorms effectively due to physical limitations, and that multiple incarcerated people working as custodians testified they did not receive enough cleaning supplies to get through an entire cleaning shift).

127. *See id.* at 1147 (stating staff members regularly did not wear gloves when passing meals out and when searching cubicles, which requires touching virtually every personal item inside the cubicle).

128. *See id.* at 1167 (acknowledging incarcerated people listed multiple officials in the Pack Unit who frequently did not wear masks, demonstrating a level of non-compliance beyond the occasional slip-up).

129. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (defining deliberate indifference as being aware of, yet disregarding, an excessive risk to the health or safety of a person who is incarcerated).

130. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (citing *Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976)) (establishing that deliberate indifference is a state of mind that is more blameworthy than negligence, amounting to the “unnecessary and wanton infliction of pain”).

131. *See Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985) (citing *Smith v. Wade*, 461 U.S. 30, 39 (1983)) (defining wantonness as “the conscious failure by one charged with a duty to exercise due care and diligence to prevent an injury after the discovery of the peril”).

needless suffering.¹³² Given the dangers associated with contracting COVID-19, the level of spread at the Pack Unit, and the high number of deaths in the prison, it is clear that the Pack Unit's conditions were not only likely to cause serious illness and suffering, but actually resulted in such.¹³³ The Supreme Court has also implied that forcing incarcerated people to live in an enclosed space, where any of them have been diagnosed with contagious diseases, violates the Eighth Amendment.¹³⁴ The Fifth Circuit stated that because the Pack Unit quarantined the inmates who tested positive for COVID-19 and did not mix positive and negative-testing incarcerated people together, it did not violate the Eighth Amendment.¹³⁵ However, COVID-19 differs from diseases like tuberculosis in that this virus can spread both from asymptomatic individuals and people who presently test negative for the disease, meaning that quarantining incarcerated people who tested positive alone is not sufficiently effective to quell the virus.¹³⁶ Therefore, even if TDCJ separated positive and negative-testing incarcerated people, that action alone would not be enough to slow or stop the spread of COVID-19.¹³⁷

132. See *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (noting that because it is unconstitutional for officials to be deliberately indifferent to an incarcerated person's current health issues, it follows that it is also unconstitutional for them to be deliberately indifferent to a prison condition that is "sure or very likely to cause serious illness and needless suffering the next week or month or year").

133. See *Valentine v. Collier*, 490 F. Supp. 3d 1121, 1135 (S.D. Tex. 2020) (stating that in less than four months, approximately 500 incarcerated men tested positive for COVID-19, seventy-four were hospitalized, and nineteen died).

134. See *Hutto v. Finney*, 437 U.S. 678, 685-87 (1978) (holding that crowding incarcerated people into a small cell with others that had hepatitis and venereal disease violated the Eighth Amendment).

135. See *Valentine*, 978 F.3d at 163-64 (finding that TDCJ tested incarcerated people and quarantined those who tested positive for COVID-19, actions which were held sufficient in two prior Fifth Circuit cases concerning tuberculosis); *but see Valentine*, 490 F. Supp. 3d at 1152 (describing inmate testimony that Pack Unit staff did not follow quarantine procedures, often keeping negative and positive people in the same dorm and failing to retest those who had been quarantined before placing them back in the dorm).

136. See *generally How COVID-19 Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last updated July 14, 2021) (establishing that asymptomatic individuals can spread COVID-19 to others).

137. See *Test for Current Infection*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/testing/diagnostic-testing.html> (last updated Aug. 2, 2021) (explaining that a negative test result may mean that person did not have COVID-19 but may also mean that person was too early in his infection to detect the virus).

Even if TDCJ's COVID-19 policy sufficiently abided by CDC guidelines in responding to the prison's outbreak, the deliberate indifference test requires analysis of what prison officials actually did, not what they intended or planned to do.¹³⁸ Therefore, the overwhelming evidence that the Pack Unit officials did not properly implement the policy should have impacted the Fifth Circuit's deliberate indifference analysis.¹³⁹

B. A Prison's Response to COVID-19 Cannot be Analyzed Under the Same Standard as a Response to Other Contagious Diseases Because the Disease's Effects Require a Greater Level of Care from Officials

Even if the most generous constitutional analysis finds that the Pack Unit officials did not demonstrate deliberate indifference, the Fifth Circuit's test is not equipped to assess prison officials' actions in light of an unparalleled, highly contagious disease like COVID-19.¹⁴⁰ The Fifth Circuit's deliberate indifference analysis did not properly account for COVID-19's unprecedented impact on the United States.¹⁴¹ The Fifth Circuit's determination that TDCJ's actions passed constitutional muster relies on its past decisions regarding prison officials' responses to tuberculosis, the only contagious disease the Fifth Circuit has encountered in the context of allegations of cruel and unusual punishment.¹⁴² The Fifth Circuit acknowledged that COVID-19 is riskier than tuberculosis, but reasoned that TDCJ officials could not have had a wanton disregard for the plaintiffs'

138. See *Farmer*, 511 U.S. at 837 (1994) (establishing that deliberate indifference is a subjective inquiry which requires analyzing both the prison official's state of mind and his actions).

139. See *Valentine*, 490 F. Supp. 3d at 1147, 1152, 1169 (stating that several incarcerated people testified that positive and negative men were placed together in the same dorm, that TDCJ staff was frequently seen not wearing PPE or wearing it incorrectly, and that there were not enough available cleaning supplies for incarcerated men working as custodians).

140. See, e.g., *Valentine*, 490 F. Supp. 3d at 1164 (citing *Valentine v. Collier*, 956 F.3d 797, 807 (5th Cir. 2020) (Higginson, J., concurring)) (stating that the deliberate indifference inquiry is a subjective, fact-based analysis).

141. See *Valentine v. Collier*, 978 F.3d 154, 164 (5th Cir. 2020) (dismissing the lower court's opinion that TDCJ did not meet its constitutional obligations by reasoning that the Eighth Amendment does not require enacting CDC guidelines).

142. E.g., *id.* at 163-64 (stating the court's infectious disease precedent supports the decision that TDCJ's actions were constitutional); see *Gibbs v. Grimmer*, 254 F.3d 545, 550 (5th Cir. 2001) (explaining that because officials did not know of any diagnosed cases of tuberculosis that the plaintiff would have come in contact with, they did not act with deliberate indifference); see also *Wallace v. Dallas Cty., TX*, No. 94-11034, 1995 WL 153406 at *4 (5th Cir. Mar. 29, 1995) (finding that testing and treating incarcerated people who were in contact with a person who tested positive was enough).

serious medical needs because they took affirmative steps to contain the virus.¹⁴³ However, the Fifth Circuit has previously recognized an incarcerated person's Eighth Amendment claim as plausible, even where prison officials have taken some steps to address a medical need, when the steps taken were deemed insufficient in response to the risk.¹⁴⁴ Simply taking some form of action is not equivalent to taking the reasonable measures required by the Supreme Court.¹⁴⁵ What is reasonable in one situation may not be considered reasonable in every case; a change in circumstances requires a change in the standard for reasonable action.¹⁴⁶

While testing and treating incarcerated people may demonstrate a reasonable response in the case of a tuberculosis outbreak, combatting COVID-19 requires a greater level of precaution than combatting tuberculosis.¹⁴⁷ In contrast to tuberculosis, which can only be spread by a person exhibiting symptoms, asymptomatic people and even people who have just tested negative for the virus can spread COVID-19.¹⁴⁸ Because of that, to effectively reduce the risk of COVID-19 spreading, prison officials do not just have to pay attention to the people who are obviously sick but also those who may appear healthy.¹⁴⁹ Doing anything less would result in an uncontrolled environment where the rapid spread of COVID-19 is

143. See *Valentine*, 978 F.3d at 164 (stating that testing and treating incarcerated people is enough to overcome deliberate indifference claim).

144. See *Carlucci v. Chapa*, 884 F.3d 534, 539 (5th Cir. 2018) (finding the plaintiff stated a plausible Eighth Amendment claim for relief, despite the prison addressing his dental needs in part).

145. See *Farmer v. Brennan*, 511 U.S. 825, 844-45 (1994) (stating that while an official does not have to avert the risk, he must respond reasonably); see also *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (citing *DeShaney v. Winnebago Cty. Dep't of Soc. Serv.*, 489 U.S. 189, 200 (1989)) (finding the Constitution requires officials to ensure the reasonable safety of those incarcerated).

146. See *Gibbs*, 254 F.3d at 550 (stating that officials' failure to administer a tuberculosis test was not deliberate indifference because they were unaware of any active cases).

147. Compare *Tuberculosis: Data & Statistics*, *supra* note 86 (stating that there were 8,916 cases of tuberculosis in all of 2019), with *Coronavirus in the U.S.: Latest Map and Case Count*, *supra* note 86 (demonstrating that by March 23, 2020, there were already 10,432 new cases of COVID-19 in the country).

148. Compare *Gibbs*, 254 F.3d at 549 (stating that tuberculosis is only contagious when active), with *Valentine v. Collier*, 490 F. Supp. 3d 1121, 1130 (S.D. Tex. 2020) (explaining that COVID-19 is highly communicable and can be spread unknowingly by people who exhibit mild or no symptoms).

149. See *Valentine*, 490 F. Supp. 3d at 1138 (explaining that social distancing is a crucial measure to prevent COVID-19).

inevitable.¹⁵⁰ Based on the level of contagion alone, it is apparent that a tuberculosis outbreak and a COVID-19 outbreak require very different preventative measures.¹⁵¹

In addition to the high rate of contagion that COVID-19 presents, COVID-19 is also far deadlier than tuberculosis.¹⁵² While prison officials must go to greater lengths to contain COVID-19 than tuberculosis, the stakes are also higher when the precautions are ineffective, especially for the elderly and those with pre-existing conditions.¹⁵³ It defies logic to determine that prison officials may respond to two unique substantial risks with the same actions when both the preventative measures, as well as the impact of the two diseases, vary so greatly.¹⁵⁴

Following in the Supreme Court's footsteps, the Fifth Circuit described deliberate indifference as a subjective inquiry.¹⁵⁵ In refusing to create an objective test for deliberate indifference, the Supreme Court held that it could not find deliberate indifference from looking at officials' actions in isolation.¹⁵⁶ Because deliberate indifference cannot be found from examining a person's actions alone, it necessarily follows that courts must also look to the circumstances surrounding the person's actions.¹⁵⁷ The Fifth

150. *See id.* at 1172 (reiterating that TDCJ's existing policies were inadequate because they resulted in twenty deaths and a forty percent infection rate among men in the Pack Unit).

151. *See id.* at 1138-40, 1147-48, 1152-53 (S.D. Tex. Sept. 29, 2020) (establishing that contact-tracing, social-distancing, and mask-wearing are necessary to prevent the spread of COVID-19); *see also Gibbs*, 254 F.3d at 548-49 (explaining that identical procedures for detecting communicable diseases are not required under the Eighth Amendment).

152. *Compare* Chorba, *supra* note 87 at 612 (stating the U.S. mortality rate for tuberculosis was less than 0.1 deaths per 100,000 people in 2018), *with COVID Data Tracker*, *supra* note 86 (stating the most recent U.S. mortality rate of COVID-19 was 185 deaths per 100,000 people).

153. *See Valentine*, 490 F. Supp. 3d at 1130 (describing COVID-19 as a highly communicable disease with a long incubation period).

154. *See, e.g., id.* at 1161 (Higginson, J., concurring) (citing *Valentine v. Collier*, 956 F.3d 797, 807 (S.D. Tex. 2020) (describing the deliberate indifference inquiry as a fact-based analysis, suggesting that as context changes, so will the level of acceptable response from prison officials)).

155. *See Valentine v. Collier*, 978 F.3d 154, 163 (5th Cir. 2020) (citing *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)) (stating that deliberate indifference is a subjective inquiry).

156. *See Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994) (rejecting the petitioner's argument that deliberate indifference be found with an objective test and requiring courts to look into a prison official's state of mind).

157. *See id.* at 837 (explaining that to find deliberate indifference, the prison official must "be aware of facts from which the inference could be drawn that a substantial risk

Circuit, however, stated that it did not need to consider whether TDCJ enacted CDC guidelines or took actions to avoid the spread of COVID-19, effectively ignoring the circumstances surrounding TDCJ's decisions.¹⁵⁸

Analyzing the constitutionality of prison officials' actions is further complicated by the subjectivity of the deliberate indifference test.¹⁵⁹ Finding deliberate indifference requires attempting to do the near impossible: read a person's mind.¹⁶⁰ The Supreme Court has held that courts must look into the officials' states of mind to find deliberate indifference.¹⁶¹ However, it becomes substantially easier to consider what a person may have been thinking when that analysis is accompanied by the context of that person's environment.¹⁶² In a global pandemic, it is impossible to separate a person's thoughts or point of view from the health crisis impacting everyone in the world.¹⁶³ When evaluating constitutional violation challenges to prison conditions during COVID-19, it is crucial for courts to consider the effects and implications of the virus, because the pandemic inevitably shapes the prison officials' actions and state of mind.¹⁶⁴ Without acknowledging and examining the uniquely high risk that COVID-19 creates, the Fifth Circuit did not fully examine the Pack Unit officials' states of mind as required to determine whether they were deliberately indifferent.¹⁶⁵ This narrow

of serious harm exists, and he must also draw the inference").

158. *See Valentine*, 978 F.3d at 164-65 (stating the court must consider TDCJ's actions under the Eighth Amendment alone, and not consider whether TDCJ could have done more to prevent the spread and future damage of COVID-19).

159. *See Farmer*, 511 U.S. at 842 (establishing that the deliberate indifference test requires making inferences from circumstantial evidence).

160. *See id.* (stating that knowledge is inferred with an obvious risk by using a reasonable person standard rather than requiring plaintiffs to prove that the official had actual knowledge).

161. *See id.* at 837-38 (requiring courts to evaluate an official's state of mind to find deliberate indifference).

162. *See Valentine v. Collier*, 490 F. Supp. 3d 1121, 1169 (S.D. Tex. 2020) (reasoning that while occasional lapses in a prison's cleaning regimen would not be an Eighth Amendment violation in "normal times," the same lapses during a pandemic create a different standard).

163. *See Valentine*, 490 F. Supp. 3d at 1164 (citing *Valentine v. Collier*, 140 S. Ct. 1598, 1600 (2020) (Sotomayor, J., respecting the denial of application to vacate stay)) (stating that deliberate indifference is a question of fact, determined by inference from circumstantial evidence).

164. *See id.* at 1165-66 (finding that TDCJ officials demonstrated deliberate indifference through the lack of a systematic approach to slow COVID-19's spread, the failure to follow basic public health guidance, and the ongoing risk to the health of people incarcerated).

165. *See Valentine v. Collier*, 141 S. Ct. 57, 61 (2020) (Sotomayor, J., dissenting)

analysis was only further injured by the Fifth Circuit's majority using its previous tuberculosis cases to justify the determination that the Pack Unit officials did not demonstrate deliberate indifference.¹⁶⁶ In doing so, the court failed to consider the different responses that a COVID-19 outbreak and a tuberculosis outbreak require, therefore analyzing TDCJ's actions through an inaccurate and unrealistic lens.¹⁶⁷

C. The Fifth Circuit's Application of the Deliberate Indifference Test is Incomplete Because it Does Not Consider Important Circumstances

In contrast to the Fifth Circuit, the Eleventh Circuit's determination that a prison official will be found deliberately indifferent if he knows of, but disregards, an appropriate and sufficient alternative to fix the unconstitutional condition, is a more fulsome and detailed analysis.¹⁶⁸ The COVID-19 outbreak had already killed twenty people in the Pack Unit by the time of the trial, so the Fifth Circuit should have applied a test for deliberate indifference that accurately reflected the gravity of the situation and relevant circumstances.¹⁶⁹ TDCJ officials are not expected to entirely rid the Pack Unit of COVID-19 to satisfy the Constitution, especially because the virus did not have an available vaccine for the first year.¹⁷⁰ Still, they should have been required to take further measures that would have more effectively reduced the spread of COVID-19.¹⁷¹ The Fifth Circuit's

(stating that TDCJ officials taking affirmative steps was insufficient when they knew the steps were "sorely inadequate" and left the Pack Unit men at high risk).

166. See *Valentine v. Collier*, 978 F.3d 154, 163-64 (5th Cir. 2020) (citing *Gibbs v. Grimmette*, 254 F.3d 545 (5th Cir. 2001)) (citing)); see also *Wallace v. Dallas Cty.*, 51 F.3d 1045 (5th Cir. 1995) (per curiam)) (stating the court's limited precedent in the context of infectious disease supports the decision that TDCJ's actions were constitutional).

167. See *id.* at 164 (describing COVID-19 as posing a greater risk than tuberculosis yet reasoning that TDCJ could not have been deliberately indifferent in relation to the tuberculosis cases).

168. See *LaMarca v. Turner*, 995 F.2d 1526, 1536 (11th Cir. 1993) (explaining that an official who tries and fails is not deliberately indifferent "unless he knows of, but disregards, an appropriate and sufficient alternative").

169. See *Valentine v. Collier*, 490 F. Supp. 3d 1121, 1134-35 (S.D. Tex. 2020) (explaining that twenty incarcerated people in the Pack Unit have died from COVID-19 since April 11, 2020 while there were eleven natural deaths in the Pack Unit throughout all of 2019).

170. See *Farmer v. Brennan*, 511 U.S. 825, 844-85 (1994) (holding that prison officials must respond reasonably to a risk, but do not need to eliminate the risk).

171. See *LaMarca*, 995 F.2d at 1537 (requiring officials to take actions to improve conditions that violate the Eighth Amendment when they have knowledge of those conditions).

application of its deliberate indifference test has made it far too easy for prison officials to pass constitutional muster simply by doing the bare minimum.¹⁷²

A detailed analysis like the Eleventh Circuit's held prison officials more accountable than the Fifth Circuit's.¹⁷³ Such an analysis is crucial when a prison official's actions, or lack thereof, are likely to lead to widespread illness and death.¹⁷⁴ The Eleventh Circuit's test is more effective in reducing the possibility that an officer will respond to a substantial risk simply to avoid an Eighth Amendment challenge, recognizing that he could have taken some greater action that would have been more effective.¹⁷⁵ When incarcerated people are exposed to a substantial risk of serious bodily harm, a prison official cannot be permitted to respond to the risk by simply checking the box as taking some form of action.¹⁷⁶ Rather, the question becomes whether the prison official takes the correct action.¹⁷⁷ Although the correct course of action may not always be obvious to the official at the time of the risk, the correct course of action was certainly apparent to the Pack Unit officials at the time of this case.¹⁷⁸ If the Eleventh Circuit had evaluated the plaintiffs' Eighth Amendment claims, this case would have had a different outcome.¹⁷⁹

172. See, e.g., *Mendoza v. Lynaugh*, 989 F.2d 191, 193 (5th Cir. 1993) (finding no deliberate indifference where a plaintiff received some of the necessary care for a critical back injury).

173. See *LaMarca*, 995 F.2d at 1536 (requiring an official to take actions to improve unconstitutional prison conditions when he has the means and knowledge to do so).

174. See *Valentine v. Collier*, 141 S. Ct. 57, 57-58 (2020) (Sotomayor, J., dissenting) (citing *Valentine v. Collier*, 455 F. Supp. 3d 308, 322, 325 (S.D. Tex. 2020)) (referring to the Pack Unit as a "tinderbox" for COVID-19).

175. See *LaMarca*, 995 F.2d at 1536 (stating that if a prison official fails to fix an unconstitutional prison condition, while simultaneously disregarding an appropriate and sufficient alternative, he has demonstrated deliberate indifference).

176. See *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (citing *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)) (explaining that prison officials have a duty to ensure that people who are incarcerated experience humane conditions of confinement, to provide food, clothing, shelter, and medical care, and to take reasonable measures to guarantee safety).

177. See *Lamarca*, 995 F.2d at 1537 (requiring officials to take actions that would have improved the conditions to avoid liability); see also *Valentine v. Collier*, 490 F. Supp. 3d 1121, at 1165 (S.D. Tex. 2020) (stating that prison officials do not automatically meet constitutional standards just by designing a policy and implementing some of it).

178. See *id.* at 1167 (finding that TDCJ knew about its shortcomings but did not make changes even after several incarcerated people died).

179. Compare *LaMarca*, 995 F.2d at 1536 (explaining an official is deliberately indifferent when he disregards an appropriate alternative to fix an unconstitutional prison

In *Swain v. Junior*, the Eleventh Circuit's case addressing COVID-19 in prison, the court held that the prison officials were not deliberately indifferent to the facility's conditions; instead, the only reason they did not enforce social distancing is because it was impossible to do so.¹⁸⁰ It ultimately concluded that failing to do what is impossible cannot amount to a constitutional violation.¹⁸¹ In contrast to *Swain*, the Pack Unit officials did not face challenges that were impossible to alleviate.¹⁸² While the Pack Unit did not distribute hand sanitizer to incarcerated people, text messages among staff members proved that the staff knew it was possible to do so.¹⁸³ In another text message, a TDCJ staff member revealed that TDCJ's executive director said that he felt the Pack Unit was not doing everything it could have been doing to mitigate COVID-19, including providing access to cleaning supplies and PPE.¹⁸⁴ The incapability of the facility to take action in *Swain* was certainly different from the Pack Unit's situation, as the preventative measures were not impossible in the Pack Unit.¹⁸⁵

Although the Eleventh Circuit did not find deliberate indifference in its COVID-19 case, the reasoning in *Swain* strongly suggests that it would have found deliberate indifference if it had considered the Pack Unit's case.¹⁸⁶ The response from the Pack Unit officials can be contrasted in multiple ways from the institution's response in *Swain*.¹⁸⁷ While the Fifth Circuit found that TDCJ could have done more to protect the vulnerable housed in the Pack Unit, the Eleventh Circuit concluded that the officials in *Swain* did the best

condition), *with Valentine v. Collier*, 978 F.3d 154, 164-65 (5th Cir. 2020) (finding that officials "affirmative steps" to contain COVID-19 passed constitutional muster, though they could have done more).

180. *See Swain v. Junior*, 961 F.3d 1276, 1287 (11th Cir. 2020) (stating the district court already established that social distancing was impossible in this institution).

181. *See id.* (explaining that, "failing to do the 'impossible' doesn't evince indifference, let alone deliberate indifference").

182. *See Valentine*, 490 F. Supp. 3d at 1167 (demonstrating that TDCJ officials were aware their policy was not being implemented effectively).

183. *See id.* at 1143 (stating that TDCJ's executive director said in a text that if TDCJ needed to provide hand sanitizer to people, "we know we can figure it out").

184. *See id.* at 1154 (quoting a text message from a TDCJ staff member stating the executive director said he felt TDCJ was not "doing everything [they] should have been").

185. *See Valentine*, 978 F.3d at 165 (acknowledging that TDCJ could have done more to protect men incarcerated in the Pack Unit from COVID-19).

186. *See id.* (stating that TDCJ had lapses in its response to COVID-19).

187. *Compare Swain v. Junior*, 961 F.3d 1276, 1288 (11th Cir. 2020) (determining that officials did their best to implement COVID-19 safety measures), *with Valentine*, 978 F.3d at 165 (stating there were lapses in TDCJ's COVID-19 response).

they could to maximize social distancing, despite the impossibility of actually maintaining a distance of six feet between each incarcerated person.¹⁸⁸ For example, the Miami officials marked the floor with tape to demonstrate a six-foot distance and staggered the bunks so that people slept head-to-foot.¹⁸⁹

Measures such as social distancing in the Pack Unit were met with challenges due to the prison's set-up and the style of the dormitories.¹⁹⁰ However, TDCJ has never argued (and the Fifth Circuit never determined) that it was completely impossible to implement certain measures.¹⁹¹ Indeed, in the wake of the lawsuit against TDCJ, the Pack Unit eventually began to implement some of the practices it could have been enforcing all along.¹⁹² This proves the officials in the Pack Unit knew that better, more effective measures were available to them, but chose not to implement them until the threat of a lawsuit exposed their lack of action.¹⁹³ Notably, the timing of some of these actions and internal communications amongst TDCJ staff suggest that the lawsuit was the primary motivation for making these changes—not the significant number of incarcerated people who died under the Pack Unit's care.¹⁹⁴

If the Fifth Circuit had employed the Eleventh Circuit analysis of the Pack Unit's response, it likely would have held the officials violated the Eighth Amendment because there were sufficient alternatives to TDCJ's actions were available that would have successfully prevented the spread of COVID-

188. *Compare Swain*, 961 F.3d at 1288 (identifying steps the officials took to contain COVID-19), *with Valentine*, 978 F.3d at 165 (concluding that TDCJ could have done more to enforce social distancing).

189. *See Swain*, 961 F.3d at 1288 (explaining that officials did their best to enforce social distancing when incarcerated people were sleeping, standing in line, and going to medical).

190. *See Valentine v. Collier*, 490 F. Supp. 3d 1121, 1138-39 (S.D. Tex. 2020) (describing different ways to socially-distance within the prison, including rotating meal and shower times).

191. *See Valentine*, 978 F.3d at 165 (stating that TDCJ could have done more to protect incarcerated people from COVID-19).

192. *See Valentine*, 490 F. Supp. 3d at 1134 (stating that in response to the trial, the Pack Unit made several changes to its practices including conducting mass testing and marking the floor with tape to ensure people remain six feet apart).

193. *See id.* (discussing the court's lack of confidence in the defendants' credibility and its suspicion that officials were not following a deliberate strategy to mitigate COVID-19 spread).

194. *See id.* (documenting text messages amongst TDCJ officials that suggest, among other things, that the Pack Unit should take a certain measure because it would "look more favorable in the [c]ourt's eyes").

19.¹⁹⁵ In any circumstance where incarcerated people experience cruel and unusual punishment, but especially one in which the threat of serious illness or death is imminent and substantial, courts must look carefully not only at what prison officials have done, but also at what they have not done, to respond accordingly.¹⁹⁶

IV. POLICY RECOMMENDATION

The Prison Litigation Reform Act (“PLRA”) requires people who are incarcerated to exhaust all available administrative remedies before they can challenge prison conditions in court.¹⁹⁷ The Supreme Court has held that the PLRA bars courts from taking special circumstances into account when determining whether incarcerated people have exhausted administrative remedies before bringing a lawsuit.¹⁹⁸ However, even if a court determines that an incarcerated person did not exhaust administrative remedies before challenging the conditions in court, the legal action may still be permissible if the court concludes that these remedies were not available to the plaintiff.¹⁹⁹

In *Valentine v. Collier*, the Fifth Circuit found that Mr. Valentine and Mr. King did not exhaust administrative remedies before challenging the Pack Unit’s conditions in court.²⁰⁰ After determining this, the Fifth Circuit noted that the Eighth Amendment analysis was inconsequential because plaintiffs must meet the PLRA’s requirement before a court can even consider whether the incarcerated persons’ constitutional rights were violated.²⁰¹ The Fifth Circuit insisted that the district court applied the impermissible special circumstances exception when it determined TDCJ’s grievance process was effectively unavailable to the plaintiffs because it could not respond

195. See *Valentine*, 978 F.3d at 165 (stating that TDCJ officials could have done more to protect incarcerated people in the Pack Unit).

196. See *Valentine*, 490 F. Supp. 3d, at 1129 (detailing the public health emergency that COVID-19 created).

197. See 42 U.S.C. § 1997e(a) (2013) (establishing the requirement that prisoners must exhaust available remedies before bringing an action regarding prison conditions).

198. See *Ross v. Blake*, 136 S. Ct. 1850, 1862 (2016) (holding that courts cannot consider special circumstances when making a finding about whether prisoners exhausted administrative remedies).

199. See *id.* (stating the only limit to the PLRA exhaustion requirement is that an incarcerated person can only exhaust remedies that are actually available).

200. See *Valentine*, 978 F.3d at 161 (stating that TDCJ’s grievance procedure was available to the plaintiffs, they were required to exhaust that procedure, and they did not).

201. See 42 U.S.C. § 1997e(a) (2013) (requiring prisoners to exhaust available administrative remedies before bringing a legal action regarding prison conditions).

appropriately to COVID-19.²⁰² However, even if the Fifth Circuit's assessment of the district court is true, the Supreme Court should critically examine the rule excluding special circumstances it established in *Ross v. Blake*.²⁰³ If there ever was an appropriate time to take special circumstances into account, it is now: in the face of a pandemic.²⁰⁴

The PLRA does not allow courts any discretion to hear unexhausted claims of unconstitutional prison conditions.²⁰⁵ However, the spread of COVID-19 in prisons goes beyond special circumstances previously contemplated by the Supreme Court.²⁰⁶ The widespread mishandling of COVID-19 in prisons has created a crisis that slow, bureaucratic processes cannot properly address.²⁰⁷ Mr. Valentine and Mr. King began the TDCJ grievance process before filing their lawsuit, and over two months passed with no resolution.²⁰⁸ While their grievances sat untouched, 167 incarcerated men tested positive for COVID-19, and eighteen died.²⁰⁹ Conditions quickly became a matter of life and death and could not be addressed quickly enough by TDCJ's grievance process to save anyone.²¹⁰

The justification behind the PLRA's exhaustion requirement is the desire to avoid an overwhelming number of incarcerated people bringing claims to

202. See *Valentine*, 978 F.3d at 161 (stating the district court applied the impermissible special circumstances exception "under the guise of an availability analysis").

203. See *Ross*, 136 S. Ct. at 1862 (establishing that courts cannot consider special circumstances when making a finding about whether prisoners exhausted administrative remedies).

204. See *Valentine v. Collier*, 141 S. Ct. 57, 60 (2020) (Sotomayor, J., dissenting) (stating that at least one incarcerated person died before TDCJ addressed his grievance, and at least two others contracted COVID-19 while grievances were still pending).

205. See generally *Ross*, 136 S. Ct. at 1857 (explaining the PLRA forecloses judicial discretion).

206. Compare *Ross*, 136 S. Ct. at 1862 (concerning an incarcerated person who wrongfully believed he complied with the prison's administrative process), with *Valentine v. Collier*, 490 F. Supp. 3d 1121, 1162 (S.D. Tex. 2020) (demonstrating that plaintiffs did not wait for the administrative process to be complete because the dangers of COVID-19 were time sensitive).

207. See *Park & Meagher*, *supra* note 26 (demonstrating the disproportionate impact COVID-19 has had on incarcerated people as compared to the general population).

208. See *Valentine*, 490 F. Supp. 3d at 1162 (finding that plaintiffs filed grievances, waited two months, and filed suit).

209. See *id.* (describing the high rates of death and illness while the plaintiffs awaited the grievance process).

210. See *id.* (stating that 167 incarcerated people tested positive and eighteen of them died while Mr. King and Mr. Valentine were waiting for responses to their grievances).

court that lack merit.²¹¹ To a certain extent, it is a logical method of conserving judicial resources and allowing facilities to solve their problems without court intervention.²¹² But the strict rule that the Supreme Court has mandated is dangerous at its best, and deadly at its worst.²¹³ One of the most threatening aspects of COVID-19 is its rapid transmission rates.²¹⁴ COVID-19 does not wait for administrative solutions, so courts should not force those incarcerated to either.²¹⁵ Instead, the Supreme Court should reconsider the strict rule it established in *Ross v. Blake* and allow courts to consider special circumstances in the context of contagious disease, when the exhaustion requirement is both unrealistic and dangerous.²¹⁶

V. CONCLUSION

The Fifth Circuit's decision in *Valentine v. Collier* demonstrates a fatal misapplication of the deliberate indifference test to find an Eighth Amendment violation.²¹⁷ Through direct evidence and personal testimony, Mr. Valentine and Mr. King successfully showed TDCJ's unconstitutional response to COVID-19 in the Pack Unit.²¹⁸ The Eighth Amendment requires incarcerated people to be granted, at the very least, humane conditions of confinement.²¹⁹ Put simply, the officials in the Pack Unit were aware of the

211. See *Jones v. Bock*, 549 U.S. 199, 219 (2007) (explaining that the exhaustion requirement helps improve litigation quality).

212. See *id.* (identifying reducing litigation and allowing facilities to address their own complaints before being subject to litigation as benefits of the exhaustion requirement).

213. See *Valentine v. Collier*, 141 S. Ct. 57, 60 (2020) (Sotomayor, J., dissenting) (explaining that TDCJ's grievance process takes a minimum of 160 days and that within only 116 days, seventy-four incarcerated people were hospitalized for COVID-19 and nineteen of them died).

214. See *How to Protect Yourself & Others*, *supra* note 23 (explaining that COVID-19 spreads very easily from one person to another).

215. See *generally id.* (demonstrating that COVID-19 spreads quickly, particularly in crowded environments).

216. See *Ross v. Blake*, 136 S. Ct. 1850, 1862 (2016) (holding that courts cannot consider special circumstances when deciding whether prisoners exhausted administrative remedies).

217. See *Valentine v. Collier*, 978 F.3d 154, 158 (5th Cir. 2020) (granting TDCJ's motion to stay a permanent injunction requiring prison officials to implement basic safety measures).

218. See *generally Valentine v. Collier*, 490 F. Supp. 3d 1121, 1165 (S.D. Tex. 2020) (citing specific instances of Pack Unit officials demonstrating unconstitutional behavior).

219. See *Farmer v. Brennan*, 511 U.S. 825, 832, 834 (1994) (establishing an official's duty to provide people who are incarcerated with humane conditions of confinement).

extreme risk COVID-19 presents, yet failed to mitigate the risks despite having the resources and the opportunity to do so.²²⁰ This inaction amounted to deliberate indifference and violated the incarcerated peoples' Eighth Amendment rights not to have cruel and unusual punishment inflicted upon them.²²¹

220. *See Valentine*, 490 F. Supp. 3d 1165 (outlining the obvious risk to inmate health, the Pack Unit's COVID-19 policy, and the failure to implement crucial portions of the policy).

221. *See Farmer*, 511 U.S. at 834 (explaining that to succeed on an Eighth Amendment claim, a plaintiff must prove that (1) he was exposed to a substantial risk of serious harm and that (2) prison officials acted with deliberate indifference to the risk or failed to act at all).