

IN THE FIFTH CIRCUIT COURT OF APPEALS

RAIS BHUIYAN

v.

RICK PERRY, GOVERNOR,
State of Texas,
BRAD LIVINGSTON, Executive Director,
Texas Department of Criminal Justice,
ANGIE McCOWN, Director,
TDCJ Victim Services Division,
RISSIE L. OWENS, Member

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No. _____

W.D.Tex. (Austin)
Cause No. 1:11-cv-00603

MOTION FOR A STAY
TO PRESERVE JURISDICTION

Plaintiff¹ RAIS BHUIYAN (“Plaintiff”) files this *Motion for a Stay to Preserve Jurisdiction*. Plaintiff needs this relief in order to preserve the status quo and avoid the permanent deprivation of his rights without this Court having a fair opportunity to hear his claims.

I. STATEMENT OF THE CASE

Plaintiff Rais Bhuiyan is a victim who was shot in the face and left for dead by Mark Ströman. Ströman faces execution later today, at 6pm.

Mr. Bhuiyan was never told of his rights as a victim – which are detailed below, and are rights that are overwhelmingly supported by Texans, such that they were enshrined in a constitutional amendment. See *Tex. Const. Art. 1, §30*. Indeed, Mr. Bhuiyan was manipulated in a shameless way at Ströman’s trial, resulting in him unwittingly testifying (along with the

¹ Mr. Bhuiyan refers to himself either by name or as “Plaintiff” as he does not know at the time of writing whether he will be Appellant or, if the Defendants choose to seek review of an adverse order, Appellee. Either way, it is vital that he be permitted the opportunity to vindicate his rights in a timely and meaningful manner.

widows of the two other victims) in such a manner as to help assure a death penalty – which was the last thing he wanted. He was not permitted to make a victim impact statement to the court or jury. He was then told that he could have no contact with Ströman – and Ströman was told the converse. He was never informed of his right to mediation by a Texas official. He struggled with his victimization – first at Ströman’s hands, and subsequently at the hands of Texas Officialdom.

When he heard that an execution date had been set on Mark Ströman, Mr. Bhuiyan felt morally bound to make his views public, painful though that process inevitably was. Only then did he learn – from others, not defendants or Texas officials – that he had various rights and the authority to enforce them. Mark Ströman had written to the TDCJ, offering to meet with Mr. Bhuiyan if the latter wished to, and he also sent this message through his lawyers. Mr. Bhuiyan then immediately contacted the TDCJ asking for mediation – as, he had been told, was his right. Mr. Bhuiyan followed this up with a letter. Until this morning, the defendants have never even bothered to reply to his letter, and have never told him whether his request was even being considered.

Meanwhile, on June 29, Mr. Bhuiyan made a request – via Mark Ströman’s petition for clemency – for his first opportunity publicly to address an official Texas body concerning his views as a victim. The Texas Board of Pardons and Parole never took even the minimal step of replying to his letter, rather merely denying clemency yesterday.

By now, Mr. Bhuiyan was desperate and without meaningful resources. Hearing of his plight, undersigned counsel agreed to come from Florida and help to represent him *pro bono publico*. Local counsel agreed to assist, as required by the Texas *pro hac vice* rules. Counsel worked frenetically to file a complaint in Texas state court on July 13, 2011, allowing the court a

week in which to resolve the issues, and enforce Mr. Bhuiyan's rights as a victim – or at least some dignity and respect.

Defendants were immediately served, and the state court had several days in which to consider the issues. A hearing was scheduled in the 353rd District Court for Monday, July 18, 2011, at 3pm, to determine if Mr. Bhuiyan would be granted injunctive relief. The state court still had 51 hours in which to act.

However, around lunchtime on July 18, 2011, Defendants removed the entire case to federal court. See *Bhuiyan v. Perry*, No. 1:11-cv-00603 (W.D. Tex. Austin Div.). Mr. Bhuiyan objected to this procedure, and has asked that at least the Texas law claims – which make up the majority of his complaint – be referred back to the state court for decision. Meanwhile, a new judge had to get familiar with the case. The federal court therefore took the following two days to try to make a review of the case, and set a hearing for 10am today (July 20, 2011). That hearing will last at least until noon, leaving only six hours before the execution for any subsequent litigation to vindicate Mr. Bhuiyan's rights.

Mr. Bhuiyan now seeks a preliminary injunction (or a simple stay order) enjoining Mr. Stroman's July 20, 2011, execution in order to give Mr. Bhuiyan the opportunity to vindicate his rights, including the mandatory Texas right to participate in Victim Offender Mediation/Dialogue (hereinafter VOM/D). *See Plaintiff's Original Complaint*.

II. THIS COURT'S AUTHORITY TO PRESERVE ITS JURISDICTION

Rais Bhuiyan has raised issues of profound importance. He is a victim of a very violent crime. Every State in the Union, as well as the Federal Government, has recognized the rights of a victim to respect and dignity. Texas has, by constitutional amendment, provided for such rights, and specifically included the provision allowing him standing to enforce them. *Tex.*

Const. Art. 1 §30(e). The defendants, and other Texas officials, seem to have made a concerted effort to deprive Mr. Bhuiyan of his rights at every turn. Now, they seek to render any claim he has moot by preventing – eternally, and without recourse, at least in this life – him from ever vindicating his rights, including the right to the cathartic and curative experience of mediation with his assailant, Mark Ströman.

In order to vindicate these rights, there is no need for this Court to override the “disposition” of the Texas’ court; a stay does not prevent the ultimate execution of Mark Ströman, but it does allow Plaintiff to vindicate his rights. Defendants, including the strongly states’ rights Governor Perry, are the ones who moved this case to federal court. They are therefore in no position now to argue that this Court must respect Texas’ sovereignty and not intervene – they could have chosen to vindicate their own perceptions of the sovereign interests of Texas in their own courts. Plaintiff, who is himself a “proud Texan”, filed in state court to give them the opportunity to do that, but instead they chose to run to federal court.

There is no question that this Court has the authority to stay the execution of Mark Ströman in order to preserve its jurisdiction in this case. *In re Peterson*, 253 U.S. 300, 312 (1920) (courts have, at least in the absence of legislation to the contrary, inherent power to provide themselves with appropriate instruments required for the performance of their duties). This Court has the power to preserve its jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a) (“The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”). *See F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966). It is well established that the Court may issue injunctive relief under the All Writs Act —to safeguard not only ongoing proceedings, but potential future proceedings. *Klay v. United Healthgroup, Inc.*,

376 F.3d 1092, 1099 (11th Cir. 2004) (citing *Heckler v. Redbud Hosp. Dist.*, 473 U.S. 1308, 1313 (1985)).

In *ITT Community Development Corp. v. Barton*, 569 F.2d 1351 (11th Cir. 1978), the Eleventh Circuit clarified the distinction between the All Writs Act and the inherent powers doctrine:

Both the All Writs Act and the inherent powers doctrine provide a federal court with various common law equity devices to be used incidental to the authority conferred on the court by rule or statute. The All Writs Act may be said to provide a federal court with those writs necessary to the preservation or exercise of its subject matter jurisdiction. The Act is necessary because federal courts, being courts of limited jurisdiction, would not otherwise possess the tools necessary to implement their jurisdictional grants. The inherent powers doctrine, however, does not derive from a statutory base. Instead, the doctrine is rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion.

Id. at 1359 (citation omitted).

III. THE PARTY CLAIMING EQUITABLE RELIEF – OR ARGUING AGAINST IT – MUST COME WITH CLEAN HANDS

It is surprising, and rather sad, that Defendants spend so much time vilifying Rais Bhuiyan in their pleadings before various courts. Whatever else one might say about Mr. Bhuiyan (and the media has overwhelmingly praised him for his moral integrity), he is a victim of a terrible crime.

Mr. Bhuiyan came to the United States from Bangladesh on February 22, 1999. He arrived in New York, saw the Statue of Liberty, and was thrilled at the prospects before him. A friend told him to try out life in Texas. He wanted to pursue further education and, in between, return to Bangladesh to bring his wife to the US, as they had both applied for a green card. However, in the meantime he had to earn some money to make this possible. He therefore got a job at a

friend's gas station. He had been robbed earlier that summer, in July, and he had been intimidated after 9/11 by the surge in Islamophobic attacks. But he simply could not make do without the job.

Mark Ströman walked into the store on September 21, 2001, around 12.30pm, and put the shotgun in his face. When Mr. Bhuiyan felt the pain "like a million bee stings," heard the echo of the gun blast, and fell to the ground with blood pouring out of the side of his head, he thought he was going to die. It is a miracle that he did not.

As if that were not enough, Mr. Bhuiyan went through some very difficult times in the aftermath. Once his life was saved, he had to have multiple operations to try to save some of the sight in his right eye, and to deal with the lengthy medical treatments on his other injuries. Because he had only been working at a gas station, and was only planning further education, he had no medical insurance. He was constantly billed for his treatment. His doctor did apply for him to the Texas *Crime Victim Compensation Program* but it languished without approval until 2003. As a recent immigrant, he could not possibly afford to pay, and the prospect of not being able to fulfill his legal obligations, of not being able to get the medical care he needed, and of debt collectors arriving at his doorstep, caused him traumatic concern.

Meanwhile, two days after he was almost killed, his father suffered a stroke but, because of his medical situation, Mr. Bhuiyan was not able to return to Bangladesh to see him. Because of his traumatized reaction to his terrible experiences in Texas, he was going through a deep depression, and this led to the severance of his engagement. He had been living with a friend, but in early 2002, the friend said he needed to move out – suggesting that he needed to be in a nursing home.

Meanwhile, the District Attorney prosecuting Mark Ströman met with Mr. Bhuiyan. He did not explain any of Mr. Bhuiyan's rights, but simply said that the death penalty would be imposed on Ströman, and Ströman would become the 20th photograph on the wall of the District Attorney's Office. Mr. Bhuiyan, recently arrived from Bangladesh, did not understand his rights, or the nature of the process. He thought the decision to impose death had already happened, and he had nothing to do with it.

Mr. Bhuiyan was called as a witness at the penalty phase of Mark Ströman's trial. He was told only to answer the questions he was asked, and he was never told by the prosecutor that he had rights beyond that. The defense lawyer did nothing, and did not have the courtesy to contact him.

At the end of the trial, Mr. Bhuiyan asked the Office of the District Attorney whether he had any rights, including to compensation. The DA's Office told him that he had no right to compensation, and did not explain any other rights. Mr. Bhuiyan did not understand that he had any rights with respect to contacting Mark Ströman. Indeed – while the order was not issued with notice to him – the State of Texas forbade him from any contact.² Actually, the imposition of this order, while it is a strong indicator of the inequity of Defendant's current arguments, made little difference to Mr. Bhuiyan's actions. The Texas Department of Criminal Justice

² Mr. Bhuiyan only learned of this formal order in the afternoon of July 18, 2011. The following representation was made by defendants:

The convicting court entered an order which prohibited Stroman from having any contact with Plaintiff. In essence, Plaintiff – the victim – is making a collateral attack on the validity of the convicting court's order prohibiting visitation contact by Stroman with him.

Defendants' Answer, Affirmative Defenses and Motion to Dismiss, at 11, Bhuiyan v. Perry, Travis County Civil District Court No. 1:11-CV-00603 (July 18, 2011). This is not an order that Mr. Bhuiyan was ever shown, and seems to have been entered *ex parte* without any notice to any parties.

(TDCJ) had the same rule barring Mark Ströman from contact with Mr. Bhuiyan which achieved the same effect.

In June 2003, Mr. Bhuiyan got a job as a waiter at the Olive Garden restaurant, where he worked for three years. In 2005, he became aware of a charity, the Pathway Clinic, and started therapy with them. Meanwhile he trained in computers. In late 2009, he was able to pay for a trip with his mother on Haj, to Mecca. This helped him further in dealing with the impact of what he had gone through.

At the end of 2010, Mr. Bhuiyan met with Professor Rick Halperin, Direct of Human Rights Program at SMU, to discuss the possibility of studying Human Rights there. Mr. Bhuiyan then learned, in March 2011, that a date had been set for Mark Ströman's execution. He was shocked and horrified. He asked Professor Halperin whether there was anything he could do about it. Professor Halperin told him that he might have some rights as a victim and that he could perhaps make his feelings known publicly.

On May 16, 2011, therefore, Mr. Bhuiyan did an interview with the *Dallas Morning News* in which he stated publicly, for the first time, that he wanted to work on reconciliation with Mark Ströman. This came to the attention of Mark Ströman's lawyer, who was under the impression (and apparently advised Mr. Ströman) that it was not possible for Mr. Ströman to write to Mr. Bhuiyan because of TDCJ regulations. However, counsel contacted Mr. Bhuiyan herself and ultimately, when satisfied that this would be welcomed by Mr. Bhuiyan, delivered a letter from her client to him expressing his deep remorse for the crime.

On June 21, 2011, Mark Ströman wrote to the TDCJ saying that he was willing to undergo mediation with Mr. Bhuiyan. There was then a month before the execution date. Mr. Bhuiyan also contacted the TDCJ to express the same desire. He was told that various officials

had to approve it, and the Attorney General³ would anyway have the power to veto any mediation. Nobody got back to either Mr. Bhuiyan or Mr. Ströman.

On July 7, 2011, Mr. Ströman's lawyer wrote to follow up, expressing concern at the brief time available. Mr. Bhuiyan also wrote asking what was happening. Neither has ever – to this day – received a reply.

In the meantime, through the clemency petition filed in Mark Ströman's case, Mr. Bhuiyan had asked for the right to speak to the Board of Pardons and Parole about his feelings, and his need for at least a stay of execution in order to conduct a cathartic mediation process. He never heard from them. Yesterday, July 19, 2011, the Board issued a blanket denial of clemency.

Mr. Bhuiyan got desperate, and was able to find counsel willing, *pro bono*, to bring his case to court. This was done in state court on July 13, 2011, a week after his last request to the TDCJ defendants, and a week before the scheduled execution. A hearing was set for five days later. Very shortly before that hearing, Defendants chose to remove the case to federal court.

Mr. Bhuiyan has expressed to Governor Perry his request for a meeting, and a 30-day stay so that he can vindicate his interests as a victim. He has not heard back.

a. TEXAS HAS STRONGLY ADVERTISED ITS SUPPORT FOR VICTIMS' RIGHTS

There was a time, not so long ago, when victims were perhaps routinely treated as badly as Mr. Bhuiyan has been treated in this case:

³ Mr. Bhuiyan cannot fail to note how rude the Attorney General has been in pleadings filed in the *Ströman* litigation, concerning him, his motivations, and his integrity. These statements were brought to his attention by counsel for Mr. Ströman, in order to ensure that any representations that counsel was making were accurate. Most of those comments have come in the course of accusing him of telling lies about the views of the other victims' families in this case. Mr. Bhuiyan states only this: he has been honest throughout the process, unlike the State of Texas he has taken a great deal of time to try to ensure that his fellow victims are not re-victimized, and he hopes that at some point those who wrote those statements will have the integrity to apologize.

The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children--seen but not heard. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process.

Kenna v. United States District Court, 435 F.3d 1011, 1013 (9th Cir. 2006), citing Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, §§ 101-104, 118 Stat. 2260, 2261-65 (2004) (codified at 18 U.S.C. § 3771).

Twenty-five years ago, there was a presidential commission on the rights of crime victims.⁴ Fortunately, the subsequent changes on the federal level were reflected in Texas, as they were in all fifty states.

- i. The rights of victims have been endorsed overwhelmingly by the people of Texas and cannot now be lightly ignored

Now, the rights of the victims of crime have been recognized in all fifty states, making victims participants, rather than mere witnesses, to the criminal justice system. Texas has enacted a constitutional amendment on the subject. Tex. Const. art. 1, §30. All the other 49 states and the federal government either have enshrined this in their constitutions,⁵ or on their statute books.

The provisions “passed with overwhelming popular support.” Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in*

⁴ See *Final Report of the President's Task Force on Victims of Crime (Recommendations for Government Actions)*, pg 29, 30 available on the internet at <http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf>.

⁵ See, e.g., Ala. Const. Amend. No. 557; Alaska Const. art. 1, §24; Ariz. Const. art. II, §2.1; Cal. Const. art. I, §28; Colo. Const. art. II, § 16a; Conn. Const. art. 1, §8; Fla. Const. art. I, §16(b); Ill. Const. art. I, 8.1; Idaho Const. art. I, §22; Ind. Const. art. 1, 13(b); Kan. Const. art. 15, §15; La. Const. art. I, § 13; Md. Constl. Declaration of Rights, art. 47; Mich. Const. art. I, 24; Miss. Const. art. 3, §26a; Mo. Const. art. I, 32; Neb. Const. art I, 28; Nev. Const. art. 1, §8; N.J. Const. art. I, §22; N.M. Const. art. II, §24; Ohio Const. art. I, §10A; Okla. Const. art. II, §34; Or. Const. art. I, §42; R.I. Const. art. 1, §23; S.C. Xonst. Art. I, §24(B); Tenn. Const. art. I, §35; Utah Const. art. I, §28; Va. Const. art. I, § 8-A; Wash. Const. art. 1, §25; Wis. Const. art. I, §25.

Light of the Crime Victims' Rights Act, 2005 B.U.U. L. Rev. 835 (2005). These rights were aimed at ensuring respect for the victim, and ensuring his dignity:

“Victimization is about powerlessness; victims’ rights are about the reclaiming of power. Being victimized strips people of their dignity; victims’ rights offer opportunities to restore dignity. Murder silences its victims; victims’ rights let the surviving families have a voice in the aftermath of the trauma. From their inception, the goal of victims’ rights has been to establish a basic respect for victims and their perspective. The federal Victims of Crime Act begins by listing “the right to be treated with fairness and with respect for the victim’s dignity and privacy.” Congress has also passed laws urging the states to treat victims with “compassion, respect, and dignity throughout the criminal justice process.” A central goal of victims’ services has always been to see to it that victims do receive such treatment, and to create a space for victims to be heard. Given these goals and this clear declaration of the federal government’s belief about how victims of crime should be treated, the silencing of, discrimination against, or abandonment of any subgroup of victims is particularly egregious.”⁶

- ii. Defendant Governor Perry, and the other defendants, cannot claim the benefits of equity if they acts hypocritically to deny the very rights they purport to support

When it comes to the issue of his rights as a victim, Mr. Bhuiyan has particular concern with the actions of Defendant Governor Perry. Gov. Perry purports to support victims and the Texas Victims’ Bill of Rights. In a press release, Governor Perry decreed that April 10-16, 2011, would be Victims’ Rights Week.

“I encourage all Texans,” he said, “to join in this effort by learning more about victims’ rights and supporting victims of crime whenever possible. *We can help our fellow Texans on the road to recovery with compassion and respect.*”⁷

⁶ See Robert Renny Cushing and Susannah Sheffer, *Dignity Denied: The Experience of Murder Victim’s Family Members Who Oppose the Death Penalty*, <http://www.murdervictimsfamilies.org/sites/default/files/pdf/dignitydenied.pdf>.

⁷ See <http://www.texansforequaljustice.org/docs/cvrw11.pdf> (emphasis supplied).

Despite this, Gov. Perry then went to state court on Monday and demanded that the case should be removed to federal court, where he has now argued that all those hallowed rights are actually hollow rights, and are symbolic at best:

Even through Art. 56.13 suggests that TDCJ “shall . . . provide mediation services” as described in Art. 56.02, it is undeniable that a crime victim such as Plaintiff has a right to *request* victim-offender mediation; he does not have a right to *have* victim-offender mediation. In any case, the “right” is essentially symbolic where Art. 56.02(d) effectively eliminates any recourse in the event the “right” is denied.

Defendants’ Answer, Affirmative Defenses and Motion to Dismiss, at 12, *Bhuiyan v. Perry*, Travis County Civil District Court No. 1:11-CV-00603 (July 18, 2011).

Not only this, but he wants the *federal* court to tell Texas that their laws are meaningless. And this is the same Gov. Perry who says the following about how federal courts should keep out of Texas affairs:

Gov. Rick Perry today joined state Rep. Brandon Creighton and sponsors of House Concurrent Resolution (HCR) 50 in support of states’ rights under the 10th Amendment to the U.S. Constitution. “I believe that *our federal government has become oppressive in its size, its intrusion into the lives of our citizens, and its interference with the affairs of our state,*” Gov. Perry said. “That is why I am here today to express my unwavering support for efforts all across our country to reaffirm the states’ rights affirmed by the Tenth Amendment to the U.S. Constitution. I believe that returning to the letter and spirit of the U.S. Constitution and its essential 10th Amendment will free our state from undue regulations, and ultimately strengthen our Union.”

A number of recent federal proposals are not within the scope of the federal government’s constitutionally designated powers and impede the states’ right to govern themselves. HCR 50 affirms that Texas claims sovereignty under the 10th Amendment over all powers not otherwise granted to the federal government. It also designates that all compulsory federal legislation that requires states to comply under threat of civil or criminal penalties, or that requires states to pass legislation or lose federal funding, be prohibited or repealed.⁸

In advocating his states’ rights stance, on the same day Gov. Perry went on:

I believe the Constitution does not empower the federal to override state laws without restraint. I agree with Texas’ 7th governor, Sam Houston, who once said, “Texas has yet

⁸ See <http://governor.state.tx.us/news/press-release/12227/>.

to learn submission to any oppression, come from what source it may."

We didn't like oppression then and we certainly don't like it now.

I believe the federal government has become oppressive in its size, its intrusion into the lives of our citizens, and its interference with the affairs of our state.

Texans need to ask themselves a question: do they side with those in Washington who are pursuing this unprecedented expansion of power? Or do they believe in the individual rights and responsibilities laid out in our foundational documents?

Texans need to stand up and be heard, because this state of affairs cannot continue indefinitely.

Gov. Perry Speaks in Support of States' Rights, Austin, Texas (Thurs. April 9, 2009).⁹

Meanwhile, in order to ensure that victims' rights really are chimerical and meaningless, the State of Texas is arguing vociferously in the Supreme Court of the United States that Mark Ströman certainly cannot raise them or enforce them. Indeed, the pleadings filed by the State of Texas assert that Mark Ströman should not "waste[] this Court's time with numerous complaints" about the input of Rais Bhuiyan in this case.¹⁰

Mr. Bhuiyan is very surprised at the attitude taken by Gov. Perry and his fellow defendants. While the contours of equity are fluid, one rule must be clear: that when a party takes a stance that smacks of hypocrisy, he probably loses his claim to equitable relief.

IV. A STAY SHOULD ISSUE BECAUSE THIS CASE PRESENTS COMPLICATED LEGAL ISSUES WHERE RAIS BHUIYAN'S RIGHTS WILL BE FOREVER EXTINGUISHED IF MARK STRÖMAN IS EXECUTED THIS EVENING

Pursuant to Federal Rule of Civil Procedure 65, Rais Bhuiyan has requested the lower court to issue a Preliminary Injunction against Defendants to immediately enjoin the execution of

⁹ See <http://governor.state.tx.us/news/speech/12228/>; see also Kathleen McKinley, *Texas Sparkle: Will Governor Perry Run for President?* (July 2011), <http://blog.chron.com/texassparkle/2011/07/will-governor-perry-run-for-president/> ("Perry is also a staunch advocate of states' rights, and of a limited role for the federal government. These two things are rallying cries of the Tea Party.")

¹⁰ *State's Motion to Dismiss Stromans's Subsequent Application for Writ of Habeas Corpus*, at 12 (Tex. Ct. Crim. App. July 14, 2011).

Mark Stroman and enjoin the Defendants from further violating Plaintiff's legal rights. Thus, immediate injunctive relief is appropriate. Plaintiff is entitled to a preliminary injunction because he has shown:

- (a) a substantial likelihood of success on the merits in its claims against Defendant;
- (b) a substantial threat of irreparable injury if the injunction is not issued;
- (c) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and
- (d) that the grant of an injunction will not disserve the public interest.¹¹

Similar – but subtly distinct -- factors dictate the consideration of a stay to preserve jurisdiction before this Court. The four factors generally applicable when a stay of proceedings is sought are: (1) the likelihood for success on the merits; (2) the possibility of irreparable injury to the moving party if a stay is not granted; (3) the possibility of injury to other parties; and (4) the public interest. *See Jean v. Nelson*, 683 F.2d 1311, 1312 (11th Cir. 1982); *Belcher v. Birmingham Trust National Bank*, 396 F.2d 685 (5th Cir. 1968).

a. MR. BHUIYAN HAS CLEARLY SHOWN THAT REASONABLE JURISTS MAY DIFFER ON WHETHER HE HAS MADE THE NECESSARY LEGAL SHOWING

To obtain a preliminary injunction, a party must first show a substantial likelihood that it will succeed on the merits of its claims once the case proceeds to a full and complete trial. *Texas First Nat. Bank v. Wu*, 347 F. Supp. 2d 389, 398 (S.D. Tex. 2004). To establish a likelihood of success on the merits, “a party does not have to prove its claims at this stage of the proceeding, only that it is likely to succeed on the merits.” *Id.*; *see also Janvey*, 628 F.3d at 175 (citing Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, 11A Federal Practice & Procedure

¹¹ *Doe ex rel. Doe v. Vermilion Parish Sch. Bd.*, 2011 WL 1290793 (5th Cir. 2011); *Speaks v. Kruse*, 445 F.3d 396, 400 (5th Cir. 2006); *Janvey v. Alguire*, 628 F.3d 164, 174 (5th Cir. 2010).

§2948.3 (2d ed. 1995)) (“All courts agree that plaintiff must present a prima facie case but need not show that he is certain to win.”). To assess the likelihood of success on the merits, the Fifth Circuit looks to “standards provided by the substantive law.” *Id.* (quoting *Roho, Inc., v. Marquis*, 902 F.2d 345, 358 (5th Cir. 1990)).

On an application for a stay before this Court, however, Plaintiff – as Appellant – would only have to show that jurists of reason could differ on the right to an injunction. Mr. Bhuiyan does not have to prove that he would prevail (although it is highly probable that he will). Rather, he has to demonstrate that he has presented "cogent argument" that he has been denied federal constitutional rights, *Stano v. Dugger*, 946 F.2d. 1286, 1288 (11th Cir. 1988), regarding claims appropriately before the Court.

Mr. Bhuiyan’s application to this Court certainly demonstrates matters that are "debatable amongst jurists of reason":

"In requiring a 'question of some substance', or a 'substantial showing of the denial of [a] federal right,' obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'"

Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983), quoting *Gordon v. Willis*, 516 F.Supp. 911, 913 (ND Ga. 1980), citing *United States ex rel. Jones v. Richmond*, 245 F.2d 234 (CA2), cert. denied, 355 U.S. 846 (1957).

i. Defendants have clearly violated Mr. Bhuiyan’s federal rights

The State of Texas and all of its official arms, including the Defendants in this case, are bound to respect Plaintiff’s rights under the United States Constitution. This Court is similarly bound to enforce those rights. *See* US CONST. ART. VI, Clause 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or

which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

Plaintiff is strongly motivated by his religious beliefs. Within many faiths, including Islam, forgiveness is a long-standing mechanism towards the healing of the soul. As a Muslim, Plaintiff is of the belief that when he forgives, or promotes mercy for, his attacker, the government should no longer have a duty or a right to exact the ultimate punishment upon the perpetrator.

At the time of the trial process, in 2001-02, it was the policy of the previous incumbent in the Office of the District Attorney in Dallas County to refuse a plea bargain to life if the victim refuses to agree to the proposal in a capital case. In another capital case, returned for resentencing, the current Dallas County District Attorney's stated that the justification for seeking the death penalty, provided to defense counsel in writing, was that the victim's mother had rejected the defendant's offer to accept a sentence of incarceration for the remainder of his natural life. This is a clear indication that the Dallas County DA treats victims with one set of beliefs very differently than victims with another set of beliefs, despite the fact that this was an inappropriate delegation of the District Attorney's constitutional duty to exercise discretion in narrowing the class of death-eligible prisoners. The office ignores and disregards the judgment of victims whose faith leads them to seek avenues of reconciliation as it, simultaneously, abdicates its own authority in favor of the judgment of victims who seek vengeance.

It is also the primary policy of the Governor of the State of Texas to refuse clemency if the victims oppose it. It is the policy of the TDCJ to refuse mediation to those whose religious

beliefs compel them to see meaningful mediation with the perpetrators of capital crimes, even though the victims of other (apparently equal or lesser) crimes are allowed this right.

This violates the Plaintiff's rights under the United States Constitution because Plaintiff enjoys equal rights and equal protection of the laws. U.S. CONST. Amend. V, XIV. Mr. Bhuiyan also enjoys the right to religious freedom under the Federal Constitution. *See* U.S. CONST. Amend. I. And he has the right under the First Amendment to the United States Constitution to freedom of association. *See* US CONST. AMEND. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

Most of these rights are self-evident and need no more discourse at this point. However, the First Amendment has been construed to include the right to Freedom of Association. Such a right cannot be violated on a discriminatory basis. In this case, while Defendants allow myriad people to visit and associate with Mark Ströman, including significant numbers of foreign nationals from countries such as Britain and Germany, Plaintiff is not allowed to meet with him. Indeed, Defendant is enjoined from even writing to Plaintiff. Meanwhile, CBS News and large numbers of other media outlets are also allowed to meet with Mark Ströman.

Defendants are legally obligated to not violate Plaintiff's civil rights. *See* 42 U.S.C § 1983. Section 1983 provides:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof *to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress*, except that in any action brought against a judicial officer for an act or omission taken in such officer's

judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (emphasis added). See also 42 U.S.C. § 1981.

ii. Mr. Bhuiyan has a number of other complex pendant rights under Texas law

The actions taken by the defendants in this case violate a broad range of Texas provisions as well. Mr. Bhuiyan originally brought the case in state court, but defendants removed it – causing 19 hours’ delay where only 27 hours remained for the vindication of his rights. He has asked that the state court rights be referred back to state court, but the District Judge will only rule on that motion today, with hours left before Mark Ströman’s scheduled execution.

For example, there are state constitutional rights at stake. Tex. Const. Art. 1, § 6 (“FREEDOM OF WORSHIP. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.”).

Plaintiff has the right to equal rights and equal protection of the laws under the state constitution as well. *See* Tex. Const. Art. 1, § 3 (“EQUAL RIGHTS. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.”); Tex. Const. Art. 1, § 3a (“EQUALITY UNDER THE LAW. Equality under the law shall not be denied or

abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.”).

Defendants have denied Mr. Bhuiyan effective mediation where those who are the victims of lesser crimes, or crimes that are perhaps essentially identical in all respects but for Defendants’ plan to inflict capital punishment on the perpetrator, enjoy this right. This does not even need to be discriminatory (though it is) in order to state a claim for relief under state law. The victim’s right to rehabilitation and catharsis are purportedly so important to the State, and yet, Mr. Bhuiyan is refused even a letter about his rights, let alone meaningful action. As a victim under Texas law, Plaintiff has a mandatory right to mediation:

In Texas, victims of crime have the Crime Victim's Bill of Rights, created by the legislature in 1985. It has been amended and expanded during the past twenty years, and explicitly lists remedies and redress options that a "victim, guardian of a victim, or close relative of a deceased victim is entitled to ... within the criminal justice system." Of the thirteen numbered rights, the twelfth is "the right to request victim-offender mediation coordinated by the victim services division of the Texas Department of Criminal Justice." This portion of the statute was not enacted until the 77th legislative session in 2001.

Patrick Drake, *Victim-Offender Mediation in Texas: When "Eye for Eye" Becomes "Eye to Eye"*, 47 S. Tex. L. Rev. 647 (2006) (footnotes omitted).

The relevant statutes read as follows:

Art. 56.02. CRIME VICTIMS' RIGHTS. (a) A victim, guardian of a victim, or close relative of a deceased victim is entitled to the following rights within the criminal justice system:

- (1) the right to receive from law enforcement agencies adequate protection from harm and threats of harm arising from cooperation with prosecution efforts;
- (2) the right to have the magistrate take the safety of the victim or his family into consideration as an element in fixing the amount of bail for the accused;
- (3) the right, if requested, to be informed:

(A) by the attorney representing the state of relevant court proceedings, including appellate proceedings, and to be informed if those proceedings have been canceled or rescheduled prior to the event; and

(B) by an appellate court of decisions of the court, after the decisions are entered but before the decisions are made public;

(4) the right to be informed, when requested, by a peace officer concerning the defendant's right to bail and the procedures in criminal investigations and by the district attorney's office concerning the general procedures in the criminal justice system, including general procedures in guilty plea negotiations and arrangements, restitution, and the appeals and parole process;

(5) the right to provide pertinent information to a probation department conducting a presentencing investigation concerning the impact of the offense on the victim and his family by testimony, written statement, or any other manner prior to any sentencing of the offender;

(6) the right to receive information regarding compensation to victims of crime as provided by Subchapter B, including information related to the costs that may be compensated under that subchapter and the amount of compensation, eligibility for compensation, and procedures for application for compensation under that subchapter, the payment for a medical examination under Article 56.06 for a victim of a sexual assault, and when requested, to referral to available social service agencies that may offer additional assistance;

(7) the right to be informed, upon request, of parole procedures, to participate in the parole process, to be notified, if requested, of parole proceedings concerning a defendant in the victim's case, to provide to the Board of Pardons and Paroles for inclusion in the defendant's file information to be considered by the board prior to the parole of any defendant convicted of any crime subject to this subchapter, and to be notified, if requested, of the defendant's release;

(8) the right to be provided with a waiting area, separate or secure from other witnesses, including the offender and relatives of the offender, before testifying in any proceeding concerning the offender; if a separate waiting area is not available, other safeguards should be taken to minimize the victim's contact with the offender and the offender's relatives and witnesses, before and during court proceedings;

(9) the right to prompt return of any property of the victim that is held by a law enforcement agency or the attorney for the state as evidence when the property is no longer required for that purpose;

(10) the right to have the attorney for the state notify the employer of the victim, if requested, of the necessity of the victim's cooperation and testimony in a proceeding that may necessitate the absence of the victim from work for good cause;

(11) the right to counseling, on request, regarding acquired immune deficiency syndrome (AIDS) and human immunodeficiency virus (HIV) infection and testing for acquired immune deficiency syndrome (AIDS), human immunodeficiency virus (HIV) infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, if the offense is an offense under Section 21.02, 21.11(a)(1), 22.011, or 22.021, Penal Code;

(12) the right to request victim-offender mediation coordinated by the victim services division of the Texas Department of Criminal Justice;

(13) the right to be informed of the uses of a victim impact statement and the statement's purpose in the criminal justice system, to complete the victim impact statement, and to have the victim impact statement considered:

(A) by the attorney representing the state and the judge before sentencing or before a plea bargain agreement is accepted; and

(B) by the Board of Pardons and Paroles before an inmate is released on parole;

(14) to the extent provided by Articles 56.06 and 56.065, for a victim of a sexual assault, the right to a forensic medical examination if, within 96 hours of the sexual assault, the assault is reported to a law enforcement agency or a forensic medical examination is otherwise conducted at a health care facility; and

(15) for a victim of an assault or sexual assault who is younger than 17 years of age or whose case involves family violence, as defined by Section 71.004, Family Code, the right to have the court consider the impact on the victim of a continuance requested by the defendant; if requested by the attorney representing the state or by counsel for the defendant, the court shall state on the record the reason for granting or denying the continuance.

Tex. Code Crim. Proc. 56.02(a) (emphasis supplied).

Tex. Civ. Prac. & Rem. Code § 154.023 states:

(a) Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.

(b) A mediator may not impose his own judgment on the issues for that of the parties.

(c) Mediation includes victim-offender mediation by the Texas Department of Criminal Justice described in Article 56.13, Code of Criminal Procedure.

Tex. Civ. Prac. & Rem. Code Ann. § 154.023 (Vernon).

And there are other important state statutory rights at stake. These actions violates Texas law. Tex. Civ. P. & R. Code Tit. 5, Sec. 110.001:

(a) In this chapter:

(1) "Free exercise of religion" means an act or refusal to act that is substantially motivated by sincere religious belief. In determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief.

(2) "Government agency" means:

(A) this state or a municipality or other political subdivision of this state; and

(B) any agency of this state or a municipality or other political subdivision of this state, including a department, bureau, board, commission, office, agency, council, or public institution of higher education.

(b) In determining whether an interest is a compelling governmental interest under Section 110.003, a court shall give weight to the interpretation of compelling interest in federal case law relating to the free exercise of religion clause of the First Amendment of the United States Constitution.

Sec. 110.002. APPLICATION. (a) This chapter applies to any ordinance, rule, order, decision, practice, or other exercise of governmental authority.

(b) This chapter applies to an act of a government agency, in the exercise of governmental authority, granting or refusing to grant a government benefit to an individual.

(c) This chapter applies to each law of this state unless the law is expressly made exempt from the application of this chapter by reference to this chapter.

Tex. Civ. P. & R. Code Tit. 5, Sec. 110.002.

Texas law protects religious freedom:

Sec. 110.003. RELIGIOUS FREEDOM PROTECTED. (a) Subject to Subsection (b), a government agency may not substantially burden a person's free exercise of religion.

(b) Subsection (a) does not apply if the government agency demonstrates that the application of the burden to the person:

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that interest.

(c) A government agency that makes the demonstration required by Subsection (b) is not required to separately prove that the remedy and penalty provisions of the law, ordinance, rule, order, decision, practice, or other exercise of governmental authority that imposes the substantial burden are the least restrictive means to ensure compliance or to punish the failure to comply.

Tex. Civ. P. & R. Code Tit. 5, Sec. 110.003.

Texas law specifically provides for injunctive relief under these circumstances:

Sec. 110.005. REMEDIES. (a) Any person, other than a government agency, who successfully asserts a claim or defense under this chapter is entitled to recover:

- (1) declaratory relief under Chapter 37;
- (2) injunctive relief to prevent the threatened violation or continued violation;
- (3) compensatory damages for pecuniary and nonpecuniary losses; and
- (4) reasonable attorney's fees, court costs, and other reasonable expenses incurred in bringing the action.

(b) Compensatory damages awarded under Subsection (a)(3) may not exceed \$10,000 for each entire, distinct controversy, without regard to the number of members or other persons within a religious group who claim injury as a result of the government agency's exercise of governmental authority. A claimant is not entitled to recover exemplary damages under this chapter.

(c) An action under this section must be brought in district court.

(d) A person may not bring an action for damages or declaratory or injunctive relief against an individual, other than an action brought against an individual acting in the individual's official capacity as an officer of a government agency.

(e) This chapter does not affect the application of Section 498.0045 or 501.008, Government Code, or Chapter 14 of this code.

Tex. Civ. P. & R. Code Tit. 5, Sec. 110.005.

These laws involve complicated interactions of different principles. Under these circumstances, the shortage of time – occasioned solely by defendants’ flat refusal even to engage with Rais Bhuiyan on his mandatory rights -- is such that an injunction must be issued in order to preserve the status quo.

b. MR. BHUIYAN HAS CLEARLY SHOWN THE “POSSIBILITY OF IRREPARABLE INJURY”

“A plaintiff seeking a preliminary injunction must establish that ... he is likely to suffer irreparable harm in the absence of preliminary relief.” *Winter v. Natural Res. Def. Council*, 129 S.Ct. 365, 375 (2008). To establish “threat of irreparable harm,” a plaintiff must demonstrate that if the district court denied the grant of a preliminary injunction, irreparable harm would result. *Janvey*, 628 F.3d at 179. “A presently existing actual threat must be shown.” *United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001) (quoting Wright, Miller & Kane, *Federal Practice & Procedure*; Civil 2D § 2948.1 at 153-56). “However, the injury need not have been inflicted when application is made [for a preliminary injunction] or be certain to occur; *a strong threat* of irreparable injury before trial is an adequate basis [for the issuance of a preliminary injunction].” *Id.* (emphasis in original). To obtain a preliminary injunction, a movant must prove a substantial threat that he will suffer irreparable harm if the injunction is not granted. *Shanks v. City of Dallas*, 752 F.2d 1092, 1097 (5th Cir. 1985).

The threat of irreparable injury to Mr. Bhuiyan is not just substantial here, it is inevitable, if this injunction is not granted. Mark Ströman will be executed and Mr. Bhuiyan's quest to avail himself of his rights will be permanently lost. He would be denied the process of healing that he desperately requires. The denial of this injunctive relief would victimize Plaintiff a second time, as it would permanently deprive him of any opportunity to close this chapter of his life, obtain peace of mind, and move on from the initial victimization that he suffered when he was shot.

c. THE THREAT OF “INJURY TO OTHER PARTIES” IS LIMITED WHERE DEFENDANTS HAVE SOUGHT TO MANIPULATE THE FORUM IN WHICH THE CASE SHOULD BE HEARD

The threatened injury to Mr. Bhuiyan will vastly outweigh any harm to the State of Texas. Indeed, Mr. Stroman's execution prior to Mr. Bhuiyan going through the VOM/D would permanently leave Mr. Bhuiyan's issue moot. The only harm to the State would be a delay of the execution scheduled for this week.

“A plaintiff seeking a preliminary injunction must establish that ... that the balance of equities tips in his favor...” *Winter*, 129 S. Ct. at 375 (emphasis added). In each case where a plaintiff seeks a preliminary injunction, the courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter*, 129 S.Ct. at 376, quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987). “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Id.* at 376-77, quoting *Weinberger v. Romero-Barcello*, 456 U.S. 305, 312 (1982).

As discussed in detail above, Defendants have no claim to clean hands – indeed, dirtier hands have perhaps rarely been seen in such a context. And defendants, having removed a state court proceeding to federal court, can hardly be heard to complain that a stay would infringe

states' rights. Indeed, Texas law would also provide for a stay to preserve jurisdiction under the facts of this case.¹²

Mr. Bhuiyan does not know – at the time of writing – whether the District Court will refer the state court rights back to state court where they belong. He has asked for this to be done. If the District Court does refer the issues back, this will simply underline how defendants have been forum shopping in a most extraordinary way, thereby seeking to prevent Mr. Bhuiyan from ever asserting his rights. It would be entirely reasonable for a federal court to issue a temporary stay to permit Mr. Bhuiyan to get to state court under those circumstances. If, on the other hand, the District Court decides to hold onto the state court claims, asserting pendant jurisdiction, then complex issues will arise concerning the propriety of such a decision.

d. THE PUBLIC INTEREST, EXPRESSED BY OVERWHELMING SUPPORT FOR VICTIMS' RIGHTS, CLEARLY SUPPORTS A STAY

“A plaintiff seeking a preliminary injunction must establish that ... *an injunction is in the public interest.*” *Winter*, 129 S. Ct. at 375 (emphasis added). Far from being a disservice toward public interest, the injunction here will serve the very purposes that the Texas Victims Bill of Rights was meant to serve. There can be no harm in delaying the execution for the VOM/D commence.

¹² Rule 52.10 of the Texas Rules of Appellate Procedure provides that a "relator may file a motion to stay any underlying proceeding or for any other temporary relief pending the court's action on the underlying petition." Rule 52.10 exists to "afford the court opportunity to address the dispute encompassed within a petition for writ of mandamus (for instance) by maintaining the status quo until it can address the dispute." *In re Kelleher*, 999 S.W.2d 51, 52 (Tex. App.-Amarillo 1999, orig. proceeding); *H & R Block, Inc. v. Haese*, 992 S.W.2d 437, 439 (Tex. 1999) (per curiam) (in continuing stay of district court's order during appeal of that order to the court of appeals, explaining that "our stay preserved the issues from becoming moot so that they could be reviewed by that court"); *see also* Alan Wright et al., *Appellate Practice and Procedure*, 53 SMU L. R. Ev. 617, 665 (2000) ("The supreme court also has the power to stay enforcement of a trial court order pending the court of appeals' review of the order to prevent the appeal from becoming moot.").

Indeed, the State of Texas has a strong public interest in allowing victims to pursue mediation. The Texas Civil Practice and Remedies Code, Chapter 154 Alternative Dispute Resolution Procedures, states that “[i]t is the policy of this state to encourage the peaceable resolution of disputes” and that “[i]t is the responsibility of all trial and appellate courts and their court administrators to carry out the policy.” Civ. P. and R. Chapter 154, Sec. 154.002 and 154.003. This “[m]ediation includes victim-offender mediation by the Texas Department of Criminal Justice described in Article 56.13, Code of Criminal Procedure.” Sec. 154.023(c).

Here, there are two mediations that must take effect: one, between Mr. Bhiuyan and Mark Ströman. The second between Mr. Bhuiyan and the defendants. The defendants simply would not enter into a dialog with Mr. Bhuiyan before the filing of this litigation. He wrote to them, he called them -- they ignored him and were rude to him. This Court, in issuing an injunction, is simply mediating and forcing the Defendants to behave as civilized people ought to behave when faced with a traumatized victim of violent crime.

The rights of victims are enshrined in the Texas Constitution. “A crime victim has the following rights: (1) the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process”. Tex. Const. Art. 1, §30(a)(1). Thus, the public has a significant policy interest in FAVOR of granting the injunction and, because the injunction will only temporarily delay the execution of the state court judgment against Mr. Stroman, it will not harm the public in any way. It will merely allow time to fully litigate the matter at hand and hopefully result in the enforcement of rights Mr. Bhuiyan has just recently discovered he has.

CONCLUSION & REQUESTED RELIEF

RAIS BHUIYAN therefore respectfully moves that this Court issue a stay of Mark Ströman's execution in order to allow for the full consideration of this case.

Respectfully submitted, this 20day of July, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing pleading to be served on opposing counsel, *via* hand delivery and facsimile to:

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