UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JOSEPH LEWIS, JR., *et al.*, on behalf of themselves and all others similarly situated, Plaintiffs, v. BURL CAIN, Warden of the Louisiana State Penitentiary, in his official capacity, *et al.*, Defendants.	CIVIL ACTION NO. 3:15-cv-00318 JUDGE SDD MAGISTRATE RLB

MEMORANDUM IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION TO RESTRAIN DEFENDANTS FROM TRANSFERRING COVID-19 CARRIERS TO LOUISIANA STATE PENITENTIARY

Defendants are about to embark on a course of action that will likely result in the death of dozens if not hundreds of Class members. According to multiple press reports, Defendants intend to transfer persons with COVID-19 from prisons and jails throughout Louisiana to the Louisiana State Penitentiary at Angola ("LSP").[1] But LSP has "no place to treat an ill person with COVID-19 except in a general housing unit or on the infirmary, both of which would expose other patients to infection."[2] And even if Defendants could somehow isolate the transferred inmates while treating their condition, LSP's inappropriate policy on staff who may have contracted COVID-19 makes it likely that staff would transmit the virus to other staff and to the general population of LSP. In such settings, transmission to large numbers of Class members is inevitable.[3]

As established at the 2018 trial in this case, LSP has a uniquely high number of inmates who are elderly, immuno-compromised, or disabled, or have cardiac, pulmonary, or cardiovascular conditions—individuals who are at particularly high risk for severe or even fatal consequences if

[1] *See, e.g.*, Emily Lane, *Louisiana plans to house local and state inmates with coronavirus at Angola and Allen Correctional*; WDSU NEWS (March 27, 2020), https://www.wdsu.com/article/louisiana-plans-to-house-inmates-with-coronavirus-at-angola-and-another-prison/31960114.
[2] Supplemental Declaration of Dr. Michael Puisis ("Supp. Puisis Dec."), ¶ 13.
[3] *Id.* ¶¶ 7-10.

they contract COVID-19.[4] If Defendants intentionally bring carriers of COVID-19 to LSP and treat them in the infirmary—the only place at LSP where even moderate cases of COVID-19 could conceivably be treated—"the infection is likely to spread throughout this unit of compromised patients," just like "nursing homes where COVID is known to have caused significant death."[5] Defendants will be intentionally and willfully exposing the most vulnerable people in the entire DOC system to an unconscionably high risk of death or serious harm.

Moreover, as proven at the 2018 trial in this case, the medical system at LSP is unconstitutional at its worst and severely overtaxed at its best. The transfer of numerous patients requiring intensive medical care, and the increased risk of an outbreak sweeping through both the Class and the medical personnel who treat them, will devastate LSP's capacity to provide care to even those inmates who do not contract COVID-19. This will exacerbate the already unconstitutional risk to which Defendants subject Class members, and result in avoidable suffering and death.

Plaintiffs have expressed this concern to Defendants, who have refused to confirm whether DOC intends to transfer patients with COVID-19 to LSP.[6] Indeed, they have refused even to get on the phone with Plaintiffs.[7] Instead, they have stated that they will respond only in their briefing on Plaintiffs' Emergency Motion to Re-Open Discovery Regarding COVID-19. But if Defendants carry out their reported plan before the Court has the opportunity to rule on Plaintiffs' motion, it will be too late to provide meaningful relief: Defendants will have already introduced COVID-19 to LSP and the risk of transmission will be impossible to undo.

The four-factor test for a preliminary injunction and temporary restraining order is therefore readily satisfied. Plaintiffs can likely show that the transfer plan will knowingly and unconstitutionally place Class members at a substantial risk of serious harm, and there can be no question that that harm would be irreparable. The public interest weighs heavily against a plan that would introduce

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[4] *Id.* ¶ 12.
[5] *Id.* ¶ 10.
[6] *See* Supplemental Declaration of Jeffrey Dubner ("Supp. Dubner Dec."), Ex. A, ¶¶ 4-12.
[7] *See id.* ¶ 3; Declaration of Jeffrey Dubner ("First Dubner Dec.), Rec. Doc. No. 580-3, ¶¶ 5-8.

COVID-19 to a population where it is not known to have spread, and from where it could easily spread to the broader community and devastate the region's medical infrastructure. And Defendants would suffer no harm from an injunction. Accordingly, Plaintiffs respectfully request that the Court immediately restrain Defendants from knowingly transferring patients with COVID-19 to LSP, and then issue a preliminary injunction enjoining the transfer plan once the parties have fully briefed the issue.

FACTUAL BACKGROUND

I. COVID-19

COVID-19 "is a novel virus for which there is no established curative medical treatment and no vaccine."[8] Compared with past outbreaks of communicable diseases, the COVID-19 pandemic is of "unprecedented magnitude" because of the "magnitude and speed of transmission of COVID-19."[9] COVID-19 "is transmitted by droplets of infected aerosol when people with the infection cough," which can survive in the air for up to three hours—and on surfaces such as plastic and stainless steel for up to 2-3 days.[10]

COVID-19 is an acute respiratory syndrome that can cause pneumonia, acute respiratory distress syndrome, respiratory failure, heart failure, sepsis, and other potentially fatal conditions.[11] Treatment for severe cases of COVID-19 include "respiratory isolation, oxygen, and mechanical ventilation."[12] COVID-19 is particularly dangerous for elderly or immunocompromised individuals and those who have chronic lung disease, moderate to severe asthma, serious heart conditions, severe obesity, or other medical conditions such as diabetes, renal failure, or liver disease, particularly if not well controlled.[13] According to a study of nearly 1600 COVID-19 cases, "patients with at least

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[8] Supp. Puisis Dec. ¶ 2.
[9] *United States v. Martin*, No. 19-cv-140-13, 2020 WL 1274857, at *2 (D. Md. Mar. 17, 2020).
[10] Supp. Puisis Dec. ¶ 6.
[11] Fei Zhou et al., *Clinical Course and Risk Factors for Mortality of Adult Inpatients with COVID-19 in Wuhan, China: A Retrospective Cohort Study*, 395 LANCET 1054 (Mar. 11, 2020), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext.
[12] Supp. Puisis Dec. ¶ 13.
[13] Centers for Disease Control ("CDC"), "People Who Are at Higher Risk for Severe Illness" (Mar. 26, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.

one co-morbidity—including cardiovascular disease, diabetes and chronic kidney diseases—'had a 79% greater chance of requiring intensive care or a respirator or both, or of dying.'"[14] Nationwide, the mortality rate among persons aged 55-64 is 1-3%; among persons aged 65-84, 3-11%; and among persons 85 or older, 10-27%.[15]

To reduce the risk of contracting COVID-19, the Centers for Disease Control and Prevention ("CDC") advises all people—and particularly those "at higher risk of severe illness"—to "[s]tay home," "[w]ash your hands often," "[a]void close contact (6 feet, which is about two arm lengths) with people who are sick," and "[c]lean and disinfect frequently touched surfaces."[16] The President's Task Force on COVID-19 recommends avoiding gatherings of more than 10 people.[17]

Louisiana is experiencing some of the worst COVID-19 outbreaks in the world. As of March 29, 2020, Louisiana had 3540 confirmed cases of COVID-19, with at least 151 deaths.[18] A study from the University of Louisiana at Lafayette reported that COVID-19 cases grew at 67.8%, the highest rate in the United States.[19] New Orleans "is quickly becoming a coronavirus epicenter in

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[14] *Coronel v. Decker*, No. 20-cv-2472, 2020 WL 1487274, at *3 (S.D.N.Y. Mar. 27, 2020) (slip op.) (quoting Sharon Begley, *Who Is Getting Sick, and How Sick? A Breakdown of Coronavirus Risk by Demographic Factors*, STAT NEWS (Mar. 3, 2020), https://www.statnews.com/2020/03/03/who-is-getting-sick-and-how-sick-a-breakdown-of-coronavirus-risk-by-demographic-factors/; *see also* Jason Oke & Carl Heneghan, *Global Covid-19 Case Fatality Rates*, Oxford COVID-19 Evidence Service (Mar. 28, 2020), https://www.cebm.net/covid-19/global-covid-19-case-fatality-rates/ ("Patients with comorbid conditions had much higher [fatality] rates.").

[15] CDC COVID-19 Response Team, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)—United States, February 12–March 16, 2020*, 69 MORBIDITY AND MORTALITY WEEKLY REPORT 343 (Mar. 26, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm; *see also* Oke & Heneghan, *supra* n.14 (finding similar mortality rates globally).

[16] CDC, "What You Can Do" (Mar. 21, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/what-you-can-do.html; *see also Martin*, 2020 WL 1274857, at *2 ("With no known effective treatment, and vaccines months (or more) away, public health officials have been left to urge the public to practice 'social distancing,' frequent (and thorough) hand washing, and avoidance of close contact with others … all of which are extremely difficult to implement in a detention facility.").

[17] Supp. Puisis Dec. ¶ 10.

[18] *Coronavirus Updates in Louisiana: 3540 COVID-19 Cases in State; 151 Deaths Reported*, WDSU NEWS (Mar. 29, 2020), https://www.wdsu.com/article/coronavirus-updates-in-louisiana-3540-covid-19-cases-in-state-151-deaths-reported/31969586#.

[19] Adam Daigle, *Coronavirus Cases Grew Faster in Louisiana Than Anywhere Else in the World: UL Study*, THE ACADIANA ADVOCATE (Mar. 24, 2020), https://www.wdsu.com/article/coronavirus-updates-in-louisiana-3540-covid-19-cases-in-state-151-deaths-reported/31969586#.

the U.S.,"[20] while "an equally alarming outbreak" is occurring in Shreveport.[21] As of yet, however, West Feliciana Parish, where LSP is located, is only known to have one or two confirmed COVID-19 cases.[22]

II. LSP Presents a Heightened Risk of Transmission of COVID-19

As a rule, "[i]ndividuals in carceral settings are at a significantly higher risk of spreading infectious diseases."[23] This is because it is typically "not possible to isolate … detainees from the outside world (including from staff and vendors who may have been exposed to COVID-19), nor is it possible to isolate them from one another."[24] "Prevention of contact with an infected droplet is significantly more difficult in a prison than in the community."[25]As a result, "[j]ails and prisons are long known to be a breeding ground for infectious respiratory illness."[26] And as has long been understood, "[t]he probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, [and] insufficient infection-control expertise."[27]

LSP poses a particularly high risk of transmission. The CDC recommendations described above "are not possible in LSP."[28] The majority of inmates live in dormitories of up to 86 people,

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[20] Erika Edwards, *Why New Orleans Is Quickly Becoming a Coronavirus Epicenter in the U.S.*, NBC NEWS (Mar. 26, 2020), https://www.nbcnews.com/health/health-news/why-new-orleans-quickly-becoming-coronavirus-epicenter-u-s-n1169376.

[21] Kent Sepkowitz, *The Alarming Message of Louisiana's Sharp Rise in Covid-19 Cases*, CNN (Mar. 29, 2020) (https://www.cnn.com/2020/03/29/opinions/shreveport-louisiana-new-orleans-coronavirus-kent-sepkowitz-opinion/index.html).

[22] Charles Lussier, *School Leader in West Feliciana Parish in Hospital for "Presumed Coronavirus,"* THE ADVOCATE (Mar. 27, 2020), https://www.theadvocate.com/baton_rouge/news/coronavirus/article_91166ce4-7037-11ea-b95d-3b57904f3ce6.html; Matt Sledge, *Two Louisiana Prison Staffers, Including Angola Employee, Test Positive for Coronavirus*, NOLA.com (Mar. 26, 2020), https://www.nola.com/news/coronavirus/article_e947332a-6f70-11ea-83bf-8fb78c8ff09c.html.

[23] *Coronel*, 2020 WL 1487274 (internal quotation omitted).

[24] *Id.*

[25] Supp. Puisis Dec. ¶ 7.

[26] *Id.* ¶ 8.

[27] *United States v. Stephens*, No. 15-cr-95, --- F. Supp. 3d ----, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (quoting Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047, 1047 (Oct. 2007), https://doi.org/10.1086/521910.

[28] Supp. Puisis Dec. ¶ 7.

which "are not arranged to provide social distancing as the distance between beds is approximately 3 feet."[29] "Large fans blow air through the units which is likely to spread contagious agents embedded in aerosol like COVID-19."[30] As a result, "[o]ne couldn't devise a system more contrary to current public health recommendations and the President's Task Force recommendations than a prison like LSP."[31] Indeed, "LSP has worse living conditions and higher commingling of people than cruise ships and nursing homes, where COVID-19 is known to have easily spread" and "caused significant death."[32]

III. LSP Houses Thousands of Class Members Who Are at Particular Risk of Death If They Contract COVID-19

As shown on the record throughout the course of this case, LSP houses thousands of people who are at high risk of suffering severe or even fatal effects if they contract COVID-19 due to the "aging and elderly" population,[33] as well as the extremely high numbers of people suffering from chronic diseases.[34]

The most vulnerable among the LSP population are the patients at the infirmaries in the Treatment Center. Most if not all of these patients have one or more conditions that put them at high risk. Their "beds are in dormitory style setting and are close together."[35] "If inmates with COVID-19 are housed on the infirmary rather than outside hospitals, the infection is likely to spread throughout this unit of compromised patients."[36] The approximately 240 residents of the so-called "medical dormitories" are nearly as vulnerable: virtually all have risk factors for severe consequences from COVID-19, yet they live in "dormitories [that] are incapable of allowing inmates to follow

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[29] *Id.* ¶ 10.
[30] *Id.*
[31] *Id.*
[32] *Id.* ¶¶ 7, 10.
[33] *See* Oct. 24, 2018 Testimony of Tonia Faust at 104.
[34] *See* Nov. 2, 2017 Class Cert. Tr. at 23:12-24:16, 51:9-21; Rec. Doc. 377 at 4 (Dr. Lavespere testifying at the class certification hearing that approximately 2600 patients at Angola have hypertension, 800 have asthma or COPD, 800 have hepatitis C, 900 have hyperlipidemia, 600 have diabetes, 112 have cancer, 125 have hyperthyroidism, 110 have HIV, 50 have seizure disorder, and 75 are anticoagulated).
[35] Supp. Puisis Dec. ¶ 10.
[36] *Id.*

current CDC recommendations regarding prevention against COVID-19."[37] These "[d]ormitories with large numbers of persons with severe medical conditions are similar to nursing homes where COVID is known to have caused significant death."[38]

IV. Defendants Intend to Transfer Inmates with COVID-19 to LSP from Facilities in Other Parts of Louisiana

To prevent spread of COVID-19, Defendants have suspended "[t]ransfers between DOC facilities and/or local facilities … indefinitely absent extenuating circumstances."[39] But they are not applying this protective policy to LSP, despite it having the largest concentration of high-risk inmates in the entire DOC system. Instead, Defendants plan to "house inmates who test positive for the coronavirus, including those from all over the state," at LSP and the Allen Correctional Center.[40] According to a DOC spokesman, "[o]perators of local jails not equipped to treat coronavirus patients, as well as other state prisons, can transfer inmates with COVID-19 to [LSP]."[41]

According to news reports, Defendants plan to house the patients brought to Angola at "Camp J," an outcamp that Defendants shut down in May 2018. But as discussed at trial, the outcamps have limited medical facilities.[42] "LSP is not set up to manage hospital level care including ventilation" even at the Treatment Center, much less the outcamps.[43] To the extent any of the transferred patients require intensive medical care, that would need to occur in the Treatment Center. LSP is 25 miles from the nearest hospital and even further from the nearest hospital of any meaningful size,[44] and Defendants "frequently decline to send patients to outside hospitals when indicated by urgent, life-threatening vital signs and symptoms,"[45] making it highly likely that they will

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[37] *Id.*
[38] *Id.*
[39] Ex. A, First Dubner Dec., Rec. Doc. No. 580-4 at 2 (Mar. 25, 2020 email from Randy Robert to Jeffrey Dubner).
[40] Lane, *supra* n.1.
[41] *Id.*
[42] Oct. 9, 2018 Testimony of Dr. Mike Puisis at 117-120.
[43] Supp. Puisis Dec. ¶ 13.
[44] Rec. Doc. No. 573 ¶ 27.
[45] Rec. Doc. No. 573 ¶ 230.

attempt to treat serious cases of COVID-19 at the Treatment Center, with all the attendant risk of transmission throughout the facility.

Even if Defendants could find a way to provide all medical care for the COVID-19 transferees at Camp J, medical personnel and other correctional staff regularly move between Camp J and the Treatment Center, creating a high likelihood of transmission from Camp J to the rest of the prison. Equally concerning, Defendants' plan for preventing staff from transmitting the virus is directly contrary to CDC guidelines. Defendants have directed employees found to have a fever to be sent home, and then return to work as soon as 24 hours after they are fever-free without the use of fever medication.[46] But the CDC recommends returning to work no less than *three* days after resolution of the fever—and at least *seven* days after symptoms first appeared (or after receiving multiple negative COVID-19 tests).[47]

Medical personnel are at particular risk for contracting and spreading COVID-19.[48] In many medical systems, this has impaired the ability to provide care for serious non-COVID-19 conditions. As detailed at the trial, countless Class members require ongoing care for serious, chronic medical conditions, and Class members need emergency care for urgent medical needs every day even in normal times.[49]

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[46] Rec. Doc. No. 580-4 at 31.
[47] Supp. Puisis Dec. ¶ 22 n.17; *see* CDC, "What to Do If You Are Sick" (Mar. 25, 2020), https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html (under "How to discontinue home isolation"); *see also* CDC, "Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities" (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (advising that symptomatic correctional staff should follow the guidance in "What to Do If You Are Sick").
[48] CDC, "Interim Infection Prevention and Control Recommendations" (Mar. 19, 2020), https://www.cdc.gov/coronavirus/2019-ncov/infection-control/control-recommendations.html
[49] *See, e.g.*, JX-rr, R. Lavespere Depo. at 44:4-7 (testifying that as many as 76 patients may be seen each day in the ATU).

V. Defendants Have Refused to Meet and Confer with Plaintiffs About the Transfer Plan

News reports first disclosed Defendants' plan to transfer inmates with COVID-19 to LSP on Friday, March 27, 2020.[50] The following morning, Plaintiffs contacted Defendants' counsel to inquire whether the reports were accurate, explaining that the high proportion of high-risk individuals and distance from hospital care would make the plan "unconscionably risky to Class members."[51] Plaintiffs asked Defendants whether their understanding of DOC's plans was incorrect, and advised Defendants that they would move for emergency relief if they did not hear from Defendants on the subject by Monday, March 30, 2020.[52] Defendants informed Plaintiffs that they would not respond, due to Plaintiffs' filing of their motion to reopen discovery.[53] Plaintiffs twice more asked for Defendants to confirm whether DOC did in fact plan to transfer patients with COVID-19 and if Defendants would meet and confer about it, explaining that "given the urgency of the approaching tragedy we really have no choice but to go to the Court in an expedited fashion if you refuse even to meet and confer with us."[54]

Late Monday afternoon, Defendants' counsel stated that "DOC has not transferred anyone with Covid-19 to Angola and there are no imminent plans to make any such transfers at this time," but pointedly did not respond to Plaintiffs' request that they confirm whether Defendants planned to transfer inmates with COVID-19 to LSP at all.[55] Within an hour, Plaintiffs learned that Defendants had begun transferring inmates with COVID-19 to Allen.[56] Accordingly, Plaintiffs specifically asked "whether 1) DOC plans to transfer patients with COVID-19 from other jails and facilities to LSP (whether before or after Allen runs out of room for transfers) and 2) whether Defendants will provide us with 14 days' notice before making such transfers, allowing us time at

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[50] *See* Lane, *supra* n.1.
[51] Ex. A, Supp. Dubner Dec.; Supp. Dubner Dec. ¶¶ 3-4.
[52] Supp. Dubner Dec. ¶ 4
[53] *Id.* ¶ 6.
[54] *Id.* ¶¶ 7-9; Ex. A, Supp. Dubner Dec.
[55] Supp. Dubner Dec. ¶ 10; Ex. A, Supp. Dubner Dec.
[56] Supp. Dubner Dec. ¶ 11.

that point to bring the matter to the Court in a more orderly fashion,"[57] and requested a response by 10:30 a.m. Tuesday, March 31, 2020. Defendants responded immediately to ask who told Plaintiffs that transfers had begun, but declined to respond to Plaintiffs' questions.[58]

LEGAL STANDARD

In order to obtain a preliminary injunction or temporary restraining order, "Plaintiffs must demonstrate: (1) a substantial likelihood of success on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury outweighs the threatened harm to the defendant, and (4) that granting the preliminary injunction will not deserve the public interest."[59] Plaintiffs must show each of these factors.[60] However, Plaintiffs are "not required to prove [their] entitlement to summary judgment"; rather, they "must present a prima facie case but need not show that [they are] certain to win."[61]

The Court may issue a temporary restraining order without awaiting for the adverse party's response if it finds that "immediate and irreparable injury … will result to the movant before the adverse party can be heard in opposition."[62]

ARGUMENT

Plaintiffs are a certified Class of "all inmates who [are] now, or will be in the future, incarcerated at LSP."[63] In a three-week trial in October 2018, they proved "that the medical care at [LSP] is unconstitutional in some respects."[64] In other words, they have shown that Defendants have acted "with deliberate indifference to [their] serious medical needs"[65] and that they are

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[57] *Id.* ¶ 12; Ex. A, Supp. Dubner Dec.
[58] Supp. Dubner Dec. ¶ 13; Ex. A, Supp. Dubner Dec.
[59] *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, No. 18-cv-23-SDD-EWD, 2018 WL 4701849, at *2 (M.D. La. Jan. 30, 2018)
[60] *Id.*
[61] *New River Shopping Ctr., LLC v. Villenurve*, No. 17-cv-281-SDD-RLB, 2017 WL 1821108, at *2 (M.D. La. May 5, 2017).
[62] Fed. R. Civ. P. 65(b)(1).
[63] Rec. Doc. 394 at 30.
[64] Rec. Doc. 578.
[65] *Domino v. Tex. Dep't of Criminal Justice*, 239 F.3d 752, 754 (5th Cir. 2001).

"incarcerated under conditions posing a substantial risk of serious harm."[66] As yet, the Court has not entered any remedy alleviating these unconstitutional conditions.

Now, Defendants are on the verge of taking a step that will exponentially exacerbate this constitutional violation. They are about to intentionally bring COVID-19, a deadly and contagious virus of "unprecedented magnitude,"[67] to LSP. Doing so is highly likely to lead to an outbreak of COVID-19 that could literally decimate the elderly and medically vulnerable population of LSP. Dozens if not hundreds of Class members may die. And even those who do not contract COVID-19 could face serious harm. COVID-19 outbreaks wreak devastating harm on even the most prepared medical systems, and they would cripple LSP's already unconstitutional system—further limiting access to care for the most vulnerable Class members.

Plaintiffs more than meet the standard for a preliminary injunction. There is a substantial likelihood that they can show that the transfer plan is unconstitutional under the Eighth Amendment, and the substantial threat of irreparable harm is incontestable. There would be no harm to Defendants from enjoining this plan, and the public interest stands strongly against allowing Defendants to create a COVID-19 cluster where none currently exists, in an area that is unequipped to handle an outbreak.

Once Defendants introduce COVID-19 to LSP, there will be no unringing the bell. As soon as the transfers begin, transmission could immediately spread through LSP like wildfire and rapidly become uncontainable even in the best of circumstances and with the best of intentions. Accordingly, the Court should immediately enter an order temporarily restraining Defendants from effectuating their plan while it considers the full motion for a preliminary injunction and while the parties confer to determine whether there is any way to obviate the need for such an injunction.

I. Plaintiffs Face a Substantial Threat of Irreparable Injury

Thousands of Class members are elderly or have medical conditions that make it highly likely that they would experience severe consequences, and possibly death, if they contract COVID-19.[68]

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[66] *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).
[67] *Martin*, 2020 WL 1274857, at *2.
[68] *See supra* nn.33 & 34.

And because Class members are incarcerated in dormitories with little to no control over their contact with others and the hygiene of their confinement, they cannot practically take the preventative measures recommended by the CDC and the President's Task Force on COVID-19.[69] They are entirely at the mercy of Defendants.

Defendants' affirmative plan is to take individuals with COVID-19 from hotspots around the state and bring them to LSP. For all the reasons explained above, it would take a miracle for this plan not to result in a COVID-19 outbreak at LSP. And even if Defendants could somehow show that transmission was not a virtual certainty, "it is not necessary to demonstrate that harm is inevitable."[70] Rather, all that is required is "a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm."[71] At a minimum, there is no question that the likelihood of transmission of this virus of unprecedented "magnitude and speed of transmission"[72] through a facility that could hardly be "more contrary to current public health recommendations and the President's Task Force recommendations"[73] is "significant" and "imminent."

Nor can there be any question that the threatened harm is irreparable. Thousands of Class members have risk factors making death or severe illness likely if they contract COVID-19.[74] "It goes without saying that … death is an irreparable injury."[75] Even for those who recover, the extreme suffering that they may experience during their illness[76] and the possibility of long-term

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[69] *See supra* nn.16 & 17.
[70] *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986).
[71] *Id.*
[72] *Martin*, 2020 WL 1274857, at *2.
[73] Supp. Puisis Dec. ¶ 10.
[74] *See supra* nn.33 & 34.
[75] *East v. Blue Cross & Blue Shield of La.*, No. 14-cv-115-BAJ-RLB, 2014 WL 8332136, at *2 (M.D. La. Feb. 24, 2014); *accord, e.g.*, *Turner v. Epps*, 842 F. Supp. 2d 1023, 1028 (S.D. Miss. 2012) (describing death as "the single most irreparable harm of all").
[76] *See, e.g.*, Graham Readfearn, *What Happens to People's Lungs When They Get Coronavirus?*, THE GUARDIAN (Mar. 28, 2020, 2:56 AM), https://www.theguardian.com/world/2020/mar/28/what-happens-to-peoples-lungs-when-they-get-coronavirus (noting that "almost all serious consequences of Covid-19 feature pneumonia" and that "there is evidence that pneumonia caused by Covid-19 may be particularly severe." The lungs "become filled with inflammatory material [and] are unable to

respiratory impairment[77] could not be erased. Such "bodily injury is not far behind" death as "an irremediable and unfathomable harm."[78]

Moreover, COVID-19 outbreaks have brought some of the most well-equipped medical systems in the country to their knees.[79] In New York City, for example, many people with serious non-COVID-19 conditions are finding it difficult if not impossible to obtain needed medical care.[80] People have died while waiting in line for overburdened emergency rooms.[81] Medical personnel have been hit particularly hard, leading to numerous deaths and further depleting medical systems'

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get enough oxygen to the bloodstream, reducing the body's ability to take on oxygen and get rid of carbon dioxide").

[77] *See, e.g.*, Peter Wark, *How Are the Most Serious COVID-19 Cases Treated, and Does the Coronavirus Cause Lasting Damage?*, THECONVERSATION.COM (Mar. 29, 2020, 9:29 PM), http://theconversation.com/how-are-the-most-serious-covid-19-cases-treated-and-does-the-coronavirus-cause-lasting-damage-134398 ("At this stage there is no data on the long-term effects of COVID-19. But we can look at the after-effects of other acute viral respiratory diseases such as influenza, SARS and Middle East respiratory syndrome (MERS). In these diseases, collectively called acute respiratory distress syndromes (ARDS), the fragile small airways and air sacs become damaged by inflammation, can become blocked by fluid and blood, and are replaced by scar tissue as they heal. This can stiffen the lungs – at first from fluid and then from scar tissue – impairing their ability to transfer oxygen and making breathing more laboured.").

[78] *Garcia v. Google, Inc.*, 743 F.3d 1258, 1268 (9th Cir. 2014); *see also, e.g.*, *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (noting that the "suffer[ing] of physical effects" can "serve as an independent basis for [a] conclusion that the plaintiff would suffer irreparable harm in the absence of preliminary injunctive relief").

[79] *See, e.g.*, Michael Rothfeld, Somini Sengupta, Joseph Goldstein, and Brian M. Rosenthal, *13 Deaths in a Day: An "Apocalyptic" Coronavirus Surge at an N.Y.C. Hospital*, NEW YORK TIMES (Mar. 25, 2020), https://www.nytimes.com/2020/03/25/nyregion/nyc-coronavirus-hospitals.html ("[H]ospitals are under siege. New York City's hospitals run the gamut from prestigious teaching institutions catering to the elite to public hospitals providing care for some of the poorest communities in the nation. Regardless of whom they serve, few have been spared the impact of the pandemic: A flood of sick and fearful New Yorkers has besieged emergency rooms across the city."); *see also* Miguel Marquez and Sonia Moghe, *Inside a Brooklyn Hospital that Is Overwhelmed with COVID-19 Patients and Deaths*, CNN (Mar. 30, 2020, 12:25 PM), https://www.cnn.com/2020/03/30/us/brooklyn-hospital-coronavirus-patients-deaths/index.html ("'A medical war zone,' [Dr. Arabia] Mollette, an emergency room physician at Brookdale Hospital, told CNN. 'Every day I come, what I see on a daily basis, is pain, despair, suffering and health care disparities.'").

[80] *Id.*

[81] *See, e.g.*, Jessica Glenza, Ankita Rao, and Alexandra Villarreal, *"It's What Was Happening in Italy": the Hospital at the Center of New York's COVID-19 Crisis*, THE GUARDIAN (Mar. 27, 2020, 1:59 PM), https://www.theguardian.com/us-news/2020/mar/27/new-york-coronavirus-elmhurst-hospital.

resources.[82] The strain on LSP's already overtaxed and insufficient system will almost certainly be catastrophic and could result in grievous harm to the many Class members with chronic conditions that require regular medical care, as well as Class members who experience emergency medical needs of all types. Class members' access to physicians, nurses, outside specialists, and hospital care is already unconstitutionally limited, as shown at trial; if Defendants introduce a novel virus of unprecedented magnitude to LSP, even the faint access to care that existed before the outbreak will be beyond reach.

II. Plaintiffs Have a Substantial Likelihood of Success on the Merits

To show a substantial likelihood of success on the merits, Plaintiffs "must present a prima facie case but need not show that [they are] certain to win."[83] Plaintiffs are likely to be able to show that the transfer plan is unconstitutional for three reasons. First, for all the reasons explained above, it directly exposes Class members to a heightened risk of contracting COVID-19. "[C]orrectional officials have an affirmative obligation to protect inmates from infectious disease."[84] The Eighth Amendment "require[s] a remedy" where their jailors knowingly expose them to a risk of contracting serious infectious diseases, even if "it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed."[85]

Second, Plaintiffs have already shown that Defendants' inadequate medical system places them at a substantial risk of serious harm.[86] Defendants' new plan is to make that unconstitutional system even worse by introducing a virulent communicable disease into the system, exponentially increasing providers' caseloads and reducing access to care for all Class members. In effect, Defendants are intentionally taking capacity out of LSP's health care system, exacerbating all the

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[82] *See, e.g.*, Dylan Scott, Umair Irfan, and Jen Kirby, *The Next Coronavirus Crisis Will Be a Shortage of Doctors and Nurses*, VOX (Mar. 26, 2020, 7:00 AM), https://www.vox.com/2020/3/26/21192191/coronavirus-us-new-york-hospitals-doctors-nurses.
[83] Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, 11A Federal Practice & Procedure § 2948.3 (2d ed. 1995); *see also Janvey v. Alguire*, 647 F.3d 585, 595-96 (5th Cir. 2011) (noting that plaintiffs are "not required to prove [their] entitlement to summary judgment" to show likelihood of success on the merits).
[84] *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996).
[85] *Helling v. McKinney*, 509 U.S. 25, 33 (1993).
[86] *See* Rec. Doc. 578.

problems that Plaintiffs have already proven. Defendants are knowingly increasing the risk of harm to Class members from their understaffing and inadequate procedures, which likely constitutes deliberate indifference.[87]

Third, Plaintiffs have yet to receive any remedy for their successful claim that Defendants' medical care places them at a substantial risk of serious harm in violation of the Eighth Amendment. A preliminary injunction would be in aid of remediating this proven constitutional violation, as it is necessary to ensure that Plaintiffs' medical care does not get even worse before a remedy is instated. Indeed, the requested injunction will save an unknowable number of Class members from passing away before they can ever receive relief on their proven claim.

III. The Remaining Factors Weigh Heavily in Favor of a Temporary Restraining Order and Preliminary Injunction

The third and fourth factors, "harm to the opposing party and weighing the public interest …[,] merge when the Government is the opposing party."[88] Here, they weigh heavily in favor of granting relief.

As an initial matter, the requested injunction would protect Plaintiffs' constitutional rights under the Eighth Amendment, and "[i]t is always in the public interest to prevent the violation of a party's constitutional rights."[89] Because "confidence in the humane application of the governing laws of the State must be in the public's interest,"[90] there is a clear public interest in preventing Defendants from exposing Class members to cruel and unusual punishment in the form of willful exposure to a serious risk of severe harm.

And beyond the public interest in protecting the Class members themselves, minimizing risk of transmission of COVID-19 is inarguably in the public interest. As already explained, the transfer

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[87] *See Newman v. Alabama*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975) (finding that when systematic deficiencies in staffing, facilities or procedures make unnecessary suffering inevitable, a court will not hesitate to use its injunctive powers).
[88] *Nken v. Holder*, 556 U.S. 418, 435 (2009).
[89] *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012)); *accord, e.g.*, *June Medical Servs., LLC v. Caldwell*, No. 14-cv-525-JWD-RLB, 2014 WL 4296679, at *8 (M.D. La. Aug. 31, 2014).
[90] *Harris v. Johnson*, 323 F. Supp. 2d 797, 810 (S.D. Tex. 2004).

plan is likely to spread COVID-19 to the staff of LSP and then to the broader West Feliciana and central Louisiana community.[91] "[A] COVID-19 outbreak at a detention facility could quickly overwhelm" not only the facility's medical system, but "surrounding community hospitals" as well.[92] The resulting effect on "public health and safety" would plainly harm the public interest.[93]

By contrast, there is no substantial harm to Defendants in enjoining the transfer plan. Defendants can have no interest in following through with a plan that will expose not only Class members but hundreds of their own staff to COVID-19. Moreover, Defendants have other, safer options than transferring persons with COVID-19 to a prison distinctly ill-suited to house and treat them, and to prevent transmission.[94] And even if there were some harm to Defendants, it would be greatly outweighed by the catastrophic risk to Class members.

IV. The Court Should Immediately Enter a Temporary Restraining Order While It Adjudicates This Motion

At any moment, Defendants could begin transferring inmates with COVID-19 to LSP. They have refused even to acknowledge their transfer plan to Plaintiffs, making it impossible to know when they will start introducing COVID-19 to LSP or how they expect to prevent its spread. Although they have said that transfers are not imminent "at this time,"[95] they have given no assurance that that will not change at any time without notice. Even on an expedited briefing schedule, by the time the Court can receive full briefing and hold a preliminary injunction hearing, the damage may already be done. Once COVID-19 begins to spread at LSP, it will likely be impossible to stop it. "A hearing *weeks* from now may be no relief at all, because Petitioners may contract COVID-19 in the interim and face serious health consequences—including death."[96]

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[91] *See, e.g.*, Supp Puisis Dec. ¶¶ 14, 19
[92] *Coronel*, 2020 WL 1487274, at *7.
[93] *Id.*
[94] *See, e.g.*, Supp. Puisis Dec. ¶¶ 15-16 (recommending, *inter alia*, release of low-risk prisoners to make room for proper isolation).
[95] Supp. Dubner Dec. ¶ 10; Ex. A, Supp. Dubner Dec.
[96] *Coronel*, 2020 WL 1487274, at *7.

This is an archetypal situation for a temporary restraining order. Temporarily restraining the Defendants from transferring inmates with COVID-19 to LSP will allow the Court to "preserve the status quo and prevent irreparable harm just so long as is necessary to hold a hearing, and no longer."[97] Plaintiffs are prepared to proceed to a preliminary injunction hearing as soon as Defendants and the Court are able. But in the interim, a temporary restraining order is the only way to ensure that Defendants' plan to affirmatively introduce COVID-19 to LSP is not a fait accompli before this Court has the opportunity to pass judgment on it.

CONCLUSION

For the foregoing reasons, the Court should immediately issue an order temporarily restraining Defendants from transferring inmates with COVID-19 to LSP; and, after a hearing, preliminarily enjoin Defendants from doing so.

Respectfully submitted this 31st day of March, 2020.

Respectfully submitted by:

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[97] *Snow v. Lambert*, No. 15-cv-567-SDD-RLB, 2015 WL 5071981, at *1 (M.D. La. Aug. 27, 2015) (quoting *RW Dev't, LLC v. Cuningham Grp. Architecture, Inc.*, No. 12-cv-224, 2012 WL 3258782, at *2 (S.D. Miss. Aug. 8, 2012)).

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2020, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

I further certify that copies of all pleadings and other papers filed in the action to date or to be presented to the Court at the hearing, have been furnished to the Defendants' attorneys, who have already made an appearance in this matter.

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