

**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").<sup>1</sup> 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."<sup>2</sup> 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.<sup>3</sup>

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

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<sup>1</sup> 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>.

<sup>2</sup> Supplemental Declaration of Dr. Michael Puisis ("Supp. Puisis Dec."), ¶ 13.

<sup>3</sup> *Id.* ¶¶ 7-10.

they contract COVID-19.<sup>4</sup> 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.”<sup>5</sup>

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.

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.’”<sup>14</sup> 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%.<sup>15</sup>

To reduce the risk of contracting COVID-19, the Centers for Disease Control and Prevention (“CDC”) advises all people—and particular

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

## **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."<sup>23</sup> 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."<sup>24</sup> "Prevention of contact with an infected droplet is significantly more difficult in a prison than in the community."<sup>25</sup> As a result, "[j]ails and prisons are long known to be a breeding ground for infectious respiratory illness."<sup>26</sup> 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."<sup>27</sup>

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

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<sup>20</sup> Erika Edwards,

which “are not arranged to provide social distancing as the distance between beds is approximately 3 feet.”<sup>29</sup> “Large fans blow air through the units which is likely to spread contagious agents embedded in aerosol like COVID-19.”<sup>30</sup> 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.”<sup>31</sup> 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.”<sup>32</sup>

### **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,<sup>33</sup> as well as the extremely high numbers of people suffering from chronic diseases.<sup>34</sup>

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

current CDC recommendations regarding prevention against COVID-19.”<sup>37</sup> 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.”<sup>38</sup>

#### **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.”<sup>39</sup> 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.<sup>40</sup> 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].”<sup>41</sup>

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.<sup>42</sup> “LSP is not set up to manage hospital level care including ventilation” even at the Treatment Center, much less the outcamps.<sup>43</sup> 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,<sup>44</sup> and Defendants “frequently decline to send patients to outside hospitals when indicated by urgent, life-threatening vital signs and symptoms,”<sup>45</sup> making it highly likely that they will

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Ex. A, First Dubner Dec., Rec. Doc. No. 580-4 at 2 (Mar. 25, 2020 email from Randy Robert to Jeffrey Dubner).

<sup>40</sup> Lane, *supra* n.1.

<sup>41</sup> *Id.*

<sup>42</sup> Oct. 9, 2018 Testimony of Dr. Mike Puisis at 117-120.

<sup>43</sup> Supp. Puisis Dec. ¶ 13.

<sup>44</sup> Rec. Doc. No. 573 ¶ 27.

<sup>45</sup> 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



**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.<sup>50</sup> The following morning, Plaintiffs contacted Defendants' counsel to inquire whether the reports were accurate, expl

that point to bring the matter to the Court in a more orderly fashion,"<sup>57</sup> and requested a response by

“incarcerated under conditions posing a substantial risk of serious harm.”<sup>66</sup> 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,”<sup>67</sup> 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 uncontrollable 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.<sup>68</sup>

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<sup>66</sup> *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

<sup>67</sup> *Martin*, 2020 WL 1274857, at \*2.

<sup>68</sup> *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.<sup>69</sup> 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."<sup>70</sup> 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."<sup>71</sup> At a minimum, there is no question that the likelihood of transmission of this virus of unprecedented "magnitude and speed of transmission"<sup>72</sup> through a facility that could hardly be "more contrary to current public health recommendations and the President's Task Force recommendations"<sup>73</sup> 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.<sup>74</sup> "It goes without saying that ... death is an irreparable injury."<sup>75</sup> Even for those who recover, the extreme suffering that they may experience during their illness<sup>76</sup> and the possibility of long-term

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<sup>69</sup> See *supra* nn.16 & 17.

<sup>70</sup> *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986).

<sup>71</sup> *Id.*

<sup>72</sup> *Martin*, 2020 WL 1274857, at \*2.

<sup>73</sup> Supp. PUISIS Dec. ¶ 10.

<sup>74</sup> See *supra* nn.33 & 34.

<sup>75</sup> *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").

<sup>76</sup> 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<sup>77</sup>

resources.<sup>82</sup> 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."<sup>83</sup> 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."<sup>84</sup> 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."<sup>85</sup>

Second, Plaintiffs have already shown that Defendants' inadequate medical system places them at a substantial risk of serious harm.<sup>86</sup> 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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<sup>82</sup> 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>.

<sup>83</sup> 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).

<sup>84</sup> *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996).

<sup>85</sup> *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

<sup>86</sup> 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.<sup>87</sup>

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."<sup>88</sup> 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."<sup>89</sup> Because "confidence in the humane application of the governing laws of the State must be in the public's interest,"<sup>90</sup> 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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<sup>87</sup> 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).

<sup>88</sup> *Nken v. Holder*, 556 U.S. 418, 435 (2009).

<sup>89</sup> *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (quoting *Awad v. Ziriya*, 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).

<sup>90</sup> *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.<sup>91</sup> “[A] COVID-19 outbreak at a detention facility could quickly overwhelm” not only the facility’s medical system, but “surrounding community hospitals” as well.<sup>92</sup> The resulting effect on “public health and safety” would plainly harm the public interest.<sup>93</sup>

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.<sup>94</sup> 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**



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.”<sup>97</sup> 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:

/s/ Mercedes Montagnes

Mercedes Montagnes, La. Bar No. 33287  
Jamila Johnson, La. Bar No. 37953  
Nishi Kumar, La. Bar No. 37415  
The Promise of Justice Initiative  
1024 Elysian Fields Avenue  
New Orleans, LA 70117  
Telephone: (504) 529-5955  
Facsimile: (504) 595-8006  
Email: [mmontagnes@defendla.org](mailto:mmontagnes@defendla.org)

