CASE NO. 14-30067

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ELZIE BALL; NATHANIEL CODE; JAMES MAGEE,

Plaintiffs-Appellees,

v.

JAMES M. LEBLANC, SECRETARY, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY; ANGELIA NORWOOD, WARDEN OF DEATH ROW; LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS,

Defendants-Appellants.

Appeal from The United States District Court,
Middle District of Louisiana, Case No. 3:13-cv-00368
Hon. Brian A. Jackson

APPELLEES' PRINCIPAL AND RESPONSE BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

1. *PLAINTIFFS-APPELLEES*: ELZIE BALL, NATHANIEL CODE, AND JAMES MAGEE;

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Oral Argument

The question presented by Plaintiffs-Appellees ("Plaintiffs") with respect to the treatment of thermoregulation as a major bodily function under the Americans with Disabilities Act Amendments Act is one of first impression and appropriate for oral argument.

Plaintiffs are, of course, also prepared to discuss the proper and straightforward analysis that was the basis for the district court's narrow and fact-specific findings on Plaintiffs' successful claims under the Eighth Amendment. Plaintiffs would welcome the opportunity to clarify the incorrect statements of fact included in Defendants-Appellants' brief as well as the discovery misconduct that lead to the district court's credibility findings and monetary sanctions.

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I. STATEMENT OF JURISDICTION

Under 28 U.S.C. § 1291, jurisdiction exists over the cross-appeal of Plaintiffs-Appellees ("Plaintiffs") as a properly noticed appeal from a final judgment of a district court.

II. STATEMENT OF ISSUES

1. Whether the district court clearly erred in finding that prolonged exposure to a heat index exceeding 88º with ineffective remedial measures violates the Eighth Amendment.

2. Whether the district court clearly erred in finding that Defendants were deliberately indifferent to the substantial risk of serious harm to Plaintiffs' health.

3. Whether the district court abused its discretion in ordering Defendants to create and implement a plan to mitigate the risk to Plaintiffs' health by ensuring the heat index did not exceed 88º.

4. Whether the district court applied the incorrect statutory definition of disability in its finding that Plaintiffs were not disabled and protected under the Americans with Disabilities Act and Rehabilitation Act.

III. STATEMENT OF THE CASE

Summers in South Louisiana are hot and humid; the heat has caused deaths in Louisiana.[1] Prisoners on Angola's death row, confined to their cells for 23 hours a day, have limited access to the remedial measures available to the general public. Those with medical conditions are even more susceptible to heat-related illness.

A. Factual Background

Plaintiffs/Cross-Appellants Elzie Ball ("Ball"), Nathaniel Code ("Code"), and James Magee ("Magee") (together, "Plaintiffs") are death row inmates at the Louisiana State Penitentiary in Angola, Louisiana ("Angola").[2] Ball is 60 and suffers from hypertension and diabetes.[3] Ball's blood pressure is "uncontrolled" and "spikes" in the summer months.[4] An Angola physician told Ball that "sooner or later [he is] going to stroke out."[5] Code is 57 and suffers from hypertension and

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[1] PLS_EX_127-0019-0021. Trial Exhibits lodged with the district court, while part of the official record on appeal pursuant to Fed. R. App. Proc. 10(a), are not in the electronic Record on Appeal ("ROA"). Per the Fifth Circuit Clerk's recommendation, Plaintiffs have not sought to supplement the ROA, but have provided citations to Plaintiffs' Trial Exhibits as follows: PLS_EX_[Exhibit Number]-[Page Number], corresponding to the numbering of the Trial Exhibits.

[2] ROA.4958.

[3] References to age are as of trial date. ROA.4974.

[4] ROA.4974.

[5] ROA.4974.

hepatitis.[6] Magee is 35 and suffers from hypertension, high cholesterol, and depression.[7] Plaintiffs take various medications to treat their conditions.[8]

In ***2006,*** the Louisiana Department of Public Safety and Corrections (the "DOC") constructed a new death row facility at Angola.[9] The 25,000 square foot facility includes four housing wings (three in use for death row), each of which contains two housing tiers (the "tiers") where inmates' cells are located; offices, visitation rooms, clinic rooms, and a control center where the correctional officers are stationed.[10] While there is heating throughout these areas, air conditioning is provided in all areas ***except*** the tiers where inmates are housed.[11] Instead, the tiers have a ventilation system—with one six-inch-by-eight-inch vent per cell—that uses "outside air" to ventilate the space.[12] "Heat alerts" at Angola are issued when the outdoor temperature exceeds 90º, and according to an Angola Captain, these alerts are issued daily in the summer.[13] According to the architect who oversaw construction of the death row facility, the temperature and humidity in the cells are

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[6] ROA.4975-4976.

[7] ROA.4977-4978.

[8] ROA.4974-4978.

[9] ROA.4968.

[10] ROA.4968.

[11] ROA.4968-4969.

[12] ROA.4970, ROA.4973, ROA.5732.

[13] ROA.5740:6-9.

"subject to" the conditions outside of the facility, and it "would not be any cooler inside than it is outside."[14]

Plaintiffs are confined to their cells for 23 hours per day.[15] It is undisputed that Plaintiffs are frequently moved between tiers.[16] Plaintiffs have limited access to remedial measures. They have no direct access to ice while confined to their cell.[17] During their hour outside their cell, Plaintiffs can access ice from a 48- or 64-ounce ice chest located on the tiers.[18] The ice chest on Plaintiffs' tiers, however, "frequently runs out" of ice over the course of the day, and Plaintiffs cannot access it during the overnight hours when the tiers are locked down.[19] The drinking water from Plaintiffs' sinks is "lukewarm."[20] Plaintiffs are allowed one shower each day in water heated between 100º and 120º.[21] The tiers are equipped with one non-oscillating 30-inch fan for every two inmates.[22] The fans were not part of the original construction.[23] When operating, the fans do not provide equal

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[14] ROA.4973-4974, ROA.5730-5732.

[15] A description of Plaintiffs' cells is in the record at ROA.4968-72, ROA.4970.

[16] ROA.5053.

[17] ROA.4971-4972, ROA.4978.

[18] ROA.4971-4972.

[19] ROA.4972.

[20] ROA.4996.

[21] ROA.4971.

[22] ROA.4970.

air flow to each cell.[24] The fans occasionally break and are not always immediately fixed.[25] Further, the "windows" at the facility do not open wide, rather they are louvers which do not provide for the same air flow as traditional windows.[26]

Despite Plaintiffs' efforts to utilize available resources, the existing measures do not provide relief from the heat.[27] Heat levels at night remain so high that Ball and Code's sleep patterns are disturbed.[28] Code stated that his cell receives "direct sunlight" through a window, he "languishes" in the heat from "sunrise until approximately 2:00 A.M.," and that he attempts to lie as still as possible to avoid overheating.[29] Magee described his cell as a "sauna" in the morning and an "oven" in the afternoon.[30] The heat conditions on the tiers cause Plaintiffs to endure nausea, sweating, swelling of joints, painful inflammation of

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[23] ROA.4970.

[24] ROA.4996.

[25] ROA.4975.

[26] ROA.4970.

[27] The district court's site visit confirmed that, "in the Court's observation, the windows, fans, and cell vents did not provide a cooling effect or relief from the heat conditions in the tier." ROA.4995.

[28] ROA.4975-4978.

[29] ROA.4975-4978.

[30] ROA.4975-4978.

keloid scars, dizziness and lightheadedness, and headaches.[31]

In 2012, Plaintiffs each filed grievances under Angola's administrative remedy procedures describing their medical conditions and medications, symptoms suffered because of the heat, and inability to alleviate the conditions.[32] Each requested accommodations in the form of "any" effective cooling mechanism and a safer housing environment.[33] Each grievance was denied by Defendant Norwood and subsequently denied on appeal by Defendant James LeBlanc.[34] Plaintiffs also attempted to resolve their concerns about the heat through correspondence with Defendants Norwood, Cain, and LeBlanc, but these efforts were fruitless.[35]

B. The Complaint and Motion for Preliminary Injunction

In 2013, having exhausted administrative remedies, Plaintiffs filed the complaint alleging violations of the Eighth Amendment, the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"), and the Rehabilitation Act, 29 U.S.C. § 701 *et seq.* ("RA").[36] Plaintiffs sought injunctive relief in the form of an order requiring maintenance of the heat index in Plaintiffs' cells at safe, humane

[31] ROA.4975-4978.
[32] PLS_EX_39-48.
[33] PLS_EX_39-48.
[34] PLS_EX_39-48.
[35] PLS_EX_32-35, PLS_EX_39-48, ROA.5696-5697, ROA.5714.
[36] ROA.24-35.

levels.[37] The district court deferred any preliminary injunctive relief pending the collection of heat index data from the tiers.[38]

C. The Heat Index Data from Death Row

Between July 15 and August 5, 2013 (the "data collection period"), a neutral expert collected temperature, humidity, and heat index data on the tiers pursuant to the district court's order (the "Data").[39] The Data confirmed that "the temperature, humidity, and heat index *inside* the tiers were, more often than not, the same or higher than the temperature, humidity, and heat index recorded *outside* the tiers."[40] The heat index on each tier exceeded 104º at various times; some reached 110°.[41]

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[37] ROA.76-567.

[38] ROA.2558-2560.

[39] ***Defendants' summary of does not reflect the Data submitted to the Court.*** Original Brief of Defendants Appellants ("Def. Br.") at 3, n.5 (citing ROA.4429-4430). Defendants cite to their own proposed findings filed in the district court, not the Data. Defendants state that "there [sic] only temperature exceeding 90º (90.6º) was on Tier C" and that "the heat index very rarely exceeded 99º." ***This is false.*** The data show that the temperature exceeded 90º on all six tiers during the monitoring period; there were extended periods on all tiers of eight hours to several days where the heat index exceeded 99º–in fact, it exceeded 100º on Tier A on five days, Tier B on 10 days, Tier C on 13 days, Tier F on eight days, Tier G on 15 days, and Tier H on seven days. ROA.4981-4993.

[40] ROA.4979-4980.

[41] The district court's summary of the heat index data is provided at ROA.4979-4993. The Data is provided in JOINT_EX_1.

There were extended periods where the heat index did not drop below 99º, including five straight days on Tier G and three on Tier C.[42]

D. The Discovery Sanctions Against Defendants

The district court sanctioned Defendants for discovery misconduct in two areas. First, Defendants modified the death row facilities "under cover of darkness" by installing "awnings" to shade tier windows and "soaker hoses" to cool the outside walls while the court ordered data was being recorded. Defendants made these modifications without the district court's permission and without informing Plaintiffs, despite repeated discovery requests. The district court found that Defendants' actions were in "bad faith," and made "on the two tiers exhibiting the highest recorded temperatures and heat indices," amounting to spoliation. Ultimately, "although the temperature, humidity, and heat index each remained dangerously high after Defendants' installation of awnings and soaker hoses, the [court could] not be sure that the readings would not have been higher absent Defendants' actions."[43]

Second, Defendants were sanctioned for their "failure to timely disclose information regarding the cost of installation of air-conditioning in Angola's death row tiers." "Defendants put the cost of installing air-conditioning at issue from the

[42] JOINT_EX_1

[43] ROA.5060-5076, ROA.5088-5099.

outset," but "repeatedly refused to answer Plaintiffs' interrogatories" seeking these costs, despite the Magistrate Judge ordering them to do so. Defendants' expert witness "adamantly and repeatedly insisted" that he could not estimate such costs, but after the expert discovery deadline—just one business day before trial—produced an "emailed report" dated several days earlier stating the cost could be "as high as $1,860,000."[44]

The district court sanctioned Defendants, ordering payment of Plaintiffs' fees related to the violations.[45]

E. The District Court's Ruling and Order Following Trial

In August 2013, the district court held a three-day trial on the merits. Following the trial, the district court conducted an in-person site visit of the facility.[46]

The district court issued findings of fact and conclusions of law in its Ruling and Order, granting in part and denying in part Plaintiffs' request for relief.[47] The court found that the heat index levels on the tiers, together with Plaintiffs' medical conditions, caused a substantial risk of serious harm to Plaintiffs' health.[48] The

[44] ROA.5076-5085, ROA.5099-5106.
[45] ROA.5107-5109.
[46] ROA.4994-4996.
[47] ROA.4957-5058.
[48] ROA.5003-5012.

court adopted the conclusion of Plaintiffs' expert Dr. Vassallo[49] that "the heat conditions . . . (1) put all three Plaintiffs at risk of heat-related illnesses, including heat stroke; and (2) worsened Plaintiffs' underlying medical conditions."[50] Dr. Vassallo emphasized that even healthy individuals with controlled blood pressure "are at risk of serious harm in heat conditions like those in the death row tiers."[51] The symptoms Plaintiffs suffer as a result of the heat are "symptoms that people will describe when they're entering a phase of heat exhaustion."[52] Plaintiffs are at "imminent risk of severe physical harm due to the heat conditions on death row," and "it's just a matter of time until . . . heat stroke or myocardial infarction or stroke arises because of the temperatures on death row."[53] The district court noted that her testimony was "largely uncontroverted" and that Defendants "failed to rebut Dr. Vassallo's testimony."[54]

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[49] Dr. Vassallo was the medical expert at the trial in *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004). She testified that the conditions at Angola are worse than those in *Gates*. ROA.6061:6-7.

[50] ROA.5006.

[51] ROA.5008.

[52] ROA.5008.

[53] ROA.5009.

[54] ROA.5011.

The district court found that Defendants were deliberately indifferent to these risks.[55] The risks to Plaintiffs' health were obvious, and Defendants had actual knowledge because Defendants walk in death row "regularly" and "closely monitor" the temperature on the death row tiers "every two hours" each day "to ensure that they do not reach unacceptable levels."[56] Defendants also received Plaintiffs' grievances in which they expressed concern that they were at risk of heat-related illness, but denied any relief.[57] Defendants "did not take any actions" to remedy the heat conditions.[58] Further, Defendants "failed to abide by their own policies and regulations when they failed to add Plaintiff Magee, who is on psychotropic medication, to Angola's 'Heat Precautions List.'"[59]

Plaintiffs prevailed on their Eighth Amendment claim.[60]

The district court denied any relief for Plaintiffs' disability claims, finding that Plaintiffs had failed to show that they were disabled.[61]

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[55] ROA.5019-5044. The court also found that Defendant Norwood lacked credibility. ROA.4962-4968.

[56] ROA.5023-5026.

[57] ROA.5020-5021.

[58] ROA.5027-5032.

[59] ROA.5032-5034.

[60] ROA.5032-5034.

[61] ROA.5044-5050.

F. The Injunctive Relief

In order to remedy the Eighth Amendment violations, the district court adopted Dr. Vassallo's recommendation that a maximum heat index of 88º be maintained on the tiers. The district court ordered Defendants to develop a plan within 60 days to achieve this maximum heat level.[62] After Defendants submitted their proposed plan[63] and Plaintiffs responded without opposition to the proposal,[64] the district court ordered the plan's implementation virtually unchanged.[65] This Court stayed the district court's order requiring implementation of Defendants' proposed plan pending appeal.[66]

G. The Appeal

Defendants filed their Notice of Appeal of the district court's ruling on the Eighth Amendment claims. Plaintiffs filed their Notice of Appeal of the district court's ruling on the disability claims following entry of final judgment.[67]

IV. SUMMARY OF ARGUMENT

The district court did not err in finding that the conditions of confinement on Angola's death row violate the Eighth Amendment. The

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[62] ROA.5053.

[63] This plan is different than anything discussed at trial. ROA.5393-5421.

[64] ROA.5488-5491.

[65] ROA.6839.

[66] ROA. 6858.

[67] ROA.6853-6854.

uncontroverted temperature, humidity, and heat index data from Angola's death row revealed an environment that poses significant health risks to inmates who are confined to their cells for 23 hours per day. Not even the remedial measures previously ordered by this Court in *Gates* were present. Faced with this overwhelming evidence in the record, Defendants take a kitchen-sink approach, asserting a variety of errors in the district court's findings. None of these asserted errors is supported by the law nor do they meet the clear error requirement. Most importantly, Defendants fail to show any prejudice resulting from the asserted errors. Plainly, reversal of the district court's findings is unwarranted.

The district court did not abuse its discretion in fashioning its injunctive relief. Defendants next assert that the district court abused its discretion in fashioning injunctive relief. This assertion is based on a mischaracterization of the law and the proceedings below. Defendants object that the injunctive relief ordered by the district court exceeds that upheld by this Court in *Gates v. Cook*. This objection ignores Supreme Court precedent making clear that Eighth Amendment requirements cannot be satisfied by meeting any minimal set of standards—such as those set out in *Gates*. Rather, remedies should be fashioned in accordance with the specific circumstances of each case and based on expert recommendations designed to prevent the risks to prisoners' health. In fashioning its injunctive relief, the district court examined the specific circumstances at

Angola's death row and adopted expert testimony that substantial health risks exist whenever Plaintiffs are exposed to heat indices over 88º.

The district court's order complied with the PLRA. Finally, Defendants object that the district court violated the PLRA's requirements that injunctions be narrow, necessary, and non-intrusive. To the contrary, the district court's procedure in fashioning injunctive relief was consistent with Supreme Court guidance on injunctions in the prison setting and in compliance with the PLRA's requirements. The district court ordered Defendants to prepare a plan to ensure the heat index does not exceed 88º and then ordered Defendants to implement their proposed plan. Nothing in the record or in this procedural history suggests an abuse of discretion by the district court.

The district court erroneously found Plaintiffs did not have disabilities. On Plaintiffs' disability claims, however, the district court erred when it concluded that Plaintiffs did not have disabilities and were not protected by the ADA and RA. The district court based its conclusion on superseded statutory definitions of disability and now-abrogated case law applying those definitions. Had the district court applied the correct definition of disability, the evidence was clear that Plaintiffs were disabled. This error by the district court warrants remand for further proceedings on Plaintiffs' disability claims, in the event that this Court reverses the district court with respect to the Eighth Amendment.

V. STANDARD OF REVIEW

The district court's findings are reviewed for clear error on questions of fact and *de novo* on questions of law. *Ivy v. Jones*, 192 F.3d 514, 516 (5th Cir. 1999). Under the clear error standard, a finding of fact should not be overturned, unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Gates*, 376 F.3d at 333 (citing *Alberti v. Klevenhagen*, 790 F.2d 1220, 1224 (5th Cir 1986)). Put differently, "[a] factual finding is not clearly erroneous as long as it is plausible in the light of the record read as a whole." *Walker v. City of Mesquite*, 402 F.3d 532, 535 (5th Cir. 2005) (quotations omitted). *See also Spaulding v. U.S.*, 241 Fed. Appx. 187, 191 (5th Cir. 2007). "Even if the trial judge does commit error, it is presumed harmless until shown to be prejudicial. The complaining party must prove that the error was substantial and that it prejudiced his case." *Ruiz v. Estelle*, 679 F.2d 1115, 1129, *amended in part, vacated in part,* 688 F.2d 266 (5th Cir. 1982).

"A prison official has violated the Eighth Amendment when he 1) shows a subjective deliberate indifference to 2) conditions posing a substantial risk of serious harm to the inmate." *Gates*, 376 F.3d at 333. The district court's findings on each of these elements is subject to review for clear error. *Id.*

The district court's injunction order is reviewed for abuse of discretion. *Id*. (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971)).

A district court abuses its discretion in fashioning injunctive relief if it: "(1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *McClure v. Ashcroft*, 335 F.3d 404, 408 (5th Cir. 2003). If this Court finds that the district court erred in fashioning its injunction, the Court should remand for further proceedings as to the remedy. *See, e.g.*, *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 285 (5th Cir. 2008) (finding abuse of discretion in crafting injunction and remanding for further proceedings on details of injunctive relief).

Regarding the Cross-Appeal, under the ADA, the determination of whether an individual has a disability—an impairment that substantially limits a major life activity—is a mixed question of law and fact. *EEOC v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 616 (5th Cir. 2009).[68] What constitutes a major life activity is a question of law for the court to determine. *Id*. (determining that sleep is a major life activity as a matter of law and collecting authorities finding the same). *See also Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211, 1216 (10th Cir. 2007) (same); *cf. Hooven-Lewis v. Caldera*, 249 F.3d 259, 268 (4th Cir. 2001) (same).

Whether a major life activity is "substantially limited" by the impairment is a question of fact. *See Carmona v. Southwest Airlines Co.*, 604 F.3d 848, 857 (5th

[68] While the *Chevron* definition of disability was overturned by the ADAAA, *Chevron* correctly states that the determination of disability is a mixed question of law and fact.

Cir. 2010) (leaving a determination of whether an activity is substantially limiting to a jury). Because Plaintiffs appeal the district court's legal conclusions as to what major life activities were substantially impaired, these legal conclusions are reviewed *de novo*.

VI. RESPONSE ARGUMENT

A. The District Court Correctly Found an Eighth Amendment Violation.

"The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones." *Gates*, 376 F.3d at 332 (citing *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)). Defendants must "provide humane conditions of confinement," must "ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" *Farmer*, 511 U.S. at 832 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). The Eighth Amendment is violated where prison officials "1) show[] a subjective deliberate indifference to 2) conditions posing a substantial risk of serious harm to the inmate." *Gates*, 376 F.3d at 333. The district court did not err in its factual findings that Plaintiffs prevailed on both prongs.

1. The district court, relying on extensive factual evidence, correctly concluded that the conditions on Angola's death row violate the Eighth Amendment.

a. The conditions on Angola's death row created substantial risk of serious harm to Plaintiffs' health.

(i) The heat levels at Angola created a substantial risk of serious harm to Plaintiffs' health.

It is well-established that extremely hot or cold conditions can create a substantial risk of harm to inmates' health. *See, e.g.*, *Wilson v. Seiter*, 501 U.S. 294, 304 (1991) ("low cell temperature at night combined with a failure to issue blankets" could rise to the level of an Eighth Amendment violation); *Blackmon v. Garza,* 484 F. App'x 866, 869 (5th Cir. 2012) (unpublished) ("Allowing a prisoner to be exposed to extreme temperatures can constitute a violation of the Eighth Amendment.")

This Court overturned the district court's entry of judgment as a matter of law on a Texas inmate's § 1983 claims that the heat levels in his dormitory exposed him to substantial health risks. *Blackmon,* 484 F. App'x at 872 (reasonable jury could find an Eighth Amendment violation where "extreme heat in [plaintiff's] dorm caused substantial health risks to [plaintiff]" and available remedial measures were inadequate). Notably, this decision was not based on heat measurements from the actual facility, relying instead on historical heat levels in

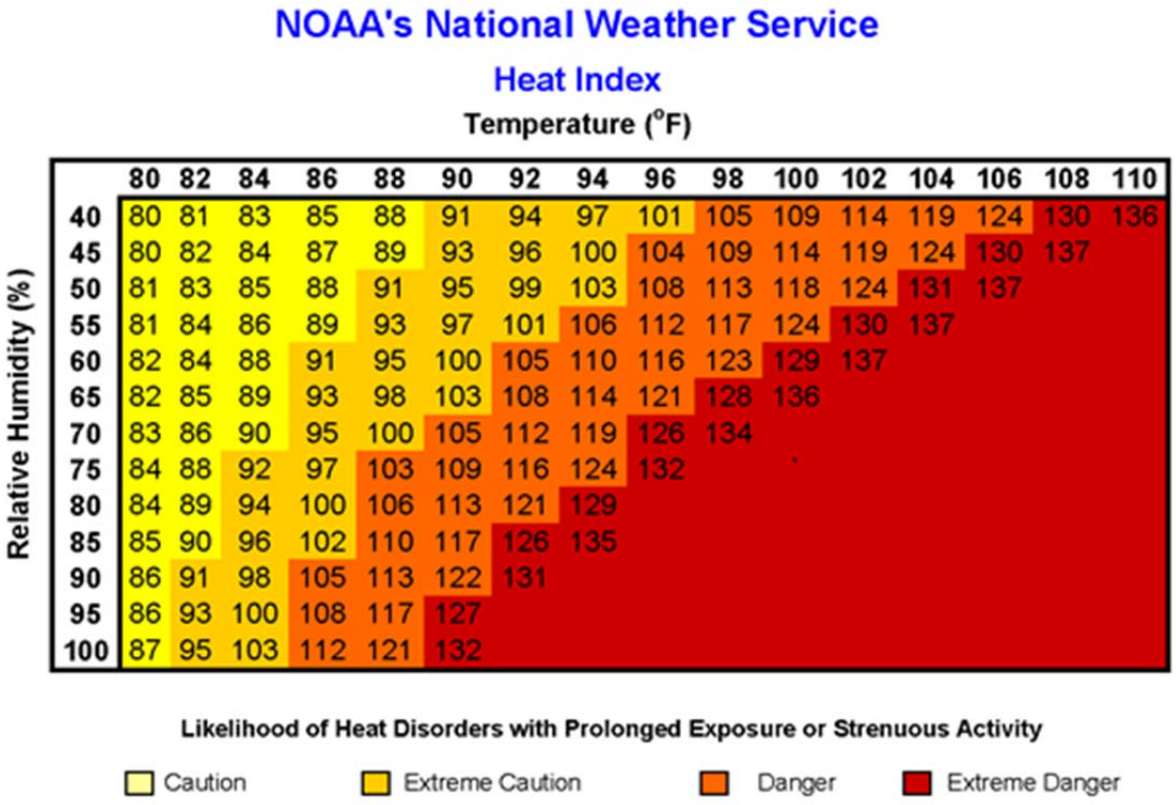
the area, which reached NOAA danger and extreme danger levels during summer months. *Id.* at 870-71.

Blackmon is consistent with precedent including *Gates* which established that heat indexes lower than those recorded at Angola violated the Eighth Amendment. *Gates*, 376 F.3d at 339-40; *see also Valigura v. Mendoza*, 265 Fed. Appx. 232, 235 (5th Cir. 2008) (unpublished) ("[T]emperatures consistently in the nineties without remedial measures . . . sufficiently increase the probability of death and serious illness so as to violate the Eighth Amendment."); *Hadix v. Caruso*, 492 F. Supp. 2d 743, 753 (W.D. Mich. 2007) ("Eighth Amendment […] violated by housing high-risk inmates in facilities which are routinely at heat index levels above 90 during summer months").

In this case, the Data shows even more extreme conditions,[69] with the temperature, humidity, and heat index remaining high, even at night. Plaintiffs' expert David Garon noted that the data collection period "coincided with unusually mild weather for this area." PLS_EX_97-0005. Still, the court found that the Data "unequivocally established that inmates housed in each of the death row tiers are consistently, and for long periods of time, subjected to high temperatures and heat

[69] Plaintiffs' expert confirmed that conditions at Angola were worse than those in the *Gates* case. Comparing conditions in this matter to those in *Gates*, Dr. Vassallo testified, "Angola is hotter. So, in that sense I feel that the concerns are more pressing at Angola." ROA.6061:6-7.

indices in the National Weather Service's ("NWS") 'caution,' 'extreme caution,' and 'danger' zones." ROA.4994.

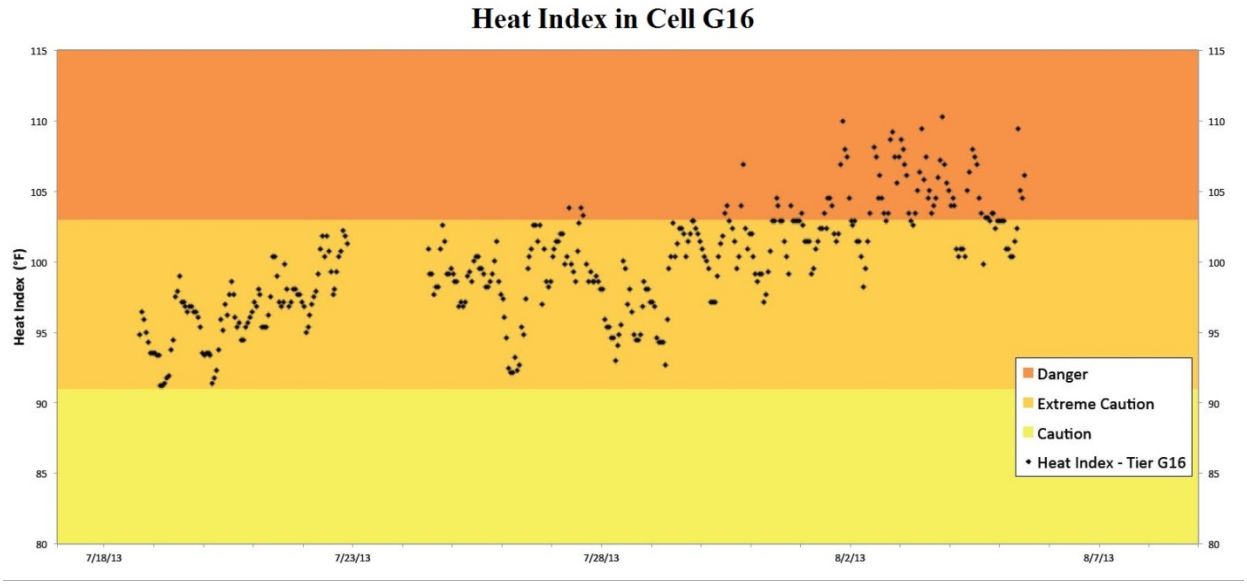


Relative Humidity (%)	80	82	84	86	88	90	92	94	96	98	100	102	104	106	108	110
40	80	81	83	85	88	91	94	97	101	105	109	114	119	124	130	136
45	80	82	84	87	89	93	96	100	104	109	114	119	124	130	137	
50	81	83	85	88	91	95	99	103	108	113	118	124	131	137		
55	81	84	86	89	93	97	101	106	112	117	124	130	137			
60	82	84	88	91	95	100	105	110	116	123	129	137				
65	82	85	89	93	98	103	108	114	121	128	136					
70	83	86	90	95	100	105	112	119	126	134						
75	84	88	92	97	103	109	116	124	132							
80	84	89	94	100	106	113	121	129								
85	85	90	96	102	110	117	126	135								
90	86	91	98	105	113	122	131									
95	86	93	100	108	117	127										
100	87	95	103	112	121	132										

"[T]he heat index in all of the tiers exceeded 104 degrees at various times during the data collection period" and was often higher than the heat index outside. ROA.4980. Even the tier with the lowest recorded data "nonetheless presented an alarming trend." ROA.4980.[70] On the hottest tiers, where the heat index reached 110.3°, the data "established that there were multiple, consecutive hours during which inmates . . . were subjected to heat indices up to twenty degrees higher than outside the housing tier." ROA.4986, ROA.4991. For example, the Data showed

[70] The district court provides an extensive summary of the Data in its opinion. ROA.4979-4994.

that the heat index in cell G16 were consistently in the "extreme caution zone" and reached the "danger" zone for several days.[71]



On this record, the district court did not err.

(ii) The district court's finding of a substantial risk of serious harm to Plaintiffs' health resulting from the heat is correct.

Plaintiffs presented extensive evidence of the health risks they face as a result of prolonged exposure to extreme heat—evidence that was largely uncontroverted. Plaintiffs' expert Dr. Vassallo testified that Plaintiffs' medical conditions and prescribed medications increase their susceptibility to heat-related illness, and why conditions on death row constitute a substantial risk to Plaintiffs' health and safety. *See* ROA.5995:24-ROA.6061:7. Dr. Vassallo also explained

[71] Plaintiffs include this graphical representation of the Data for purposes of argument only. Plaintiffs do not contend that this graph is part of the record.

the precipitous nature of a heatstroke emergency, ROA.6011:25-ROA.6012:13, and why the lack of medical records demonstrating elevated body temperature did not bear on whether Plaintiffs face a substantial risk of serious harm. ROA.6049:20-ROA.6050:14, ROA.6059:15-ROA.6060:2. Plaintiffs themselves testified as to the symptoms they experience due to the summer heat. ROA.5678:14-17, ROA.5680:16-5683:8 (Code), ROA.5754:7-ROA.5757:17, ROA.5765:18-ROA.5766:2 (Ball), ROA.6204:2-ROA.6205:1 (Magee). Dr. Vassallo corroborated that those symptoms are indicative of their heightened risk of heat-related illness. ROA.5996:8-ROA.6007:4, ROA.6012:14-ROA.6013:20, ROA.6028:17-21, ROA.6049:16-ROA.6052:10.

Plaintiffs' environmental health expert, Balsamo, reported that fans are inadequate because "just pushing around hot air inside the cells doesn't necessarily help cool the body and may increase the body temperature load if the air is hotter than the body temperature and evaporative cooling is impaired by high humidity levels." PLS_EX_098-0037-0040. Dr. Vassallo wrote that "[t]he risk for heat-related illnesses soars when air temperatures exceed 88º." PLS_EX_99-002.[72] "In the extremely hot environment reflected in the temperature and humidity measurements at and near the prison, even individuals without any underlying

[72] See ROA.6063:4-14 (Dr. Vassallo confirming that she intended this to mean "heat index" not temperature).

medical conditions would be expected to suffer heat-related illness. However, the Plaintiffs in this action each have particularly heightened risks of serious heat-related illness and permanent injury." PLS_EX_99-002. at 5.

Defendants argue that because Plaintiffs have not already suffered heat-related illness, they cannot prevail. Def. Br. 18. However, an inmate "does not need to show that death or serious illness has yet occurred to obtain relief. He must show that the conditions pose a substantial risk of harm to which [prison] officials have shown a deliberate indifference." *Gates* 376 F.3d at 339.[73] Dr. Vassallo testified that Plaintiffs had made many complaints of symptoms which indicate heat-related illness, but that those symptoms were not recognized. ROA.6002-6006.[74]

Moreover, where "summer temperatures . . . average in the nineties with high humidity [and] ventilation is inadequate to afford prisoners a minimal level of

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[73] Defendants' reliance on *Woods v. Edwards*, 51 F.3d 577 (5th Cir. 1995) is similarly misplaced. "The *Woods* court found that Woods had not presented medical evidence sufficient to state an Eighth Amendment violation; *Woods* does not stand for the proposition that extreme heat can never constitute cruel and unusual punishment." *Gates,* 376 F.3d at 339.

[74] Dr. Vassallo also rejected an insinuation that the medical records were proof of a lack of heat related symptoms. ROA.6006:7-ROA.6007:16. Further, the district court noted that Defendants' own sick-call form "supports the conclusion that Plaintiffs were discouraged from submitting 'sick call' requests because of the monetary and potential disciplinary consequences of doing so." ROA.5011-5012 n.76. Further, the prison's intake and documentation system might lead to the underreporting of heat-related illness. ROA.6006:7-ROA.6011:5.

comfort[,] [t]he probability of heat-related illness is extreme [and] the medications often given to deal with various medical problems interfere with the body's ability to maintain a normal temperature." *Gates* 376 F.3d at 334.[75] Plaintiffs have demonstrated that they faced a substantial risk of serious harm owing to the extreme heat conditions on the tiers.

(iii) The district court found that the remedial measures previously upheld by this Court were not present at Angola.

In order to determine whether a particular facility violates the Eighth Amendment, Courts use a totality of the circumstances test. *Smith v. Sullivan*, 553 F.2d 373, 378 (5th Cir. 1977) (district judge "was fully justified in finding that the totality of circumstances in the El Paso jail amounted to a violation of the Eighth Amendment."); *Gates v. Collier*, 501 F.2d 1291, 1309 (5th Cir. 1974) (same).

In *Gates*, this Court ordered that Mississippi provide a fan for each cell, ice water, and daily showers. *Gates*, 376 F.3d at 339-40. *See also Blackmon,* 484 F. App'x 866 (not providing regular access to cold water germane to a constitutional

[75] Defendants argue that Plaintiffs' personal choices were "quite possibly" or "more probably than not" the cause of their medical ailments. Def. Br. at 18. Leaving aside the irrelevance of this argument, the district court explicitly rejected it, finding that Defendants controlled the vast majority of Plaintiffs' diet and lifestyle choices. ROA.5012.

violation); *Valigura*, 265 F. Appx. at 235 (citing lack of access to fans, ice water, and showers in finding a constitutional violation).[76]

The remedial measures upheld in *Gates* are not available to Plaintiffs. It is uncontroverted that "Plaintiffs do not have direct access to ice during the twenty-three hours per day that they are confined to their cells" (ROA.5036 n.100); ice "frequently runs out" (ROA.4972); Plaintiffs do not have individual fans (ROA.4970); the fans occasionally break (ROA.4975); drinking water is "lukewarm to the touch" (ROA.4996); Plaintiffs do not have windows in their cells (ROA.4970); and shower temperatures are between 100º and 120º (ROA.4971).

Further, the windows, fans, and cell vents did not provide relief from the heat. ROA.4995, ROA.5015, ROA.5776, ROA.6033-6035, ROA.6117, ROA.6207-6208. The district court found, "It is also uncontroverted that the ventilation system does not reduce the temperature, humidity level, or heat index in the housing tiers." ROA.4973. Based on the lack of effective remedial measures,

[76] These cases can be easily distinguished from the 2004 case, *Chandler v. Crosby*, where the Eleventh Circuit upheld the findings of the district court that heat conditions did not constitute a constitutional violation. 379 F.3d 1278 (11th Cir. 2004). In *Chandler,* the court based its finding on several factors not present here including: inmate access to "cold running water"; temperatures lower than those found here; and an effective ventilation system which led to "reasonable levels of comfort" for the inmates. *Id.* at 1286, 1296-1298.

combined with the extreme conditions shown in the Data, the district court correctly found a substantial risk to Plaintiffs' health.[77]

b. The district court based its finding that the conditions on death row create a substantial risk of serious harm to Plaintiffs on proper, reliable evidence.

(i) The district court did not clearly err in using the heat index as the measure of conditions consistent with this Court's precedent.

Using the heat index as a measurement is not clear error. This standard measurement incorporates both temperature and humidity, and provides the most comprehensive measurement of environmental conditions and their effect on the body. Defendants argue that the heat index is an inappropriate measure because it is only the "apparent temperature" or a "guideline." Def. Br. at 9. This argument fails for three reasons.

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[77] Though not necessary to find a constitutional violation, this Court should consider the evolving standards of decency. In *Gates*, this Court held that "[t]he Supreme Court has made clear that the standards against which a court measures prison conditions are 'the evolving standards of decency that mark the progress of a maturing society' and not the standards in effect during the time of the drafting of the Eighth Amendment." *Gates*, 376 F.3d at 332-33 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). In 2011, the Supreme Court found that the conditions in California's prison system violated the Eighth Amendment. In evaluating whether those conditions of confinement constituted an objective substantial risk of serious harm, the Court measured them against the "evolving standards of decency." *Brown v. Plata*, 131 S. Ct. 1910, 1926 n.3 (2011). *Plata* affirmed the Supreme Court's earlier application of this standard in *Helling v. McKinney*, 509 U.S. 25, 29 (1993), where evolving societal standards and greater understanding of the risks associated with cigarette smoke were relevant to determining whether exposure to second-hand smoke amounted to a constitutional violation. For more discussion, *see infra* § VI.B.2.a.i-ii

First, the district court was "unpersuaded that the heat index—which is calculated based on the temperature *and* humidity—is not of critical importance when evaluating the risk of serious harm to Plaintiffs." ROA.5018. The district court rejected Defendants' expert Grymes' assertion that the heat index was not a useful measure of the heat level, finding that Grymes himself uses the heat index to advise his viewers. ROA.6268:15-ROA.6271:18. Grymes also admitted that the "heat index is a measure of the amount of stress from heat that is placed on the human body." ROA.6269:15-21. All of Plaintiffs' experts regularly employ the heat index and rely on it as the appropriate measure here. ROA.5942 (Garon), ROA.6036 (Vassallo), ROA.6074 (Balsamo). Where a finding involves a "classic battle of the experts," there is no clear error in "accepting the testimony [plaintiff's] experts over that of [defendant's]." *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1154 (5th Cir. 1990).

Second, Defendants' attack on the heat index ignores this Court's consistent reliance on the heat index. *See, e.g., Blackmon,* 484 F. App'x 866 (relying on heat index when evaluating temperature conditions inside a correctional facility); *Gates*, 376 F.3d at 339 (upholding injunction which provided relief "when the heat index is 90 degrees or above").

Third, even assuming that the district court erred in using the heat index, Defendants do not even allege that it was prejudicial. *Ruiz*, 679 F.2d at 1129

("Even if the trial judge does commit error, it is presumed harmless until shown to be prejudicial. The complaining party must prove that the error was substantial and that it prejudiced his case."). Because Defendants failed to show any resulting prejudice, this asserted error cannot be a basis for reversal.

(ii) The district court's opinion appropriately referenced reliable secondary sources.

Defendants ask this Court, without support, to overturn the district court's decision based on its references to a series of credible secondary sources.[78] Def. Br. at 11-15. This argument fails for three reasons: (1) the court can properly take judicial notice of the sources; (2) all of the information was admitted, based on the district court's observation, or referenced in the record; and (3) Defendants fail to allege prejudice resulted from the Court's citation to these sources.[79]

First, the district court can properly take judicial notice of the facts in its opinion. While Plaintiffs argue that the Court did not even need to take judicial notice, it has broad discretion to do so. Pursuant to Fed. R. Evid. 201, a court is

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[78] Defendants mischaracterize two cases to support their position. *Gisclair v. Galliano Marine Serv.*, No. 05-5223, 2007 U.S. Dist. LEXIS 99004 (E.D. La. Apr. 30, 2007) is merely an order **deferring** ruling on the relevance of particular data. *Ruff v. Godinez*, explicitly points out that the court "may take judicial notice" of the temperatures recorded in the almanac but credited contradictory testimony over the almanac. No. 91-7242, 1993 U.S. Dist. LEXIS 8745, at *12 (N.D. Ill. June 28, 1993). Both dealt with pre-trial rulings.

[79] Plaintiffs endeavor to address each alleged infraction cited by Defendants but, since no specific references were included in the brief, are left to guess the content to which Defendants objected.

"entitled to take judicial notice of adjudicative facts from reliable sources 'whose accuracy cannot reasonably be questioned.'" *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co*, 704 F.3d 413, 422 (5th Cir. 2013) (citations omitted).[80] Further, "a district court's use of judicial notice under Federal Rule of Evidence 201 is reviewed for abuse of discretion." *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011). "The district court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Id.* (citation omitted). Defendants have failed to show the required abuse or error.

Second, while Defendants do not specify what evidence was allegedly outside the record, the citations in the district court's order that are at issue were discussed in expert testimony and reports admitted into evidence; much of the information is contained or cited directly in the record, including the NOAA heat index chart, the EPA Study, and the NWS report *Heat: A Major Killer*. ROA.4510; PLS_EX_ 127, ROA.29.[81]

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[80] Defendants do not contend that the information is unreliable.

[81] The district court cited to various federal government publications providing that extreme heat can cause health risks to individuals with medical conditions and discussing effectiveness of various remedial measures. ROA.5012-5016. These publications were cited in publications relied upon by Defendants (ROA.5867-5868; PLS_EX_127-0049-0052) and expert reports admitted into evidence (PLS_EX_98-99). These citations were also discussed in expert testimony about CDC recommendations and the limitations of electric fans (ROA.6095, ROA.6117) and Plaintiffs' susceptibility to heat-related illness

Finally, even assuming Defendants showed error, it is not reversible error since they, again, allege no prejudice. *See Figgs v. Quick Fill Corp.*, 766 F.2d 901, 903 (5th Cir. 1985) (harmless error where other evidence in record sufficient to uphold findings). The district court relied on extensive information to make its findings. *See supra* § III.[82] As discussed above, the citations are cumulative to other evidence in the record.[83] The evidence at issue was merely contextual and not essential for the district court's ruling, thus there is no reversible error. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) ("[T]he party that seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.") (citations omitted); *U. S. v. Articles of Device, etc.*, 481 F.2d 434, 436 (10th Cir. 1973) (no reversible error where extrajudicial notice was not essential to court's decision).

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because of medical conditions and prescription medication (ROA.5995-6006; ROA.6014-6015).

Additionally, the NWS website for definition of heat index in relation to effect on body (ROA.4981-4982) is consistent with Defendants' expert defining heat index as "apparent temperature" and "what the air and humidity combination would feel like to this average person." ROA.6259.

[82] The court made these references on December 19, 2013. Defendants were free to object before that court. Having elected to wait for appeal, Defendants must show prejudice, which they have utterly failed to do.

[83] The district court's observations of the weather on the day of the site visit or references to "average maximum temperatures" in summer 2013 are simply points of comparison to show that the recorded temperatures inside the facility were higher than the weather station. This did not determine the outcome of the court's ruling, but rather gave context to the court's discussion of conditions on the tiers.

2. The district court did not err in finding that Defendants were deliberately indifferent to the substantial risk of harm to Plaintiffs' health.

"Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Gates*, 376 F.3d at 333. Here, the district court made extensive findings that Defendants were deliberately indifferent to Plaintiffs' substantial risk of serious harm, both because the risk was obvious, and because of circumstantial evidence. ROA.5019-5035.

a. Defendants had knowledge of the risk of heat-related illness because the risk was obvious.

The district court based its obviousness finding on "the uncontroverted USRM data . . . , Plaintiffs' ages, Plaintiffs' underlying medical conditions, and Plaintiffs' medications," and concluded that "Defendants' knowledge of the substantial risk of serious harm may be inferred by the obviousness of the risk to Plaintiffs." ROA.5019-5035. The district court did not clearly err in finding that the temperatures and humidity on the tiers were open and obvious conditions of which Defendants were aware. The USRM data established that the heat index on the tiers regularly exceeded 100º. *See supra* § III.C. It was uncontroverted that the temperature inside the tiers would be as hot or hotter than the temperature outside the facilities. ROA.4973-4974. This evidence, together with Defendants'

admissions that they walk the tiers regularly, was sufficient for the district court to find that the extreme heat and its consequent risks were obvious. ROA.5026-5027.

b. Defendants had knowledge of the risk of heat-related illness based on circumstantial evidence.

"In the alternative," the district court wrote, "Defendants' knowledge of the substantial risk of harm to Plaintiffs may be inferred from circumstantial evidence presented at trial."[84] The district court correctly pointed to three facts which support this finding:

> (1) Plaintiffs submitted multiple ARPs complaining of the excessive heat conditions to Defendants, prior to filing the instant litigation; (2) Defendants 'closely monitor' the temperature in each of the death row tiers and record such temperatures in tier log books; and (3) Defendants Cain and Norwood walk the death row tiers 'regularly'. . . .

ROA.5026-5027.

Defendants first assert that there was no constitutional violation at all, and that therefore Defendants could never have had knowledge of such a violation. Def. Br. at 19. For the reasons described above, the assertion is plainly false. *See* discussion, *supra* § VI.A.1; ROA.4999-5019.

[84] "[I]t is not necessary for an Eighth Amendment claimant to show that a prison official acted or failed to act due to a belief that an inmate would actually be harmed. It is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." ROA.5019-5020, citing *Farmer*, 511 U.S. at 825.

Next, Defendants argue that the grievances Plaintiffs submitted through Angola's Administrative Remedy Procedure ("ARPs") should not inform the subjective deliberate indifference inquiry because, "If the mere fact that Plaintiffs followed the requisite administrative procedures prior to filing suit proves that Defendants acted with deliberate indifference . . . no court would ever have to evaluate the subjective element of an Eighth Amendment claim." Def. Br. at 20.[85] Defendants mischaracterize, however, the place of the administrative grievance procedure in the deliberate indifference analysis. It is not the mere fact that Plaintiffs filed ARPs that showed Defendants' deliberate indifference. Rather, it is Defendants' refusal to take action (ROA.5027-5035) despite issuing responses "in which Defendants acknowledged Plaintiffs' claims that it is 'extremely hot on Death Row' and that they are 'more susceptible to heat' because of their underlying medical conditions and medications, and denied Plaintiffs' requests for relief." ROA.5021; PLS_EXS_40, 43, and 47.[86] Where the evidence shows that prison officials had knowledge of, but failed to respond to, prisoners' complaints of conditions causing substantial risk to prisoners' health, this Court has upheld a finding of deliberate indifference. *See, e.g.*, *Gates*, 376

[85] ROA.5021-5023. The ARP process at Angola is the only official procedure by which prisoners can raise grievances with prison officials.

[86] Additional evidence showed that Defendants failed to meaningfully respond to Plaintiffs' complaints relating to the extreme heat. *See* ROA.5027-5035.

F.3d at 339. *See also Blackmon*, 484 F. Appx. at 872-73 (evidence from ARPs was sufficient to allow a jury to conclude that prison officials were deliberately indifferent); *Johnson v. Pearson*, 316 F. Supp. 2d 307, 317–18, 321 n.8 (E.D.Va. 2004) (receipt of grievance form alleging violation and refusal to provide any remedy were sufficient to show deliberate indifference); *cf. Verser v. Elyea*, 113 F. Supp. 2d 1211, 1215–16 (N.D.Ill. 2000) (denying grievance appeal was sufficient to establish personal involvement).[87]

The district court properly considered Plaintiffs' medical conditions and medications in finding that Defendants were deliberately indifferent. Defendants suggest that Defendant Warden Norwood testified at trial that "none of the Plaintiffs ever complained of any symptoms of heat-related illness," and that Plaintiffs' medical records show that they never exhibited symptoms of heat-related illness. Def. Br. at 20-21. The court considered and rejected this argument. ROA.5011-5012. The argument fails for at least three reasons.

[87] Defendants attempt to distinguish *Blackmon* from the instant case on the basis that the plaintiff "visited the prison infirmary complaining of heat with elevated blood pressure readings." Def. Br. at 20 n.76. This attempt fails. Here, Plaintiffs complained of symptoms of heat-related illness and had high blood pressure during infirmary visits. ROA.4974-4978, ROA.5021-5022; see also PLS_EX_94-96. *Blackmon* also found that ARPs can serve as a basis for a finding of deliberate indifference. 484 F. App'x at 873.

First, Plaintiffs did complain of symptoms of heat-related illness in their ARPs and in their discussions with Warden Norwood. ROA.5021-5023; PLS_EXS_40, 43, and 47.

Second, the district court determined that Warden Norwood lacked credibility as a witness (ROA.4962-4968), a finding to which this Court should defer. *Justiss Oil, Co., Inc. v. Kerr-McGee Refining Corp.*, 75 F.3d 1057, 1067 (5th Cir. 1996) ("In a non-jury trial, credibility choices and the resolution of conflicting testimony are the province of the judge, subject only to Rule 52(a)'s clearly erroneous standard."); *Reich v. Lancaster*, 55 F.3d 1034, 1045 (5th Cir. 1995) ("The trial judge's 'unique perspective to evaluate the witnesses and to consider the entire context of the evidence must be respected.'") (citation omitted).

Third, there is no requirement that Plaintiffs demonstrate that they have already suffered from a heat-related illness to prevail. Defendants' assertion that "there must be medical evidence of Plaintiffs complaining of or experiencing heat-related symptoms" (Def. Br. at 20 n.76) has been rejected by this Court. *See Gates*, 434 F.3d at 339 (rejecting prison defendants' contention that "no Unit 32–C inmate has ever suffered any serious heat-related illness" and stating there is no requirement that inmates provide medical evidence of heat-related illness to obtain relief).

The district court made extensive findings as to the subjective prong of deliberate indifference and determined that the evidence presented demonstrated Defendants' deliberate indifference.

B. The District Court Ordered an Appropriate Remedy to the Eighth Amendment Violation.

1. The district court did not err in its conclusion that Plaintiffs were entitled to injunctive relief.

To receive injunctive relief, Plaintiffs were required to show: (1) success on the merits; (2) irreparable injury in the absence of an injunction; (3) that the balance of hardships between the parties justifies injunctive relief; and (4) that the public interest would not be disserved by a permanent injunction. *See Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). The district court properly found Plaintiffs had succeeded on the merits of their Eighth Amendment claim (*see supra* § VI.A.1). The district court did not err in its findings on the remaining three elements.

a. Plaintiffs' exposure to substantial health risks constituted irreparable harm.

It is well-established that violations of constitutional rights are sufficient to show irreparable harm. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of First Amendment freedoms "for even minimal periods of time" was "unquestionably" irreparable harm). Here, the irreparable harm to Plaintiffs is not

abstract; it is a substantial risk of heat-related illness, which could result in paralysis or death. *See supra* § VI.A.1.

b. Plaintiffs' irreparable injury outweighed injury to Defendants.

The district court correctly found that Plaintiffs' harm outweighed Defendants' purported harms of time, money, and efforts required to remedy the constitutional violation. *See Smith*, 553 F.2d at 378 ("[I]nadequate resources can never be an adequate justification for depriving any person of his constitutional rights."); *Collier*, 501 F.2d at 1319 ("Where state institutions have been operating under unconstitutional conditions and practices, the defenses of fund shortage and the inability of the district court to order appropriations by the state legislature, have been rejected by the federal courts."); *Stewart v. Winter*, 669 F.2d 328, 332-33 (5th Cir. 1982) ("state officials cannot disclaim responsibility for cruel and unusual conditions of confinement of prisoners in their custody on the ground that it is beyond their power to effect the changes necessary to bring the conditions up to minimal standards" because of a lack of funds or state legislature approval).

Second, even if the time, money, and energy were relevant, the Defendants failed to present evidence of what would be required to implement Defendants'

proposed plan.[88] Defendants' expert admitted under oath that he was unqualified to provide cost estimates. ROA.5076-5085, ROA.5099-5106. The assertion that the cost would be "at least $2 million" is without merit or foundation. Def. Br. at 30. First, Defendants claimed the cost would be $1.8 million at trial. ROA. 6304:25. Second, as Defendants' own expert testified, his estimate was the "worst case scenario." ROA.6303-6305. ***The plan Defendants submitted post-trial and that the district court ordered implemented was substantially different***,[89] and there is no evidence of its cost on the record.[90]

Moreover, Defendants were sanctioned for their misconduct in discovery as to the costs associated with any potential remedy. ROA.5059-5109.[91] The district

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[88] The district court noted that Defendants' expert specifically testified that he was unqualified and unable to provide any estimate of the expenses required at his deposition. ROA.5082-5083.

[89] *Compare* ROA.5393-5421 (Heat Remediation Plan) *with* ROA.3280-3282, ROA.3479-3481 (Defendants' expert Eyre's "feasibility study" and separate, untimely "supplemental report"). *See also* ROA.6303:21-ROA.6306:2 (Eyre's testimony regarding his $1.86 million cost estimate being a rough, worst-case-scenario estimate), ROA.6308:25-ROA.6309:20, ROA.6312:9-ROA.6315:19 (Eyre's testimony that his "feasibility study" was only one of "many different systems" available to cool the death row tiers).

[90] Should the Court request such evidence, Plaintiffs are ready to submit credible evidence that the cost would be substantially less than what Defendants purport. However, this Court has refused to consider factual issues not previously presented to the trial court. *Gates*, 376 F.3d at 340, n.10 (refusing to consider argument that relief would cause prison security problems because argument not raised in district court).

[91] Defendants have not appealed the order sanctioning them for this conduct.

court did not abuse its discretion because of its failure to consider the costs of maintaining a heat index below 88º where Defendants failed to provide that evidence in discovery and were sanctioned for this failure.[92]

c. The public interest was served by an injunction remedying the violation of constitutional rights.

The public interest is best served where constitutional rights are protected. *See, e.g.*, *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 93 (5th Cir. 1992). The district court did not abuse its discretion in finding that the public interest is served by injunctive relief remedying the Eighth Amendment violation.

2. The district court complied with the PLRA and did not abuse its discretion when it fashioned the injunctive relief.

The district court correctly fashioned the remedy in this matter. Defendants argue that the court erred in its application of the law to the factual findings. Specifically, Defendants argue: (1) that the district court erred by providing injunctive relief beyond that which was upheld in *Gates*, Def. Br. at 21-22; and

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[92] In *Ruiz v. Estelle*, this Court noted that when considering remedies, "the cost of one proposed remedy in comparison with the cost of others and the demonstrable need for the remedy should both be considered." *Ruiz*, 679 F.2d at 1146 (considering costs associated with mandate of specific square footage per prison cell to reduce overcrowding). Here, the district court's refusal to consider costs was consistent with *Ruiz*, because the district court specifically found that the heat index needed to remain below 88º to prevent undue risk of heat-related illness. Thus, even if the remedy would "impos[e] great cost on a state," it was only ordered because "its constitutional need has been demonstrated." *Id.* Moreover, where the district court provided an opportunity for Defendants to minimize the cost consistent with *Plata* and *Lewis v. Casey*, 518 U.S. 343 (1996), it is clear that there was no prejudice to Defendants on the basis of costs.

(2) that the district court's order is inconsistent with the requirements of the Prison Litigation Reform Act, 18 U.S.C. § 3626 ("PLRA"), Def. Br. at 26-27. Neither argument has merit.

a. The district court did not misapply the law of *Gates* when it fashioned its injunctive relief.

The district court ordered injunctive relief that was tailored to the facts of the case and the constitutional violation at issue. "[F]raming an injunction appropriate to the facts of a particular case is a matter peculiarly within the discretion of the district judge." *Gore v. Turner*, 563 F.2d 159, 165 (5th Cir. 1977). The Supreme Court recently reaffirmed "a district court's equitable powers" in *Brown v. Plata*, 131 S. Ct. 1910, 1944 (2011) ("Once invoked, the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies" (citations omitted)). *See also U.S. v. Jamestown Ctr.-In-The-Grove Apartments*, 557 F.2d 1079, 1080 (5th Cir. 1977) ("appropriate relief for violations . . . is to be determined on a case-by-case basis with relief tailored in each instance to the needs of the particular situation.") (citations omitted).

(i) Because Eighth Amendment violations are determined by the totality of the circumstances, no single precedent can establish a static test for minimally sufficient conditions.

Defendants assert that no Eighth Amendment violation can occur if Defendants provide "fans, ice, water, and cool showers." Def. Br. at 21-22. This

argument fails as a matter of law. While *Gates* upheld the ***remedy*** that was ordered by the district court, nothing in *Gates* stated that provision of fans, water, ice, and showers constituted *per se* constitutionally sufficient conditions.[93]

Nor would such a standard be consistent with precedent that has directed courts "considering an Eighth Amendment challenge to conditions of confinement [to] examine the totality of the circumstances." *Rhodes v. Chapman*, 452 U.S. 337, 362-63 (1981). *See also Williams v. Edwards*, 547 F.2d 1206, 1211 (5th Cir. 1977) (district court "was fully justified in finding that the totality of circumstances as to conditions of confinement at Angola" violated Eighth Amendment). "[N]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Rhodes*, 452 U.S. at 346 (citations omitted).

(ii) The district court found that *Gates*-type relief is insufficient.

The district court found that the injunctive relief ordered in *Gates* was not present here and would not have been sufficient to reduce the risk of harm to Plaintiffs. For a discussion of the specific remedial measures not present, *see*

[93] Even if *Gates* did provide a *per se* constitutional standard, the district court found that the Defendants provided to Plaintiffs only ***limited access*** to ice, ***lukewarm*** water, ***shared*** fans, and ***hot*** showers which were insufficient to prevent the substantial risk of harm to Plaintiffs' health, ROA.4968-4978; ROA.4994-4996, and therefore ordered additional relief.

supra § VI.A.1.a.iii. In fact, the court found that some of the remedies ordered in *Gates* ***actually exacerbated*** the heat conditions on death row. ROA.5015. Public health guidelines, relied on by Defendants,[94] acknowledge that fans are insufficient to prevent heat-related illness when the heat index exceeds 99º. PLS_EX_127-0043 ("[U]sing a portable electric fan alone when heat index temperatures exceed 99°F ***actually increases*** the heat stress the body must respond to by blowing air that is warmer than the ideal body temperature over the skin surface" (citing American Medical Association Council on Scientific Affairs and Center for Disease Control)). This is consistent with the district court's observations during its visit. ROA.4995-4996.

Finally, the district court's findings that *Gates*-type relief was insufficient was consistent with other evidence of standards for correctional facilities in the record. The district court took judicial notice of statutes and regulations from 23 states—including the state of Louisiana—that mandate specific climate conditions for correctional facilities and other facilities where individuals are similarly confined. ROA.4954-4956, ROA.2901-3186.[95] Two states within the

[94] Defendant Norwood relied on the EPA publication in responding to Plaintiffs' grievances. ROA.5860-5861.

[95] *See, e.g.*, PLS_EX_001-0001 (Alaska DOC standards requiring "temperatures shall be maintained between 65 and 80º Fahrenheit"); PLS_EX_002-0043 (Arkansas Criminal Detention Facility Review Commission's requirements that "temperature shall be between 65° and 85° Fahrenheit" in all facilities);

Fifth Circuit have such regulations: Texas requires county correctional facilities to prevent temperatures over 85º, and Louisiana mandates air-conditioning in juvenile detention facilities. *See* PLS_EX_017-0001, PLS_EX_019-0003.[96]

PLS_EX_003-0011 (Colorado DOC requiring "adequate, comfortable temperature"); PLS_EX_004-0004 (District of Columbia requiring "temperature and humidity are mechanically raised or lowered to acceptable comfort levels"); PLS_EX_005-0003 (Illinois requiring detention areas to be "heated and cooled . . . to provide temperatures within the normal comfort zone"); PLS_EX_008-0017 (Kentucky requiring temperatures between 65 and 85º Fahrenheit); PLS_EX_009-0055 (Maine requiring temperatures between 65 and 85º Fahrenheit); PLS_EX_013-0001 (Nevada requiring temperature not exceed 85º); PLS_EX_015-0001 (Ohio requiring temperature not exceed 85º); PLS_EX_016-0001 (Tennessee requiring temperature not exceed 80º); PLS_EX_018-0001 (Virginia requiring use of air-conditioning to ensure temperatures do not exceed 85º).

[96] Other evidence demonstrated present standards of decency for those who are at risk of illness from extreme heat. Plaintiffs' expert David Garon testified that Angola's natural ventilation system lacked important features and that he had never in his career seen a building where humans reside that didn't have mechanical cooling in Louisiana. ROA.5042. Various Louisiana standards of which the district court took judicial notice require maintenance of air conditioning to prevent extreme heat for individuals and even animals. *See, e.g.*, PLS_EX_020-0002 (Louisiana assisted living facility standard requiring air conditioning and maintenance of temperature lower than 80º); PLS_EX_021-0007 (Louisiana adult residential care facility standard requiring air conditioning and maintenance of temperature lower than 80º); PLS_EX_022-0006 (child residential care facilities standard requiring air conditioning and maximum 80º); PLS_EX_023-0002 (substitute family care standard requiring air conditioning and maximum 80º temperature); PLS_EX_024-0004 (adult day-care facilities required maximum 80º temperature); PLS_EX_025-0008 (substance abuse treatment facilities requiring maximum temperature of 85º); PLS_EX_026-0001 (hospital nursery required temperature at 75º); PLS_EX_027-0004 (pediatric health care facilities required maximum temperature of 80º); PLS_EX_028-0004 (renal disease treatment facilities required to be air-conditioned to below 85º); PLS_EX_029-0006 (facilities for developmentally disabled must provide air

(iii) The district court fashioned its relief based on expert recommendations.

Defendants protest that "the district court, without any support whatsoever, suggests that at some point over the past decade, inmates have obtained a constitutional right to mechanical cooling" and that such a finding is "obviously based on the subjective views of the district judge." Def. Br. at 22. To the contrary, the district court found that confining inmates to cells for 23 hours per day with insufficient access to mitigating measures with extended heat indices over 88º places inmates at substantial risk of serious harm. As a result, the district court ordered Defendants to maintain a maximum heat index of 88º. Far from being "subjective views" devoid of evidentiary support, the district court's relief was fashioned based on the recommendations of experts, as well as current public health standards, correctional facility standards, and other evidence of the present societal standards of decency.[97]

Consistent with the Supreme Court's guidance, the district court established this 88º maximum heat index based on expert recommendations. In *Plata*, 131 S.

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conditioning); PLS_EX_030-0002 (animal shelter requirement that air conditioning be provided when temperature exceeds 85º).

[97] Plaintiffs recognize this Court's pre-PLRA admonition that "the remedy should begin with what is absolutely necessary" and that "if these measures later prove ineffective, more stringent ones should be considered." *Ruiz*, 679 F.2d at 1145-46. Here, the district court made specific factual findings that the relief afforded in *Gates* was insufficient and that only by maintaining a maximum heat index of 88º would the unconstitutional risk of harm to Plaintiffs' health be remedied.

Ct. 1910, the Supreme Court found no abuse of discretion in ordering a prison to reduce its population to specific levels where the population reduction was adopted pursuant to expert's recommendations. *Id.* at 1945 ("When expert opinion is addressed to the question of how to remedy the relevant constitutional violations, as it was here, federal judges can give it considerable weight."). Similarly, in *Gates*, this Court held that the district court did not abuse its discretion in fashioning injunctive relief where the injunctive relief was based upon expert testimony. *See Gates*, 373 F.3d at 339-40.

Here, there is no abuse of discretion because the district court's order was based on the recommendations of Plaintiffs' expert who provided uncontroverted testimony indicating that only maintenance of a heat index at or below 88º could ensure minimally safe conditions of confinement that did not pose undue health risks. ROA.4959-4960.[98] The district court adopted Dr. Vassallo's

[98] This finding is not inconsistent with *Smith v. Sullivan*, where this Court overturned a requirement that a specific temperature range be maintained. 553 F.2d at 381. Unlike the present case, *Smith* did not introduce evidence that a specific temperature range would cause harm. *Id.* Here, the court tailored its order to ensure that "extremes" of temperature or heat index would not be "injurious to inmates' health" based on expert testimony. ROA.5050-5055. *See also Graves v. Arpaio*, 623 F.3d 1043, 1049 (9th Cir. 2010) ("The district court did not err, therefore, in concluding that dangerously high temperatures that pose a significant risk to detainee health violate the Eighth Amendment. Accepting the district court's factual finding that temperatures in excess of 85°F greatly increase the risk of heat-related illness for pretrial detainees taking psychotropic medications, it follows that the Eighth Amendment prohibits housing such pretrial detainees in areas where the temperature exceeds 85°."). Moreover, the establishment of

recommendation in fashioning its order requiring Defendants to develop a plan to maintain a heat index below 88º during the summer months. ROA.5053, ROA.6033:7-6036:18.[99]

Finally, the remedy ordered here is consistent with precedent nationwide. See *Graves*, 623 F.3d at 1049-50; *Jones-El v. Berge*, 374 F.3d 541 (7th Cir. 2004) (upholding a district court's order requiring prison officials to cool cells to between 80 and 84º during the summertime); *Tillery v. Owens*, 907 F.2d 418 (3d Cir. 1990) (affirming remedy which required an end to double celling in part because of extreme heat).[100]

3. The procedure employed by the district court in fashioning the remedy is consistent with Supreme Court precedent and plainly meets the PLRA's requirements of necessary, narrow, and non-intrusive injunctions.

Defendants claim the district court abused its discretion by failing to ensure that the relief was narrow, necessary, and non-intrusive as required by the PLRA,

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a specific heat index range was necessary to comply with Federal Rule of Civil Procedure 64(d)'s required level of detail. *See McClain*, 519 F.3d at 283-84 (reversing injunction and remanding for greater specificity in injunction).

[99] Moreover, the American Society of Heating, Refrigeration, and Air-Conditioning Engineers (ASHRAE) defines a comfort range for indoor climate conditions during the summer to have an upper limit of 78º Fahrenheit with 50% relative humidity, which is ***significantly cooler*** than the relief ordered here. PL_EX_97-0004. *See also* ROA.5941:2-5942:2 (Plaintiffs' expert defining this standard as normal), ROA.6308:6-6309:4 (Defendants' expert identifying the goal temperature for his air conditioning to be 74°).

[100] Though Defendants argue that climate differences make these cases irrelevant, they offer no explanation as to why.

18 U.S.C. § 3626(a)(1). Def. Br. at 26-27. Specifically Defendants object to the "installation of new equipment" in the form of mechanical cooling. Def. Br. at 27. This argument mischaracterizes the proceedings below and the law.

In fashioning injunctions governing prisons, district courts should provide defendants an opportunity to create their own plans to remedy constitutional violations, provide inmate-plaintiffs an opportunity to object, and then order implementation following appropriate findings. *Lewis v. Casey*, 518 U.S. 343, 362-63 (1996). *See also Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1071 (9th Cir. 2010) ("Allowing defendants to develop policies and procedures to meet the ADA's requirements is precisely the type of process that the Supreme Court has indicated is appropriate for devising a suitable remedial plan in a prison litigation case" (citing *Casey*, 518 U.S. at 362-63)). Consistent with the Supreme Court's guidance in *Casey*, the district court directed Defendants to create a plan to remedy the constitutional violations and subsequently ordered implementation of Defendants' proposal. ROA.5053, ROA.5393-5421, ROA.6839.

A similar procedure was recently approved in *Plata*, 131 S. Ct. 1910. In *Plata*, the Court considered whether the district court had violated the PLRA's requirements that any injunctive relief be narrow, necessary, and nonintrusive in concluding, based on expert testimony, that the only way to remedy the Eighth Amendment violations was by capping the population of prisoners in all California

prisons at 137.5% of the design capacity. *Id.* at 1939-46. The district court ordered the California prison officials to create a plan to achieve the population cap of 137.5%, leaving the specific means of achieving the 137.5% cap to prison officials. *Id.* at 1945-46. The Court approved of the district court's imposition of a specific population level based on expert evidence presented at trial. *Id.* at 1939-44 ("The adversary system afforded the court an opportunity to weigh and evaluate evidence presented by the parties. The plaintiffs' evidentiary showing was intended to justify a limit of 130 percent, and the State made no attempt to show that any other number would allow for a remedy.").[101] The Court noted its approval of the district court providing an opportunity for Defendants to propose a plan whereby the prison officials would achieve the specified target population. *Id.* at 1943 ("Courts should presume that state officials are in a better position to gauge how best to preserve public safety and balance competing correctional and law enforcement concerns. The decision to leave details of implementation to the State's discretion protected public safety by leaving sensitive policy decisions to responsible and competent state officials.").

[101] *See also Plata*, 131 S. Ct. at 1940 ("The PLRA states that a remedy shall extend no further than necessary to remedy the violation of the rights of a particular plaintiff or plaintiffs . . . . This means ***only*** that the scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court.") (emphasis added).

As in *Plata*, the district court here permitted Defendants latitude in determining the means to achieve the necessary remedy.[102] The "narrow tailoring" requirement of the PLRA merely requires "a fit between the remedy's ends and the means chosen to accomplish those ends." *Plata*, 131 S. Ct. at 1939 (citations omitted).[103] There is overwhelming authority that where Defendants propose a plan, the plan should be assumed to be narrowly tailored and nonintrusive. *See, e.g.*, *id.* at 1939-47; *Bounds v. Smith*, 430 U.S. 817, 832-33 (1977) (pre-PLRA case upholding injunctive relief and approving of procedure whereby district court provided prison with opportunity to propose constitutional remedies and then implemented the plan with minimal changes); *Williams v. Edwards*, 547 F.2d 1206, 1218 (5th Cir. 1977) ("The purpose of the plan is to allow the [prison defendants] and the state the kind of self-determination for which they repeatedly argue in their briefs. . . . Though we emphasize the policy of minimum intrusion into the details of state prison administration, when constitutional violations of rights of individuals, even prison inmates, are brought to our attention, we are bound to redress them. The scope of our authority to correct these conditions is as broad as the violations proven, striving where possible to permit self-determination

[102] Defendants concede that the 88º maximum heat index was based on Dr. Vassallo's recommendation. Defs. Brf. at 10-11.

[103] Defendants remediation plan only requires minimal alteration because it uses existing ductwork and infrastructure. ROA.5399-5400.

to prison officials."). *See also Armstrong*, 622 F.3d at 1071-72 ("Defendants' arguments . . . that the relief ordered . . . is not the narrowest, least intrusive relief possible, are remarkably weak. . . . Intrusiveness is a particularly difficult issue for defendants to argue, as by ordering them to draft and promulgate a plan, the district court left to defendants' discretion as many of the particulars regarding how to deliver the relief as it deemed possible."); *Morales Feliciano v. Calderon Serra*, 300 F. Supp. 2d 321, 334 (D.P.R. 2004), *aff'd*, 378 F.3d 42 (1st Cir. 2004), *cert. denied*, 543 U.S. 1054 (2005) ("The very fact that the defendants chose to join the plaintiffs in selecting this remedy would seem to mean—and must be taken to mean—that they understood it to be precisely tailored to the needs of the occasion, that it is narrowly drawn and least intrusive—in fact not intrusive at all."); *Little v. Shelby Cnty., Tenn.*, No. 96-2520, 2003 WL 23849734, at *2 (W.D. Tenn. Mar. 25, 2003) ("Clearly, the least intrusive means in this case is that advocated by the parties themselves and determined by the parties and the court-appointed experts.").

VII. CROSS-APPEAL ARGUMENT

A. The district court committed reversible error in finding that Plaintiffs were not disabled.

The district court erred in applying pre-Americans with Disabilities Act Amendments Act (ADAAA) precedent to the definition of disability. Proof of

a disability is the first requirement for claims under either the ADA or the RA.[104] To establish disability, an individual must show that he has "a physical or mental impairment that substantially limits one or more major life activities . . . ." 42 U.S.C. § 12102(1)(A). The ADAAA, enacted in 2008, revised the definition of disability under the ADA. Pub. L. No. 110-325, 122 Stat. 3553 (2008).

Here, the district court's finding that Plaintiffs did not have disabilities was based on erroneous application of pre-ADAAA definitions of disability. Having determined that Plaintiffs did not have disabilities, the district court did not analyze the other elements of Plaintiffs' disability claims.[105] ROA.5047-5050.

This Court should reverse the district court's application of superseded statutory definitions and abrogated case law and remand to the district court for further consideration of the remaining elements of Plaintiffs' disability claims.[106] *See Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 330-33 (4th Cir. 2014) (district

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[104] Plaintiffs omit the term "qualified" here because Plaintiffs are clearly qualified to participate in the program. *See Southeastern Community College v. Davis*, 442 U.S. 397, 406 (U.S. 1979).

[105] Under the ADA, Plaintiffs must show that they have been denied the benefits of the services, programs, or activities of a public entity, and that such exclusion or discrimination was by reason of their disability. 42 U.S.C. § 12132. Similarly, under the RA, Plaintiffs must show that they were denied benefits of a public entity's program solely because of their disability, and that the program in question receives federal financial assistance. 29 U.S.C. § 794(a).

[106] Should this Court uphold the district court's ruling and injunctive relief, this error is not prejudicial to Plaintiffs, and the Court need not consider whether the district court erred in its findings on Plaintiffs' disability claims.

court's application of pre-ADAAA case law was reversible error).

1. The ADAAA expanded the definition of disability.

The ADAAA significantly amended the definition of disability under the ADA and abrogated Supreme Court case law interpreting the ADA in favor of a broad standard favoring the finding of a disability. The ADAAA was passed in response to Supreme Court decisions that "created an inappropriately high level of limitation necessary to obtain coverage under the ADA," and was intended to reinstate "a broad scope of protection . . . available under the ADA." Pub. L. No. 110-325, 122 Stat. 3553 at 3554 (2008) (codified at 42 U.S.C. § 12101 (Note)) (stating intent to overturn statutory interpretation in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Mfg., Kentucky Inc. v. Williams*, 534 U.S. 184 (2002)). Congress's purpose was to convey that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *Id*. *See also Neely v. PSEG Tex., Ltd. P'ship*, 735 F.3d 242, 245 (5th Cir. 2013) (adopting ADAAA).

The ADAAA expanded the definition of disability in two ways integral to this appeal. First, it made it easier for individuals to show that they are disabled by requiring that "the definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A). "The Act

emphasizes that the term 'substantially limit' under the actual disability prong shall be interpreted as broadly as possible." *Norton v. Assisted Living Concepts, Inc.*, 786 F. Supp. 2d at 1185 (citing 42 U.S.C. § 12102(4)(A)-(B)).

Second, under the ADAAA and relevant regulations, major life activities were expanded to include the operation of major bodily functions. 42 U.S.C. § 12102(2)(B). The ADAAA empowered the Equal Employment Opportunity Commission (EEOC) to issue revised implementing regulations on the definition of disability for employment cases. Pub. L. 113-36 § 6(a)(2). These definitions are afforded *Chevron* deference when definitions are ambiguous. *Canfield v. Movie Tavern, Inc.*, 29 Am. Disabilities Cas. (BNA) 430 (E.D. Pa. Dec. 12, 2013). The definition of "substantially limited" under the current EEOC regulations specifically rejects a requirement that the individual be "significantly restricted in the ability to perform" a major life activity. *Compare* 29 C.F.R. § 1630.2(j) (2010) with 29 C.F.R. § 1630.2(j) (2012) ("An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be

considered substantially limiting.").[107]

The EEOC regulations are widely used in interpreting the ADAAA. Courts regularly apply these new regulations in Title I employment cases. *See, e.g.*, *Summers*, 740 F.3d at 330 (EEOC revised its definition of disability after the ADAAA "pursuant to its delegated authority" by Congress); *Canfield*, 29 Am. Disabilities Cas. (BNA) 430 (same); *Rico v. Xcel Energy, Inc.*, 893 F. Supp. 2d 1165, 1168 (D.N.M. 2012) (same); *Norton*, 786 F. Supp. 2d at 1185-86 (same).

Courts also apply the regulation to Title II cases involving discrimination by state or local governments. *See Kravtsov v. Town of Greenburgh*, No. 10-3142, 2012 U.S. Dist. LEXIS 94819, at *37-38 (S.D.N.Y. July 9, 2012); *Moore v. Chilton County Bd. of Educ.*, No. 12-424, 2014 U.S. Dist. LEXIS 26631, at *31 (M.D. Ala. Mar. 3, 2014).

Courts also use EEOC regulations to guide interpretation of the ADAAA in cases outside the employment context. *See, e.g., See Hale v. King,* 642 F.3d 492,

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[107] The DOJ issued a Notice of Proposed Rulemaking to conform its Title II & III regulations to the ADAAA. It states that "consistent with Executive Order 13563's instruction to agencies to coordinate rules across agencies and harmonize regulatory requirements where appropriate, the Department is proposing, ***wherever possible, to adopt regulatory language that is identical to the revisions to the Equal Employment Opportunity Commission's (EEOC) Title I regulations implementing the ADA Amendments Act***. See 76 FR 16978 (Mar. 25, 2011). This will promote consistency in the application of the ADA and prevent confusion among entities subject to both Titles I and II, as well as those subject to both Titles I and III." 79 Fed. Reg. 4839, 4840 (DOJ Jan. 30, 2014) (emphasis added).

500 (5th Cir. 2011) (Court relied on EEOC regulations when evaluating prisoner's claim under the ADAAA); *Bragdon v. Abbott,* 524 U.S. 624, 643–644 (1998) (citing EEOC analysis on issue of disability in a non-employment context).

2. The District Court failed to apply the ADAAA definition of disability.

The district court erred by applying the definition in *Toyota* to the term "major life activities" and defined them as "those activities that are of central importance to daily life." ROA.5047. However, ADAAA redefined "major life activities" and specifically rejects a requirement that the individual be "significantly restricted in the ability to perform" a major life activity. *See, e.g.*, *Cordova v. Univ. of Notre Dame Du Lac*, 936 F. Supp. 2d 1003, 1008 (N.D. Ind. 2013) ("The ADAAA now provides a specific definition for . . . 'major life activities,' whereas prior to the amendments, courts frequently looked to the regulations. . . for guidance."). Had the district court applied the correct definition of major life activity, the evidence showed that Plaintiffs suffer from disabilities. See *infra* § VII.A.3.

Additionally, the district court erred in its reliance upon now-superseded implementing regulations defining "major life activity" and "substantially limited." *See* ROA.5047-5048. These older definitions of "major life activities" excluded major bodily operations and functions of integral organ systems, such as the circulatory system and the endocrine system. *Compare* 29 C.F.R. § 1630.2(i)

(2010) with 29 C.F.R. § 1630.2(i) (2012). The failure to apply the correct definition was significant. As discussed below, had the correct definition been applied, Plaintiffs would have prevailed.

3. Under the ADAAA definition, Plaintiffs have disabilities.

Undisputed evidence at trial demonstrated Plaintiffs were impaired in their circulatory systems, and in their ability to maintain a normal body temperature through thermoregulation. Thermoregulation is the ability of the body to maintain the temperature of 98.6° within half a degree. ROA.5993:14-17.[108] Heat-related illness, including heatstroke, is a result of the failure of the body's thermoregulation system. ROA.6011:6-ROA.6013:5. Dr. Vassallo testified that heatstroke is a sudden and catastrophic failure of thermoregulation. ROA.6049:20-ROA.6050:14. Plaintiffs also testified that they experience weakness and dizziness in the summertime. ROA.5681:8-ROA.5683:8 (Code), ROA.5755:25-ROA.5757:17 (Ball), ROA.6204:10-ROA.6205:1 (Magee). Thus, since maintenance of a normal bodily temperature is critical not just to staying

[108] Whether thermoregulation is a major life activity is an issue of first impression for this Court. However, in *EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 469 n.8 (5th Cir. 2009), this Court assumed that thermoregulation was a major life activity for the purposes of argument. Furthermore, thermoregulation is consistent with examples of major bodily functions enumerated in the non-exhaustive list provided by the legislation.

alive but also to performing the tasks of daily life, it is a major life activity.[109]

As described below, Plaintiffs suffer from impairments that substantially limit their ability to thermoregulate. Additionally, the medications required to treat Plaintiffs' heat-sensitive disabilities further limit their ability to thermoregulate.

a. Plaintiffs' uncontrolled hypertension substantially impairs thermoregulation.

Plaintiffs' hypertension substantially limits their ability to thermoregulate. It is undisputed in the record that Plaintiffs all suffer from hypertension that is largely uncontrolled. PLS_EX_94-96; ROA.5997:10-18 (Ball); ROA.6002:19-ROA.6003:1 (Code); ROA.6004:10-11 (Magee); ROA.6051:5 (referring to Ball's "uncontrolled hypertension"). Blood pressure is a vascular measure of the pressure in the blood vessels against which the heart has to pump blood, and hypertension is the condition of having high blood pressure. ROA.6334:17-ROA.6335:10.

Dr. Vassallo testified that hypertension requires "the heart . . . to pump much harder" than in a person in the general population, because "the elasticity and the ability of the blood vessels to open and close is decreased in that setting. . . . So that those vessels, those arteries and arterials are not as compliant as they should be. And they can't open like they should and have to in response to heat."

[109] "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A).

ROA.5996:8-5997:18. By this process, hypertension substantially limits the cardiovascular and circulatory systems of Plaintiffs in a manner that substantially limits their ability to thermoregulate.

Defendants did not dispute that Plaintiffs' hypertension substantially impairs their circulatory system. Dr. Singh, the medical director for the DOC, testified that hypertension is a "silent killer," that Ball has suboptimal control of his hypertension, and that Ball has other "non-modifiable risk factors," such as his age and race, that put him at increased risk of harm. ROA.6336:3-15, ROA.6335:23. He testified, "if the blood pressure is high, that means our heart is pumping against a higher pressure. So, down the road, it's going to be having a significant consequences [sic]." ROA.6335:7-10. Dr. Macmurdo, a prison physician who has treated Ball, described Ball's blood pressure as "out of control" and said "sooner or later" Ball was "going to stroke out." ROA.5755:15-24.

Based on this evidence, it is clear that Plaintiffs' hypertension is a disability under the ADAAA. *See*, *e.g., Gogos v. AMS Mech. Sys., Inc.*, 737 F.3d 1170, 1173 (7th Cir. 2013) (finding that chronic high blood pressure is a disability because it interfered with Plaintiffs' cardiovascular and circulatory systems); *Garner v. Chevron Phillips Chemical Co., L.P.*, 834 F. Supp. 2d 528, 538-39 (S.D. Tex. 2011) (stating that disability includes hypertension, even if it is episodic or in remission); *cf. Blackard v. Livingston Parish Sewer Dist.*, No. 12-704, 2014 U.S.

Dist. LEXIS 5490, at *5 (M.D. La. Jan. 14, 2014)) (listing "hypertension, asthma, diabetes, major depression, bipolar disorder" as impairments which qualify as disabilities under the ADAAA).[110]

b. Plaintiffs' medications for hypertension substantially limit their ability to thermoregulate.

Under the ADAAA, while "mitigating measures (such as medications . . .) are ignored when assessing whether an impairment substantially limits a person's major life activities,"[111] "the negative side effects of medication" should be considered when determining substantial limitations on a major life activity. 29 CFR 1630.2(4)(ii); *Garner*, 834 F. Supp. 2d at 539 (citing ADAAA (2008), Pub. L. 110-325, Sec. 4 § 3(4)(E)(1), 122 Stat. 3553, 3556). Plaintiffs take several prescription medications for their hypertension that negatively affect their ability to thermoregulate.

First, Ball takes a "beta blocker," and all Plaintiffs take a "calcium channel blocker." Dr. Vassallo testified that both the beta blocker and the calcium channel

[110] While noting that it may be that hypertension always constitutes a disability, in this matter, Plaintiffs only contend that their hypertension—which is uncontrolled—causes substantial impairment in their ability to maintain a normal body temperature in the environment to which they are confined for 23 hours per day and thus is a disability.

[111] "Someone who began taking medication for hypertension before experiencing substantial limitations related to the impairment would still be an individual with a disability if, without the medication, he or she would now be substantially limited in functions of the cardiovascular or circulatory system." *Gogos*, 737 F.3d at 1173 (citing 29 C.F.R. 1630.2(j)(1)(vi)).

blockers "impair[] the ability of the body to cool, because the blood vessels are not able to dilate properly" and because they "decrease the heart's ability to pump as hard and to meet the requirements of heat or exercise." ROA.5997:19-ROA.6002:18 (Ball is susceptible to heat-related illness and limited in his ability to thermoregulate because of his age, his "not well controlled" blood pressure, and medications he takes to treat his heat-sensitive disabilities; Ball's symptoms like dizziness and weakness are common signs of heat exhaustion); ROA.6002:19-ROA.6004:2 (describing similar concerns and symptoms for Code); ROA.6004:3-ROA.6006:2 (describing similar risks associated with hypertension and additional risks associated with psychotropic medication for Magee).

Second, Dr. Vassallo noted that Plaintiffs Ball and Code are required to take angiotensin receptor blockers (ARBs), which further substantially limit the ability to thermoregulate by preventing the normal acclimatization process where individuals physiologically adjust to changing environmental conditions. ROA.5997:19-ROA.6000:11 (Angiotensin is "involved in thermoregulation [a]nd particularly in climatization [sic]. You cannot climatize [sic] when your angiotensin system is blocked."), ROA.6003:7-8.

Finally, Dr. Vassallo noted that Plaintiffs take diuretic medications, such as Lasix and HydroDiuril, which substantially limit their ability to thermoregulate. ROA.6001:2-17 (diuretics "are important in decreasing the ability to

thermoregulate" and are "one of the most recognized drugs that lessens the ability of the body to thermoregulate"), ROA.6003:7-20. Dr. Vassallo explained that diuretic medications cause loss of water and salt, thereby decreasing the fluids around which the heart can contract and limiting the heart's ability to pump blood. ROA.6001:2-17. The heart and the cardiovascular system are integral to the ability to thermoregulate because the heart must have a healthy pump and the blood vessels must be able to dilate. ROA.5996:22-ROA.5997:1. Thermoregulation requires a "very healthy squeeze of the heart and very healthy compliant vascular system," neither of which Plaintiffs have as a result of their disabilities and the medications necessary to treat those disabilities. ROA.6000:6-8. By affecting the heart and circulatory system in this manner, diuretics inhibit body's ability to thermoregulate more than what would occur without such medications. ROA.6000:6-8.

Plaintiffs are unable to perform the major life activity of thermoregulation. Because of their hypertension and the medications they take to treat it, Plaintiffs have a substantially limited ability to thermoregulate. ROA.5996:14-ROA.6005:2, ROA.6049:18-ROA.6053:19 (Plaintiffs are at increased risk of heatstroke "because they have underlying health problems, including cardiovascular disease, diabetes, hypertension . . . [and take] medications that are required to treat them, which prevent their ability to respond to heat").

c. Ball's diabetes substantially limits his ability to thermoregulate.

In addition to his hypertension, Ball's diabetic condition also causes a substantial limitation on his major life activity of thermoregulation by impairing his cardiovascular system. The undisputed evidence shows that Ball suffers from diabetes. ROA.6051:5 (describing Ball's "uncontrolled diabetes").

Dr. Vassallo testified that "diabetes causes cardiovascular disease" and that "the ability to maintain temperature is dependent on the cardiovascular system." ROA.5996:19-ROA.5997:9. The specific impairment, as described by Dr. Vassallo, is that the blood vessels lose the ability to move blood to the periphery of the body, which is a critical function in thermoregulation when the body encounters hot environments. ROA.5996:19-ROA.5997:9. In this respect, Ball's diabetes causes further medical complications and symptoms with respect to the cardiovascular system. Courts have found that where diabetes causes substantial impairments on major life activities, diabetes is a disability. *See, e.g.*, *Willoughby v. Connecticut Container Corp.*, No. 11-992, 2013 WL 6198210, at *9 (D. Conn. Nov. 27, 2013) ("[Under] the ADAAA, . . . Plaintiff—who *suffers [from] symptoms due to diabetes,* which is by definition a disease which impacts the functioning of the endocrine system—could indeed easily be found by a jury to

be an individual who . . . has a disability under the ADA.").[112] Thus, Ball is also an individual with a disability as a result of the substantial impairment that his diabetes has on the major life activity of thermoregulation.

d. Ball's diabetic condition also affects the major bodily function of operation of the endocrine system and seeing.

Ball's diabetic condition is also a disability under the ADAAA because it affects Ball's major bodily function of operation of the endocrine system and his major life activity of seeing. The district court erred by failing to evaluate the evidence showing the extent to which Ball's diabetes substantially limits his major life activities *outside of his diabetes' impact on his ability to thermoregulate*.

Under the ADAAA, major life activities include the operation of major bodily functions such as the endocrine system. 42 U.S.C. § 12102(2); *see supra* § VII.A.1. It is well-established that diabetes as a disease substantially affects the major bodily function of operation of the endocrine system. *See, e.g.*, 29 C.F.R. § 1630.2 (EEOC regulations stating that "it should be easily concluded" that "diabetes substantially limits endocrine function"). Courts have found that diabetes is a disability under the ADAAA, consistent with the EEOC regulations'

[112] One of the ADAAA's purposes was to ensure that specific heat-sensitive disabilities including diabetes were within the definition of disability. *See Pinckney v. Fed. Reserve Bank of Dallas*, 2013 WL 5461873, at *8 (W.D. Tex.) (quoting *Koller v. Riley Riper Hollin & Colagreco*, 850 F. Supp. 2d 502, 513 (E.D. Pa. 2012)).

guidance. *See, e.g.*, *Szarawara v. Cnty. of Montgomery*, No. 12-5714, 2013 WL 3230691, at *3 (E.D. Pa. June 27, 2013) ("The EEOC has advised that diabetes 'will, as a factual matter, virtually always be found to impose a substantial limitation' on endocrine function. 29 C.F.R. § 1630.2(j)(3)(ii)-(iii).").

Here, Ball's diabetes caused a persistent and sharp spike in his blood glucose levels, which is evidence of a substantial limitation on the endocrine system. ROA.5751:14-ROA.5752:21. Thus, Ball is an individual with a disability because his diabetic condition substantially limits his endocrine system's operation.

Additionally, Ball's diabetes substantially limits his major life activity of seeing. Seeing is a major life activity, according to the ADA, ADAAA, and EEOC Implementing Regulations, and was recognized by the district court as a "major life activity." ROA.5047; 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(i).

At trial, Ball testified as to his diabetes-induced vision impairment, stating he had experienced extreme symptoms for several days before his diabetes diagnosis. ROA.5751:14-ROA.5752:21. These symptoms included blurred vision to the point that he was barely able to see the television screen. ROA.5751:14-ROA.5752:21. The evidence of Ball's visual impairment is sufficient to substantiate a disability finding.[113] Since the district court recognized

[113] Though Ball received treatment for his diabetes after his diagnosis, this evidence was still sufficient to find that Ball had a disability, because disability

that seeing is a "major life activity" for ADA purposes, its failure to consider the evidence in the record of Ball's visual impairment resulting from diabetes was reversible error.

e. Magee's psychotropic medication substantially limits his ability to thermoregulate.

In addition to his hypertension, Magee suffers from depression, for which he is prescribed Fluoxetine, a Selective Serotonin Reuptake Inhibitor ("SSRI") commonly known as "Prozac." ROA.6004:24-ROA.6005:20. This drug inhibits Magee's hypothalamus and its ability to maintain his body temperature to 98.6º. ROA.6004:24-ROA.6005:20. Dr. Vassallo testified that, "One of the major pieces of thermoregulation occurs in the brain. . . . [P]articularly where SSRI's are at work . . . they decrease the ability of the thermacenter, the hypothalmus [sic], to do what it's supposed to do, which is to keep the temperature within half a degree of 98.6 degrees Fahrenheit." ROA.6004:24-ROA.6005:20. Dr. Macmurdo noted that Magee also takes Remeron, another psychotropic drug. ROA.6444:9-12. Thus, the psychotropic medication Magee takes substantially limits his ability to thermoregulate, which qualifies him as an individual with a disability.

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must be determined without regard to mitigating measures. ADAAA, Pub. L. 110-325, Sec. 4 § 3(4)(E)(i), 122 Stat. 3553, 3556.

B. The district court's error was prejudicial.

The district court, having concluded in error that Plaintiffs were not qualified individuals with disabilities, did not analyze the remaining elements of Plaintiffs' disability claims. This Court should accordingly remand to the district court for further proceedings. *See, e.g.*, *Arthur J. Gallagher & Co. v. Babcock*, 339 F. App'x 384, 388 (5th Cir. 2009) (remanding for further consideration of remaining elements); *Spectators' Commc'n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 225 (5th Cir. 2001) (same). Should this Court analyze the remaining elements, it is clear that the district court's error was prejudicial.

1. Defendant DOC is subject to Title II of the ADA and Section 504 of the RA.

The district court correctly noted that the DOC did not contest that they are subject to Title II of the ADA and Section 504 of the RA. ROA.5044-5045. The district court's decision that the DOC was a "public entity" within the purview of the ADA was consistent with precedent. *See, e.g.*, *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) ("[s]tate prisons fall squarely within the statutory definition of public entity").

The DOC receives federal financial assistance. *See* PLS_EX_133, ROA.5044-5055. Thus, the DOC must comply with the RA. *Pace v. Bogalusa City School Board*, 403 F.3d 272, 282-285 (5th Cir.) (en banc) (42 U.S.C.

§ 2000d-7 "conditions receipt of federal funds . . . on the State's waiver of Eleventh Amendment immunity" for suits under the RA).

2. The DOC discriminated against Plaintiffs and violated the DOC's obligations under the ADA and RA.

Title II of the ADA and § 504 of the RA govern the DOC's legally required provision of safe, appropriate housing to all inmates.[114] The evidence at trial was sufficient to show that the DOC violated the ADA and RA in at least two ways.

a. The DOC refused to provide Plaintiffs with a reasonable modification despite Plaintiffs' requests.

Title II of the ADA and § 504 of the RA "impose [on public entities] an affirmative obligation to make reasonable accommodations for disabled individuals" to ensure that they are not denied the benefits of government services or programs. *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005). *See also Garrett v. Thaler*, 560 F. App'x 375, 382 (5th Cir. 2014) ("Title II imposes an obligation on public entities to make reasonable accommodations or modifications for disabled persons, including prisoners."). To prevail, "discrimination need not be the sole reason" for the exclusion of or denial of benefits to the plaintiff. *See, e.g.*, *Bennett-Nelson* 431 F.3d at 454.

[114] 28 C.F.R. § 35.152(b)(3) ("Public entities shall implement reasonable policies . . . so as to ensure that each inmate with a disability is housed in a cell with the accessible elements necessary to afford the inmate access to safe, appropriate housing.").

Here, the DOC discriminated against Plaintiffs by failing to provide reasonable accommodations to ensure Plaintiffs were not denied safe housing.[115] Under the ADA and RA, individuals with disabilities "must be provided with meaningful access to the benefit that the [federal] grantee offers." *Alexander v. Choate*, 469 U.S. 287, 301 (1985). "[T]o assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Id.* To show a failure to accommodate, Plaintiffs were required to show that the DOC—despite its awareness of Plaintiffs' disabilities—denied a reasonable accommodation. *See, e.g.*, *Bennett-Nelson*, 431 F.3 at 455 ("[W]hether the failure to accommodate the disability violates the ADA . . . depends on whether . . . the demanded accommodation is in fact reasonable and therefore required. If the accommodation is required, the defendants are liable simply by denying it."). *See also U.S. v. Georgia*, 546 U.S. 151, 157 (2006) (failure to accommodate disability plausibly "constituted exclusion from participation or denial of the benefits of the prison's services, programs, or activities.") (citations omitted).[116]

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[115] Prisons are legally required under the Eighth Amendment to provide safe housing. *See, e.g.*, *Collier*, 501 F.2d at 1303 (confining inmates "in barracks unfit for human habitation and in conditions that threaten their physical health and safety . . . constitutes cruel and unusual punishment").

[116] This Court has recognized some distinction between the ADA's and the RA's causation language. *See, e.g.*, *Pace*, 403 F.3d at 288-89. However, where a discrimination claim is based on failure to provide a reasonable accommodation, this Court has clarified that there is no fundamental difference in the causation

Here, Defendants were aware of Plaintiffs' disabilities. Plaintiffs made requests through grievance procedures describing their disabilities and the corresponding increased risk of heat-related illness and requesting "any effective cooling system," but were categorically refused. PLS_EX_39-48. Having been informed of Plaintiffs' disabilities, Defendants had an affirmative obligation to provide a reasonable accommodation to ensure that they were not exposed to an increased risk of heat-related illness. Indeed, Defendants' unjustified denial of accommodations to Magee is particularly egregious. Despite knowing that Magee takes psychotropic medication, Defendants did not place Magee on the Heat Precaution Lists that Defendants maintain pursuant to their own policies requiring that prisoners on psychotropic drugs be placed on the list and monitored during extreme heat conditions. ROA.5032-5034.

Defendants never explored any of the reasonable accommodations that could have been provided to Plaintiffs. An accommodation is unreasonable where it "would require a fundamental alteration in the nature of the program'" or "would impose 'undue financial or administrative burdens.'" *Bennett-Nelson*, 431 F.3d at 455 (citing *School Board of Nassau County v. Arline*, 480 U.S. 273, 288 n.17

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analysis, since the cause of a failure to accommodate is irrelevant. *Bennett-Nelson*, 431 F.3d at 454-55 ("[B]oth the ADA and the Rehabilitation Act impose upon public entities an affirmative obligation to make reasonable accommodations . . . . Where a defendant fails to meet this affirmative obligation, the cause of that failure is irrelevant.").

(1987)). *See also* 28 C.F.R. § 35.130(b)(7). Plaintiffs requested any effective cooling system that would lower the heat indices to mitigate the heightened risks of heat-related illness on the basis of their disabilities. PLS_EX_39-48. Ensuring a maximum heat index of 88º would not have constituted a "fundamental alteration" to the DOC's services, programs, or activities, because the DOC is already legally required to provide safe housing.

Nor did Plaintiffs' request for reasonable accommodations impose undue financial costs or administrative burden. Any number of cooling mechanisms could have achieved the reduction in risks of heat-related illness caused by Plaintiffs' disabilities. Defendants' expert testified, "There's many, many ways to skin a cat. . . . There are many different systems that can be utilized to provide cooling" that would accommodate Plaintiffs (ROA.6315:6-19), and specifically stated that "spot coolers" or window units could have lowered the heat index to a safe level. ROA.6309:5-20, ROA.6314:13-ROA.6315:5.

Plaintiffs concede that there was no evidence showing the costs of potential accommodations. But any lack of evidence was the result of Defendants' refusal to describe the administrative burden or financial costs during discovery—conduct for which Defendants were sanctioned by the district court. ROA.5099-5106. While Defendants have now created a plan that would lower the heat index in Plaintiffs' cells and mitigate the risk of heat-related illness, ROA.5393-5421

(Defendants' Heat Remediation Plan), there remains no evidence in the record as to the costs of Defendants' proposed plan.[117] Given Defendants' discovery misconduct the district court's resulting sanctions, this Court should remand for further proceedings on this element.

b. The DOC discriminated by applying neutral policies that had a disparate impact on Plaintiffs as a result of Plaintiffs' disabilities.

The DOC discriminated against Plaintiffs when it applied facially neutral policies in a manner that disproportionately impacted Plaintiffs. The application of neutral policies is discriminatory where the facially neutral policy disproportionately negatively impacts persons with disabilities, regardless of intent. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) ("disparate-impact claims are cognizable under the ADA") (citations omitted); *Gonzales v. City of New Braunfels, Tex.*, 176 F.3d 834, 839 & n.26 (5th Cir. 1999) (same).

Here, Defendants confine Plaintiffs to their cells for 23 hours per day with limited access to ice or other ameliorative measures.[118] Given Plaintiffs'

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[117] To the extent that testimony on costs exists, that testimony relates to a hypothetical plan that was never ordered to be implemented. ROA.6303:21-ROA.6305:12 (testimony from Defendants' expert Eyre that the cost estimate provided at trial was "very high-end" and a "worst case scenario" and that "it could be considerably less than that").

[118] *See supra* § III.A. The decision to move Plaintiffs in 2007 from the old death row facility to a "new and modern" facility (ROA.6198:7-8) that did not include mechanical cooling, or even initially fans (ROA.5731:11-24), was itself discriminatory.

disabilities, these facially neutral policies force Plaintiffs to endure a higher risk of heat-related illness than the general population would face.[119] Based on this evidence, the district court could have found that injunctive relief was warranted to prevent this discrimination. *See, e.g.*, *Armstrong*, 622 F.3d at 1068 (upholding injunctive relief ordered by district court to prevent discriminatory impact on prisoners with disabilities).

VIII. CONCLUSION

For the foregoing reasons, this Court should affirm the district court's opinion on the Eighth Amendment and remand with respect to the disability claims for further findings.

Respectfully submitted on September 23, 2014.

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[119] *See supra* § VI.A.1.a.

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September 23, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 23, 2014, a copy of the foregoing has this date been served upon all parties through their respective counsel of record by operation of the Court's electronic filing system and has been filed electronically with the Clerk of the Court using the CM/ECF system.

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v.

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BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLEES/CROSS-APPELLANTS AND URGING AFFIRMANCE IN PART

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INTEREST OF THE UNITED STATES

This case concerns the application of the Eighth Amendment to inmates' claims that they have been subjected to life-threatening heat conditions. The Justice Department is charged with enforcing the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 *et seq.*, which allows the Attorney General to investigate and seek equitable relief for a pattern or practice of unconstitutional conditions in, among other institutions, state and local prisons. Pursuant to its

CRIPA authority, the Justice Department frequently investigates prison conditions, including those in high-security units. Thus, the United States has a substantial interest in ensuring courts properly apply the Eighth Amendment in this context.

This case also concerns the interpretation and application of Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504). Title II of the ADA applies to state and local governments and prohibits disability-based discrimination in their services, programs, and activities, including the operation of prison systems. 42 U.S.C. 12131-12134; *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 210 (1998). Section 504 prohibits disability-based discrimination by recipients of federal funding, which include many prison systems. 29 U.S.C. 794. The Justice Department has authority to issue regulations implementing Title II of the ADA and Section 504, including regulations implementing the definition of disability, and can bring civil actions to enforce both statutes. See 29 U.S.C. 794, 794a; 42 U.S.C. 12133-12134, 12205a; 28 C.F.R. Pts. 35 & 41. It also coordinates the implementation and enforcement of Section 504 by all federal agencies. See Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980). Thus, the United States has a substantial interest in ensuring courts properly construe both statutes.

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether the district court correctly found that defendants violated the Eighth Amendment by consistently subjecting inmates who are susceptible to heat-related illnesses to extreme heat.

2. Whether the district court applied the wrong legal standard when it denied plaintiffs' claims under Title II of the ADA and Section 504.

STATEMENT OF THE CASE

1. Plaintiffs are three death row inmates incarcerated at the Louisiana State Penitentiary in Angola, Louisiana (Angola). ROA.24-25; ROA.4958. All three have hypertension and take diuretic medication for their condition. ROA.4974-4978. In addition, Elzie Ball is approximately 60 years old, has diabetes, and is obese; Nathaniel Code is approximately 57 years old, has hepatitis, and is obese; and James Magee is approximately 35 years old and has high cholesterol and depression. ROA.4974-4978.

Angola's death row facility was constructed in 2006. ROA.4968. It is composed of four housing wings, each consisting of two single-level tiers that radiate from a control center and central administrative area. ROA.4968-4969. Between the walls of the two back-to-back housing tiers are the plumbing, electrical wires, and duct work for that wing. ROA.4969. Each tier consists of 12

to 16 windowless, concrete cells separated from a tier walkway by metal security bars on one side of the cells. ROA.4969. On the other side of the approximately nine-foot-wide walkway is an outer wall with louvered windows. ROA.4969. The slats on the windows can be adjusted to admit varying degrees of air or light; non-oscillating fans are mounted above the windows and serve two cells each. ROA.4969-4970. Each cell contains an eight-by-six inch vent through which air from the louvered window is drawn into the cell, through the vent, into the wing's exhaust system, and out of the building. ROA.4970. Although the control center and central administrative area are air-conditioned, there is no mechanical cooling system in the death row tiers that permits the temperature or humidity to be lowered, nor does the ventilation system lower the temperature or humidity. ROA.4968-4969, ROA.4972-4974, ROA.5041-5043.

Death row inmates spend 23 hours per day in their cells, which include a sink, mirror, toilet, bed, desk, and chair. ROA.4970. During the hour in which inmates are allowed to leave their cells (tier time), they may engage in outdoor recreation up to four times per week, spend time in the tier walkway, or shower. ROA.4970. Each tier has two shower stalls; Angola maintains the water temperature at 100 to 120 degrees. ROA.4971. Tiers also have a portable ice chest where staff stores ice. ROA.4971. Inmates may access the chest, but only during their tier time. ROA.4971. Correctional officers are not required to

distribute ice to the inmates; instead, inmates on tier time usually distribute ice to fellow inmates confined to their cells. ROA.4971. If an inmate elects outdoor recreation time, declines to distribute ice to fellow inmates, or exhibits habits that other inmates find so unsanitary that they will not accept ice from him, inmates do not receive ice during that hour unless an officer agrees to distribute it. ROA.4971-4972. Inmates also lack access to ice when the tiers are locked down overnight and when the ice runs out, which happens frequently. ROA.4972.

2. On June 10, 2013, plaintiffs filed a complaint seeking declarative and injunctive relief against the Louisiana Department of Public Safety and Corrections, its Secretary, Angola's Warden, and Angola's Death Row Warden. ROA.24-35; ROA.4958-4960.[1] Plaintiffs alleged that, given their susceptibility to heat-related illnesses, they face a substantial risk of serious harm, including permanent injury or death, because of extremely hot conditions on death row. ROA.27-32. Plaintiffs alleged that, because of the extreme heat, they have experienced, among other things, dizziness, loss of appetite, difficulty breathing, difficulty sleeping, profuse sweating, headaches, chest pain, weakness, nausea, numbness in the hands, anxiety, dehydration, and loss of concentration. ROA.30-

[1] The parties do not dispute that plaintiffs exhausted their administrative remedies in accordance with the Prison Litigation Reform Act, 42 U.S.C. 1997e(a). ROA.25; ROA.5052.

32. Plaintiffs asserted they cannot alleviate the excessive heat themselves, and that defendants do little or nothing to alleviate it for them. ROA.27.

Plaintiffs alleged an Eighth Amendment violation based on defendants' deliberate indifference to their health and safety. ROA.32-33; ROA.4959. They also alleged that defendants violated Title II of the ADA and Section 504 by failing to provide them with reasonable accommodations despite knowing of their medical conditions and the effects of those conditions. ROA.33-34; ROA.4959. Plaintiffs sought an injunction ordering defendants to maintain the heat index in the death row tiers at or below 88 degrees, ensure plaintiffs have regular access to uncontaminated ice and drinking water during summer months, and provide for cold showers. ROA.34; ROA.4959-4960.

Plaintiffs then moved for a preliminary injunction, but the court deferred issuing a ruling until after it conducted an evidentiary hearing and trial on the merits. ROA.4961; ROA.6587-6595. The court ordered the parties to gather information it considered essential to resolving plaintiffs' claims, including the outdoor temperature, humidity, and heat index at Angola, and the temperature, humidity, and heat index as recorded in the six death row tiers inmates currently occupy. ROA.4961, ROA.4979; ROA.6589-6592. A third-party contractor placed electronic monitors outside the facility and in the six occupied tiers; it also placed a second monitor in one of those tiers to determine whether the heat index differed

based on a cell's location in the front or rear of a tier. ROA.4979-4980, ROA.4988. In August 2013, during the subsequent trial, the parties presented evidence regarding the data collected, conditions on Angola's death row, plaintiffs' health, and heat-related warnings and precautions that federal and state agencies issue when the heat index is high. ROA.4961, ROA.4968-4994, ROA.5003-5018.

3. On December 19, 2013, the court issued findings of fact and conclusions of law. ROA.4957-5058. It held that plaintiffs established an Eighth Amendment violation (ROA.4996-5044), but rejected plaintiffs' claims under the ADA and Section 504 (ROA.4957, ROA.5044-5050).

a. As to plaintiffs' Eighth Amendment claim, the court found plaintiffs consistently are subjected to heat indices in "extreme caution" and "danger" zones, which "may cause increasingly severe heat disorders with continued exposure or physical activity." ROA.4982; see ROA.4980-4994 (detailed findings of fact for each tier). The court found that although "the temperature, humidity, and heat index in each tier varied from day-to-day, the heat index in all of the tiers exceeded 104 degrees at various times during the collection period." ROA.4980. The court also found that the heat indices inside at least two of the housing tiers were sometimes up to 20 degrees higher than the heat indices recorded outside the facility, and that inmates housed at the rear of the tiers were subjected to hotter conditions than those housed closer to the tier's entrance. ROA.4994. Plaintiffs

testified that they cope with the extreme heat by drinking water, lying on the floor, avoiding direct sunlight, removing unnecessary clothing, and draping wet towels over their bodies. ROA.4975-4978.

The district judge visited Angola a week after the data collection period ended. ROA.4994. The court stated that the temperature inside death row felt appreciably higher than the outside temperature; that "windows, fans, and cell vents did not provide a cooling effect or relief from the heat conditions"; that when the tier's entrance was opened, air-conditioning could be detected briefly near the entrance of the tier, but not at the rear of the tier; that the cold water from the cell faucets was lukewarm; that the mounted fans did not provide equal amounts of air flow to each cell; and that the concrete walls of the tiers were "hot to the touch" and the metal security bars "very warm to the touch." ROA.4995-4996.

The court found that the extreme heat on death row presented a substantial risk of serious harm to plaintiffs, who provided uncontroverted temperature, humidity, and heat index data, as well as credible medical evidence regarding their susceptibility to heat-related illnesses. ROA.5001-5012. The court cited the testimony of plaintiffs' expert witness, Dr. Susan Vassallo, who concluded that the heat conditions on death row put plaintiffs' health at serious risk and exacerbated plaintiffs' underlying medical conditions. ROA.5006. According to Dr. Vassallo, plaintiffs' medical conditions and related medication inhibit their body's ability to

thermoregulate (*i.e.*, respond to heat), and their ages, especially for plaintiffs Ball and Code, further increase the risk of harm. ROA.5006-5009.[2]

The court stated that plaintiffs did not need to establish that death or serious illness had already occurred in order to establish a substantial risk of harm. ROA.5011. Rather, it sufficed that plaintiffs had filed multiple formal written complaints about the excessive heat. To the extent defendants argued that plaintiffs had not made "sick call" requests about the heat, the court stated that monetary and disciplinary consequences discouraged them from doing so. ROA.5011. The court also rejected defendants' argument that plaintiffs' lifestyle and diet choices, and not the heat conditions on death row, contributed to plaintiffs' risk of harm. ROA.5012.

Finally, the court stated that many federal and state agencies have recognized that overexposure to extreme heat increases the risk of serious harm to individuals. ROA.5012. For example, the National Weather Service, CDC, and Louisiana Office of Public Health have warned that higher-risk individuals are susceptible to serious illness with prolonged exposure to dangerously high heat indices. ROA.5004, ROA.5013-5014. In addition, FEMA has stated that

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[2] Dr. Vassallo testified in detail regarding how plaintiffs' medical conditions and related medication make them particularly susceptible to heat-related illnesses, including heat stroke, heart attack, and stroke. ROA.5996-6006, ROA.6012-6021, ROA.6028, ROA.6047-6055.

"stagnant atmospheric conditions and poor air quality" can trigger heat-related illnesses, and that "asphalt and concrete store heat longer and gradually release heat at night, which can produce higher nighttime temperatures." ROA.5014.

The court also held that plaintiffs had shown that defendants acted with deliberate indifference to this danger. ROA.5019-5020. First, the court concluded that, because of the obvious risk of serious harm to plaintiffs, defendants knew of a substantial risk of serious harm. ROA.5020. The court also concluded that defendants' knowledge of the risk of harm could be inferred from circumstantial evidence presented at trial. ROA.5020. In particular, the court cited plaintiffs' numerous administrative complaints, and the fact that defendants closely monitored temperatures on death row and regularly visited its housing tiers. ROA.5021-5027.

The court further concluded that defendants unlawfully disregarded the substantial risk of serious harm to plaintiffs. ROA.5027. The court stated Angola's Warden testified that he had "often 'thought' of ways to reduce the heat in the death row tiers, yet failed to take any action" to do so. ROA.5027. Indeed, Angola's Warden first attempted to reduce the temperatures in the hottest tiers only after the court ordered ongoing data collection. ROA.5029-5031. The court stated that this action demonstrated defendants' knowledge of the extreme heat on death row, emphasizing that Angola's Warden did not take any action until the data

exposed the extremely high and dangerous temperatures. ROA.5031-5034. Accordingly, the court concluded that plaintiffs had shown that defendants acted with deliberate indifference to the substantial risk of serious harm to their health and safety. ROA.5034-5035, ROA.5044.

b. The court rejected plaintiffs' disability discrimination claims under Title II of the ADA and Section 504. The court held that plaintiffs did not establish they are "qualified individuals with a disability." ROA.5047-5050. Relying on *Toyota Motor Manufacturing* v. *Williams*, 534 U.S. 184, 197 (2002), to define "[m]ajor life activities," the court found that plaintiffs had not shown any physical or mental impairment that substantially limits one or more of their life activities. ROA.5047-5048.

Defendants did not dispute that plaintiffs suffer from chronic diseases, including hypertension, diabetes, obesity, high cholesterol, depression, and hepatitis. ROA.5048. The court stated, however, that plaintiffs had not shown how these chronic diseases "substantially limit their ability to care for themselves, perform manual tasks, walk, see, hear, speak, breath[e], learn, working, eat, sleep, stand, lift, bend, read, concentrate, think, or communicate." ROA.5048-5049. Rather, according to the court, plaintiffs' evidence was "limited to how the *heat conditions* in the death row tiers limit [their] major life activities, and how [their] underlying medical conditions put them at increased risk of developing heat-

related illnesses." ROA.5049. Thus, the court concluded plaintiffs had failed to establish a prima facie case of disability-based discrimination. ROA.5049-5050.

c. The court issued declaratory and injunctive relief. ROA.5050-5055. Defendants were ordered to immediately develop a plan to maintain the heat index on death row at or below 88 degrees; record and report the temperature, humidity, and heat index on the death row tiers at two hour intervals between April 1 and October 31; provide plaintiffs and other heat-susceptible inmates at least one cold shower per day and direct access to clean, uncontaminated ice and/or cold drinking water during their tier time and while confined to their cells; and provide whatever other relief was necessary to comply with constitutional standards. ROA.5053-5054. Because of defendants' deliberate indifference to the substantial risk of serious harm to plaintiffs and defendants' manipulation of the heat data during the data collection period, the court stated it would retain jurisdiction to monitor implementation of the final plan and would appoint a special master to report on defendants' compliance. ROA.5054-5055.

4. Defendants appealed. ROA.5178-5180. On May 23, 2014, the district court approved defendants' heat remediation plan and ordered its implementation. ROA.6839. After the court entered final judgment (ROA.6851-6852), plaintiffs cross-appealed the denial of their ADA and Section 504 claims (ROA.6853-6854). This Court granted a stay pending appeal. ROA.6860.

SUMMARY OF ARGUMENT

The district court properly held that subjecting inmates susceptible to heat-related illnesses because of their physical conditions to dangerously hot conditions violates the Eighth Amendment where the prison officials here knew of and disregarded a substantial risk of serious, heat-related harm to inmate health and safety. Plaintiffs in this case presented reliable temperature and humidity data, as well as credible medical evidence substantiating their claims that current conditions on Angola's death row constitute a sufficiently serious risk of harm. The record supports the court's finding that defendants acted with deliberate indifference to that substantial risk of serious harm to plaintiffs. Thus, the judgment in favor of plaintiffs under the Eighth Amendment should be affirmed.

The court erred, however, in analyzing plaintiffs' claims under Title II of the ADA and Section 504. In examining whether plaintiffs are qualified individuals with a disability, the court failed to apply the standard Congress established when it enacted the ADA Amendments Act of 2008. The court's decision conflicts with the text and purpose of the ADA and Section 504, and the regulations implementing both statutes. Thus, the judgment in favor of defendants under the ADA and Section 504 should be vacated, and the case remanded to the district court to consider plaintiffs' claims under the correct legal standard.

ARGUMENT

I

THE DISTRICT COURT PROPERLY HELD THAT LIFE-THREATENING HEAT CONDITIONS ON ANGOLA'S DEATH ROW VIOLATE PLAINTIFFS' EIGHTH AMENDMENT RIGHTS

The Eighth Amendment prohibits "cruel and unusual punishments." U.S. Const. Amend. VIII; *Robinson* v. *California*, 370 U.S. 660, 675 (1962). To determine whether a punishment is cruel and unusual, "courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham* v. *Florida*, 560 U.S. 48, 58 (2010) (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 102 (1976)). The Supreme Court has recognized that, consistent with the Eighth Amendment, "the State must respect the human attributes even of those who have committed serious crimes." *Id.* at 59.

It is well-established that "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Farmer* v. *Brennan*, 511 U.S. 825, 832 (1994) (quoting *Helling* v. *McKinney*, 509 U.S. 25, 31 (1993)); see also *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981). Accordingly, prison officials must provide humane conditions of confinement and take reasonable measures to protect inmate health and safety. See *Farmer*, 511 U.S. at 832-833.

To establish an Eighth Amendment violation, an inmate must show (1) a deprivation that is "sufficiently serious," in that "he is incarcerated under conditions posing a substantial risk of serious harm," and (2) that prison officials have acted with "deliberate indifference to inmate health or safety." *Farmer*, 511 U.S. at 834 (citations and internal quotation marks omitted); see also *Herman* v. *Holiday*, 238 F.3d 660, 664 (5th Cir. 2001) (applying this test). Under the first prong, a deprivation is "sufficiently serious" when a prison official's act or omission results in the denial of "the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834 (citation omitted). The second prong requires a showing that officials had a "sufficiently culpable state of mind." *Ibid.* (citation omitted).

A. Extreme Heat On Death Row Poses A Substantial Risk Of Serious Harm To Plaintiffs

This Court has already recognized that being subjected to extreme temperatures, either alone or in combination with other conditions of confinement, can violate the Eighth Amendment. For example, in *Gates* v. *Cook*, 376 F.3d 323, 339-340 (5th Cir. 2004), this Court recognized an Eighth Amendment claim based in part on high heat indices in Mississippi's death row facility. See also *Blackmon* v. *Garza*, 484 F. App'x 866 (5th Cir. 2012) (per curiam) (reversing directed verdict and remanding for a new trial on prisoner's claim that Texas authorities inadequately protected him from substantial health risks associated with extreme

heat); *Valigura* v. *Mendoza*, 265 F. App'x 232, 235 (5th Cir. 2008) (per curiam) (recognizing claim based in part on high heat indices in high-security unit with limited inmate access to water). This Court also has recognized that medications can impact a prisoner's ability to withstand extreme heat, stating that "the medications often given to deal with various medical problems interfere with the body's ability to maintain a normal temperature." *Gates*, 376 F.3d at 334; see also *Blackmon*, 484 F. App'x at 871.

Under this Court's cases, whether certain conditions constitute a substantial risk of serious harm is a fact-specific inquiry that examines the totality of circumstances, including the severity and duration of inmates' exposure to the challenged conditions. See *Gates*, 376 F.3d at 333; compare, *e.g.*, *Blackmon*, 484 F. App'x at 869-872 (discussing facts and citing cases that would allow a reasonable juror to find for inmate on excessive-heat claim), with *Powers* v. *Clay*, 560 F. App'x 290, 292 (5th Cir. 2014) (per curiam) (rejecting claim that six-hour detention on a sun-exposed concrete yard constitutes sufficiently serious harm). Other courts of appeals likewise have recognized that extreme temperatures can violate the Eighth Amendment, and that whether conditions give rise to a violation is particularly appropriate for the fact finder's resolution. See, *e.g.*, *Walker* v. *Schult*, 717 F.3d 119, 126-127 (2d Cir. 2013); *Bennett* v. *Chitwood*, 519 F. App'x 569, 574 (11th Cir. 2013) (per curiam); *Graves* v. *Arpaio*, 623 F.3d 1043, 1048-

1049 (9th Cir. 2010) (per curiam); *Skelton* v. *Bruce*, 409 F. App'x 199, 204 (10th Cir. 2010); *Chandler* v. *Crosby*, 379 F.3d 1278, 1294-1295 (11th Cir. 2004); *Dixon* v. *Godinez*, 114 F.3d 640, 642-643 (7th Cir. 1997); *Mitchell* v. *Maynard*, 80 F.3d 1433, 1441-1443 (10th Cir. 1996).

Here, the district court correctly applied governing law to the facts of this case to conclude that plaintiffs established that their conditions of confinement create a substantial risk of serious harm. The court's findings are well supported by the record, including the heat data, trial testimony, medical evidence, federal and state warnings, and the court's credibility determinations and own observation of death row tiers. Moreover, the court's reliance on temperature and humidity data and expert testimony detailing the ways in which consistently high heat indices interact with plaintiffs' ages, medical conditions, and medication to increase their susceptibility to heat-related illnesses comports with the types of information this Court has relied upon in the past to hold that plaintiffs had proven a sufficiently serious deprivation under the Eighth Amendment. See, *e.g.*, *Blackmon*, 484 F. App'x at 871; *Gates*, 376 F.3d at 333-340.

The cases defendants rely upon to argue that the district court erred in finding that conditions on Angola's death row create a substantial risk of serious harm to plaintiffs actually support the court's conclusion in this case. As the district court correctly explained (ROA.5000-5002), this Court's decisions in

Woods v. *Edwards*, 51 F.3d 577 (5th Cir. 1995) (per curiam), and *Gates* v. *Cook*, *supra*, do not mandate a decision for defendants. In *Woods*, this Court affirmed the grant of summary judgment against an Angola inmate who claimed that high temperatures and inadequate cooling in extended lockdown aggravated his sinus condition. 51 F.3d at 581. In so doing, the Court stated that the defendants had presented evidence that they used fans to circulate the air in that area of Angola's housing and that the inmate, on the other hand, had "failed to present medical evidence of any significance" or identify "a basic human need that the prison has failed to meet." *Ibid.* Subsequently, in *Gates*, this Court, in upholding the finding of an Eighth Amendment violation, stated that *Woods* "does not stand for the proposition that extreme heat can never constitute cruel and unusual punishment." *Gates*, 376 F.3d at 339. This Court expressly distinguished *Woods* from *Gates* on its facts, stating that the inmate in *Woods* "had not presented medical evidence sufficient to state an Eighth Amendment violation." *Ibid.* Here, in plaintiffs' case, the district court found that, unlike in *Woods*, plaintiffs presented credible medical evidence and heat data to support their claim that conditions on death row constituted a substantial risk of serious harm to their health and safety. ROA.5002.

Nor does *Chandler* v. *Crosby*, *supra*, support disturbing the court's holding. In *Chandler*, death row inmates in Florida challenged high cell temperatures and inadequate ventilation as unconstitutional. 379 F.3d at 1282-1286. The Eleventh

Circuit acknowledged that extreme heat and inadequate cooling can alone, or in combination with other conditions, create unconstitutional conditions, but affirmed the district court's finding that the inmates had failed to satisfy the first prong of their claim. See *id.* at 1294-1297. The *Chandler* court cited three findings in particular: (1) summertime temperatures were not excessive, where cell temperatures were mostly in the eighties, and where it was at times cooler in the cells than outdoors; (2) the ventilation system effectively managed air circulation and humidity, with relative humidity rarely raising above seventy percent; and (3) other conditions, including the lack of exposure to direct sunlight, the availability of hot and cold water in each cell, and the limited opportunity to gain relief in air-conditioned visiting areas, alleviated the heat. *Id.* at 1297-1298. Here, the evidence reasonably led the district court to a contrary conclusion that is neither clearly erroneous nor incorrect as a matter of law. ROA.5039-5043.

Finally, the fact that plaintiffs have not yet suffered medical emergencies as a result of the extreme heat does not mandate a different conclusion. Cf., *e.g.*, Defs.' Br. 17-19. The Eighth Amendment is not limited to addressing harm that has already occurred; it also prevents serious future harm. As the Supreme Court stated in *Helling*, an inmate may "successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery." 509 U.S. at 33. Given the Eighth Amendment's assurance that inmates be afforded reasonable

safety, "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Ibid.* This Court likewise has stated that "the inmate need not show that death or serious illness has occurred." *Gates*, 376 F.3d at 333. Contrary to defendants' suggestion, plaintiffs asserting an Eighth Amendment violation need not show they have suffered prior injuries to establish a substantial risk of serious harm to their health.

B. Defendants Acted With Deliberate Indifference To The Substantial Risk Of Serious Harm To Plaintiffs

The Supreme Court has explained that a prison official acts with deliberate indifference if he "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837; see also *Wilson* v. *Seiter*, 501 U.S. 294, 303 (1991) (applying this standard to prison-conditions cases). An inmate does not have to show that an official "acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer*, 511 U.S. at 842. An official's knowledge is a question of fact, and the "factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Ibid*.

Here, the district court correctly concluded that defendants acted with deliberate indifference to a substantial risk of serious harm based on the obvious risk to plaintiffs as well as evidence permitting the court to infer defendants' knowledge of such harm. ROA.5019-5020. For example, plaintiffs submitted numerous administrative complaints to defendants, who denied the requests despite acknowledging plaintiffs' claims that it is extremely hot on death row and that they are susceptible to heat-related illnesses. ROA.5021-5024. In finding defendants deliberately indifferent, the court correctly rejected defendants' argument that plaintiffs sought only air conditioning, and not relief from the health risks the extreme heat triggered. ROA.5021-5022. Moreover, the district court in this case found that defendants closely monitored the temperatures on death row and regularly visited plaintiffs' tiers, thereby allowing the court to find that defendants knew of the extreme heat. ROA.5024-5027. Although defendants argue there was no evidence showing that they knew of and disregarded the excessive heat, ample evidence supports the court's factual determination.

The evidence also supports the court's conclusion that defendants disregarded the substantial risk of serious harm to plaintiffs. Defendants failed to take any action to reduce the extreme heat on death row, despite testifying that they had often thought of ways to do so. ROA.5027-5028. Indeed, the court emphasized defendants' belated attempts, during the data collection period, to

modify the two tiers with the highest recorded temperatures and heat indices as evidence of defendants' knowledge of the extreme heat. ROA.5029-5031, ROA.5065-5067; ROA.5091-5096. The court also noted that defendants had provided no individual ice chests to death row inmates, and had not complied with their own policies and procedures with respect to Plaintiff Magee, who should have been included on defendants' "Heat Precautions List" based on his use of psychotropic medication. ROA.5030-5034. Thus, the court correctly concluded that plaintiffs had shown that defendants acted with deliberate indifference to a substantial risk of serious harm to their health and safety. ROA.5034-5035.

Contrary to defendants' argument, the fact that defendants were making available to plaintiffs some of the remedies that this Court found appropriate to remedy the constitutional violation in *Gates* does not mandate a different conclusion.[3] Indeed, the court expressly distinguished the facts in this case from those in *Gates*, noting that here plaintiffs' cells were not each equipped with a fan, that the fans mounted on the tiers provided inadequate relief, that plaintiffs had direct access to ice for only one hour each day, that the cold water in plaintiffs' sinks was lukewarm, and that the shower temperature was between 100 and 120 degrees. ROA.5036; cf. *Gates*, 376 F.3d at 336, 339-340. In addition, the court

[3] Mississippi ultimately closed the unit at issue in *Gates*. See Order of Dismissal Without Prejudice by Agreement of the Parties, Doc. 136, *Presley* v. *Epps*, No. 05cv148 (N.D. Miss. Aug. 2, 2010).

credited the testimony of plaintiffs' expert that the cooling provisions defendants here made available to plaintiffs were inadequate to safeguard plaintiffs' health. ROA.5002, ROA.5005-5011; ROA.6030-6033, ROA.6051-6052. Plaintiffs' medical expert testified that, short of exposing plaintiffs to any air-conditioning, defendants still could ensure that inmates had personal ice chests, increased numbers of fans and cooling towels, the ability to take cold showers a couple of times per day, and access to a prison health system that does not charge or penalize inmates for requesting medical care. ROA.6006-6009, ROA.6032-6035, ROA.6054-6055. These expert recommendations were consistent with warnings that federal and state agencies issue to the public, and especially to those individuals at an increased risk for heat-related illness and death, when the heat index is high. ROA.5012-5019.

Accordingly, this Court should affirm that portion of the district court's judgment holding that plaintiffs established an Eighth Amendment violation.

II

THE DISTRICT COURT ERRED IN ANALYZING PLAINTIFFS' ADA AND SECTION 504 CLAIMS

The district court erred in its method of analyzing whether plaintiffs are qualified individuals with a disability under Title II of the ADA and Section 504.[4] In holding that plaintiffs failed to establish that they are qualified individuals with a disability, the court imposed an overly narrow definition of "disability" that conflicts with the ADA, as amended by the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553. The court also ignored the ADA's mandate that "[a]n impairment that substantially limits one major life activity," *e.g.*, thermoregulation or cardiovascular or endocrine function, "need not limit other major life activities in order to be considered a disability." 42 U.S.C. 12102(4)(C). Accordingly, this Court should vacate the judgment dismissing plaintiffs' ADA and Section 504 claims and remand the case for the district court to consider those claims under the appropriate legal standard.

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[4] Title II of the ADA is interpreted and applied consistently with the rights, procedures, and remedies set forth under Section 504 and applies a no lesser standard than the standards applied under Title V of the Rehabilitation Act, 29 U.S.C. 791 *et seq.*, or the regulations issued pursuant to that Act. See 42 U.S.C. 12201(a); 28 C.F.R. 35.103. Thus, while the discussion that follows focuses primarily on the ADA, our analysis is informed by the Rehabilitation Act and applies to both statutes. See *Frame* v. *City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011) (stating the ADA and Section 504 "generally are interpreted *in pari materia*"), cert. denied, 132 S. Ct. 1561 (2012).

A. The ADA's Definition Of "Disability" Favors Broad Coverage Of Individuals

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "disability" includes any "physical or mental impairment that substantially limits one or more major life activities" of an individual. 42 U.S.C. 12102(1)(A); see 28 C.F.R. 35.104. Under the ADA, the definition of "disability" must be "construed in favor of broad coverage of individuals," and the term "substantially limits" must be "interpreted consistently with" the ADAAA's findings and purposes. 42 U.S.C. 12102(4)(A) and (B). A court's "determination of whether an impairment substantially limits a major life activity" must be made "without regard to the ameliorative effects of mitigating measures such as -- medication." 42 U.S.C. 12102(4)(E)(i)(I).

The ADA, as amended by the ADAAA, includes a non-exhaustive list of activities considered to be major life activities. These include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. 12102(2)(A). "Major life activities" also include "[m]ajor bodily functions" such as "functions of the immune system,

normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U.S.C. 12102(2)(B).

The ADAAA responded to two Supreme Court cases that interpreted the ADA's definition of "disability" in a manner that Congress determined conflicted with the statute's broad remedial purpose by narrowing the Act's coverage. See ADAAA § 2(a)(3)-(7) and (b)(2)-(5), 122 Stat. 3553-3554. The first decision, *Sutton* v. *United Air Lines*, 527 U.S. 471 (1999), required courts examining whether an impairment substantially limits a major life activity to take into account the ameliorative effects of mitigating measures. *Id.* at 475, 481-489. In amending the ADA, Congress made clear that a court's determination of whether an individual has a "disability" must be made without regard to the effect of mitigating measures such as medication. See ADAAA § 2(b)(2), 122 Stat. 3554 (codified at 42 U.S.C. 12102(4)(E)(i)(I)).

The second decision, *Toyota Motor Manufacturing* v. *Williams*, 534 U.S. 184 (2002), imposed a demanding showing for the terms "substantially" and "major" in the ADA's definition of disability. Under *Toyota Motor Manufacturing*, for an individual to have a "disability," he or she had to show that the claimed impairment "prevents or severely restricts" him or her "from doing activities that are of central importance to most people's daily lives." *Id.* at 195-198; see ADAAA § 2(a)(5)-(7) and (b)(4), 122 Stat. 3553-3554. In rejecting that

demanding standard by amending the ADA, Congress explained that *Toyota Motor Manufacturing* had "created an inappropriately high level of limitation necessary to obtain coverage under the ADA." ADAAA § 2(b)(5), 122 Stat. 3554. In amending the ADA to restore its broad protections, Congress stated that the "primary object of attention in [ADA] cases * * * should be whether entities covered under the ADA have complied with their obligations," and that "whether an individual's impairment is a disability under the ADA should not demand extensive analysis." ADAAA § 2(b)(5), 122 Stat. 3554.

B. The Court Imposed An Overly Narrow Definition Of "Disability"

In this case, the court imposed the more demanding standard from *Toyota Motor Manufacturing*. Although the court correctly required plaintiffs to establish that their chronic medical conditions "substantially limit[ ] one or more major life activities," 42 U.S.C. 12102(1)(A), the court defined "major life activities" as "those activities that are of central importance to daily life" (ROA.5047) and stated that to be "substantially limited" in the performance of a major life activity, an individual must be "unable to perform" or "significantly restricted in the ability to perform" a major life activity (ROA.5048). In so stating, however, the district court relied on *Toyota Motor Manufacturing*, which was superseded by the ADAAA, and *EEOC* v. *Chevron Phillips Chemical Co.*, 570 F.3d 606, 614 (5th Cir. 2009), which applied pre-ADAAA regulations that Congress specifically

instructed the EEOC to amend under the ADAAA.[5] See ADAAA § 2(b)(4)-(6), 122 Stat. 3554. In amending the ADA, Congress rejected the application of these more demanding statutory and regulatory standards for assessing whether an individual has a disability. While the limitation an impairment imposes must be substantial, Congress made clear that it need not significantly or severely restrict the performance of a major life activity in order to qualify as a disability. See ADAAA § 2(a)(5)-(8) and (b)(4)-(6), 122 Stat. 3553-3554.

Compounding its mistake, the court relied on the EEOC's pre-ADAAA regulations implementing Title I of the ADA for a list of "major life activities." In so doing, the court ignored the more inclusive statutory definition of "major life activities," which recognizes that "the operation of a major bodily function," including circulatory and endocrine functions, is "a major life activity." 42 U.S.C. 12102(2)(B). Compare ROA.5047-5048 (failing to recognize "major bodily functions" as "major life activities"), with 42 U.S.C. 12102(2) (ADA text, as

[5] *Chevron Phillips* arose under Title I of the ADA and also applied the EEOC's prior Title I regulations setting forth three factors for determining whether an individual is substantially limited. Although the EEOC's current regulations that became effective May 24, 2011, permit courts to examine the condition, manner, or duration of an individual's impairment in appropriate cases, they no longer include the list of factors that the prior regulations delineated. Compare ROA.5048 (citing these factors), with 29 C.F.R. Pt. 1630, App. ("Section 1630.2(j)(4) Condition, Manner, or Duration"), and 29 C.F.R. 1630.2(j)(1) and (4). By relying on these outdated factors (ROA.5048), the district court again erred.

amended), and 29 C.F.R. 1630.2(i)(1)(i)-(ii) and (2) (current EEOC regulations implementing Title I in accordance with the ADAAA).[6] In amending the ADA, Congress specifically included this expanded definition of "major life activity" in order "to ensure that the impact of an impairment on the operation of major bodily functions is not overlooked or wrongly dismissed as falling outside" the ADA's broad scope. H.R. Rep. No. 730, Pt. 2, 110th Cong., 2d Sess. 16 (2008).

Because the district court failed to apply the correct legal standard consistent with the plain text of the amended statute and its implementing regulations, this Court should vacate that portion of the judgment dismissing plaintiffs' ADA and

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[6] Earlier this year, the Justice Department issued a Notice of Proposed Rulemaking to revise its Title II and Title III regulations in order to implement the ADAAA. See Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, 79 Fed. Reg. 4839 (proposed Jan. 30, 2014) (to be codified at 28 C.F.R. Pts. 35 & 36). Among other things, the Department proposes to expand its regulatory definition of "major life activities" to include the operation of major bodily functions. See 79 Fed. Reg. at 4840, 4844. The Department's proposed revisions also add rules of construction that should be applied when determining whether an impairment "substantially limits" a major life activity. See 79 Fed. Reg. at 4840, 4844-4846. Consistent with Executive Order 13,563's instruction to federal agencies to coordinate rules across agencies and harmonize regulatory requirements where appropriate, the Department has proposed to adopt, wherever possible, regulatory language that is identical to the EEOC's regulations implementing Title I in light of the ADAAA. See 79 Fed. Reg. at 4840, 4843, 4850. Even in the absence of regulations implementing Title II in accordance with the ADAAA, however, defendants must comply with their statutory obligations. Accord *Fortyune* v. *City of Lomita*, No. 12-56280, 2014 WL 4377467, at *3 (9th Cir. Sept. 5, 2014).

Section 504 claims and remand to the district court to consider those claims under the correct legal standard in the first instance.

In applying the correct legal standard on remand, the district court must make an individualized determination as to each plaintiff. In analyzing whether plaintiffs are "qualified individuals with a disability," the district court should examine, for example, the impact of plaintiffs' hypertension, diabetes, and other conditions on the operation of their cardiac, endocrine, and other major bodily functions. See 42 U.S.C. 12102(2)(B) (stating "a major life activity" for purposes of establishing a disability "also includes the operation of a major bodily function"). In addition, it should consider any side effects of plaintiffs' medication that might make them more susceptible to harm from excessive heat. Cf. 29 C.F.R. 1630.2(j)(4)(ii) (stating "the way an impairment affects the operation of a major bodily function" and the "negative side effects of medication" are relevant to assessing whether an impairment substantially limits a major life activity). Moreover, because the ADA expressly extends to impairments that are episodic in nature so long as the impairments "would substantially limit a major life activity when active," 42 U.S.C. 12102(4)(D), the court on remand should consider whether plaintiffs' reduced ability to cool down in extreme heat is itself a substantially limiting impairment. See *EEOC* v. *Agro Distribution, LLC*, 555 F.3d

462, 469 n.8 (5th Cir. 2009) (assuming without deciding that "the regulation of body temperature constitutes a major life activity").

CONCLUSION

This Court should affirm that portion of the judgment finding defendants violated the Eighth Amendment. This Court should vacate that portion of the judgment dismissing plaintiffs' ADA and Section 504 claims and remand to the district court for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLEES/ CROSS-APPELLANTS AND URGING AFFIRMANCE IN PART with the Clerk of the Court using the appellate CM/ECF system on September 30, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

Dated: September 30, 2014

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure, that the attached BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLEES/CROSS-APPELLANTS AND URGING AFFIRMANCE IN PART:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6880 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14-point Times New Roman font.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

300 F.R.D. 270
United States District Court,
M.D. Louisiana.

Elzie BALL, et al.
v.
James M. LeBLANC, et al.

Civil Action No. 3:13–cv–00368–BAJ–SCR. | Dec. 19, 2013.

Synopsis

Background: Death row inmates incarcerated at state penitentiary brought action against prison officials and state Department of Public Safety and Corrections, alleging that defendants subjected them to excessive heat during the summer months, acted with deliberate indifference to their health and safety, and discriminated against them on the basis of their disabilities. Inmates filed motions for sanctions against defendants for discovery violations and spoliation of evidence.

Holdings: The District Court, Brian A. Jackson, Chief Judge, held that:

[1] defendants' modifications to death row tiers, including installation of awnings and soaker hoses and maintenance to cell vent, during three-week court-ordered data collection period warranted imposition of sanctions;

[2] sanctions against defendants for discovery violations were warranted based on defendants' failure to timely disclose information regarding the cost of installation of air-conditioning in death row tiers; but

[3] sanctions against defendants for discovery violations were not warranted based on defendants' initial refusal to allow inmates' "shadow" expert access to the death row tiers with his measurement equipment.

Motions granted in part and denied in part.

West Headnotes (14)

[1] Federal Civil Procedure
Inherent authority

A federal court has the inherent power to sanction a party who has abused the judicial process.

Cases that cite this headnote

[2] Federal Civil Procedure
Failure to Comply; Sanctions

Spoliation of evidence is among the offenses for which a court may assess sanctions using its inherent powers.

Cases that cite this headnote

[3] Federal Civil Procedure
Failure to Comply; Sanctions

Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.

Cases that cite this headnote

[4] Federal Civil Procedure
Failure to Comply; Sanctions

Before a court may sanction a party for spoliation of evidence, the party seeking the sanction must show: (1) the existence of a duty to preserve the evidence; (2) a culpable breach of that duty; and (3) resulting prejudice to the innocent party.

1 Cases that cite this headnote

[5] Federal Civil Procedure
Discovery and Production of Documents and Other Tangible Things

A party to civil litigation has a duty to preserve relevant information when that party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future litigation.

1 Cases that cite this headnote

[6] **Federal Civil Procedure**

Failure to Comply; Sanctions

Prison officials' modifications to death row tiers, including installation of awnings and soaker hoses and maintenance to cell vent, during three-week court-ordered data collection period in action brought by death row inmates alleging the officials subjected them to excessive heat during the summer months and acted with deliberate indifference to their health and safety, warranted imposition of sanctions against officials; the modifications were made to the two death row tiers exhibiting the highest recorded temperatures and heat indices and the modifications were made under cover of darkness, the officials' stated purpose for installing the awnings and soaker hoses, "[t]o see if the temperature would fall," was to manipulate the very data the officials were obliged to preserve, and inmates were precluded from obtaining more reliable evidence tending to prove or disprove the validity of their position.

Cases that cite this headnote

[7] **Federal Civil Procedure**

Failure to Comply; Sanctions

In assessing prejudice for purposes of imposing sanctions for spoliation of evidence, a court may consider whether a party was precluded from obtaining much more reliable evidence tending to prove or disprove the validity of his position.

1 Cases that cite this headnote

[8] **Federal Civil Procedure**

Inherent authority

Pursuant to its inherent powers, a court has broad discretion in crafting a remedy for abuses of the judicial process; however, the remedy must be proportionate to both the culpable conduct of the guilty party and resulting prejudice to the innocent party.

Cases that cite this headnote

[9] **Federal Civil Procedure**

Failure to Comply; Sanctions

An appropriate sanction for spoliation of evidence should: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.

Cases that cite this headnote

[10] **Federal Civil Procedure**

Failure to Answer; Sanctions

Sanctions against prison officials for discovery violations were warranted in action brought by death row inmates, alleging the officials subjected them to excessive heat during the summer months and acted with deliberate indifference to their health and safety, based on officials' failure to timely disclose information regarding the cost of installation of air-conditioning in death row tiers; officials put the cost of installing air-conditioning at issue from the outset by their insistence that the inmates could not satisfy the standard for injunctive relief because the balance of harms, particularly the cost of installing air-conditioning, favored the officials' position, officials then repeatedly refused to answer the inmates' interrogatories aimed at assessing officials' estimate of the cost of installation, to the point that the inmates had received an order from the Magistrate Judge compelling officials to answer the inmates' questions, even if the answer was simply that the officials did not currently have an estimate, and even after the Magistrate Judge's Order, the officials refused to produce a cost estimate. Fed.Rules Civ.Proc.Rules 26, 37, 28 U.S.C.A.

Cases that cite this headnote

[11] **Federal Civil Procedure**

Failure to Answer; Sanctions

Sanctions against prison officials for discovery violations were warranted in action brought by death row inmates, alleging the officials

subjected them to excessive heat during the summer months and acted with deliberate indifference to their health and safety, based on officials' failure to supplement their responses to inmates' interrogatories with information regarding the installation of soaker hoses on death row tiers; such information was directly responsive to inmates' inquiries regarding any steps that had been taken related to altering climate conditions in the death row facility, inmates learned about the soaker hoses only when they deposed prison warden, and lacking the information about the soaker hoses in advance, inmates were, at a minimum, prejudiced in their ability to prepare for the warden's deposition. Fed.Rules Civ.Proc.Rules 26, 37, 28 U.S.C.A.

Cases that cite this headnote

[12] Federal Civil Procedure

Failure to Answer; Sanctions

Sanctions were not warranted against prison officials for discovery violations in action brought by death row inmates, alleging the officials subjected them to excessive heat during the summer months and acted with deliberate indifference to their health and safety, based on officials' failure to supplement their interrogatory responses with information regarding maintenance to a cell vent; inmates were not prejudiced because maintenance occurred after the evidentiary hearing and trial on the merits of inmates' complaint. Fed.Rules Civ.Proc.Rules 26, 37, 28 U.S.C.A.

Cases that cite this headnote

[13] Federal Civil Procedure

Failure to Comply; Sanctions

Sanctions were not warranted against prison officials for discovery violations in action brought by death row inmates, alleging the officials subjected them to excessive heat during the summer months and acted with deliberate indifference to their health and safety, based on officials' initial refusal to allow inmates' "shadow" expert access to the death row tiers with his measurement equipment; the expert was eventually allowed to access the death row tiers with his equipment in hand. Fed.Rules Civ.Proc.Rules 26, 37, 28 U.S.C.A.

Cases that cite this headnote

[14] Federal Civil Procedure

Failure to respond; sanctions

When considering sanctions under Federal Rule of Civil Procedure governing failure to make disclosures or to cooperate in discovery, a district's court's discretion is limited by two standards, one general and one specific: (1) any sanction must be "just," and (2) the sanction must be specifically related to the particular "claim" which was at issue in the order to provide discovery. Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

Cases that cite this headnote

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Catherine M. Maraist, United States Attorney's Office, Baton Rouge, LA, for United States.

RULING AND ORDER

BRIAN A. JACKSON, Chief Judge.

I. INTRODUCTION

Before the Court are two motions by Plaintiffs Elzie Ball, Nathaniel Code, and James Magee (collectively "Plaintiffs"), seeking sanctions against Defendants James M. LeBlanc, Nathan Burl Cain, Angelia Norwood, and the Louisiana Department of Public Safety and Corrections (collectively "Defendants") for discovery violations and spoliation of evidence. (Docs. 62, 63.) Plaintiffs also request that sanctions be imposed against Defendants' counsel based on representations made throughout this litigation regarding discovery and spoliation of evidence. (Doc. 85, p. 10.) Defendants oppose each motion. (Docs. 66, 68.) The Court heard oral argument on Plaintiffs' motions on August 5, 2013, (Doc. 75), and, subsequently, Plaintiffs filed reply memoranda addressing Defendants' arguments in opposition to sanctions, (Docs. 84, 85). It is uncontested that this Court has jurisdiction over these proceedings pursuant to 28 U.S.C. §§ 1331, 1343, and 2201.

Upon thorough review, and for reasons fully explained below, this Court determines that sanctions against Defendants are warranted based on Defendants' willful, bad faith attempts to manipulate data critical to Plaintiffs' cause of action, and for abuses of the discovery process.

Accordingly,

***273 IT IS HEREBY ORDERED** that Plaintiffs' Motions for Imposition of Sanctions (Docs. 62, 63) are each **GRANTED IN PART and DENIED IN PART.**

Further, in reviewing Plaintiffs' requests for sanctions, this Court has come to share Plaintiffs' concerns regarding the alarming lack of candor demonstrated by Defendants' counsel throughout this litigation. Accordingly,

IT IS HEREBY ORDERED that Defendants' counsel **E. WADE SHOWS, AMY L. MCINNIS,** and **JACQUELINE B. WILSON SHOW CAUSE WHY SANCTIONS SHOULD NOT BE IMPOSED** against each personally, under Fed.R.Civ.P. 37(c); M.D. La. LR83.2.4 and LR83.2.8; Louisiana Professional Conduct Rules related to honesty and fair dealing to opposing counsel; Louisiana Professional Conduct Rules related to candor to the tribunal; and this Court's inherent powers; possible sanctions to include, but not limited to, reprimand, ethics training, suspension, disbarment, and/or the payment of attorneys' fees to cover the cost of motions and discovery related to this proceeding. A show cause hearing on this matter shall follow.

II. FACTUAL AND PROCEDURAL BACKGROUND

At this point, the facts and procedural history in the underlying civil action are well-established.[1] Suffice for now to say that Plaintiffs are death row inmates, currently incarcerated at the Louisiana State Penitentiary in Angola, Louisiana ("Angola"), who allege that Defendants have subjected them to cruel and unusual punishment in violation of the Eighth Amendment and certain statutory provisions, including the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 794. (Doc. 1.) The gravamen of Plaintiffs' complaint is that Defendants have subjected them to excessive heat during the summer months, acted with deliberate indifference to their health and safety, and discriminated against them on the basis of their disabilities.

Against this backdrop, Plaintiffs assert the following independent, but related, bases for imposing sanctions against Defendants: (1) Defendants deliberately "undermine[d] the accuracy ... of court-ordered data collection" related to temperature, humidity, and heat index in Angola's death row tiers, and thus should be sanctioned for spoliation of evidence, (Doc. 63, p. 14); (2) Defendants were "evasive," "incomplete," and untimely in their responses to Plaintiffs' discovery requests regarding the cost of installing air-conditioning in the death row tiers, (Doc. 62, p. 3), and also refused to permit Plaintiffs' "shadow" expert "to bring instruments into the prison to verify any of the data collection" efforts, (Doc. 63, p. 3), and thus should be sanctioned for violating the Federal Rules of Civil Procedure and this Court's discovery orders. The following facts are pertinent to Plaintiffs' allegations.

A. Defendants' attempts to "undermine the accuracy ... of court-ordered data collection"

Plaintiffs' first complaint is that Defendants deliberately "undermine[d] the accuracy ... of court-ordered data collection" related to temperature, humidity, and heat index in Angola's death row tiers and, accordingly, should be sanctioned for spoliation of evidence. (Doc. 63, p. 14.)

1. The data collection period

On June 18, 2013, Plaintiffs filed a Motion for Preliminary Injunction (Doc. 12), seeking an order from this Court instructing Defendants to "maintain a heat index along

the death row tiers that ... does not pose substantial risk to [Plaintiffs'] health—i.e. maintain a heat index below 88°," (Doc. 12–1, p. 28). Defendants opposed Plaintiffs' motion arguing, among other things, that Plaintiffs request for a preliminary injunction should be denied because Plaintiffs could not show a likelihood of success on the merits of their claim. (Doc. 15 pp. 8–16.) Specifically, Defendants took issue with Plaintiffs' assertions that conditions on death row were unconstitutional based on "temperature and humidity conditions ... [that] regularly reach into the ***274** category of 'extreme danger' heat index." (Doc. 12–1, p. 3.) Defendants stated:

> As *Angola does not calculate the heat index on tiers*, the numbers provided by Plaintiffs in their memorandum and exhibits are simply calculations, which must be proven like any other fact. And as explained in defendants' Motion to Strike, calculations made by counsel are not competent evidence and cannot be considered. Furthermore, as will be borne out through testimony at the hearing, the calculations utilized are deficient. It is scientifically impossible to reach the heat indexes that Plaintiffs claim to exist inside the cells at Angola (even though *no heat index, humidity or dew point measurements were taken inside the facility*, further questioning the reliability of the data being presented to the Court).

(Doc. 15, p. 12 (emphasis added).)

On July 2, 2013, this Court heard oral argument on Plaintiffs' Motion for Preliminary Injunction. (Doc. 24.) Based on Plaintiffs' claims and Defendants' defenses, the need for current, accurate temperature, humidity, and heat index data from Angola's death row housing tiers was obvious. Accordingly, the Court deferred its ruling on Plaintiffs' motion pending the collection of such data by a neutral expert, re-set the hearing on the motion, set trial on the merits, and ordered the parties to meet, confer, and develop an accelerated joint discovery plan and schedule. (Doc. 24.) Subsequently, the parties submitted a proposed joint discovery schedule, which was later adopted by the Court. (Docs. 26, 28.) The discovery schedule included the parties' joint stipulation to retain a neutral expert to collect, analyze, and disseminate the temperature, humidity, and heat index data over a 21–day period to begin July 15, 2013. (Doc. 28.)

After some back and forth, the parties agreed to retain the expert proposed by Defendants, United States Risk Management, LLC. (*See* Docs. 31, 36.) On July 12, 2013, this Court ordered "U.S. Risk Management ... [to install] the necessary equipment, collect[ ] the required data, and disseminat[e] such data," so that the temperature, humidity, and heat index in Angola's Death row could be reliably measured over a 21–day period. (Doc. 36, p. 2.) Data collection was intended to accurately capture climate conditions as they existed on Death row, *without* adulteration due to remedial measures undertaken by Defendants. (*See* Transcript, July 2, 2013 (Hearing on Preliminary Injunction) (BY THE COURT: "The goal here is to have 21 straight days of data."); Doc. 31, p. 5 (Defendants' Submission of Proposed Independent Expert) ("Most importantly, the data must be accurate so that it can be relied upon by this Court."); Doc. 36, p. 2 (providing certain instructions to ensure collection of "the most accurate data"); Doc. 63–17 (email from Norwood admonishing death row supervisors "to ensure accurate and consistent temperature recording" and to avoid making adjustments to cells that would "tamper with" data collection).) This Court's July 12 Order also directed that Plaintiffs would be allowed to retain their own expert, and that this expert would "be permitted to shadow U.S. Risk Management during the installation of the necessary equipment, and inspect the equipment at least once per week." (Doc. 36, pp. 2–3.)

2. Defendants' modifications to the death row tiers

On July 15, the first day that data collection was set to begin, Defendant Assistant Warden Angelia Norwood sent the following email to all Death row Supervisors:

> In order to ensure accurate and consistent temperature recording, all fans and windows are not to be adjusted in any manner. In addition, no offender and/or employee is to tamper with the recording devices placed on each tiers. Only authorized persons will be allowed inside the cells with the recording devices.
>
> If you have any questions, please see me. Your assistance is appreciated.

(Doc. 63–17.) Nevertheless, despite Norwood's email, and this Court's emphatic instruction "that the most accurate

data ... be collected," (Doc. 36, p. 2), Defendants undertook efforts to change the conditions in the death row tiers soon after the data collection period began.

***275** First, under cover of night, Defendants installed awnings over the windows of death row tiers C and G. Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013 ("We worked the inmates all night long to get the awnings up...."). At trial, Defendant Warden Burl Cain testified that he ordered the awnings installed "to shade the window to see what would happen. To see if the temperature would fall." *Id.* Whether or not the awnings had the intended effect of reducing the temperature in the selected tiers, it is uncontroverted that the awnings "shaded the window[s]." *See id.; see also* Doc. 85–11, p. 39 (Deposition of David Garon).

Next, Defendants employed "soaker hoses"[2] to "mist[ ] the walls" of certain tiers, and also endeavored—albeit unsuccessfully—to "put[ ] the sprinkler system on the roof, [and a] water sprinkler in the yard." Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013; Doc. 85–9, p. 34 (Deposition of Nathan Burl Cain). As with the awnings, the intent of these measures was to "cool[ ]" the selected death row tiers. (Doc. 85–9, p. 34 (Deposition of Nathan Burl Cain) ("We are actually misting the walls of the building to try to see if we can get the cinder blocks to be cooler so then they won't conduct the heat all the way through....").) Again, however, it is unclear precisely what effect Defendants' efforts to "mist[ ] the walls of the building" actually had on temperatures in the selected death row tiers.

Finally, Defendants repaired a malfunctioning vent in Plaintiff Nathaniel Code's cell one business day prior to this Court's scheduled site visit to Angola's death row facility. (*See* Doc. 85–2.)

The precise date that Defendants installed the awnings and soaker hoses on the selected death row tiers is not clear from the record. Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013 ("I don't recall the specific dates and times [that the awnings and soaker hoses were installed]."); *id.* (stating "I'm not exactly sure when we [installed the awnings]," and indicating that installation may have occurred in the early morning hours of Thursday, July 25, 2013 or Friday, July 26, 2013). Nor is it clear when, exactly, Defendants' fixed Code's vent. (*See* Doc. 85–2 (suggesting that repairs occurred sometime after Code's complaints on August 8, 2013, but before Wilson's email of August 10).) A few things, however, *are* clear. First, the installation of awnings and soaker hoses, and the repairs to Code's vent occurred *after* this Court ordered Defendants to collect "the *most accurate* data," *and after* the data collection period had begun. (*See* Doc. 36, p. 2 (emphasis added); Doc. 24, p. 2; Doc. 63–14 (July 26, 2013 email from Amy McInnis to Mercedes Montagnes stating that "awnings ... are *being installed* over the windows on only two tiers" (emphasis added)); Trial Transcript, Argument of Amy McInnis, Aug. 5, 2013 ("[T]hose awnings were erected after we—after Defendants had disclosed [to the Magistrate Judge on July 25, 2013] that this is something that we were going to do.").) Second, there is no indication in the record that Defendants informed Plaintiffs or Plaintiffs' counsel of their plans to modify the death row tiers prior to the modifications being made. Third, and perhaps most importantly, Defendants never requested permission from this Court to make any alterations whatsoever to the death row tiers.

3. Plaintiffs' discovery of Defendants' modifications

On July 15, 2013—the same day that data collection began—Plaintiffs served Defendants with interrogatories requesting: (1) disclosure of "any steps that have been taken, since the Complaint in the LAWSUIT was filed, related to altering climate conditions in the DEATH ROW FACILITY"; and (2) disclosure of "any changes to any of the climate control mechanisms in the DEATH ROW FACILITY that have occurred since this action was filed." (Doc. 63–11, p. 6 (Interrogatories Nos. 4–5) (emphasis in original).) Four days later, on July 19, Defendants responded that "since the filing of the complaint, only routine maintenance and inspections ***276** were performed on the climate control systems," but "reserve[d] the right to supplement their answer[s] at a later time." (*Id.*) Despite this "reserv[ation]," Defendants failed to follow through with additional information regarding changes to the climate control mechanisms.

Instead, Plaintiffs learned about Defendants' modifications through their own channels.[3] Having heard rumors of modifications being made to the death row tiers, Plaintiffs' counsel emailed Defendant's counsel the following message at 3:02 p.m., July 26, 2013:

> Counsel,
>
> We have received numerous reports from various sources that alterations are being made to death row. We believe these actions are designed to reduce the heat.

> Can you please confirm this as soon as possible? Obviously we are entitled to this information pursuant to our discovery requests as well as our pending lawsuit.
>
> Yours very truly,
>
> Mercedes Montagnes

(Doc. 63–13.)

A little more than an hour-and-a-half after Montagnes sent her email, at 4:39 p.m., defense counsel Amy McInnis reported the installation of awnings, but failed to mention the soaker hoses. Specifically, McInnis wrote:

> Mercedes and all,
>
> I think what you may [sic] referring to as "alterations" are awnings that are being installed over the windows on only two tiers. *This was discussed with Magistrate Judge Riedlinger yesterday in our settlement conference.* We had indicated to him that although the terms of your proposed settlement were not agreeable to our clients, that they were nonetheless committed to exploring and implementing measures that would make the inmates housed on Death Row more comfortable and that they would do so own [sic] their own, without being ordered to do so by the Court. We had specifically mentioned the possibility of installing awnings on windows on only two tiers during the monitoring period, so that we could ascertain whether such effort would have a measurable effect on temperatures on those two tiers. *Judge Riedlinger indicated that he believed that this would be a good idea.* It was our impression that this was being communicated to you during the settlement conference.
>
> Please note that the awnings are being installed on only two tiers, not all tiers, as we want to be certain that we do not skew the data monitoring.
>
> In the spirit of full disclosure, please see the attached pictures of the awnings being installed.
>
> I trust that this will suffice in lieu of a formal supplemental discovery response.
>
> Regards, Amy

(Doc. 63–14 (emphasis added).[4])

Three days later, on July 29, 2013, Defendants' counsel sent Plaintiffs' counsel Defendants' Supplemental Response to Plaintiffs' Discovery (Doc. 63–16), which, among other things, stated: "Since the filing of the complaint, the forced ventilation system was inspected and awnings were added on to tiers C and G by inmates and/or employees of LSP," (*id.*, pp. 6–7.) Again, however, Defendants' counsel neglected to mention Defendants' installation of soaker hoses on certain tiers. (*See generally id.*)

Indeed, Plaintiffs' counsel only learned of the soaker hoses when they deposed Defendant Warden Nathan Burl Cain on July 31, 2013. (*See* Doc. 85–9, p. 34 (Deposition of Nathan Burl Cain).) Even *after* Warden Cain's deposition, Defendants' counsel failed to supplement Defendants' responses to Plaintiffs' interrogatories with information regarding Defendants' use of soaker hoses and/or misting devices.

Plaintiffs' counsel learned of Defendants' attempts to repair Plaintiff Code's cell vent ***277** in much the same way that they learned of Defendants' construction of awnings and installation of soaker hoses. Yet again, Defendants only informed Plaintiffs' counsel regarding this "routine maintenance" to Code's vent *after* Montagnes emailed to inquire about work done in Code's cell. (*See* Doc. 85–2, pp. 2–3.) And, as before, Defendants' did not supplement their interrogatory responses to reflect their maintenance to this "climate control mechanism." (*See* Doc. 63–11, p. 6.)

4. The Court's discovery of Defendants' modifications

The Court did not learn that Defendants installed awnings and soaker hoses on the death row tiers until the final pretrial conference on July 31, 2013. During this conference, which was not on the record, Plaintiffs' counsel informed the Court that Defendants had installed awnings over the windows in certain death row tiers, including tiers subject to the Court's data-collection Order. (*See* Doc. 57, p. 2.) Plaintiffs further informed the Court that Defendants had attempted to soak and/or mist some of the tiers by spraying water on the roof of and/or on the side of the buildings. (*See id.*)

In response, Defendants' counsel conceded that Defendants took such actions. (*See id.).* Defendants' counsel also conceded that Defendants had done so without seeking permission from the Court. (*See id.*) However, Defendants' counsel E. Wade Shows asserted that Magistrate Judge Riedlinger "knew" that Defendants planned to take such actions, and also asserted that counsel informed Judge

Riedlinger of Defendants' intentions during the parties' settlement conference on July 25.

Defendants' counsel maintained the position that Magistrate Judge Riedlinger endorsed Defendants' modifications to the death row tiers in their memorandum opposing Plaintiffs' Motion for Imposition of Sanctions for Defendants' Spoliation of Evidence, (Doc. 63). Specifically, Defendants' counsel stated:

> Plaintiffs have not and cannot demonstrate that Defendants acted in bad faith in the installation of awnings on the windows on only two tiers of the Death Row Facility. First, Defendants' motivation in installation awnings was the same as all of the other possible solutions discussed in the July 25, 2013 settlement conference with Magistrate Judge Riedlinger—to explore all feasible solutions to alleviate effects of heat on the inmates housed on the Death Row Tiers. *This good faith impetus was expressed to Magistrate Judge Riedlinger, who indicated that he thought any good faith solutions would be appreciated by this Court.* During this same conference, Defendants stated that they intended to erect awnings over the windows to explore whether such measures would enhance the comfort level of inmates by preventing the glare from the sun from reflecting into their cells.

(Doc. 66, pp. 10–11 (emphasis added).)

In the same memorandum Defendants' counsel represented to the Court that Defendants' had fully complied with all discovery obligations, despite having failed to inform Plaintiffs regarding Defendants' use of soaker hoses/misting devices prior to Warden Cain's deposition. Specifically, Defendants' counsel stated:

> Defendants were anything but evasive in the discovery process, as evidenced by (1) Defendants' prior notice of the awning installation during the settlement conference; (2) Defendants' prompt notification of the awning installation the same day as the installation; and (3) the fact that Plaintiffs certified to the Court on July 31, 2013, that *no discovery issues remained.*

(*Id.*, p. 12 (emphasis added).)

On August 5, 2013, at the hearing on Plaintiffs' Motion for Sanctions, Defendants' counsel again laid blame with Magistrate Judge Riedlinger for Defendants' alterations to the death row tiers. Specifically, the following colloquy ensued between this Court, and Defendant's counsel Amy McInnis:

> BY MS. MCINNIS: And, Your Honor, the attempts that were made—and let me just be clear about what those attempts are. Because I think we're talking around. There were awnings that were erected. Those—
>
> ***278** BY THE COURT: And they were erected after I ordered the collection of the data, correct?
>
> BY MS. MCINNIS: Correct, Your Honor.
>
> BY THE COURT: No one came to me and asked for permission to make any material changes to any of the conditions during the period of time that the data was being collected, correct?
>
> BY MS. MCINNIS: That is correct, Your Honor.
>
> BY THE COURT: And why is that?
>
> BY MS. MCINNIS: Your Honor, that very remedial measure, along with several other possible ones were *specifically discussed at length with Magistrate Judge Riedlinger in the 20—the July 25th summary conference.*

Trial Transcript, Argument of Amy McInnis, Aug. 5, 2013 (emphasis added).

Defendants' counsel persisted in her position that Magistrate Judge Riedlinger tacitly approved Defendants' actions even *after* this Court cautioned about relating the contents of confidential settlement discussions.

> BY THE COURT: Let me say, Ms. McInnis. The discussions, as I appreciate it, and I don't even know the extent of those discussions, because those discussions occurred in the context of a settlement conference. Which, of course, the District Court is not privy to, and

nor do I want to be privy to it. So, with that in mind, please proceed.

BY MS. MCINNIS: And, Your Honor, I'm not trying to violate that rule. The reason that I mention it is only to show the court that it was taken in good faith. We—the erection of the awnings. And that those awnings were erected after we—after Defendants had disclosed that this is something that we were going to do and, in fact, do it tomorrow. So.

BY THE COURT: I understand that. But, as I appreciate it, it was shared in the context of if we settle this case—if we settle this case, contingent upon a settlement, these are the things we can and will do.

BY MS. MCINNIS: That was not the—that's not the context in which that statement was made. It was we are going to do this outside of any court order. We are going to do in order to, as a sign of good faith. And it was our impression that it was taken that way.

Id.

Later, *after* the Court informed Defendants' counsel that it had independently conferred with Magistrate Judge Riedlinger regarding his approval—tacit or otherwise—of Defendants' actions, Defendants' counsel retreated from her position.

BY THE COURT: Ms. McInnis, were you present at the conference with the Magistrate Judge?

BY MS. MCINNIS: Yes, Your Honor. I was.

BY THE COURT: I will tell you that I have conferred with the Magistrate Judge. And he has made it very clear to me, and if necessary I will produce evidence, that he gave no party any approval to make any material changes. Now, I believe it is the case that to the extent there were discussions of the installation of awnings and other devices, that it was, again, contingent upon a settlement in the case. So, I want to ask you to be very, very careful, Ms. McInnis. Because if you tell me, as Mr. Shows told me, that the Magistrate Judge knew it and at least tacitly approved it, it will—I am obligated then to verify that.

BY MS. MCINNIS: I understand.

BY THE COURT: And if the one person who is in position to verify that doesn't verify it, then I'm in a position to impose not just sanctions on the parties. I may have to impose sanctions on counsel.

BY MS. MCINNIS: I understand, Your Honor.

BY THE COURT: I'm not threatening you. Now, I want to be clear about that. But I just want to be absolutely certain that everyone knows the rules.

BY MS. MCINNIS: I understand, Your Honor. And, Your Honor, and I do want to be very careful and I do want the court to understand what I'm saying. That what I'm saying is that we had put ***279** this forward. And I'm—what I'm representing to the court. This was done—we had given plaintiffs prior notice. I'm not offering it to say that this was a term of settlement or—because I know that those conversations are off limits at this time. Just to say that there is no culpable breach insofar as it was discussed and it was mentioned in advance.

Id.

B. Defendants' "evasive," "incomplete," and untimely responses to Plaintiffs' discovery requests regarding the cost of installing air-conditioning in the death row tiers

Next, Plaintiffs' complain that Defendants' responses to discovery requests regarding the cost of installing air-conditioning in the death row tiers were "evasive," "incomplete," and untimely in violation of the Federal Rules of Civil Procedure and this Court's discovery orders. (Doc. 62, p. 3).

1. Putting the cost of air-conditioning at issue

Almost from the outset, it was clear that the potential cost of remedial measures was a relevant and, indeed, critical consideration to determining whether Plaintiffs' would achieve the relief that they sought, at least in the short-term. In response to Plaintiffs' request for a preliminary injunction ordering Defendants to "maintain a heat index below 88°," (Doc. 12–1, p. 28), Defendants took the position that "the harm to Defendants greatly exceeds the actual likelihood of [Plaintiffs'] serious health problems," because remedial measures—specifically installation of air-conditioning in the death row tiers—could "only be done at a huge expense and after massive construction and installation efforts." (Doc. 15, p. 16.)

2. Plaintiffs' attempts to discover Defendants' cost estimates for installation of air-conditioning on death row

Notably, Defendants' opposition to Plaintiffs' preliminary injunction motion did *not* include an actual cost estimate for the installation of air-conditioning. (*See id.*, pp. 16–17.) Nor did Defendants' opposition include any suggested alternatives for reducing the temperature, humidity, and heat index in the death row tiers.[5] (*See generally id.*) Thus, after this Court deferred ruling on Plaintiffs' request for a preliminary injunction pending a full evidentiary hearing, (Doc. 24, p. 2), Plaintiffs included among their July 15 interrogatories questions aimed at assessing the balance of harm prong of the preliminary injunction inquiry. *See La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 608 F.3d 217, 219 (5th Cir.2010) ("A preliminary injunction is an extraordinary remedy that should only issue if the movant shows: (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and (4) the injunction will not disserve the public interest."). Specifically, Plaintiffs' interrogatories included the following:

> ***INTERROGATORY NO. 11*** **:**
>
> DESCRIBE IN DETAIL how YOU would be willing [sic] ensure that the heat index on the DEATH ROW TIERS remains below 88 degrees Fahrenheit.
>
> ***INTERROGATORY NO. 12*** **:**
>
> DESCRIBE IN DETAIL the expenses associated with furnishing air conditioning on the DEATH ROW TIERS so as to ensure that the heat index on the DEATH ROW TIERS remains below 88 degrees Fahrenheit.

(Doc. 62–1, pp. 7–8 (Interrogatories 11–12) (emphasis in original).)

3. Defendants' responses to Plaintiffs' interrogatories

Despite the obvious relevance of Plaintiffs' interrogatories given Defendants' position on the issue of air-conditioning, Defendants' July 19 response to Plaintiffs' discovery requests stated:

> ****280 RESPONSE TO INTERROGATORY NO. 11:***
>
> *Defendants object to the interrogatory as written, as it seeks information that is not relevant to a claim or defense of either party nor is it calculated to lead to the discovery of admissible evidence. Further, it presumes that a heat index below 88 degree is an optimal heat index.*
>
> *Defendants reserve the right to supplement their answer at a later time.*
>
> ***RESPONSE TO INTERROGATORY NO. 12:***
>
> *Defendants cannot answer this question, as it seeks information that it not in its possession, custody, or control.*
>
> *Defendants reserve the right to supplement their answer at a later time.*

(Doc. 62–2, pp. 4–5 (Responses to Interrogatories 11–12) (emphasis in original).)

Immediately upon receipt of Defendants' Responses, Plaintiffs' counsel sent a twelve-page letter to Defendants' counsel, requesting a meeting "to resolve issues relating to the issues raised by Defendants' deficient discovery responses." (Doc. 62–3, p. 1.) Plaintiffs' letter outlined each of Plaintiffs' concerns with Defendants' Interrogatory Responses. (*See id.*, pp. 5–7.) Specifically, as to Defendants' Response to Interrogatory 11, Plaintiffs noted that Defendants' refusal to answer was without basis because "[t]he request plainly seeks information relating to the permanent injunctive relief sought by Plaintiffs, including without limitation the balance of the harms that Defendants have themselves contended are in Defendants' favor." (*Id., p.* 7.) As to Defendants' Response to Interrogatory 12, Plaintiffs' stated that despite Defendants' insistence that the information requested was beyond their "possession, custody, or control," Defendants were known to "have retained a consulting engineer to testify as an expert—thereby making clear that Defendants have information readily available and the ability to answer the Interrogatory." (*Id.*)

Plaintiffs' initial attempts to resolve this discovery dispute with Defendants' counsel were fruitless. Thus, Plaintiffs' counsel raised the issue again during discovery conferences with Magistrate Judge Riedlinger on July 23 and 25, 2013. (*See* Doc. 49, pp. 1–2.) Following these conferences, the Magistrate Judge issued an Order stating, in pertinent part:

> Interrogatory Number 11: defendants required to supplement, even if the substantive answer is that Defendants currently do not have a plan to keep the heat index below 88 degrees F on the Death row tiers.
>
> Interrogatory Number 12: defendants required to supplement, even if the substantive answer is that Defendants currently do not have an estimate of the cost to air condition the Death row tiers.

(*Id.*, p. 2.) The Magistrate Judge further ordered that Defendants were "to file their supplemental discovery responses by 5:00 p.m., on July 29, 2013." (*Id.*, p. 1.)

4. Further developments: Defendants' Expert's Report regarding costs of installing remedial measures on death row

On July 24, in accordance with the Court's discovery schedule, (Doc. 28, p. 2), Defendants provided to Plaintiffs the expert report of Henry C. Eyre, III, (Doc. 62–5). Defendants retained Eyre, a consulting engineer, "to determine the feasibility of adding cooling to the existing inmate holding cells & inmate tiers" at Angola's Death row. (*Id.*, p. 1.) Eyre's report—titled "Feasibility Study—Addition of Cooling"—made no mention of costs or expenses, specific *or* general, associated with installing air conditioning in the death row tiers. (*See generally id.*) Nor did Eyre's report indicate that an estimate of costs or expenses would follow. (*See generally id.*)

On July 26, two days after the deadline for exchanging expert reports had passed, (Doc. 28, p. 2), Defendants' counsel provided Plaintiffs with "exhibits to the expert report submitted by Mr. Eyre." (Doc. 62–6, p. 1.) Defendants' counsel described these exhibits as "nothing new but simply the supporting documentation that was relied upon by [Eyre] in forming his opinion." (*Id.*) Included in the exhibits were three cost estimates: (1) "Budget Price for (8) new air units is $52,000"; (2) ***281** "Budget Price for (8) new cooling coil sections with cooling coils and drain pans is $22,000"; and (3) "Budget Price for (8) new cooling coils only is $14,000." (Doc. 62–7, p. 1) The exhibits also included a "Schedule of Rates" for Eyre's consulting firm. (*Id.*, p. 31)

On July 29, Plaintiffs deposed Eyre. In his deposition, Eyre was emphatic that he could not "give total construction cost estimates" for the installation of air-conditioning on the death row tiers, despite having relied upon certain estimates in creating his report. (*See* Doc. 62–8, p. 44.) Specifically, Eyre stated:

> I can't give you the entire job estimate because, like I said already, an electrical engineer would be involved. There would be an electrical aspect. You know, I believe I state that in my report, and I don't—I'm not qualified to estimate those costs so I'm just one piece to the puzzle.

(Doc. 62–8, p. 42);

> I can't give you a final—I can't give you a number because any number would not be a knowledgeable—I wouldn't have all of the information.

(*Id.*, p. 43);

> Again, I can't give you a complete project cost estimate. I just can't.... There's so many different scenarios on how—the total construction cost estimate to give that I'm not qualified to give you on all of those other disciplines.

(*Id.*, pp. 43–44); and again,

> I don't give total construction cost estimates.

(*Id.*, p. 44.)

5. Defendants' supplemental responses to Plaintiffs' interrogatories

Also on July 29, the same day that Plaintiffs deposed Eyre, Defendants produced their Supplemental Responses pursuant to Magistrate Judge Riedlinger's Order. (Doc. 62–4.) In pertinent part, these Responses stated:

> ***RESPONSE TO INTERROGATORY NO. 11:***
>
> *Defendants do not believe that the question of maintenance of the heat index below 88 degrees answers the ultimate question of how to ensure that Plaintiffs are not at risk of suffering heat-related medical problems. Defendants think*

> *a more appropriate inquiry is to consider various measures (in addition to those currently provided) designed to ensure that Plaintiffs' body temperatures are not elevated to a level that jeopardizes their health during the summer months. Defendants do not currently have a plan to keep the heat index below 88 degrees on the Death Row Tiers.*
>
> ***RESPONSE TO INTERROGATORY NO. 12:***
>
> *Defendants have no personal knowledge as to the information sought in the request. However, the report of Defendants' expert, Henry C. Eyre, III, discusses generally the services of various professionals and/or vendors needed to undertake such an enormous task. Specific costs associated with each of these professionals and/or vendors and the construction of the system desired by Plaintiffs would need to be obtained individually.*

(*Id.*, pp. 7–8 (emphasis in original).) Notably, despite the specific cost estimates included in the exhibits to Eyre's Report, Defendants' responses still did not include any cost estimates, or any indication that cost estimates would be forthcoming, except to provide a general disclaimer that "Defendants are presently in the process of gathering additional information and documents that are responsive to plaintiffs' requests. Defendants will supplement these responses to produce those documents as soon as possible." (*Id.*, p. 1.)

On July 31, 2013, the Court and the parties convened for the final pretrial conference. (Doc. 57.) Still not satisfied that Defendants had complied with their discovery obligations, Plaintiffs' counsel sought, and were granted, "leave to file one or more motions, related to the evidentiary and discovery issues discussed during the pretrial conference." (Doc. 57, p. 2.) This Court ordered that Plaintiffs' motions were due by 12:00 p.m. on Friday, August 2, 2013. (*Id.*)

*282 6. Defendants' Expert's Supplemental Report with cost estimates included

After all this, at 6:00 p.m. on Thursday, August 1, 2013, Defendants produced "Henry Eyre Ill's supplemental report in the form of an email," stating Eyre's opinion that "the potential Mechanical Construction cost could reach as high as $1,860,000.00," (Doc. 62–9, p. 1.) In full, this "supplemental report in the form of an email," provided:

> Jackie,
>
> Assuming the highest tonnage of the potential HVAC solutions, and the higher of the range of equipment installations of this caliber, the potential Mechanical Construction cost could reach as high as $1,860,000.00. This would have an engineering fee of $203,574.00. I have added a renovation factor to the design fee calculation to assume worst case, however this would be at the discretion of the state. I have attached the State of Louisiana fee calculator that shows this computation. If you need anything further in regard to this matter please let me know.

(*Id.*) Notably, Defendants produced Eyre's supplemental report one day *after* the July 31 deadline to take expert depositions had expired, and one business day *before:* (1) the evidentiary hearing on Plaintiffs' Motion for Preliminary Injunction; and (2) trial on the merits of Plaintiffs' Complaint. (Doc. 28, p. 2.)

C. Defendants' refusal to permit Plaintiffs' "shadow" expert "to bring instruments into the prison to verify any of the data collection" efforts

Last, Plaintiffs' allege that Defendants violated this Court's discovery order by refusing to permit Plaintiffs' "shadow" expert, David Garon, "to bring instruments into the prison" for the purpose of "verify[ing] the temperature and humidity levels being taken and to ensure that Defendants had not tampered with the equipment." (Doc. 63, pp. 3–4.)

1. Plaintiffs' request for a "shadow" expert

On July 9, 2013, the parties filed their joint Proposed Discovery Order, (Doc. 26), outlining a joint proposed discovery schedule, certain stipulations, and an agreed upon data collection plan, (*id.*, pp. 1–3). Also included in this document was a request by Plaintiffs for permission "to send in an identified designee to verify the temperatures that are being taken and to insure that the instruments in Defendants' possession have not suffered any tampering once per week for the three weeks of data collection," (*id.*, p. 3). Defendants opposed this request for a variety of reasons, including that it was unduly "burdensome" and, in any event, "duplicitous." (*Id.*)

Initially, the Court denied Plaintiffs' request, stating that "such weekly monitoring shall be conducted by the [parties'] mutually-agreed upon expert." (Doc. 28, p. 4.) However, on July 12, after a status conference in which the parties agreed

that U.S. Risk Management would serve as the neutral expert to collect data on the death row tiers, this Court relented and allowed Plaintiffs to retain a "shadow" expert to monitor the data collection. Specifically, this Court ordered:

> Plaintiffs shall be permitted to retain an own expert to shadow U.S. Risk Management. Plaintiffs shall identify one individual, who shall be permitted to shadow U.S. Risk Management during the installation of the necessary equipment, and inspect the equipment at least once per week. However, Plaintiffs shall bear all costs of retaining such expert.

(Doc. 36, p. 2.)

2. Plaintiffs' request that their "shadow" expert be allowed to bring monitoring equipment to death row

The same day that this Court issued its Order granting Plaintiffs' request to retain a "shadow" expert, Plaintiffs' counsel emailed Defendants' counsel to disclose that Plaintiffs' "intend to use as our 'shadow' expert David Garon of Consolidated Balancing Services, Inc.," and to request "confirm[ation] that arrangements will be made so that Mr. Garon will be able to bring in his own equipment to engage in the necessary shadow measurements." (Doc. 63–3, p. 2.) Shortly thereafter, Defendants' counsel responded to confirm that they would "check[ ] with the facility regarding your requests as to Mr. ***283** Garon." (*Id.*, p. 1.) A half-hour later, however, Defendants' counsel emailed to "advise [ ] that Mr. Garon will not be allowed to bring his own equipment during his shadowing visits." (*Id.*) After some additional back and forth, Defendants' counsel sent an email elaborating that Defendants' refusal was due to Plaintiffs' request "being outside of the scope" of the parties' discussions at the status conference and this Court's Order. (*Id.*) Defendants' counsel explained:

> At no point was it ever requested that the "shadow" expert be allowed to bring his own instruments and act as a check on the third-party neutral expert. In fact, the Court's minute entry does not support your assumption that the "shadow" would bring in his own equipment and spot check.

(*Id.*)

Despite Defendants' initial protestations, Plaintiffs' concede that "Garon was subsequently able to bring ... his instrument[s into the prison] on two occasions," (Doc. 85, p. 4), but only after Plaintiffs submitted to Defendants a formal Request for Entry Upon Land For Inspection, (Doc. 63–5; *see also* Doc. 63–6, p. 1) (Defendants' Response to Plaintiffs Request for Entry Upon Land for Inspection, stating "Defendants will agree to allow reasonable instrumentation that does not pose a security risk which are necessary to perform the inspections agreed upon").

III. DISCUSSION

A. Spoliation of Evidence

Plaintiffs' claims for sanctions for spoliation of evidence relate to "Defendants ... various actions since the filing of this lawsuit, and especially during the three-week Court-ordered data collection period, seeking to lower the temperature on the Death Row Tiers." (Doc. 85, p. 1). In particular, Plaintiffs seek sanctions based on Defendants' installation of awnings, Defendants' installation of soaker hoses, and Defendants' maintenance to Plaintiff Code's cell vent. (*See* Doc. 63, pp. 5–10.)

[1] [2] [3] [4] A federal court has the inherent power to sanction a party who has abused the judicial process. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). Spoliation of evidence is among the offenses for which a court may assess sanctions using its inherent powers. *See Hodge v. Wal–Mart Stores, Inc.*, 360 F.3d 446, 449 (4th Cir.2004) ("The imposition of a sanction ... for spoliation of evidence is an inherent power of federal courts."). "Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir.2001) (*citing West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999)); *see also* Black's Law Dictionary 1531 (9th ed.2009). Before a Court may sanction a party for spoliation of evidence, the party seeking the sanction must show: (1) the existence of a duty to preserve the evidence; (2) a culpable breach of that duty; and (3) resulting prejudice to the innocent party. *Ashton v. Knight Transp., Inc.*, 772 F.Supp.2d 772, 800 (N.D.Tex.2011).

1. Defendants' duty to preserve conditions in the death row tiers

[5] "[I]t is beyond question that a party to civil litigation has a duty to preserve relevant information ... when that party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future litigation." *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir.2008) (*citing Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir.2001) (quotation marks and alteration omitted)).

[6] At the outset, Defendants' "acknowledge that they ... were under a court-ordered obligation to preserve the data collected" during the data collection period. (Doc. 66, p. 9; *see also id.*, p. 10 ("[T]here is no dispute as to the obligation of the parties to preserve the U.S. Risk Management data collection.").) Although Defendants' concession does *not* go so far as to acknowledge a duty to preserve the status quo in the death row tiers during the data collection period, this Court has little trouble determining: (1) Defendants' obligation was *precisely* to preserve ***284** the status quo during the data collection period; and (2) Defendants *understood* their obligation as such.

First, given the nature of Plaintiffs' claims, this Court repeatedly emphasized the necessity for "the most accurate data" reflecting confinement conditions in Angola's death row tiers. (*See* Doc. 36, p. 2; *see also* Transcript, July 2, 2013 (Hearing on Preliminary Injunction).) It is simply untenable to suggest that this imperative could be accomplished if Defendants were not also obliged to avoid modifying the death row tiers in such a way as to affect cell temperatures during the data collection period.

Second, Defendants' own communications indicate that they appreciated the necessity of collecting accurate data during the data collection period, (Doc. 31, p. 5 (Defendants' Submission of Proposed Independent Expert) ("Most importantly, the data must be accurate so that it can be relied upon by this Court.")), and, even more significantly, that Defendants understood this obligation to be concurrent with an obligation to avoid making *any* modifications that could possibly affect the measurements being taken. Assistant Warden Norwood's admonishment to avoid adjusting fans and windows "in any manner" would be an empty letter if Defendants also believed that they could make structural changes to the death row tiers aimed at reducing cell temperatures. (Doc. 63–17; *see also* Trial Transcript, Testimony of Angelia Norwood, Aug. 5, 2013 (Norwood's acknowledgement that she "had a duty to obey the court's order and to not engage in any action that might interfere with the court's collection of ... data").)

In sum, it is inescapable that the status quo condition of Angola's death row tiers was "evidence ... relevant to [this] litigation." *See Goetz*, 531 F.3d at 459. Accordingly, Defendants' concession and common sense dictate that Defendants were under a duty to avoid making modifications to the death row tiers during the data collection period. [6]

2. Defendants' culpable breach of their duty to preserve the status quo

Because the Court is proceeding according to its inherent authority, Plaintiffs must show "bad faith or willful abuse of the judicial process" in order to prove that Defendants committed a culpable breach of their duty to preserve the status quo conditions on death row. *Pressey v. Patterson*, 898 F.2d 1018, 1021 (5th Cir.1990). The Fifth Circuit has opined that the spoliation doctrine's "bad faith" requirement entails the intentional destruction of important evidence whose contents is unfavorable to the destroying party. *See Whitt v. Stephens Cnty.*, 529 F.3d 278, 284 (5th Cir.2008). In a similar vein, this Court has previously described "bad faith" as "act[ing] with fraudulent intent and a desire to suppress the truth." *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 344 (M.D.La.2006).

Under either of these articulations, this Court has little trouble determining that Defendants' construction of awnings and installation of soaker hoses exhibited "bad faith." First, although the precise date that Defendants installed the awnings and experimented with the soaker hoses is unclear from the record, (*see* Transcript, Aug. 6, 2013 (Testimony of Warden Burl Cain) (stating "I don't recall the specific dates and times [that the awnings and soaker hoses were installed]."); *id.* (stating "I'm not exactly sure when we [installed the awnings]," and indicating that installation may have occurred in the early morning hours of Thursday, July 25, 2013 or Friday, July 26, 2013)), it is abundantly clear that Defendants' manipulations occurred *after* this Court ordered that "the most accurate data ... be collected," *and after* the 21–day data collection period had commenced. (*See* Doc. 36, p. 2 (ordering Defendants to ***285** retain U.S. Risk Management); Doc. 24, p. 2 (ordering Defendants to collect

data from the death row tiers for a period of 21 days beginning on July, 15, 2013).)

Second, it is not beyond the Court's notice that Defendants' chose to modify tiers C and G—the two death row tiers exhibiting the highest recorded temperatures and heat indices, (*see* Slip Op., Doc. 87 at pp. 23–40)—and that Defendants made their modifications under cover of darkness.

Finally, and most significantly, Defendants' *stated purpose* for installing the awnings and soaker hoses was to *manipulate* the very data that they concede they were "oblig[ed] to preserve." (Doc. 66, p. 9.) Warden Cain testified at trial that he ordered the awnings installed "[t]o see if the temperature would fall." Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013; *see also* Trial Transcript, Testimony of Angelia Norwood, Aug. 5, 2013 (stating that the awnings were installed "to see if it would make a difference as far as providing shade over the windows, to see if it would cool—to see if it would make a difference, as far as the temperature, to bring it down"). Likewise, at his deposition, Warden Cain stated "[w]e are ... misting the walls of the building to try to see if we can get the cinder blocks to be cooler so then they won't conduct the heat all the way through." (Doc. 85–9, p. 34.) Certainly, had Defendants' achieved their goal of cooling the temperatures in the death row tiers, they would have ameliorated data unfavorable to their position, and reaped data more favorable to their position. This Court simply cannot ignore Defendants' brazen attempt to "suppress the truth" regarding the temperatures in the death row tiers. *Consol. Aluminum Corp.*, 244 F.R.D. at 344; *see Whitt*, 529 F.3d at 284.

Defendants insist that the bad faith element is not satisfied here because: (1) they "never intended to undermine or otherwise interfere with the termperature [sic] and/or humidity readings by U.S. Risk Management," (Doc. 66, p. 11); (2) they installed the awnings and soaker hoses in a "good faith" attempt "to explore all feasible solutions to alleviate effects of heat on the inmates housed on the Death Row Tiers," (*id.*, p. 10–11)[7]; and, in any event, (3) they "have not deprived Plaintiffs of any evidence whatsoever" because "[t]hey did not destroy any evidence," (*id.*, p. 11).

The Court is not convinced by any of Defendants' protestations. First, Defendants' insistence that their actions were "never intended to undermine or otherwise interfere with the termperature [sic] and/or humidity readings" is flatly contradicted by Warden Cain's testimony that Defendants' actions were taken "[t]o see if the temperature would fall."

Second, Defendants' insistence that they were merely "explor[ing] all feasible solutions to alleviate effects of heat on the inmates housed on the Death Row Tiers," is belied by: (1) Defendants' decision to undertake such efforts only *after* the Court-ordered data collection period had begun, despite having been on notice of Plaintiffs' complaints regarding the heat on death row since at *least* the preceding year, *see* Trial Transcript, Testimony of Angelia Norwood, Aug. 5, 2013 (indicating that Norwood received as many as thirteen prisoner ARPs complaining about "heat" since February 2011); (2) Defendants' decision to "explore" remedial efforts designed "[t]o see if the temperature would fall," rather than investigating alternatives that would not impact data collection in the tiers, such as providing additional ice chests to prisoners, or access to cold showers; (3) Defendants' decision to target the two tiers with the highest temperatures and heat indices in their "explor[ations]"; and (4) Defendants' decision to target tiers occupied by inmates and specified for data collection despite the existence of unoccupied, unmeasured tiers that could have served as control experiments, (*see* Slip Op., Doc. 87 at pp. 2, 23–40). More fundamentally, Defendants' stance that they were ***286** merely "explor[ing] all feasible solutions to alleviate effects of heat on the inmates housed on the Death Row Tiers," is at odds with the position Defendants' took throughout the course of this litigation, specifically that "[t]he conditions on Death Row are not objectively serious." (Doc. 15, p. 13.)

Finally, for reasons discussed more fully in the Court's analysis of whether Plaintiffs suffered prejudice as a result of Defendants' manipulations, *infra*, this Court is not at all satisfied that "Defendants ... have not deprived Plaintiffs of any evidence whatsoever," nor "destroy[ed] any evidence." To the contrary, although the temperature, humidity, and heat index each remained dangerously high after Defendants' installation of awnings and soaker hoses, the Court cannot be sure that the readings would not have been *higher* absent Defendants' actions. Indeed, Plaintiffs' expert David Garon testified in his deposition that the awnings "should stop the sun from coming in the windows," which, in turn, could alleviate "solar radiation issues." (Doc. 85–11, p. 38.) When asked to clarify, Garon stated:

> [W]hen the sun beats on the windows and they get hot and the air passes over it, it's almost like a heater. So if you

> get the sun off of there, it might help. And it should help keep the sun from penetrating into the jail cell for sure. I would expect that to happen.

(*Id.*) Additionally, Plaintiffs have submitted unrebutted evidence indicating that *after* the awnings were installed on tier C, the temperature variations between tier C (with awnings) and tier A (without awnings) were less significant than the variations between the two tiers *before* the installation of awnings on tier C. (Doc. 85–10.)

Quite simply, the Court finds Defendants' protestations that they acted in "good faith" when installing the awnings and soaker hoses to be incredible. Defendants' chosen structural modifications, combined with their stated reasons for making them, make it quite clear that Defendants' breached their duty to preserve the status quo on death row with the goal of thwarting accurate measurement of temperature, humidity and heat index. This intentional, and by Plaintiffs' unrebutted account *successful*, destruction of unfavorable evidence is quite sufficient to satisfy the "bad faith" standard. *See Whitt,* 529 F.3d at 284; *Consol. Aluminum Corp.,* 244 F.R.D. at 344.

3. Prejudice to Plaintiffs

[7] In assessing prejudice, a Court may consider whether a party "was precluded from obtaining much more reliable evidence tending to prove or disprove the validity [of his position]." *Flury v. Daimler Chrysler Corp.,* 427 F.3d 939, 946 (11th Cir.2005). Although the Court cannot assess the full extent of the prejudice Plaintiffs suffered as a result of Defendants' manipulations, it is satisfied that Plaintiffs suffered at least *some* prejudice. The temperature, humidity, and heat index were each dangerously high in the impacted tiers prior to Defendants' modifications, and each remained dangerously high after the installation of awnings and soaker hoses. However, Plaintiffs' unrebutted evidence shows that the temperatures in the selected tiers may have been gone higher but for Defendants' installation of awnings—at least in tier C. (*See* Doc. 85–10.) Accordingly, while this Court cannot say that Defendants' actions were "highly prejudicial" to Plaintiffs' case, *see Silvestri,* 271 F.3d at 594 (indicating that spoliation was "highly prejudicial" where "[i]t denied [defendant] access to the only evidence from which it could develop its defenses adequately"), Plaintiffs have produced sufficient unrebutted evidence to conclude that they were "precluded from obtaining much more reliable evidence tending to prove or disprove the validity [of their position]." *Flury,* 427 F.3d at 946.

4. Remedy

[8] **[9]** Being satisfied that Plaintiffs have made out a claim for spoliation based on the installation of awnings and soakers hoses at the death row tiers, the question becomes what sanctions to impose. Pursuant to its inherent powers, a court has broad discretion in crafting a remedy for abuses of the judicial process. *See Chambers,* 501 U.S. at 44–45, 111 S.Ct. 2123. However, the remedy must be proportionate to both the culpable conduct of the guilty party and resulting prejudice to the innocent party. *See id.* ("A primary ***287** aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process."); *see also Anderson v. Beatrice Foods Co.,* 900 F.2d 388, 395 (1st Cir.1990) ("[A] trial court confronted by sanctionable behavior should consider the purpose to be achieved by a given sanction and then craft a sanction adequate to serve that purpose.... [T]he judge should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms. Whether deterrence or compensation is the goal, the punishment should be reasonably suited to the crime."). When the sanctionable conduct is spoliation of evidence, an appropriate sanction should: "(1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party." *West v. Goodyear Tire & Rubber Co.,* 167 F.3d 776, 779 (2d Cir.1999) (quotation marks omitted).

Plaintiffs request that multiple sanctions be imposed on Defendants, ranging from judgment in their favor, to the imposition of a rebuttable presumption, to the assessment of fees and costs attendant to Plaintiffs' motion for sanctions for spoliation. (*See* Doc. 63, p. 1.) Ultimately, while the Court condemns Defendants' bad faith efforts to subvert collection of data and discovery in the strongest terms, it remains mindful of the Supreme Court's admonishment to exercise its discretion prudently. *See Chambers,* 501 U.S. at 44–45, 111 S.Ct. 2123.

Here, despite Defendants' efforts to lower the temperature in the selected tiers, the data produced in the collection period remains compelling, and is more than sufficient to sustain Plaintiffs' claim that they are being subjected to

unconstitutional conditions of confinement, even *after* the awnings and soaker hoses were installed. (*See* Slip Op., Doc. 87 at pp. 32–36.) Accordingly, the Court determines that neither the extreme sanction of judgment in Plaintiffs' favor, or an adverse inference, is necessary. Instead, the Court shall impose upon Defendants Plaintiffs' legal costs for preparing their Motion for Spoliation (Doc. 63) and Reply (Doc. 85), as well as any costs of discovery or fees attendant to the preparation of those filings.

B. Discovery Violations

Next, Plaintiffs seek sanctions against Defendants under Federal Rules of Civil Procedure ("Rule") 26 and 37 for violation of their discovery obligations. Specifically, Plaintiffs seek sanctions based on Defendants' failure to timely produce cost estimates related to the installation of air-conditioning in the death row tiers despite repeated requests, Defendants' failure to supplement their disclosures with information regarding installation of soaker hoses and maintenance to Plaintiff Code's cell vent, and Defendants' refusal to permit Plaintiffs' "shadow" expert access to the death row tiers with his measuring equipment.

1. Defendants' breach of discovery obligations

Rule 26 establishes the general rules regarding parties' duty to disclose. Rule 26(a) provides, in pertinent part:

> [A] party must, without awaiting a discovery request, provide to the other parties: ... a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.

Fed.R.Civ.P. 26(a)(1)(A)(ii). Further, this duty to disclose is ongoing. Specifically:

> A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:
>
> (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or
>
> ***288** (B) as ordered by the court.

Id. at 26(e)(1).

The rules regarding disclosure of expert testimony are also established by Rule 26(a). All parties are required to "disclose to the other parties the identity of any witness it may use at trial to present evidence." *Id.* at 26(a)(2)(A). Further, "[u]nless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report" that contains, among other things:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them; [and]
>
> (ii) the facts or data considered by the witness in forming them;

Id. at 26(a)(2)(B). "A party must make these disclosures at the times and in the sequence that the court orders." *Id.* at 26(a)(2)(C). Finally, as with all other disclosures under Rule 26(a), parties have an obligation to supplement their disclosures regarding expert testimony. *Id.* at 26(a)(2)(E). As it relates to expert testimony, Rule 26 states:

> For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

Id. at 26(e)(2); *see also id.* at 26(e)(1).

Rule 37 outlines sanctions that a court may impose upon parties for failing to fulfill their discovery obligations under Rule 26. *See* Fed.R.Civ.P. 37. Rule 37 also provides for sanctions where a party has failed to comply with Court imposed discovery obligations. *Id.* at 37(b). Rule 37(c) provides:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> (B) may inform the jury of the party's failure; and
>
> (C) may impose other appropriate sanctions....

Fed.R.Civ.P. 37(c). Finally, Rule 37(d) provides that the district court "must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." *Id.* at 37(d)(3).

[10] Here, the Court again determines that sanctions against Defendants' are appropriate based on Defendants' failure to timely disclose information regarding the cost of installation of air-conditioning in Angola's death row tiers. Defendants' put the cost of installing air-conditioning at issue from the outset by their insistence that Plaintiffs could not satisfy the standard for injunctive relief because the balance of harms—particularly the cost of installing air-conditioning—favored Defendants' position. Defendants then repeatedly refused to answer Plaintiffs' interrogatories aimed at assessing Defendants' estimate of the cost of installation, to the point that Plaintiffs' requested, and received, an order from the Magistrate Judge compelling Defendants' to answer their questions, even if the answer was simply that "defendants currently do not have an estimate of the cost to air condition the Death Row Tiers." (Doc. 49, p. 2.) Still, even after the Magistrate Judge's Order, Defendants' refused to produce a cost estimate. Instead, at his deposition, Defendants' expert witness adamantly and repeatedly insisted that he was utterly unable to provide such an estimate. (*See* Doc. 62–8, pp. 42–44.) Nonetheless, one day *after* the July 31 deadline for deposing expert witnesses had passed, and one business day *before* trial was set to begin, Defendants' produced Eyre's emailed "report" stating that "the potential Mechanical Construction cost could reach as high as $1,860,000." (Doc. 62–9.) This "report" did not reference Eyre's original report, and provided ***289** little independent basis for its cost estimate, except to say that it included "an engineering fee of $203,574.00." (*Id.*)

Eyre's "supplemental report in the form of an email" was relevant to Defendants' defenses, responsive to Plaintiffs' discovery requests, and certainly expressed an expert "opinion" that Defendants' intended to rely on. Further, there is simply no reason why this bare-boned "opinion" could not have been generated prior to the expiration of the deadline for deposing expert witnesses, and prior to the eleventh hour in the timeline to trial. At a minimum, Defendants' failure to produce this report earlier prejudiced Plaintiffs' ability to prepare for Eyre's deposition.

[11] The Court further finds that sanctions are appropriate based on Defendants' failure to supplement their responses to Plaintiffs' interrogatories with information regarding the installation of soaker hoses on the selected death row tiers. At trial, Warden Cain testified that the soaker hoses were installed "at the same time" as the awnings. Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013. However, while Defendants' eventually supplemented their interrogatory responses to include information about the awnings, they never updated their responses to report Defendants' installation of soaker hoses despite the fact that such information was directly responsive to Plaintiffs' inquiries regarding "any steps that have been taken ... related to altering climate conditions in the DEATH ROW FACILITY." (*See* Doc. 63–16, pp. 6–7 (emphasis in original).) Instead, Plaintiffs' learned about the soaker hoses only when they deposed Warden Cain. Lacking this information in advance, Plaintiffs were, at a minimum, prejudiced in their ability to prepare for Warden Cain's deposition.

[12] On the other hand, the Court will not impose sanctions based on Defendants' failure to supplement their disclosures with information regarding maintenance to Plaintiff Code's cell vent. Rule 26 states that supplemental disclosure is required "if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed.R.Civ.P. 26(e)(1)(A). In this instance, Plaintiffs' were not prejudiced by Defendants' failure to supplement their interrogatory responses regarding the vent maintenance because maintenance occurred *after* the evidentiary hearing and trial on the merits of Plaintiffs' Complaint.

[13] Likewise, the Court declines to sanction Defendants for their initial refusal to allow Plaintiffs' "shadow" expert access to the death row tiers with his measurement equipment. Although Plaintiffs' assert that Defendants agreed to their request that Garon be allowed to bring his instruments into death row as part of the compromise reached to retain U.S. Risk Management, (*see* Doc. 63, pp. 3–4), this Court's July 12 Order does not reflect that understanding, (*see* Doc. 36, p. 2). Instead, this Court's Order states merely that Plaintiffs' expert "shall be permitted to shadow U.S. Risk Management during the installation of the necessary equipment, and inspect the equipment at least once per week." (*Id.*) Although the Court certainly understands Plaintiffs' position that lacking instrumentation, Garon could not "meaningfully 'shadow' the Court appointed expert"—in other words, verify the accuracy of the data collection, (Doc. 63, p. 4)—Defendants' position that the Court's Order only allowed Garon access *without* his equipment is not unreasonable. Further, Plaintiffs concede that Garon was eventually allowed to access the death row tiers with his equipment in hand. (Doc. 85, p. 4.)

2. Remedy

[14] When considering sanctions under Rule 37, particularly under Rule 37(b), a district's court's discretion is limited by "two standards—one general and one specific." *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403, 413 (5th Cir.2004). "First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Id.* (quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982)).

Here again, the Court determines that a "just" sanction is to assess attorney's fees ***290** and costs related to Defendants' failure to respond to Plaintiffs' requests for information regarding the cost of installing air-conditioning, as well as the installation of soaker hoses. *See id.*

C. Counsels' lack of candor to Plaintiffs' counsel and the Court

Before concluding, this Court takes a moment to address its grave reservations regarding defense counsels' conduct in the course of this litigation. In assessing Plaintiffs' motions for sanctions, it appears that Defendants' counsel deliberately dodged requests for information related to the cost of installing air-conditioning; avoided turning over to Plaintiffs' information regarding Defendants' installation of soaker hoses; and, when confronted with information regarding Defendants' willful attempts to manipulate data collection in the death row tiers, excused Defendants' behavior by creating the impression that remedial measures were approved and encouraged by Magistrate Judge Riedlinger. In light of defense counsel's various representations to opposing counsel and this Court—particularly those which suggested that the Magistrate Judge endorsed and approved Defendants' attempts to manipulate data collection in the death row tiers when, in fact, no such approval was given—there appears to be a basis to sanction Defendants' counsel individually for lack of candor to the tribunal and lack of candor to opposing counsel.

IV. CONCLUSION

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' **MOTIONS FOR SANCTIONS (Docs. 62, 63)** are each **GRANTED IN PART and DENIED IN PART.** Plaintiffs' Motions are **GRANTED** to the extent that they seek reimbursement of attorney's fees and costs. Defendants' **SHALL REIMBURSE** Plaintiffs the full value of all attorney's fees and costs associated with the evidentiary and discovery violations described in this Order. Plaintiff's Motions are **DENIED** to the extent that they seek additional relief.

IT IS FURTHER ORDERED that Plaintiffs' shall file a motion for attorneys' fees and costs within 30 days of the date of this Order. Such motion shall comply with the Federal Rules of Civil Procedure and the Local Rules for the United States District Court for the Middle District of Louisiana.

IT IS FURTHER ORDERED, in light of the Court's serious concerns regarding defense counsels' lack of candor, that Defendants' counsel **E. WADE SHOWS, AMY L. MCINNIS,** and **JACQUELINE B. WILSON SHOW CAUSE WHY SANCTIONS SHOULD NOT BE IMPOSED** against each personally, under Fed.R.Civ.P. 37(c); M.D. La. LR83.2.4 and LR83.2.8; Louisiana Professional Conduct Rules related to candor to the tribunal (specifically, Rules 3.3, 8.3, and 8.4); Louisiana Professional Conduct Rules related to honesty and fair dealing to opposing counsel (specifically, Rules 3.4, 4.1, and 8.4); and this Court's inherent powers; possible sanctions to include, but not limited to, reprimand, ethics training, suspension, disbarment, and/or

the payment of attorneys' fees to cover the cost of motions and discovery related to this proceeding.

IT IS FURTHER ORDERED that this Order to Show Cause, and the facts contained herein, **SHALL SERVE AS NOTICE** of the possibility of such disciplinary action, in accordance with M.D. La. LR83.2.8. *See Matter of Thalheim,* 853 F.2d 383, 386 (5th Cir.1988) ("It is well-settled that federal district courts are bound by their own disciplinary rules when proceeding against attorneys for violation of ethical standards.").

An order setting a date for a hearing on this Order to Show Cause shall follow. *See id.;* M.D. La. LR83.2.8.

All Citations

300 F.R.D. 270

Footnotes

1 For a complete summary of the underlying facts and procedural history, see docket entry 87, *Ball v. LeBlanc,* No. 13–368, F.Supp.2d (M.D.La. Dec. 19, 2013) (hereinafter "Slip Op., Doc. 87").

2 At trial, Warden Cain described the "soaker hoses" as "three-quarter inch" hoses with "half-inch" perforations to allow water to seep out. Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013. According to Cain, Defendants' attempted use of soaker hoses was unsuccessful because "the water all ran out as soon as you put it on. We didn't have enough power." *Id.*

3 It is hardly surprising that Plaintiffs found out about Defendants efforts to modify the death row facility, given that they each live there.

4 For reasons explained, *infra,* defense counsels' representations to the effect that Magistrate Judge Riedlinger approved installation of the awnings are dubious.

5 Indeed, Defendants' took the position that "[t]he conditions on Death Row are not objectively serious." (Doc. 15, p. 13.)

6 Although not entirely clear from the record, it appears that Defendants repaired Plaintiff Code's malfunctioning vent sometime around August 9, 2013—in other words, *after* the data collection period had ended. (Doc. 85–2, p. 2.) Thus, while this Court entertains doubts regarding Defendants' motives in repairing the vent given the close proximity between the repairs and the undersigned's August 12 site visit, it cannot say that the repairs violated Defendants' duty to maintain the status quo on death row throughout the data collection period. It is another matter whether Defendants' failure to update their responses to Plaintiffs' interrogatories regarding this maintenance was a discovery violation.

7 Defendants' counsel further states that "[t]his good faith impetus was expressed to Magistrate Judge Riedlinger, who indicated that he thought any good faith solutions would be appreciated by this Court." (Doc. 66, p. 11.) This attempt to lay blame for Defendants' actions at the Magistrate Judge's door is indicative of the lack of candor for which Defendants' counsel is being ordered to show cause for why sanctions should not be imposed against each individually, *infra.*

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Elzie Ball, Nathaniel Code, and James Magee, **Plaintiffs,** **vs.** **James M. LeBlanc, Secretary of the Louisiana Department of Public Safety and Corrections, Burl Cain, Warden of the Louisiana State Penitentiary, Angela Norwood, Warden of Death Row, and the Louisiana Department of Public Safety and Corrections,** **Defendants.**	**Civil Action No. 13-368-BAJ-SCR** **STATEMENT OF INTEREST OF THE UNITED STATES**

STATEMENT OF INTEREST OF THE UNITED STATES

This litigation presents two questions of vital public importance: (1) Whether Louisiana prison officials are exposing prisoners to extreme heat conditions that constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution or Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12133, and, if so, (2) What remedies are needed to ensure that Louisiana prison officials comply with federal constitutional and statutory civil rights laws. The United States takes no position on the fact-dependent first question.[1] Rather, the United States files this statement of interest to assist the

[1] The United States is aware, however, that the Court granted Plaintiffs' motion for preliminary injunction on July 1, 2013, and in doing so, found that "Plaintiffs have presented an overwhelming amount of evidence indicating that the conditions inside Death Row at Louisiana State Penitentiary are in clear violation of the Eighth Amendment's ban on cruel and unusual punishment." [ECF No. 21 at 2].

Court in determining what remedies would be necessary should the Court find that the Louisiana Department of Corrections violated the federal civil rights of prisoners in its custody. It is the United States' position that if the Court so finds, it should permit Plaintiffs' counsel and representatives to access the Louisiana State Penitentiary at Angola ("Angola") or, in the alternative, appoint an independent monitor to ensure that the injunctive relief Plaintiffs seek is properly implemented.

Interest of the United States

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in federal court.[2] The United States, acting through the Civil Rights Division of the U.S. Department of Justice, has an interest in this matter because the alleged unconstitutional correctional practices at Angola fall within the Civil Rights Division's enforcement authority. Specifically, the Civil Rights Division enforces the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997 *et seq*., which allows it to investigate and remedy unconstitutional conditions of confinement imposed by state and local governments pursuant to a pattern or practice of civil rights violations. *See, e.g. United States v. Miami-Dade County*, No. 13-cv-21570 (S.D. Fla. filed May 1, 2013); *United States v. Cook County, Ill.* No. 10-cv-2946 (N.D. Ill. filed May 13, 2010); *United States v. Erie County, N.Y.*, No. 09-cv-849 (W.D.N.Y. filed Sept. 30, 2009); *United States v. Dallas County, Tex.*, No. 07-cv-1559 (N.D.

[2] The full text of 28 U.S.C. § 517 is as follows: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

Tex. filed Sept. 12, 2007); *Jones v. Gusman*, No. 06cv5275 (E.D. La. filed Aug. 31, 2006); *United States v. Terrell County*, Ga., No. 04cv76 (M.D. Ga. filed June 7, 2004).[3]

Background

On June 10, 2013, Plaintiffs Elzie Ball, Nathaniel Code, and James Magee, death row inmates at Angola, filed suit against the Louisiana State Department of Public Safety and Corrections and prison officials seeking declaratory and injunctive relief for extreme heat conditions. Compl. [ECF No. 1]. On June 18, 2013, Plaintiffs moved for a preliminary injunction. Pls.' Mot. for Prelim. Inj. ("Pls.' Mot.") [ECF No. 12]. Defendants responded on June 28, 2013. Defs.' Mem. in Opp. to Pls.' Mot. for Prelim. Inj. ("Defs.' Mem.") [ECF No. 15].

After considering Plaintiffs' "overwhelming amount of evidence," the court granted their Preliminary Injunction Motion on July 1, 2013. Order [ECF No. 21 at 3–4] . The Court found that by Defendants' own reporting, the heat index on death row often exceeds 150 degrees and "put Plaintiffs in substantial risk of death, paralysis and other extreme health problems." Order [ECF No. 21 at 1–2]. In response to Defendants' contention that reducing the heat index would be cost-prohibitive, the Court found "any harm that Defendants might face is financial in nature and therefore plainly outweighed by the threat of substantial injury or death to Plaintiffs." *Id.* at 3–4.

Plaintiffs now seek several forms of injunctive relief, as set forth in their Complaint and Motion for Preliminary Injunction. The requested relief includes ordering Angola to maintain the death row heat index at 88 degrees and requiring Defendants to work with Plaintiffs' experts to implement the heat reduction. Compl. at 11; Pls. Mot. at 26.

[3] For a more comprehensive list of cases concerning the constitutionality of conditions in correctional facilities, please visit the Civil Rights Division Special Litigation Section's website at http://www.justice.gov/crt/about/spl/findsettle.php.

Discussion

I. If the Court Finds that Unconstitutional Conditions Exist in Angola, the Court Has Broad Authority to Enter Injunctive Relief.

If Plaintiffs prevail on the merits of their claims, this Court has broad authority to order injunctive relief to remedy constitutional violations at Angola. In order to secure final injunctive relief, Plaintiffs must not only prevail on the merits of their claims, they also must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange LLC*, 547 U.S. 388, 391 (2006). Given that the question of whether Plaintiffs have satisfied this standard is intertwined with the fact-dependent question of whether Plaintiffs should prevail on the merits, the United States does not opine on whether Plaintiffs have satisfied this four-prong test.

However, if the Plaintiffs have met their burden, it is well established that "the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *see also Valley v. Rapides Parish Sch. Bd.*, 702 F.2d 1221, 1225 (5th Cir. 1983); *Gates v. Collier*, 501 F.2d 1291, 1320 (5th Cir. 1974) ("Having found these numerous constitutional violations . . . the court had the duty and obligation to fashion effective relief."). While broad, a court's equitable discretion is not without limits, and a court must tailor injunctive relief to the specific constitutional violations that the relief is meant to correct. *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1041 (5th Cir. 1982). Nonetheless, district courts have wide latitude to fashion comprehensive relief that addresses "each element contributing to the violation" at issue. *Hutto*

v. Finney, 437 U.S. 678, 687 & n.9 (1978); *see also Milliken v. Bradley*, 433 U.S. 267, 282 (1977) ("[W]here . . . a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the 'condition that offends the Constitution.'").

II. Monitoring Mechanisms Are Essential to Ensuring Compliance with the Court's Order.

The effectiveness of injunctive relief is often contingent on some level of compliance monitoring over a court's order to restore constitutional conditions in a correctional facility. If a monitoring system is not in place, reliance on "self-certification" can further endanger the constitutional rights of all inmates who are affected by the defendants' behavior. *Benjamin v. Schriro*, 370 Fed. App'x 168, 171 (2d Cir. 2010); *see also Gary W. v. State of Louisiana*, No. 74-cv-2412, 1987 WL 12120, at *1 (E.D. La. June 9, 1987) (court-ordered independent monitoring "needed to provide an objective assessment to the Court."). The importance of a monitoring mechanism is particularly important when an unconstitutional practice is entrenched. Plaintiffs allege that Defendants' failure to remedy the extreme heat conditions has existed since at least 1991. Pls.' Mot. at 2–3. If the Court finds that this practice is unconstitutional, it will show an entrenchment of Eighth Amendment violations requiring close observation to ensure compliance.

In exercising its enforcement authority under CRIPA, the United States commonly employs two monitoring mechanisms: (1) access to the correctional facility by counsel and representatives (in the form of a team of experts), and (2) court-appointed independent monitors. These monitoring mechanisms are particularly effective and are commonly used by the United States in its corrections practice. Both mechanisms have been approved by the Fifth Circuit.

A. If the Court Finds Liability, Facility Access to Plaintiffs' Counsel and Representatives Is an Appropriate Form of Relief.

Plaintiffs' counsel and representatives' access to Angola is vital to ensuring that Defendants comply with Court-ordered injunctive relief, if granted. Many court orders and settlement agreements in correctional conditions of confinement cases between the Department of Justice and states or local governments contain "full and complete" provisions granting the United States and its agents "unrestricted" access to the facilities in question. Settlement Agreement, *Shreve, et al. v. Franklin County, Oh., et al.*, No. 2:10-cv-644 (S.D. Ohio, filed July 16, 2010) [ECF 94-1 at 11]; Consent Agreement, *Miami-Dade County* [ECF No. 1-5 at 31]; Agreed Order, *Cook County* [ECF No. 3-1 at 53]; Stipulated Order of Dismissal, *Erie County* [ECF No. 225-1 at 32] (providing for "reasonable access . . . once each six (6) month reporting period"); Agreed Order, *United States v. Dallas County, Tex.* [ECF No. 8 at 18]; Order, *Terrell County, Ga.* [ECF No. 82-1 at 28-29] ("DOJ representatives, with their experts, may conduct periodic, unannounced, on-site compliance monitoring tours."); Consent Judgment, *Jones v. Gusman* [ECF No. 466 at 40]. Facility access allows the United States to keep abreast of defendants' implementation of both the ordered relief and the independent monitor's recommendations for achieving that relief. If defendants fail to reach compliance or take any steps toward compliance, on-site observations give the United States the opportunity to advise the court and potentially take further enforcement action.

The same is true in cases involving private plaintiffs. Several courts have ordered that plaintiffs' counsel have access rights to monitor progress with court orders for constitutional prison conditions. *See, e.g.*, *Ruiz v. Johnson*, 164 154 F. Supp. 2d 975, 996 (S.D. Tex. 2001) ("Section XVI of the Final Judgment identifies . . . provisions for prison access and inmate meetings by plaintiffs' counsel for purposes of monitoring defendant's compliance. . . .");

Inmates of D.C. Jail v. Jackson, 158 F.3d 1357, 1359 (D.C. Cir. 1998) (discussing plaintiffs' counsel monitoring prison conditions); *Adams v. Mathis*, 752 F.2d 553, 554 (11th Cir. 1985) (discussing fees of court-ordered compliance monitoring by plaintiff's counsel).

Most pertinently, in *Advocacy Center v. Cain*, No. 3:12-cv-508 (M.D. La. filed Aug. 17, 2012), the Louisiana Protection and Advocacy Agency (P&A) brought an access suit against Angola's prison officials after they denied the P&A access to investigate extreme heat conditions. The parties resolved this litigation through a settlement agreement that provides the P&A's agents, experts Dr. Susi Vassallo and Mr. James Balsamo (the same experts for the plaintiffs in this matter), with access to Angola. Pursuant to the access provisions, Dr. Vassallo and Mr. Balsamo were able to expeditiously investigate the heat conditions on death row without any known disruption to facility operations or prison security. Granting Plaintiffs and their experts access in this case will allow them to function in the same way as in the *Advocacy Center* agreement, but with the ultimate goal of enforcing any relief ordered by the Court.

B. If the Court Finds Liability, It May Appoint an Independent Monitor.

If the Court finds unconstitutional conditions from the excessive heat on death row at Angola, it may also choose to appoint an independent monitor. The authority of the Court to appoint a monitor is well established. *See Ex Parte Peterson*, 253 U.S. 300, 312–13 (1920) (acknowledging inherent power of courts to "appoint persons unconnected with the court to aid judges in the performance of specific judicial duties," and noting that courts have long exercised this power "when sitting in equity by appointing, either with or without the consent of the parties, special masters, auditors, examiners, and commissioners."); *Gates v. Collier*, 501 F.2d 1291, 1321–22 (5th Cir. 1974).

The United States often uses monitors to ensure compliance with settlement agreements or court orders involving correctional facilities. *See, e.g.* Consent Agreement, *Miami-Dade County* [ECF No. 1-5 at 31-33]; Agreed Order, *Cook County, Ill.* [ECF No. 3-1 at 50–52]; Stipulated Order of Dismissal, *Erie County, N.Y.* [ECF No. 225-1 at 33–35] (monitor called a "technical compliance consultant"); Agreed Order, *Dallas County, Tex.* [ECF No. 8 at 19]; Consent Judgment, *Jones* [ECF No. 466 at 40–42]. In addition, the Fifth Circuit has upheld several appointments of outside monitors in the prison condition context. *Sockwell v. Phelps*, 20 F.3d 187, 189 n.2 (5th Cir. 1994); *Miller v. Carson*, 683 563 F.2d 741, 752–53 (5th Cir. 1977). In fulfilling their duties under these agreements, independent monitors are ensured access to the facilities to observe conditions, review records, and speak with both prisoners and prison officials to ensure defendant's compliance with the injunctive relief.[4] An independent monitor can guide implementation of injunctive relief, reduce unnecessary delays, and provide an unbiased tracking record of defendants' compliance with court-ordered relief. An independent monitor operating in this function also can provide substantial assistance to the Court and the parties, which reduces potential future litigation over compliance disputes.

Conclusion

Should the Court find that Louisiana prison officials are exposing prisoners at Angola to extreme heat conditions that constitute cruel and unusual punishment in violation of the Eighth Amendment or Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12133, it has broad powers to order injunctive relief to remedy those conditions. It is the position of the United States, grounded in decades of experience in investigating and litigating

[4] For example, in the Orleans Parish Prison consent decree, the language concerning monitor access to the facility was as follows: "The Monitor shall have full and complete access to the Facility, all Facility records, prisoners' medical and mental health records, staff, and prisoners. OPSO shall direct all employees to cooperate fully with the Monitor. All information obtained by the Monitor shall be maintained in a confidential manner." Consent Judgment *Jones* [ECF No. 466 at 41].

conditions of confinement in prisons such as Angola, that the Court should grant Plaintiffs' counsel and representatives ongoing access to Angola or, in the alternative, appoint an independent monitor to ensure that the injunctive relief Plaintiffs seek is properly implemented. These aspects of final remedy are within the Court's equitable authority and are minimally necessary considering the persistent nature of Plaintiffs' allegations. Federal courts in Louisiana, the Fifth Circuit, and around the country have included plaintiffs' right of access or the appointment of an independent monitor in final injunctive relief, and the Court should do so here in shaping any relief in this case.

Respectfully submitted,

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Attorneys for the United States of America

DATED: August 2, 2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Statement of Interest was filed electronically on this 2nd day of August 2013, with the Clerk of Court for the Middle District of Louisiana using the CM/ECF System, which will send a notice of such filing to all registered parties.

s/Catherine M. Maraist
CATHERINE M. MARAIST
Assistant United States Attorney

988 F.Supp.2d 639
United States District Court,
M.D. Louisiana.

Elzie BALL, et al.
v.
James M. LeBLANC, et al.

Civil Action No. 13–00368–BAJ–SCR. | Dec. 19, 2013.

Synopsis

Background: State death row inmates brought § 1983 action against state department of corrections and state officials, seeking declaratory and injunctive relief based on allegations of violations of the Eighth Amendment, Americans with Disabilities Act (ADA), and Rehabilitation Act.

Holdings: After a non-jury trial, the District Court, Brian A. Jackson, Chief Judge, held that:

[1] temperature and humidity of cells presented substantial risk of harm to inmates;

[2] officials had knowledge that heat and humidity in death row tiers placed inmates at substantial risk of harm;

[3] officials disregarded substantial risk of serious harm to inmates; and

[4] there was no evidence that inmates were limited in any major life activities due to their medical conditions.

Declaratory and injunctive relief granted in part and denied in part.

West Headnotes (14)

[1] Sentencing and Punishment
Conditions of Confinement

A court must measure a prison's conditions against the evolving standards of decency that mark the progress of a maturing society and not the standards in effect during the time of the drafting of the Eighth Amendment. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[2] Sentencing and Punishment
Deliberate indifference in general

A prison official must have acted with a sufficiently culpable state of mind to violate the Eighth Amendment as to conditions of confinement; in condition of confinement cases, a court is required to determine if the prison official acted with "deliberate indifference," which is defined as knowing of and disregarding an excessive risk to inmate health or safety. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[3] Sentencing and Punishment
Conditions of Confinement

Sentencing and Punishment
Deliberate indifference in general

To demonstrate that prison conditions violate the Eighth Amendment, an inmate must meet the following requirements: (1) an objective requirement showing that the condition is so serious as to deprive prisoners of the minimal civilized measure of life's necessities, as when it denies the prisoner some basic human need; and (2) a subjective requirement, which mandates a showing that prison officials have been deliberately indifferent to inmate health or safety. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[4] Prisons
Hazardous and unhealthful conditions; housing

Sentencing and Punishment
Housing

Temperature and humidity of cells presented substantial risk of harm to death row inmates, as required for their claims against prison and officials, alleging conditions of confinement violated the Eighth Amendment; inmates were regularly subjected to temperatures above 90.5

degrees and heat indices above 100 degrees, heat index inside death row tiers was often higher than that outside facility, inmates were subjected to consecutive days with heat indices above 100 degrees, inmates were at risk of heat-related illnesses, including heat stroke and worsening of their underlying conditions, which included diabetes, hypertension, and uncontrolled blood pressure, and two inmates were over age 55, increasing risk for them. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[5] Sentencing and Punishment

Medical care and treatment

Prison officials violate the Eighth Amendment when they act with deliberate indifference to a prisoner's serious medical needs. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[6] Sentencing and Punishment

Deliberate indifference in general

To establish that a prison official was deliberately indifferent to an inhumane condition of confinement in violation of the Eighth Amendment, a plaintiff bears the burden of showing that the official knew of and disregarded an excessive risk to inmate health or safety. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[7] Civil Rights

Criminal law enforcement; prisons

Civil Rights

Criminal law enforcement; prisons

Sentencing and Punishment

Deliberate indifference in general

Whether a prison official had the requisite knowledge of a substantial risk of harm to an inmate, for purposes of an Eighth Amendment claim, is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[8] Sentencing and Punishment

Deliberate indifference in general

It is not necessary for an Eighth Amendment claimant to show that a prison official acted or failed to act due to a belief that an inmate would actually be harmed; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[9] Prisons

Hazardous and unhealthful conditions; housing

Sentencing and Punishment

Housing

Prison officials had knowledge that heat and humidity in death row tiers placed inmates at substantial risk of harm, as required to find officials were deliberately indifferent to serious medical needs for inmates' Eighth Amendment claims; two inmates were over age 55, inmates had underlying medical conditions, inmates submitted multiple administrative complaints regarding heat, and officials responded that they knew it was “extremely hot.” U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[10] Prisons

Hazardous and unhealthful conditions; housing

Sentencing and Punishment

Housing

Prison officials disregarded substantial risk of serious harm to death row inmates regarding heat and humidity in cells, as required to find official were deliberately indifferent to serious medical needs for inmates' Eighth Amendment claims; officials did not take any actions to reduce

heat conditions despite knowledge of conditions. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[11] Civil Rights

Prisons

The Americans with Disabilities Act (ADA) and related statutes afford certain rights to incarcerated individuals in state facilities. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

Cases that cite this headnote

[12] Civil Rights

Impairments in general; major life activities

"Major life activities," for purposes of the Americans with Disabilities Act (ADA) and Rehabilitation Act, are those activities that are of central importance to daily life. Rehabilitation Act of 1973, § 7(9)(B), 29 U.S.C.A. § 705(9)(B); Americans with Disabilities Act of 1990, § 3(1)(A), 42 U.S.C.A. § 12102(1)(A).

Cases that cite this headnote

[13] Civil Rights

Particular conditions, limitations, and impairments

There was no evidence that death row inmates were limited in any major life activities due to their medical conditions, including hypertension, obesity, and depression, as required for their claims against prison and officials, alleging violations of the Americans with Disabilities Act (ADA) and Rehabilitation Act. Rehabilitation Act of 1973, § 7(9)(B), 29 U.S.C.A. § 705(9)(B); Americans with Disabilities Act of 1990, § 3(1)(A), 42 U.S.C.A. § 12102(1)(A).

Cases that cite this headnote

[14] Civil Rights

Impairments in general; major life activities

Merely having an impairment does not make one disabled for purposes of the Americans with Disabilities Act (ADA). Americans with Disabilities Act of 1990, § 3(1)(A), 42 U.S.C.A. § 12102(1)(A).

Cases that cite this headnote

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RULING AND ORDER

BRIAN A. JACKSON, Chief Judge.

I. INTRODUCTION

On August 5, 2013, this matter came before the Court for a non-jury trial on the merits and a hearing on Plaintiffs' Motion for a Preliminary Injunction (Doc. 12). [1] Having considered the parties pretrial and post-trial submissions, the evidence introduced at the trial, and the arguments presented by counsel, the Court finds that Plaintiffs have satisfied their burden of proving that Defendants have subjected them to cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution. The Court finds, however, that Plaintiffs did not introduce sufficient evidence to establish that Defendants have violated the Americans with Disabilities Act, as modified by ***642** the Americans with Disabilities Act Amendment Act, and Section 504 of the Rehabilitation Act of 1973. Accordingly, Plaintiffs' request for declaratory and injunctive relief is **GRANTED IN PART** and **DENIED IN PART,** as outlined below. Further, Plaintiffs' Motion for a Preliminary Injunction (Doc. 12) is **DENIED AS MOOT.** [2] The Court's credibility

findings, findings of fact and conclusions of law are set forth below, as required by Federal Rule of Civil Procedure ("Rule") 52(a).

II. JURISDICTION

It is uncontested that this Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and 2201.

III. BACKGROUND

A. Plaintiffs' Claims

Plaintiffs Elzie Ball ("Ball"), Nathaniel Code ("Code"), and James Magee ("Magee") (collectively "Plaintiffs") are death row inmates, who are currently incarcerated at the Louisiana State Penitentiary in Angola, Louisiana ("Angola"). Plaintiffs filed this lawsuit against Defendants James M. LeBlanc[3] ("LeBlanc"), Nathan Burl Cain[4] ("Cain"), Angelia[5] Norwood[6] ("Norwood"), and the Louisiana Department of Public Safety and Corrections (collectively "Defendants") pursuant to 42 U.S.C. § 1983[7] ("Section 1983"); the Eighth Amendment to the United States Constitution, U.S. Const. amend. VIII; Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1; Title II of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12101 *et seq.*, as modified by the Americans with Disabilities Act Amendment Act (the "ADAAA"), 42 U.S.C. § 12131 *et seq.;* and Section 504 of the Rehabilitation Act of 1973 (the "Rehabilitation Act"), 29 U.S.C. § 794. (Doc. 1.) Plaintiffs allege that Defendants have violated, and continue to violate, their rights under the Eighth Amendment, ADA, ADAAA, and Rehabilitation Act by subjecting them to excessive heat, acting with deliberate indifference to their health and safety, and discriminating against them on the basis of their disabilities.

***643** Plaintiffs seek a ruling and order from this Court granting their Motion for a Preliminary Injunction (Doc. 12), and requiring Defendants to take action to decrease and maintain the heat index in the Angola death row tiers at or below 88 degrees Fahrenheit.[8] Plaintiffs further seek a ruling and order: (1) declaring that Defendants have violated Plaintiffs' rights; (2) requiring Defendants to develop and implement a long-term plan to maintain the heat index in the Angola death row tiers at or below 88 degrees Fahrenheit; (3) appointing a monitor to oversee Defendants' implementation of such plan; (4) requiring Defendants to provide Plaintiffs clean, uncontaminated ice and drinking water at regular intervals during the summer months; (5) requiring Defendants to lower the shower temperature during the summer months; and (6) enjoining Defendants from retaliating against Plaintiffs.[9] Plaintiffs also seek attorneys' fees, pursuant to 42 U.S.C. §§ 1988 and 12205.

Defendants oppose Plaintiffs' Motion for a Preliminary Injunction and deny all liability. (Docs. 15, 38.) Defendants contend that Plaintiffs have not suffered, nor are they likely to suffer, adverse health effects due to the conditions of confinement at Angola's death row facility. Defendants further contend that they have not violated Plaintiffs' rights under the ADA, ADAAA, or Rehabilitation Act. Thus, Defendants request that the Court deny Plaintiffs' motion, rule in Defendants' favor, and deny Plaintiffs all requested relief.

B. Procedural History

The instant litigation was filed on June 10, 2013. (Doc. 1.) Eight days later, Plaintiffs filed a Motion for a Preliminary Injunction. (Doc. 12.)

On July 2, 2013, Plaintiffs' Motion for a Preliminary Injunction was heard with oral argument. (Doc. 24.) After considering the parties' arguments, the Court determined that it was necessary to obtain current, accurate temperature, humidity, and heat index data from Angola's death row facility before ruling on Plaintiffs' motion. Accordingly, the Court deferred its ruling, pending the collection of such data by a neutral third-party expert. (Doc. 24.) The Court also issued a scheduling order, and set the trial on the merits to begin on August 5, 2013. (Docs. 24, 28.) Subsequently, the Court ordered the parties to retain a neutral third-party expert to install the necessary equipment, and record, collect, and disseminate the required data, ***644** beginning on July 15 and ending on August 5, 2013. (Doc. 36.)

From August 5 through August 7, 2013, the Court conducted a hearing on Plaintiffs' Motion for a Preliminary Injunction and the trial on the merits. Fed.R.Civ.P. 65(a)(2). During the trial, the parties jointly submitted the temperature, heat index, and humidity data collected and analyzed by the neutral third-party expert, United States Risk Management, L.L.C. ("USRM"), to the Court. During the trial, the parties also presented testimonial evidence regarding the conditions at Angola's death row facility, and Plaintiffs' underlying medical conditions and medications. Following the trial, the undersigned toured the death row facility and observed the conditions first-hand. As a result, the Court makes

the following credibility findings, findings of fact, and conclusions of law.

IV. CREDIBILITY FINDINGS

1. "In a non-jury trial, credibility choices and the resolution of conflicting testimony are the province of the judge, subject only to Rule 52(a)'s clearly erroneous standard." *Justiss Oil, Co., Inc. v. Kerr–McGee Refining Corp.*, 75 F.3d 1057, 1067 (5th Cir.1996) (citation omitted); *Reich v. Lancaster*, 55 F.3d 1034, 1045 (5th Cir.1995) ("The trial judge's 'unique perspective to evaluate the witnesses and to consider the entire context of the evidence must be respected.' ") (citation omitted).

2. In making its findings of fact, the undersigned relied on the parties' written submissions, the oral testimony presented at trial, and the evidence introduced at trial. Due to the number of disputed facts, it was necessary to consider the demeanor of each witness, his or her interests in the case, and the internal consistency of his or her testimony. *See Justiss Oil*, 75 F.3d at 1067.

3. The following are the Court's credibility findings as to Defendant Norwood.

4. On July 15, 2013 at 4:45 p.m., Defendant Norwood issued an email to all of the death row supervisors regarding the monitors that were installed in the death row tiers by USRM. Norwood's email ordered the following:

> In order to ensure accurate and consistent temperature recording, all fans and windows are not to be adjusted in any manner. In addition, no offender and/or employee is to tamper with the recording devices placed on each tier. Only authorized persons will be allowed inside the cells with the recording devices.

5. Despite Norwood's issuance of the hold order, Defendants installed awnings over the windows in tiers C and G on or about July 26, 2013. Such awnings remained on the windows from that date until the end of the data collection period. Defendants also attempted to wet and/or mist the ceiling and/or outside walls of certain housing tiers using water hoses. Defendants took such actions without seeking the permission of the Court.

6. When asked by counsel for Plaintiffs about her understanding as to the purpose of the data collection, Norwood testified as follows:

> BY MR. VORA: Ms. Norwood, what was your understanding as to why USRM was installing those monitors?
>
> BY MS. NORWOOD: Because the Judge wants a fair and impartial, objective reading of the temperatures.
>
> BY MR. VORA: And you understood that it was important for you to make sure that he did get fair and impartial readings of the temperatures inside of the death row tiers, correct?
>
> BY MS. NORWOOD: Yes.
>
> ***645** BY MR. VORA: In fact, you understood it and you even advised the other death row supervisors to ensure that the correctional officers also understood that they were to ensure that the Judge received fair and impartial numbers for the USRM monitors, correct?
>
> BY MS. NORWOOD: Yes.
>
> ...
>
> BY MR. VORA: The reason that you asked for all the fans and windows not to be adjusted in any manner was to ensure, in your words, accurate and consistent temperature recordings, correct?
>
> BY MS. NORWOOD: Yes.

Trial Transcript, Testimony of Angelia Norwood, Aug. 5, 2013.

7. Later, Norwood testified that she understood that: (1) the data was being collected pursuant to a court order; (2) she had an obligation to obey the Court's order; and (3) she had an obligation not to engage in any actions that could possibly interfere with the collection of such data.

> BY MR. VORA: And you understand that the USRM data was also being collected pursuant to the Court's order, correct?
>
> BY MS. NORWOOD: Yes.
>
> BY MR. VORA: And you understood that you had a duty to obey the Court's order and to not engage in any action

that might interfere with the Court's collection of that data, correct?

BY MS. NORWOOD: Yes.

...

BY MR. VORA: You understood that the Court wanted accurate and consistent temperature recordings, correct?

BY MS. NORWOOD: Yes.

Trial Transcript, Testimony of Angelia Norwood, Aug. 5, 2013.

8. Despite this testimony, Norwood proceeded to testify that it "didn't occur" to her that Defendants' installation of window awnings and use of "soaker" hoses might interfere with the data collection. Trial Transcript, Testimony of Angelia Norwood, Aug. 5, 2013.

BY MR. VORA: ... [D]id it ever cross your mind that the awnings might interfere with this Court's order that the temperature be accurately consistently recorded and collected?

BY MS. NORWOOD: No, it did not.

Trial Transcript, Testimony of Angelia Norwood, Aug. 5, 2013.

9. Norwood further added that she did not see a problem with Defendants' installation of the awnings or use of the "soaker" hoses. Thus, she did not question her superiors, nor did she attempt to prevent the installation or use of such devices, after Defendant Cain ordered the installation and use of such.

10. Norwood's credibility was further undermined by her testimony that it "didn't occur" to her that Defendants' installation and use of such devices was inconsistent with her July 15, 2013 email. Trial Transcript, Testimony of Angelia Norwood, Aug. 5, 2013.

11. When questioned by the Court, Norwood testified as follows:

BY THE COURT: ... it didn't dawn on you that [Defendants'] activity was completely inconsistent with your email, the message in your email? ... and now you are testifying—you're telling the Court that somehow you didn't think there was any problem with the installation, even after you issued this email message to all [of] the supervisors on death row? You saw nothing wrong, no problem with the installation of the awnings? You ***646** saw no problem with the use of the misters or soaker hoses or anything else? Is that what you are telling me?

BY MS. NORWOOD: Yes, sir. It is.

Trial Transcript, Testimony of Angelia Norwood, Aug. 5, 2013.

12. When further questioned by the Court, Norwood testified that she did not believe that the awnings or "soaker" hoses would affect the temperature readings.

13. That testimony, however, was wholly inconsistent with Norwood's later testimony, in which she admitted that the *purpose* of the awnings and "soaker" hoses was to attempt to lower the temperatures inside the death row housing tiers:

BY MR. VORA: Why were the awnings installed on the death row tiers?

BY MS. NORWOOD: To see if it would make a difference as far as providing shade over the windows, to see if it would cool—to see if it would make a difference, as far as the temperature, to bring it down.

...

BY MR. VORA: Are you ever in a position to ask Warden Venoit questions?

BY MS. NORWOOD: Yes.

BY MR. VORA: Did you ask him whether installing soaker hoses would affect the gathering of the data consistently and accurately pursuant to this Court's order?

BY MS. NORWOOD: Not in so many words.

BY MR. VORA: Did you ask him in any words?

BY MS. NORWOOD: Yes.

BY MR. VORA: What did you ask him?

BY MS. NORWOOD: I asked him if he seriously thought that wetting the outside of that building would impact the interior temperature.

BY MR. VORA: Why did you ask him about impacting the interior temperature, but you didn't ask him about

whether or not that would be consistent with this Court's order that accurate and consistent data be recorded?

BY MS. NORWOOD: It didn't occur to me.

...

BY MR. VORA: But your understanding as to why any of these actions with respect to soaker hoses or awnings, your understanding was that it was in order to further the settlement, correct?

BY MS. NORWOOD: No.

BY MR. VORA: What was your understanding as to why that was happening?

BY MS. NORWOOD: My understanding was to—to see if there was anything that would work to reduce the temperature.

Trial Transcript, Testimony of Angelia Norwood, Aug. 5, 2013.

14. As highlighted above, Norwood's testimony was illogical and riddled with contradictions and inconsistencies. For example, despite instructing her subordinates to not tamper with the tier windows "to ensure accurate and consistent temperature recording[s]," Norwood attempted to convince the Court that it "didn't occur" to her that Defendants' installation of the window awnings and use of "soaker" hoses may interfere with the data collection.

15. In another example, Norwood testified that she understood that the purpose of the twenty-one day data collection period was to collect accurate and consistent data. Yet, she testified that she never questioned Defendants' attempts to alter the temperature, and thus, the data.

***647** 16. In another example, despite testifying that it "didn't occur" to her that Defendants' actions may alter the temperature, and thus, the data, Norwood subsequently testified that the *purpose* of the window awnings and "soaker" hoses was to alter the temperature inside the death row tiers.

17. In sum, the Court finds that Norwood's testimony on this issue lacked the ring of truth. Accordingly, this Court does not consider Norwood to be a credible witness, particularly as it relates to Defendants' actions during the data collection period. Accordingly, Norwood's testimony regarding Defendants' actions during the data collection period were not relied on by the undersigned.

V. FINDINGS OF FACT

The following findings of fact are uncontroverted or supported by the evidence in the record. Where a particular fact was controverted, the Court weighed the evidence and determined that the evidence presented by the party supporting that fact was more persuasive.

A. Angola's Death Row

1. In 2006, the Louisiana Department of Public Safety and Corrections constructed a new facility at Angola to house inmates who have been sentenced to death ("death row" or "death row facility"). The 25,000 square foot death row facility features four housing wings, each of which contains (1) two housing tiers; (2) administrative offices; (3) visitation rooms; (4) a medical clinic; (5) a dental clinic; (6) a control center where the correctional officers are stationed; and (7) an execution chamber. Air conditioning is provided in the administrative offices, visitation rooms, medical clinic, dental clinic, control center, and execution chamber. Air conditioning is not provided in the tiers where the inmates are housed.

2. Each of the four housing wings extend from the control center like spokes on a wheel. Each wing contains two housing tiers, for a total of eight tiers. Each tier is assigned a letter name: A, B, C, D, E, F, G, and H. Currently, only tiers A, B, C, F, G, and H house death row inmates.

3. Between the housing tiers, which sit back-to-back, are a series of pipes, in which are encased the plumbing, electrical wires, and duct work for the entire wing.

4. Each tier contains between twelve and sixteen cells, which house one inmate each, and a tier walkway. Tiers A, B, G, and H contain sixteen cells. Tier C contains twelve cells. Tier F contains fourteen cells.

5. The ceiling, floor, and walls of each housing tier are made of concrete. Similarly, the ceiling, floor, and walls of each inmate cell are made of concrete.

6. Each inmate cell is separated from the tier walkway by metal security bars.

7. Approximately nine feet across from the security bars are louver windows. The record is unclear as to how many windows are in each housing tier. However, the record indicates that each window measures approximately two feet wide by four feet tall.

8. Each louver window is comprised of a screen and a series of translucent, sloping, overlapping blades or slats that may be adjusted to admit varying degrees of air or light. [10] Like most louver windows, the windows do not open in the traditional method. Rather, to open the window, one must tilt or adjust the horizontal louvers ***648** by using a handle. The maximum degree to which the louvers may be tilted is approximately forty-five degrees.

9. Above the windows are non-oscillating mounted fans that measure thirty inches in width. [11] Each fan is shared by two inmates (i.e., the fan services two cells). [12] The uncontroverted testimony at trial was that the mounted fans were not a part of the original construction. Rather, they were added to the death row tiers at a later date.

10. Death row inmates are required to remain in their cells twenty-three hours a day.

11. Each cell includes a sink, mirror, toilet, bed, desk, and chair. There are no windows or fans inside the cells. Rather, each cell contains a vent, measuring approximately six inches by eight inches, through which air from the window on the other side of the tier is drawn into the cell, and then into the vent, and then into the housing wing's exhaust system, and then to the outside.

12. During the one hour period in which inmates are permitted to leave their cells, inmates may engage in outdoor recreation in the recreation cage [13], or spend time in the tier walkway ("tier time"), and/or take a shower.

13. Each tier has two shower stalls, one standard shower and one handicap accessible shower. Inmates are permitted one shower per day. The shower water temperature is maintained between 100 and 120 degrees. [14]

14. Each housing tier also has a portable, forty-eight ounce or sixty-eight ounce chest cooler ("ice chest") where Angola staff place ice from the death row facility's only ice machine. The ice chest is located in the tier walkway, at the entrance of the tier. Inmates are permitted access to the ice chest during their tier time only. Thus, during the twenty-three hours in which the inmates are confined to their cells, they do not have direct access to the ice chest.

15. Ice is not usually distributed to the inmates by the correctional officers. Indeed, the correctional officers are not required, and sometimes decline requests from the inmates, to distribute ice to the inmates. [15] Rather, although they are not required to do so, the inmates who are on tier time usually distribute ice to the inmates who are confined to their cells. As a result, the inmates who are confined to their cells must rely on other inmates to distribute ice to them during each respective inmate's tier time.

16. If an inmate chooses to engage in outdoor recreation rather than tier time, or refuses to distribute ice to inmates who are confined to their cell, then the confined inmates do not receive ice during that hour. Further, if an inmate exhibits habits that the other inmates consider to be unsanitary, the other inmates will not ask ***649** such inmate to distribute ice during his tier time. As a result, inmates who are confined to their cells do not receive ice during that hour, unless the correctional officers agree to provide it.

17. Inmates also do not have access to the ice chest during the overnight hours, during which the death row tiers are locked down. [16] Further, it is uncontroverted that, over the course of a day, the ice in the ice chests, as well as the ice in the facilities' only ice machine, frequently runs out. [17]

18. While Angola's death row has a facility-wide heating system, none of the housing wings include a mechanical cooling system by which the dry bulb [18] (i.e. ambient temperature) ("temperature"), humidity level [19], or heat index [20] can be lowered.

19. It is uncontroverted that the housing wings were designed without a mechanical cooling system. Instead, each wing features a ventilation system that consists of the above-mentioned windows and cell vents, as testified to by witness Frank Thompson. [21]

BY MS. COMPA: Is there any mechanism on the death row tiers to lower the temperature or humidity?

BY MR. THOMPSON: No. Just ventilation.

BY MS. COMPA: What is the relationship between the temperature and the humidity outside and the temperature and humidity inside the death row tiers?

BY MR. THOMPSON: The ventilation brings the air in from the back of the cells through the windows, across the—across the way—from the windows into the exhaust grill that's in the back of the cell. So, it just brings it in from the outside. So basically, you're using the outside air to cool or ventilate the space.

Trial Transcript, Testimony of Frank Thompson, Aug. 5, 2013.

20. It is also uncontroverted that the ventilation system does not reduce the temperature, humidity level, or heat index in the housing tiers. Thus, there is no system that will lower or limit the temperature, humidity level, or heat index in the tiers.

BY MS. COMPA: And would it be any cooler inside than it is outside?

BY MR. THOMPSON: No. You would reach about the temperature in the shade would be your goal.

***650** BY MS. COMPA: And humidity wise, is that also true?

BY MR. THOMPSON: Humidity is similar.

BY MS. COMPA: And, to your knowledge, is there an upper limit to how hot it can become on the death row tiers temperature wise?

BY MR. THOMPSON: It's subject to what's outside, the outside temperature.

Trial Transcript, Testimony of Frank Thompson, Aug. 5, 2013.

B. Plaintiff Elzie Ball

21. Plaintiff Ball is sixty years old. He has been on death row for sixteen years. Currently, Ball lives in tier H, cell 5. [22]

22. It is uncontroverted that Ball suffers from hypertension, diabetes, and obesity. To treat his hypertension and diabetes, Ball takes a variety of medications that make him more susceptible to heat-related illness. [23]

23. It is also uncontroverted that Ball's blood pressure is uncontrolled, and that it spikes during the summer months. It is further uncontroverted that Defendants' staff physician, Dr. Hal David Macmurdo, M.D. (“Macmurdo”) is of the opinion that “[s]ooner or later” Ball is “going to stroke out.” Trial Transcript, Testimony of Elzie Ball, Aug. 5, 2013.

24. During the trial, Ball also testified that the heat conditions in death row cause him to experience profuse sweating, swelling of his joints, hands, ankles, and keloids [24], tingling in his hands and feet, dizziness, lightheadedness, and headaches. Ball further testified that it is difficult to sleep at night due to the heat in the housing tier.

25. According to Ball, he copes with the heat by drinking water, lying on the cell floor, creating “cool towels” by wetting his towels or wrapping them in ice, and taking off his shirt.

26. Ball testified that he does not have direct access to the ice chest during the twenty-three hours in which he is confined his cell, and that he is dependent on other inmates, who are on their tier time, to distribute ice to him.

27. Ball also testified that the lukewarm sink water, warm showers, and fans do not provide significant relief from the heat.

28. Ball's uncontroverted testimony was that the mounted fans occasionally break, and are not always immediately fixed by Angola's maintenance staff.

C. Plaintiff Nathaniel Code

29. Plaintiff Code is fifty-seven years old. He has been on death row for twenty-two years. Code currently lives in tier H, cell 16. [25]

***651** 30. It is uncontroverted that Code suffers from hypertension, obesity and hepatitis. To treat his hypertension, Code takes a number of medications that make him more susceptible to heat-related illness. [26]

31. During the trial, Code testified that during the summer months he “languishes” in the heat from sunrise until approximately 2:00 a.m. when the tier cools down. According to Code, he is subjected to direct sunlight through the window

across from his cell, which prevents him from getting relief from the heat.

32. During the trial, Code testified that he avoids overheating by lying as still as possible. However, he must avoid lying in one position for too long to prevent that part of his body from getting too hot.

33. Code also testified that the heat causes him to sweat profusely, feel dizzy and light-headed, and experience headaches. He further testified that the heat conditions disturb his sleep patterns and disorient him, causing him to forget where he placed objects inside his cell. The heat conditions also cause Code to experience a "wave" over his body, which he described as a tingling sensation that moves from his feet to his head.

34. Code testified that he copes with the heat by wearing light clothing, drinking water, and creating "cool towels" by wrapping ice into his towels.

35. Code testified that he does not have direct access to the ice chest during the twenty-three hours in which he is confined to his cell, and that he is dependent on other inmates, who are on their tier time, to distribute ice to him.

36. According to Code, the lukewarm sink water, warm showers, and fans do not provide adequate relief from the heat.

37. He further testified that the vent in his cell does not work, and that Angola's maintenance staff has yet to repair it. This testimony was not contested by Defendants.

38. According to Code, the only time he has access to air conditioned areas is when he has an attorney visit, personal visit, or when he goes to the doctor. He testified that he goes to the doctor or has an attorney or personal visit only once every two months:

> BY MS. MONTAGNES: ... Any visits outside of the tier. How long between visits?
>
> BY MR. CODE: Oh, okay. It's at least two months between any of those. Even if I get some of all of them, some personal visits, doctor visits, and attorney visits, it's at least two months between them. I can't think of any of them being close[r] than two months.

Trial Transcript, Testimony of Nathaniel Code, Aug. 5, 2013.

D. Plaintiff James Magee

39. Plaintiff Magee is thirty-five years old. He has been on death row for three years. Magee lives in tier A, cell 13. [27]

40. It is uncontroverted that Magee suffers from hypertension, high cholesterol, and depression. To treat his hypertension ***652** , high cholesterol, and depression, Magee takes a variety of medications that make him more susceptible to heat-related illnesses. [28]

41. During the trial, Magee described his housing conditions as a "sauna" in the morning and an "oven" in the afternoon. According to Magee, during the summer months, he is often hot and sweaty, experiences headaches, nausea, dizziness, lightheadedness, and has difficulty breathing and sleeping.

42. Magee testified that he tries to cope with the heat by wetting his t-shirt with the water from his cell sink, standing close to cell bars to get air from the mounted fan, and creating "cool towels." He further testified that he attempts to cool down his cell by wiping the cell walls and floor with "cool towels."

43. Magee testified that he does not have direct access to the ice chest during the twenty-three hours in which he is confined to his cell, and that he is dependent on other inmates, who are on their tier time, to distribute ice to him.

44. Magee further testified that the lukewarm sink water, warm showers, and fans do not provide relief from the heat.

E. The Data Collected by United States Risk Management

45. Neither the United States Court of Appeals for the Fifth Circuit, nor any other federal court of appeals, has established a constitutionally precise temperature, humidity level, or heat index that may constitute cruel and unusual punishment, in violation of the Eighth Amendment. Thus, this Court, like other courts, is left to establish the temperature, humidity level, heat index, and/or physical and/or medical conditions at which there has been a violation of Plaintiffs' constitutional rights. Accordingly, the Court required the parties' to retain a neutral third-party expert to collect, analyze, and disseminate temperature, humidity, and heat index data for a period of twenty-one days. The following is a summary of the data,

which shall serve as the foundation of the Court's conclusions of law.

1. The Data Collection Period

46. On July 12, 2013, the Court ordered the parties to retain neutral third-party expert, United States Risk Management, L.L.C. ("USRM") to collect temperature and humidity data, and calculate the heat index in the death row tiers for exactly twenty-one days.[29] (Docs. 36, 24.) Immediately thereafter, USRM installed seven 3M QUESTempE 46 Waterless Heat ***653** Stress Monitors in tiers A, B, C, F, G, and H. USRM also installed an external weather station outside of the death row tiers to capture external "weather link" data. The USRM monitors collected data inside each of the six tiers, and outside, once per hour from July 15, 2013 through August 5, 2013 ("the data collection period").

47. The data collected by USRM established that while the temperature, humidity, and heat index in each tier varied from day-to-day, the heat index in all of the tiers exceeded 104 degrees[30] at various times during the data collection period.

48. Further, the data collected by USRM established that the temperature, humidity, and heat index *inside* the death row tiers were, more often than not, the same or *higher* than the temperature, humidity, and heat index recorded *outside* of the death row tiers.

2. Tier A

49. The data collected in tier A proved to be slightly less extreme than the other tiers. However, the temperature, humidity, and heat index data recorded in tier A nonetheless presented an alarming trend.

50. The first reading was taken on July 15, 2013 at 2:45 p.m.[31] At that time, the monitor recorded a temperature of 84 degrees and a heat index of 89 degrees.[32]

51. During the data collection period, the lowest recorded temperature was 80.42 degrees[33] while the highest recorded temperature was 90.68 degrees.[34] In contrast, the lowest recorded heat index was 84.2 degrees[35] while the highest recorded heat index was 104.54 degrees.[36]

52. On each day of the collection period, the heat index rose to 92 degrees or higher. In other words, on every single day during the collection period, inmates housed in tier A were subjected to heat indices in the National Oceanic and Atmospheric Administration's ("NOAA") National Weather Service's ("NWS") "extreme caution" zone or higher.[37] *See* Exhibit 1.

53. Notably, the heat index in tier A was recorded at 100 degrees or higher on five days: July 29, July 30, August 2, August 3, and August 4, 2013. Such heat ***654** indices are in the NWS's "extreme caution" or "danger" zones. *See* Exhibit 1.

54. Data from tier A also showed high heat indices for extended periods of time. For example, on August 3, 2013, the heat index remained between 99.5 and 102.02 degrees for thirteen hours, or from 9:13 a.m. to 10:13 p.m.

55. As noted above, the highest heat index (104.54 degrees) was recorded on August 2, 2013. On that day, from 11:13 a.m. to 11:13 p.m., the following heat indices were consecutively recorded: 99.5, 100.4, 100.94, 101.48, 102.92, 100.4, 101.84, 102.92, 104.54, 104, 103.46, 101.48, 101.3, all of which are in the NWS's "extreme caution" or "danger" zones. *See* Exhibit 1.

56. In sum, based on the data collected in tier A, the Court concludes that the inmates housed in this tier were consistently subjected to heat indices in the NWS's "extreme caution" and "danger" zones, which, according to the NWS, "may cause increasingly severe heat disorders with continued exposure or physical activity."[38] *See* Exhibit 1.

3. Tier B

57. The data collected in tier B reflected *higher* temperatures and heat indices than in tier A. The first reading in tier B was taken on July 15, 2013 at 2:56 p.m.[39] At that time, the recorded temperature was 83.6 degrees and the heat index was 90 degrees.

58. During the data collection period, the lowest recorded temperature was 79.52 degrees[40] while the highest recorded temperature was 90.68 degrees.[41] In contrast, the lowest

recorded heat index was 83.84 degrees[42] while the highest recorded heat index was 109.94 degrees.[43]

59. On each day of the collection period, the heat index rose to 92 degrees or higher. In other words, on every single day during the collection period, inmates housed in tier B were subjected to heat indices in the NWS's "extreme caution" zone or higher. *See* Exhibit 1.

60. Indeed, the heat index in tier B was recorded at 100 degrees or higher on ten days: July 22, July 24, July 28, July 30, July 31, August 1, August 2, August 3, August 4, and August 5, 2013. Such heat indices are in the NWS's "extreme caution" and "danger" zones. *See* Exhibit 1.

61. High heat indices for extended periods of time were typical in tier B. For example, on July 29, 2013, the heat index remained between 98.24 and 102.2 degrees for eights hours, or from 1:23 p.m. to 9:23 p.m. On July 30, 2013, the heat index remained between 99.14 and 103.28 degrees for nine hours, or from 11:23 a.m. to 8:51 p.m. On August 1, 2013, the heat index remained between 100.4 and 103.82 degrees for eleven hours, or from 11:51 a.m. to 10:51 p.m. On August 3, the heat index remained between 100.4 and 105.08 degrees for thirteen hours, or from 8:50 a.m. to 9:50 p.m.

62. As noted above, the highest heat index (109.94 degrees) was recorded on August 2, 2013. Indeed, one of the longest periods of heat indices reaching 100 degrees ***655** or above was recorded on that day. Specifically, from 11:50 a.m. to 11:50 p.m., the following heat indices were consecutively recorded: 103.82; 104.54; 101.48; 105.8; 102.92; 102.92; 105.08; 107.42; 109.94; 104.36; 102.2; 102.2; and 103.28.

63. Based on the data collected in tier B, the Court concludes that the inmates housed in this tier were consistently, and for long periods of time over the course of multiple days, subjected to heat indices in the NWS's "extreme caution" or "danger" zones. *See* Exhibit 1.

4. Tier C

64. The data collected in tier C reflected *higher* temperatures and heat indices than in any of the other tiers. The first reading was taken on July 15, 2013 at 3:05 p.m.[44] At that time, the recorded temperature was 86.4 degrees and the heat index was 92 degrees.

65. During the data collection period, the lowest recorded temperature was 85.1 degrees[45] while the highest recorded temperature was 92.12 degrees.[46] In contrast, the lowest recorded heat index was 89.96 degrees[47] while the highest recorded heat index was 110.3 degrees[48], which is well within the NWS's "danger" zone. *See* Exhibit 1.

66. The data shows that the heat index in tier C rose to, and remained above, 100 degrees for two or more hours on thirteen of the twenty-one days in the collection period.

67. The Court also notes that, despite Defendants' installation of awnings over the windows in tier C on or about July 26, 2013, the most alarming heat index figures were recorded between July 29 and August 5, 2013. For example, on July 29, the heat index remained between 99.32 and 103.46 degrees for ten hours, or from 1:16 p.m. to 11:16 p.m. On July 30, the heat index remained between 100.4 and 107.42 degrees for ten hours, or from 1:16 p.m. to 11:58 p.m. On August 1, 2013, the heat index remained between 100.04 and 106.88 degrees for fifteen consecutive hours, or from 8:58 a.m. to 11:58 p.m. The Court notes that, but for the awnings installed by Defendants over the windows in tier C, the heat indices recorded in tier C may have been higher.

68. As noted above, the highest heat index (110.3 degrees) was recorded on August 2, 2013. On that day, the heat index remained at 100 degrees or above for fifteen hours, or from 8:58 a.m. to 11:38 p.m.

69. Further, the data shows that the heat index in tier C did not drop below 100 degrees from August 3 through August 5, 2013. For example, on August 3, 2013, from 12:38 a.m. to 11:38 p.m., the following heat indices were consecutively recorded: 106.16, 106.16, 105.08, 104.54, 105.08, 104.54, 104, 102.56, 105.8, 105.8, 105.8, 104, 102.92, 102.56, 105.08, 104.54, 105.08, 107.24, 106.52, 108.32, 109.76, 105.62, 105.08, and 104.

70. This 100+ degree heat index trend continued until the last reading on August 5, 2013 at 12:22 p.m.

71. By comparison, on August 3, 2013 from 12:30 a.m. to 11:30 p.m., the following heat indices were recorded by the outside ***656** weather monitor: 93.4, 92.4, 90.6, 88.5, 87.6, 86.4, 82.9, 83.6, 92.6, 98.4, 98.8, 104.3, 105.5, 105.2, 110.6, 110.8, 109.2, 109.5, 108.7, 104.7, 95.3, 89.3, 86.4, and 84.3.

72. This data established that there were multiple, consecutive hours during which inmates housed in tier C were subjected to heat indices up to twenty degrees higher than *outside* the housing tier.

73. Based on the data collected in tier C, the Court concludes that the inmates housed in this tier were consistently, and for long periods of time over the course of multiple days, subjected to heat indices in the NWS's "extreme caution" or "danger" zones. *See* Exhibit 1. The Court also concludes that inmates housed in tier C were subjected to heat indices up to twenty degrees higher than the heat indices recorded outside the housing tier.

5. Tier F

74. The first reading in tier F was taken on July 15, 2013 at 3:14 p.m.[49] At that time, the recorded temperature was 81.8 degrees and the heat index was 87 degrees.

75. During the data collection period, the lowest recorded temperature was 80.2 degrees[50] while the highest recorded temperature was 91.04 degrees.[51] In contrast, the lowest recorded heat index was 85 degrees[52] while the highest recorded heat index was 106.16 degrees.[53]

76. On each day of the collection period, the heat index rose to 92 degrees or higher. In other words, on every single day during the collection period, inmates housed in tier F were subjected to heat indices in the NWS's "extreme caution" zone or higher. *See* Exhibit 1.

77. Notably, the heat index in tier F was recorded at 100 degrees or higher on eight days: July 17, July 29, July 30, July 31, August 1, August 2, August 3, and August 4, 2013. Such heat indices are in the NWS's "extreme caution" or "danger" zones. *See* Exhibit 1.

78. Like the data collected from the other death row tiers, the data collected from tier F showed high heat indices for extended periods of time. For example, on August 1, 2013, the heat index remained between 100.4 and 105.62 degrees for eight hours, or from 2:15 p.m. to 10:15 p.m. On August 4, 2013, the heat index remained between 101.3 and 104.54 degrees for 8 hours, or from 12:17 p.m. to 7:17 p.m. On August 3, 2013, the heat index remained between 99.86 and 105.08 degrees for 12 hours, or from 9:32 a.m. to 9:32 p.m.

79. As noted above, the highest heat index (106.16 degrees) was recorded on August 2, 2013. The Court notes that one of the longest periods of heat indices reaching 100 degrees or above was also recorded on this day. Specifically, from 11:32 a.m. to 11:32 p.m., the following heat indices were consecutively recorded: 101.84, 102.74, 101.3, 103.46, 102.38, 100.94, 102.92, 102.92, 106.16, 103.82, 102.2, 101.3, 102.74. All of which are in the NWS's "extreme caution" or "danger" zones. *See* Exhibit 1.

80. Based on the data collected in tier F, the Court concludes that the inmates ***657** housed in this tier were consistently, and for long periods of time over the course of multiple days, subjected to heat indices in the NWS's "extreme caution" or "danger" zones. *See* Exhibit 1.

6. Tier G

81. In their submissions to the Court and during the trial on the merits, Plaintiffs argued that the heat indices in cells closest to the tier entrance are lower than the heat indices in cells at the rear of the tier, or furthest from the tier entrance. Thus, Plaintiffs allege that inmates who are assigned to cells at the rear of the tier are subjected to more extreme conditions of confinement than inmates who are assigned to cells that are close to the tier entrance.

82. To determine whether Plaintiffs' allegations have merit, two monitors were placed in tier G: one approximately halfway down the tier in cell 8, and one at the very rear of the tier in cell 16.

83. The data collected in both cells revealed an appreciable difference in the recorded temperatures and heat indices in cell 8 versus cell 16.

84. The first reading in cell 8 was taken on July 15, 2013 at 3:25 p.m. At that time, the recorded temperature was 86.4 degrees and the heat index was 91.4 degrees. For reasons that are unknown to the Court, the first reading was not taken in cell 16 until three days later, on July 18, 2013.

85. During the data collection period, the lowest recorded temperature in cell 8 was 80.06 degrees[54] while the highest recorded temperature was 91.04 degrees.[55] In contrast, the

lowest recorded temperature in cell 16 was 85.46 degrees [56] while the highest recorded temperature was 91.58 degrees. [57]

86. The lowest recorded heat index in cell 8 was 84.02 degrees [58] while the highest recorded heat index was 107.42 degrees. [59] In contrast, the lowest recorded heat index in cell 16 was 91.22 degrees [60] while the highest recorded heat index was 110.3 degrees. [61]

87. On each day of the collection period, the heat index rose to 93.2 degrees or higher in cell 8, and 96.44 degrees or higher in cell 16. In other words, on every single day during the collection period, inmates housed nearer to and furthest from the tier entrance were subjected to heat indices in the NWS's "extreme caution" zone or higher. *See* Exhibit 1.

88. However, as noted below, the data shows consistently higher heat indices in cell 16, as compared to cell 8.

89. According to the data collected by USRM, the heat index rose to 100 degrees or above in cell 8 on twelve days: July 22, July 23, July 24, July 26, July 29, July 30, ***658** July 31, August 1, August 2, August 3, August 4, and August 5, 2013.

90. The data also established high heat indices for extended periods of time in cell 8. For example, on August 2, 2013, the heat index remained between 101.84 and 107.42 degrees for twelve hours, or from 11:21 a.m. to 11:21 p.m. In another example, on August 3, 2013, the heat index remained between 100.4 and 105.08 degrees for fourteen hours, or from 9:21 a.m. to 11:21 p.m.

91. Even more alarming, however, are the recorded heat indices further down the tier in cell 16.

92. In cell 16, the heat index was recorded at 100 degrees or higher on fifteen consecutive days: July 21, July 22, July 24, July 25, July 26, July 27, July 28, July 29, July 30, July 31, August 1, August 2, August 3, August 4, and August 5, 2013. [62]

93. The data collected from cell 16 also shows high heat indices for extended periods of time. For example, on five consecutive days during the data recording period (August 1–5, 2013), the heat index did not dip below 99.14 degrees. In other words, inmates assigned to cells at the rear of tier G were subjected to heat indices of 99.14 degrees or above for 120 consecutive hours, while inmates housed in cells at the front of the tier experienced lower heat indices.

94. As noted above, the highest heat index in cell 16 (110.3 degrees) was recorded on August 3, 2013. Notably, one of the longest periods of heat indices reaching 100 degrees or above was also recorded on that day. Specifically, from 12:25 a.m. to 11:25 p.m., the following heat indices were consecutively recorded: 108.68, 107.96, 106.88, 106.16, 103.46, 102.92, 102.56, 103.46, 105.08, 106.34, 109.4, 105.8, 107.42, 104.54, 105.08, 103.46, 104, 104.54, 105.98, 107.24, 110.3, 106.88, 105.62, and 105.08.

95. By comparison, on August 3, 2013 from 12:30 a.m. to 11:30 p.m., the following heat indices were recorded by the outside weather monitor: 93.4, 92.4, 90.6, 88.5, 87.6, 86.4, 82.9, 83.6, 92.6, 98.4, 98.8, 104.3, 105.5, 105.2, 110.6, 110.8, 109.2, 109.5, 108.7, 104.7, 95.3, 89.3, 86.4, 84.3.

96. This data established that there were multiple, consecutive hours during which the inmates housed in cells at that rear of tier G were subjected to heat indices that were up to twenty degrees higher than the heat indices recorded outside of the death row facility.

97. Based on the data collected in tier G, the Court concludes that the inmates housed in this tier were consistently, and for long periods of time over the course of multiple days, subjected to heat indices in the NWS's "extreme caution" or "danger" zones. *See* Exhibit 1. The Court notes that, but for the awnings installed by Defendants over the windows in tier G on or about July 26, 2013, such temperatures and heat index recordings may have been higher.

98. Based on the data collected in tier G, the Court further concludes that inmates who are housed in cells at the rear of the respective housing tiers, or furthest away from the tier entrance, are subjected to more extreme conditions of confinement than inmates who are housed in cells closer to the entrance of each respective tier.

7. Tier H

99. The data collected from tier H reveals slightly lower temperatures and heat indices than tiers C and G. However, as ***659** noted below, during the undersigned's tour of tier H, the undersigned noted that the tier is partially shaded by another tier.

100. The first reading was taken in this tier on July 15, 2013 at 3:32 p.m.[63] At that time, the recorded temperature was 82.1 degrees and the heat index was 87 degrees.

101. During the data collection period, the lowest recorded temperature was 78.26 degrees[64] while the highest recorded temperature was 92.66 degrees.[65] In contrast, the lowest recorded heat index was 81.5 degrees[66] while the highest recorded heat index was 107.78 degrees.[67]

102. On each day of the collection period, the heat index rose to 90 degrees or higher. In other words, on every single day during the collection period, inmates housed in tier H were subjected to heat indices in the NWS's "caution" or "very warm" zone (hereinafter "caution" zone) or higher. *See* Exhibit 1.

103. The data also shows that the heat index rose to 100 degrees or higher on seven consecutive days: July 29, July 30, July 31, August 1, August 2, August 3, and August 4, 2013.

104. The data further established high heat indices for extended periods of time. For example, on August 1, 2013, the heat index remained between 99.32 and 105.08 degrees for nine hours, or from 1:41 to 10:41 p.m. On August 3, 2013, the heat index remained between 99.5 and 104.54 degrees for nine hours, or from 1:43 to 10:43 p.m.

105. As noted above, the highest heat index (107.78 degrees) was recorded on August 2, 2013. Notably, one of the longest periods of heat indices reaching 100 degrees or above was also recorded on this day, and the following morning. Specifically, from 12:43 p.m. on August 2 to 1:43 a.m. on August 3, the following heat indices were consecutively recorded: 101.3, 100.94, 104, 104, 103.64, 105.44, 107.78, 107.42, 104.54, 102.92, 100.76, 102.2, 100.4, 100.4. Such heat indices fall squarely within the NWS's "extreme caution" or "danger" zones. *See* Exhibit 1.

106. Although the data collected from tier H is less alarming than the data collected from tiers C and G, based on the data, the Court concludes that the inmates housed in this tier were also consistently, and for long periods of time over the course of multiple days, subjected to heat indices in the NWS's "extreme caution" or "danger" zones. *See* Exhibit 1.

107. In sum, the data collected by USRM during the data collection period unequivocally established that inmates housed in each of the death row tiers are consistently, and for long periods of time, subjected to high temperatures and heat indices in the NWS's "caution," "extreme caution," and "danger" zones. *See* Exhibit 1.

108. The data also established that inmates in at least two of the tiers are frequently subjected to heat indices that are up to twenty degrees higher than the heat indices recorded outside the death row facility.

***660** 109. Further, the data established that inmates who are housed in cells at the rear of the respective housing tiers, or furthest away from the tier entrance, are subjected to more extreme conditions of confinement than inmates who are housed in cells closer to the entrance of each respective tier.

F. The Court's Observation of the Death Row Tiers

110. On August 12, 2013 from approximately 2:15 p.m. to 3:00 p.m., the undersigned observed Angola's death row facility, including the administrative offices, visitation rooms, control center, and housing tiers A, C, G, and H. Counsel for both parties, as well as Defendant Norwood, accompanied the undersigned during the site visit.

111. During the undersigned's tour of the death row facility, which was conducted after the data collection period, the Court made factual observations which support the Court's findings of fact.

112. Approximately one and one half hour before the undersigned's tour, Angola, Louisiana and the surrounding areas sustained thunderstorms and heavy rain. By 2:15 p.m., the thunderstorms and rain had ceased. However, the sky was densely overcast and the temperature had noticeably decreased from a high of 91 degrees at 12:42 p.m.[68]

113. During the site visit, the Court observed that despite the decreased outside temperature and overcast sky, the temperature inside the housing tiers was appreciably higher than the temperature outside. For example, according to Defendants' mercury-in-glass thermometers[69], the temperature in tiers A, C, G, and H were 88 degrees, 89 degrees, 94 degrees, and 89 degrees, respectively. However, weather data collected from the closest weather station indicates that the outside weather temperature was only 77 degrees at 2:00 p.m.

114. The Court also observed that tier H is shaded by one of the other housing tiers.

115. The Court also observed the windows, fans, and cell vents in tiers A, C, G, and H. In the Court's observation, the windows, fans, and cell vents did not provide a cooling effect or relief from the heat conditions in the tier.

116. During the site visit, the undersigned detected the cool air that blew into the tiers from the central corridor each time a tier entrance was opened. The Court noted that cool air could be detected for the few seconds that a tier entrance remained open, while standing near the entrance of the tier, but that the cool air could not be detected while standing at the rear of the tier.

117. While the Court did not attempt to measure the temperature of the cold and hot water from the in-cell faucets, the undersigned noted that the cold water was lukewarm to the touch.

118. The Court further observed that although each fan was positioned to be shared by two cells, the fans did not provide equal amounts of air flow to each cell.

***661** 119. The undersigned did not observe dirt, debris, or insects in the ice chests or in the water from the in-cell faucets.

120. The Court observed, however, that the walls of the housing tiers were hot to the touch, and that the security bars separating the cells from the tier walkway were very warm to the touch.

VI. CONCLUSIONS OF LAW

A. 42 U.S.C. § 1983

1. "Section 1983 imposes liability on anyone who, under color of state law, deprives a person 'of any rights, privileges, or immunities secured by the Constitution and laws.' ... [T]his provision [also] safeguards certain rights conferred by federal statutes." *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997) (citing *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980)).

2. Here, the gravamen of Plaintiffs' Section 1983 claim is that Defendants have subjected them to cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution, made applicable to the States "by reason of the Due Process Clause of the Fourteenth Amendment." *Robinson v. California*, 370 U.S. 660, 675, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

3. Specifically, Plaintiffs allege that by subjecting them to "extreme conditions of confinement, specifically excessive heat, with full knowledge of the dangerousness of those conditions, Defendants [ ] are acting and have acted with deliberate indifference to Plaintiffs' serious health and safety needs, in violation of their rights under the Eighth and Fourteenth Amendments to the United States Constitution." (Doc 1, ¶¶ 12, 67–68.)

1. The Eighth Amendment

4. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

5. It is well settled that the United States Constitution does not require comfortable prisons. *See Farmer v. Brennan*, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *Rhodes v. Chapman*, 452 U.S. 337, 349, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). However, it is equally well established that conditions of confinement "must not involve the wanton and unnecessary infliction of pain." *Rhodes*, 452 U.S. at 347, 101 S.Ct. 2392.

6. The Eighth Amendment's prohibition against cruel and unusual punishment requires that prisoners be afforded "humane conditions of confinement," including adequate food, clothing, shelter, and medical care. *Farmer*, 511 U.S. at 832, 114 S.Ct. 1970; *Gates v. Cook*, 376 F.3d 323, 332 (5th Cir.2004) (holding that a prison official's obligation includes "ensur[ing] that inmates receive adequate food, clothing, shelter, and medical care," as well as "reasonable measure[s] to ensure the safety of the inmates").

7. Thus, "[t]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Gates*, 376 F.3d at 332; *Wilson v. Seiter*, 501 U.S. 294, 304, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991) ("[C]onditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need.").

8. Such "conditions of confinement" that are subject to review include temperature conditions. *Wilson*, 501 U.S. at 303, 111 S.Ct. 2321 (stating that "the temperature [a prisoner] is subjected to in his cell" ***662** is "a condition of his confinement") (quotation marks omitted); *Gates*, 376 F.3d at 333 (same).

9. An Eighth Amendment claim has two components. *Wilson*, 501 U.S. at 298, 111 S.Ct. 2321.

10. First, the deprivation alleged must be sufficiently serious. *Wilson*, 501 U.S. at 298, 111 S.Ct. 2321. "[O]nly those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave" to constitute cruel and unusual punishment. *Id.* (quoting *Rhodes*, 452 U.S. at 347, 101 S.Ct. 2392).

[1] 11. A court must measure a prison's conditions against " 'the evolving standards of decency that mark the progress of a maturing society,' and not the standards in effect during the time of the drafting of the Eighth Amendment." *Gates*, 376 F.3d at 332–33 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). Further, the Supreme Court of the United States has noted that "the length of confinement cannot be ignored in deciding whether the confinement meets the constitutional standards. A filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months." *Hutto v. Finney*, 437 U.S. 678, 686–87, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978).

[2] 12. Second, the prison official must have acted with a sufficiently culpable state of mind. *See Farmer*, 511 U.S. at 838, 114 S.Ct. 1970; *Wilson*, 501 U.S. at 305, 111 S.Ct. 2321. In condition of confinement cases, the Court is required to determine if the prison official acted with deliberate indifference, which the Supreme Court has defined as knowing of and disregarding an excessive risk to inmate health or safety. *Farmer*, 511 U.S. at 836, 114 S.Ct. 1970 ("It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.").

[3] 13. Thus, to demonstrate that prison conditions violate the Eighth Amendment, an inmate must meet the following requirements: (1) an objective requirement showing that the condition is "so serious as to 'deprive prisoners of the minimal civilized measure of life's necessities,' as when it denies the prisoner some basic human need;" and (2) a subjective requirement, which mandates a showing that prison officials have been " 'deliberately indifferent' to inmate health or safety." *Woods v. Edwards*, 51 F.3d 577, 581 (5th Cir.1995) (citing *Farmer*, 511 U.S. at 834, 114 S.Ct. 1970).

a. The Conditions of Confinement at Angola's Death Row Constitute a Substantial Risk of Serious Harm to Plaintiffs

14. It is axiomatic that a prison official's failure to provide inmates relief from extreme temperatures may constitute an Eighth Amendment violation. *Wilson*, 501 U.S. at 304, 111 S.Ct. 2321 ("low cell temperature at night combined with a failure to issue blankets" could constitute an Eighth Amendment violation); *Smith v. Sullivan*, 553 F.2d 373, 381 (5th Cir.1977) ("If the proof shows the occurrence of extremes of temperature that are likely to be injurious to inmates' health relief should be granted...."); *Blackmon v. Garza*, 484 Fed.Appx. 866, 869 (5th Cir.2012) (unpublished) ("Allowing a prisoner to be exposed to extreme temperatures can constitute a violation of the Eighth Amendment."); *Valigura v. Mendoza*, 265 Fed.Appx. 232, 235 (5th Cir.2008) (unpublished) ("[T]emperatures consistently in the nineties without remedial measures, such as fans, ice water, and showers, sufficiently increase the ***663** probability of death and serious illness so as to violate the Eighth Amendment.").

15. Further, the Fifth Circuit has held that "extreme heat" coupled with a failure to provide cooling devices such as "fans, ice water, and daily showers" is a "condition [that] presents a substantial risk of serious harm to the inmates," particularly where such conditions are "open and obvious," and where "inmates ha[ve] complained of symptoms of heat-related illness." *Gates*, 376 F.3d at 339–40 (determining that an Eighth Amendment violation justified an "injunction direct[ing the Mississippi Department of Corrections] to provide fans, ice water, and daily showers when the *heat index* is 90 degrees or above, or alternatively to make such provisions during the months of May through September") (emphasis added).

16. A survey of the opinions from various Circuit Courts of Appeals reveals that other courts have also recognized that a prison official's failure to provide relief from extremely high temperatures may constitute an Eighth Amendment violation. *See Walker v. Schult*, 717 F.3d 119, 126 (2d Cir.2013)

("[I]t is well settled that exposing prisoners to extreme temperatures without adequate ventilation may violate the Eighth Amendment."); *Graves v. Arpaio,* 623 F.3d 1043, 1049 (9th Cir.2010) ("The district court did not err ... in concluding that dangerously high temperatures that pose a significant risk to detainee health violate the Eighth Amendment."); *Chandler v. Crosby,* 379 F.3d 1278, 1294 (11th Cir.2004) ("[T]he Eighth Amendment applies to prisoner claims of inadequate cooling and ventilation.").

17. In *Jones'El v. Berge,* 374 F.3d 541 (7th Cir.2004), the United States Court of Appeals for the Seventh Circuit affirmed a district court's enforcement order requiring air-conditioning of plaintiffs' cells during summer heat waves following "the plaintiffs assert[ions] that they were subjected to extreme temperatures in violation of the Eighth Amendment." *Id.* at 543–45.

18. In *Tillery v. Owens,* 907 F.2d 418 (3d Cir.1990), the U.S. Court of Appeals for the Third Circuit affirmed a district court's determination that prison conditions were unconstitutional because, among other things, "[v]entilation [was] grossly inadequate" and "[t]here [were] no systems to control temperature or humidity, causing excessive odors, heat and humidity." *Id.* at 423.

19. Indeed, Defendants do not contest this well established principle.

20. The Court notes that prior to the Fifth Circuit's decision in *Gates,* the Fifth Circuit rejected a prisoner's claim that the conditions in extended lockdown at Angola were unconstitutional because, among other things, his lockdown cell was inadequately cooled and the high temperature aggravated his sinus condition. *Woods,* 51 F.3d at 581. In reaching its determination, the Court noted that the plaintiff "failed to present medical evidence of any significance," and went on to state: "[w]hile the temperature in extended lockdown may be uncomfortable, that alone cannot support a finding that the plaintiff was subjected to cruel and unusual punishment in violation of the Eighth Amendment." *Id.*

21. The Fifth Circuit has since clarified that "[t]he *Woods* court found that Woods had not presented medical evidence sufficient to state an Eighth Amendment violation; *Woods* does not stand for the proposition that extreme heat can never constitute cruel and unusual punishment." *Gates,* 376 F.3d at 339.

22. The Court further notes that *Woods* is distinguishable from the case at ***664** bar. As noted above, Woods did not present medical evidence. Here, Plaintiffs have introduced credible medical evidence in the form of medical records and sworn testimony. Further, in *Woods,* the plaintiff failed to provide temperature data for his lockdown cell. *Woods,* 51 F.3d at 581 (indicating that the plaintiff complained of "high temperature ... uncomfortable in itself," but provided no data as to the actual temperatures in the extended lockdown cell). Here, temperature, humidity, and heat index data were collected, analyzed, and submitted to the Court by a neutral third-party expert.

1.) The Uncontroverted Temperature, Humidity and Heat Index Data

[4] 23. According to the NWS, the average maximum temperature in July 2013 in Baton Rouge, Louisiana was 90.5. [70] In August 2013, the average maximum temperature in Baton Rouge was 90.9 degrees. [71]

24. However, as summarized above, the uncontroverted USRM data established that, during July and August 2013, inmates housed in each of the death row tiers were frequently subjected to temperatures above 90.5 degrees. The uncontroverted USRM data also established that inmates housed in each of the death row tiers were frequently subjected to heat indices above 100 degrees. The data collected by USRM established that the temperature, humidity, and heat index recorded *inside* the death row tiers was, more often than not, the same or *higher* than the temperature, humidity, and heat index recorded *outside* of the death row facility. [72]

25. For example, as noted above, inmates housed in tiers C and G were frequently subjected to heat indices that were up to twenty degrees higher than the heat indices recorded outside. Indeed, the uncontroverted USRM data established that inmates housed in these two tiers were subjected to heat indices as high as 110.3 degrees.

26. As it relates to Plaintiffs, the data shows that inmates housed in tier A, including Plaintiff Magee, were subjected to heat indices at 100 degrees or higher on five days during the data collection period. Such heat indices fall squarely within the NWS's "extreme caution" or "danger" zones. *See* Exhibit 1. Indeed, the data established that on each day of the

collection period, the heat index rose to 92 degrees or higher in tier A.

27. The data also shows that inmates housed in tier H, including Plaintiffs Ball and Code, were subjected to heat indices at 100 degrees or higher on seven consecutive days during the data collection period. Such heat indices fall squarely within the NWS's "extreme caution" or "danger" zones. *See* Exhibit 1. The data established that on each day of the collection period, the heat index rose to 90 degrees or higher in tier H.

28. According to the NWS, "higher risk" individuals are at risk of sunstroke, heat cramps, or heat exhaustion with prolonged ***665** exposure to heat indices in the "extreme caution" or "danger" zones [73]:

In other words, sunstroke, heat cramps, or heat exhaustion are "possible" among high risk individuals who are subjected to prolonged exposure to heat indices in the "extreme caution" zone, and "likely" among high risk individuals who are subjected to prolonged exposure to heat indices in the "danger" zone. *See also* Exhibit 1.

2.) The Risk of Harm to Plaintiffs Given Their Medical Conditions and Medications

29. The substantial risk of serious harm to Plaintiffs was further underscored by the sworn testimony of Plaintiffs' expert, Dr. Susan Vassallo, M.D. ("Vassallo").

30. Vassallo, who has been on the faculty of the New York University School of Medicine since 1993, is an attending physician in emergency medicine at Bellevue Hospital Center in New York, New York. Vassallo is a certified correctional health professional and an expert on the effects of drugs and illness on an individual's ability to thermoregulate (or regulate one's own body temperature). [74]

31. After observing the conditions in the death row facility, reviewing the USRM data, and reviewing Plaintiffs' medical records and Administrative Remedy Program ("ARP") requests [75], Vassallo concluded that the heat conditions in the death row facility: (1) put all three Plaintiffs at risk of heat-related illnesses, including heat stroke; and (2) worsened Plaintiffs' underlying medical conditions:

> BY MR. KAMIN: ... And based upon your review of the information that you looked at, have you reached an opinion on that matter?
>
> BY DR. VASSALLO: Yes. My opinion is that the temperatures on death row ***666** are excessively hot, and put the prisoners there at risk of heat stroke, as well as worsening of their underlying medical conditions. In addition [ ], maybe death from those conditions, that is, cardiovascular disease, particularly.

Trial Transcript, Testimony of Dr. Susan Vassallo, Aug. 6, 2013.

32. Vassallo testified that each of Plaintiffs' underlying medical conditions (i.e. diabetes, hypertension, uncontrolled blood pressure) inhibit their ability to thermoregulate.

33. Vassallo further testified that the Plaintiffs' medications (i.e. beta blockers, diuretics, antidepressants) also inhibit their ability to thermoregulate.

> BY DR. VASSALLO: Well, the reason that [there is] increased risk is because they have underlying health problems, including cardiovascular disease, diabetes, hypertension. Those are the problems that cause [increased risk]. Secondly, the medications that are required to treat them, which prevent their ability to respond to heat, which [are] well accepted to be risks. So those are some of the problems that the Plaintiffs have that make th [ese] conditions dangerous for them.

Trial Transcript, Testimony of Dr. Susan Vassallo, Aug. 6, 2013.

34. Vassallo also testified about the increased risk to Plaintiffs Ball and Code, who are over the age of fifty-five:

> BY MR. KAMIN: ... Mr. Ball is actually sixty years old. Is that a factor in your assessment of his risk?
>
> BY DR. VASSALLO: Well, it is. Because, when you look at the CDC, which publishes something called an MMWR, which is the morbidity and mortality weekly

report—it's probably one of the most respected journals and publications in America today—[ ] you see very clearly that the people who are above the age of fifty-five to sixty are the ones who most commonly die during heat-during heat episodes. They're much more at risk. And so, the risk with age is shown in experimental studies. It's shown in epidemiological studies of heat waves. We have a plethora of knowledge about that.

Trial Transcript, Testimony of Dr. Susan Vassallo, Aug. 6, 2013.

35. When asked about the symptoms that Plaintiffs testified they experience during the summer months, Vassallo testified as follows:

BY MR. KAMIN: During his testimony yesterday at trial, Mr. Ball testified about symptoms including dizziness, sweating, light-headedness and weakness, all when it's hot. Do those symptoms have any significance to you?

BY DR. VASSALLO: Well, those are common temperatures—symptoms that people will describe when they're entering a phase of heat exhaustion.

Trial Transcript, Testimony of Dr. Susan Vassallo, Aug. 6, 2013.

36. Vassallo further emphasized that even healthy individuals, and individuals whose blood pressure is being controlled by medication are at risk of serious harm in heat conditions like those in the death row tiers:

BY MR. KAMIN: Okay. Does blood pressure control, due to medication, alleviate the risk of heat-related illness?

BY DR. VASSALLO: No. I mean, the problem with these temperatures is that everybody is at risk in these temperatures. So, although the ***667** young, healthy individual who is not exercising is at less risk than an older individual with medical problems, like these three Plaintiffs. But every—this is—these temperatures are dangerous when you're confined in this setting.

BY MR. KAMIN: I just want to be clear for the Court's benefit. That—does someone with hypertension—let's take Mr. Magee as an example. Even though his hypertension is in the best state of the three Plaintiffs due to medication, does the hypertension itself still put him at risk for heat-related illness that he would not face if he did not have hypertension?

BY DR. VASSALLO: The—my answer is yes....

Trial Transcript, Testimony of Dr. Susan Vassallo, Aug. 6, 2013.

37. Vassallo's expert opinion was further informed by her review of the USRM data:

BY MR. KAMIN: And, so, Dr. Vassallo, based upon the data received from the neutral third party, USRM, has your opinion changed in any way from the report that you previously submitted?

BY DR. VASSALLO: No.

BY MR. KAMIN: What is your opinion, based upon the data submitted by USRM?

BY DR. VASSALLO: My opinion is that the temperatures on death row are a health hazard to everybody, particularly to those individuals with health problems, such as cardiovascular disease, diabetes, hypertension. And that ... it's just a matter of time until there is a health emergency, such as heat stroke or myocardial infarction or stroke arises because of the temperatures on death row.

BY MR. KAMIN: It is your opinion that the Plaintiffs, Nathaniel Code, Elzie Ball, and James Magee, are at imminent risk of severe physical harm due to the heat conditions on death row?

BY DR. VASSALLO: Yes, it is.

Trial Transcript, Testimony of Dr. Susan Vassallo, Aug. 6, 2013.

38. During cross-examination, Vassallo testified as to how quickly one can have a heat stroke:

BY MR. JONES: Wouldn't you expect in the medical records of Mr. Ball, for instance, who's been on death row for fifteen years, to see some medical evidence of the effects of heat on him over that period of time?

BY DR. VASSALLO: Well, no sir. The heat strokes that happened in Dallas, the heat strokes I've had in my entire career, I've had hundreds where I've been at the bedside of 110 degrees. Those people don't have warning. The —they don't have—there's no warning with heat stroke. You don't feel hot for five days or before or even one day.

> So, heat stroke is a failure of thermoregulation which is dramatic and catastrophic. It occurs suddenly....

Trial Transcript, Testimony of Dr. Susan Vassallo, Aug. 6, 2013.

39. When further questioned by counsel for Defendants about the risk of heat stroke, Dr. Vassallo testified as follows:

> BY DR. VASSALLO: ... There are two pieces to the stress of the heat and the temperatures on death row. One is the worsening of their underlying medical conditions. And their risk of stroke, myocardial infarction, which is a heart attack, and et cetera. So, that is well supported in the literature. But you don't have to have heat ***668** stroke for heat to do its—to be bad for you. And a sustained temperature such as they're undergoing. The second piece is this issue of heat stroke. And that's the piece that I don't want to be misunderstood. That people can suffer suddenly from heat strike without ever having complained about the weather....

Trial Transcript, Testimony of Dr. Susan Vassallo, Aug. 6, 2013.

40. The Court notes that Defendants failed to rebut Dr. Vassallo's testimony regarding the risk of harm to Plaintiffs. Indeed, as noted above, Dr. Vassallo was subject to cross-examination. Yet, her testimony was largely uncontroverted.

41. Defendants point to evidence in the record that, prior to the instant litigation, Plaintiffs did not submit any formal written complaints, ARPs, or "sick call" requests as a result of the heat conditions. Defendants further contend that Plaintiffs' medical records do not contain evidence of prior heat-related illnesses.

42. The record, however, is replete with evidence that Plaintiffs filed multiple ARPs complaining of the excessive heat conditions, prior to filing the instant litigation. *See, e.g.*, Trial Transcript, Testimony of Angelia Norwood, Aug. 5, 2013.

43. Further, prior complaints of heat-related illness are not a predicate for a finding that the conditions in Angola's death row facility present a substantial risk of serious harm to Plaintiffs. "That the Eighth Amendment protects against future harm to inmates is not a novel proposition." *Helling v. McKinney*, 509 U.S. 25, 33, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993). "It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Id.* Accordingly, Plaintiffs need not establish that death or serious illness has occurred in order to establish a substantial risk of serious harm. [76]

44. Additionally, the Court is not persuaded by Defendants' argument that Plaintiffs' lifestyle or diet choices—and not the heat conditions—are what increase Plaintiffs' risk of harm. *See* Trial Transcript, Dr. Hal David Macmurdo, Aug. 7, 2013. It is uncontested that Plaintiffs' conditions of confinement, including Plaintiffs' food, beverage, and exercise options, are in the exclusive control of Defendants. While it is unclear from the record how often Plaintiffs are permitted to purchase beverages and snacks from the penitentiary canteen, even assuming, *arguendo*, that Plaintiffs are permitted to do so regularly, it belies logic to conclude that such beverages and snacks compose the *majority* of Plaintiffs' diet. Rather, the majority of Plaintiffs' diet is composed of beverages and food that are in the exclusive control of *and provided by* Defendants. *See* Trial ***669** Transcript, Testimony of Dr. Raman Singh, M.D., Aug. 7, 2013. [77] Thus, Defendants' argument is unavailing.

3.) Multiple Federal and State Agencies Have Recognized the Risk of Harm to Individuals Subjected to Extreme Heat

45. According to the Federal Emergency Management Agency ("FEMA"), "[m]ost heat disorders occur because the victim has been over-exposed to heat or has over-exercised for his or her age and physical condition. Older adults, young children and those who are sick or overweight are more likely to succumb to extreme heat." [78]

46. Multiple federal agencies and the Louisiana Office of Public Health recognize that the following human factors inhibit an individual's ability to regulate temperature: age, certain medical conditions, and use of certain medications. [79]

47. According to the Centers for Disease Control and Prevention ("CDC"), individuals sixty-five years old or older, individuals who are physically ill, especially those with heart disease or high blood pressure, and individuals with mental illness are at greater risk to develop heat-related illnesses.[80] Additional risk factors include: "obesity, fever, dehydration, ... poor circulation, ... and prescription drug ... use."[81]

48. The CDC further advises, "[t]he risk for heat-related illness and death may increase among people using the following drugs: (1) psychotropics, which affect psychic function, behavior, or experience (e.g. haloperidol or chlorpromazine); (2) medications for Parkinson's disease, because they can inhibit perspiration; (3) tranquilizers ***670** such as phenothiazines, butyrophenones, and thiozanthenes; and (4) diuretic medications or "water pills" that affect fluid balance in the body."[82]

49. In addition to human risk factors, several environmental factors also increase the risk of heat-related illnesses and deaths. For example, according to FEMA, "[c]onditions that can induce heat-related illnesses include stagnant atmospheric conditions and poor air quality ... [a]lso, asphalt and concrete store heat longer and gradually release heat at night, which can produce higher nighttime temperatures ..."[83]

50. According to the NWS, successive days of heat with high nighttime temperatures also increases the likelihood that heat-related illnesses and deaths may occur.[84] The NWS further advises that a building's "overnight minimum heat index" is a factor that increases the impact of heat: "houses and buildings that do not have air conditioning will not cool down if the overnight minimum heat index remains above 75–80E and the area goes into a second hot day."[85]

51. The CDC further cautions that electric fans will not prevent heat-related illnesses when the temperature is in the high 90s.[86] Specifically, the CDC warns that "[e]lectric fans may provide comfort, but when the temperature is in the high 90's, fans will not prevent heat-related illness."[87]

52. Instead, the CDC contends that "[a]ir conditioning is the strongest protective factor against heat-related illness."[88] Indeed, according to the CDC, "[e]xposure to air conditioning for a few hours a day will reduce the risk of heat-related illness."[89]

53. Given the substantial risk of serious harm due to extreme heat, which has been recognized by multiple federal and state agencies, and the CDC's recommendations, the Court is also not persuaded by Defendants' argument that the conditions of confinement in the death row tiers are no different than the conditions in a "free" person's home in which there no mechanical cooling or air conditioning is installed. While the Court recognizes that there are residents of this State who do not have air conditioning in their homes, it cannot be said that such conditions are analogous to the conditions of confinement at issue here. Indeed, when the temperature rises, "free" people are urged to take the precautions recommended by multiple federal and state agencies, and if need be, seek refuge in air conditioned buildings *at will.* In contrast, Plaintiffs are not permitted to take many of the precautions recommended by federal and state agencies, nor are they permitted to seek refuge in air conditioned buildings *at will.*

54. In sum, the information published by multiple federal and state agencies supports the conclusion that, considering Plaintiffs' ages[90], underlying medical conditions ***671** and/or medications, the conditions of confinement in Angola's death row tiers create a substantial risk of serious harm to Plaintiffs.

4.) Multiple Federal and State Agencies Have Recognized the Importance of the Heat Index

55. During the trial, Defendants' witness John "Jay" Grymes[91] attempted to minimize the importance of the heat index by characterizing it as merely a derived number.

> BY MR. HILBURN: ... What about the heat index? Can you explain what heat index means?
>
> BY MR. GRYMES: The heat index is a derived guideline estimate of the impact of the combination of temperature and atmospheric moisture on, 'an average person.'
>
> ...
>
> BY MR. HILBURN: Okay. Are there any issues with respect to using particular heat index values

without taking into account various environmental and physical factors?

BY MR. GRYMES: Well, the first thing you have to remember—and this sometimes gets lost in this concept of heat index—it is a derived number. It's not a real number. It, in fact, is sometimes called the apparent temperature. It's what the air and humidity combination would feel like to the average person.... But it's simply a guideline number.

Trial Transcript, Testimony of Jay Grymes, Aug. 6, 2013.

56. However, when further questioned by counsel for Plaintiffs, Grymes admitted that when the heat index is high, he advises his television viewers so that they can take the proper precautions.

BY MR. VORA: Mr. Grymes, when you provide, and when your colleagues, who are weather persons, provide information about temperatures in South Louisiana during the summertime, you provide the heat index as well as the temperatures, generally, correct?

BY MR. GRYMES: Often. Correct.

BY MR. VORA: And when you say often, you mean more often than not? Is that a fair statement?

BY MR. GRYMES: I can't speak for the others on my team, but I would say I probably mention the heat index probably every other weathercast.

BY MR. VORA: And the reason you provide the heat index every other weathercast is because you believe that it is important [to] your job [of] informing the public as to what they can expect the ambient conditions [to] which they are about to be exposed—in the event they go outside—to be, so that they can go on with their lives in a predictable fashion, correct?

BY MR. GRYMES: I provide heat index as a guideline to our viewers for them to make better decisions.

BY MR. VORA: And it is a guideline that you would expect your viewers to make decisions pursuant to, correct?

BY MR. GRYMES: I would hope so.

Trial Transcript, Testimony of Jay Grymes, Aug. 6, 2013.

57. The Court notes that reputable meteorology organizations agree that the heat index is critical to human safety. For ***672** example, the NOAA's heat alert procedures "are based mainly on Heat Index Values." *See, e.g., Heat: A Major Killer, supra* note 37; *Heat, supra* note 79.

58. Finally, the Fifth Circuit itself has recognized heat index as a valid measure for determining the constitutionality of prison conditions. *See Gates*, 376 F.3d at 334, 336.

59. Thus, the Court is unpersuaded that the heat index—which is calculated based on the temperature *and* humidity—is not of critical importance when evaluating the risk of serious harm to Plaintiffs.

60. In sum, based on the USRM data summarized above, the testimony presented at trial, and the advisories issued by numerous federal and state agencies, the Court concludes that Plaintiffs have met their burden of establishing that the conditions of confinement at Angola's death row constitute a substantial risk of serious harm to plaintiffs. The Court's conclusion is consistent with previous rulings by the Fifth Circuit. *See, e.g., Valigura*, 265 Fed.Appx. at 236 (unpublished) ("requiring an inmate to remain on his bunk almost twenty-four hours a day for several days in a row in temperatures into the nineties and hundreds are allegations that are sufficiently serious to implicate the minimal civilized measure of life's necessities."). Accordingly, the Court shall evaluate the second element of Plaintiffs' Eighth Amendment claim.

b. The Evidence Establishes that Defendants Acted with Deliberate Indifference to the Substantial Risk of Serious Harm to Plaintiffs

[5] 61. Prison officials violate the Eighth Amendment when they act with deliberate indifference to a prisoner's serious medical needs. *Estelle*, 429 U.S. at 105–106, 97 S.Ct. 285.

[6] 62. To establish that a prison official was deliberately indifferent to an inhumane condition of confinement, the plaintiff bears the burden of showing that the official knew of and disregarded an excessive risk to inmate health or safety.

[7] 63. "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that

a prison official knew of a substantial risk from the very fact that the risk was obvious." *Gates*, 376 F.3d at 332. *See also Farmer*, 511 U.S. at 837, 114 S.Ct. 1970 (the evidence must show that "the official [was] both ... aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [that] he ... also [drew] the inference."); *Reeves v. Collins*, 27 F.3d 174, 176 (5th Cir.1994) ("[u]nder exceptional circumstances, a prison official's knowledge of a substantial risk of harm may be inferred by the obviousness of the substantial risk.").

[8] 64. As established by the Supreme Court in *Farmer*, it is not necessary for an Eighth Amendment claimant to show that a prison official acted or failed to act due to a belief that an inmate would actually be harmed. It is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. 511 U.S. at 842, 114 S.Ct. 1970.

1.) The Evidence Establishes that Defendants Had Knowledge of the Substantial Risk of Serious Harm to Plaintiffs

[9] 65. Considering the uncontroverted USRM data summarized above, Plaintiffs' ages, Plaintiffs' underlying medical conditions, and Plaintiffs' medications, the Court concludes that Defendants' knowledge of the substantial risk of harm may ***673** be inferred by the obviousness of the risk to Plaintiffs. [92]

66. In the alternative, the Court concludes that Defendants' knowledge of the substantial risk of harm to Plaintiffs may be inferred from circumstantial evidence presented at trial.

67. In cases asserting deliberate indifference by prison officials where there is excessive heat, the Fifth Circuit has found deliberate indifference where prison officials ignored complaints "of heat stroke or some other heat-related illness." *Gates*, 376 F.3d at 339; *Blackmon*, 484 Fed.Appx. at 872–73 (evidence was sufficient to allow a jury to conclude that prison officials were deliberately indifferent to significant risks to prisoner's health where prisoner "filed numerous grievances complaining about the heat, its effect on his health, and prison officials' failure to address his concerns").

68. Here, it is uncontroverted that Plaintiffs submitted multiple ARPs to Defendants complaining of the excessive heat conditions, prior to filing the instant litigation.

69. During the trial, the Court admitted into evidence multiple ARPs submitted by Plaintiffs to Defendants between July 24 and October 17, 2012. The Court also admitted into evidence Defendants' responses to Plaintiffs' ARPs, in which Defendants acknowledged Plaintiffs' claims that it is "extremely hot on Death Row" and that they are "more susceptible to heat" because of their underlying medical conditions and medications, and denied Plaintiffs' requests for relief. [93]

***674** 70. During the trial, Defendant Norwood, who has been the Assistant Warden responsible for the death row tiers since February 2011, testified that she received thirteen ARPs related to the heat conditions in the death row tiers:

> BY MR. VORA: You received the ARP request that was filed by Mr. Elzie Ball, correct?
>
> BY MS. NORWOOD: Yes.
>
> BY MR. VORA: And you received the ARP request that was filed by Mr. Code?
>
> BY MS. NORWOOD: Yes.
>
> BY MR. VORA: You received the ARP request that was filed by Mr. Magee?
>
> BY MS. NORWOOD: Yes.
>
> BY MR. VORA: You received all of those ARP requests?
>
> BY MS. NORWOOD: I did, among others.
>
> BY MR. VORA: And you received—the ARP requests that I'm referring to, Mr. Code, Mr. Ball, Mr. Magee, were related to what they described as extreme heat or hot conditions. Is that accurate?
>
> BY MS. NORWOOD: Yes.
>
> ...
>
> BY MR. VORA: You received many, many ARPs being filed since February, end of February, 2011, correct?
>
> BY MS. NORWOOD: Actually, no. I have received the most on this subject.
>
> BY MR. VORA: And when you say this subject, you mean —
>
> BY MS. NORWOOD: The heat.

BY MR. VORA:—with respect to the heat, correct?

BY MS. NORWOOD: Right.

BY MR. VORA: And with respect to those, how many would you approximate there would be, how many requests?

BY MS. NORWOOD: Thirteen.

Trial Transcript, Testimony of Angelia Norwood, Aug. 5, 2013.

71. Norwood also testified that she talked with Plaintiffs Ball and Code regarding the heat conditions on multiple occasions:

BY MR. VORA: And did you speak to Mr. Ball and Mr. Code prior to the filing of the ARP?

BY MS. NORWOOD: I did.

BY MR. VORA: Did you speak to them after they filed the ARP?

BY MS. NORWOOD: I did.

BY MR. VORA: Did you speak to them after they filed this lawsuit?

BY MS. NORWOOD: Yes, sir.

72. During the trial, Defendant Cain, who oversees the entire penitentiary, including the death row facility[94], testified ***675** regarding Defendants' knowledge of a substantial risk of serious harm to Plaintiffs.

73. For example, according to Cain, correctional officers assigned to the death row facility "closely monitor" the temperature in the death row tiers and record such temperatures in tier log books.

BY MR. VORA: You state here in this letter that we do understand their concern and would like to assure you that the temperature, and all the main areas, is closely monitored. Do you see that, sir?

BY MR. CAIN: Yes.

BY MR. VORA: And when you say 'closely monitored' you mean in the logs that are required by the correctional officers to be filled out with the air temperatures at various times throughout the day. Is that correct?

BY MR. CAIN: Yes.

BY MR. VORA: Those logs are monitored by individuals who are to monitor them to ensure that the temperatures do not reach unacceptable levels, correct?

BY MR. CAIN: Yes, correctional officers.

Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013.

74. Defendant Norwood also testified as to Defendants' constant monitoring of the internal temperature[95]:

BY MR. VORA: ... Correctional officers then, pursuant to policies that are in place on the death row tiers, are required to record temperatures in log books. Is that accurate?

BY MS. NORWOOD: Yes.

BY MR. VORA: And that temperature is supposed to be recorded indoors as well as outdoors, correct?

BY MS. NORWOOD: Indoors daily.

BY MR. VORA: It is recorded indoors daily, correct?

BY MS. NORWOOD: Yes.

BY MR. VORA: It is recorded multiple times per day, correct?

BY MS. NORWOOD: Yes.

BY MR. VORA: It is recorded more or less every two hours indoors, correct?

BY MS. NORWOOD: Yes.

BY MR. VORA: Its your responsibility to ensure that the correctional officers properly record that temperature?

BY MS. NORWOOD: Ultimately, yes.

BY MR. VORA: And it's your responsibility not just that they record it, but that they record it accurately, correct?

BY MS. NORWOOD: Ultimately, yes.

Trial Transcript, Testimony of Angelia Norwood, Aug. 5, 2013.

75. Defendant Cain further testified that he visits the death row facility regularly and is aware of the heat conditions in the tiers:

> ***676** BY MR. CAIN: ... I go to death row regularly. So I walk in there. So I know what it feels and how hot it is and inmates talk to me. So, evidently I didn't have anyone talk to me about being too hot.

Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013.

76. Despite Cain's contention that Plaintiffs did not verbally complain about the heat conditions, the Court concludes that Defendants had knowledge of the heat conditions in the death row tiers, and thus, the substantial risk of serious harm to Plaintiffs. Considering the uncontroverted USRM data, Plaintiffs' ages, Plaintiffs' underlying medical conditions, and Plaintiffs' medications, the Court concludes that Defendants' knowledge of the substantial risk of harm may be inferred by the obviousness of the risk to Plaintiffs. In the alternative, based on the evidence that: (1) Plaintiffs submitted multiple APRs complaining of the excessive heat conditions to Defendants, prior to filing the instant litigation; (2) Defendants "closely monitor" the temperature in each of the death row tiers and record such temperatures in tier log books; and (3) Defendants Cain and Norwood walk the death row tiers "regularly," the Court concludes that Defendants' knowledge of the substantial risk of harm to Plaintiffs may be inferred.

2.) The Evidence Establishes that Defendants Disregarded the Substantial Risk of Serious Harm to Plaintiffs

[10] 77. Despite "know[ing] what it feels and how hot it is," Cain testified that he did not take any actions to reduce the heat conditions in the death row tiers, prior to the data collection period. [96]

78. Indeed, according to Cain, he often "thought" of ways to reduce the heat in the death row tiers, yet failed to take any action, even after the instant litigation was filed:

> BY MR. VORA: Warden Cain, between the June date on which this complaint was filed to July 2nd, did you ever consider taking any remedial measures to address the issue of heat on the death row tiers?
>
> BY MR. CAIN: I don't recall the specific dates and times, but we always have thought and tried to figure any way to have the ice on the tiers, any way—and to add extra fans. We've got a building with no fans. Inmates know that. Anything we can come up with and make that building cooler or any other building at Angola, we would do it. And we will—it was always on our mind how to overcome the heat. Because their comfort means less problems for me. I'm sure during that period of time, as all of the time almost, we're thinking about how to get this place cooler.
>
> BY MR. VORA: Did you actually do anything to try to make the death row tiers cooler between the June time frame that the complaint was filed and July 2nd?
>
> BY MR. CAIN: I don't know that I did or didn't. I know that we made a mistake after the Judge gave the [July 2nd] order. Is that what you're talking about?
>
> BY MR. VORA: No, sir. I'm trying to refer to the time before the order was issued but after the complaint, in which the lawsuit against you was filed. During that time frame, did you take any actions in order to remedy the heat that the inmates were complaining about in this case?
>
> ***677** BY MR. CAIN: I don't think so. I think we were already giving the ice. We thought about doing buckets at some point in there. So, I don't know exactly when. So, I can't answer accurately, because I don't remember in your dates. But we were thinking about ice and thinking about other things all through that period of time. Specifically, I don't want to say I did when I don't know for sure that I did exactly during those dates.
>
> BY MR. VORA: Warden Cain, you never provided a[n] [ice] bucket that you referred to in your previous answer to any of the inmates on the death row tiers at any point in time since this lawsuit was filed against you, correct?
>
> BY MR. CAIN: No, we haven't done that yet. I thought about it.

Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013.

79. Cain conceded, however, that once the Court-ordered data collection period began, he took action to attempt to reduce the temperature in tiers C and G, the tiers with the highest recorded temperatures and heat indices:

> BY MR. VORA: But you ordered the awnings to be procured, correct?
>
> BY MR. CAIN: Well, this is a homemade thing. Where we had wood in the warehouse and the 2 x 4's, and we used, I think, mattress material that we would normally make mattresses with. And this was just a really thrown together thing, just to see if it would shade. We were trying to shade the windows to see what would happen. To see if the temperature would fall.
>
> ...
>
> BY MR. VORA: You had tried other measures in order to try to lower the temperature and address the issue of heat that had been raised by Mr. Ball, Mr. Magee, and Mr. Code, right?
>
> BY MR. CAIN: I haven't tried other measures. I've only given them ice.
>
> BY MR. VORA: You never tried to do—you never tried to do something with soaker hoses?
>
> BY MR. CAIN: I had never before, but I did during this [data collection period], but it didn't work.
>
> BY MR. VORA: And during this time, when did you try to use soaker hoses?
>
> BY MR. CAIN: At the same time that we were putting the awnings up. I would think the next day or two. And there was, I mean, that didn't work at all. It was not, it was never up, really. It was up, but the water all ran out as soon as you put it on. We didn't have enough power. It was a half inch of line going into a three-quarter inch hose.
>
> BY MR. VORA: Who gave the order to install the soaker hoses and try to use them?
>
> BY MR. CAIN: Me
>
> ....
>
> BY MR. VORA: Outside of misting, using soaker hoses and awnings, have you ever attempted to do anything else in order to address the issues that Mr. Ball, Mr. Code, and Mr. Magee have raised with respect to what they consider to be prolonged exposure to heat, sir?
>
> BY MR. CAIN: I've just ensured—the only thing I would do is ensure that the system put in the building was working, that the belts were there, that they kept it operating, and it didn't, it didn't falter. Because it did a time or two. And so we had to keep the belt on there because the belts would break off. And they turned the fans that worked in the duct work that ***678** make air moves through the, through the little vents that go into the cells. So yes, keep it, keep it up. Maintain it well. What we do have, make it work the best we can. And add the additional fans.
>
> BY MR. VORA: Did you ever consider doing anything that would not have manipulated the USRM data, that would have provided some relief for Mr. Ball, Mr. Code, or Mr. Magee?
>
> BY MR. CAIN: I just told you what I did. That's all I've ever done.
>
> BY MR. VORA: You had considered previously, though, providing them with larger buckets in which they could store ice, correct?
>
> BY MR. CAIN: We've never given them buckets. We thought about that, about using the soft-type ice chests.
>
> BY MR. VORA: But you never provided the soft-type ice chest that you had considered to Mr. Ball, Mr. Code, or Mr. Magee. Is that correct?
>
> BY MR. CAIN: Correct.
>
> BY MR. VORA: To this day, you do not have a soft-type ice chest, correct?
>
> BY MR. CAIN: No. We don't have one.

Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013.

80. While the Court questions Cain's motivation for taking such actions *for the first time* during the Court ordered data collection period, it defies logic to conclude that Cain would have taken such actions if he *did not* have knowledge of the heat conditions in the death row tiers. Indeed, prior to the filing of the instant litigation, Cain acknowledged the heat conditions in the death row tiers and the need for remedial

action. *See* Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013 ("Anything we can come up with and make that building cooler or any other building at Angola, we would do it. And we will—it was always on our mind how to overcome the heat."). Nevertheless, Cain failed to take any remedial action *until* USRM began collecting, analyzing, and disseminating the *alarming* temperature, humidity, and heat index data.

81. Further, during the trial, Cain testified about the importance of even one-half of a degree decrease in the death row tiers:

> BY MR. CAIN: And if it were a half degree, we would know it. And the half a degree is a half a degree. And we would put the awnings up, if we could save a half a degree.

Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013.

82. Additionally, the evidence establishes that Defendants failed to abide by their own policies and regulations when they failed to add Plaintiff Magee, who is on psychotropic medication, to Angola's "Heat Precautions List." [97]

> BY MR. VORA: ... Do you recognize this document as being an email that you sent to the death row supervisors on July 24, 2013 at 9:19 a.m.? Do you recognize that?
>
> BY MS. NORWOOD: Yes.
>
> BY MR. VORA: And that is an email that relates to the heat precaution list for the week of July 22nd, correct?
>
> BY MS. NORWOOD: Yes.
>
> ***679** BY MR. VORA: This goes out to all of the death row supervisors because there are [inmates who] belong on the heat precautions list that [the supervisors are] supposed to monitor, correct?
>
> BY MS. NORWOOD: Yes.
>
> BY MR. VORA: And that is pursuant to a prison policy and applies to the death row tiers in which [inmates] are to be monitored because of their risk of heat-related illness. Is that correct?
>
> BY MS. NORWOOD: Yes.
>
> ...
>
> BY MR. VORA: You were the recipient of this email, correct?
>
> BY MS. NORWOOD: Yes.
>
> BY MR. VORA: This was July 23, 2013, correct?
>
> BY MS. NORWOOD: Yes.
>
> BY MR. VORA: You did not ask for Mr. Ball, Mr. Magee, or Mr. Code to be put on a list, or this list, correct?
>
> BY MS. NORWOOD: No.
>
> BY MR. VORA: Meaning that you did not ask at any time? That is your statement?
>
> BY MS. NORWOOD: That's true
>
> ....
>
> BY MR. VORA: Warden Norwood, there is, in fact, a list of offenders who are placed on a list because they are perceived to be at risk of heat-related illness, correct?
>
> BY MS. NORWOOD: If they are on any type of psychotropic medication, yes.
>
> ...
>
> BY MR. VORA: This list was distributed then weekly to you, who then in turn provide[d] it to the relevant death row supervisors to ensure [that] the policies of the prison [ ], with respect to the death row tiers [and] with respect to monitoring, [were] properly followed and enforced, is that correct?
>
> BY MS. NORWOOD: Yes.
>
> BY MR. VORA: And this is an example of the list that you did not put Mr. Ball, Mr. Magee, or Mr. Code on, despite the fact that they had complained of their concern about being affected by the heat that they had been exposed to, correct?
>
> BY MS. NORWOOD: They are not on any psychotropic, except for Mr. Magee. [98]

...

> BY MR. VORA: Warden Norwood, the lists that get sent out every week of the [inmates] who are at risk for heat-related illness, with respect to that list that goes out every week, at no time did you ask that Mr. Code, Mr. Magee, or Mr. Ball be placed on that list, is that a true statement?
>
> BY MS. NORWOOD: Yes.

Indeed, Defendants failed to introduce any evidence that Magee is on, or was ever placed on, the "Heat Precautions List."

83. In sum, the Court concludes that Defendants disregarded the substantial risk of serious harm to Plaintiffs' health and safety. Accordingly, the Court concludes that Plaintiffs have met their burden of proving that Defendants acted with deliberate indifference. Thus, the Court concludes that the conditions of confinement ***680** at Angola's death row do not meet constitutional standards, and Defendants have violated the Eighth Amendment. [99]

84. This conclusion is consistent with determinations made by other District Courts addressing similar prison conditions, and affirmed by various Courts of Appeals.

85. For example, in *Russell v. Johnson,* No. 02–261, 2003 WL 22208029 (N.D.Miss. May 21, 2003) a magistrate judge in the Northern District of Mississippi determined that prison officials at the Mississippi State Penitentiary ("Parchman") violated death row inmates' Eighth Amendment rights by, among other things, forcing them to endure summer cell temperatures exceeding a heat index of 90 degrees without access to "extra showers, ice water, or fans" where the ventilation in death row was otherwise "inadequate to afford prisoners a minimal level of comfort during the summer months." *Id.* at *2, *5, *aff'd in part, vacated in part sub nom. by Gates,* 376 F.3d 323. After a bench trial, the magistrate judge found:

> The probability of heat-related illness is extreme [on death row], and is dramatically more so for mentally ill inmates who often do not take appropriate behavioral steps to deal with the heat. Also, the medications commonly given to treat various medical problems interfere with the body's ability to maintain a normal temperature.

Id. at *2. Based on these findings of fact, the court determined that the inmates' cell conditions were unconstitutional, and ordered the defendants to "insure that each cell is equipped with a fan, that ice water is available to each inmate, and that each inmate may take one shower during each day when the heat index is 90 degrees or above." *Id.* at *5. As an alternative, the magistrate judge ordered that "the defendants may provide fans, ice water, and daily showers during the months of May through September." [100] *Id.*

86. On appeal, the Fifth Circuit agreed that the magistrate judge's findings were sufficient to support the injunction, to the extent that it applied to Parchman's death row unit. [101] *Gates,* 376 F.3d at 340. In particular, the Fifth Circuit noted that the magistrate judge's findings supported a determination that "the probability of ***681** heat-related illness [was] extreme" on Parchman's death row and, therefore, the heat index "present[ed] a substantial risk of serious harm to the inmates." *See id.* Thus, "based on the open and obvious nature of these conditions and the evidence that inmates had complained of symptoms of heat-related illness," the Fifth Circuit affirmed "the trial court's finding regarding MDOC's deliberate indifference" and held that the injunction was "justified by an Eighth Amendment violation." *Id. See also Valigura,* 265 Fed.Appx. at 235–36 (affirming the district court's denial of summary judgment to prison officials at Texas's Beeville State Prison on an inmate's prison conditions claim where poor ventilation in the bunk area resulted in "temperatures above the eighties and into the hundreds," because temperatures consistently in the nineties without remedial measures, such as fans, ice water, and showers, sufficiently increase the probability of death and serious illness so as to violate the Eighth Amendment) (citing *Gates,* 376 F.3d at 339–40).

87. The district court for the Western District of Wisconsin addressed a similar situation in *Jones'El v. Berge,* No. 00–421, 2003 WL 23109724 (W.D.Wis. Nov. 26, 2003), *aff'd Jones'El,* 374 F.3d at 545. After prisoners confined at the Supermax Correctional Institution in Boscobel, Wisconsin ("Supermax") sued prison officials alleging unconstitutional conditions of confinement based, in part, on having to endure "extreme" summer temperatures in their cells, *Jones'El,* 374 F.3d at 542–43, the defendants entered into a settlement agreement requiring them to "investigate and implement as practical a means of cooling the cells during summer heat

waves." *Jones'El,* 2003 WL 23109724, at *1. Later, when the defendants failed "to cool the cells to temperatures between 80 degrees and 84 during the hot months," the prisoners sought an enforcement order from the district court. *See id.* Noting the defendants' admission that "air conditioning [was] the only viable way to cool the cells to the required temperatures," *id.,* the district court ordered the defendants "to take steps immediately to air condition the cells." *Id.* at *2.

88. On appeal, the Seventh Circuit affirmed the district court's enforcement order, and rejected the prison officials' arguments that the order failed under the Prison Litigation Reform Act because it was not narrowly drawn, and that installing air conditioning at Supermax was otherwise impractical and/or would cause undue strife between prisoners and guards. *Jones'El,* 374 F.3d at 545.

89. Likewise, in *Graves v. Arpaio,* 623 F.3d 1043 (9th Cir.2010), the Ninth Circuit affirmed a district court order requiring the Sheriff of Maricopa County, Arizona to "provide pretrial detainees taking psychotropic medications with housing in which the temperature does not exceed 85° F." *Id.* at 1045. The district court's order came in the wake of ongoing litigation in which pretrial detainees argued that "harsh conditions of confinement at [county] jails," which included "dangerously high [cell] temperatures," violated their constitutional rights. *Id.* at 1046. After a hearing on the defendants' Motion to Terminate a previous order requiring remedial relief, *see id.* at 1046, "[t]he district court found that air temperatures above 85° F greatly increase the risk of heat-related illnesses for individuals who take psychotropic medications and found further that pretrial detainees taking psychotropic medications [were] held in areas [of the jails] where the temperature ... exceeded 85° F." *Id.* at 1048–49. Based on these findings, "[t]he district court ordered Sheriff Arpaio to house all detainees taking psychotropic medications in temperatures ***682** that do not exceed 85° F." *Id.* at 1049.

90. On appeal, the Ninth Circuit determined that "the district court reasonably concluded that temperatures in excess of 85° F are dangerous for pretrial detainees taking psychotropic medications," and agreed with its legal conclusion that the "Eighth Amendment requires that the temperature of the areas in which pre-trial detainees are held or housed does not threaten their health or safety." *Id.* Thus, "the Eighth Amendment prohibits housing such pretrial detainees in areas where the temperature exceeds 85° F."

91. Finally, this Court's conclusion that the conditions in Angola's death row tiers are unconstitutional is *not* inconsistent with the Eleventh Circuit's reasoning in *Chandler v. Crosby.* In that case, death row inmates at Florida's Union Correctional Institution ("UCI") also alleged unconstitutional conditions of confinement based on "the high temperatures in their cells during the summer months." *Chandler,* 379 F.3d at 1282. After a bench trial, the district court rejected the inmates' claims, determining that they failed to establish the objective prong for proving an Eighth Amendment violation. [102] *See id.* at 1297 n. 27. This determination was based on evidence showing that during the period in question: (1) the typical temperature in the inmates' cells was "between approximately eighty degrees at night to approximately eighty-five or eighty-six degrees during the day," *id.* at 1285 (quotation marks omitted); (2) the inmates' experienced temperatures over ninety degrees only nine percent of the time and never experienced temperatures exceeding 100 degrees, *id.* (quotation marks omitted); and (3) the ventilation system on UCI's death row exceeded industry standards for air circulation and was working properly, *see id.* at 1285–86 n. 14.

92. On appeal, the Eleventh Circuit affirmed the district court's ruling. Before discussing the evidence, the Court clarified three points of law: "[f]irst, the Eighth Amendment applies to prisoner claims of inadequate cooling and ventilation. Cooling and ventilation are distinct prison conditions, and a prisoner may state an Eighth Amendment claim by alleging a deficiency as to either condition in isolation or both in combination," *id.* at 1294; "[s]econd, the Eighth Amendment is concerned with both the 'severity' and the 'duration' of the prisoner's exposure to inadequate cooling and ventilation," *id.* at 1295; and "[t]hird, a prisoner's mere discomfort, without more, does not offend the Eighth Amendment," *id.* However, despite acknowledging that under the right circumstances an excessive heat claim could make out an Eighth Amendment violation, the Eleventh Circuit agreed with the district court that the inmates "failed to meet their burden under the objective component" of the test. *Id.* at 1297. First, the summertime heat, averaging "between approximately eighty degrees at night to approximately eighty-five or eighty-six degrees during the day," was simply "not unconstitutionally excessive." *Id.* "Second, [UCI was] equipped with a ventilation system that effectively manage[d] air circulation and humidity." *Id.* at 1298. Finally, "apart from the ventilation system, numerous conditions at [UCI] alleviate[d] rather than exacerbate[d] the heat," including that "[t]he cells [were] not exposed to any direct sunlight"; the

inmates were allowed to wear "only shorts in the summer months"; every cell had a ***683** sink with "cold running water, and every inmate possesse[d] a drinking cup"; the inmates were not compelled to engage in strenuous activity; and, finally, the inmates had "limited opportunities to gain relief in air-conditioned areas, e.g., during visitation time."

93. As discussed, the facts in the instant matter are materially different than the facts addressed by the district court and the Eleventh Circuit in *Chandler*. First, and most obvious, the temperatures, humidity, and heat index endured by Plaintiffs here are substantially higher than those at issue in *Chandler*. Second, it is uncontroverted that Plaintiff Code is subjected to direct sunlight through the window across from his cell. Third, whereas the prison officials in *Chandler* produced extensive evidence regarding the ventilation system at UCI and its functional capacity, *see id.* at 1283–85, the record here is void of any evidence regarding the instant ventilation system's ability to lower the temperature, humidity, and heat index in the tiers. Rather, Plaintiffs produced testimonial evidence from David Garon [103], which was uncontroverted, that the ventilation system at Angola is incapable of cooling or dehumidifying the death row tiers:

> BY MS. COMPA: ... Can you describe the system that's in place in the death row tiers?
>
> BY MR. GARON: It's a—there's a heating only system for winter conditions. And there's an exhaust system for ventilation. That's basically all there is.
>
> BY MS. COMPA: And were there—
>
> BY MR. GARON: There's some prop fans mounted on the walls also.
>
> BY MS. COMPA: And with respect to the exhaust system that you just mentioned, what is that designed to do?
>
> BY MR. GARON: Its designed to exhaust air from the facility and its toilets and each cell. And there's—so there's an exhaust system for the cell block, each individual cell. There's exhaust fans to take care of that. And there is a separate exhaust system for the showers, basically just to remove odors and provide some ventilation.
>
> BY MS. COMPA: And what—what is it designed to do, if I can ask it that way? What are the limitations of the serta system?
>
> BY MR. GARON: Its just to remove odors and ventilate the cell.
>
> BY MS. COMPA: And is [the ventilation system] designed to cool or dehumidify the air in any way?
>
> BY MR. GARON: No. You can't dehumidify with exhaust.

Trial Transcript, Testimony of David Garon, Aug. 5, 2013. Garon further testified that Angola's "natural" ventilation system, which is not recommended in hot, humid climates, does not include features that are essential to a sound natural ventilation system:

> BY MS. COMPA: Is building a building in south Louisiana with natural ventilation typical for this region?
>
> BY MR. GARON: I have never seen a naturally ventilated building that didn't have mechanical cooling.
>
> BY MS. COMPA: Have you seen a naturally ventilated building that did have mechanical cooling?
>
> BY MR. GARON: Yes.
>
> ...
>
> ***684** The exhaust system would qualify under naturally ventilated. As long as it doesn't have the mechanical cooling, it will qualify as naturally ventilated.
>
> ...
>
> BY MS. COMPA: Does the death row building, based on your inspection of the premises, include features that are considered part of a sound natural ventilation system?
>
> BY MR. GARON: No.
>
> BY MS. COMPA: And what—what are some features that might describe such a system that are lacking in death row?

> BY MR. GARON:—As I described before, usually you would want to have cross—some sort of cross ventilation. Windows on both sides. Orientation of the building geographically, and the geometry of the building....
>
> Trial Transcript, Testimony of David Garon, Aug. 5, 2013.

Thus, according to the uncontroverted testimony of Plaintiffs' expert, a building designed and built to house human beings for twenty-four hours per day should have included a mechanical cooling system *or* a cross-ventilation system *at the very least.* The death row tiers have *neither*. Fourth, whereas the UCI inmates each had sinks with cold running water in their cells, the uncontroverted evidence here is that Plaintiffs do not have unfettered access to ice. Further, as noted above, during the Court's site visit, the undersigned noted that the "cold" water was lukewarm to the touch. Fifth, it is uncontroverted that Plaintiffs' opportunities to gain relief in air-conditioned areas is limited to once every few months.

94. Additionally, the medical records and uncontroverted testimonial evidence establish that, due to their underlying medical conditions and medications, which interfere with their ability to maintain a normal temperature, the probability of Plaintiffs developing heat-related illness in such extreme heat conditions is high.

95. As noted above, "the Supreme Court has made clear that the standard against which a court measures prison conditions are 'the evolving standards of decency that mark the progress of a maturing society,' and not the standards in effect during the time of the drafting of the Eighth Amendment." *Gates,* 376 F.3d at 332–33 (quoting *Estelle,* 429 U.S. at 102, 97 S.Ct. 285) ("The [Eighth] Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency'... against which we must evaluate penal measures.") (citations omitted). Given the overwhelming evidence in the record and our nations' current standards of decency, it cannot be said that the conditions of confinement in Angola's death row facility pass constitutional muster.

96. In sum, the Court concludes that the conditions of confinement at Angola's death row constitute cruel and unusual punishment, in violation of the Eighth Amendment.

B. Title II of the Americans with Disabilities Act, the Americans with Disabilities Act Amendment Act, and Section 504 of the Rehabilitation Act of 1973

97. Plaintiffs also allege that Defendants have violated their rights under the ADA, as modified by the ADAAA, and the Rehabilitation Act, by "fail[ing] and refus[ing] to reasonably accommodate their disabilities while in custody," and that this "failure and refusal put them at substantial risk of serious harm" (Doc. 1, ¶ 73.)

[11] 98. The ADA and related statutes afford certain rights to incarcerated individuals in state facilities. [104]

***685** 99. Title II of the ADA provides: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

100. A "public entity" includes "any State or local government" and "any department, agency, ... or other instrumentality of a State." 42 U.S.C. § 12131(1)(A, B).

101. State agencies, including Defendant Louisiana Department of Public Safety and Corrections, can be sued under Title II. *See United States v. Georgia,* 546 U.S. 151, 159, 126 S.Ct. 877, 163 L.Ed.2d 650 (2006) (holding that Title II "validly abrogates state sovereign immunity" and authorizes suits against States, including complaints concerning conditions of confinement in state prisons).

102. Title II of the ADA followed in the footsteps of Section 504 of the Rehabilitation Act, which provides: "No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...." 29 U.S.C. § 794(a). The Fifth Circuit has observed:

> The language of Title II generally tracks the language of Section 504 of the Rehabilitation Act of 1973, and Congress' intent was that Title II extend the protections of the Rehabilitation Act "to cover all programs of state or local governments, regardless of the receipt of federal financial assistance" and that it "work in the same manner as Section 504."

Hainze v. Richards, 207 F.3d 795, 799 (5th Cir.2000) (quoting H.R.Rep. No. 101–485, pt. III at 49–50 (1990)) (footnotes omitted).

103. Indeed, Title II of the ADA specifically provides that "[t]he remedies, procedures and rights" available under Section 504 shall be the same as those available under Title II. 42 U.S.C. § 12133. Thus, cases interpreting either Title II of the ADA or Section 504 of the Rehabilitation Act are applicable to both. *Hainze*, 207 F.3d at 799.

104. The tests for determining success under the Rehabilitation Act and Title II of the ADA are substantially similar. To ***686** prove a claim under Section 504 of the Rehabilitation Act, a plaintiff must prove: (1) that he is a qualified individual with a disability; (2) that he was excluded from participation in, denied benefits of, or subjected to discrimination under the defendant's program solely because of his disability; and (3) that the program in question receives federal financial assistance. 29 U.S.C. § 794(a). Similarly, to prove discrimination under Title II of the ADA, a plaintiff must show: (1) that he is a qualified individual with a disability; (2) that he has been excluded from participation in, or denied the benefits of the services, programs, or activities of a public entity, or that he was otherwise discriminated against by such entity; and (3) that such exclusion or discrimination was by reason of his disability. 42 U.S.C. § 12132; *Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 428 (5th Cir.1997).

1. Plaintiffs Failed to Introduce Evidence into the Record to Establish that They are Qualified Individuals with Disabilities

105. The ADA and the Rehabilitation Act each define disability to mean "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A); 29 U.S.C. § 705(9)(B) ("The term 'disability' means ... the meaning given it in section 12102 of Title 42."). [105]

[12] 106. "Major life activities" are "those activities that are of central importance to daily life." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002).

107. The Equal Employment Opportunity Commission's regulations implementing the ADA provide a non-exhaustive list of "major life activities." Such activities include, but are not limited to "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working." 29 C.F.R. § 1630.2(i). *See also* 42 U.S.C. § 12102(2)(A)(1).

108. "[T]o be substantially limited means to be unable to perform a major life activity that the average person in the general population can perform, or to be significantly restricted in the ability to perform it." *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 614 (5th Cir.2009) (citing 29 C.F.R. § 1630.2(j)).

109. In making that determination, the EEOC has advised that courts consider: "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id.* at 614–15 (citing 29 C.F.R. § 1630.2(j)).

[13] 110. The evidence in the record establishes that Plaintiffs suffer from several chronic diseases. As previously noted, it is uncontroverted that Plaintiff Ball suffers from uncontrolled blood pressure, hypertension, diabetes, and obesity; Plaintiff Code suffers from hypertension, obesity ***687** , and hepatitis; and Plaintiff Magee suffers from hypertension, high cholesterol, and depression.

111. While the Court has no doubt that such diseases may limit one or more of Plaintiffs' major life activities, the record is void of any *evidence* to support such a conclusion.

112. Indeed, Plaintiffs failed to introduce evidence into the record to establish that Plaintiffs chronic diseases substantially limit their ability to care for themselves, perform manual tasks, walk, see, hear, speak, breath, learn, working, eat, sleep, stand, lift, bend, read, concentrate, think, or communicate. Rather, the evidence introduced by Plaintiffs was limited to how the *heat conditions* in the death row tiers limit Plaintiffs' major life activities, and how Plaintiffs' underlying medical conditions put them at increased risk of developing heat-related illnesses.

[14] 113. During the trial and in their submissions to the Court, Plaintiffs described the chronic diseases that each

Plaintiff suffers, and the medications that each Plaintiff is required to take. *See, e.g.*, Doc. 53–9, pp. 11–15. However, "[m]erely having an impairment ... does not make one disabled for purposes of the ADA." *Chevron Phillips Chem. Co.*, 570 F.3d at 614. Here, Plaintiffs simply failed to introduce evidence that their chronic diseases and/or medications impede their ability to perform major life activities.

114. In their submissions to the Court, Plaintiffs describe themselves as "disabled" and allege that they are "qualified individuals regarded as having physiological impairments that substantially limit one or more of their major life activities." (Docs. 1, ¶ 73; 53–9, p. 11.) However, such conclusory statements and/or allegations are insufficient to establish that Plaintiffs have physical or mental impairments that substantially limit one or more major life activities. Nor are such conclusory statements and/or allegations sufficient to establish that Plaintiffs are regarded as having a physical or mental impairment that substantially limits one or more of their life activities.

115. In sum, the Court concludes that Plaintiffs have failed to establish that they are qualified individuals with a disability. *See Chevron Phillips Chem. Co.*, 570 F.3d at 614.

116. Absent evidence in the record that Plaintiffs' underlying medical conditions substantially limit one or more of their life activities, Plaintiffs have failed to establish a prima facie case for discrimination under Title II of the ADA, as modified by the ADAAA, and the Rehabilitation Act. *Blanks v. SW Bell Communs., Inc.*, 310 F.3d 398, 400 (5th Cir.2002) ("To establish a prima facie case for discrimination under the ADA, a plaintiff must be a qualified individual with a disability."). Accordingly, Plaintiffs' claims under the ADA and the Rehabilitation Act must be denied.

VII. CONCLUSION

A. Declaratory and Injunctive Relief

1. "According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that he has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006) (citing cases).

***688** 2. Here, as discussed at length above, Plaintiffs have met their burden of proving that Defendants have violated, and continue to violate, their Eighth Amendment rights. Undoubtedly, remedies available at law, such as monetary damages, are inadequate to compensate Plaintiffs for such injury. To support their argument that the "harm" to Defendants outweighs the injury to Plaintiffs, Defendants introduced testimonial evidence regarding the Louisiana Department of Public Safety and Corrections' "reduced budget." *See* Trial Transcript, Testimony of James M. LeBlanc, Aug. 7, 2013. However, Defendants' purported financial hardships "can never be an adequate justification for depriving any person of his constitutional rights." *Udey v. Kastner*, 805 F.2d 1218, 1220 (5th Cir.1986). Finally, it is beyond dispute that a permanent injunction against Defendants serves the public interest in that it will enforce the fundamental rights enshrined in the United States Constitution. In sum, the Court concludes that Plaintiffs have met the test and shown "a clear threat of continuing illegality portending immediate harmful consequences irreparable in any other manner." *Posada v. Lamb County*, 716 F.2d 1066, 1070 (5th Cir.1983). Accordingly, the Court concludes that it has a "duty and obligation to fashion effective relief." *Gates v. Collier*, 501 F.2d 1291, 1320 (5th Cir.1974); *see also Swann v. Board of Educ.*, 402 U.S. 1, 15, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

3. Because this case concerns conditions of confinement, the Court must abide by the standards set out in the Prison Litigation Reform Act ("PLRA"). The PLRA narrowly limits the relief that a federal court may impose in prisoner suits. *See* 18 U.S.C. § 3626.

4. According to the PLRA, injunctive relief "must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2).

5. The PLRA further prohibits a federal court from ordering any prospective relief "unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct

the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A).

6. According to the parties' Statement of Undisputed Facts: "Plaintiffs have each exhausted their administrative remedy proceedings as required under the Prison Litigation Reform Act[,] 42 U.S.C. § 1997(e) ..." (Doc. 53–1, p. 3.) *See also supra* note 93.

7. The Fifth Circuit has held that "[i]ntrusion of federal courts into state agencies should extend no further than necessary to protect federal rights of the parties. An injunction, however, is not necessarily made overbroad by extending benefit[s] or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Prof'l Assoc. of College Educators v. El Paso County Cmty. College Dist.*, 730 F.2d 258, 273–274 (5th Cir.1984) (citing *Meyer v. Brown & Root Const. Co.*, 661 F.2d 369, 374 (5th Cir.1981)); *accord Gregory v. Litton Systems, Inc.*, 472 F.2d 631, 633–34 (9th Cir.1972).

8. Here, it is uncontested that Defendants may move any death row inmate to a ***689** different tier and/or cell at any time. Accordingly, the Court finds that a remedy aimed at ameliorating the heat conditions throughout the death row facility is necessary to adequately vindicate Plaintiffs' rights, and is not overbroad.

9. Having found that the conditions of confinement at Angola's death row constitute cruel and unusual punishment, in violation of the Eighth Amendment, the Court grants Plaintiffs request for declaratory and injunctive relief, and directs the following immediate remedial actions:

10. Defendants are hereby ordered to immediately develop a plan to reduce and maintain the heat index in the Angola death row tiers at or below 88 degrees Fahrenheit.

11. Defendants shall submit their plan to the Court ***no later than February 17, 2014 at 5:00 p.m.***

12. Defendants' plan shall include a step-by-step description as to how Defendants will: (1) immediately lower and maintain the heat index in the Angola death row tiers at or below 88 degrees Fahrenheit; (2) maintain the heat index in the Angola death row tiers at or below 88 degrees Fahrenheit **from April 1 through October 31;** (3) monitor, record, and report the temperature, humidity, and heat index in each of the death row tiers every two hours on a daily basis **from April 1 through October 31;** (4) provide Plaintiffs, and other death row inmates who are at risk of developing heat-related illnesses, with (a) at least one cold shower per day; (b) direct access to clean, uncontaminated ice and/or cold drinking water during their "tier time" *and* the twenty-three hours in which the inmates are confined to their cell; and (c) any and all relief that it is necessary to comply with this Court's order and the prevailing constitutional standards.

13. Defendants are advised that financial considerations will ***not*** be considered a legitimate reason for Defendants' failure to comply with this Court's order. As noted above, "inadequate resources can never be an adequate justification for depriving any person of his constitutional rights." *Udey*, 805 F.2d at 1220; *Smith v. Sullivan*, 553 F.2d 373, 378 (5th Cir.1977) (rejecting the defendants' argument that "lack of funds to implement the trial court's order" justified the defendants' failure to remedy ongoing constitutional violations); *Gates v. Collier*, 501 F.2d 1291, 1319 (5th Cir.1974) ("Where state institutions have been operating under unconstitutional conditions and practices, the defense[ ] of fund shortage ... ha[s] been rejected by the federal courts.").

14. Defendants are further ordered to comply with Louisiana Department of Public Safety and Corrections Health Care Policy No. HC–45 and Louisiana State Penitentiary Department Regulation No. B–06–001 and immediately add Plaintiff James Magee to Angola's "Heat Precautions List."

15. Plaintiffs shall file a response to Defendants' proposed plan ***no later than March 10, 2014 at 5:00 p.m.***

16. Given Defendants' deliberate indifference to the substantial risk of harm to Plaintiffs, and Defendants' actions throughout the data collection period, the Court will retain jurisdiction and monitor Defendants' implementation of the plan. Accordingly, the Court shall also appoint a Special Master to oversee Defendants' implementation of the plan, and report on Defendants' progress on a weekly basis. Fed.R.Civ.P. 53. Defendants shall bear all costs associated with the duties of the Special Master.

17. Plaintiffs and Defendants shall jointly or separately recommend candidates for appointment as Special Master ***690** ***no later than March 10, 2014 at 5:00 p.m.*** The parties' recommendations shall be filed into the record of this

matter and shall set out the qualifications of the persons so recommended.

18. Prior to the trial on the merits, the United States Department of Justice submitted a Statement of Interest of the United States (Doc. 64), advising the Court as to the additional relief available to Plaintiffs. Accordingly, Plaintiffs and Defendants shall jointly or separately file a response to the United States Department of Justice's submission ***no later than March 10, 2014 at 5:00 p.m.***

B. Attorneys' Fees and Costs

19. 42 U.S.C. § 1988 states in pertinent part:

> (b) Attorney's fees
>
> In any action or proceeding to enforce a provision of section [ ] ... 1983 ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs ... including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b).

20. Accordingly, Plaintiffs are awarded reasonable attorneys' fees and costs. Counsel for Plaintiffs shall file their motion for attorneys' fees and costs ***on a date to be fixed by the Court.*** Plaintiffs' motion shall comply with the Federal Rules of Civil Procedure and the Local Rules for the United States District Court for the Middle District of Louisiana.

VIII. JUDGMENT

Accordingly,

IT IS ORDERED that Plaintiffs' **Motion for a Preliminary Injunction (Doc. 12)** is **DENIED AS MOOT.**

The Court concludes that the conditions of confinement at Angola's death row constitute cruel and unusual punishment, in violation of the Eighth Amendment.

The Court further concludes that Plaintiffs have failed to establish a prima facie case for discrimination under Title II of the Americans with Disabilities Act, as modified by the Americans with Disabilities Act Amendment Act, and Section 504 of the Rehabilitation Act of 1973.

Accordingly,

IT IS FURTHER ORDERED that Plaintiffs' request for declaratory and injunctive relief is **GRANTED IN PART** and **DENIED IN PART.**

IT IS FURTHER ORDERED that Defendants shall immediately develop a plan to reduce and maintain the heat index in the Angola death row tiers at or below 88 degrees Fahrenheit.

IT IS FURTHER ORDERED that Defendants shall submit their plan to the Court ***no later than February 17, 2014 at 5:00 p.m.***

IT IS FURTHER ORDERED that Defendants' plan shall include a step-by-step description as to how Defendants will: (1) immediately lower and maintain the heat index in the Angola death row tiers at or below 88 degrees Fahrenheit; (2) maintain the heat index in the Angola death row tiers at or below 88 degrees Fahrenheit **from April 1 through October 31;** (3) monitor, record, and report the temperature, humidity, and heat index in each of the death row tiers every two hours on a daily basis **from April 1 through October 31;** (4) provide Plaintiffs, and other death row inmates who are at risk of developing heat-related illnesses, with (a) at least one cold shower per day; (b) direct access to clean, uncontaminated ice and/or cold drinking water during their "tier time" *and* the twenty-three hours in which the ***691** inmates are confined to their cell; and (c) any and all relief that it is necessary to comply with this Court's order and the prevailing constitutional standards.

Defendants are advised that financial considerations will ***not*** *be considered a legitimate reason for Defendants' failure to comply with this Court's order.*

IT IS FURTHER ORDERED that Defendants shall immediately add Plaintiff James Magee to Angola's "Heat Precautions List."

IT IS FURTHER ORDERED that Plaintiffs shall file a response to Defendants' proposed plan ***no later than March 10, 2014 at 5:00 p.m.***

IT IS FURTHER ORDERED that Plaintiffs and Defendants shall jointly or separately recommend candidates for appointment as Special Master ***no later than March 10, 2014 at 5:00 p.m.*** The parties' recommendations shall be filed into

the record of this matter and shall set out the qualifications of the persons so recommended.

IT IS FURTHER ORDERED that Plaintiffs and Defendants shall jointly or separately file a response to the United States Department of Justice's submission ***no later than March 10, 2014 at 5:00 p.m.***

IT IS FURTHER ORDERED that Plaintiffs are awarded reasonable attorneys' fees and costs. Plaintiffs shall file their motion for attorneys' fees and costs ***on a date to be fixed by the Court.*** Plaintiffs' motion shall comply with the Federal Rules of Civil Procedure and the Local Rules for the United States District Court for the Middle District of Louisiana.

IT IS FURTHER ORDERED that the Clerk of Court shall serve a copy of this Ruling and Order on the United States Attorney for the Middle District of Louisiana and the Assistant Attorney General for the Civil Rights Division of the United States Department of Justice.

All Citations

988 F.Supp.2d 639

Footnotes

1 The Court initially heard Plaintiffs' Motion for a Preliminary Injunction with oral argument on July 2, 2013. (Doc. 24.) At the conclusion of the hearing, the Court deferred its ruling on the motion, pending the collection of essential data by a neutral third-party expert, re-set the motion hearing to August 5, 2013, and set the trial on the merits to August 5, 2013.

2 Whether to grant or deny a request for a preliminary injunction is within the sound discretion of the district court. *See Allied Marketing Group, Inc. v. CDL Marketing, Inc.,* 878 F.2d 806, 809 (5th Cir.1989). However, the purpose of a preliminary injunction is to prevent irreparable injury so as to preserve the Court's ability to render a meaningful decision on the merits. *Mississippi Power & Light Co. v. United Gas Pipe Line Co.,* 760 F.2d 618, 627 (5th Cir.1985) (citing *Canal Authority of Florida v. Callaway,* 489 F.2d 567, 576 (5th Cir.1974)). Because the Court now issues its ruling and order on the merits, a preliminary injunction is no longer necessary. Therefore, Plaintiffs' request is denied as moot.

3 Defendant LeBlanc is the Secretary of the Louisiana Department of Public Safety and Corrections. (Doc. 1, ¶ 10.) LeBlanc is sued in his official capacity for declaratory and injunctive relief.

4 Defendant Cain is the Warden of the Louisiana State Penitentiary in Angola, Louisiana. (Doc. 1, ¶ 8.) Cain is sued in his official capacity for declaratory and injunctive relief.

5 Plaintiffs identified Defendant Norwood at “Angela” in their complaint. However, Defendant Norwood's testimony at trial was that her first name is spelled as above.

6 Defendant Norwood is the Assistant Warden in charge of death row at the Louisiana State Penitentiary in Angola, Louisiana. (Doc. 1, ¶ 9.) Norwood is sued in her official capacity for declaratory and injunctive relief.

7 As discussed below, the gravamen of Plaintiffs' Section 1983 claim is that Defendants have subjected them to cruel and unusual punishment, in violation of the Eighth Amendment, made applicable to the States by the Fourteenth Amendment.

8 Plaintiffs request that Defendants be required to decrease and maintain the heat index at or below 88 degrees Fahrenheit based on the recommendations of their expert, Dr. Susan Vassallo, M.D.:

> BY MR. KAMIN: And do you have an opinion, Dr. Vassallo, on the heat index thresholds that you would recommend for creating a safer environment for the Plaintiffs on death row?
>
> BY DR. VASSALLO: Well, in my report, I have put that temperature at 88 degrees. That is probably towards the warmer side ... none of us would tolerate being in a setting at 88 degrees heat index ... we would get out of that and we would go into some cooler setting.... I derive[d] that based on the [National Oceanic and Atmospheric Administration] charts, as well as the literature, which I have at least five or six articles behind that statement, that show this sort of a U-shape that when it's 88, 90 degrees, the morbidity and mortality from heat rises exponentially. And those are all [in] peer review scientific articles.
>
> Trial Transcript, Testimony of Dr. Susan Vassallo, Aug. 6, 2013.

9 At the conclusion of the trial on the merits, the Court denied Plaintiffs' request that the Court enjoin Defendants from retaliating against Plaintiffs. Trial Transcript, Aug. 7, 2013. Accordingly, this request for injunctive relief was denied, as Plaintiffs failed to present evidence that Defendants were likely to retaliate against them.

10 It is not clear from the record whether the louvers are made of plastic, glass, or another material.

11 The parties stipulated to the width of the death row fans. (Doc. 70.)

12 Mounted above the windows are televisions, which are also shared by two inmates (i.e., the television services two cells).

13 Inmates are permitted to engage in outdoor recreation only four times per week.

14 The uncontroverted testimony at trial is that the shower water temperature is required to range between 100 and 120 degrees to promote hygienic practices.

15 During the trial, Defendant Norwood testified that "offender orderlies who are assigned to work death row" "are allowed" to distribute ice to the death row inmates, but only "if it is asked of them" by a correctional officer. Trial Transcript, Testimony of Angelia Norwood, Aug. 7, 2013.

16 The uncontroverted testimony at trial was that the housing tiers are placed on lock down beginning at 10:30 or 11:00 p.m. It is not clear from the record what time the housing tiers are re-opened each morning.

17 During the Court's site visit, Defendants contended that when the ice in the death row facility's only ice machine runs out, the correctional officers retrieve ice from the ice machines in a nearby housing unit.

18 The dry bulb temperature is the temperature indicated by a dry-bulb thermometer that is the actual temperature of the air. Merriam–Webster Dictionary (11th ed.2009).

19 Relative humidity is a dimensionless ratio, expressed in percent, of the amount of atmospheric moisture present relative to the amount that would be present if the air were saturated. National Weather Service Glossary, http://forecast.weather.gov/glossary.php (last visited Dec. 17, 2013) [hereinafter "NWS Glossary"].

20 The heat index, or the "apparent temperature," is an accurate measure of how hot it really feels when relative humidity is factored with the actual air temperature. NWS Glossary, *supra* note 19.

21 During the trial, Thompson testified that his firm, Thompson, Luke & Associates, oversaw the construction of the death row facility.

22 Ball testified that he has also lived in tiers C, F, and G.

23 Specifically, Ball takes the following medications on a daily basis: Insulin, Glyburide (brand name: Micronase®), Meteformin Hydrochloride, Simvastatin (brand name: Zocor®), Amlodipine (brand name: Norvasc®), Clonidine (brand name: Catapres®), Losartan Potassium (brand name: Cozaar®), Furosemide (brand name: Lasix®), and Atenolol (brand name: Tenormin®). Plaintiffs' expert, Dr. Susan Vassallo, M.D.'s uncontroverted testimony at trial was that Plaintiffs' medications "prevent their ability to respond to heat." As it relates to Ball, Dr. Vassallo testified that his medication "impairs the ability of the body to cool." Trial Transcript, Testimony of Dr. Susan Vassallo, Aug. 6, 2013.

24 Ball testified that he has keloid scars that become inflamed and painful due to the heat.

25 Code testified that he also lived in tier F and tier C.

26 Specifically, Code takes the following medications on a daily basis: Losartan Potassium (brand name: Cozaar®), Hydrochlorothiazide, and Amlodipine (brand name: Norvasc®). Dr. Vassallo's uncontroverted testimony at trial was that Plaintiffs' medications "prevent their ability to respond to heat." As it relates to Code, Dr. Vassallo testified that his medications also impair his body's ability to cool." Trial Transcript, Testimony of Dr. Susan Vassallo, Aug. 6, 2013.

27 Magee also testified that he has also lived in tier C.

28 Specifically, Magee takes the following medications on a daily basis: Amlodipine (brand name: Norvasc®), Clonidine (brand name: Catapres®), Cholestyramine, Fluoxetine (brand name: Prozac®) and Mirtazapine (brand name: Remeron®). Dr. Vassallo's uncontroverted testimony at trial was that Plaintiffs' medications "prevent their ability to respond to heat." As it relates to Magee, Dr. Vassallo testified that his medication "affects his body's ability to adjust to and tolerate the heat." Trial Transcript, Testimony of Dr. Susan Vassallo, Aug. 6, 2013.

29 The Court also ordered the parties to collect the wetbulb globe temperature. The wetbulb globe temperature ("WBGT") is a measure of heat stress in direct sunlight which takes into account temperature, humidity, wind speed, sun angle and cloud cover (solar radiation). This differs from the heat index, which takes into consideration temperature and humidity and is calculated for shady areas. Military agencies and the Occupational Safety Health Administration use the WBGT as a guide to managing workload in direct sunlight. *WetBulb Globe Temperature,* National Weather Service Weather Forecast Office, http://www.srh.noaa.gov/tsa/?n=wbgt (last visited Dec. 17, 2013). Although wetbulb globe temperature data was provided to the Court, it was not used in the Court's analysis.

30 All temperature and heat index measurements herein are presented in degrees Fahrenheit.

31 One monitor was installed in cell 11 of tier A.

32 Hereinafter, "heat indices" shall refer to multiple heat index recordings. The Court also notes that some temperatures and heat indices were recorded and produced as round numbers, while other were recorded as numbers with one or two decimal points. All temperatures and heat indices presented herein are described in the same manner as produced by USRM.

33 This temperature was recorded on July 20, 2013 at 5:17 a.m.

34 This temperature was recorded on August 4, 2013 from 4:59 to 6:59 p.m.

35 This heat index was also recorded on July 20, 2013 at 5:17 a.m.
36 This heat index was recorded on August 2, 2013 at 7:13 p.m.
37 The NWS defines heat index as "how hot weather 'feels' to the body." *Heat: A Major Killer,* NWS Office of Climate, Water, and Weather Services, http://www.nws.noaa.gov/om/heat/index.shtml (last visited Dec. 17, 2013) [hereinafter *Heat: A Major Killer].* The NWS's Heat Index Chart uses relative humidity and air temperature to produce the "apparent temperature" or the temperature the body "feels." According to the NWS, "[t]hese values are for shady location only. Exposure to full sunshine can increase heat index values by up to 15 [Fahrenheit]. Also, strong winds, particularly with very hot, dry air, can be extremely hazardous as the wind adds heat to the body." *Id.*
38 *Heat: A Major Killer, supra* note 37.
39 One monitor was installed in cell 8 of tier B.
40 This temperature was recorded on July 19, 2013 at 6:03 a.m. and again at 7:03 a.m., and on July 20, 2013 a 7:03 a.m.
41 This temperature was recorded on August 2, 2013 at 4:50 p.m. and again at 5:50 p.m., and again on August 4, 2013 at 6:04 p.m.
42 This heat index was recorded on July 26, 2013 at 6:43 p.m.
43 This heat index was recorded on August 2, 2013 at 7:50 p.m.
44 One monitor was installed in cell 11 of tier C.
45 This temperature was recorded on July 20, 2013 at 6:34 a.m., and again at 7:34 a.m.
46 This temperature was recorded on August 4, 2013 at 6:22 p.m., and again at 7:22 p.m.
47 This heat index was also recorded on July 20, 2013 at 4:34 a.m.
48 This heat index was recorded on August 2, 2013 at 7:38 p.m., and again at 8:38 p.m.
49 One monitor was installed in cell 6 of tier F.
50 This temperature was recorded on July 18, 2013 at 7:14 a.m.
51 This temperature was recorded on August 4, 2013 at 5:17 p.m.
52 This heat index was recorded on July 16, 2013 from 3:14 a.m. to 7:14 a.m., and again on July 18, 2013 from 4:14 a.m. to 7:14 a.m.
53 This heat index was recorded on August 2, 2013 at 7:32 p.m.
54 This temperature was recorded on July 20, 2013 at 5:14 a.m.
55 This temperature was recorded on August 4, 2013 at 5:11 p.m., and again at 6:11 p.m.
56 This temperature was recorded on July 19, 2013 at 7:26 a.m.
57 This temperature was recorded on August 3, 2013 at 6:25 p.m., 7:25 p.m., and 8:25 p.m. This temperature was also recorded on August 4, 2013 at 5:13 p.m., 6:13 p.m., and 7:13 p.m.
58 This heat index was recorded on July 19, 2013 at 6:14 a.m.
59 This heat index was recorded on August 2, 2013 at 12:21 p.m.
60 This heat index was recorded on July 19, 2013 at 3:26 a.m. and 4:26 a.m.
61 This heat index was recorded on August 3, 2013 at 8:25 p.m.
62 For reasons unknown to the Court, no data was recorded in tier G, cell 16 on July 23, 2013.
63 One monitor was installed in cell 8 of tier H.
64 This temperature was recorded on July 19, 2013 at 6:23 a.m.
65 This temperature was recorded on August 4, 2013 5:53 p.m.
66 This temperature was recorded on July 19, 2013 at 6:23 a.m.
67 This heat index was recorded on August 2, 2013 at 6:43 p.m.
68 According to a Climatological Report obtained from National Weather Service Forecast Office, the maximum temperature recorded at the Baton Rouge Regional Airport on August 12, 2013 was 91 degrees. That temperature was recorded at 12:42 p.m. Climatological Report (Daily), http://www.nws.noaa.gov/view/validProds.php?prod=CLI (last visited Aug. 13, 2013).
69 Each of Defendants' mercury-in-glass thermometers were located at the rear of each tier, or on the wall furthest away from the tier entrance.
70 National Weather Service Forecast Office, New Orleans/Baton Rouge, LA, http://www.nws.noaa.gov/climate/index.php?wfo=lix (last visited Dec. 17, 2013).
71 *Id.*

72 For example, as summarized above, inmates in tier C were subjected to heat indices up to twenty degrees higher than outside of the death row facility for multiple hours on August 3, 2013. Inmates housed at the rear of tier G were also were subjected to heat indices up to twenty degrees higher than outside of the death row facility for multiple hours on that day.

73 *Heat: A Major Killer, supra* note 37.

Heat Index	Possible Heat Disorders for Individuals in Higher Risk Groups
130° or higher	Heat Stroke/Sun Stroke Highly Likely with Continued Exposure
105°–130°	Sunstroke, Heat Cramps, or Heat Exhaustion Likely, and Heatstroke Possible with Prolonged Exposure and/or Physical Activities
90°–105°	Sunstroke, Heat Cramps, or Heat Exhaustion Possible with Prolonged Exposure and/or Physical Activities
80°–90°	Fatigue Possible with Prolonged Exposure and/or Physical Activities

74 During the trial, the parties stipulated that Vassallo qualified as an expert "on the effect of drugs and [ ] illness on thermoregulation, including [the] effect of temperature on prisoners." According to Vassallo, "... it's not until your body loses [the] ability to regulate that the [body] temperature starts to rise and [it] becomes an emergency." Trial Transcript, Testimony of Dr. Susan Vassallo, Aug. 6, 2013.

75 According to the Louisiana Department of Public Safety and Corrections' website, "[t]he Department and all local jails housing state offenders have established Administrative Remedy Procedures (ARP) through which an offender may, in writing, request a formal review of a complaint related to any aspect of his incarceration. Such complaints include actions pertaining to conditions of confinement, personal injuries, medical malpractice, time computations, or challenges to rules, regulations, policies, or statutes. Through this procedure, offenders shall receive reasonable responses and where appropriate, meaningful remedies." *Frequently Asked Questions,* Louisiana Department of Public Safety and Corrections, Corrections Services, http://www.doc.la. gov/quicklinks/offender-info/faq/ (last visited Dec. 17, 2013).

76 Further, assuming, *arguendo,* that prior requests for medical assistance or complaints of heat-related illness are required, there is sufficient evidence in the record to support the conclusion that Plaintiffs were discouraged from submitting "sick call" requests because of the monetary and potential disciplinary consequences of doing so. Indeed, it is uncontested that Defendants' "Health Care Request Form" includes the following acknowledgment above the signature and date lines:

> I understand that in accordance with Dept. Reg. No. B–06–001, I will be charged $3.00 for routine request [*sic*] for health care services, $6.00 for emergency request [*sic*] and $2.00 for each new prescription written and dispensed to me, with the exceptions noted in the referenced regulation. I am aware that if I declare myself a medical emergency and the health care staff finds that and [*sic*] emergency does not exist, I may be given a disciplinary report for malingering.

77 During the trial, Dr. Singh testified that his the Chief Medical and Mental Health Director for the all ninety of the Louisiana Department of Public Safety and Corrections' correctional facilities, including Angola.

78 *Extreme Heat,* FEMA, http://www.ready.gov/heat (last visited Dec. 17, 2013) [hereinafter *Extreme Heat]; see also Heat Wave—A Major Summer Killer,* Louisiana Office of Emergency Preparedness, http://www. gohsep.la.gov/factsheets/heatwave.aspx (last visited Dec. 17, 2013) [hereinafter *Heat Wave]* ("Ranging in severity, heat disorders share one common feature: the individual has overexposed or over exercised for his age and physical condition in the existing thermal environment.").

79 *Heat,* NWS, http://www.weather.gov/bgm/heat (last visited Dec. 17, 2013) [hereinafter *Heat]; Frequently Asked Questions About Extreme Heat,* Centers for Disease Control and Prevention, Emergency Preparedness and Response, http://www.bt.cdc.gov/disasters/extremeheat/faq.asp (last visited Dec. 17, 2013) [hereinafter *Frequently Asked Questions About Extreme Heat]* ("Those at greatest risk for heat-related illness include infants and children up to four years of age, people 65 years of age and older, people who are overweight, and people who are ill or on certain medications."); *Excessive Heat Events Guidebook,* June 2006, United States Environmental Protection Agency, http://www.epa. gov/hiri/about/pdf/EHEguide_final.pdf (last visited Dec. 17, 2013) [hereinafter *Excessive Heat Events Guidebook]; DHH and DCFS Remind Residents to Stay Safe in Summer Heat: High Temperatures Put Louisianans at Risk,* State of Louisiana Department of Health & Hospitals, Office of Public Health, http://dhh.louisiana.gov/index.cfm/newsroom/detail/2844 (last visited Dec. 17, 2013) [hereinafter *High Temperatures Put Louisianans at Risk].*

80 *Tips for Preventing Heat–Related Illness,* CDC, Emergency Preparedness and Response, http://www.bt.cdc. gov/disasters/extremeheat/heattips.asp (last visited Dec. 17, 2013) [hereinafter *Tips for Preventing Heat–Related Illness].*

81 *Extreme Heat: A Prevention Guide to Promote Your Personal Health and Safety,* CDC, Emergency Preparedness and Response, http://www.bt. cdc.gov/disasters/extremeheat/heat_guide.asp (last visited Dec. 17, 2013) [hereinafter *Extreme Heat: A Prevention Guide*].

82 *Frequently Asked Questions About Extreme Heat, supra* note 79.

83 *Extreme Heat, supra* note 78.

84 *Heat, supra* note 79 ("Successive days of heat with high nighttime temperatures is *really* bad-fatalities *will* occur.") (emphasis added).

85 *Heat, supra* note 79.

86 *Frequently Asked Questions About Extreme Heat, supra* note 79.

87 *Id.*

88 *Id.*

89 *Id.*

90 The Court acknowledges that Plaintiff Magee is only thirty-five years old. However, the evidence supports the conclusion that his underlying medical conditions and medications place him in a higher risk category.

91 By stipulation of the parties, Grymes was accepted an as expert in the field of meteorology. He has worked as a meteorologist and climatologist for approximately thirty years.

92 Indeed, there is nothing in the record to suggest that the temperature, humidity, and heat index data collected, analyzed, and disseminated by USRM from July 15—August 5, 2013 was higher than the average temperature, humidity, and heat index normally experienced during the summer months in south Louisiana. Further, the record establishes that Defendants have been in possession of Plaintiff's medical records throughout the duration of their incarceration at death row.

93 Defendants' receipt of and response to Plaintiffs' ARPs was also summarized in the parties' Statement of Undisputed Facts (Doc. 53–1), which states:

> Plaintiff Ball submitted a Request for Administrative Remedy ("ARP") on July 28, 2012 to Warden Cain, describing among other things the excessive heat conditions, the adverse symptoms he was experiencing due to the heat, his inability to alleviate the conditions, and his medical diagnoses and medications. Plaintiff Elzie Ball requested that the prison accommodate his illness by providing a safer environment. Angola, through Warden Norwood, issued a Response denying the ARP on October 12, 2012. Plaintiff Ball appealed Warden Norwood's response on October 17, 2012. The DOC denied the appeal December 14, 2012. Plaintiff Ball's grievance process was thereby exhausted.
>
> Plaintiff Code submitted Request for Administrative Remedy ("ARP") on July 24, 2012, describing the excessive heat conditions, the adverse symptoms he was experiencing due to the heat, his inability to alleviate the conditions, and his medical diagnoses and medications. Plaintiff Nathaniel Code requested that the prison accommodate his illness by providing a safer environment. Angola, through Warden Norwood, issued a Response denying the ARP on September 5, 2012. Plaintiff Code appealed Warden Norwood's response on September 13, 2012, reasserting his grievances and outlining why LSP's First Step Response was inadequate. The DOC denied the appeal on November 21, 2012. Plaintiff Code's grievance process was thereby exhausted.
>
> Plaintiff Magee submitted a Request for Administrative Remedy ("ARP") on August 28, 2012, describing the excessive heat conditions, the adverse symptoms he was experiencing due to the heat, his inability to alleviate the conditions, and his medical diagnoses and medications. Plaintiff James Magee requested that the prison accommodate his illness by providing a safer environment. Angola, through Warden Norwood, issued a Response denying the ARP on November 6, 2012. Plaintiff Magee appealed Warden Norwood's response on November 7, 2012. The DOC denied the appeal on January 3, 2013. Plaintiff Magee's grievance process was thereby exhausted.
>
> (Doc. 53–1, pp. 2–3.) Despite these undisputed facts, Norwood later attempted to characterize Plaintiffs' ARPs as nothing more than Plaintiffs' complaints that "they were hot and [that] they wanted air conditioning." Trial Transcript, Testimony of Angelia Norwood, Aug. 5, 2013.

94 Cain testified as follows:

> BY MR. VORA: How long have you been the Warden at Angola?
>
> BY MR. CAIN: Eighteen and a half years.
>
> BY MR. VORA: And during the eighteen and a half years that you have been Warden at Angola, you have been the top official at Angola?
>
> BY MR. CAIN: Yes.
>
> BY MR. VORA: You would also, therefore, exercise control and responsibility over what happens at death row, correct?
>
> BY MR. CAIN: Yes.
>
> According to Cain, he also is responsible for enforcing policies and/or regulations related to inmates who have been prescribed medications that increase their risk of developing heat-related illnesses:

BY MR. VORA: Sir, my question is, you are responsible for enforcing any policies that would have to deal with medications that could create the risk of an adverse effect to somebody's health, an inmate's health, as a result of rising temperatures—is that a fair statement?

BY MR. CAIN: Yes.

Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013.

95 Norwood further testified that the mercury in-glass thermometers in each of the death row tiers are "hard to read." However, both she and Cain testified that Defendants have not attempted to replace the thermometers nor taken any action to make the current in-mercury thermometers easier to read. Trial Transcript, Testimony of Angelia Norwood, Aug. 5, 2013; Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013.

96 Defendants' attempts to "lower the temperatures" in the death row tiers during the data collection period will be addressed in a separate order by this Court.

97 During the trial, the Court admitted into evidence Louisiana Department of Public Safety and Corrections Health Care Policy No. HC–45 and Louisiana State Penitentiary Department Regulation No. B–06–001. It is undisputed that both the policy and regulation require Defendants to, *inter alia,* identify, and monitor "offenders prescribed psychotropic medication."

98 Defendants' staff physician, Dr. Macmurdo, also acknowledged this fact:

BY MS. MONTAGNES: Do you consider Remeron® to be a psychotropic drug?

BY DR. MACMURDO: Yes.

BY MS. MONTAGNES: And Mr. Magee is on Remeron®, isn't he?

BY DR. MACMURDO: Yes.

Trial Transcript, Testimony of Dr. Hal David Macmurdo, Aug. 7, 2013.

99 The Court notes that the fact that Angola has attained accreditation from the American Correctional Association (ACA) does not moot the issues in this matter, nor does it automatically ensure that the conditions of confinement at death row meet constitutional standards. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,* 528 U.S. 167, 190, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

100 In contrast, here, Plaintiffs' cells are not equipped with fans. Rather, each housing tier includes non-oscillating fans, which are mounted approximately nine feet away from the inmate cells. Each fan is shared by two cells. However, during the Court's site visit, the undersigned observed that the fans did not provide equal amounts of air flow to each cell, nor did the fans provide a detectable cooling effect or relief from the heat conditions in the tier. Further, it is uncontroverted that Plaintiffs do not have direct access to ice during the twenty-three hours per day that they are confined to their cells. Rather, Plaintiffs are largely dependant on other death row inmates to distribute ice to them during that inmate's tier time. Further, while the Court did not attempt to measure the temperature of the water from the in-cell faucets, the undersigned noted that the cold water was lukewarm to the touch. Additionally, it is uncontroverted that Plaintiffs are permitted only one shower per day, and that the shower water temperature is maintained between 100 and 120 degrees.

101 The Fifth Circuit invalidated the injunction to the extent that it purported to apply to cell blocks beyond Parchman's death row because "the class represented by [the plaintiff] consists entirely of Parchman's Death Row prisoners." *Gates,* 376 F.3d at 339.

102 The district court also determined that the inmates failed to satisfy the subjective prong. *Chandler,* 379 F.3d at 1297 n. 27.

103 The parties stipulated that Garon is an expert in the field of testing and balancing, who tests, adjusts, and analyzes mechanical heating, ventilation, and air conditioning systems.

104 Here, Defendants do not contest that they are subject to Title II of the ADA, the ADAA, and Section 504 of the Rehabilitation Act of 1973:

BY MR. VORA: And you understand that the Louisiana State Penitentiary is subject to the requirements of Title II of the Americans with Disabilities Act. Correct, sir?

BY MR. CAIN: Yes.

BY MR. VORA: ... You also understand as a recipient of public federal funds, the Louisiana Department of Public Safety and Corrections is subject to Section 504 of the Rehabilitation Act, correct?

BY MR. CAIN: Yes.

Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013. Defendants also do not contest that they had an obligation, under the ADA, to provide eligible inmates with an accommodation:

BY MR. VORA: And your officers, after receiving this training, then would understand that depression is one of the types of mental illnesses, correct?

BY MR. CAIN: I would hope.

BY MR. VORA: And you would also hope that the correctional officers working under you at Angola would understand that these types of mental illnesses would be the types of things for which accommodations should be provided pursuant to Title II of the Americans with Disabilities Act, correct?

BY MR. CAIN: Yes.

Trial Transcript, Testimony of Nathan Burl Cain, Aug. 6, 2013.

105 In 2008, the ADA was modified by the ADAAA, Pub.L. No. 110–325, 122 Stat. 3553, which, among other things, clarified that "[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter," 42 U.S.C. § 12102(4)(A), and that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as ... medication, [or] medical supplies." 42 U.S.C. § 12102(4)(E)(i)(I).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

ASHLEY DIAMOND,

Plaintiff,

v.

Case No. 5:15-cv-50-MTT-CHW

BRIAN OWENS, *et al.*,

Defendants.

STATEMENT OF INTEREST OF THE UNITED STATES

Failure to provide individualized and appropriate medical care for inmates suffering from gender dysphoria[1] violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Kothmann v. Rosario*, 558 F. App'x 907, 910 (11th Cir. 2014); *Fields v. Smith*, 653 F.3d 550, 554-55 (7th Cir. 2011); *Lynch v. Lewis*, No. 7:14-CV-24, 2014 WL 1813725, at *2 (M.D. Ga. May 7, 2014). In her first Motion for Preliminary Injunction (ECF No. 1), Plaintiff Ashley Diamond alleges that the Georgia Department of Corrections ("GDOC") violated the Eighth Amendment by withholding treatment for Ms. Diamond's gender dysphoria against the advice and recommendations of her treating clinicians.

Ms. Diamond alleges that GDOC withheld this care pursuant to an unconstitutional "freeze-frame" policy. A "freeze-frame" policy impermissibly prohibits individualized

[1] The terms "gender dysphoria," "gender identity disorder," and "transsexualism" are used interchangeably in the case law and the record in this case. The United States uses the term "gender dysphoria" in this Statement of Interest except when quoting case law or other parts of the record.

assessment and treatment of individuals with gender dysphoria. Instead, prisoners may only receive the same level of care they received in the community. Under GDOC's policy, if an inmate is not identified as transgender and referred for treatment at intake, he or she may receive no treatment at all. According to Ms. Diamond, because GDOC did not identify her as transgender at intake and refer her for additional evaluation, GDOC officials continue to deny Ms. Diamond treatment pursuant to GDOC's freeze-frame policy.

Without taking a position on the factual accuracy of Plaintiff's claims, the United States files this Statement of Interest to assist the Court in evaluating Ms. Diamond's Motion. In particular, the United States files this Statement to bring the Court's attention to the standards used to evaluate appropriate medical care for gender dysphoria under the Eighth Amendment and the unconstitutionality of freeze-frame policies that may prevent such treatment. In cases like Ms. Diamond's, gender dysphoria constitutes a serious medical need requiring appropriate treatment. For that reason, proscriptive freeze-frame policies are facially unconstitutional under the Eighth Amendment because they do not provide for individualized assessment and treatment.

INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a federal court.[2] The United States enforces the rights of incarcerated individuals pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997. CRIPA authorizes the Attorney General to investigate conditions of confinement in

[2] The full text of 28 U.S.C. § 517 is as follows: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

correctional facilities and bring a civil action against a State or local government that, pursuant to a "pattern or practice" of conduct, "is subjecting persons residing in or confined to an institution . . . to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 42 U.S.C. § 1997(a).

The United States has a broad interest in ensuring that conditions of confinement in state and local correctional facilities are consistent with the Constitution and federal law. To that end, the Department of Justice has previously exercised its CRIPA authority to investigate jurisdictions for issues similar to those presented in this case, such as access to adequate medical and mental health care and protection from harm for lesbian, gay, bisexual, transgender, and intersex prisoners.[3]

The United States also has a strong interest in protecting the rights of lesbian, gay, bisexual, and transgender individuals more broadly. Accordingly, the United States is active in litigation involving employment discrimination against transgender individuals under Title VII of the Civil Rights Act; discrimination and harassment of transgender students in schools under

[3] *See, e.g.*, Letter from Loretta King, Acting Assistant Att'y Gen. of the United States, U.S. Dep't of Justice, to Marlin N. Gusman, Sheriff, Orleans Parish Sheriff's Office (Sept. 11, 2009), *available at* http://www.justice.gov/crt/about/spl/documents/parish_findlet.pdf (finding that the Orleans Parish Sheriff's Office failed to provide Orleans Parish Prison detainees with constitutional levels of medical and mental health care); Letter from Thomas Perez, Assistant Att'y Gen. of the United States, U.S. Dep't of Justice, to Carlos A. Gimenez, Mayor, Miami-Dade Cnty. (Aug. 24, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/Miami-Dade_findlet_8-24-11.pdf (finding that the Miami-Dade County Jail failed to provide detainees with appropriate medical and mental health care, including screening, chronic care, and access to services for acute needs); Letter from Jocelyn Samuels, Acting Assistant Att'y Gen. of the United States, U.S. Dep't of Justice, to Robert Bentley, Governor, State of Ala. (Jan. 17, 2014), *available at* http://www.justice.gov/crt/about/spl/documents/tutwiler_findings_1-17-14.pdf (raising concerns regarding the treatment of lesbian, gay, bisexual, transgender, and intersex prisoners at Julia Tutwiler Prison for Women).

Title IX of the Education Amendments of 1972; and discrimination against transgender individuals in violation of the Fair Housing Act.[4]

FACTUAL BACKGROUND

Ms. Diamond's Complaint (ECF No. 3) and the supporting materials for her Motion for Preliminary Injunction (ECF No. 2) detail the factual background concerning Ms. Diamond's medical history and treatment while incarcerated in the GDOC. Rather than repeat these allegations in full, the United States summarizes the general factual allegations upon which this Statement of Interest relies.[5]

Ms. Diamond suffers from gender dysphoria. Gender dysphoria is listed in the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-V) as a major mental illness and characterized by a marked incongruence between one's experienced/expressed gender and assigned gender at birth. Gender dysphoria involves a persistent physical and emotional discomfort with one's biological sex. Left untreated, that discomfort can become so painful that individuals consider or attempt suicide, self-castration, or self-mutilation. The accepted course of treatment to alleviate these symptoms often involves allowing the individual to live as his or her chosen gender, through one or more of the following treatments: changes in gender expression

[4] *See, e.g.*, Statement of Interest of the United States, *Jamal v. SAKS & Co*., No. 4:14-CV-2782 (S.D. Tex. 2015), ECF No. 1, *available at* http://www.justice.gov/crt/about/emp/documents/jamalsoi.pdff (Title VII's prohibition of discrimination on the basis of sex proscribes discrimination because of transgender status); Statement of Interest of the United States, *Tooley v. Van Buren Pub. Sch., et al.*, No. 2:14-CV-13466 (E.D. Mich. 2015), ECF No. 64-1, *available at* http://www.justice.gov/crt/about/edu/documents/tooleysoi.pdf (discrimination based on transgender status constitutes discrimination based on sex for purposes of Title IX and Equal Protection Clause of the Fourteenth Amendment, regardless of whether there is evidence of sex stereotyping); *see also* Mediated Settlement Order, *United States v. Toone*, No. 6:13-CV-744 (E.D. Tex. 2014), ECF No. 45, *available at* http://www.justice.gov/crt/about/hce/documents/toonesettle.pdf (settling action brought by United States against owner of a trailer park in Texas for discrimination against renter based on transgender status in violation of the Fair Housing Act).

[5] As noted above, the United States does not take a position on the accuracy of the facts asserted in Ms. Diamond's Complaint and Motion for Preliminary Injunction. The United States assumes those facts to be true for the purposes of this Statement of Interest.

and role; dressing, grooming, and otherwise outwardly presenting in a manner consistent with one's gender identity; hormone therapy; and, in some cases, surgery to change primary and/or secondary sex characteristics.[6]

Ms. Diamond states that she was first diagnosed with gender dysphoria when she was a teenager, nearly twenty years ago.[7] Ms. Diamond also states that she lived as a female in the community prior to incarceration, and took feminizing hormones for seventeen years, which caused her to develop female secondary sex characteristics such as breasts and soft skin.[8] When GDOC processed Ms. Diamond through intake, she presented as female; identified as transgender; and discussed her medical history, including her diagnosis of gender dysphoria and hormone therapy.[9] However, for reasons not explained in the current pleadings, GDOC did not refer Ms. Diamond for additional evaluation or treatment. Instead, GDOC terminated Ms. Diamond's hormone therapy and confiscated her female clothing and undergarments before placing her in a male facility.[10] This had a profound physical and emotional impact on Ms.

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[6] Compl. ¶¶ 28-31 (discussing the World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 9-10 (7th ed. 2011), *available at* http://admin.associationsonline.com/uploaded_files/140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf).

[7] Compl. ¶¶ 38-39.

[8] Compl. ¶ 40.

[9] Compl. ¶ 44.

[10] *See* Compl. ¶¶ 45, 64. Ms. Diamond's complaint and recently-filed Emergency Motion for a Temporary Restraining Order and Preliminary Injunction (ECF No. 25) raise additional allegations concerning her placement in a maximum security male facility and GDOC's failure to protect her from sexual abuse and harassment. Because those issues were not covered in Ms. Diamond's Motion for Preliminary Injunction (ECF No. 1), the United States does not address them in this Statement of Interest. The United States may choose to weigh in on the constitutionality of GDOC's conduct on those issues at a later date. The United States has previously investigated jurisdictions pursuant to CRIPA for failure to protect prisoners from sexual abuse. *See generally* Letter from Jocelyn Samuels, Acting Assistant Att'y Gen. of the United States, U.S. Dep't of Justice, to Robert Bentley, Governor, State of Ala. (Jan. 17, 2014), *available at* http://www.justice.gov/crt/about/spl/documents/tutwiler_findings_1-17-14.pdf (concluding that administrators at the Julia Tutwiler Prison for Women failed to keep women prisoners safe from harm due to sexual abuse and harassment from correctional staff); Letter from Thomas E. Perez, Assistant Att'y Gen. of the United States, U.S. Dep't of Justice, to Samuel Brownback, Governor, State of Kan. (Sept. 6, 2012), *available at*

Diamond. Terminating her hormone therapy created painful side effects, including chest pains, heart palpitations, clinically significant depression, and increased thoughts of suicide, hopelessness and anxiety.[11] According to Ms. Diamond, her gender dysphoria is so severe that she has attempted suicide and self-castration on multiple occasions during her incarceration.[12]

Multiple GDOC clinicians later confirmed Ms. Diamond's gender dysphoria. Those GDOC clinicians recommended treatment, including hormone therapy and allowing Ms. Diamond to outwardly express her female gender identity through dress and adherence to female grooming standards.[13] GDOC never provided this recommended treatment.[14] When Ms. Diamond requested treatment consistent with her clinician's recommendations, GDOC officials told her that such treatment was either not available or prohibited by GDOC's freeze-frame policy.[15] That policy prohibits initiating new treatments for gender dysphoria for prisoners who either did not receive such treatments in the community, or who were not identified as transgender and referred for such treatment during the intake process.[16] Ms. Diamond filed this suit to combat this policy and obtain the treatment recommended by her GDOC clinicians.

DISCUSSION

Ms. Diamond claims that the GDOC violated her constitutional right to be free from cruel and unusual punishment under the Eighth Amendment by failing to provide her with adequate treatment for her gender dysphoria. Ms. Diamond is challenging both the individual treatment

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http://www.justice.gov/crt/about/spl/documents/topeka_findings_9-6-12.pdf (concluding that administrators at the Topeka Correctional Facility fail to protect women prisoners from harm due to sexual abuse and misconduct).

[11] *See generally* Compl. ¶¶ 5, 96, 121, 138-39.

[12] *See generally* Compl. ¶¶ 38-39, 44, 73-76, 90, 96-97, 104, 116-18.

[13] *See* Compl. ¶¶ 75, 96.

[14] *See* Compl. ¶¶ 75-76, 95-97.

[15] *See* Compl. ¶¶ 74-76, 79-91, 95-97, 107-10, 117-18.

[16] Compl. ¶¶ 48-50.

she received, and the constitutionality of the GDOC policy that she believes prevented her treatment. Accordingly, Ms. Diamond is currently seeking two preliminary injunctions: one directing Defendants to provide her with medically necessary treatment for her gender dysphoria, including hormone therapy and allowing her to express her female gender through grooming, pronouns, and dress, and the second enjoining Defendants from enforcing their freeze-frame policy, which Ms. Diamond asserts contributes to the on-going violation of her Eighth Amendment Rights.[17]

The Court should grant Ms. Diamond's request for a preliminary injunction if it finds that (1) she has a strong likelihood of success on the merits of her underlying claims; (2) she will suffer irreparable injury unless the injunction issues; (3) the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. *Am.'s Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1329 (11th Cir. 2014). Although the United States believes that the facts alleged in Ms. Diamond's Motion, if true, would be sufficient to satisfy each of the four elements,[18] it limits its Statement of Interest to the first prong – whether Ms. Diamond has a substantial likelihood of success on the merits of her two Eighth Amendment claims. The United States asserts that, under the facts alleged, Ms. Diamond will be successful in showing that she has thus far received a constitutionally inadequate level of medical care for her gender dysphoria, and that the policy preventing her from receiving more appropriate and individualized treatment – the "freeze-frame" policy – is facially unconstitutional.

[17] Pl.'s Mot. for Prelim. Inj. 1, ECF No. 1.

[18] In particular, the facts as alleged indicate that Ms. Diamond will experience irreparable harm if a preliminary injunction is not granted. Ms. Diamond continues to experience significant distress as a result of being forced to live as a man, and medical personnel familiar with gender dysphoria who evaluated Ms. Diamond indicated that she is at an "extremely high risk of continued decompensation and suicide." Mem. in Supp. of Prelim. Inj. 18, ECF No. 2.

I. GDOC Violates the Eighth Amendment by Failing to Provide Ms. Diamond with Adequate Medical Treatment for her Serious Medical Needs

Ms. Diamond must meet two elements to prevail on an Eighth Amendment claim for inadequate medical care. First, Ms. Diamond must show that she has an objectively serious medical need. *See Estelle*, 429 U.S. at 104. Second, Ms. Diamond must show that prison officials were "deliberately indifferent" to that need, meaning they knew there was a substantial risk of harm to Ms. Diamond if the need was not met, yet they disregarded that risk by conduct that amounted to more than mere negligence. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1970); *Kothmann*, 558 F. App'x at 910; *Lancaster v. Monroe Cnty., Ala.*, 116 F.3d 1419, 1425 (11th Cir. 1997).

a. *Ms. Diamond's gender dysphoria and risk of self-harm constitute serious medical needs under the Eighth Amendment*

The first element is easily met in this case. An "objectively serious medical need" is considered "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004) (quoting *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003)). Courts have routinely held that gender dysphoria is a serious medical need under the Eighth Amendment. *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011); *Allard v. Gomez*, 9 F. App'x 793, 794 (9th Cir. 2001) (citing *Meriwether v. Faulkner*, 821 F.2d 408, 412-13 (7th Cir. 1987)); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 243 (D. Mass. 2012); *Wolfe v. Horn*, 130 F. Supp. 2d 648, 652 (E.D. Pa. 2001).[19] Here, GDOC clinicians diagnosed Ms. Diamond with gender dysphoria

[19] These courts' conclusions are consistent with the views of the preeminent medical and professional associations that gender dysphoria is a serious medical condition for which treatment is necessary and effective. *See, e.g.*,

during her first few years of incarceration. Those with training on gender dysphoria recommended hormone therapy and allowing Ms. Diamond to express her female gender identity. Ms. Diamond's gender dysphoria therefore constitutes a serious medical need deserving of adequate treatment under the Eighth Amendment.

Further, Ms. Diamond has a documented risk of engaging in self-harm, which may constitute a serious medical need separate from the underlying gender dysphoria deserving of treatment under the Eighth Amendment. *See De'lonta v. Angelone (De'lonta I)*, 330 F.3d 630, 634 (4th Cir. 2003) ("De'lonta's need for protection against continued self-mutilation constitutes a serious medical need to which prison officials may not be deliberately indifferent.") (citing *Lee v. Downs*, 641 F.2d 1117, 1121 (4th Cir. 1981) (explaining that "prison officials have a duty to protect prisoners from self-destruction or self-injury")). Ms. Diamond's extensive history of attempting suicide and self-castration demonstrate that she has a second serious medical need, distinct from her diagnosis of gender dysphoria – the need to be kept safe from self-harm.

b. *GDOC knew of Ms. Diamond's serious medical needs and the risk they posed to her health and safety, yet unconstitutionally disregarded that risk*

The second element of an Eighth Amendment claim is also clear in this case. Ms. Diamond has shown that GDOC officials' conduct amounts to deliberate indifference, because they knew of and disregarded her serious medical needs that created a risk to Ms. Diamond's health and safety. Under the facts as alleged, GDOC officials knew of Ms. Diamond's gender

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American Medical Association, *Resolution: Removing Financial Barriers to Care for Transgender Patients* (2008), *available at* http://www.tgender.net/taw/ama_resolutions.pdf; American Psychological Association, *Transgender, Gender Identity & Gender Expression Non-Discrimination* (2008), *available at* http://www.apa.org/about/policy/transgender.pdf; World Professional Association of Transgender Health, *WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage for Transgender and Transsexual People Worldwide* (2008), *available at* http://www.wpath.org/uploaded_files/140/files/Med%20Nec%20on%202008%20Letterhead.pdf.

dysphoria, past suicide attempts, self-mutilation, and attempts at self-castration. The issue then becomes whether GDOC officials impermissibly disregarded Ms. Diamond's medical needs and the risks they posed.

Under any rubric, GDOC did not provide Ms. Diamond with adequate care. Although prisoners do not have the right to the medical treatment of their choice, the important consideration under the Eighth Amendment is not whether *any* care was provided, but rather whether the level of care provided was constitutionally adequate. *See Estelle*, 429 U.S. at 103-06; *Kothmann*, 558 F. App'x at 910; *De'lonta v. Johnson (De'lonta II)*, 708 F.3d 520, 526 (4th Cir. 2013) (holding that "just because [Defendants] have provided [Plaintiff] with *some* treatment consistent with the [WPATH Standards of Care], it does not follow that they have necessarily provided her with constitutionally adequate treatment.") (emphasis in original); *Edwards v. Snyder*, 478 F.3d 827, 831 (7th Cir. 2007) ("plaintiff's receipt of *some* medical care does not automatically defeat a claim of deliberate indifference"). Indifference to a serious medical need can occur in many forms, "whether . . . manifested by prison doctors in response to the prisoner's needs" or by officials "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once proscribed." *Estelle*, 429 U.S. at 105-06. "Delays, poor explanations, missteps, changes in position, and rigidities" which result in the delay or denial of adequate treatment may be sufficient to prove deliberate indifference. *Battista*, 645 F.3d at 455.

In assessing Ms. Diamond's Eighth Amendment claim, the Court should determine whether the current course of treatment is medically adequate, which may be informed by current professional standards of care. *Estelle*, 429 U.S. at 102 (courts should look to the

"evolving standards of decency that mark the progress of a maturing society."); *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987) (the Eighth Amendment requires medical care "at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards.") (*cited with approval in Fernandez v. United States*, 941 F.2d 1488, 1493-4 (11th Cir. 1991); *see also Kosilek v. Maloney*, 221 F. Supp. 2d 156, 180 (D. Mass. 2002); *Barrett v. Coplan*, 292 F. Supp. 2d 281, 285 (D.N.H. 2003) ("'Adequate medical care' requires treatment by qualified medical personnel who provide services that are of a quality acceptable when measured by prudent professional standards in the community, tailored to an inmate's particular medical needs, and that are based on medical considerations.").[20]

Two things are clear from the record in this case: one, the generally accepted standards for treatment of gender dysphoria require treatment decisions be individualized; and two, Ms. Diamond did not receive individualized care. As other courts have recognized, the World Professional Association for Transgender Health (WPATH) is "an association of medical, surgical and mental health professionals specializing in the understanding and treatment of [gender dysphoria]." *See, e.g., O'Donnabhain* v. *Comm'r*, 134 T.C. 34, 36 (2010). Since the 1970s, WPATH has published "Standards of Care," which set forth WPATH's recommendations

[20] The United States recognizes that in the corrections context additional considerations may weigh against implementing certain medical recommendations. However, officials must be able to articulate those considerations with specificity and substantiate that the recommended treatment would give rise to concerns that cannot otherwise be adequately addressed. General, amorphous security concerns cannot be grounds for refusing to provide medically recommended treatment. *See, e.g., Soneeya*, 851 F. Supp. 2d at 250 (finding deliberate indifference where DOC failed to engage in individualized inquiry into prisoner's medical needs and security implications of various treatments, and instead relied on blanket prohibitions and "amorphous security concerns" as grounds to refuse treatment). Specific security concerns must be balanced against the medical need. And, importantly, officials cannot deny treatment merely because it is expensive or controversial. *See Kosilek*, 221 F. Supp. 2d at 192; *Barrett*, 292 F. Supp. 2d at 286 ("[T]he Eighth Amendment does not permit necessary medical care to be denied to a prisoner because the care is expensive or because it might be controversial or unpopular.").

for the treatment of gender dysphoria and the research supporting those recommendations.[21] The Standards, which were most recently updated in 2011, make clear that a variety of therapeutic interventions may be appropriate, and that the necessary course of treatment must be determined on an individual basis.[22] Importantly, however, the Standards of Care recognize that the appropriate course of treatment should be decided after evaluation by a qualified medical professional who has specific knowledge of and training in the diagnosis and treatment of gender dysphoria.[23] Here, GDOC displayed deliberate indifference by ignoring its clinicians' individualized treatment recommendations for Ms. Diamond. GDOC clinicians with training on gender dysphoria reconfirmed Ms. Diamond's gender dysphoria diagnosis. Based on their individualized assessments and clinical training, these doctors recommended hormone therapy and permission to express female gender identity as the appropriate course of treatment for Ms. Diamond, given the severity of her symptoms and the recommendations contained in the Standards of Care. Yet, GDOC never provided any part of this treatment. Instead, GDOC officials told Ms. Diamond that GDOC does not provide treatment for gender dysphoria beyond antipsychotic medication and/or basic counseling, and that further treatment would be denied pursuant to GDOC policy. GDOC delayed referrals to appropriate health care providers, denied the care recommended by Ms. Diamond's treating clinicians, and otherwise refused to acknowledge Ms. Diamond's serious medical needs. These delays and failures to follow medical determinations amount to deliberate indifference. *Battista*, 645 F.3d at 455.

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[21] World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th ed. 2011), *available at* http://admin.associationsonline.com/uploaded_files/140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf.

[22] *Id.* at 8.

[23] *See generally id.* at 22-23.

Indeed, Ms. Diamond's assertion that she was on feminizing hormones in the community for seventeen years and that GDOC abruptly discontinued this treatment upon intake is especially troubling in the Eighth Amendment context. As noted by WPATH, grave consequences are associated with a sudden withdrawal of hormones, including self-castration and increased risk of suicide.[24] Ms Diamond's case was no exception. Abruptly terminating Ms. Diamond's medical treatment caused her condition to deteriorate and reversed the years of therapeutic benefits she experienced by taking hormones in the community. As recognized by one court, "taking measures which actually reverse the effects of years of healing medical treatment . . . is measurably worse" than merely failing to provide inmates with care that would improve their medical state, thereby "making the cruel and unusual determination much easier." *Phillips v. Mich. Dep't of Corr.*, 731 F. Supp. 792, 800 (W.D. Mich. 1990); *see also Wolfe*, 130 F. Supp. 2d at 653 ("abrupt termination of prescribed hormonal treatments by a prison official with no understanding of [Plaintiff's] condition, and failure to treat her severe withdrawal symptoms or after-effects, could constitute 'deliberate indifference'"); *Fields*, 653 F.3d at 554 ("When hormones are withdrawn from a patient who has been receiving hormone treatment, severe complications may arise. The dysphoria and associated psychological symptoms may resurface in more acute form."). Terminating Ms. Diamond's hormone therapy at intake caused her great suffering: she has lost breast mass and other female secondary sex characteristics, and continues to experience physical pain, muscle spasms, heart palpitations, vomiting, dizziness, hot flashes, and other symptoms of hormone withdrawal.[25]

[24] *Id.* at 68.
[25] Compl. ¶ 138.

Based on the facts alleged in the Complaint, GDOC did not provide Ms. Diamond with constitutionally adequate treatment for her gender dysphoria. Ignoring Ms. Diamond's need for such treatment and her history of self-harm and multiple suicide attempts, GDOC made no efforts to provide Ms. Diamond with anything beyond general counseling and antipsychotic medication – therapies that were well below the level of treatment that was medically indicated and recommended by the qualified GDOC medical personnel who evaluated Ms. Diamond. For these reasons, GDOC was and remains deliberately indifferent to Ms. Diamond's serious medical needs.

II. "Freeze-Frame" policies do not adequately address the individualized medical needs of inmates and therefore violate the Eighth Amendment

Ms. Diamond's Motion for Preliminary Injunction not only challenges her individual treatment – it also addresses the facial constitutionality of GDOC's policy regarding the treatment of all individuals with gender dysphoria in GDOC custody. Because GDOC's policy amounts to a blanket prohibition of certain treatments for certain inmates, without regard to an individual's medical needs or their progression over time, it does not pass constitutional muster, and must be struck down.

GDOC Standard Operating Procedure VH47-0006, "Management of Transsexuals," states that prisoners identified as transgender at intake should be referred for medical evaluation.[26] However, the policy also states that GDOC will only provide "maintenance" of a prisoner's "transgender status,"[27] meaning that GDOC will not begin new treatments or advance the level of care for transgender prisoners beyond that which they received in the community.

[26] GDOC Standard Operating Procedure VH47-0006, "Management of Transsexuals," Mem. in Supp. of Mot. Prelim. Inj. 2, Ex. 3, ECF No. 2-3.
[27] *Id.*

Under this policy, prisoners must be identified as transgender at intake and referred for further evaluation in order to receive *any* treatment, and the treatment they may receive is decidedly limited.[28] As a result, many prisoners – including those not identified at intake, or those whose gender dysphoria worsens during their incarceration – are denied the medical care necessary to protect their health and safety.

Such a policy cannot stand under the Eighth Amendment. Courts have continuously struck down similar policies that place a blanket prohibition on certain kinds of medical care. In *Fields v. Smith*, 653 F.3d 550, 557-58 (7th Cir. 2011), the Seventh Circuit considered a Wisconsin state statute that prohibited the Wisconsin Department of Corrections from providing hormone therapy or sexual reassignment surgery to prisoners. The district court found the statute to be facially unconstitutional because "[t]he statute applies irrespective of an inmate's serious medical need or the DOC's clinical judgment." *Id.* at 559 (*citing Fields v. Smith*, 712 F. Supp. 2d 830, 867 (E.D. Wisc. 2010)). In upholding the district court's determination, the Circuit noted that "[j]ust as the legislature cannot outlaw all effective cancer treatments for prison inmates, it cannot outlaw the only effective treatment for a serious condition like [gender dysphoria." *Id.* at 557. Other courts to consider similar blanket prohibitions on treatment for gender dysphoria have reached the same conclusions. *See, e.g., De'lonta I*, 330 F.3d at 635 (terminating hormone treatment based on blanket policy may amount to Eighth Amendment

[28] As Ms. Diamond points out, this is especially problematic if intake personnel are not trained on gender dysphoria. *See* Compl. ¶ 48. Under GDOC policy, intake personnel are the only line of defense for transgender prisoners in need of treatment for gender dysphoria. If intake personnel are untrained or unaware on the basic of this condition, prisoners in need of such treatment will not be referred and will subsequently be denied necessary care. For example, it is unclear why Ms. Diamond herself was not referred for evaluation for gender dysphoria after presenting as transgender at intake; presumably, Ms. Diamond should have been referred pursuant to GDOC policy given her self-identification as transgender, her medical history, and her use of hormones in the community. Yet, because she was not referred and properly diagnosed at the initial intake stage, Ms. Diamond continued to be denied treatment pursuant to GDOC policy throughout her incarceration.

violation); *Allard*, 9 F. App'x at 795 (denial of hormone therapy based on blanket rule rather than individualized medical evaluation constitutes deliberate indifference).

Blanket prohibitions on all gender dysphoria treatment are identical to freeze-frame policies for the purposes of the Eighth Amendment; both types of policies strike an arbitrary line that preclude individualized medical evaluations and proscribe physician's ability to provide appropriate care. *Soneeya*, 851 F. Supp. 2d at 243-44; *Kosilek*, 221 F. Supp. 2d at 193 (presumptive freeze-frame policies are constitutionally permissible *only* if exceptions are made when necessary, as determined by sound medical judgment and adherence to prudent professional standards); *Barrett*, 292 F. Supp. at 286 ("A blanket policy that prohibits a prison's medical staff from making a medical determination of an individual inmate's medical needs and prescribing and providing adequate care to treat those needs violates the Eighth Amendment.").

For example, in *Brooks v. Berg*, a district court considered the constitutionality of the New York Department of Correctional Services' (NYDOCS) freeze-frame policy. *Brooks v. Berg*, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003) *vacated in part on other grounds*, 289 F. Supp. 2d 286 (N.D.N.Y. 2003). Under that policy, NYDOCS provided treatment for gender dysphoria only to those prisoners who could prove they received such treatment prior to incarceration. *Id.* at 305. There was no dispute that the plaintiff in *Brooks* was denied treatment for her GID; rather, defendants claimed qualified immunity on the grounds that they were following NYDOCS policy. *Id.* at 312. The district court rejected the defendants' immunity argument and held that NYDOCS' freeze-frame policy was facially unconstitutional. *Id.* In reaching this conclusion, the district court noted that the Eighth Amendment requires adequate treatment for *all* serious medical needs, and that "[t]here is no exception to this rule for serious medical needs

that are first diagnosed in prison." *Id.* This Court should reach a similar conclusion in the instant case.

Recognizing the need to treat prisoners according to their needs, rather than blanket rigid policies, the Federal Bureau of Prisons recently adopted a policy requiring an individualized assessment of the health needs of transgender prisoners.[29] The current policy, Federal Bureau of Prisons Program Statement 6031.04 ("Patient Care"), provides that prisoners in Bureau custody with a possible diagnosis of gender dysphoria "will receive a current individualized assessment and evaluation" and "[t]reatment options will not be precluded solely due to level of services received, or lack of services, prior to incarceration."[30]

For the above stated reasons, freeze-frame policies are facially unconstitutional. Ms. Diamond did not receive the treatment she needed because GDOC administrators purportedly followed GDOC's unconstitutional freeze-frame policy to determine the level of care to provide to Ms. Diamond. The United States therefore urges the Court to find that Ms. Diamond will have a strong likelihood of success on the merits of her facial challenge to GDOC's current policy governing the treatment of gender dysphoria.

CONCLUSION

Failure to provide adequate treatment for transgender inmates with gender dysphoria constitutes cruel and unusual punishment under the Eighth Amendment. Freeze-frame policies

[29] This policy came about as a result of litigation similar to the instant case. In 2009, Vanessa Adams, a Bureau prisoner, sued the Bureau for the Bureau's failure to treat her gender dysphoria. At the time, the Bureau followed a "freeze-frame" policy, similar to GDOC's policy, which allowed prisoners with gender dysphoria to receive only the level of treatment they received in the community prior to incarceration. In 2011, Ms. Adams and the Bureau settled Ms. Adams claims – the Bureau reformed its policy and agreed to provide Ms. Adams with medically necessary treatment for her gender dysphoria. *See generally Adams v. Federal Bureau of Prisons*, No. 09-CV-10272 (D. Mass.).

[30] U.S. Dep't of Justice, Fed. Bureau of Prisons, Program Statement 6031.04 ("Patient Care") at 42, June 3, 2014, *available at* http://www.bop.gov/policy/progstat/6031_004.pdf.

and other policies that apply blanket prohibitions to such treatment are facially unconstitutional because they fail to provide individualized assessment and treatment of a serious medical need. Accordingly, the United States urges the Court to (1) find that Ms. Diamond has a substantial likelihood of success on the merits of her claims, (2) declare that GDOC's freeze-frame policy is facially unconstitutional under the Eighth Amendment, and (3) issue appropriate injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2015, a copy of the foregoing was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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KIMBERLY HURRELL-HARRING, *et al.*, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs

-against-

THE STATE OF NEW YORK, *et al.*,

Defendants.

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INDEX No. 8866-07
(Connolly, J.)

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STATEMENT OF INTEREST OF THE UNITED STATES

As the Supreme Court recognized in *Powell v. Alabama*, the constitutional right to counsel is more than a formality: It would be "vain" to give the defendant a lawyer "without giving the latter any opportunity to acquaint himself with the facts or law of the case." 287 U.S. 45, 59 (1932) (*quoting Com. v. O'Keefe*, 148 A. 73, 74 (Pa. 1929)). Without taking a stance on the merits of the case, the United States files this Statement of Interest to assist the Court in assessing whether the State of New York has "constructively" denied counsel to indigent defendants during criminal proceedings. Plaintiffs allege that their nominal representation amounted to no representation at all, such that the State failed to meet its *foundational* obligations to provide legal representation to indigent defendants. *Gideon v. Wainwright*, 372 U.S. 335 (1963). It is the position of the United States that constructive denial of counsel may occur in two, often linked circumstances:

(1) When, on a systemic basis, lawyers for indigent defendants operate under substantial structural limitations, such as a severe lack of resources, unreasonably high workloads, or critical understaffing of public defender offices; and/or

(2) When the traditional markers of representation—such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecution's case—are absent or significantly compromised on a system-wide basis.

Under either or both of these circumstances, a court may find that the appointment of counsel is superficial and, in effect, a form of non-representation that violates the Sixth Amendment guarantee of counsel.

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INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a state court. The United States has an interest in ensuring that all jurisdictions—federal, state, and local—are fulfilling their obligation under the Constitution to provide effective assistance of counsel to individuals facing criminal charges who cannot afford an attorney, as required by *Gideon*. The United States can enforce the right to counsel in juvenile delinquency proceedings pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (Section 14141). The United States is currently enforcing Section 14141's juvenile justice provision through a comprehensive settlement with Shelby County, Tennessee.[1] An essential component of the agreement, which is subject to independent monitoring, is the establishment of a juvenile public defender system with "reasonable workloads" and "sufficient resources to provide independent, ethical, and zealous representation to Children in delinquency matters." *Id.* at 15.

As the Attorney General stated, "It's time to reclaim *Gideon*'s petition—and resolve to confront the obstacles facing indigent defense providers."[2] In March 2010, the Attorney General launched the Access to Justice Initiative to address the crisis in indigent defense services, and the Initiative provides a centralized vehicle for carrying out the Department of Justice's (Department) commitment to improving indigent defense.[3] The Department has also sought to

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[1] Mem. of Agreement Regarding the Juvenile Court of Memphis and Shelby Counties, Tennessee (2012), *available at* http://www.justice.gov/crt/about/spl/findsettle.php.

[2] Attorney General Eric Holder Speaks at the Justice Department's 50th Anniversary Celebration of the U.S. Supreme Court Decision in *Gideon v. Wainwright* (March 15, 2013), *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-1303151.html.

[3] The Initiative works with federal agencies and state, local, and tribal justice system stakeholders to increase access to counsel, highlight best practices, and improve the justice delivery systems that serve people who are unable to afford lawyers. More information is available at http://www.justice.gov/atj/.

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address this crisis through a number of grant programs, as well as through support for state policy reform, and has identified indigent defense as a priority area for Byrne-JAG funds, the leading source of federal justice funding to state and local jurisdictions.[4] In 2013, the Department's Office of Justice Programs announced a collection of grants totaling $6.7 million to improve legal defense service for the poor.[5] These grants were preceded by a 2012 $1.2 million grant program, *Answering Gideon's Call: Strengthening Indigent Defense Through Implementing the ABA Ten Principles of a Public Defense Delivery System*, administered by the Bureau of Justice Assistance.[6]

In addition, it is always in the interest of the United States to safeguard and improve the administration of criminal justice consistent with the prosecutor's professional duty as outlined in the American Bar Association (ABA) Criminal Justice Standards: "It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action." ABA CRIMINAL JUSTICE STANDARDS, STANDARD 3-1.2(D), PROSECUTION AND DEFENSE FUNCTION (1993).[7]

Thus, in light of the United States' interest in ensuring that any constitutional deficiencies the Court may find are adequately remedied, the United States files this Statement of Interest to address the factors considered in a constructive denial of counsel claim.

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[4] *See* U.S. Gov't Accountability Office, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support this Purpose* 11-14 (May 2012), *available at* http://www.justice.gov/atj/idp/.

[5] As noted by Associate Attorney General Tony West in the announcement, "These awards, in conjunction with other efforts we're making to strengthen indigent defense, will fortify our public defender system and help us to meet our constitutional and moral obligation to administer a justice system that matches its demands for accountability with a commitment to fair, due process for poor defendants." Attorney General Holder Announces $6.7 Million to Improve Legal Defense Services for the Poor (Oct. 30, 2013), *available at* http://www.justice.gov/opa/pr/2013/October/13-ag-1156.html.

[6] Grants have been awarded to agencies in Texas, Delaware, Massachusetts, Mississippi, Tennessee, Utah and Michigan.

[7] *Available at* http://www.americanbar.org/groups/criminal_justice/standards.html.

BACKGROUND

Fifty years ago, the Supreme Court held that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon*, 372 U.S. at 344. Four years later, the Supreme Court held that the right to counsel extended to juveniles in delinquency proceedings. *In re Gault*, 387 U.S. 1, 36 (1967). And yet, as the Attorney General recently noted, "America's indigent defense systems continue to exist in a state of crisis, and the promise of *Gideon* is not being met."[8] Recently, the federal district court in *Wilbur v. City of Mount Vernon* echoed this concern, stating, "The notes of freedom and liberty that emerged from Gideon's trumpet a half a century ago cannot survive if that trumpet is muted and dented by harsh fiscal measures that reduce the promise to a hollow shell of a hallowed right." 989 F.Supp.2d 1122, 1137 (W.D. Wash. 2013).

Our national struggle to meet the obligations recognized in *Gideon* and *Gault* is well documented.[9] *See*, *e.g.*, Am. Bar Ass'n, Standing Comm. on Legal Aid and Indigent Defendants Report, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004); National Juvenile Defender Center (NJDC) State Assessments[10] (outlining obstacles to provision of juvenile defense services in numerous states). Despite long recognition that "the proper performance of the defense function is . . . as vital to the health of the system as the performance of the prosecuting and adjudicatory functions," Attorney General's Committee on Poverty and

[8] Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html.
[9] In March 2013, the Yale Law Journal held a symposium on the challenges of meeting *Gideon*'s promise and published the discussions. *See* 122 Yale L.J. 8 (June 2013).
[10] Assessments available at http://www.njdc.info/assessments.php.

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the Administration of Federal Criminal Justice, *Final Report* 11 (1963), public defense agencies nationwide are continually funded at dramatically lower levels than prosecutorial agencies.[11]

Due to this lack of resources, states and localities across the country face a crisis in indigent defense.[12] In many states, remedying the crisis in indigent defense has required court intervention. *See e.g.*, *Pub. Defender v. State,* 115 So. 3d 261, 278-79 (Fla. 2013) (holding that courts must intervene when public defenders' excessive caseloads and lack of funding result in "nonrepresentation and therefore a denial of the actual assistance of counsel guaranteed by *Gideon* and the Sixth Amendment"); *Missouri Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 607 (Mo. 2012) (ruling that the trial court erred when it appointed counsel to indigent defendants when, due to excessive caseloads and insufficient funding, that counsel could not provide adequate assistance, noting that "a judge may not appoint counsel when the judge is aware that, for whatever reason, counsel is unable to provide effective representation to a defendant"); *Duncan v. State*, 832 N.W.2d 761, 771 (Mich. Ct. App. 2012) (holding that, absent court intervention, "indigent persons who are accused of crimes in Michigan will continue to be subject to inadequate legal representation without remedy unless the representation adversely affects the outcome"); *State v. Citizen*, 898 So.2d 325, 338-39 (La. 2005) (holding that courts are obliged to halt prosecutions if adequate funding is not available to lawyers representing indigent defendants).

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[11] *Compare* Steven W. Perry & Duren Banks, U.S. Bureau of Justice Statistics, *Prosecutors in State Courts, 2007 Statistical Table*s 1 (2012) (noting that prosecution offices nationwide receive a budget of approximately $5.8 billion), *with* Lynn Langton & Donald J. Farole, Jr., U.S. Bureau of Justice Statistics, *Public Defender Offices, 2007 Statistical Tables* 1(2010) (noting that public defender offices nationwide had a budget of approximately $2.3 billion). *See also* Nat'l Right to Counsel Comm., *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* 61-64 (2009) (collecting examples of funding disparities).

[12] John P. Gross, *Gideon at 50: A Three-Part Examination of Indigent Defense in America*, Nat'l Ass'n of Criminal Def. Lawyers (2013) (describing astonishingly low rates of compensation for assigned counsel across the nation); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. Rev. L. & Soc. Change 427 (2009) (describing crises nationwide).

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The United States is taking an active role to provide expertise on this pressing national issue. Last year, the United States filed a Statement of Interest in *Wilbur v. City of Mount Vernon*, a case in which indigent defendants challenged the constitutional adequacy of the public defense systems provided by the cities of Mount Vernon and Burlington in the Western District of Washington.[13] As in this case, the United States took no position on the merits of the plaintiffs' claims in *Wilbur*, but instead recommended to the court that, if it found for the plaintiffs, the court should ensure that counsel for indigent defendants have realistic workloads, sufficient resources, and are carrying out the hallmarks of minimally effective representation, "such as visiting clients, conducting investigations, performing legal research, and pursuing discovery." Ex. 1 at 5-10. The court in *Wilbur* ultimately ruled for the plaintiffs, finding "that indigent criminal defendants in Mount Vernon and Burlington are systematically deprived of the assistance of counsel at critical stages of the prosecution and that municipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused that deprivation." *Wilbur*, 989 F.Supp.2d at 1124. To remedy this systematic deprivation of counsel, the court ordered increased resources for indigent defense services, controls to be established for defenders' workloads, and monitoring of defenders' actual representation to ensure that they carry out the traditional markers of representation. *Id.* at 1134-37.

DISCUSSION

In this matter, Plaintiffs allege that indigent defendants within five New York counties have been constructively denied counsel in their criminal proceedings. That is, as a result of inadequate funding, indigent defendants face systemic risks of constructive denial of counsel

[13] Attached as Exhibit 1.

including: "the system-wide failure to investigate clients' charges and defenses; the complete failure to use expert witnesses to test the prosecution's case and support possible defenses; complete breakdowns in attorney-client communication; and a lack of any meaningful advocacy on behalf of clients." Plaintiffs' Mem. of Law in Opposition to the State Defendant's Motion for Summary Judgment at 41. An analysis of *Gideon* cases informs the United States' position that constructive denial of counsel may occur when: (1) on a systemic basis, counsel for indigent defendants face severe structural limitations, such as a lack of resources, high workloads, and understaffing of public defender offices; ***and/or*** (2) indigent defenders are unable or are significantly compromised in their ability to provide the traditional markers of representation for their clients, such as timely and confidential consultation, appropriate investigation, and meaningful adversarial testing of the prosecution's case. *Wilbur,* 989 F.Supp.2d 1122; *Pub. Defender v. State,* 115 So. 3d 261; *Missouri Pub. Defender Comm'n*, 370 S.W.3d 592; *Duncan*, 832 N.W.2d 761; *State v. Young*, 172 P.3d 138 (N.M. 2007); *Citizen*, 898 So.2d 325; *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004); *New York Cnty. Lawyers' Ass'n v. State*, 196 Misc. 2d. 761 (N.Y. Sup. Ct. 2003); *State v. Peart*, 621 So.2d 780, 789 (La. 1993).

Constructive denial may occur even in public defender systems that are not systematically underfunded if the attorneys providing defender services are unable to fulfill their basic obligations to their clients. The Supreme Court has recognized that, in some circumstances, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."

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United States v. Cronic, 466 U.S. 648, 659-60 (1984). This may occur when, for example, the defense attorney is not provided sufficient time to prepare. *Powell*, 287 U.S. at 53-58. Thus, whether there are severe structural limitations, the absence of traditional markers of representation, or both, the appointment of counsel is superficial and, in effect, a form of non-representation that may violate the guarantees of the Sixth Amendment.[14]

I. The Court May Consider Structural Limitations and Defenders' Failure to Carry Out Traditional Markers of Representation in its Assessment of Plaintiffs' Claim of Constructive Denial of Counsel.

It is a core guarantee of the Sixth Amendment that every criminal defendant, regardless of economic status, has the right to counsel when facing incarceration. *Gideon*, 372 U.S. at 340-44 (1963) (holding that the right to counsel is "fundamental and essential to a fair trial"). This right is so fundamental to the operation of the criminal justice system that its diminishment erodes the principles of liberty and justice that underpin all of our civil rights in criminal proceedings. *Gideon,* 372 U.S. at 340-341, 344; *Powell,* 287 U.S. at 67-69 ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel . . . . [A Defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."); *see also Alabama v. Shelton*, 535 U.S. 654 (2002).

[14] If the Plaintiffs prevail, the court may appoint a monitor as part of its authority to grant injunctive relief. Monitors, or their equivalent, have been utilized in similar cases. In *Wilbur*, pursuant to an order for injunctive relief, the court required the hiring of a "Public Defense Supervisor" to supervise the work of the public defenders. The supervision and monitoring includes extensive file review, caseload assessments, data collection, and reports to the court to ensure there is "actual" and appropriate representation for indigent criminal defendants in the cities of Mount Vernon and Burlington. *See Wilbur*, No. C11-1100RSL at 19. Similarly, in Grant County, Washington, an independent monitor was essential to implementing the court's injunction in a right-to-counsel case. *Best v. Grant Cnty.*, No. 04-2-00189-0 (Kittitas Cty. Sup. Ct. Dec. 21, 2004).

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As the New York Court of Appeals held in this matter, claims of systemic constructive denial of counsel are reviewed under the principles enumerated in *Gideon* and the Sixth Amendment, not the *Strickland*[15] ineffective assistance standard which provides only retrospective, individual relief. *Hurrell-Harring v. State*, 930 N.E.2d 217, 224 (N.Y. 2010) (holding that these "allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*."); *see also Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) (holding that the Sixth Amendment protects rights that do not affect the outcome of a trial, and deficiencies that do not meet the "ineffectiveness" standard may still violate a defendant's rights under the Sixth Amendment); *Missouri Pub. Defenders Comm'n,* 370 S.W.3d at 607 (holding Sixth Amendment right to counsel requires more than just a "pro forma" appointment whereby the defendant has counsel in name only); *Powell*, 287 U.S. at 58-61 (holding that counsel's "appearance was rather pro forma than zealous and active [and] defendants were not accorded the right of counsel in any substantial sense"). Courts have consistently defined "constructive" denial of counsel as a situation where an individual has an attorney who is *pro forma* or "in name only."

A. Considering the Role of Structural Limitations

The provision of defense services is a multifaceted and complicated task. To guide the defense function, the ABA and NJDC have promulgated national standards to ensure that defenders are able to establish meaningful attorney-client relationships and provide the constitutionally required services of counsel. *See* ABA, STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION; Am. Bar Ass'n, Standing Comm. on Legal Aid and Indigent Defendants, *ABA Eight Guidelines of Public Defense Related to Excessive Workloads*

[15] *Strickland v. Washington*, 466 U.S. 668 (1984).

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(2009); Am. Bar Ass'n, Standing Comm. on Legal Aid and Indigent Defendants, *ABA Ten Principles of a Public Defense Delivery System* (2002); NAT'L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS (2012). These standards emphasize the structural supports required to ensure that defenders can perform their duties. They include an independent defense function, early appointment, adequate staffing, funding for necessary services (e.g., investigation, retention of experts, and administrative staff), workload controls, training, legal research resources, and oversight connected to practice standards.

In assessing *Gideon* claims for systemic indigent defense failures, courts have considered the absence of these structural supports as reflected in insufficient funding, agency-wide lack of training and performance standards, understaffing, excessive workloads, delayed appointments, lack of independence for the defense function from the judicial or political function, and insufficient agency-wide expert resources.[16] In *Wilbur,* for example, the court noted the structural limitations—insufficient staffing, excessive caseloads, and almost non-existent supervision—that resulted in a system "broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned." *Wilbur*, 989 F.Supp.2d at 1127. The court continued,

> The Court does not presume to establish fixed numerical standards or a checklist by which the constitutional adequacy of counsel's representation can be judged. The experts, public defenders, and prosecutors who testified at trial made clear that there are myriad factors that must be considered when determining whether a system of public defense provides indigent criminal

[16] We note that, in alleging that there has been a constructive denial of counsel based on systemic indigent defense failures, plaintiffs are not seeking to reverse criminal convictions but are seeking only prospective injunctive relief. The Court may enter prospective relief upon a finding of a substantial risk of a constitutional violation. *See Brown v. Plata*, 131 S. Ct. 1910, 1941 (2011). In the context of a challenge to a criminal conviction, the defendant must also show that the denial of counsel caused actual prejudice to secure a reversal. *Strickland*, 466 U.S. 668. *Cronic,* 466 U.S. 648, creates a narrow exception to the need to show prejudice where the denial of counsel contaminates the entire criminal proceeding.

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> defendants the assistance required by the Sixth Amendment. Factors such as the mix and complexity of cases, counsel's experience, and the prosecutorial and judicial resources available were mentioned throughout trial.

Wilbur, 989 F.Supp.2d at 1126.

Similarly, the court in *Pub. Defender v. State,* 115 So. 3d at 279, held that the public defender's office could withdraw from representation of indigent defendants because of structural limitations. Insufficient funds and the resultant understaffing created a situation where indigent defendants did not receive assistance of counsel as required by the Sixth Amendment. Courts have also held in indigent defense funding cases that budget exigencies cannot serve as an excuse for the oppressive and abusive extension of attorneys' professional responsibilities, and courts have the power to take corrective measures to ensure that indigent defendants' constitutional and statutory rights are protected. *See Citizen*, 898 So.2d at 336. Similarly, in *Lavallee*, 812 N.E.2d at 904, the court held that proactive steps may be necessary when an indigent defense compensation scheme "raises serious concerns about whether [the defendants] will ultimately receive the effective assistance of trial counsel." *See also New York Cnty. Lawyers' Ass'n*, 196 Misc. 2d. 761 (holding statutory rates for assigned counsel unconstitutional as they resulted in denial of counsel and excessive caseloads, among other issues); *Young,* 172 P.3d 138 (holding that inadequate compensation of defense attorneys deprived capital defendants of counsel). In all of these cases, the courts granted relief based on evidence that indigent defense services were subject to such substantial structural limitations that actual representation would simply not be possible.

Substantial structural limitations force even otherwise competent and well-intentioned public defenders into a position where they are, in effect, a lawyer in name only. Such limitations essentially require counsel to represent clients without being able to fulfill their basic

obligations to prepare a defense, including investigating the facts of the case, interviewing witnesses, securing discovery, engaging in motions practice, identifying experts when necessary, and subjecting the evidence to adversarial testing. Under these conditions, the issue is not effective assistance of counsel, but, as the Court of Appeals noted, "nonrepresentation." *Hurrell-Harring,* 930 N.E.2d at 224. Other courts have emphatically made this same point. As the Supreme Court of Louisiana stated, "We know from experience that no attorney can prepare for one felony trial per day, especially if he has little or no investigative, paralegal, or clerical assistance." *Peart,* 621 So.2d at 789. The court agreed with the trial court's characterization that "[n]ot even a lawyer with an S on his chest could effectively handle this docket." *Id.* The court concluded that "[m]any indigent defendants in Section E are provided with counsel who can perform only pro forma, especially at early stages of the proceedings. They are often subsequently provided with counsel who are so overburdened as to be effectively unqualified." *Id.*

B. Considering the Traditional Markers of Representation

In addition to the presence of structural limitations, courts considering systemic denial of counsel challenges have also examined the extent, or absence of, traditional markers of representation. The traditional markers of representation include meaningful attorney-client contact allowing the attorney to communicate and advise the client, the attorney's ability to investigate the allegations and the client's circumstances that may inform strategy, and the attorney's ability to advocate for the client either through plea negotiation, trial, or post-trial. These factors ensure that defense counsel provide the services that protect their client's due process rights.

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The New York Court of Appeals recognized the importance of these traditional markers, stating, "Actual representation assumes a certain basic representational relationship." *Hurrell-Harring*, 930 N.E.2d at 224. Other courts have adopted this reasoning. For example, in *Wilbur*, 989 F.Supp.2d at 1128, clients met their attorneys for the first time in court and immediately accepted a plea bargain, without discussing their cases in a confidential setting. The court found that these services "amounted to little more than a 'meet and plead' system," and that the resulting lack of representational relationship violated the Sixth Amendment. *Id.* at 1124. Similarly, in *Pub. Defender v. State*, 115 So. 3d at 278, the court reasoned that denial of counsel was present where attorneys engaged in routine meeting and pleading practices, did not communicate with clients, were unable to investigate the allegations, and were unprepared for trial.

The absence of these traditional markers of representation has led courts to find non-representation in violation of the Sixth Amendment. *Wilbur*, 989 F.Supp.2d at 1131 (noting that in such cases "the appointment of counsel may be little more than a sham and an adverse effect on the reliability of the trial process will be presumed") (citing *Cronic*, 466 U.S. at 658-60, and *Avery v. Alabama*, 308 U.S. 444, 446 (1940)); *see also Pub. Defender,* 115 So. 3d at 278; *Citizen*, 898 So.2d 325; *Peart,* 621 So. 2d at 789. The traditional markers require the "opportunity for appointed counsel to confer with the accused to prepare a defense," engage in investigation, and advocate for the client. *Wilbur*, 989 F.Supp.2d at 1131; *Public Defender v. State,* 115 So. 3d at 278; *Peart,* 621 So.2d at 789; *see also Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the

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accused."); *Powell*, 287 U.S. at 59-60 (finding that when "no attempt was made to investigate" the defendants lacked "the aid of counsel *in any real sense*") (emphasis added).

The New York Court of Appeals, along with many other courts, has taken note of the vital importance of these traditional markers of representation. These markers may be considered in conjunction with the structural limitations placed on counsel to determine whether the counties "constructively" denied counsel to indigent defendants during criminal proceedings. When assessing the merits of the case, this Court may use this framework to assess whether a systemic "constructive" denial of counsel in violation of *Gideon* and the Sixth Amendment occurred from either factor, standing alone or in conjunction.

CONCLUSION

The Court can consider structural limitations and defenders' failure to carry out traditional markers of representation in its assessment of Plaintiffs' claim of constructive denial of counsel.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

----------x

KIMBERLY HURRELL-HARRING, *et al.*, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs

-against-

THE STATE OF NEW YORK, et al.,

Defendants.

----------x

INDEX No. 8866-07
(Connolly, J.)

EXHIBIT 1 TO U.S. STATEMENT OF INTEREST

Judge Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

----------x

JOSEPH JEROME WILBUR, *et al.*,

Plaintiffs

v.

CITY OF MOUNT VERNON, *et al.*,

Defendants.

----------x

No. C11-1100RSL

STATEMENT OF INTEREST OF THE UNITED STATES

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STATEMENT OF INTEREST OF THE UNITED STATES

The United States files this Statement of Interest to assist the Court in answering the question of what remedies are appropriate and within the Court's powers should it find that the Cities of Mount Vernon and Burlington violate misdemeanor defendants' right to counsel. The United States did not participate in the trial in this case and takes no position on whether Plaintiffs should prevail on the merits. The United States files this SOI to provide expertise and a perspective that it may uniquely possess. If the Plaintiffs prevail, it is the position of the United States that the Court has discretion to enter injunctive relief aimed at the specific factors that have caused public defender services to fall short of Sixth Amendment guarantees, including the appointment of an independent monitor to assist the Court. The United States has found monitoring arrangements to be critically important in enforcing complex remedies to address systemic constitutional harms.

In discussing the remedies available to the Court in this Statement, the United States will address questions (1) and (3) of the Court's Order for Further Briefing, with particular focus on the role of an independent monitor. (Dkt. # 319.) To answer the Court's first question, the United States is unaware of any federal court appointing a monitor to oversee reforms of a public defense agency, but the Ninth Circuit has recognized a federal court's authority in this area under 42 U.S.C. § 1983. *Miranda v. Clark County, NV*, 319 F.3d 465 (9th Cir. 2003). The United States is aware of one case in which a federal court, through a Consent Order instituting reforms of a County public defender agency, received reports from the county regarding the progress of those reforms. *Stinson v. Fulton Cnty. Bd. of Comm'rs*, No. 1:94-CV-240-GET (N.D. Ga. May 21, 1999). However, the Court did not have the benefit of an independent monitor to assist it in assessing the implementation of the reforms.

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Also, an independent monitor is currently monitoring systemic reform of a juvenile public defender system through an agreement between the United States and the Shelby County (TN) Juvenile Court ("Shelby County").

Finally, it is worth noting that but for removal to federal court by the Cities here, this matter would have proceeded in state court, and state court litigation over the crisis in indigent defense is not at all unusual. Those cases bear out the practicality—and, at times, the necessity—of court oversight in this area.

In answer to the Court's third question, a number of states have imposed "hard" caseload standards,[1] but the United States believes that, should any remedies be warranted, defense counsel's *workload* should be controlled to ensure quality representation. "Workload," as defined by the *ABA Ten Principles of a Public Defense Delivery System,* takes into account not only a defender's numerical caseload, but also factors like the complexity of defenders' cases, their skills and experience, and the resources available to them. Workload controls may require flexibility to accommodate local conditions. Due to this complexity, an independent monitor would provide the Court with indispensible support in ensuring that the remedial purpose of workload controls is achieved.

The Washington State Bar's Standards for Indigent Defense, incorporated by its Supreme Court in its criminal rules, considers the importance of workloads in evaluating the efficacy of defender services. Washington's move to implement workload controls is a welcome recognition of its obligation under *Gideon*. The United States recognizes that these standards are the result of work commenced at least since 2003 by the Washington State Bar Association's Blue Ribbon Commission on Criminal Defense and supported by the State Legislature, the

[1] For example, Arizona, Georgia, and New Hampshire have specific caseload limitations. A number of states have "soft" caseload caps by using a weighted system. See attached Exhibit 1 for a description of select jurisdictions.

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Washington Defender Association, and the Washington Association of Prosecuting Attorneys, among others. These workload controls are scheduled to go into effect October 2013.[2]

INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in federal court. The United States has an interest in ensuring that all jurisdictions—federal, state, and local—are fulfilling their obligation under the Constitution to provide effective assistance of counsel to individuals facing criminal charges who cannot afford an attorney, as required by *Gideon v. Wainwright*, 372 U.S. 335 (1963). The United States can enforce the right to counsel in juvenile delinquency proceedings pursuant the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (Section 14141). As noted above, the United States is currently enforcing Section 14141's juvenile justice provision through a comprehensive out-of-court settlement with Shelby County.[3] An essential piece of the agreement, which is subject to independent monitoring, is the establishment of a juvenile public defender system with "reasonable workloads" and "sufficient resources to provide independent, ethical, and zealous representation to Children in delinquency matters." *Id.* at 14-15.

As the Attorney General recently proclaimed, "It's time to reclaim Gideon's petition – and resolve to confront the obstacles facing indigent defense providers."[4] In March 2010, the Attorney General launched the Access to Justice Initiative to address the access-to-justice crisis. Indigent defense reform is a critical piece of the office's work, and the Initiative provides a

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[2] The United States does not by this mean to endorse or detract from the efforts of these entities.

[3] Mem. of Agreement Regarding the Juvenile Court of Memphis and Shelby Counties, Tennessee (2012), *available at* http://www.justice.gov/crt/about/spl/findsettle.php.

[4] Attorney General Eric Holder Speaks at the Justice Department's 50th Anniversary Celebration of the U.S. Supreme Court Decision in *Gideon v. Wainwright*, March 15, 2013, *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-1303151.html.

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centralized focus for carrying out the Department's commitment to improving indigent defense.[5] The Department has also sought to address this crisis through a number of grant programs.[6] The most recent is a 2012 $1.2 million grant program, *Answering Gideon's Call: Strengthening Indigent Defense Through Implementing the ABA Ten Principles of a Public Defense Delivery System* administered by the Bureau of Justice Assistance.[7] In light of the United States' interest in ensuring that any constitutional deficiencies the Court may find are adequately remedied, the United States files this Statement of Interest on the availability of injunctive relief.

BACKGROUND

The Plaintiffs' claims of deprivations of the right to counsel, if meritorious, are part of a crisis impacting public defender services nationwide. Fifty years ago, the Supreme Court held that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon*, 372 U.S. at 344. And yet, as the Attorney General recently noted, "despite the undeniable progress our nation has witnessed over the last half-century—America's indigent defense systems continue to exist in a state of crisis," and "in some places—do little more than process people in and out of our courts."[8]

Our national difficulty to meet the obligations recognized in *Gideon* is well documented.[9] *See, e.g.* ABA Standing Committee on Legal Aid and Indigent Defendants Report, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, (December 2004). Despite

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[5] The office works with federal agencies, and state, local, and tribal justice system stakeholders to increase access to counsel, highlight best practices, and improve the justice delivery systems that serve people who are unable to afford lawyers. More information is available at http://www.justice.gov/atj/.

[6] *See* Government Accountability Office, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding* 11-14 (May 2012), *available at* http://www.justice.gov/atj/idp/.

[7] Grants have been awarded to agencies in Texas, Delaware, Massachusetts, and Michigan.

[8] Attorney General Eric Holder Speaks at the American Film Institute's Screening of *Gideon's Army*, June 21, 2013, *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130621.html.

[9] In March 2013, the Yale Law Journal held a symposium on the challenges of meeting Gideon's promise and published resulting articles in its most recent issue. *See* 122 Yale L.J. __ (June 2013).

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long recognition that "the proper performance of the defense function is . . . as vital to the health of the system as the performance of the prosecuting and adjudicatory functions," Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, *Final Report* 11 (1963), public defense agencies nationwide remain at a staggering disadvantage when it comes to resources. Steven W. Perry & Duren Banks, U.S. Bureau of Justice Statistics, *Prosecutors in State Courts, 2007 Statistical Table*s 1 (2012) (noting that prosecution offices nationwide receive about 2.5 times the funding that defense offices receive); National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* 61-64 (2009) (collecting examples of funding disparities).

Due to this lack of resources, states and localities across the country face a crisis in indigent defense. Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. Rev. L. & Soc. Change 427 (2009) (describing crises nationwide). In many states, remedying the crisis in indigent defense has required court intervention. *E.g.*, *State v. Citizen*, 898 So.2d 325 (La. 2005); *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010); *Missouri Public Defender Comm'n v. Waters*, 370 S.W.3d 592 (Mo. 2012). The crisis in indigent defense extends to misdemeanor cases where many waive their right to counsel and end up unnecessarily imprisoned. NACDL, *Minor Crimes, Massive Waste* 21 (2009).[10]

DISCUSSION

It is the position of the United States that it would be lawful and appropriate for the Court to enter injunctive relief if this litigation reveals systemic constitutional deficiencies in the Defendants' provision of public defender services. Indeed, the concept of federal oversight to address the crisis in defender services has gained momentum in recent years. *See, e.g,. Gideon's*

[10] The report is available at http://www.opensocietyfoundations.org/reports/minor-crimes-massivewaste.

Broken Promise, *supra*, at 41-42 (recommending federal funding); Drinan, *The Third Generation of Indigent Defense Litigation*, *supra* (arguing federal judges are well suited to address systemic Sixth Amendment claims); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 Harv. L. Rev. 2062 (2000) (advocating systemic litigation). (Again, the United States takes no position on the merits of the underlying suit.)

I. The Court Has Broad Authority to Enter Injunctive Relief, Including the Appointment of an Independent Monitor, if It Finds a Deprivation of the Right to Counsel.

If Plaintiffs prevail on the merits of their claims, or as part of a consent decree, this Court has broad authority to order injunctive relief that is adequate to remedy any identified constitutional violations within the Cities' defender systems. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *see also Thomas v. County of Los Angeles*, 978 F.2d 504, 509 (9th Cir. 1992) (noting that courts have power to issue "broad injunctive relief" where there exist specific findings of a "persistent pattern of [police] misconduct"). When crafting injunctive relief that requires state officials to alter the manner in which they execute their core functions, a court must be mindful of federalism concerns and avoid unnecessarily intrusive remedies. *Labor/Community Strategy Center v. Los Angeles County*, 263 F.3d 1041, 1050 (9th Cir. 2001). Courts have long recognized—across a wide range of institutional settings—that equity often requires the implementation of injunctive relief to correct unconstitutional conduct, even where that relief relates to a state's administrative practices. *See, e.g.*, *Brown v. Plata*, 131 S. Ct. 1910 (2011) (upholding injunctive relief affecting State's administration of prisons); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (upholding injunctive relief affecting State's administration of schools). Indeed, while courts "must be sensitive to the State's interest[s]," courts "nevertheless

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must not shrink from their obligation to 'enforce the constitutional rights of all persons.'" *Plata*, 131 S. Ct. at 1928 (quoting *Cruz v. Beto,* 405 U.S. 319, 321 (1972)).

In crafting injunctive relief, the authority of the Court to appoint a monitor is well established. *Eldridge v. Carpenters 46*, 94 F.3d 1366 (9th Cir. 1996) (holding that district court's failure to appoint a monitor was an abuse of discretion where defendant insisted on retaining a hiring practice already held to be unlawfully discriminatory); *Nat'l Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 543 (9th Cir. 1987); *Madrid v. Gomez*, 889 F. Supp. 1146, 1282 (N.D. Cal. 1995) (holding that the "assistance of a Special Master is clearly appropriate" because "[d]eveloping a comprehensive remedy in this case will be a complex undertaking involving issues of a technical and highly charged nature").

II. Appointment of an Independent Monitor Is Critical to Implementing Complex Remedies to Address Systemic Constitutional Violations.

In the experience of the United States, appointing a monitor can provide substantial assistance to courts and parties and can reduce unnecessary delays and litigation over disputes regarding compliance. This is especially true when institutional reform can be expected to take a number of years. A monitor provides the independence and expertise necessary to conduct the objective, credible analysis upon which a court can rely to determine whether its order is being implemented, and that gives the parties and the community confidence in the reform process. A monitor will also save the Court's time.

In Grant County, Washington, an independent monitor was essential to implementing the court's injunction in a right-to-counsel case. *Best et al. v. Grant County*, No. 04-2-00189-0 (Kittitas Cty. Sup. Ct., filed Dec. 21, 2004). There, the monitor assisted the court and parties for almost six years by conducting site visits, assessing caseloads, and completing quarterly reports on the County's compliance with court orders. We note that the monitor's term in Grant County

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was limited from the outset to a defined period, and the monitor's final report noted work that still remained to be done.[11] In our experience, it is best to continue monitoring arrangements until the affected parties have demonstrated sustained compliance with the court's orders.

In 2009, the United States entered a Memorandum of Agreement with King County, Washington to reform the King County Correctional Facility. *United States v. King County, Washington*, No. 2:09-cv-00059 (W.D. Wash., filed Jan. 15, 2009). That successful reform process was assisted by an independent monitor. Other significant cases involving monitors include: *United States v. City of Pittsburgh*, No. 97-cv-354 (W.D. Pa., filed Feb. 26, 1997) (police; compliance reached in 1999); *United States v. Dallas County*, No. 3:07-cv-1559-N (N.D. Tex., filed Nov. 6, 2007) (jail); *United States v. Delaware*, No. 1-11-cv-591 (D. Del., filed Jun 6, 2011) (mental health system); *United States v. City of Seattle*, No. 12-cv-1282 (W.D. Wash., filed July 27, 2012)(police). In each of these cases, the independent monitor improved efficiency in implementation, decreased collateral litigation, and provided great assistance to the court.[12]

The selection of a monitor need not be a strictly top-down decision by the Court. The parties may agree on who should fill the role of the monitor, but if they cannot, the Court can order them to nominate monitor candidates for the Court's consideration. In addition, it should be noted that the cost of an independent monitor, however it is paid, should not reduce the funds available for indigent defense.

Finally, it should be noted that the appointment of an independent monitor can ensure public confidence in the reform process. With allegiance only to the Court and a duty to report its findings accurately and objectively, the monitor assures the public that the Cities will move

[11] The monitor's final report and two of its quarterly reports are attached as Exhibit 2.
[12] Summaries of those cases, relevant pleadings, and reports from the monitors can be found at http://www.justice.gov/crt/about/spl/findsettle.php.

forward in implementing the Court's order, and will not escape notice if they do not. Moreover, the Cities' progress towards implementing the Court's order will be more readily accepted by a broader segment of the public if that progress is affirmed by a monitor who is responsible for confirming each claim of compliance asserted by the Cities.

III. If the Court Finds Liability in this Case, its Remedy Should Include Workload Controls, Which Are Well-Suited to Implementation by an Independent Monitor.

Achieving systemic reform to ensure meaningful access to counsel is an important, but complex and time-consuming, undertaking. Any remedy imposed by the Court may require years of assessment to determine whether it is accomplishing its purpose, and the Court and the parties may need independent assistance to resolve concerns about compliance.

One source of complexity will be how the Court and parties assess whether public defenders are overburdened. In its Order for Further Briefing, the Court asked about "hard" caseload standards, which provide valuable, bright-line rules that define the outer boundaries of what may be reasonably expected of public defenders. *ABA Ten Principles*, *supra*. However, caseload limits alone cannot keep public defenders from being overworked into ineffectiveness; two additional protections are required. First, a public defender must have the authority to decline appointments over the caseload limit. Second, caseload limits are no replacement for a careful analysis of a public defender's *workload*, a concept that takes into account all of the factors affecting a public defender's ability to adequately represent clients, such as the complexity of cases on a defender's docket, the defender's skill and experience, the support services available to the defender, and the defender's other duties. *See id.* Making an accurate assessment of a defender's workload requires observation, record collection and analysis, interviews with defenders and their supervisors, and so on, all of which must be performed quarterly or every six months over the course of several years to ensure that the Court's remedies

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are being properly implemented. The monitor can also assess whether, regardless of workload, defenders are carrying out other hallmarks of minimally effective representation, such as visiting clients, conducting investigations, performing legal research, and pursuing discovery. ABA Standing Committee on Legal Aid and Indigent Defendants, *Eight Guidelines of Public Defense Workloads* (August 2009). These kinds of detailed inquiries, carried out over sufficient time to ensure meaningful and long-lasting reform, are critical to assessing whether the Cities are truly honoring misdemeanor defendants' right to counsel, and they can be made most efficiently and reliably by an independent monitor. As shown in Exhibit 2, these are the kinds of inquires made by the independent monitor in the Grant County, Washington case. Also, should non-compliance be identified, early and objective detection by the monitor, as well as the identification of barriers to compliance, allow the parties to undertake corrective action.

An independent monitor may also obviate the need for the Court to dictate specific and rigid caseload requirements. In the Shelby County juvenile justice enforcement matter, for example, the County is required to establish a juvenile defender program that provides defense attorneys with reasonable workloads, appropriate administrative supports, training, and the resources to provide zealous and independent representation to their clients, but the agreement does not specify a numerical caseload limit. *See* Mem. of Agreement at 14-15.

CONCLUSION

Should the Court find for the Plaintiffs, it has broad powers to issue injunctive relief. That power includes the authority to appoint an independent monitor who would assist the Court's efforts to ensure that any remedies ordered are effective, efficiently implemented, and achieve the intended result.

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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Radical Cross-Examinations

By Nilay U. Vora – February 24, 2015

The core principles of a "textbook" cross-examination are to (1) never ask a question to which you do not know the answer (stick to those you have asked in depositions), and (2) ask only leading questions in order to (3) always maintain control of the witness. This "textbook" method—while safe, effective, and efficient—often makes for routine and occasionally mundane courtroom theatrics.

Limitations of the "Textbook" Cross-Examination

Despite the method being tried and true, it is difficult for the cross-examiner to infuse the courtroom with a sense of drama because the cross-examiner already knows the answers to the questions asked. Indeed, a cross-examination that elicits damning admissions through "yes/no" answers is *only effective if the fact finder pays attention and recognizes the importance of the admissions*. If the judge or jury is not paying attention, they could fail to recognize the importance of the testimony elicited—or worse, lose interest in your cross-examination or case-in-chief entirely.

This article makes a radical suggestion—that in specific situations, conducting a "radical" cross-examination without previously deposing the witness will result in the same admissions but with greater emphasis and greater weight attributed by the fact finder. To illustrate the effectiveness of this "radical" cross-examination technique, I will use an example from a recent civil rights bench trial in which the judge interrupted the witness to ask his own questions and ultimately concluded that the witness was "not credible."

Whether to Cross-Examine or Depose

The most important decision in a cross-examination at trial is ultimately whether or not to cross-examine in the first place. Whether a witness should be cross-examined is determined by a variety of factors, including whether the witness has provided evidence undermining your case, whether the witness's biases have been exposed, and whether the witness has information exclusively within his or her knowledge.

These exact same principles can and should be applied when evaluating whether a witness should be deposed. Classic methods of discovery suggest that a witness should be deposed where the witness (1) has information that is not known to the adverse party that could be helpful or harmful, and (2) has authored documents prior to a dispute arising that support the adverse party's case theory but which could potentially be "explained away."

But does every witness—even those who authored critical communications or documents, or who might have knowledge critical to the dispute—need to be deposed? Consider the following scenario. You represent the defendant in a breach of contract case. The central issue in the case is the ambiguity of a particular term of the contract. You know two witnesses, each of whom is an employee of the plaintiff. Both witnesses state unambiguously that they interpret that term of the contract in the same way that the defendant contends. Your judge has a predisposition against granting summary judgment in such breach of contract cases, where the terms of the contract are at issue. That judge prefers to have a bench trial on the issue of what the terms of the contract really meant when they were negotiated. The parties are too far apart to resolve the dispute through a settlement, and your client has authorized you to resolve the matter through trial and any necessary appeals because of the stakes at issue.

Would you depose each witness? Pursuant to the above criteria, consider the benefits of not deposing: (1) the witness is unlikely to have information that could credibly be provided at trial given his or her obvious bias; and (2) assuming the documents authored by the witness predispute are unequivocal, they are the most credible information as to the parties' intent given an ambiguous term in a contract and cannot credibly be "explained away." Consider the risks associated with deposing each witness: (1) the witness becomes attuned to your style of questioning and is able to more meaningfully prepare for your cross-examination at trial, and (2) the witness is able to learn your theory of the case and to practice "explaining away" the document to escape your theory of the case.

In such a situation, it might be beneficial to forego your opportunity to depose the witnesses and instead engage in a "radical" cross-examination. Doing so will allow you to maximize your client's chances at trial because the witnesses (1) are obviously biased and unable to provide credible testimony to explain away their prior admissions in writing, and (2) won't know your cross-examination style or have experienced the type of embarrassment that might motivate them to prepare for trial.

A Dynamic Cross-Examination Without the Deposition
In this section, I will attempt to outline a new cross-examination technique—the "radical" cross-examination—that fundamentally relies on two strategic decisions: (1) foregoing a deposition of an adverse witness, and (2) employing the dynamic cross-examination methods to take advantage of the witness's inability to prepare for the cross-examination. Recognizing that cross-examinations should be fluid processes, the radical cross-examination employs a combination of cross-examination techniques, from the most traditional to the most innovative. *See generally* William A. Barton, "Different Types of Cross-Examination," *Litig. J.* (Or. State Bar), Summer 2012, at 7. Ultimately, however, the "radical" cross-examination heavily incorporates the main theme of the "dynamic" cross-examination technique outlined by James H. McComas in *Dynamic Cross-Examination: A Whole New Way to Create Opportunities to Win* (2011)—to fluidly question the witness with a variety of questioning styles, monitor the witness's answers, subtly expose the witness's biases, and gently but firmly point out the witness's inconsistencies.

Dynamic cross-examinations encourage attorneys to engage in a more fluid cross-examination. Instead of using leading questions exclusively, a dynamic cross-examination allows the attorney to ask open-ended questions, enabling the witness to gain a general level of credibility. This lets the witness be credible enough to provide the background on the dispute at hand. Having established the witness's general credibility, the goal of the dynamic cross-examination is to then ask questions that will (1) paint the undisputed factual background underlying the dispute, and (2) show that the witness—if testifying neutrally and honestly—could have information damaging your opponent's case.

In conducting a dynamic cross-examination, recognize that asking open-ended questions to provide underlying, undisputed factual background is virtually guaranteed not to hurt your case. To the extent that the witness unjustifiably paints facts in his or her favor, a minor impeachment will establish the credibility of the cross-examining attorney—and by extension the client. But even the dynamic cross-examination makes clear that depositions, where available, are powerful tools to be able to control witnesses even during open-ended questioning.

Now consider conducting a "radical" cross-examination—that is, a dynamic cross-examination *after having foregone the opportunity to take a deposition*. Trial lawyers operating "by the book" would never conduct a cross-examination without having deposed a witness. Indeed, impeaching a witness with prior inconsistent statements from the deposition would be impossible. But as email and other forms of electronic writing become ubiquitous and easily discoverable, it may be easier—assuming such electronic communications favor your theory of the case—to control a witness's testimony by asking open-ended, but inescapable, questions about them. Doing so has the advantage of potentially avoiding the tricky mechanics of impeachment, while simultaneously telling your client's theory of the case through an adverse witness's own words.

Where a cross-examining attorney has an opportunity to illustrate his or her case theory through an adverse witness, the judge and jury will pay attention and give further credence to the case theory. And to the extent that a witness attempts to obfuscate and "explain away" his or her written communication made prior to the dispute arising, the judge and the jury will recognize the witness to be obfuscating or evading the question—undermining the witness's credibility while bolstering your case.

A Case Study: Cross-Examining a Prison Official Who Spoliated Evidence
To illustrate the advantages of a radical cross-examination, consider the following actual example from a recent trial. In *Ball v. LeBlanc*, 988 F. Supp. 2d 639 (M.D. La. 2013), at issue was whether the Eighth Amendment's bar on cruel and unusual punishment was violated by the conditions of confinement on Louisiana's death row. Specifically, the issue was whether prisoners being locked in cells for 23 hours per day in extremely hot temperatures and high humidity creates a health risk and therefore violates the Eighth Amendment.

In order to indisputably measure the heat and humidity, the district court ordered that a neutral third-party expert, United States Risk Management, L.L.C. (USRM), measure the temperature, humidity, and heat index inside the prison cells that were the subject of litigation. Shortly before trial, it was revealed that prison officials altered the facilities and thereby potentially spoliated the evidence being collected pursuant to the court's order.

While it would certainly have been justifiable to seek a trial continuance to determine the extent of the spoliation and conduct discovery into the factual circumstances surrounding the spoliation, another option was to forego deposing prison officials on this subject and instead cross-examine them cold. Foregoing a deposition prevented the witnesses from preparing for hostile questioning about an indisputable error in judgment and made trial the first "real" time they were forced to describe their error as directed by opposing counsel.

Conducting such a radical cross-examination without the benefit of a deposition required carefully listening to the answers to questions and crafting the follow-up questions accordingly. And it was also necessary to intensely prepare to impeach the witnesses with their own authored documents. Using a mixture of open-ended questions that called for narrative explanations and leading questions designed to elicit "yes/no" answers, the testimony elicited ultimately resulted in the court making factual findings that one witness lacked credibility.

First, the witness's knowledge of the importance of the court's order was established through an open-ended question:

> **BY MR. VORA:** [Warden] Norwood, what was your understanding as to why USRM was installing those monitors?
> **BY MS. NORWOOD:** Because the Judge wants a fair and impartial, objective reading of

the temperatures.

Ball, 988 F. Supp. 2d at 644. Had the witness been unwilling to answer this question truthfully, a document authored by the witness was ready—an email in which she had ordered the court-ordered monitors not be manipulated: "In order to ensure accurate and consistent temperature recording, all fans and windows are not to be adjusted in any manner. In addition, no offender and/or employee is to tamper with the recording devices placed on each tier." *Ball*, 988 F. Supp. 2d at 644. Thus, asking this open-ended question contained a controllable risk, but allowed the witness to use her own words to make her opponent's point.

Second, having established the witness's knowledge of the court order, the witness was asked through a combination of leading and open-ended questions to explain why structural changes to the death row facilities were made during the data collection period. Again, these open-ended questions required the cross-examiner to carefully listen to the answers in formulating follow-up questions, but the resulting testimony was more natural in its delivery, if implausible in its content:

BY MR. VORA: Why were the awnings installed on the death row tiers?
BY MS. NORWOOD: To see if it would make a difference as far as providing shade over the windows, to see if it would cool—to see if it would make a difference, as far as the temperature, to bring it down.
. . . .
BY MR. VORA: Are you ever in a position to ask [your fellow warden] questions?
BY MS. NORWOOD: Yes.
BY MR. VORA: Did you ask him whether installing soaker hoses would affect the gathering of the data consistently and accurately pursuant to this Court's order?
BY MS. NORWOOD: Not in so many words.
BY MR. VORA: Did you ask him in any words?
BY MS. NORWOOD: Yes.
BY MR. VORA: What did you ask him?
BY MS. NORWOOD: I asked him if he seriously thought that wetting the outside of that building would impact the interior temperature.
BY MR. VORA: Why did you ask him about impacting the interior temperature, but you didn't ask him about whether or not that would be consistent with this Court's order that accurate and consistent data be recorded?
BY MS. NORWOOD: It didn't occur to me.

Ball, 988 F. Supp. 2d at 646. This combination of open-ended questions, follow-up questions that were leading but incorporated previous answers, and leading questions designed to elicit "yes/no" answers was designed to ensure the district court's interest in the testimony being elicited.

Demonstrating the power of this combination, the district court interrupted the cross-examination to ask its own questions and indicate its own incredulity with the witness's testimony:

BY THE COURT: . . . it didn't dawn on you that [Defendants'] activity was completely inconsistent with your email, the message in your email? . . . and now you are testifying—you're telling the Court that somehow you didn't think there was any problem with the installation, even after you issued this email message to all [of] the supervisors on death row? You saw nothing wrong, no problem with the installation of the awnings? You saw no problem with the use of the misters or soaker hoses or anything else? Is that what you are telling me?
BY MS. NORWOOD: Yes, sir. It is.

Ball, 988 F. Supp. 2d at 645–46 (alterations in original). In the end, the court concluded that the witness's testimony was "illogical and riddled with contradictions and inconsistencies." *Ball*, 988 F. Supp. 2d at 646–47. The court held that the witness's testimony "lacked the ring of truth" and therefore it did "not consider Norwood to be a credible witness, particularly as it relates to Defendants' actions during the data collection period." *Ball*, 988 F. Supp. 2d at 647.

Conclusion
Criminal defense attorneys are routinely required to cross-examine witnesses without the benefit of depositions. Civil trial lawyers should consider doing the same where the circumstances warrant such an approach. The general tools of the dynamic cross-examination—when combined with the strategic advantages gained by foregoing a deposition—can result in a highly effective radical cross-examination as the above example demonstrates.

Keywords: litigation, minority trial lawyer, cross-examination, deposition, admissions

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