

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION**

BRANDON LIVAS, RICHARD BUSWELL,
DEWAYNE CORBETT, JOHNNY SMITH,
CARLOS LORENZO MARTIN, and
GAINES ANDREWS, on behalf of
themselves and those similarly situated,

Petitioners,

v.

RODNEY MYERS, warden of Oakdale
Federal Correctional Institutions; and
MICHAEL CARVAJAL, Federal Bureau of
Prisons Director, in their official capacities,

Respondents.

Civil Action No. 2:20-CV-00422

Judge Terry A. Doughty

Magistrate Judge Kathleen Kay

**MEMORANDUM IN SUPPORT OF PETITIONERS' EMERGENCY MOTION
FOR RELEASE OF VULNERABLE AND LOW-RISK PRISONERS FROM OAKDALE**

The outbreak of COVID-19 at Oakdale federal correctional institutions I and II (“Oakdale”) has already claimed the lives of six people incarcerated there.¹ At least 50 prisoners and 17 staff members have tested positive.² More people are falling sick every day. Yet Respondents’ efforts to stem the outbreak have been far too little, far too late, and their newly produced “plan” does nothing to achieve the social distancing that experts agree is necessary to prevent further suffering. Accordingly, Petitioners seek an order for the expedited, responsible release³ of medically-vulnerable incarcerated persons at Oakdale to locations where they can

¹ BOP’s COVID-19 Inmate Review Update, April 10, 2020, Dkt. No. 8 at 7 (“Inmate Update”).

² *Id.*

³ The term “release,” as used throughout this memorandum, refers to discharge of incarcerated persons from the physical confines of Oakdale, not necessarily release from custody. Release options may include, but are not limited to: release to parole or community supervision; transfer furlough (as to another facility, hospital, or halfway house); or non-transfer furlough, which could entail a released person’s eventual return to Oakdale once the pandemic is over and the viral health threat is abated. Any releases would include requirements for testing, care, and social distancing, as informed by the Rule 706 expert that Petitioners have requested.

socially distance. Petitioners also seek the appointment of a public-health expert to oversee changes at Oakdale to ensure social distancing and infection prevention and treatment for those remaining. Given the mounting death toll inside, there is no time to waste.

At the April 7, 2020 telephone conference with this Court, Respondents presented no meaningful plan or timeline to expedite prisoner release.⁴ Indeed, Respondents represented on April 7 that they were awaiting further guidance related to the April 3 Memo, indicating that normal procedures would be slowed, if anything. Respondents also conceded that only three prisoners had been identified for release in the nine full days since the Attorney General's earlier March 26, 2020 Memorandum.⁵

Respondents' disclosures since the conference have not cured the problem. First, the number of prisoners identified for potential release has apparently *decreased*.⁶ Second, Respondents' April 10, 2020 "update" is not sufficient to reverse the ongoing Eighth Amendment violations at Oakdale. Fewer than 70 Oakdale prisoners have been deemed even "potentially eligible" for home confinement,⁷ with no timeline or specifics as to when those determinations would be made or whether any such releases would cure the baseline problem: that social distancing at current population levels is *impossible*, and therefore COVID-19 will continue to spread and potentially kill prisoners, staff, and those in the community.

Petitioners readily satisfy the four-factor test for a temporary restraining order. They can likely show that the status quo will continue to unconstitutionally place Class and Subclass members at a substantial risk of serious harm, and there can be no question that the harm would be irreparable—six men have died already. The public interest weighs heavily in favor of a plan that will prevent the guaranteed spread of COVID-19 in that incarcerated population, which

⁴ See Minutes of Proceeding, April 7, 2020, Dkt. No. 5 at 2 ("Minute Order") ("The Director of the BOP is currently working on guidance for the facilities to use for these assessments.")

⁵ Minute Order, Dkt. No. 5 at 2.

⁶ BOP's Notice of Inmates Previously Identified for Removal from FCC Oakdale, April 9, 2020, Dkt. No. 7 (showing that only 1 of 4 named prisoners is currently slated for release, while others have been rejected or are still pending).

⁷ Inmate Update, Dkt. No. 8 at 8-9.

could easily spread to the broader community and devastate the region’s medical infrastructure. Indeed, public health experts, including the declarant in this record, agree that prisoners, staff, and the public at large would be harmed *far more* by waiting for Respondents’ slow-moving plan to take shape while Class members are unable to safely socially distance or maintain recommended hygienic practices.

Numerous correctional facilities nationwide—including other federal prisons—are already clearing and releasing people in significant numbers in response to the imperative of social distancing.⁸ Elected officials in Louisiana are demanding action.⁹ Yet the Oakdale Respondents are still “reviewing,” with no end date in sight. Therefore, despite Petitioners’ stated preference to collaborate privately and quickly, a temporary restraining order is now required to compel the necessary action.

FACTUAL BACKGROUND

I. COVID-19 is a Fast-Moving Disease Particularly Harmful to Elderly or Immune-Compromised People

⁸ BOP itself claims it has placed an additional 566 prisoners on home confinement since Attorney General Barr’s March 26, 2020 memorandum. *See* Federal Bureau of Prisons, *Update on COVID-19 and Home Confinement* (April 5, 2020),

https://www.bop.gov/resources/news/20200405_covid19_home_confinement.jsp. Outside the federal system, for example, officials in Cleveland have moved more than 700 prisoners out of Cuyahoga County Jail in less than two weeks; more than 250 have been released near Oakland, California; Pennsylvania has authorized release of up to 1,800. New Jersey planned release of as many as 1,000. *See* Kevin Johnson, *Local jails releasing hundreds of prisoners amid coronavirus fears*, USA Today (March 26, 2020), Tracey Tully, *1,000 Inmates Will Be Released From N.J. Jails to Curb Coronavirus Risk*, THE NEW YORK TIMES (March 23, 2020), available at: <https://www.nytimes.com/2020/03/23/nyregion/coronavirus-nj-inmates-release.html> <https://www.usatoday.com/story/news/politics/2020/03/26/jails-free-hundreds-prisoners-stop-coronavirus/5077204002/>; *see also* Michael Gorsenger, *Gov. Wolf issues executive order to release 1,800 inmates to stop COVID-19 spread*, Local News 21 (April 10, 2020), <https://local21news.com/news/local/gov-wolf-issues-executive-order-to-release-18000-inmates-to-stop-covid-19-spread>.

⁹ Press Release, Senator John Kennedy (R-LA), *Kennedy, Cassidy, Johnson urge Federal Bureau of Prisons to take immediate action at Oakdale Prison* (April 7, 2020), <https://www.kennedy.senate.gov/public/2020/4/kennedy-cassidy-johnson-urge-federal-bureau-of-prisons-to-take-immediate-action-at-oakdale-prison>.

COVID-19 is a novel virus for which there is no established curative medical treatment, no vaccine, and no cure.¹⁰ Compared with past outbreaks of communicable diseases, the COVID-19 pandemic is of “unprecedented magnitude” because of the “magnitude and speed of transmission of COVID-19.”¹¹ COVID-19 is transmitted by droplets of infected aerosol, which can survive in the air for up to three hours—and on surfaces such as plastic and stainless steel for up to 2 to 3 days.¹² Indeed, a new study of an early cluster of COVID-19 cases in Wuhan, China revealed the dangers of indirect transmission resulting from infected people contaminating common surfaces—in the study, it was a communal mall bathroom.¹³ New research also shows that controlling the spread of COVID-19 is made even more difficult because of the prominence of asymptomatic transmission, i.e., transmission by people who are contagious but who exhibit limited or no symptoms, rendering ineffective any screening tools dependent on identifying symptomatic behavior.¹⁴

COVID-19 is an acute respiratory syndrome that can cause pneumonia, acute respiratory distress syndrome, respiratory failure, heart failure, sepsis, and other potentially fatal conditions.¹⁵ Treatment for severe cases of COVID-19 includes isolation, oxygen, and mechanical ventilation.¹⁶ COVID-19 is particularly dangerous for elderly or immunocompromised individuals and those who have chronic lung disease, moderate to severe

¹⁰ Goldenson Dec., Dkt. No. 1-3 at ¶ 14; *see also Information for Clinicians on Therapeutic Options for Patients with COVID-19*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/therapeutic-options.html> (“There are no drugs or other therapeutics approved by the [FDA] to prevent or treat COVID-19.”).

¹¹ *United States v. Martin*, No. 19-cr-140-13, 2020 WL 1274857, at *2 (D. Md. Mar. 17, 2020).

¹² Goldenson Dec., Dkt. No. 1-3 at ¶ 17; *see also* George Petras *et al.*, *How long does the coronavirus live on surfaces?*, USA Today (March 27, 2020), <https://www.usatoday.com/in-depth/news/2020/03/25/coronavirus-survives-on-metal-plastic-cardboard-common-objects/2866340001/>.

¹³ Jing Cai, *et al.*, *Indirect virus transmission in cluster of COVID-19 cases, Wenzhou, China, 2020*, *Emerging Infectious Diseases*, Vol. 26, No. 6, June 2020, <https://doi.org/10.3201/eid2606.200412>.

¹⁴ Chelsea Ritschel, *Coronavirus: Are People Who Are Asymptomatic Still Capable of Spreading COVID-19*, *Independent* (March 15, 2020), <https://www.independent.co.uk/life-style/health-and-families/coronavirus-symptoms-asymptomatic-covid-19-spread-virus-a9403311.html>.

¹⁵ Fei Zhou, *et al.*, *Clinical Course and Risk Factors for Mortality of Adult Inpatients with COVID-19 in Wuhan, China: A Retrospective Cohort Study*, 395 *LANCET* 1054 (March 11, 2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30566-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext).

¹⁶ Goldenson Dec., Dkt. No. 1-3 at ¶¶ 9, 14.

asthma, serious heart conditions, severe obesity, or other medical conditions such as diabetes, renal failure, or liver disease, particularly if not well-controlled.¹⁷ According to a study of nearly 1,600 COVID-19 cases, “patients with at least one co-morbidity—including cardiovascular disease, diabetes and chronic kidney diseases—‘had a 79% greater chance of requiring intensive care or a respirator or both, or of dying.’”¹⁸ Nationwide, the mortality rate among persons aged 55-64 is 1-3%; among persons aged 65-84, 3-11%; and among persons 85 or older, 10-27%.¹⁹

To reduce the risk of contracting COVID-19, the Centers for Disease Control and Prevention (“CDC”) advises all people—and particularly those “at higher risk of severe illness”—to “[s]tay home,” “[w]ash your hands often,” “[a]void close contact,” “keep space between yourself and others (stay 6 feet away, which is about two arm lengths),” “[k]eep away from people who are sick,” and “[c]lean and disinfect frequently touched surfaces.”²⁰ The President’s Task Force on COVID-19 recommends avoiding gatherings of more than 10 people.²¹

¹⁷ Centers for Disease Control and Prevention, *People Who Are at Higher Risk for Severe Illness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

¹⁸ *Coronel v. Decker*, No. 20-cv-2472, 2020 WL 1487274, at *3 (S.D.N.Y. Mar. 27, 2020) (slip op.) (quoting Sharon Begley, *Who Is Getting Sick, and How Sick? A Breakdown of Coronavirus Risk by Demographic Factors*, STAT NEWS (Mar. 3, 2020), <https://www.statnews.com/2020/03/03/who-is-getting-sick-and-how-sick-a-breakdown-of-coronavirus-risk-by-demographic-factors/>; see also Jason Oke & Carl Heneghan, *Global Covid-19 Case Fatality Rates*, Oxford COVID-19 Evidence Service (March 28, 2020), <https://www.cebm.net/covid-19/global-covid-19-case-fatality-rates/> (“Patients with comorbid conditions had much higher [fatality] rates.”).

¹⁹ CDC COVID-19 Response Team, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)—United States, February 12–March 16, 2020*, 69 MORBIDITY AND MORTALITY WEEKLY REPORT 343 (March 26, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm>; see also Oke & Heneghan, *supra* n.18 (finding similar mortality rates globally).

²⁰ Centers for Disease Control and Prevention, *What You Can Do*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/what-you-can-do.html>; see also *Martin*, 2020 WL 1274857, at *2 (“With no known effective treatment, and vaccines months (or more) away, public health officials have been left to urge the public to practice ‘social distancing,’ frequent (and thorough) hand washing, and avoidance of close contact with others . . . all of which are extremely difficult to implement in a detention facility.”).

²¹ Cecelia Smith-Schoenwalder, *Trump Administration Suggests Avoiding Gatherings of More Than 10 People*, USNews.com (March 16, 2020), <https://www.usnews.com/news/national-news/articles/2020-03-16/trumps-coronavirus-task-force-suggests-limiting-gatherings-to-10-people-or-fewer>.

Louisiana is experiencing some of the worst COVID-19 outbreaks in the world. As of April 12, 2020, Louisiana had 20,595 confirmed cases of COVID-19, with at least 840 deaths.²² A study from the University of Louisiana at Lafayette reported that COVID-19 cases grew at 67.8%, the highest rate in the United States.²³

II. Class and Subclass Members at Oakdale Are at Heightened Risk of Contraction, Transmission of COVID-19

Oakdale is a complex of two federal correctional institutions; it comprises two, low-security facilities (FCI Oakdale I and FCI Oakdale II, which include a “Camp”) with a total population of approximately 1,800. According to the Bureau of Prisons (“BOP”), 50 incarcerated persons and 17 staff members at Oakdale have tested positive for COVID-19, 19 staff members have been quarantined awaiting test results, and six people have died.²⁴

As a rule, “[i]ndividuals in carceral settings are at a significantly higher risk of spreading infectious diseases.”²⁵ This is because it is typically “not possible to isolate . . . detainees from the outside world (including from staff and vendors who may have been exposed to COVID-19), nor is it possible to isolate them from one another.”²⁶ Prevention of infection from an infected droplet is “particularly difficult to control in detention facilities, as social distancing and proper decontamination of surfaces is virtually impossible.”²⁷ “The probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and

²² See Louisiana Department of Health Coronavirus (COVID-19) Information, updated daily at noon: <http://ldh.la.gov/coronavirus/>.

²³ Adam Daigle, *Coronavirus Cases Grew Faster in Louisiana Than Anywhere Else in the World: UL Study*, THE ACADIANA ADVOCATE (March 24, 2020), https://www.theadvocate.com/acadiana/news/coronavirus/article_94494420-6d4b-11ea-ac42-ff7dd722c084.html.

²⁴ Inmate Update, Dkt. No. 8 at 7.

²⁵ *Coronel*, 2020 WL 1487274, at *3 (internal quotation omitted).

²⁶ *Id.*

²⁷ Goldenson Dec., Dkt. No. 1-3 at ¶ 17.

treatment, rationed access to soap, water, and clean laundry, [and] insufficient infection-control expertise.”²⁸

Because they contain high concentrations of people in close proximity, prisons are breeding grounds for the uncontrolled transmission of the virus that causes COVID-19. Louisiana State University and Tulane University health experts concluded the same in a recent letter to Louisiana Governor John Bel Edwards.²⁹ People are housed “in tightly-packed and poorly-ventilated dormitories; they share toilets, showers, and sinks; they wash their bedsheets and clothes infrequently; and often lack access to basic personal hygiene items,” the 15 professors said.³⁰ In light of the pandemic, prisons are “tinderboxes, ready to explode and endanger our entire country.”³¹

a. While Public Health Officials Recommend Social Distancing, Oakdale Prisoners are “Jammed Like Sardines” in Unsanitary Conditions

The conditions inside Oakdale are in particular need of swift intervention. First and foremost, Oakdale is too crowded to achieve anything close to recommended social distancing. Every declarant confirms that prisoners live, eat, and sleep much closer than six feet apart. Petitioner Dewayne Corbett sleeps in a 10 by 15-foot cell with two other cellmates. When he wakes up, they are “face-to-face,” and he has to “slide by them” to get out the door.³² And yet there are cells housing up to six people per cell. Phones are roughly two feet apart, as are the sinks, and there is no indication that Oakdale has introduced staggered usage or other protocols to ensure that prisoners can maintain social distancing while using those facilities.

²⁸ *United States v. Stephens*, No. 15-cr-95, --- F. Supp. 3d ----, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (quoting Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047, 1047 (Oct. 2007), <https://doi.org/10.1086/521910>).

²⁹ Katherine Andrinopoulos et al., *Public Health Letter to Gov. John Bel Edwards* (March 27, 2020), <https://www.scribd.com/document/453999944/Public-Health-Letter-to-Gov-Edwards>.

³⁰ *Id.*

³¹ *Id.*

³² Declaration of Dewayne Corbett, Exhibit 6 at ¶ 4.

In FCI Oakdale I, beds are roughly 2.5 feet apart.³³ Around 160 to 180 prisoners share eight toilets, 12 to 14 sinks, and 20 showers.³⁴ The showers are separated by “thin, plastic partitions so that water from one shower stall splashes the person in the next stall.”³⁵ In FCI Oakdale II, men sleep in crowded dormitories in which the beds are also roughly two to three feet apart.³⁶ Petitioner Richard Buswell says, “We are jammed together like sardines.”³⁷ The hallways are also less than six feet wide.³⁸ There are no more than eight working showers for the roughly 120 men housed there.³⁹ There is no indication of staggering or other protocols to ensure distancing while in the bathroom or shower areas.

Worse yet, many prisoners report being in close contact with individuals *known to be infected with COVID-19*.⁴⁰ Indeed, Petitioner Smith reports that after the first prisoner tested positive, his cellmates were “dispersed throughout other units,”⁴¹ thereby accelerating the spread, not containing it. Other declarants report that fellow prisoners have symptoms like coughing and diarrhea, but do not receive medical attention until they have a fever or are “pale, sweating,”⁴² or “very sick.”⁴³ Declarant Arthur Wammel estimates that “around 60 men are coughing all night long”⁴⁴ while in their bunks.⁴⁵ Accordingly, because prisoners are often closer to one another

³³ Declaration of Johnny Smith, Exhibit 11 at ¶ 3.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Declaration of Brandon Livas, Exhibit 7 at ¶ 3; Declaration of Arthur Wammel, Exhibit 13 at ¶ 5; Declaration of Richard Buswell, Exhibit 3 at ¶ 6 (beds are “30 to 36 inches apart”); Declaration of Daniel Collins, Exhibit 5 at ¶ 3; Declaration of Pio Alejandr Campos, Exhibit 4 at ¶ 5.

³⁷ Buswell Dec., Ex. 3 at ¶ 6; Smith Dec., Ex. 11 at ¶ 7 (“we were crowded like sardines”).

³⁸ Buswell Dec., Ex. 3 at ¶ 7.

³⁹ Wammel Dec., Ex. 13 at ¶ 5; Collins Dec., Ex. 5 at ¶ 3.

⁴⁰ Declaration of Travis Scott, Exhibit 10 at ¶ 5; Wammel Dec., Ex. 13 at ¶ 4; Livas Dec., Ex. 7 at ¶¶ 4–5; Collins Dec., Ex. 5 at ¶ 4.

⁴¹ Smith Dec., Ex. 11 at ¶ 7.

⁴² Buswell Dec., Ex. 3 at ¶ 4.

⁴³ Declaration of Gaines Andrews, Exhibit 2 at ¶ 5 (“Almost all of the other prisoners I interact with seem to be displaying symptoms.”); Collins Dec., Ex. 5 at ¶ 13.

⁴⁴ Wammel Dec., Ex. 13 at ¶ 6; Livas Dec., Ex. 7 at ¶ 6 (“many people are coughing throughout the night”).

⁴⁵ Campos Dec., Ex. 4 at ¶ 7.

than six feet,⁴⁶ it stands to reason that dozens if not hundreds of Class members are unconsciously inhaling droplets from fellow prisoners who are potentially or actually infected.

Cleaning supplies are rationed and running low.⁴⁷ Communal phones and computers are not sanitized after use,⁴⁸ despite the fact that coronavirus can live on such surfaces. At Oakdale II, “[f]ive to ten men use the bathroom facility every two minutes, so it is almost impossible to keep it clean.”⁴⁹ Prisoners are being moved from quarantine back into crowded areas.⁵⁰ Prisoners are being told that they are no longer being tested for COVID-19, under the assumption that everyone already has it.⁵¹ Staff have quit in light of these conditions,⁵² or they “lock themselves in the office.”⁵³ Prisoners have no such recourse.

b. Respondents’ Asserted Mitigation Efforts are Too Little, Too Late

i. The April 10 “Update” Does Not Contain a Credible Social Distancing Plan

Respondents’ April 10 “Update” is woefully inadequate to decrease the prison’s crowded, congregate conditions and achieve CDC-recommended social distancing. Under the Attorney General’s March 26, 2020 direction, Respondents admit that BOP had identified only three people at Oakdale for potential release.⁵⁴ Under its expanded authority under the Attorney General’s April 3, 2020, memorandum, BOP identified 58 people to review.⁵⁵ By April 10, 2020, Oakdale staff have only managed to review 34 individuals.⁵⁶ Oakdale staff expanded their criteria to include 90 more prisoners for home-confinement eligibility, but only 10 were

⁴⁶ See, e.g., Livas Dec., Ex. 7 at ¶ 3.

⁴⁷ Campos Dec., Ex. 4 at ¶ 6; Declaration of John Sposato, Exhibit 12 at ¶ 8.

⁴⁸ Buswell Dec., Ex. 3 at ¶ 11; Andrews Dec., Ex. 2 at ¶ 7; Smith Dec., Ex. 11 at ¶ 4; Livas Dec., Ex. 7 at ¶ 9; Collins Dec., Ex. 5 at ¶ 7.

⁴⁹ Buswell Dec., Ex. 3 at ¶ 12.

⁵⁰ Wammel Dec., Ex. 13 at ¶ 7.

⁵¹ *Id.*

⁵² Andrews Dec., Dkt. 1-5 at ¶ 6; Scott Dec., Ex. 10 at ¶ 9; Campos Dec., Ex. 4 at ¶ 13.

⁵³ Buswell Dec., Ex. 3 at ¶ 10.

⁵⁴ Inmate Update, Dkt. No. 8 at 8.

⁵⁵ *Id.* at 9.

⁵⁶ *Id.*

determined eligible.⁵⁷ Thus, Oakdale appears presently to have identified, *at most*, 44 people for potential release. Even if all 44 were released, which is far from clear, this number is paltry in a population of about 1,800—about 2 percent—and will do nothing to allow those who remain in the facility to achieve social distancing.⁵⁸ Accordingly, it will do nothing to stop the outbreak.⁵⁹ As Dr. Goldenson concludes, “[t]he government’s April 10, 2020 plan is inadequate to achieve social distancing or protect prisoners from COVID-19 and does not change my public health recommendations.”⁶⁰

Moreover, Respondents provide no timeline for release and additional review, no plan to increase social distancing for those who remain, and no indication that the risk of infection is sufficiently considered. According to Respondents, Oakdale staff rely on at least eight BOP criteria to consider a person for home confinement, none of which is their pre-existing medical condition or vulnerability to COVID-19.⁶¹ Instead, they calculate factors such as a person’s rating under BOP’s algorithm, the Prisoner Assessment Tool Targeting Estimated Risk and Needs, or “PATTERN.”⁶² Released last July to implement the First Step Act, it is designed to “measure risk of recidivism of inmates.”⁶³ The tool obviously does not consider risk of infection or death—it was not designed for the present circumstance of a viral pandemic.⁶⁴ Hence, even if Respondents were proceeding with the necessary speed and with social distancing as their

⁵⁷ *Id.*

⁵⁸ April 12, 2020 Declaration of Joe Goldenson, MD, Exhibit 1 at ¶ 31.

⁵⁹ Indeed, prisoners have heard that staff have stopped testing people under the assumption that everyone already has COVID-19. Wammel Dec., Ex. 13 at ¶ 7.

⁶⁰ Goldenson Dec., Ex. 1 at ¶¶ 29-35.

⁶¹ Inmate Update, Dkt. No. 8 at 8-10.

⁶² *Id.* at 8.

⁶³ Department of Justice Announces Enhancements to the Risk Assessment System (Jan. 15, 2020), <https://www.justice.gov/opa/pr/departments-justice-announces-enhancements-risk-assessment-system-and-updates-first-step-act>.

⁶⁴ *See, e.g.*, Letter from Leadership Conference on Civil Rights to Attorney General Bill Barr, RE: The use of the PATTERN risk assessment in prioritizing release in response to the COVID-19 pandemic, April 3, 2020, http://civilrightsdocs.info/pdf/policy/letters/2020/Final_Letter_on_PATTERN_in_Response_to_AG_Barr_Memo_on_4_26-4_3_2020.pdf.

primary imperative—neither of which are true—their tools are not calibrated to those ends, further underscoring the need for court and expert oversight.

ii. Respondents' Efforts to Mitigate the Unsanitary Conditions at Oakdale are Insufficient and May be Making Things Worse

Respondents claim they have now taken remedial measures to improve hygiene, such as deploying ubiquitous staff mask usage and “inmate orderlies” on a “24-hour basis to disinfect” its facilities—all of which is directly contradicted by the declarations of people actually incarcerated at Oakdale.⁶⁵

At the April 7 conference, Respondents asserted that they are conducting daily temperature checks at the 4 p.m. hour. Prisoners confirm that Oakdale staff have been performing daily temperature checks since about April 2.⁶⁶ However, the CDC recommended daily temperature checks in prisons on March 23, 2020.⁶⁷ Further, prisoners are lined up “right next to each other” during the checks, not six feet apart,⁶⁸ and staff are not always sanitizing

⁶⁵ Compare Inmate Update, Dkt. No. 8 at 6 to Smith Dec., Ex. 11 at ¶¶ 4, 11 (“Good sanitation is not practically possible because of the conditions here. The building is so congested that it cannot be effectively disinfected. The chemical used in FCI Oakdale I, Clean On The Go, requires 10 minutes between applications. I have never seen prison staff applying it to common areas between prisoners’ uses of those areas. [...] Correction officers used to wear masks in the prison, but they have largely stopped because they have apparently decided that it is futile.”); Collins Dec., Ex. 5 at ¶ 7 (“Orderlies are not sanitizing the phones. I’m forced to use the phone right after someone else without it being cleaned.”); Livas Dec., Ex. 7 at ¶¶ 9, 11 (“I have never seen prison staff sanitizing or wiping down common areas or surfaces such as telephones. [...] The prison staff wear personal protective equipment inconsistently—some of them wear a mask or gloves, but generally not both and not all the time.”); Sposato Dec., Ex. 12 at ¶ 7 (“The showers are not cleaned after each use.”); Declaration of Hector Perez, Exhibit 8 at ¶ 8 (“We are housed in dormitories that are dirty and crowded.”)

⁶⁶ Buswell Dec., Ex. 3 at ¶ 5; compare Corbett Dec., Ex. 6 at ¶ 3 (describing a temperature check at 9 a.m.).

⁶⁷ Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, (March 23, 2020) (“This interim guidance is based on what is currently known about the transmission and severity of coronavirus disease 2019 (COVID-19) as of March 23, 2020.”) (recommending twice daily temperature checks for those in contact with known COVID-19 cases), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>.

⁶⁸ Wammel Dec., Ex. 13 at ¶ 3.

head thermometers after use.⁶⁹ This process exacerbates the spread of droplets potentially containing the disease.⁷⁰

Respondents asserted at the April 7 conference that Oakdale staff are now wearing personal protective equipment. But, according to the Petitioners and other declarants, not all staff wear the equipment all the time.⁷¹ Indeed, some have stopped completely because they believe “it is futile.”⁷² Petitioner Corbett asserted that a doctor touched every prisoner with the same gloves without changing them.⁷³ Droplets could easily have passed from one prisoner to another during that check—even assuming they were kept six feet apart while waiting for the doctor.

Respondents also asserted that prisoners are being given masks on a daily basis.⁷⁴ Some prisoners confirm having been provided one mask per day since April 2 (well after community spread), while others say it is sporadic⁷⁵ or that they are being asked to reuse them.⁷⁶ But, by the same token, all their personal cleaning supplies were confiscated and there are not enough replacement bottles.⁷⁷ Prisoners report increased cleaning, but that it only started “this week.”⁷⁸

In the end, while Oakdale staff have started implementing some hygiene mitigation efforts, they only started after numerous infections and deaths; the efforts are only sporadically enforced; and, most importantly, these substandard hygiene efforts have not addressed social distancing. Indeed, some practices like group temperature checks may be increasing the risk of close-quarters transmission. Yet the CDC, Dr. Goldenson, and the consensus of public-health experts have recommended social distancing as the best protection against COVID-19 contraction. Respondents have not made any successful efforts to increase social distancing because, without significantly reducing the prisoner population, social distancing at Oakdale is

⁶⁹ Scott Dec., Ex. 10 at ¶ 4.

⁷⁰ Goldenson Dec., Ex. 1 at ¶ 17.

⁷¹ Andrews Dec., Ex. 2 at ¶ 8; Livas Dec., Ex. 7 at ¶ 11.

⁷² Smith Dec., Ex. 11 at ¶ 11.

⁷³ Corbett Dec., Ex. 6 at ¶ 3.

⁷⁴ Inmate Update, Dkt. No. 8 at 6.

⁷⁵ Andrews Dec., Ex. 2 at ¶ 9; Collins Dec., Ex. 5 at ¶ 11.

⁷⁶ Smith Dec., Ex. 11 at ¶ 15.

⁷⁷ Declaration of Carlos Lorenzo Martin, Exhibit 8 at ¶ 5; *see also* Collins Dec., Ex. 5 ¶ 8.

⁷⁸ Wammel Dec., Ex. 13 at ¶ 7.

“impossible.”⁷⁹ Without addressing this central requirement, Respondents’ April 10 plan is window dressing at best. Indeed, unless and until the population at Oakdale is reduced to such a level that the prisoners who remain can engage in social distancing, there is no set of mitigating actions that will reduce or eliminate the unconstitutional risk of harm to all prisoners in the facility.

LEGAL STANDARD

To obtain a preliminary injunction or temporary restraining order, Petitioners must demonstrate: “(1) a substantial likelihood of success on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that grant of an injunction will not disserve the public interest.” *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009) (quoting *Speaks v. Kruse*, 445 F.3d 396, 399-400 (5th 2006)); *La. Dep’t of Transp. & Dev. v. U.S. Dep’t of Transp.*, No. 15-2638, 2015 WL 7313876, at *4 (W.D. La. Nov. 20, 2015) (citing *Byrum*, 566 F.3d at 445). Petitioners must meet each of these requirements, *La. Dep’t of Transp.*, 2015 WL 7313876 at *4, but are “not required to prove [their] entitlement to summary judgment.” *Byrum*, 566 F.3d at 446 (citing *ICEE Distribs., Inc. v. J&J Snack Foods Corp.*, 325 F.3d 586, 596 n.34 (5th Cir. 2003)). Rather, they “must present a prima facie case but need not show that [they are] certain to win.” *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011) (quoting C. Wright & A. Miller, 11A FEDERAL PRACTICE & PROCEDURE § 2948.3 (2d ed. 1995)). The Court may issue a temporary restraining order without awaiting for the adverse party’s response if it finds that “immediate and irreparable injury . . . will result to the movant before the adverse party can be heard in opposition.” FED. R. CIV. P. 65(b)(1); *Havlik v. United States*, No. 18-cv-0692, 2018 WL 5117282, at *1 (W.D. La. Oct. 19, 2018).

⁷⁹ Goldenson Dec., Dkt. 1-3 at ¶ 17; Smith Dec., Ex. 11 at ¶ 3 (“It is impossible for people at Oakdale to stay six feet away from each other.”); Livas Dec., Ex. 7 at ¶ 3.

ARGUMENT

Corrections officials have a constitutional obligation to protect incarcerated people from a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). Petitioners have a substantial likelihood of succeeding in their claim that Respondents are failing to provide those constitutionally-mandated protections to the Class. The harm arising from these constitutional violations—severe illness and possibly death—is irreparable, and the remaining balancing factors weigh heavily in favor of the Court granting Petitioners’ motion for a temporary restraining order/preliminary injunction.

I. Plaintiffs Have a Substantial Likelihood of Success on the Merits of Their Claim That the Conditions in Which They Are Being Confined are Unconstitutional

Plaintiffs can present a prima facie case that the current conditions at Oakdale are unconstitutional. Under the Eighth Amendment, prison officials have a constitutional obligation to provide for incarcerated persons’ reasonable safety and to address their serious medical needs. *See, e.g., Farmer*, 511 U.S. at 832-33 (1994) (under the Eighth Amendment, prison officials “must provide humane conditions of confinement,” including adequate medical care, and “must take reasonable measures to guarantee the safety of the inmates”); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (“deliberate indifference to serious medical needs of prisoners” is “proscribed by the Eighth Amendment”); *Hinojosa v. Livingston*, 807 F.3d 657, 666 (5th Cir. 2015) (plaintiff stated an Eighth Amendment claim when defendants subjected him to conditions “posing a substantial risk of serious harm” to his health).

Prison officials violate this affirmative obligation by showing “deliberate indifference” to the substantial risk of serious harm to the prisoners. *Farmer*, 511 U.S. at 828. “A prison official acts with deliberate indifference when he ‘knows of and disregards an excessive risk to inmate health or safety.’” *Hinojosa*, 807 F.3d at 665 (quoting *Farmer*, 511 U.S. at 837). A court “may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” *Ball v. LeBlanc*, 792 F.3d 584, 594 (5th Cir. 2015) (quoting *Farmer*, 511 U.S. at 842);

see also Hinojosa, 807 F.3d at 667 (“open and obvious nature” of dangerous prison conditions supported an inference of deliberate indifference).

With respect to an impending infectious disease like COVID-19, deliberate indifference is satisfied when prison officials “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” *even when “the complaining inmate shows no serious current symptoms.”* *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993) (emphasis added). “That the Eighth Amendment protects against future harm to inmates is not a novel proposition. . . . 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.* at 33; *see also Gates v. Cook*, 376 F.3d 323, 333 (5th Cir. 2004) (“It is also important to note that [an] inmate need not show that death or serious illness has [already] occurred.”) (citing *Helling*, 509 U.S. at 32). “[H]aving stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.” *Farmer*, 511 U.S. at 833.

Here, there can be no doubt that Respondents are aware of and have insufficiently responded to the substantial risk that exposure to COVID-19 poses to all persons incarcerated at Oakdale, and particularly to the Medically Vulnerable Subclass. Respondents’ own “update” contains several admissions to that effect. First, the BOP claims it began preparing for the coronavirus in January 2020,⁸⁰ yet it waited at least six weeks to release its national directives to screen prisoners and staff, suspend prisoners’ movements, and modify operations to maximize social distancing.⁸¹ An Oakdale prisoner became the first person to die from COVID-19 in BOP custody on March 28, 2020.⁸² By that time, BOP and its agents had known for weeks or months about the rapid-fire spread of COVID-19, the danger it posed to prisons, and especially the

⁸⁰ Inmate Update, Dkt. No. 8 at 3.

⁸¹ *Id.* at 3-4.

⁸² Sarah N. Lynch, *Prisoner Serving Time for Drug Charge Is First U.S. Inmate to Die From COVID-19*, Reuters (March 29, 2020), <https://www.reuters.com/article/us-health-coronavirus-prison-death/prisoner-serving-time-for-drug-charge-is-first-u-s-inmate-to-die-from-covid-19-idUSKBN21G04T>.

danger it posed to medically vulnerable populations. Indeed, a BOP agency task force worked with the CDC and reviewed World Health Organization guidance before announcing Phase II of its “Action Plan” on March 13, 2020.⁸³ The CDC expanded its guidance for people at extreme risk of serious illness from the coronavirus in early March.⁸⁴

As COVID-19 continued to infiltrate Oakdale in recent days, Respondents have failed to provide even basic safeguards to the Class, despite being aware of directives from the Department of Justice to immediately address the issue. In his April 3 memo, Attorney General Barr noted that he had already “directed the Bureau of Prisons to prioritize the use of home confinement as a tool for combatting the dangers that COVID-19 poses to our vulnerable inmates. . . .”⁸⁵ He went on to note the “significant levels of infection” at facilities including FCI Oakdale and affirmed that the government must “move with dispatch in using home confinement, where appropriate, to move vulnerable inmates out of these institutions.”⁸⁶ Yet despite these directives, and Defendants’ understanding of the necessity of implementing them, Defendants have employed release criteria that do not consider vulnerability to COVID-19,⁸⁷ moved without dispatch or even stated timelines, and failed to release *anyone* to date. Moreover, they have placed the burden on other actors and other systems to effectuate the release of medically-vulnerable prisoners. For example, Defendants point to the use of compassionate release or reduction of sentence motions as an avenue for release.⁸⁸ But these avenues have not resulted and will not result in the release of enough people in a short enough period of time to reduce the risk of harm to the Class and Subclass Members.

⁸³ Inmate Update, Dkt. No. 8 at 3.

⁸⁴ Korin Miller, *Who’s Most At Risk for Coronavirus? Why Certain People Are Vulnerable to Complications*, Prevention (March 13, 2020), <https://www.prevention.com/health/a31245792/coronavirus-high-risk-groups/>.

⁸⁵ Memorandum from Attorney General William Barr to Director of Bureau of Prisons, *The Increasing Use of Home Confinement at Institutions Most Affected by COVID-19* (April 3, 2020), *available at* <https://politi.co/2UV3JBi>.

⁸⁶ *Id.*

⁸⁷ Goldenson Dec. at ¶ 33.

⁸⁸ Inmate Update at 7-8.

Despite pervasive warnings, Respondents failed to act, then acted sluggishly and ineffectively. Respondents' utter disregard for social distancing and any meaningful timeline to achieve it, both before the April 10 "update" and within it, prove that the deliberate indifference will continue without this Court's intercession.

This is exactly the type of inadequate action and culpable inaction that the Fifth Circuit has previously found sufficient to constitute deliberate indifference. For instance, in *Gomez v. Warner*, the Fifth Circuit found that a prisoner alleged deliberate indifference by prison officials where the prison's razor-swapping program created the mere "risk" of "possible spread" in the transmission of deadly "infectious diseases such as HIV, AIDS, and hepatitis." *Gomez v. Warner*, 39 F.3d 320 (5th Cir. 1994) (per curiam) (emphasis in original); *see also, e.g., Johnson v. Epps*, 479 F. App'x 583, 589-92 (5th Cir. 2012) (allegations that inmate was exposed to "serious, communicable diseases" and that prison officials were aware of the risk and did nothing to prevent it were sufficient to state a claim for violation of Eighth Amendment rights); *Gates v. Collier*, 501 F.2d 1291, 1300-03 (5th Cir. 1974) (affirming district court's holding that allowing "[s]ome inmates with serious contagious diseases . . . to mingle with the general prison population," alongside maintaining a host of other unsanitary and inhumane conditions, "constitute[d] cruel and unusual punishment") (cited with approval in *Rhodes v. Chapman*, 452 U.S. 337, 352 n. 17 (1981)); *Newman v. Alabama*, 503 F.2d 1320 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975) (finding that when systematic deficiencies in staffing, facilities or procedures make unnecessary suffering inevitable, a court will not hesitate to use its injunctive powers). Indeed, courts nationwide are recognizing the unprecedented health and public safety threat that COVID-19 presents and are making immediate release decisions accordingly.⁸⁹

⁸⁹ *United States v. Zuckerman*, 16-cr-194-AT, Dkt. No. 116 (S.D.N.Y. Apr. 3, 2020) (granting immediate compassionate release to a 75-year-old defendant with underlying health conditions, in light of COVID-19); *United States v. Campagna*, 16-cr-78, 2020 WL 1489829 (S.D.N.Y. March 27, 2020) ("Defendant's compromised immune system in concert with the COVID-19 public health crisis constitutes an extraordinary and compelling reason to modify Defendant's sentence"); *United States v. Hernandez*, U.S. Dist. LEXIS 58739 (S.D.N.Y. April 2, 2020) ("In light of the heightened medical risk presented to Mr. Hernandez by the COVID-19 pandemic, there are extraordinary and compelling reasons to reduce Mr. Hernandez's sentence"); *United States v. Perez*, 17-cr-513, Dkt. No. 98 (S.D.N.Y. April 1, 2020)

Here, Petitioners are alleging far more than a *risk* of transmission of a deadly disease—transmission is happening in real time while the Respondents have been deliberately indifferent to Petitioners’ fate. Indeed, by the day this Court held its status conference on April 7, 2020, the virus had spread from FCI Oakdale I to FCI Oakdale II.⁹⁰ Between Saturday, March 28, 2020

(defendant’s “heightened risk of serious illness or death from COVID-19 due to his pre-existing medical issues” constitutes an “extraordinary and compelling” reason for compassionate release); *United States v. Hunneus*, 19-cr-10117, Dkt. No. 642 (D. Mass. March 17, 2020) (finding “extraordinary and compelling reasons” and granting motion for reduction of sentence “in light of the national state of emergency due to the global COVID-19 pandemic and Hunneus’ unique health circumstances”); *United States v. Wishner*, 2:14-cr-712, Dkt. No. 155 (C.D. Cal. March 27, 2020) (granting compassionate release under 18 U.S.C. 3582(c)(1) based on COVID-19 and underlying medical conditions); *United States v. Copeland*, No. 2:05-cr-135-DCN, Dkt. No. 662 (D.S.C. Mar. 24, 2020) (granting compassionate release to defendant in part due to “Congress’s desire for courts to release individuals the age defendant is, with the ailments that defendant has during this current pandemic”); *United States v. Powell*, No. 1:94-cr-316-ESH (Mar. 28, 2020) (granting unopposed motion for compassionate release in light of COVID-19); *United States v. Rodriguez*, No. 2020 U.S. Dist. LEXIS 58718 (E.D. Pa. Apr. 1, 2020) (defendant’s circumstances—particularly the outbreak of COVID-19 and his underlying medical conditions present “extraordinary and compelling reasons” to reduce sentence); *United States v. Colvin*, 2020 U.S. Dist. LEXIS 57962, at *9 (D. Conn. Apr. 2, 2020) (defendant demonstrated “extraordinary and compelling reasons justifying her immediate release under Section 3582(c)(1)(A) and U.S.S.G. 1B1.13” because her diabetes substantially increases risk of illness should she contract COVID-19); *United States v. Resnick*, 12-cr-152, 2020 U.S. Dist. LEXIS 59091 (granting compassionate release because defendant is particularly vulnerable to COVID-19 because he is 65 years old with diabetes and end-stage liver disease); *United States v. Jepsen*, 2020 U.S. Dist. LEXIS 57007 (“The court finds that the totality of the circumstances specific to Mr. Jepsen constitute ‘extraordinary and compelling’ reasons to grant compassionate release,” including that he suffers chronic conditions considered to be risk factors for COVID-19); *United States v. Edwards*, 17-cr-3, Dkt. 134 (April 2, 2020) (Granting compassionate release, in considerations of COVID-19 pandemic and defendant’s compromised immune system.”); *United States v. Karl Oreste*, 14-20349-cr-Scola, Dkt. No. 200 (S.D. Fl. April 6, 2020) (granting compassionate release, concluding that there were extraordinary and compelling circumstances presented by COVID-19 pandemic and defendant’s advanced age and poor health); *United State v. Bartolo Hernandez*, 16-20091-CR-Williams, Dkt. No. 561 (S.D. Fl. April 3, 2020) (finding extraordinary and compelling reasons and granting compassionate release motion, over the government’s opposition, where—because of the coronavirus pandemic—the defendant was the only potential caregiver for his elderly mother); *United States v. Foster*, No. 1:14-cr-324-02, DE 191 (M.D. Pa. Apr. 3, 2020) (granting compassionate release to a defendant who—due to an underlying lung condition—was at greater risk of serious illness or death from COVID-19); *United States v. Brannan*, No. 4:15-CR-80-01, DE 286 (S.D. Tx. Apr. 2, 2020) (granting compassionate release where defendant was 66-years-old with diagnoses of high blood pressure and high cholesterol); *United States v. Williams*, No. 3:04-cr-95-MCR-CJK, DE 91 (N.D. Fla. Apr. 1, 2020) (granting compassionate release in light of severe risk posed to defendant by COVID-19); *United States v. Marin*, 15-cr-252, Dkt. No. 1326 (E.D.N.Y. Mar. 30, 2020) (granting release due to age, deteriorating health and elevated risk of dire health consequences due to COVID-19 outbreak); *United States v. Bolston*, 18-cr-382-MLB, DE 20 (N.D. Ga. Mar. 30, 2020) (releasing defendant in part because of danger inherent to continued incarceration during COVID-19).

⁹⁰ Nicholas Chrastil, *Following five inmate deaths, coronavirus has spread to a new facility at Louisiana federal prison*, THELENSNOLA.org (April 7, 2020), available at:

and Friday, April 10, 2020, Respondents' deliberate indifference has resulted in the deaths of six Oakdale inmates—Patrick Jones (49); Nicholas Rodriguez (43); James Wilson (57); David Townsend (66); Wallace Holley, Jr. (56); and George Jeffus (76). According to news reports, these men each had the types of pre-existing conditions that would have made them members of the proposed Medically-Vulnerable Subclass in this matter, had they been able to survive Respondents' deliberate indifference long enough to participate in this suit.⁹¹

II. Petitioners Face a Substantial Threat of Irreparable Injury

Petitioners require immediate relief to prevent irreparable injury. Indeed, six men have died, and dozens of putative Class members are already suffering the irreparable injury of COVID-19 infection. Countless more Class members inevitably will suffer infection unless immediate, remedial measures, including the expedited release of the Medically-Vulnerable Subclass members, are taken to effectively mitigate the virus's spread.

Class members are incarcerated in congregate settings with little-to-no control over their contact with others and the hygiene of their confinement, and thus cannot practically take the preventative measures recommended by the CDC and the President's Task Force on COVID-19.⁹² They are entirely at the mercy of Respondents, who have not adopted the necessary procedures to allow Class members to take these measures. In short, Respondents are failing to protect them from the obvious risk of severe harm, and Respondents impose on them conditions in which it is impossible for them to protect themselves.

<https://thelensnola.org/2020/04/07/following-five-inmate-deaths-coronavirus-has-spread-to-a-new-facility-at-louisiana-federal-prison/>

⁹¹ Caroline Habetz, *Fifth inmate at Oakdale federal prison dies from COVID-19*, KPLC News (April 3, 2020), <https://www.kplctv.com/2020/04/03/fifth-inmate-oakdale-federal-prison-dies-covid-19/>; Reuters, *Death Toll From COVID-19 at Oakdale Prison in Louisiana Continues to Climb*, N.Y. Times (April 2, 2020), <https://www.nytimes.com/reuters/2020/04/02/us/02reuters-health-coronavirus-prisons.html>; *Fourth inmate at Oakdale Federal Prison dies of COVID-19*, KATC News (April 2, 2020), <https://www.katc.com/news/covering-louisiana/fourth-inmate-at-oakdale-federal-prison-dies-of-covid-19/>; KPLC, *Sixth inmate at Oakdale federal prison dies from coronavirus* (April 10, 2020), <https://www.kplctv.com/2020/04/10/sixth-inmate-oakdale-federal-prison-dies-coronavirus/>

⁹² See *supra* nn. 20 & 21.

And even if Respondents could somehow show that transmission was not a virtual certainty, which they cannot, “it is not necessary to demonstrate that harm is inevitable.” *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986); *Rayford v. Bowen*, 715 F. Supp. 1347, 1351 (W.D. La. 1989) (quoting *Humana*, 804 F.2d at 1394). Rather, all that is required is “a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm.” *Humana*, 804 F.2d at 1394. Here, the unprecedented “magnitude and speed of transmission” of COVID-19 through a facility that could hardly be more contrary to current public health recommendations and the President’s Task Force recommendations makes the threat of substantial injury “significant” and “imminent.” See *Martin*, 2020 WL 1274857, at *2.

Nor can there be any question that the threatened harm is irreparable. Likely hundreds of putative Class members have risk factors making death or severe illness likely if they contract COVID-19. “It goes without saying that . . . death is an irreparable injury.” *East v. Blue Cross & Blue Shield of La.*, No. 14-cv-115-BAJ-RLB, 2014 WL 8332136, at *2 (M.D. La. Feb. 24, 2014); accord, e.g., *Turner v. Epps*, 842 F. Supp. 2d 1023, 1028 (S.D. Miss. 2012) (describing death as “the single most irreparable harm of all”). Even for those who recover—a touch-and-go proposition, given the demonstrated seriousness and spread of COVID-19, particularly for vulnerable populations—the extreme suffering that they may experience during their illness⁹³ and the possibility of long-term respiratory impairment⁹⁴ could not be erased. Such bodily injury

⁹³ See, e.g., Graham Readfearn, *What Happens to People’s Lungs When They Get Coronavirus?*, THE GUARDIAN (Mar. 28, 2020, 2:56 AM), <https://www.theguardian.com/world/2020/mar/28/what-happens-to-peoples-lungs-when-they-get-coronavirus> (noting that “almost all serious consequences of Covid-19 feature pneumonia” and that “there is evidence that pneumonia caused by Covid-19 may be particularly severe.” The lungs “become filled with inflammatory material [and] are unable to get enough oxygen to the bloodstream, reducing the body’s ability to take on oxygen and get rid of carbon dioxide”).

⁹⁴ See, e.g., Peter Wark, *How Are the Most Serious COVID-19 Cases Treated, and Does the Coronavirus Cause Lasting Damage?*, THE CONVERSATION.COM (Mar. 29, 2020, 9:29 PM), <http://theconversation.com/how-are-the-most-serious-covid-19-cases-treated-and-does-the-coronavirus-cause-lasting-damage-134398> (“At this stage there is no data on the long-term effects of COVID-19. But we can look at the after-effects of other acute viral respiratory diseases such as influenza, SARS and Middle East respiratory syndrome (MERS). In these diseases, collectively called acute respiratory distress syndromes (ARDS), the fragile small airways and air sacs become damaged by inflammation, can become blocked by fluid and blood, and are replaced by scar tissue as they heal. This can stiffen the lungs – at

clearly amounts to irreparable harm. *See, e.g., Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (noting that the “suffer[ing] of physical effects” can “serve as an independent basis for [a] conclusion that the plaintiff would suffer irreparable harm in the absence of preliminary injunctive relief”).

Moreover, COVID-19 outbreaks have brought some of the most well-equipped medical systems in the country to their knees.⁹⁵ In New York City, for example, many people with serious non-COVID-19 conditions are finding it difficult, if not impossible, to obtain needed medical care.⁹⁶ People have died while waiting in line for overburdened emergency rooms.⁹⁷ Medical personnel have been hit particularly hard, leading to numerous deaths and further depleting medical systems’ resources.⁹⁸ The outbreak’s toll on Oakdale’s system is apparent: Aside from six prisoner deaths, 18 prisoner hospitalizations, and at least 50 prisoner infections, 17 prison staff members are infected and 19 more are quarantined, awaiting test results,⁹⁹ resulting in a staff shortage that has made even reviewing prisoners for release a “challenge.”¹⁰⁰

first from fluid and then from scar tissue – impairing their ability to transfer oxygen and making breathing more laboured.”).

⁹⁵ *See, e.g.,* Michael Rothfeld, Somini Sengupta, Joseph Goldstein, and Brian M. Rosenthal, *13 Deaths in a Day: An “Apocalyptic” Coronavirus Surge at an N.Y.C. Hospital*, New York Times (March 25, 2020), <https://www.nytimes.com/2020/03/25/nyregion/nyc-coronavirus-hospitals.html> (“[H]ospitals are under siege. New York City’s hospitals run the gamut from prestigious teaching institutions catering to the elite to public hospitals providing care for some of the poorest communities in the nation. Regardless of whom they serve, few have been spared the impact of the pandemic: A flood of sick and fearful New Yorkers has besieged emergency rooms across the city.”); *see also* Miguel Marquez and Sonia Moghe, *Inside a Brooklyn Hospital that Is Overwhelmed with COVID-19 Patients and Deaths*, CNN (March 30, 2020), <https://www.cnn.com/2020/03/30/us/brooklyn-hospital-coronavirus-patients-deaths/index.html> (“‘A medical war zone,’ [Dr. Arabia] Mollette, an emergency room physician at Brookdale Hospital, told CNN. ‘Every day I come, what I see on a daily basis, is pain, despair, suffering and health care disparities.’”).

⁹⁶ *Id.*

⁹⁷ *See, e.g.,* Jessica Glenza, Ankita Rao, and Alexandra Villarreal, “It’s What Was Happening in Italy”: the Hospital at the Center of New York’s COVID-19 Crisis, THE GUARDIAN (March 27, 2020), <https://www.theguardian.com/us-news/2020/mar/27/new-york-coronavirus-elmhurst-hospital>.

⁹⁸ *See, e.g.,* Dylan Scott, Umair Irfan, and Jen Kirby, *The Next Coronavirus Crisis Will Be a Shortage of Doctors and Nurses*, VOX (March 26, 2020), <https://www.vox.com/2020/3/26/21192191/coronavirus-us-new-york-hospitals-doctors-nurses>.

⁹⁹ Inmate Update, Dkt. No. 8 at 7.

¹⁰⁰ *Id.* at 9.

In the three weeks since Oakdale’s first positive COVID-19 case and the 12 days since the Attorney General ordered BOP to prioritize releases from Oakdale, the prison has apparently succeeded in releasing no one except to hospitals and mortuaries. Instead, its plan has merely identified fewer than 70 “potentially eligible” people for release. Even if every one of those people were already released, that plan is woefully insufficient to prevent the spread of disease and protect Class members from harm, primarily because it does not reduce the Oakdale population enough to allow prisoners to socially distance from others.¹⁰¹

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

The third and fourth factors, whether the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted and weighing the public interest “merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, they weigh heavily in favor of granting relief.

As an initial matter, the requested injunction would protect Petitioners’ constitutional rights under the Eighth Amendment, and “[i]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *Jackson Women’s Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012)); accord, e.g., *June Medical Servs., LLC v. Caldwell*, No. 14-cv-525-JWD-RLB, 2014 WL 4296679, at *8 (M.D. La. Aug. 31, 2014). Because “confidence in the humane application of the governing laws of the State must be in the public’s interest,” *Harris v. Johnson*, 323 F. Supp. 2d 797, 810 (S.D. Tex. 2004), there is a clear public interest in preventing Respondents from exposing Class members to cruel and unusual punishment in the form of willful exposure to a serious risk of severe harm. At the April 7 hearing, Respondents repeatedly asserted without proof that defending this suit would draw resources from their efforts to implement the Attorney General’s April 3 Memo. But prison officials cannot avoid responsibility for constitutional violations “simply because a remedy would involve intrusion into the realm of prison

¹⁰¹ Goldenson Dec., Ex. 1 at ¶¶ 31-32.

administration.” *Brown v. Plata*, 563 U.S. 493, 511 (2011) (internal citations and quotations omitted).

And beyond the public interest in protecting the putative Class members themselves, minimizing risk of transmission of COVID-19 is inarguably in the public interest. As already explained, the BOP’s delayed, sluggish, prospective and indefinite release plan is likely to spread COVID-19 from the staff of Oakdale to the broader Oakdale and Allen Parish community. “[A] COVID-19 outbreak at a detention facility could quickly overwhelm” not only the facility’s medical system, but “surrounding community hospitals” as well. *Coronel*, 2020 WL 1487274, at *7. The resulting effect on “public health and safety” would plainly harm the public interest. *Id.* “What goes on at this federal prison affects inmates, staff, and the broader Oakdale community,” Sen. John Kennedy recently said, demanding action at the prison.¹⁰²

Respondents will assuredly argue that release of Class and Subclass members, even to home confinement or other controlled environment, presents a danger to public safety. However, such generalized claims cannot overcome the very real, very immediate harm to Petitioners and the public of a continued outbreak that is likely to extend beyond the prison walls. Moreover, Oakdale is a low-security facility; the Attorney General has already recommended expanded transfers; and Petitioners’ own suggested relief contemplates self-isolation for at least 14-days to comply with CDC guidance. At the same time, most Louisianans are also sheltering in place and any discharged prisoners would be subject to the same order. Accordingly, any asserted threat to public safety is further diminished under current conditions, and, in any event, is far outweighed by the harms of continued detention in a prison racked by COVID-19, including potential death. *Cf. Thakker v. Doll*, 2020 WL 1671563, at *9 (M.D. Pa. Mar. 31, 2020) (holding that balance of equities favors release of detainees in light of COVID-19 in part because failure to appear already carries grave consequences and travel is currently restricted).

¹⁰² April 7, 2020, press release, *supra* n. 9.

This is an archetypal situation for a temporary restraining order. In the face of the virulent pandemic sweeping through Oakdale and the surrounding community, none of the government's proposed mitigation efforts—even if executed perfectly—would achieve the necessary social distancing¹⁰³ or cure Respondents' ongoing constitutional violations. Under these circumstances, it is the fact of the Petitioners' confinement itself that gives rise to the constitutional violation. *See Preiser v. Rodriguez*, 411 U.S. 475, 498 (1973); *Malam v. Adducci*, Case No. 2:20-cv-10829-JEL-APP, Dkt. No. 22, at 12 (E.D. Mich. Apr. 5, 2020) (granting temporary restraining order, in part, in COVID-19 habeas action, noting that the underlying claim was “a challenge to the continued validity of confinement itself”). Immediate, responsible release of enough prisoners to reduce the incarcerated population at Oakdale to a level that allows for adequate social distancing is therefore the only action that will reduce the risk of COVID-19 contraction and protect the constitutional rights of the Class and Subclass members. Respondents have failed to take the required decisive action. Instead, they have placed the burden on other actors and other systems to effectuate the release of medically-vulnerable prisoners. Respondents are not moving with the requisite dispatch and Petitioners do not have the luxury of waiting any longer.

Immediately requiring Respondents to expedite release of Medically-Vulnerable Subclass members will allow the Court to “preserve the status quo”—a healthy prison population—and “prevent irreparable harm”—additional infections and deaths—“just so long as is necessary to hold a hearing, and no longer.” *Snow v. Lambert*, No. 15-cv-567-SDD-RLB, 2015 WL 5071981, at *1 (M.D. La. Aug. 27, 2015) (citation omitted). Petitioners are prepared to proceed to a preliminary injunction hearing as soon as Respondents and the Court are able. But, in the interim, a temporary restraining order is the only way to ensure that Respondents' plan to lockdown Plaintiffs in a tinderbox of infection is not a *fait accompli* before this Court has the opportunity to pass judgment on it.

¹⁰³ Goldenson Dec., Dkt. No. 1-3 at ¶ 14.

CONCLUSION

For the foregoing reasons, the Court should immediately order the following relief:

- (1) A temporary restraining order and/or preliminary injunction requiring Defendants to identify all Medically-Vulnerable Subclass Members within forty-eight (48) hours of the Court's order;
 - a. For any Medically-Vulnerable Subclass Member whose release Defendants would like to challenge, Defendants must also present evidence within the same forty-eight (48) hour period that such individual presents such a serious risk of flight or imminent physical danger to others, even during home confinement and while Louisiana's stay-at-home order remains in place, that no other conditions can mitigate that risk;
 - b. Following this submission, the Magistrate Judge in this action will determine within forty-eight (48) hours whether Defendants have shown by clear and convincing evidence that Defendants' evidence of a serious risk of flight or imminent physical danger, even during home confinement and while Louisiana's stay-at-home order remains in place, substantially outweighs the risk of COVID-19 contraction at Oakdale;
 - c. The Court will immediately release all such persons for whom Defendants have not made the required showing;
- (2) A temporary restraining order and/or preliminary injunction requiring Defendants to provide all persons released with educational resources on COVID-19 including instructions that they should self-isolate for the CDC-recommended period of time (currently 14 days) following release;
- (3) A preliminary injunction, permanent injunction, and/or writ of habeas corpus requiring Defendants to:
 - a. Continue to release all current and future Medically-Vulnerable Subclass members absent the showing described above in paragraph (1);
 - b. Report weekly on the population of persons in Oakdale who are Medically-Vulnerable as defined in this action;

- c. Release additional Class Members, including those not considered Medically-Vulnerable, as needed to ensure that all remaining persons incarcerated at Oakdale are under conditions consistent with CDC and public health guidance to prevent the spread of COVID-19, including requiring that all persons be able to maintain social distancing; and
- (4) A declaration that Oakdale's policies violate the Eighth Amendment right against cruel and unusual punishment with respect to the Class Members.

Respectfully submitted this 13th day of April, 2020.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2020, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

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

/s/ Bruce Hamilton

Bruce Hamilton, La. Bar No. 33170