APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30052

ELZIE BALL; NATHANIEL CODE;
JAMES MAGEE, Plaintiffs–Appellees,

v.

JAMES M. LEBLANC, Secretary, Department of Public Safety and Corrections; DARREL VANNOY, Warden, Louisiana State Penitentiary; LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; Warden JAMES CRUZ,
Defendants–Appellants.

Appeal from the United States District Court
for the Middle District of Louisiana

FILED January 31, 2018

Before SMITH, BARKSDALE, and HIGGINSON, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Elzie Ball, Nathaniel Code, and James Magee are death row inmates in the Louisiana State Penitentiary ("LSP") and are housed in cells without air

conditioning. The three sued in 2013, claiming a violation of the Eighth Amendment. Their case comes to us for the second time, after a different panel found that an Eighth Amendment violation had occurred and that injunctive relief was appropriate but that the district court had exceeded the bounds of the Prison Litigation Reform Act ("PLRA") and *Gates v. Cook*, 376 F.3d 323, 339-40 (5th Cir. 2004), by mandating facility-wide air conditioning and setting a maximum heat index. *See Ball v. LeBlanc*, 792 F.3d 584, 596, 598-600 (5th Cir. 2015) ("*Ball I*"). Because the district court did not adhere to the mandate, we reverse and remand.

I.

A.

The basis of the complaint is that plaintiffs have pre-existing medical conditions that render them vulnerable to heat-related injury. A detailed description of the death-row facility, located in Angola, Louisiana, can be found in *Ball I*, *id.* at 589-91. Most relevant here, the cells are without air conditioning, which has resulted in heat indices of over 100 degrees. Moreover, before suing, plaintiffs had only limited access to ice and could take only hot showers. The *Ball I* panel agreed with the finding of a constitutional violation: "[W]e affirm the district court's conclusion that housing these prisoners in very hot cells without sufficient access to heat-relief measures, while knowing that each suffers from conditions that render him extremely vulnerable to serious heat-related injury, violates the Eighth Amendment." *Id.* at 596.

The *Ball I* panel also concluded, however, that the initial injunction (the "First Plan") violated the PLRA.

Id. at 598-600. Under the First Plan, the court effectively required the state "to install air conditioning throughout death row housing" by developing "a plan to reduce and maintain the heat index in the Angola death row tiers at or below 88 degrees Fahrenheit." *Id.* at 598 (quoting *Ball v. LeBlanc*, 988 F. Supp. 2d 639, 698 (M.D. La. 2013)). "The PLRA greatly limits a court's ability to fashion injunctive relief." *Id.* Courts may order only relief that "extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation." *Id.* (quoting 18 U.S.C. § 3626(a)(1)(A)).

Accordingly, the First Plan violated the PLRA, in part[1] because air conditioning was "unnecessary to correct the Eighth Amendment violation." *Id.* at 599.[2]

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[1] The panel also reasoned that the First Plan violated the PLRA by requiring facility-wide relief, which ran counter to the PLRA's requirement that relief be limited to the particular plaintiffs. *Ball I*, 792 F.3d at 599-600; 18 U.S.C. § 3626(a)(1)(A). On remand, the district court manifestly adhered to that part of the mandate, which is not at issue in this appeal.

[2] In *Ball I*, this court closed the door to air conditioning as a permissible remedy here: "[A]ssuming that air conditioning is an acceptable remedy—and it is not," the panel reasoned that any relief must be limited to the particular plaintiffs in this case. *Ball I*, 792 F.3d at 600. Plaintiffs posit, however, that *Yates v. Collier*, 868 F.3d 354, 370-71 & n.8 (5th Cir. 2017), leaves open the possibility of mandated air conditioning. *Yates* interpreted *Ball I* as holding "that air-conditioning was not appropriate in that case because other acceptable and less-intrusive remedies had yet to be tried." *Id.* at 370. That observation on *Ball I* has no bearing on the task before us, which is to interpret and enforce the mandate issued by a panel in this very case. Moreover, the only relevant *holding* in *Yate* regards class certification, an issue

The panel suggested "acceptable remedies short of facility-wide air conditioning," such as (1) diverting "cool air from the guards' pod into the tiers," (2) allowing access to air conditioned areas during tier time, (3) allowing "access to cool showers at least once a day," (4) giving "ample" cold drinking water and ice "at all times," (5) providing "personal ice containers and individual fans," and (6) installing "additional ice machines." *Id.* The panel told the district court to "limit its relief to these types of remedies." *Id.*

Additionally, the relief required under the First Plan was far broader than that approved of in *Gates*. *Id.* at 600. "The *Gates* court did not mandate a maximum heat index . . . . It required particular heat measures, including fans, ice water, and showers, 'if the heat index reaches 90 degrees or above.'" *Id.* (quoting *Gates*, 376 F.3d at 336). The panel noted that the First Plan required relief that was far more extensive and expensive than what *Gates* allowed and that because "*Gates* upheld an injunction providing narrower relief, and there is no showing that the Constitution mandated more relief for these prisoners for the same prison condition in this case, on remand the court must craft relief more closely aligned with *Gates* as well as consistent with the PLRA." *Id.*

B.

On remand, the district court ordered the state to submit a new plan in light of this court's mandate, whereupon the state submitted its 'Second Heat

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not present here. In any event, *Ball I* plainly says that air conditioning is "not" "an acceptable remedy" and was "unnecessary to correct the Eighth Amendment violation." *Ball I*, 792 F.3d at 599-600.

Remediation Plan' or 'Second Plan.'" That plan provided that plaintiffs would have cold water for their daily, fifteen-minute showers; it gave each plaintiff ice containers that would be regularly replenished from newly purchased ice machines; and it provided each plaintiff with a personal fan. Unsatisfied, plaintiffs moved to modify, urging the court to reinstate its initial plan—*i.e.*, the very plan that *Ball I* had explicitly rejected.

In connection with simultaneous settlement discussions, the state implemented additional, experimental relief measures, consistent with the stipulation that "any discussions or actions taken would not be admissible as evidence in this case pursuant to . . . Federal Rule of Evidence 408(a)(2)." These exploratory remedies, which the court termed the "Third Plan," are the basis for the later additional relief mandated by the modified second injunction at issue on this appeal. Moreover, the Special Master informed the parties that the district court had "advised that the implementation of any efforts or measures, on a trial basis, in this case will not be viewed as spoliation or destruction of evidence . . . . [T]hese discussions are confidential and will remain so as long as the parties so request."

The court then held two hearings. At the first, it heard evidence from Dr. Vassallo, who had testified in the initial trial and substantially reiterated her testimony. Additionally, each of the plaintiffs testified that, even after the implementation of the Second Plan, they experienced the same heat-related symptoms as before. At the second hearing, the Special Master testified about the Third Plan. Although the state objected that such evidence was inadmissible

under Federal Rule of Evidence 408, the district court reasoned that it would not require disclosure of "any communications among the parties" but that it had to learn about the changes in plaintiffs' conditions of confinement, which relate to a constitutional violation. Accordingly, the court overruled the objection and admitted evidence of the Third Plan.

The court issued an injunction in accordance with the Third Plan, reasoning that the Second Plan did not reduce the substantial risk of serious harm because the plaintiffs continued to experience heat-related symptoms even during its implementation. *Ball*, 223 F. Supp. 3d at 529, 545, 554-57. The court believed that "the *only* means to reduce the substantial risk of serious harm to Plaintiffs, and thereby remedy the Eighth Amendment violation in this case, is to lower the temperatures and heat indices to which Plaintiffs are exposed." *Id.* at 545.

Accordingly, the district court imposed the Third Plan, which contained the same requirements as the Second Plan but also required the state to (1) relocate plaintiffs to another tier, close to the guards' pod, (2) install an air vent in the guards' pod to divert cool air to plaintiffs' cells, (3) set up a plastic curtain around plaintiffs' cells to trap the cool air, (4) provide each plaintiff with an "IcyBreeze" unit, which is essentially an ice chest that blows cold air, and (5) regularly replenish the IcyBreeze units with ice. *Id.* The injunction would take effect only when the heat index exceeds 88 degrees. Moreover, the court provided that "[i]n the event that mold growth proliferates in the guards' pod" caused by the Third Plan, the state is enjoined "to seal the air vent and provide a sufficient number of additional IcyBreeze

units to each plaintiff in order to maintain the heat index" to "below 88 degrees Fahrenheit." *Id.* at 548. The court concluded that those measures would sufficiently lower "the indices to which Plaintiffs are exposed" to "below the 88-degree benchmark." *Id.*

The state appealed, contending that the district court had violated the *Ball I* mandate by (1) ordering a maximum heat index and (2) requiring air conditioning in the form of IcyBreeze machines. The state also maintains that the court violated Federal Rule of Evidence 408 by introducing evidence of the Third Plan.

II.

"We review *de novo* a district court's application of [a] remand order, including whether the law-of-the-case doctrine or mandate rule forecloses the district court's actions on remand." *United States v. Teel*, 691 F.3d 578, 583 (5th Cir. 2012) (citation omitted). In their briefs and at oral argument, plaintiffs insist that we should review the modified injunction for abuse of discretion. Although modifications of injunctions are typically reviewed for abuse of discretion, *see Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 190 (5th Cir. 2008), the issue here is whether that modification was barred by *Ball I*'s mandate.[3] Accordingly, we review *de*

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[3] Plaintiffs rightly point out that injunctions must "remain open to appropriate modification." *See Brown v. Plata*, 563 U.S. 493, 542-45 (2011). But that does not give district courts *carte blanche* to ignore a mandate. Though the injunction remains open to change, any modifications must be made within the confines of our circuit's decisions, subject to the few recognized exceptions to the mandate rule. *Cf. League of United Latin Am. Citizens v. City*

novo whether the modified injunction violates the mandate rule or the law-of-the-case doctrine.[4]

"Under the law-of-the-case doctrine, an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal." *United States v. Carales-Villalta*, 617 F.3d 342, 344 (5th Cir. 2010) (internal citation omitted). "The mandate rule is but a corollary to the law of the case doctrine." *United States v. McCrimmon*, 443 F.3d 454, 460 (5th Cir. 2006). Both give way to three exceptions: "(1) [T]he evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; (3) the earlier decision is clearly erroneous

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of Boerne, 675 F.3d 433, 437-39 (5th Cir. 2012) (holding that, in deciding whether to modify a consent decree, a district court could not ignore instructions regarding the proper procedures to follow; *Baum*, 513 F.3d at 187 (indicating that injunctions may not be modified in violation of the mandate rule).

Because, as we note below, one of those exceptions is for new and substantially different evidence, the mandate rule essentially dovetails with the issuing court's authority to modify an injunction in light of changed circumstances. *See Sys. Fed'n No. 91, Ry. Emp't Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961) (stating that a court "cannot be required to disregard significant changes in law or facts" and that "[a] balance must therefore be struck between the policies of res judicata and the right of the court to apply modified measures to changed circumstances'). The crucial consideration, therefore, is whether circumstances not present at the time of *Ball I* justify a maximum heat index. As we demonstrate *infra*, they do not.

[4] *Cf. League of United Latin Am. Citizens*, 675 F.3d at 437-39; *Nat'l Airlines, Inc. v. Int'l Ass'n of Machinists & Aerospace Workers*, 430 F.2d 957, 960 (5th Cir. 1970).

and would work a manifest injustice." *Id.*; *Gene & Gene, L.L.C. v. BioPay, L.L.C.*, 624 F.3d 698, 702 (5th Cir. 2010). On remand, a district court must implement "both the letter and the spirit" of the panel's mandate. *McCrimmon*, 443 F.3d at 459.

A.

Plaintiffs suggest that the new-evidence exception applies to override the mandate rule. We disagree. The only new evidence plaintiffs can point to is the Third Plan itself and allegedly new scientific testimony. But all of the relevant testimony—especially Vassallo's critical testimony—was materially unchanged.[5] And the evidence of the Third Plan itself could be relevant only in that it proved the feasibility of the Third Plan. Because the state's claims center on the propriety of a maximum heat index and the potential for air conditioning, such evidence would be irrelevant to our application of the mandate rule.[6] Accordingly, no exception to that rule applies.

B.

The state's primary claim is that the district court violated the mandate rule by effectively requiring a maximum heat index. According to the state, *Ball I* foreclosed relitigating whether the Constitution required setting a maximum heat index. And, the state contends, the district court misapplied *Ball I* by finding that a maximum heat index was necessary to

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[5] *Cf. Gene & Gene*, 624 F.3d at 704-05 (requiring evidence that was new and "substantially different" from that presented to the panel).

[6] *Cf. Nat'l Airlines*, 430 F.2d at 960 (explaining that new evidence cannot result in reopening issues squarely foreclosed by a previous appeal).

remedy the constitutional violation. *Cf. Nat'l Airlines*, 430 F.2d at 960. Plaintiffs reply only that the specific measures required by the district court were blessed in *Ball I*.

We agree with the state. *Ball I* plainly foreclosed any consideration of a maximum heat index. As that panel explained, "The *Gates* court did not mandate a maximum heat index," and the district court had to "limit its relief" to the kinds of measures found in *Gates*. *Ball I*, 792 F.3d at 599-600.[7] Although well-intentioned, the district court, to the contrary, both considered and accepted the need for a maximum heat index.[8]

Relying on a maximum heat index of 88 degrees, the court concluded that the Second Plan was inadequate because it exposed plaintiffs to heat indices above that. And based on that same maximum, the court adopted the Third Plan because it would lower the heat indices to below 88 degrees.[9] Moreover, the court gave a provisional order regarding the possibility of mold growth—in that event, the state

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[7] Indeed, Judge Reavley *dissented* on the basis of allowing a maximum heat index. *Ball I*, 792 F.3d at 600 (Reavley, J., dissenting) (stating "I would affirm the injunction which in principal only orders the heat index in the Angola death row tiers to be maintained below 88 degrees").

[8] For instance, the court repeatedly found that the only way to correct the Eighth Amendment violation would be to "lower the temperature and heat indices to which Plaintiffs are exposed." *Ball*, 223 F. Supp. 3d at 537.

[9] Specifically, the court reasoned that the Second Plan would not lower the heat index but that the Third Plan would lower it to "below the 88-degree benchmark." *Id.* at 545.

would have to provide enough IcyBreeze units to keep the heat index below 88 degrees. Therefore, the court violated the mandate by incorporating a maximum heat index into its order. Based on that violation, we reverse and remand the injunction.

On remand, the district court must re-evaluate the necessity of the Third Plan even without a maximum heat index. It may well be that parts of the Third Plan are still necessary to redress the constitutional violation: *i.e.*, "housing these prisoners in very hot cells *without sufficient access to heat-relief measures*." *Id.* at 596 (emphasis added).[10] But the court cannot decree whether any given plan is necessary to lower the heat index to below a maximum, nor can it require the state to provide an undetermined number

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[10] "[T]he Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones." *Ball I*, 792 F.3d at 592 (quoting *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)) (internal quotation marks omitted). That involves some balancing: "In Eighth Amendment cases, plaintiffs can only obtain a remedy that reduces the risk of harm to a socially acceptable level. Some risk is permissible and perhaps unavoidable." *Id.* at 599.

In accord with this reasoning, our precedent generally has eschewed setting maximum temperatures for prisons. *See, e.g.*, *Hinojosa v. Livingston*, 807 F.3d 657, 670 (5th Cir. 2015) (explaining the Eighth Amendment right "not to be subjected to extreme temperatures with-out adequate remedial measures" and noting that "the provision of fans, ice water, and daily showers can suffice"); *Valigura v. Mendoza*, 265 F. App'x 232, 235 (5th Cir. 2008) (per curiam) (noting that "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"); *Gates*, 376 F.3d at 339-40 (approving of fans, ice water, and daily showers when the heat index is above 90 degrees).

of IcyBreeze units or other measures to keep the heat index below a certain point.

The district court must ensure that any 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." *Id.* at 598 (quoting 18 U.S.C. § 3626(a)(1)(A)). And although the court is not limited to the specific relief approved of by *Gates*, it may not order measures that are more extensive or intrusive than was the relief in *Gates*. *See id.*

C.

It will help the district court and the parties for us to examine whether some of the specific measures required by the Third Plan exceed the *Ball I* mandate. The state suggests that the IcyBreeze machines might be construed as air conditioning—which *Ball I*, *id.* at 599, expressly forbade. The state posits that IcyBreeze machines are functionally much like air conditioning in that they produce cold air.

We disagree. As the district court rightly explained, the IcyBreeze units are basically ice chests with fans attached. The chest blows out cool air but does not emit water vapor. In short, they are similar to evaporative coolers. And *Ball I* specifically approved of remedial measures such as ice chests and fans. *Id.* More importantly, IcyBreeze machines are compact and inexpensive, each costing just over five hundred dollars.[11] They therefore fit comfortably

[11] The district court also found that the overall cost of the Third Plan was less than $2,000. Compared to the approximately

within *Ball I*'s admonition that any relief must not be unduly intrusive and must take into account "any adverse impact on public safety or the operation of a criminal justice system." *Id.* at 598-99 (quoting 18 U.S.C. § 3626(a)(1)(A)).

The rest of the injunction does not exceed the *Ball I* mandate. For example, the *Ball I* court specifically approved of requiring ice, cold showers, and fans. *Id.* at 599. And it allowed diverting cool air from the guards' pod—provided, of course, 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." *Id.* at 598 (quoting 18 U.S.C. § 3626(a)(1)(A)). Moreover, *Ball I* approved the use of a temperature trigger. *Id.* at 600 (explaining that *Gates* "required particular heat measures . . . if the heat index reaches 90 degrees or above") (internal quotations omitted).

Indeed, a temperature trigger is necessary to ensure that the injunction is inapplicable "during months when there is no heat risk to the Plaintiffs." *Id.* It is by effectively requiring a temperature *ceiling* that the district court went astray. Accordingly, despite that we reverse based on the erroneous adoption of a maximum heat index, we leave open the possibility that, on remand, the court may require IcyBreeze units or temperature triggers.

$100,000 that would be required to air-condition Plaintiffs' portion of Tier C, the Third Plan is sufficiently inexpensive to satisfy our concerns relating to the PLRA.

III.

The state posits that the district court admitted evidence of the Third Plan in violation of Federal Rule of Evidence 408.[12] Evidentiary rulings are reviewed for abuse of discretion. *Id.* at 591 (citing *Battle ex rel. Battle v. Mem'l Hosp. at Gulfport*, 228 F.3d 544, 550 (5th Cir. 2000)). Moreover, "[e]ven if the court abused its discretion, this court will presume the error is harmless." *Id.* (citation omitted). "The party asserting the error has the burden of proving that the error was prejudicial." *Id.* (citation omitted). The state asserts that the court violated Rule 408 because the Third Plan was regarding conduct during compromise negotiations and was a subsequent remedial measure.

Rule 408 precludes admitting any "conduct or . . . statement made during compromise negotiations about the claim" "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." FED. R. EVID. 408(a)(2). Moreover, the parties stipulated that "any discussions or actions taken [with regard to the Third Plan] would not be admissible as evidence in

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[12] Although the state also claims that the district court violated Federal Rule of Evidence 407, that contention is undermined by Rule 407's exceptions for feasibility and impeachment evidence. *See* FED. R. EVID. 407 (noting that "the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving . . . the feasibility of precautionary measures"). On remand, the state suggested that at least some measures in the Third Plan were infeasible. Accordingly, the district court could permit introduction of such evidence to impeach that statement and demonstrate feasibility. *See, e.g.*, *Dixon v. Int'l Harvester Co.*, 754 F.2d 573, 583-84 (5th Cir. 1985); *Muzyka v. Remington Arms Co.*, 774 F.2d 1309, 1310-13 (5th Cir. 1985).

this case pursuant to . . . Federal Rule of Evidence 408(a)(2)." The district judge even communicated, through the Special Master, that "the implementation of any efforts or measures, on a trial basis," would not be "viewed as spoliation or destruction of evidence" and that the discussions would remain confidential so long as the parties so requested. Accordingly, the Third Plan and any accompanying discussions were "conduct" and "statement[s] made during compromise negotiations." FED. R. EVID. 408(a)(2).

Yet Rule 408 contains a broad exception: "The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." FED. R. EVID. 408(b). Here, the other purpose relates to the court's ongoing supervisory power over its injunction. *See Plata*, 563 U.S. at 542-45. The district court may have been concerned about how the Third Plan would affect the prisoners and their constitutional rights; the court also could have wanted to know whether the Third Plan was more efficient than the Second Plan.[13]

Moreover, "Rule 408 should not exclude more than required to effectuate its goals, which, after all, run counter to the overarching policy favoring admission of all relevant evidence." *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 299 (5th Cir. 2010). Courts must ensure that Rule 408 remains

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[13] *See Plata*, 563 U.S. at 542 (stating that "[a] court that invokes equity's power to remedy a constitutional violation by an injunction . . . has the continuing duty and responsibility to assess the efficacy and consequences of its order").

"tethered to the rationales underlying the rule." *Id.* at 298. Those rationales—the irrelevancy of such evidence and the public policy in favor of compromise—are inapplicable here.[14] The evidence was relevant and probative. And the public policy in favor of compromise could be satisfied by excluding any negotiations[15]—which would have formed the basis for the state to move to modify the injunction or enter a consent decree—but still admitting conduct affecting the prisoners' constitutional rights (a manifest public policy concern, *see Plata*, 563 U.S. at 510-11, 542-43). Accordingly, the district court did not abuse its discretion by admitting evidence of the Third Plan itself.[16]

Because the district court erroneously addressed the propriety of a maximum heat index, found that it was necessary, and issued a modified injunction that in certain instances incorporated it, the order imposing the modified injunction is REVERSED and REMANDED. We are confident that, on remand, the district court will conscientiously proceed in a manner that is consistent with this opinion and *Ball I*.

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[14] *See* FED. R. EVID. 408 advisory committee's note to 1972 proposed rule; *Lyondell*, 608 F.3d at 299; *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1069 (5th Cir. 1986).

[15] Indeed, the district court did not admit any evidence of the parties' statements or negotiations.

[16] The parties would benefit from clearer notice of what is and is not admissible. For instance, the district court could have communicated, prospectively, that any actions would be admissible but that statements made during negotiations would not be admissible.

STEPHEN A. HIGGINSON, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority opinion that the injunction should be vacated to the extent it orders the state to maintain the heat index below 88 degrees. However, because, as the majority opinion recognizes, "the rest of the injunction does not exceed the *Ball I* mandate," I would affirm it. The relief measures ordered, including IcyBreeze units and diverted cool air, are consistent with the less-intrusive remedies suggested in *Ball I* and extend no further than necessary to correct plaintiffs' constitutional injury.

I write briefly to explain my view of the role of the mandate rule in this case. In its application of the mandate rule, the majority opinion reverses the district court's order despite concluding that most of the relief ordered "does not exceed the *Ball I* mandate." It reasons that the district court erred by "[r]elying on a maximum heat index"—even though the injunction does not generally mandate one—because "*Ball I* plainly foreclosed any consideration of a maximum heat index."

But in *Ball I*, our court was clear that "[t]he district court did not abuse its discretion by admitting evidence of or *relying on* the heat index." *Ball v. LeBlanc* (*Ball I*), 792 F.3d 584, 591 (5th Cir. 2015) (emphasis added). And for good reason. The heat index is the unit of measure consistently used in the medical and scientific literature to measure and identify the risk of heat-related illness. *See id.*; *Ball v. LeBlanc*, 223 F. Supp. 3d 529, 537 (M.D. La. 2016). To forbid the district court from considering a maximum safe heat index is to require that court to remedy the constitutional violation that we have found exists, *see*

Ball I, 792 F.3d at 596, without considering its cause. The record evidence, credited by the district court and not substantively challenged on appeal, demonstrates that these medically compromised plaintiffs face a risk of serious harm when they are exposed to heat indices above 88 degrees. *See Ball*, 223 F. Supp. 3d at 536-37. That factual finding must be considered when the district court assesses whether any heat-remediation plan is sufficient to remedy plaintiffs' Eighth Amendment injury.[1] *See Graves v. Arpaio*, 623 F.3d 1043, 1049-50 (9th Cir. 2010) (affirming injunction requiring sheriff to house pretrial detainees taking psychotropic medications in temperatures that do not exceed 85 degrees based on finding that exposure to higher temperatures presents an unreasonable risk of harm).

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[1] This is not to say that a constitutionally sufficient heat-remediation plan must maintain a heat index *below* 88 degrees. The district court found that the risk of serious harm due to heat "significantly increases when an individual is exposed to heat indices of 88 degrees or greater." *Ball*, 223 F. Supp. at 537. But the Eighth Amendment does not protect against any and all risk of harm; rather, it protects against "extreme" conditions, *Hudson v. McMillian*, 503 U.S. 1, 9 (1992), that present an "unreasonable risk" of harm, *Helling v. McKinney*, 509 U.S. 25, 35 (1993). Determining whether "conditions of confinement violate the Eighth Amendment requires more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused." *Id.* at 36. Determining the relevant level of risk "also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Id.* In other words, that there is some risk of harm when the heat index exceeds 88 degrees does not necessarily mean that the Eighth Amendment requires a heat index below that number.

Of course, if the district court truly did conclude that the Second Plan was inadequate simply because it failed to *maintain* a heat index below 88 degrees, that might in practice be the same as mandating a maximum heat index and thus violate our court's *Ball I* mandate (absent relevant new evidence). *See United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002) (stating that mandate rule requires lower court to implement "both the letter and the spirit of the appellate court's mandate" (quoting *United States v. Becerra*, 155 F.3d 740, 753 (5th Cir. 1998))). But the district court concluded that the Second Plan was inadequate because of plaintiffs' testimony that they "continued to experience heat-related symptoms during the implementation of Defendants' Second Plan" and expert testimony that cool showers, ice, and fans, without more, did not eliminate the substantial risk of serious harm that these plaintiffs face from extreme heat. *Ball*, 223 F. Supp. 3d at 536-37, 544-45. To be sure, the district court further concluded, based on the testimony of plaintiffs' expert, that "[t]he *only* means to reduce the substantial risk of serious harm to Plaintiffs, and thereby remedy the Eighth Amendment violation in this case, is to lower the temperatures and heat indices to which Plaintiffs are exposed." *Id.* at 545. But, in a facility where the heat index frequently exceeds 100 degrees and has risen as high as 110.3 degrees, *id.* at 531-32, requiring the state to lower the heat indices to which these medically compromised plaintiffs are exposed is not the same as mandating that the heat index remain below 88 degrees. It is only the latter that (absent relevant new evidence) *Ball I* forbids.

Contrary to the majority opinion's assertion, *Ball I* did not foreclose relitigating on remand whether a maximum heat index, or any other form of relief, could be necessary to remedy these plaintiffs' constitutional injury. By explicitly noting that "*Gates* upheld an injunction providing narrower relief" and that there was "no showing that the Constitution mandated more relief for these prisoners for the same prison condition in this case," 792 F.3d at 600, *Ball I* contemplated the possibility that new evidence could require other—possibly broader—relief.[2] That was for good reason. Injunctions must be open to modification in light of new facts or changed circumstances. *See Brown v. Plata*, 563 U.S. 493, 542-43 (2011) ("A court that invokes equity's power to remedy a constitutional

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[2] The majority opinion states that *Ball I* "closed the door to air conditioning as a permissible remedy here." I agree, but only because plaintiffs did not produce any substantively new evidence demonstrating that air conditioning—in the sense of mechanical cooling—is necessary to remedy their constitutional injuries. However, I disagree to the extent that the majority opinion suggests that *Ball I* closed the door to air conditioning regardless of any new evidence presented. I read *Ball I* to narrowly say that air conditioning was not a permissible remedy absent evidence that the more modest measures approved of in *Gates* were insufficient for these plaintiffs. In *Yates v. Collier*, 868 F.3d 354 (2017), two of our colleagues from the *Ball I* panel confirmed that "*Ball* [*I*] held that air-conditioning was not appropriate in that case because other acceptable and less-intrusive remedies had yet to be tried—not that air-conditioning was necessarily an impermissible remedy." *Id.* at 370. *Yates* is a clarification of, and consistent with, *Ball I*. *See* 792 F.3d at 600 (noting absence of evidence that plaintiffs in this case require more extensive relief than plaintiffs in *Gates*). Furthermore, as the majority opinion recognizes, some form of cooled air—be it from an IcyBreeze unit or diverted cool, *i.e.*, air-conditioned, air—can be a permissible remedy.

violation by an injunction mandating systemic changes to an institution has the continuing duty and responsibility to assess the efficacy and consequences of its order. . . . [A] court must remain open to a showing . . . that the injunction should be altered to ensure that the rights and interests of the parties are given all due and necessary protection."). No mandate can change that. *See Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 190 (5th Cir. 2008) (stating, in context of a law-of-the-case challenge, that "[m]odification of an injunction is appropriate when the legal or factual circumstances justifying the injunction have changed" (quoting *ICEE Distribs., Inc. v. J&J Snack Foods Corp.*, 445 F.3d 841, 850 (5th Cir. 2006))); *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1360 (Fed. Cir. 2006) (stating that the mandate rule "does not preclude the district court from modifying, or dissolving, the injunction if it determines that it is no longer equitable"); *Matthews*, 312 F.3d at 657 (stating that the law of the case doctrine, which includes the mandate rule, "merely expresses the practice of courts generally to refuse to reopen what has been decided, [it is] not a limit to their power" (quoting *Messinger v. Anderson*, 225 U.S. 436, 444 (1912))).

While it is true, as the majority opinion notes, that the new-evidence exception to the mandate rule is inapplicable to issues squarely foreclosed by a previous appeal, whether a different remedy could be necessary under unaddressed new facts is not an issue that can be squarely foreclosed. *Ball I* held only that the evidence *then in the record* was insufficient to establish the necessity of facility-wide air conditioning and/or a maximum heat index of 88 degrees. To suggest, as I think the majority opinion does, that

Ball I's record-specific holding forecloses future litigation of the necessity of those remedies is to imply that the mandate rule restricts a district court's authority, and indeed duty, to modify an injunction in light of changed circumstances. But that is contrary to established law. *See, e.g.*, *Baum*, 513 F.3d at 190.

The static quality that I fear the majority's opinion may inject into our Eighth Amendment jurisprudence is also inconsistent with the nature of Eighth Amendment rights. *Gates* does not set a ceiling for permissible heat-relief measures in prisons. "No 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 v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). Whether conditions of confinement amount to an Eighth Amendment violation necessarily depends on the context-specific "totality of the circumstances." *Id.* at 362-63. Courts must be free to consider those circumstances, as they change, and in light of evolving standards of decency, when determining what relief the Eighth Amendment requires.

Because there was no new evidence submitted relevant to the necessity of an 88 degree maximum heat index, I would vacate just that single provision of the injunction mandating such a maximum heat index. The rest of the injunction, ordering remedies previously approved of by us, is consistent with *Ball I* and the PLRA, particularly given the evidence presented that the *Gates* remedies alone were

insufficient to remedy plaintiffs' constitutional injuries. I would therefore affirm it.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 13-00368-BAJ-EWD

ELZIE BALL, ET AL.

v.

JAMES M. LEBLANC, ET AL.

[FILED Dec. 22, 2016]

RULING AND ORDER

Before the Court is the **Motion to Modify Injunctive Relief (Doc. 315)** filed by Plaintiffs. Plaintiffs – three seriously ill death-row inmates who are currently incarcerated at the Louisiana State Penitentiary in Angola, Louisiana ("Angola") – seek an order compelling Defendants – the Louisiana Department of Public Safety and Corrections and its Secretary, the Warden of Angola, and the Assistant Warden in charge of the death-row facility at Angola – to implement Defendants' initial Heat Remediation Plan (Doc. 118), which proposed the installation of air-conditioning throughout the death-row facility as a remedy to the constitutional violations found by this Court following a non-jury trial on the merits. Defendants oppose the Motion. (*See* Doc. 318). On

June 15, 2016, the Court held an evidentiary hearing on this matter, and the parties filed post-hearing briefs. (*See* Docs. 353, 354). Subsequently, the Court held two additional evidentiary hearings. For reasons explained herein, Plaintiffs' **Motion to Modify Injunctive Relief (Doc. 315)** is **GRANTED IN PART and DENIED IN PART.**

I. BACKGROUND

Plaintiffs Elzie Ball ("Ball"), Nathaniel Code ("Code"), and James Magee ("Magee") (collectively, "Plaintiffs") filed this lawsuit on June 10, 2013, pursuant to 42 U.S.C. § 1983; the Eighth Amendment to the United States Constitution, U.S. Const. amend. VIII; the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1; Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, as modified by the Americans with Disabilities Act Amendments Act, 42 U.S.C. § 12131 *et seq.*; and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. (Doc. 1). Plaintiffs alleged that Defendants had violated their rights by subjecting them to excessive heat, thereby endangering their health and safety. (*Id.* at ¶ 12). Plaintiffs sought declaratory and injunctive relief from this Court, requesting that Defendants be required to, among other things, develop and implement a long-term plan to maintain the heat index in Angola's death-row tiers at or below 88 degrees Fahrenheit.[1] (Doc. 12 at p. 4). Defendants denied all liability. (*See* Doc. 38).

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[1] Any subsequent reference to a measurement of degrees in this Ruling and Order, unless otherwise noted, utilizes the Fahrenheit scale.

Following a non-jury trial on the merits, this Court found that the extreme heat that Plaintiffs endured in the death-row tiers at Angola subjected Plaintiffs to a substantial risk of serious harm and that Defendants acted with deliberate indifference to that substantial risk of serious harm, in violation of Plaintiffs' Eighth Amendment right to be free from cruel and unusual punishment.[2] *See Ball v. LeBlanc*, 988 F. Supp. 2d 639 (M.D. La. 2013), *aff'd in part, vacated in part, remanded*, 792 F.3d 584 (5th Cir. 2015). The Court found that the uncontroverted evidence established that "inmates housed in each of the death row tiers were frequently subjected to heat indices above 100 degrees," *id.* at 664, and 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 tiers," *id.* at 653. Further, the Court found that "inmates housed in . . . two tiers were subjected to heat indices as high as 110.3 degrees." *Id.* at 664. Even healthy individuals are at risk of serious harm in such conditions of extreme heat, but according to expert testimony, the risk of harm to Plaintiffs is exacerbated because their various medical conditions and the pharmaceuticals prescribed to them to treat those illnesses inhibit Plaintiffs' abilities to thermoregulate

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[2] The Court denied Plaintiffs' claims under the Americans with Disabilities Act, as modified by the Americans with Disabilities Act Amendments Act, and the Rehabilitation Act. *See Ball v. LeBlanc*, 988 F. Supp. 2d 639, 687 (M.D. La. 2013), *aff'd in part, vacated in part, remanded*, 792 F.3d 584 (5th Cir. 2015). The denial of those claims was affirmed on appeal. *See Ball*, 792 F.3d at 598.

(i.e., regulate their body temperatures). *Id.* at 666. The evidence established that Defendants had knowledge of the substantial risk of serious harm that the extreme heat posed to Plaintiffs and that Defendants nevertheless failed to take any remedial action to protect them, thereby disregarding the substantial risk of serious harm to Plaintiffs' health and safety. *Id.* at 672-73, 679. Accordingly, the Court enjoined Defendants to "immediately develop a plan to reduce and maintain the heat index in the Angola death row tiers at or below 88 degrees." *Id.* at 689. Defendants' initial Heat Remediation Plan proposed that, in addition to providing Plaintiffs with a daily cold shower and access to ice and cold drinking water, air-conditioning systems would need to be installed in each of the death-row facility's eight tiers in order to maintain the heat indices in all of the tiers at or below 88 degrees. (Doc. 118).

Defendants appealed. (*See* Doc. 176). The United States Court of Appeals for the Fifth Circuit affirmed this Court's finding that Defendants had subjected Plaintiffs to conditions of confinement that violate the Eighth Amendment by "housing these prisoners in very hot cells without sufficient access to heat-relief measures, while knowing that each suffers from conditions that render him extremely vulnerable to serious heat-related injury." *Ball*, 792 F.3d at 596. The Court of Appeals, however, held that the *scope* of the Court's injunction violated the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. *Ball*, 792 F.3d at 598. The Court of Appeals held that this Court erred, first, by "order[ing] a type of relief – air conditioning – that is unnecessary to correct the Eighth Amendment violation" and, second, by

"award[ing] relief facility-wide, instead of limiting such relief to Ball, Code, and Magee." *Id.* at 599. The Court of Appeals held that under the PLRA, a district court may only order injunctive relief that "extend[s] no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs," suggesting that "there are many acceptable remedies short of facility-wide air conditioning":

> For example, the Defendants could divert cool air from the guards' pod into the tiers[,] allow inmates to access air conditioned areas during their tier time[,] allow access to cool showers at least once a day[,] provide ample supply of cold drinking water and ice at all times[,] supply personal ice containers and individual fans[,] and install additional ice machines. *Id.*

Accordingly, the Court of Appeals vacated this Court's injunction, *id.* at 600, and remanded the proceedings, instructing the Court to "limit its relief to these types of remedies," *id.* at 599.

As a result, the Court ordered Defendants to submit a new plan to ameliorate the Eighth Amendment violation that would be consistent with the opinion of the Court of Appeals. Defendants submitted their Second Heat Remediation Plan on October 23, 2015, (Doc. 251), which subsequently was revised on April 8, 2016, (Doc. 299) (collectively, "Second Plan"). Under the Second Plan, Defendants (1) installed two water-valve controllers in the showers on each tier, which allow inmates to select between hot and cold water for their daily, fifteen-minute showers; (2) provided one three-gallon ice container and a smaller ice container that is designed

to hold six twelve-ounce cans, both of which were replenished with ice by staff or orderlies during their shifts from the death-row facility's existing ice machine and/or an additional ice machine that Defendants subsequently purchased and installed; and (3) installed additional fans to ensure that each Plaintiff was provided a fan of his own. (*See* Docs. 251, 299). In response to the suggestion of the Court of Appeals that conditioned air be diverted from the guards' pod to a tier in which Plaintiffs are confined, Defendants asserted that doing so would cause the premature mechanical failure of the death-row facility's air-conditioning system due to the system's inability to handle such an increased load. (Doc. 251 at p. 2). Additionally, Defendants asserted that diverting conditioned air from the guards' pod would cause the humid, outdoor air to be pulled into the pod due to the resulting negative air balance, thereby causing water damage to the pod and rendering the building susceptible to mold growth. (*Id.* at p. 3). Finally, Defendants claimed that in order to divert the conditioned air from the guards' pod to the tier – as suggested by the Court of Appeals – the door connecting the two areas of the structure would be required to remain open, creating security concerns. (*Id.*).

On May 16, 2016, Plaintiffs filed the present Motion to Modify Injunctive Relief, urging the Court to enjoin Defendants to implement their initial Heat Remediation Plan, which called for the installation of a facility-wide air-conditioning system to maintain the heat indices in the death-row tiers at or below 88 degrees. (Doc. 315). Plaintiffs argue that because the heat indices in the death-row tiers rose above 88

degrees in spite of the measures implemented pursuant to Defendants' Second Plan, Plaintiffs remain exposed to a substantial risk of serious harm due to the conditions of extreme heat, and the Second Plan thus has proven to be insufficient to remedy the Eighth Amendment violation found by this Court and affirmed on appeal. (*Id.*). Plaintiffs assert that "Defendants' failure to propose an effective remedy," after being given wide latitude and a full opportunity to do so, demonstrates that "this Court's original injunction was a necessary, narrowly-tailored, and non-intrusive remedy." (Doc. 315-1 at p. 7). Defendants oppose the Motion, arguing that the Court of Appeals vacated this Court's finding that exposing Plaintiffs to heat indices in excess of 88 degrees places them at substantial risk of serious harm. (Doc. 318 at p. 4). Defendants assert that because the Court of Appeals held that air-conditioning was an unnecessary remedy to ameliorate the Eighth Amendment violation and the only mechanism to lower the heat indices in the death-row tiers below 88 degrees is mechanical air-conditioning, the 88-degree benchmark was vacated by the Court of Appeals. (*Id.*). Thus, Defendants contend, the only remedies that are necessary to correct the Eighth Amendment violation are those endorsed by the Court of Appeals in *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004), namely, the provision of cold showers, ice, and additional fans. (*Id.* at p. 6). Because Defendants have provided such "*Gates*-type" remedies, Defendants' argument follows, the Eighth Amendment violation has been sufficiently remedied. (*Id.* at pp. 6-7).

II. FINDINGS OF FACT

The following findings of fact are uncontroverted or supported by the evidence in the record. If 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. Defendants' Second Plan

1. Defendants' Second Plan consists of (1) the installation of two water-valve controllers in the showers on each tier, which allow inmates to select between hot and cold water for their daily, fifteen-minute showers; (2) the provision to each Plaintiff of one three-gallon ice container and a smaller ice container that is designed to hold six twelve-ounce cans, both of which are to be replenished with ice by staff or orderlies during their shifts from the death-row facility's preexisting ice machine and/or an additional ice machine that Defendants subsequently purchased and installed; and (3) the installation of additional fans to ensure that each Plaintiff is provided a fan of his own. (Docs. 251, 299).

2. The provision of a daily, fifteen-minute cold shower, standing alone, does not sufficiently reduce the substantial risk of serious harm to Plaintiffs. A brief cold shower may provide temporary relief to Plaintiffs, but such relief is limited to the time that Plaintiffs spend in the shower and a brief period afterward. Once Plaintiffs exit the shower, they are again exposed to a substantial risk of serious harm due to the conditions of extreme heat present in the death-row tiers. The Court heard compelling, uncontroverted testimony from Dr. Susan Vassallo, M.D. – who has

been on the faculty of the New York University School of Medicine since 1983; is an attending physician in emergency medicine at Bellevue Hospital Center in New York, New York; is a certified correctional health professional; and is an expert on the effects of drugs and illness on an individual's ability to thermoregulate – regarding the effectiveness of the measures implemented under Defendants' Second Plan. Regarding the provision of a daily, fifteen-minute cold shower to Plaintiffs, Dr. Vassallo testified that "a fifteen-minute shower out of twenty-four hours a day, in these temperatures, [is] absolutely not a safety measure." (Doc. 346, Hr'g Tr. at p. 141, ll. 1-3). Citing scholarly studies, which reported that there is no statistically significant value to providing a brief cold shower under similar conditions, Dr. Vassallo explained that as the cold shower water on Plaintiffs' skin evaporates following their showers, "to the extent that [their skin] is able to cool, given the humidity in the air, the individuals for that period of time will feel cooler." (*Id.* at p. 87, l. 25; *id.* at p. 88, ll. 1-3). However, Dr. Vassallo continued: "[B]y the time the evaporative cooling is completed, the story is over. The [cooler] temperature is no longer and that individual will be . . . subjected for another twenty-three hours and forty-five minutes to the heat ind[ices] that are existing at the Louisiana State [Penitentiary] cells where these folks here are being confined." (*Id.* at p. 140, ll. 19-25).

3. Plaintiffs similarly testified, from a layman's perspective, regarding the ineffectiveness of cold showers. Plaintiff Code testified that because it is "very hot" in the showers, the cold showers offer the limited benefit of providing him time to dry and clothe

himself before his body begins to perspire again due to the extreme heat. (*Id.* at p. 47, l. 5). Plaintiff Magee testified that the cold showers help relieve some of his heat-related symptoms, but merely *while* he is taking a shower. (*Id.* at p. 58, l. 8).

4. The provision of a cold shower for as long as one hour, standing alone, is similarly ineffective at reducing the substantial risk of serious harm to Plaintiffs. Even if Plaintiffs were permitted to remain in the shower for one hour, the conditions of extreme heat present in the death-row tiers continue to place Plaintiffs at risk during the remaining twenty-three-hour period of the day after the evaporative cooling from the showers has ceased. Dr. Vassallo testified that an hour-long cold shower would not reduce the risk of heat stress to Plaintiffs: "The reason is . . . that the other twenty-three hours where they're sitting under those conditions, environmental conditions [that] have been well described, are long and dangerous. One hour outside of that condition [by providing a one-hour cold shower] is insufficient to protect – to be protective." (*Id.* at p. 167, ll. 1-7).

5. The use of fans in conditions of extreme heat such as those present in the death-row tiers, standing alone, does not sufficiently reduce the substantial risk of serious harm to Plaintiffs. Dr. Vassallo testified to a clear scientific consensus "that fans are not protective" when they are utilized in "the kinds of heat indices that we see on death row where these gentlemen are . . . incarcerated." (*Id.* at p. 77, ll. 17-19). For example, Dr. Vassallo cited a clear scientific consensus that at temperatures of 90 degrees with humidity of 35%, "there was absolutely no protection from fans." (*Id.* at p. 79, ll. 5-6). On the

contrary, the use of fans in such conditions may *increase* the risk of harm to Plaintiffs because, according to Dr. Vassallo, "there is a temperature at which when you start to blow hot air across the skin, there's simply an increase in heat stress." (*Id.* at p. 78, ll. 17-20).

6. The regular provision of ice in the ice containers provided to Plaintiffs, standing alone, does not sufficiently reduce the substantial risk of serious harm to Plaintiffs. Dr. Vassallo testified that in her thirty years of experience as a clinician, she had never seen evidence that a heat stroke was prevented by a person's having "ice in their drink or ice in their cooler." (*Id.* at p. 95, l. 25).

7. Additionally, the provision of an unlimited amount of ice, coupled with a container that would permit Plaintiffs to lie down in and become encased in the ice, is not a workable remedy. Although such a configuration is used by medical professionals to treat patients who *already* have suffered a heat stroke, Dr. Vassallo testified that because of the "degree of pain and discomfort associated with that . . . as soon as our [heat stroke patients are] conscious, they have to come out of that ice bath." (*Id.* at p. 161, ll. 3-8). Further, Dr. Vassallo testified that the benefits of such an ice bath would "only last[] for the period" in which a person is immersed in the ice, (*id.* at p. 161, l. 23), and that a configuration in which Plaintiffs were immersed in an ice bath for twenty-three to twenty-four hours a day "would be intolerable for them . . . and, also, absolutely unimaginable," (*id.* at p. 162, ll. 1-2).

8. During the implementation of the Defendants' Second Plan, the heat indices in each tier in which Plaintiffs were confined rose above 88

degrees. During the implementation of the Second Plan, Plaintiffs were confined on Tiers B, F, and G. (Doc. 339 at p. 1). In the period between May 12, 2016, and June 10, 2016 – during which Defendants had implemented the measures under the Second Plan – heat indices exceeded 88 degrees on three days in Tier B, eight days in Tier F, and five days in Tier G. (*See* Doc. 328 at p. 2; Doc. 339-2; Doc. 339-6; Doc. 339-7).

9. Plaintiffs suffer from certain medical conditions and take certain prescription medications that place them at an increased risk for heat-related illness. Plaintiff Ball suffers from diabetes, hypertension, venous insufficiency, and hyperlipidemia; regarding medication, Ball takes Lasix, Claritin, potassium, Keppra, Tenormin, Cozaar, Norvasc, metformin, insulin, and Zocor. (Doc. 346, Hr'g Tr. at p. 19, ll. 11-20). Plaintiff Code suffers from hypertension, Hepatitis C, and hypothyroidism; regarding medication, Code takes Synthroid, Cozaar, and amlodipine. (*Id.* at p. 19, ll. 21-25). Plaintiff Magee suffers from depression, Hepatitis C, and hyperlipidemia; regarding medication, Magee takes Remeron, Catapres, fluoxetine, Norvasc, and cholestyramine. (*Id.* at p. 20, ll. 1-5; *see id.* at p. 223, ll. 16-18). Dr. Vassallo, who had reviewed the medical records of all Plaintiffs and was familiar with all of Plaintiffs' medical conditions, (*id.* at p. 100, ll. 8-12), testified that "the conditions and the . . . medication that [Plaintiffs are] receiving for those conditions interfere with the ability to respond to heat," (*id.* at p. 126, ll. 20-23).

10. Plaintiffs continued to experience heat-related symptoms during the implementation of Defendants' Second Plan. Plaintiff Code testified that

during the implementation of the Second Plan, he continued to experience periods of prolonged dizziness and "profuse perspir[ation]." (*Id.* at p. 43, l. 8). Plaintiff Magee testified that during the implementation of the Second Plan, he experienced the "same [symptoms] that [he] had before," namely, dizziness, nausea, and perspiration. (*Id.* at p. 54, l. 23). Plaintiff Ball testified that during the implementation of the Second Plan, he experienced the "normal every year symptoms that [he experiences] when it start[s] to get hot." (*Id.* at p. 60, ll. 18-19). Specifically, Ball testified that he continued to experience "headaches," which resemble "passing out almost," (*id.* at pp. 61, ll. 4-5), as well as "tingling" and "pain" in his fingers and his feet, a sensation that Ball described as "like . . . someone was beating [his finger] with a hammer," (*id.* at p. 60, ll. 18-23).

11. The measures implemented pursuant to Defendants' Second Plan do not, either individually *or in combination*, sufficiently reduce the substantial risk of serious harm to Plaintiffs as a result of their exposure to the conditions of extreme heat present in Angola's death-row tiers. When asked whether the measures implemented pursuant to the Second Plan – the installation of additional fans, the provision of two ice containers so that Plaintiffs have increased access to ice, and the availability of a fifteen-minute cold shower – removed the substantial risk of serious harm to Plaintiffs as a result of the conditions of extreme heat to which they are exposed in the death-row tiers, Dr. Vassallo unequivocally answered, "Absolutely not." (*Id.* at p. 96, l. 24). When asked whether the measures implemented pursuant to the Second Plan can be used to lower an individual's elevated body

temperature, Dr. Vassallo responded: "I completely disagree with that. And I have thirty years of clinical experience trying to lower a body temperature. And I can tell you 100 percent that will not work." (*Id.* at p. 162, ll. 14-17).

12. The only sufficient means to reduce the substantial risk of serious harm to Plaintiffs as a result of their exposure to the conditions of extreme heat present in Angola's death-row tiers is to lower the temperature and heat indices to which Plaintiffs are exposed. According to Dr. Vassallo: "The temperature and the heat index [are] the risk here. That is the cause of risk. To remove the risk, the temperature has to be lowered." (*Id.* at p. 97, ll. 3-5). Dr. Vassallo testified unequivocally that "in [her] expert opinion, [she did] not have any other idea . . . how to protect these prisoners other than to reduce the temperature," (*id.* at p. 147, ll. 9-12), and that the "[Second P]lan does not do that," (*id.* at p. 74, ll. 15-16).

13. The risk of serious harm due to exposure to conditions of extreme heat significantly increases when an individual is exposed to heat indices of 88 degrees or greater. Dr. Vassallo testified that, according to the findings of a recent study published in February 2016, "hospitalizations [due to heat-related illnesses] take a rather abrupt increase at the [mean] heat index . . . of 32 degrees [Celsius]." (*Id.* at p. 121, ll. 5-7). Thirty-two degrees Celsius equates to 89.6 degrees Fahrenheit. (*Id.* at p. 123, ll. 22-23). Given the information contained in that study, along with her previous findings, Dr. Vassallo concluded that the "number of 88 degree[s] is a reasonable and scientifically . . . substantiated number" as a benchmark for the heat index at which individuals are

subjected to a substantial risk of serious harm due to heat-related illness, (*id.* at p. 124, ll. 20-22), the same benchmark that the National Weather Service sets as the "top number in caution range," (*id.* at p. 129, ll. 14-15).

B. Defendants' Additional Remedial Measures Implemented Subsequent to the Implementation of the Second Plan (Defendants' "Third Plan")

1. At some time around June 26, 2016, Defendants implemented remedial measures in addition to those implemented pursuant to Defendants' Second Plan (collectively, "Third Plan"). (Doc. 369, Hr'g Tr. at p. 15, ll. 8-10).

2. Under the Third Plan, Defendants (1) moved Plaintiffs to Tier C, which was otherwise unoccupied; (2) assigned Plaintiffs to the three cells closest to the door that connects the tier to the guards' pod (e.g., cells C-1, C-2, and C-3); (3) installed a 27" x 34" air vent in the door that connects Tier C to the guards' pod, allowing conditioned air from the guards' pod to flow into Tier C; (4) installed a "curtain" constructed of heavy plastic between cells C-4 and C-5, in an attempt to keep the newly diverted cool air from escaping to the areas of Tier C in which neither Plaintiffs nor any other inmates were confined; (5) provided each Plaintiff with an individual cooling mechanism, commonly referred to as an "IcyBreeze unit" or a "Cajun cooler," which essentially consists of an ice chest, a fan, and a duct that – when the ice chest is filled with ice and the fan is powered on – emits cool air; (6) installed a water-valve controller in the showers on Tier C, which allowed Plaintiffs to select

between hot and cold water for their daily, fifteen-minute showers (a continued measure from the Second Plan); (7) provided to each Plaintiff one three-gallon ice container and a smaller ice container that is designed to hold six twelve-ounce cans, both of which were replenished with ice by staff or orderlies during their shifts from the death-row facility's preexisting ice machine and/or an additional ice machine that Defendants subsequently purchased and installed (a continued measure from the Second Plan); and (8) installed additional fans to ensure that each Plaintiff was provided a fan of his own (a continued measure from the Second Plan). (Doc. 360 at p. 3). The Court only learned of the additional measures implemented under the Third Plan through communication with the Special Master appointed in this case, Paul J. Hebert. Although both parties expressed to Special Master Hebert their desire to withhold from the Court the details regarding the specific measures implemented pursuant to the Third Plan, in spite of the fact that those measures were apparently successful in remedying the constitutional violation, Special Master Hebert disclosed to the Court the additional remedial actions that were implemented by Defendants, testifying that he "felt it was an obligation on [his] part to advise the Court that the prisoners were in a situation that did not continue to . . . subject [them] to the conditions which amounted to the constitutional violation." (Doc. 369, Hr'g Tr. at p. 18, ll. 7-12).

3. The IcyBreeze units emit air that measures approximately 57.8 degrees in temperature. (Doc. 374 at p. 2).

4. In order to maintain the temperature of the air emitted from the IcyBreeze units at a cool level, the ice-chest portion of the unit must be filled with ice and the ice must be replenished regularly. (Doc. 375, Hr'g Tr. at p. 20, ll. 11-15).

5. The IcyBreeze units were positioned in the corridor outside of each Plaintiff's cell, approximately twelve inches from the bars of each cell.[3] (*Id.* at p. 12, ll. 22-23). According to the testimony of Shane M. Hernandez – a professional engineer who, in conjunction with Special Master Hebert, was retained by the Court to evaluate the measures implemented pursuant to Defendants' Third Plan – a person who is in "close proximity" to the IcyBreeze unit is able to feel the cool air being emitted, but a person who is "more than . . . five feet away" cannot. (*Id.* at p. 27, ll. 18-20).

6. IcyBreeze units are effective at lowering the *temperature* of a small space, but do not reduce the *humidity* level in that space. (*Id.* at p. 29, ll. 11-14).

7. The installation of the 27" x 34" air vent in the door connecting Tier C to the guards' pod permitted the conditioned air in the guards' pod to flow into Tier C. According to Mr. Hernandez's testimony, Tier C is a "highly negative space" in terms of air pressure, which caused the conditioned air in the guards' pod to flow through the air vent and into the space in which Plaintiffs were confined. (*Id.* at p. 16, ll. 13-15). The

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[3] As of the date of this Ruling and Order, the Court does not possess information regarding the locations and cell assignments of Plaintiffs. The Court proceeds under the assumption that Plaintiffs are no longer being confined in Tier C and are not being availed of the remedial measures implemented under Defendants' Third Plan due to the seasonal changes in weather.

conditioned air subsequently exited the structure through the tier's exhaust system. (*Id.* at p. 16, ll. 18-19).

8. The conditioned air that flowed into Tier C from the guards' pod via the air vent reduced the humidity in the area in which Plaintiffs were confined. Mr. Hernandez testified that when he inspected the death-row facility, he did not take any humidity measurements, but noticed that when comparing Tier C – which had conditioned air flowing into it from the guards' pod through the air vent – to Tier H – which is located on the opposite side of the death-row facility and did not have an air vent connecting it to the guards' pod – the difference between "the humidity levels w[as] very drastic." (*Id.* at p. 10, ll. 23). Mr. Hernandez testified that he "could tell that the relative humidity was probably somewhere in the 60 percent range" in Tier C; in contrast, Mr. Hernandez estimated that the humidity level in Tier H was between 70% and 90%, which roughly "matched [the humidity level] outside." (*Id.* at p. 10, ll. 24-25; *id.* at p. 11, ll. 2-4). In sum, Mr. Hernandez testified that "Tier C was much more comfortable." (*Id.* at p. 10, ll. 23-24).

9. While all of the measures of the Third Plan were implemented, the temperature inside the control center in the air-conditioned guards' pod was measured to be 73.1 degrees. (Doc. 374 at p. 2).

10. While all of the measures of the Third Plan were implemented, the temperature inside the corridor in the air-conditioned guards' pod was measured to be 76.2 degrees. (*Id.*).

11. While all of the measures of the Third Plan were implemented, the temperature in front of cell C-3 – in which one of the Plaintiffs was confined – was measured to be 78.5 degrees. (*Id.*).

12. While all of the measures of the Third Plan were implemented, the heat index in the portion of Tier C in which Plaintiffs were confined remained below 80 degrees. Special Master Hebert testified that aside from the first two days in which the Third Plan was implemented, the heat indices in the portion of Tier C in which Plaintiffs were confined "hardly approach[ed] 80 degrees." (Doc. 369, Hr'g Tr. at p. 23, l. 5).

13. In the period between July 7, 2016, and August 31, 2016 – during which the heat index remained below 80 degrees in the portion of Tier C in which plaintiffs were confined – the heat index reached or exceeded 100 degrees in *each of the other tiers* of the death-row facility on at least six, and as many as thirty, days. The heat index reached or exceeded 100 degrees on twenty days in Tier A, six days in Tier B, twenty-three days in Tier D, thirty days in Tier E, twenty-three days in Tier F, nineteen days in Tier G, and eighteen clays in Tier H. (Doc. 376).

14. Although the fans installed by Defendants in the portion of Tier C in which Plaintiffs are confined, standing alone, do not reduce the substantial risk of serious harm to Plaintiffs because the fans do not reduce the temperature of the space, when used in conjunction with the IcyBreeze units, the fans help circulate the cool air that the IcyBreeze units emit. Frank Thompson, a professional engineer who specializes in HVAC systems and is the designer of

record for the death-row facility, testified that the fans provided to Plaintiffs do not lower the temperature, but rather "are just circulating air in the space." (Doc. 346, Hr'g Tr. at p. 244, ll. 13-14). Given the testimony of Mr. Hernandez that a person who is "more than . . . five feet away" cannot feel the cool air being emitted from the IcyBreeze units, (Doc. 375, Hr'g Tr. at p. 27, l. 19), and the fact that Plaintiffs' cells measure more than five feet in depth, (*see id.* at p. 27, l. 24), the fans provided to Plaintiffs aided in circulating the cool air that is emitted from the IcyBreeze units to broader areas of Plaintiffs' cells in Tier C.

15. Providing ice to Plaintiffs, when it is provided in conjunction with the other measures implemented under Defendants' Third Plan, is a humane measure. Dr. Vassallo described the desire for ice as a matter of human instinct when an individual is hot: "It's about being humane . . . . We want ice when we're hot." (Doc. 346, Hr'g Tr. at p. 153, ll. 8-9).

16. Providing Plaintiffs access to daily cold showers reduces the substantial risk of serious harm to Plaintiffs while they are in the shower area, removed from their individual IcyBreeze units. The individual IcyBreeze units were positioned in the corridor outside of each Plaintiffs cell, approximately twelve inches from the bars of each cell. (Doc. 375, Hr'g Tr. at p. 12, ll. 22-23). Plaintiffs thus did not have access to the IcyBreeze units in the shower area because the units were located directly in front of their cells. (*See id.*). A cold shower, however, can produce evaporative cooling during the shower and the brief time following the shower, (*see* Doc. 346, Hr'g Tr. at p. 140, ll. 18-21), which can protect Plaintiffs from the substantial risk of serious harm while they are

removed from the IcyBreeze units for the purpose of bathing themselves.

17. The measures implemented pursuant to Defendants' Third Plan sufficiently reduce the substantial risk of serious harm to Plaintiffs due to the conditions of extreme heat to which they are exposed in the death-row tiers at Angola. Expert testimony established that the risk of serious harm due to heat-related illness dramatically increases when the heat index exceeds 88 degrees, (*see id.* at p. 124, ll. 20-22), and that the only way to remove the risk is to lower the temperature and heat index, (*see id.* at p. 97, ll. 3-5). The measures implemented under the Third Plan, collectively, lowered the heat index in the portion of Tier C in which Plaintiffs were confined below 80 degrees, (Doc. 369, Hr'g Tr. at p. 23, ll. 3-5), while the tiers that did not benefit from the remedial measures exhibited heat indices of over 100 degrees on multiple days, (Doc. 376). This reduction of the heat indices to levels below 88 degrees sufficiently reduces the substantial risk of serious harm to Plaintiffs. (*See* Doc. 346, Hr'g Tr. at p. 124, ll. 20-22).

18. The total cost of implementing all of the measures pursuant to the Third Plan was less than $2,000. (Doc. 369, Hr'g Tr. at p. 23, ll. 19-21). Specifically, the cost of the plastic "curtain" was $785.40, and the cost of the IcyBreeze units was $519.95. (*Id.* at p. 26, ll. 15-17). Testimony established that the total cost of implementing all of the measures was less than $2,000. (*Id.* at p. 23, ll. 19-21).

19. The costs of alternatives to the Third Plan vastly exceed $2,000. The cost of installing a mechanical system that would provide "neutral air" solely in the portion of Tier C in which Plaintiffs were

confined, in order to create balanced air pressure between that portion of Tier C and the guards' pod, would be approximately $75,000 to $100,000. (Doc. 375, Hr'g Tr. at p. 22, l. 24). The cost of installing a mechanical system that would provide "neutral air" in the entirety of Tier C, in order to create balanced air pressure between Tier C as a whole and the guards' pod, would be approximately $250,000 to $300,000. (*Id.* at p. 22, ll. 8-10).

C. Potential for Mold Growth as a Result of Defendants' Third Plan

1. Due to the design of the IcyBreeze units, the cool air that is emitted from the units does not contain any water vapor, and therefore the IcyBreeze units do not contribute to any moisture- or condensation-related problems in the portion of Tier C in which Plaintiffs were confined. It appears that, according to Mr. Hernandez's testimony, "the IcyBreeze unit is a sealed heat exchanger," and thus the unit's fan is not "able to capture . . . liquid." (*Id.* at p. 13, ll. 7-10). Upon inspecting the IcyBreeze units and Plaintiffs' cells, Mr. Hernandez did not observe any moisture at the base of the unit, on the steel bars of Plaintiffs' cells, or on any of Plaintiffs' belongings inside their cells. (*Id.* at p. 12, ll. 19-25; *id.* at p. 13, ll. 1-2). There was some condensation around the ducts that emit cool air from the IcyBreeze units, "but not much." (*Id.* at p. 12, ll. 17-19).

2. Because the materials from which Tier C was constructed are not conducive to mold growth, mold-related problems are not likely in the portion of the tier in which Plaintiffs were confined. The tier was constructed from nonorganic materials, such as steel

and concrete, upon which it would be "very, very difficult" for mold to grow because, according to Mr. Hernandez, such materials do not "act as food." (*Id.* at p. 14, ll. 12-13).

3. Due to the installation of the air vent in the door connecting Tier C to the guards' pod – and the consequential flow of conditioned air from the guards' pod to Tier C through the air vent – humid, outdoor air had begun to infiltrate the guards' pod during the implementation of the Third Plan. According to Mr. Hernandez, the "sucking action" created as a result of the conditioned air's flowing from the guards' pod to Tier C through the air vent "cause[s] humid air to go through the exterior walls of the air conditioned area." (*Id.* at p. 16, l. 25; *id.* at p. 17, ll. 1-2).

4. The infiltration of humid, outdoor air increases the potential for mold growth in the guards' pod, and the areas behind the walls of the guards' pod are at the highest risk for mold growth. According to Mr. Hernandez, the "potential for mold growth would probably be in concealed spaces behind the walls." (*Id.* at p. 26, ll. 10-11).

5. Organic materials, which are conducive to mold growth, were utilized to construct the guards' pod. Mr. Hernandez testified that such organic material acts as "food for the mold." (*Id.* at p. 41, l. 6).

6. There is no certainty that mold growth will result from the infiltration of humid, outdoor air into the guards' pod. According to Mr. Hernandez, "it's questionable whether or not [mold growth] would happen or occur." (*Id.* at p. 17, ll. 4-5). Mr. Hernandez reiterated that he could not "guarantee that there'll be mold growth," (*id.* at p. 39, ll. 17-18), and testified that

there simply was a "potential for mold growth," (*id.* at p. 39, ll. 21-22).

7. The death-row facility currently exhibits no evidence of mold growth. Mr. Hernandez testified that he "did not observe any kind of mold growth . . . at all in the facility" during his investigation, (*id.* at p. 26, ll. 15-16), and repeated later that he "did not see any evidence whatsoever of mold," (*id.* at p. 39, l. 25).

D. Potential Alterations to Defendants' Third Plan in the Event of Mold Growth

1. Sealing the Air Vent in the Door Connecting Tier C to the Guards' Pod

1. If prison officials sealed the air vent in the door connecting Tier C to the guards' pod, the potential for mold growth in the guards' pod would be reduced or perhaps eliminated. Sealing the air vent would return the death-row facility "to the original condition," according to Mr. Hernandez, in which no conditioned air from the guards' pod would be diverted to Tier C, and humid, outdoor air thus would not infiltrate the guards' pod. (*Id.* at p. 17, ll. 11-12).

2. If officials sealed the air vent, however, the heat indices in the portion of Tier C in which Plaintiffs were confined would rise. Mr. Hernandez testified that if officials sealed the air vent, the lower heat indices in the portion of Tier C in which Plaintiffs were confined could not be maintained without an additional cooling mechanism. (*Id.* at p. 20, ll. 8-10).

3. In the event that officials sealed the air vent, additional IcyBreeze units could be installed in the portion of Tier C in which Plaintiffs were confined in order to attempt to maintain the heat indices at the

same levels that prevailed with the air vent open. "If you add additional IcyBreeze units," Mr. Hernandez testified, "I think you can overcome the cooling from the ventilation." (*Id.* at p. 37, ll. 20-21).

4. Even if additional IcyBreeze units were introduced into the portion of Tier C in which Plaintiffs were confined in the event that officials sealed the air vent, the humidity in the space would rise because the IcyBreeze units have no effect on the humidity level of a space. Mr. Hernandez testified that in the event that officials sealed the air vent and additional IcyBreeze units were installed, "the temperature would come down," but "the humidity would rise." (*Id.* at p. 45, ll. 19-20). The elevated humidity would necessitate the installation of additional IcyBreeze units to lower the temperature to a level that, after factoring in the elevated humidity, resembled the heat-index level of the space prior to the sealing of the air vent. Mr. Hernandez testified that in order to maintain the heat indices at the levels that prevailed with the air vent open, "you would [have to] attack[] or address[] the temperature to try to get the temperature down to where . . . your perceived temperature wouldn't be as hot." (*Id.* at p. 45, ll. 21-24).

5. Although the precise number of IcyBreeze units that would be necessary to maintain the lower heat-index levels in the portion of Tier C in which Plaintiffs were confined in the event that officials sealed the air vent cannot be determined, the number that would be required does not appear to be impracticable. In the estimation of Mr. Hernandez, it would not "take that many" additional IcyBreeze units to achieve the desired result. (*Id.* at p. 38, l. 2).

6. Additionally, an existing louver on the far end of Tier C, as far away as possible from the portion of Tier C in which Plaintiffs were confined, could be opened in an attempt to limit the amount of cool air emitted by the IcyBreeze units that exits the tier through the tier's exhaust system. This action would consist of merely opening an existing window. (*Id.* at p. 18, ll. 18-22).

7. If officials sealed the air vent in the door connecting Tier C to the guards' pod due to the proliferation of mold growth in the guards' pod, it nevertheless is probable that the substantial risk of serious harm to Plaintiffs could sufficiently be reduced by the introduction of additional IcyBreeze units and the opening of a louver in Tier C as far as possible from the portion of the tier in which Plaintiffs were confined. Such a configuration, according to Mr. Hernandez, "has a high potential of success." (*Id.* at p. 19, ll. 9-10).

2. Decreasing the Size of the Air Vent in the Door Connecting Tier C to the Guards' Pod

1. Decreasing the size of the air vent in the door connecting Tier C to the guards' pod would not appreciably reduce the potential for mold growth in the guards' pod. Mr. Hernandez testified that initially, reducing the size of the air vent merely will "increase the velocity of the air coming through." (*Id.* at p. 23, l. 25; *id.* at p. 24, l. 1). While the flow of air through the air vent eventually may decrease if officials reduced the size of the air vent, Mr. Hernandez testified that the "negative effect" in the guards' pod would remain and that the humid, outdoor air would

continue to infiltrate the guards' pod, thereby presenting a potential for mold growth. (*Id.* at p. 24, ll. 9-11).

III. DISCUSSION

The measures implemented pursuant to Defendants' Second Plan fail to remedy the Eighth Amendment violation, and Fifth Circuit precedent does not limit this Court solely to those measures when fashioning injunctive relief. The measures implemented pursuant to Defendants' Third Plan, however, sufficiently remedy the constitutional violation, and an injunction requiring that Defendants continue to implement those measures complies with the limitations on injunctive relief imposed by both the PLRA and the Court of Appeals. Although Defendants voluntarily implemented the measures under the Third Plan and those voluntary measures remedy the constitutional violation, the Court finds that the issuance of an injunction nevertheless is necessary because there is a cognizable danger that Defendants, in the absence of an injunction, may revert to measures that will cause the recurrence of the constitutional violation.

A. Defendants' Third Plan Sufficiently Reduces the Substantial Risk of Serious Harm to Plaintiffs, Is Narrowly Drawn, and Is the Least Intrusive Means to Correct the Eighth Amendment Violation

Pursuant to the PLRA, the Court may order injunctive relief to remedy a constitutional violation "with respect to prison conditions," but the injunctive relief that this Court fashions "shall extend no further than necessary to correct the violation of the Federal

right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1)(A). Additionally, the Court must find that the injunctive 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." *Id.* Further, this Court must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief," *id.*, but "[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Brown v. Plata*, 563 U.S. 493, 511 (2011). Although "plaintiffs are not entitled to the most effective available remedy[,] they are entitled to a remedy that eliminates the constitutional injury." *Ball*, 792 F.3d at 599.

The constitutional injury in this case is the "housing [of] these prisoners in very hot cells without sufficient access to heat-relief measures," *id.* at 596, which was found by this Court and the Court of Appeals to place "these prisoners . . . at a substantial risk of serious harm," *id.* at 594. Defendants suggest that the measures implemented pursuant to their Second Plan – the installation of additional fans, the provision of two ice containers so that Plaintiffs have increased access to ice, and the availability of a fifteen-minute cold shower – are all that is required in order to remedy the constitutional violation and to remove that substantial risk. The Court heard compelling and uncontroverted expert testimony, however, that these measures, whether standing alone or in combination, "absolutely" do not reduce the substantial risk of serious harm to Plaintiffs due to the conditions of

extreme heat present in Angola's death-row tiers. (Doc. 346, Hr'g Tr. at p. 96, l. 24). The measures implemented pursuant to the Second Plan are not remedies because Plaintiffs remain at substantial risk of serious harm *in spite of* those measures; the measures do not "eliminate[] the constitutional injury." *Id.* at 599. On the contrary, this Court heard expert testimony that one of the remedies – providing each Plaintiff with an individual fan – may even *exacerbate* the constitutional injury because of the increased heat stress on the body that results from "blow[ing] hot air across the skin." (*Id.* at p. 78, ll. 18-19). This expert testimony is bolstered by the testimony of Plaintiffs themselves, who all testified that they continued to experience heat-related symptoms *during* the implementation of Defendants' Second Plan. (*See id.* at p. 43, ll. 2-8; *id.* at p. 54, ll. 23-25; *id.* at p. 60, ll. 18-24; *id.* at p. 61, ll. 4-6).

Nor, as Defendants suggest, is this Court limited in fashioning injunctive relief to the measures implemented pursuant to the Second Plan as a result of Fifth Circuit precedent. Defendants argue that because the measures implemented pursuant to the Second Plan are the same measures that the Court of Appeals endorsed in *Gates*, these *Gates*-type measures are all that Defendants are required to implement, and Defendants assert that any additional measures thus are foreclosed by Fifth Circuit precedent. That argument is misplaced, however. The Court of Appeals, in the opinion remanding this case back to this Court, suggested several potential remedial measures that *exceed* the measures ordered to be implemented in *Gates*, including "divert[ing] cool air from the guards' pod into the tiers" and "allowing

inmates to access air conditioned areas during their tier time." *Id.* The Court of Appeals opined that "[t]hese are precisely the types of remedies that this court endorsed in *Gates* and that the PLRA requires." *Id.* Thus, the interpretation of the Court of Appeals *itself* is that remedial measures beyond the provision of fans, ice, and cold showers do not conflict with Fifth Circuit precedent.

In sum, based on compelling expert testimony, the measures implemented under Defendants' Second Plan "absolutely" do not reduce the substantial risk of serious harm to Plaintiffs, (*id.* at p. 96, l. 24), and Plaintiffs continued to experience heat-related symptoms during the implementation of the Second Plan, (*see id.* at p. 43, ll. 2-8; *id.* at p. 54, ll. 23-25; *id.* at p. 60, ll. 18-24; *id.* at p. 61, ll. 4-6). The *only* means to reduce the substantial risk of serious harm to Plaintiffs, and thereby remedy the Eighth Amendment violation in this case, is to lower the temperatures and heat indices to which Plaintiffs are exposed. (*Id.* at p. 97, ll. 3-5; *id.* at p. 147, ll. 10-12). Defendants' Second Plan, according to expert testimony, "does not do that." (*Id.* at p. 74, ll. 15-16).

Defendants' Third Plan, on the other hand, lowers the heat indices to which Plaintiffs are exposed – thereby sufficiently reducing the substantial risk of serious harm to Plaintiffs and remedying the Eighth Amendment violation – and is consistent with both the limits that the PLRA places on injunctive relief and the suggestions of the Court of Appeals.

As a result of the measures implemented pursuant to the Third Plan, both the temperatures and heat indices to which Plaintiffs were exposed remained below 80 degrees. According to the

testimony of Special Master Hebert, the heat indices to which Plaintiffs were exposed "hardly approach[ed] 80 degrees." (Doc. 369, Hr'g Tr. at p. 23, l. 5). These heat indices were below the 88-degree benchmark at which, as established through expert testimony, the risk of serious harm due to heat-related illness dramatically increases. (Doc. 346, Hr'g Tr. at p. 124, ll. 20-22). Thus, the implementation of the Third Plan, as Special Master Hebert testified, placed the "prisoners . . . in a situation that did not continue to . . . subject [them] to the conditions which amounted to the constitutional violation." (Doc. 369, Hr'g Tr. at p. 18, ll. 9-12).

Not only do the measures implemented pursuant to Defendants' Third Plan remedy the constitutional violation, they are also consistent with the limitations of the PLRA and the suggestions of the Court of Appeals. First, the measures implemented under the Third Plan only afford relief to Plaintiffs and no other portion of the death-row population at Angola. *See* 18 U.S.C. § 3626(a)(1)(A) ("Prospective relief . . . shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs."). Plaintiffs have been isolated in Tier C, which is otherwise unoccupied, and the measures implemented pursuant to the Third Plan only lower the heat indices in the portion of Tier C in which Plaintiffs were confined.

Second, the measures implemented under the Third Plan are consistent with the suggestions of the Court of Appeals, rendering the measures "narrowly drawn [and] extend[ing] no further than necessary to correct the violation of the Federal right." *Id.* The Third Plan involves diverting cool air from the guards'

pod to the portion of Tier C in which Plaintiffs were confined, *see Ball*, 792 F.3d at 599 ("Defendants could divert cool air from the guards' pod into the tiers . . . ."); providing a cooling mechanism that is essentially an ice chest with an attached fan, *see id.* ("Defendants could . . . supply personal ice containers and individual fans . . . ."); and providing daily cold showers, access to ice, and individual fans, *see id.* ("Defendants could . . . allow access to cool showers at least once a day[,] provide ample supply of . . . ice at all times[, and] supply . . . individual fans . . . ."). The Court of Appeals held that all of these remedies "are precisely the types of remedies this court endorsed in *Gates* . . . and that the PLRA requires," instructing this Court to "limit its relief to these types of remedies." *Id.* The remedies implemented pursuant to the Third Plan are in fact so limited, and thus they are consistent with the limitations of the PLRA.

Third, the measures implemented pursuant to the Third Plan are "the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). This Court, by enjoining Defendants to implement the measures pursuant to their Third Plan, is not intruding upon the province of prison officials, but rather ordering Defendants merely to implement a Plan of their own creation.

Fourth, this Court has "give[n] substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id.* Although there presently is no evidence of mold growth in the guards' pod as a result of the implementation of the measures under the Third Plan, this Court has identified alternative measures that could be implemented in the event that mold growth

is detected, taking due account of the potential adverse effects that this injunction may have on prison officials due to their possible exposure to mold spores. Additionally, the total cost of the implementation of the Third Plan was less than $2,000 – far below the costs of alternative remedial measures – which is an amount that will neither unduly burden Angola's budget nor have any "adverse impact on . . . the operation of a criminal justice system." *Id.*

Therefore, the measures implemented pursuant to Defendants' Third Plan remedy the constitutional violation found by this Court and affirmed by the Court of Appeals by lowering the heat indices in the area in which Plaintiffs were confined, which is the only means of sufficiently reducing the substantial risk of serious harm to Plaintiffs, and those measures are consistent with both the PLRA and the limitations that the Court of Appeals set on this Court in fashioning relief.

B. The Court Must Enjoin Defendants to Implement the Measures of the Third Plan Because Without an Injunction, There Exists a Danger that Defendants Will Revert to the Insufficient Measures of the Second Plan

"[T]he court's power to grant injunctive relief survives discontinuance of the illegal conduct." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). When a party has voluntarily discontinued illegal conduct, "[t]he necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *Id.*

Although Defendants voluntarily implemented the measures under the Third Plan in June 2016, they continue to assert that those measures are "temporary and experimental," (Doc. 375, Hr'g Tr. at p. 47, ll. 12-13), and that the measures implemented pursuant to the Second Plan "are sufficient," (*id.* at p. 46, l. 22). The Court has found that the measures implemented under the Second Plan are insufficient to remedy the Eighth Amendment violation in this case, and thus if Defendants were to revert to those measures, a recurrent constitutional violation would result. Therefore, given the Defendants' characterization of the measures voluntarily implemented pursuant to the Third Plan as "temporary and experimental" and Defendants' insistence that the measures implemented under the Second Plan are sufficient to remedy the Eighth Amendment violation – which they are not – the Court finds that there is a "cognizable danger of recurrent violation" and that it is necessary to issue an injunction. *Id.*

IV. CONCLUSION

Based on the foregoing,

IT IS ORDERED that Plaintiffs' **Motion to Modify Injunctive Relief (Doc. 315)** is **GRANTED IN PART and DENIED IN PART.**

IT IS FURTHER ORDERED that Defendants are **ENJOINED** to implement the remedial measures under the Third Plan during any period in which the heat index in the death-row tiers exceeds 88 degrees Fahrenheit. Specifically, when the heat index in the death-row tiers in which Plaintiffs are confined exceeds 88 degrees Fahrenheit:

1) Defendants are enjoined to relocate Plaintiffs to Tier C, which otherwise is to remain unoccupied during the time of such relocation;

2) Defendants are enjoined to assign Plaintiffs to cells C-1, C-2, and C-3;

3) Defendants are enjoined to install and/or unseal a 27" x 34" air vent in the door that connects Tier C to the guards' pod, which will divert conditioned air from the guards' pod to the portion of Tier C in which Plaintiffs are confined;

4) Defendants are enjoined to install a "curtain" constructed of heavy plastic between cells C-4 and C-5, in order to keep the newly diverted cool air inside the portion of Tier C in which Plaintiffs are confined;

5) Defendants are enjoined to provide to each Plaintiff an IcyBreeze unit, the front of which is to be located no more than twelve inches from Plaintiffs' cells;

6) Defendants are enjoined to fill Plaintiffs' IcyBreeze units with ice and replenish that ice regularly so that the IcyBreeze units function properly and emit cool air;

7) Defendants are enjoined to install or maintain a water-valve controller in the showers in Tier C that allows Plaintiffs to select between hot and cold water for their showers;

8) Defendants are enjoined to permit Plaintiffs to take one daily shower;

9) Defendants are enjoined to provide to each Plaintiff an ice container;

10) Defendants are enjoined to fill those ice containers with ice and replenish that ice regularly;

11) Defendants are enjoined to provide to each Plaintiff a fan;

12) In the event that mold growth proliferates in the guards' pod of the death-row facility due to the measures prescribed by this injunction, Defendants are enjoined to seek leave from this Court, and upon receiving such leave, Defendants are enjoined to seal the air vent and provide a sufficient number of additional IcyBreeze units to each Plaintiff in order to maintain the heat index of the portion of Tier C in which Plaintiffs are confined below 88 degrees Fahrenheit; and

13) Defendants are enjoined to regularly monitor the heat index of the portion of Tier C in which Plaintiffs are confined.

Baton Rouge, Louisiana, this 22nd day of December, 2016.

s/

BRIAN A. JACKSON, CHIEF JUDGE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-30067

ELZIE BALL; NATHANIEL CODE;
JAMES MAGEE, Plaintiffs–Appellees
Cross-Appellants,

v.

JAMES M. LEBLANC, Secretary, Department of Public Safety and Corrections; BURL CAIN, Warden, Louisiana State Penitentiary; ANGELA NORWOOD, Warden of Death Row; LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS,
Defendants–Appellants Cross-Appellees.

Appeals from the United States District Court
for the Middle District of Louisiana

FILED July 8, 2015

Before REAVLEY, JONES and ELROD, Circuit Judges.

EDITH H. JONES, Circuit Judge:

In 2006, Louisiana built a new state-of-the-art prison facility to house death-row inmates. The cells in

that facility, located in Angola, Louisiana, lack air conditioning. Three inmates sued the Louisiana Department of Corrections (the "State") and various prison officials in their official capacities,[1] claiming that the heat they endure during the summer months violates the Eighth Amendment because of their pre-existing medical problems. They also assert that the failure to provide air conditioning violates the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, and the Rehabilitation Act ("RA"), 29 U.S.C. § 794. After a bench trial, the district court sustained the prisoners' Eighth Amendment claims, rejected their disability claims, and issued an injunction effectively ordering the Defendants to install air conditioning throughout death row.

Although the trial court's findings of deliberate indifference by prison officials to these particular inmates' serious heat-related vulnerability suffice to support a constitutional violation, the scope of its injunctive relief exceeds our prior precedent, *Gates v. Cook*, 376 F.3d 323, 339 (5th Cir. 2004), and the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. Despite an oversight concerning applicable law, the court did not err in rejecting the prisoners' disability

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[1] The officials include James M. LeBlanc, Secretary of the Louisiana Department of Public Safety and Corrections; Nathan Burl Cain, Warden of the Louisiana State Penitentiary in Angola; and Angela Norwood, Assistant Warden in charge of death row. We refer to all appellants collectively as "the State" because suit against officials in their official capacity only is essentially against the State of Louisiana.

claims. We affirm in part, but vacate and remand the court's injunction for further consideration.[2]

BACKGROUND

Angola's 25,000 square-foot death-row facility[3] consists of a pod surrounded by four housing wings. Inside the pod are administrative offices, visitation rooms, a medical and dental clinic, a control center, and an execution chamber. Within each of the four housing wings, two tiers of cells sit back-to-back. Each tier is lettered A through H. None of the housing tiers are air conditioned, but the rest of the facility is. To alleviate the summer heat, windows (which can be opened) line the exterior wall of each housing tier. Next to the windows are 30-inch fans, which serve two adjoining cells. Inside each cell is a six-by-eight-inch vent that draws air into the cell from the window across the tier and vents outside.

Although death-row inmates spend twenty-three hours a day in their cells, in-cell sinks provide unlimited access to potable water. Inmates also enjoy access to ice. Each housing tier has an ice chest, which the Angola staff maintains. Inmates can only access the chest themselves during the one hour a day they are allowed to walk the tiers. The rest of the time inmates depend on guards or other inmates for ice.[4]

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[2] Our issuance of this ruling renders moot the Plaintiffs' request that we lift the stay pending appeal.

[3] The death row unit is one of several buildings collectively known as the "Louisiana State Penitentiary" or "Angola." Only the death-row facility is implicated here, however.

[4] Inmates can distribute ice to other inmates during the one hour they are allowed to walk the tiers. If, however, those

The uncontroverted evidence shows that the ice chests run out from time to time, either because the lone ice machine cannot generate enough ice or it breaks.

The three plaintiffs here, Elzie Ball, Nathaniel Code, and James Magee, are long-time residents of Angola's death-row facility. Magee lives on tier A, while Ball and Code live on tier H. Each suffers from various conditions: all three prisoners have hypertension; Ball has diabetes and is obese; Code is also obese and has hepatitis; and Magee is depressed and has high cholesterol. They take a variety of medications to control their ailments. According to the inmates, the extreme heat, not ameliorated by air conditioning, exacerbates their ailments, causing dizziness, headaches, and cramps.

Each inmate filed administrative complaints explaining that the heat was exacerbating his conditions and requesting air conditioning. The Defendants denied their requests. Internal appeals of the rulings were unsuccessful. Consequently, in June 2013, the inmates sued the Louisiana Department of Corrections and prison officials asserting claims under the Eighth Amendment's ban on cruel and unusual punishment and violations of the ADA and RA. As relief, the prisoners sought an injunction requiring the state to keep the heat index at or below 88º F.

A month later, the district court appointed United States Risk Management ("USRM") to monitor the temperature at the facility. During the monitoring

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inmates spend their free hour in recreation or showering, then the other inmates may not receive ice.

period, July 15 to August 5, the temperature on tiers A and H ranged from 78.26º to 92.66º F.[5] Meanwhile, the heat index ranged from 81.5º to 107.79º F. On five separate days the heat index on tier A surpassed 100º F. On tier H, the heat index surpassed 100º F on seven days.

After the data collection period, the district court held a three-day bench trial. Experts testified about the Plaintiffs' medical conditions, the conditions on death row, the design and construction of the facility, and the effectiveness of current practices and procedures. The judge personally toured the facility to observe the conditions first-hand. Several months later, the district court issued a 100-page ruling that concluded the conditions on death row are cruel and unusual because of extreme heat during parts of the year. The court denied the prisoners' ADA and RA claims because they are not disabled. Based on the constitutional violation, the court issued a permanent injunction, requiring the state to develop a plan to keep the heat index at or below 88º F. Effectively, the district court ordered Louisiana to install air conditioning. Both sides now appeal.

DISCUSSION

The parties present four issues. The Defendants assert that the district court made several erroneous evidentiary rulings, wrongly found a constitutional violation, and issued an overbroad injunction contrary to the PLRA, 18 U.S.C. § 3626, and *Gates v. Cook*,

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[5] USRM monitored the temperature on all the tiers. But because the Plaintiffs only reside on tiers A and H, and because this is not a class-action, only readings from those tiers are relevant to this appeal.

376 F.3d 323 (5th Cir. 2004). The inmates' cross-appeal contends that the district court used a superseded definition to determine whether they are disabled under the ADA and RA. We review the liability issues first, then the scope of the injunction.

I. Evidence

The State's evidentiary objections are easily resolved. It contends that the heat index, on which the district court based its ruling, is inherently unreliable and inappropriate in prison settings. It also contends that the court should not have taken judicial notice of other facts without providing the State an opportunity to respond. The objections are meritless.

We review evidentiary rulings for abuse of discretion. *Battle ex rel. Battle v. Mem'l Hosp. at Gulfport*, 228 F.3d 544, 550 (5th Cir. 2000) (citing *Jon-T Chemicals, Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1417 (5th Cir. 1983)). Even if the court abused its discretion, this court will presume the error is harmless. *See* FED. R. CIV. P. 61; *Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 584 (5th Cir. 2003). The party asserting the error has the burden of proving that the error was prejudicial. *See Dietz v. Consol. Oil & Gas, Inc.*, 643 F.2d 1088, 1093 (5th Cir. 1981) (quoting *Liner v. J.B. Talley and Co., Inc.* 618 F.2d 327, 329 (5th Cir. 1980)).

The district court did not abuse its discretion by admitting evidence of or relying on the heat index. The thrust of the State's argument is that because heat index is a derived number, courts cannot use it as a basis for ruling. Although the State's expert meteorologist, Jay Grymes, testified that the heat index is "not a real number," the rest of his testimony

bolsters the use of the heat index. For example, Grymes testified that the heat index is a "guideline number" and that he "provide[s] heat index as a guide to [his] viewers to make better decisions." Dr. Susi Vassallo, the Plaintiffs' expert, testified that peer reviewed scientific articles measure the correlation between heat index and morbidity and mortality. This court also has relied on the heat index before. *See Gates*, 376 F.3d at 339 (upholding increased access to ice, water, and showers when the heat index exceeds 90º F.). In the absence of further proof, the court did not abuse its discretion.

The State's complaint about the court's taking judicial notice of publicly available evidence is similarly weak. The court cited an article from the National Weather Service's website called *Heat: A Major Killer* and referred to temperature readings from the Baton Rouge Regional Airport.

Because the district court did not warn the State that it would be taking judicial notice of these materials, the State complains it was "deprived of the opportunity to request an opportunity to be heard regarding the data." Rule 201, however, expressly contemplates courts' taking judicial notice without prior warning. *See* FED. R. EVID. 201(e) ("If the court takes judicial notice *before notifying a party*, the party, on request, is still entitled to be heard." (emphasis added)); 21B KENNETH W. GRAHAM, JR., FED. PRAC. & PROC. EVID. § 5109 (2d ed.) (Rule 201 does "not require any notice to the parties that judicial notice [is] about to be taken," and "a party might get no advance notice at all"). The State, moreover, did not avail itself of the Rule's provision requiring the court to provide an opportunity to be heard. *See* FED. R. EVID. 201(e); *See*

also FED. R. CIV. P. 59(a)(2) ("After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment."). In any event, the State's explanation of prejudice is vague, cursory and unpersuasive. It makes no showing that the district court's consideration of the National Weather Service article or Baton Rouge temperature readings altered the outcome. *See Dietz*, 643 F.2d at 1093. The judicial notice objections fail as well as the heat index objection.

II. Eighth Amendment

Turning to the Plaintiffs' Eighth Amendment claims, the Constitution "'does not mandate comfortable prisons,' but neither does it permit inhumane ones." *Farmer v. Brennan*. 511 U.S. 825, 832, 114 S. Ct. 1970, 1976 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349, 101 S. Ct. 2392, 2400 (1981)). Extreme cell temperatures, therefore, can violate the Eighth Amendment. To be tantamount to the infliction of cruel and unusual punishment, prison conditions must pose "an unreasonable risk of serious damage" to a prisoner's health – an objective test – and prison officials must have acted with deliberate indifference to the risk posed—a subjective test. *Helling v. McKinney*, 509 U.S. 25, 33-35, 113 S. Ct. 2475, 2481-82 (1993) (holding exposure to an "unreasonable risk of damage to [a plaintiff's] health" actionable under the Eighth Amendment); *see also Wilson v. Seiter*, 501 U.S. 294, 304, 111 S. Ct. 2321, 2327 (1991) (postulating that "a low cell temperature at night combined with a failure to issue blankets" can

violate the Eighth Amendment); *Gates*, 376 F.3d at 339. Without the requisite proof of both subjective and objective components of an Eighth Amendment violation, however, merely "uncomfortable" heat in a prisoner's cell does not reflect "a basic human need that the prison has failed to meet" and is not constitutionally suspect. *Woods v. Edwards*, 51 F.3d 577, 581 (5th Cir. 1995).

The predicate findings of a substantial risk of serious harm and officials' deliberate indifference to the risk are factual findings reviewed for clear error. *Gates*, 376 F.3d at 333; *Thomas v. Bryant*, 614 F.3d 1288, 1312 (11th Cir. 2010) (citing *Farmer*, 511 U.S. at 842, 114 S. Ct. at 1981). "'A finding is clearly erroneous if it is without substantial evidence to support it, the court misinterpreted the effect of the evidence, or this court is convinced that the findings are against the preponderance of credible testimony.'" *Petrohawk Props., L.P. v. Chesapeake La., L.P.*, 689 F.3d 380, 388 (5th Cir. 2012) (quoting *French v. Allstate Indem. Co.*, 637 F.3d 571, 577 (5th Cir. 2011)). This court reviews *de novo* whether the facts so found violate the Eighth Amendment. *Gates*, 376 F.3d. at 333.

For various reasons, the State asserts that the Plaintiffs are not at substantial risk of serious harm and its officials were not deliberately indifferent to this risk. Further, the State contends that, because it provides the remedies this court mandated in *Gates*, there can be no Eighth Amendment violation as a matter of law. We reject these challenges to the trial court's findings.

Based mainly on Dr. Vassallo's testimony, the district court found that the heat puts these plaintiffs

at substantial risk of serious harm. According to Dr. Vassallo, the cardiovascular system is critical for maintaining normal body temperature. Dr. Vassallo testified that both hypertension and diabetes can adversely affect this critical system. "The heart has to be able to pump very hard to meet the demands of heat." Hypertension generally can decrease "the ability of the blood vessels to open and close." As a result, those vessels are "not as compliant as they should be," "they can't open like they should and have to in response to heat," and blood therefore cannot circulate to cool the body. Therefore, people with hypertension generally can have a hard time controlling their body temperature. The same is true for people with diabetes. Cardiovascular disease, which can result from diabetes, can harden the arteries and blood vessels, thus inhibiting circulation. As a result, diabetics can lose ability to circulate blood properly and thus the ability to maintain normal body temperature.

The treatments for hypertension can further inhibit these prisoners' ability to regulate body temperature. Specifically, beta blockers, which help control blood pressure, can compound the effects hypertension has on the cardiovascular system. Beta blockers prevent blood vessels from dilating properly while at the same time "decreas[ing] the heart's ability to pump as hard and to meet the requirements of heat or exercise." Likewise, diuretics decrease the total amount of water and salt in the body, resulting in less fluid around which the heart can contract. According to Dr. Vassallo, without sufficient fluid to contract, the heart is unable to meet the increased demands heat places on the cardiovascular system. Therefore, even

if prisoners receive proper care for their ailments, they may be at increased risk of heat stroke. This evidence of the Plaintiffs' heightened vulnerability to high temperatures, combined with the USRM temperature data showing the high temperatures on tiers A and H, led the court to find that the Plaintiffs are at substantial risk of serious harm.

The State argues that the totality of the record evidence refutes Dr. Vassallo's opinion. Specifically, the district court discounted the State's arguments that no death-row prisoner has ever suffered a heat-related incident; these prisoners' medical records show no signs of heat-related illness; the prisoners' poor dietary choices and failure to exercise caused their health problems; and the prisoners' suffer high blood pressure all year, not just in the summer months. Thus, the State contends, the prisoners do not suffer an unreasonable risk of serious heat-related injury at all.

These facts fail to show that the district court clearly erred. First, that no one at Angola, including these plaintiffs, has ever had a heat-related incident and that these prisoner's medical records do not show signs of heat-related illness are insufficient. To prove unconstitutional prison conditions, inmates need not show that death or serious injury has already occurred. *See Helling*, 509 U.S. at33, 113 S. Ct. at 2481 ("That the Eighth Amendment protects against future harm to inmates is not a novel proposition."). They need only show that there is a "substantial risk of serious harm." *Gates*, 376 F.3d at 333. Further, Dr. Vassallo provided a reasonable explanation for the lack of past harm to these plaintiffs: "heat stroke is a failure of thermoregulation which is dramatic and

catastrophic. It occurs suddenly . . . . People can suffer suddenly from heat stroke without ever having complained about the weather." As a result, the district court plausibly concluded that the Plaintiffs here are at a substantial risk of serious harm.[6]

Second, because the Plaintiffs forego exercise and overeat junk food, the State asserts that their ailments and any accompanying risk are their own creation. Prison canteen records confirm these inmates' consumption of unhealthy foods with high sugar and salt content. Although this may be true, the evidence is at best conjectural about the connection between these plaintiffs' conditions and their lifestyle. We are constrained to agree with the district court's finding that, canteen food comprises only part of the prisoners' diets, and their medical conditions arise from a combination of factors, many of which are outside their control. Thus, the district court did not clearly err when, in the face of conflicting evidence, it found that these prisoners are at substantial risk of serious harm.

Finally, that the prisoners suffer year-round high blood pressure is simply irrelevant to the district court's substantial-risk finding. The prisoners' complaint is that their high blood pressure places them at an abnormally high risk of heat stroke during Louisiana's extended hot season. The lower risk in other months does not offset their vulnerability during the summer any more than an allergy to insect bites ceases to exist when the bugs are dormant in winter.

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[6] We emphasize, however, that the finding of substantial risk regarding a heat-related injury is tied to the individual health conditions of these inmates.

The second element for Eighth Amendment liability requires "prison official[s] [to] have a 'sufficiently culpable state of mind.'" *Farmer*, 511 U.S. at 834, 114 S. Ct. at 1977 (quoting *Wilson*, 501 U.S. at 297, 111 S. Ct. at 2323). "In prison conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety." *Id*. (quoting *Wilson*, 501 U.S. at 302-303, 111 S. Ct. at 2326). Deliberate indifference is itself a two-prong inquiry. An 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." *Id*. at 837, 114 S. Ct. at 1979. "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." *Id*. at 842, 114 S. Ct. at 1981 (internal citations and quotation marks omitted).

The district court relied on a variety of evidence showing that the State knew of and disregarded a substantial risk to the Plaintiffs. Medical personnel routinely monitor prisoners and administer medication daily. Correctional officers "closely monitor" the temperature on death row, recording the temperature every two hours. Defendant Norwood, moreover, testified that the prison maintains a list of, and monitors more closely, inmates particularly susceptible to heat-related illness. None of the Plaintiffs was on the list, although Norwood personally reviewed the ARPs for each prisoner, inspected each prisoner's medical records, interviewed both Ball and Code, and admits Magee should have

been on the list. Defendant Cain admitted that he was always thinking about "how to overcome the heat" and that he considered adding extra fans and ice on the tiers. Most strikingly, after this suit was filed, and during the court-ordered monitoring period the Defendants surreptitiously installed awnings and began soaking some of the tiers' exterior walls with water in an attempt to reduce the interior temperature. Their trick backfired. Based on these facts, the district court reasonably inferred that the Defendants knew of a substantial risk of serious harm to the Plaintiffs.

Yet the State complains that the deliberate indifference finding is fundamentally flawed because the district court relied solely on the prisoners' administrative remedy requests, which are required under the PLRA. *See* 42 U.S.C. § 1997e(a). If that is sufficient to prove deliberate indifference, the State continues, then there is no need for a court to separately analyze the deliberate indifference prong. As a statutory necessity, *see Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012), every case includes an administrative remedy request. Whenever a court finds that a prisoner's complaint was justified—*i.e.*, that there is a substantial risk of harm—the defendant will be guilty of violating the Eighth Amendment.

We agree with the Defendants' premise—a request for administrative relief cannot alone prove deliberate indifference. A request for administrative relief is at best only circumstantial evidence that a prison official is aware of facts from which he can deduce a risk of harm; it is not even particularly strong evidence of that. Because grievances are essentially

pleadings, not evidence, they must have independent verification before they become probative. Separating the few meritorious complaints from the mountain of frivolous complaints is as difficult work for prison officials as for federal courts. A legitimate complaint can go unrecognized by even the most diligent official. As a result, a prison administrator who has received an administrative remedy request is not necessarily made aware, without factual corroboration, that there is a substantial risk of serious harm.

Although the State's premise is correct, its conclusion that the district court's deliberate indifference finding is erroneous does not follow. The district court did not base its finding solely on the prisoners' administrative requests, but on the totality of the record evidence. There is more than enough, particularly in light of the State's attempt to cool down the cells with awnings and misting without telling the court, to prove subjective awareness of a substantial risk of serious harm. Therefore, the district court's deliberate indifference finding is not clearly erroneous.

Even if it cannot overcome the district court's factual findings, the State argues that this court's decision in *Gates v. Cook* precludes liability. *Gates* upheld an injunction requiring Mississippi to equip each cell with fans, provide inmates with additional access to ice water, and allow daily showers when the heat index in the cells exceeded 90º F. 376 F.3d at 339. The State claims to offer these exact remedies year-round.

The district court, however, demonstrated that *Gates* is distinguishable. Where *Gates* approved fans for each cell, each fan in Angola's death row serves two

cells. *Ball v. LeBlanc*, 988 F. Supp. 2d 639, 680 n.100 (M.D. La. 2013). Although a seemingly minor difference, the district court found that "the fans [at Angola] [do] not provide equal amounts of air flow to each cell, nor [do] the fans provide a detectable cooling effect." *Id*. The district court in *Gates* also ordered increased in-cell access to ice. 376 F.3d at 339. Here, by contrast, inmates have unfettered access to ice only during the one hour a day they can walk the tiers.[7] *Ball*, 988 F. Supp. 2d at 680 n.100. When the prisoners are in their cells, they depend on other inmates or guards for ice. *Id*. And while the State allows prisoners to shower once a day, as approved in *Gates*, the water temperature is maintained between 100 and 120º F. for sanitation purposes, thus providing little relief from the heat. *Id*. Given these material differences, *Gates* does not preclude holding that the State violated the Eighth Amendment.

Based on its findings of fact, we affirm the district court's conclusion that housing these prisoners in very hot cells without sufficient access to heat-relief measures, while knowing that each suffers from conditions that render him extremely vulnerable to serious heat-related injury, violates the Eighth Amendment.

III. Disability Claims

The inmates assert that the State's failure to alleviate the heat violates their rights to a reasonable

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[7] Even then, obtaining ice is no guarantee. The record suggests that the ice machine occasionally breaks down leaving the tier ice chests empty.

accommodation for their "disabilities" under the ADA and RA.[8] The district court rejected the prisoners' claims because they presented no *evidence* that they are disabled.[9] *Ball*, 988 F. Supp. 2d at 687. The prisoners argue that the district court's conclusion rests on an abbreviated definition of disability and superseded case law. Although the prisoners are correct, there is still no evidence that the prisoners are disabled under the correct definition, so any error was harmless.

We review the district court's conclusions of law *de novo*, and its factual findings for clear error. *Lightbourn v. Cnty. Of El Paso, Tex.*, 118 F.3d 421, 426 (5th Cir. 1997). If the district court made a legal error that affected its factual findings, "remand is the proper course unless the record permits only one

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[8] On appeal, the prisoners also assert a disparate-impact claim. But the prisoners' complaint does not allege a disparate-impact claim and, as far as we can tell, this appeal is the first time the prisoners have asserted such a claim. "It is a bedrock principle of appellate review that claims raised for the first time on appeal will not be considered." *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctr., Inc.*, 200 F.3d 307, 316-17 (5th Cir. 2000). Accordingly, we will not address the prisoners' disparate-impact claim.

[9] To succeed on a failure-to-accommodate claim, a plaintiff must prove: (1) he is a qualified individual with a disability; (2) the disability and its consequential limitations were known by the covered entity; and (3) the entity failed to make reasonable accommodations. *Neely v. PSEG Tex., Ltd. P'ship*, 735 F.3d 242, 247 (5th Cir. 2013). The ADA applies to prisoners. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213, 118 S. Ct. 1952, 1956 (1998). The district court found each prisoner failed to prove the first prong—*i.e.*, that they are disabled.

resolution of the factual issue." *Pullman-Standard v. Swint*, 456 U.S. 273, 292, 102 S. Ct. 1781, 1792 (1982); *see also Aransas Project v. Shaw*, 775 F.3d 641, 658 (5th Cir. 2014), *cert. denied*, No. 14-1138, 2015 WL 1255228, at *1 (June 22, 2015).

Under both the ADA and RA,[10] a person is disabled if he has "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). The statute defines a major life activity in two ways. First, major 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.

Id. § 12102(2)(A). Second, a major life activity includes "the operation of a major bodily function." *Id*. § 12102(2)(B). Such functions include, but are not limited to:

> the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Id. The prisoners can prove themselves disabled if their ailments substantially limit either a major life activity or the operation of a major bodily function.

The prisoners point out that the district court considered whether they are disabled only under the

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[10] The RA incorporates the ADA definition of disability by reference. *See* 29 U.S.C. § 705(20)(B). Accordingly, if the prisoners are disabled, they are disabled under both statutes.

first definition of major life activities; it did not consider whether their impairments affect a major bodily function. We agree. The district court quoted only the first definition of a disability, but it overlooked that "a major life activity also includes the operation of a major bodily function." *Id.* § 12102(2)(B). The district court also partially relied on *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197, 122 S. Ct. 681 (2002), which Congress superseded in the Americans with Disabilities Amendments Act of 2008 ("ADAAA"). *Neely v. PSEG Tex., Ltd. P'ship*, 735 F.3d 242, 245 (5th Cir. 2013).

Although this error may have affected the district court's determination, the question remains whether any evidence supports the prisoners' disability claims. The prisoners argue that "thermoregulation" is a major life activity, there is ample evidence in the record showing their thermoregulatory functions are impaired, and therefore they are disabled.

Assuming *arguendo* that thermoregulation is a major life activity,[11] there is no *evidence* that these prisoners' thermoregulatory systems are actually

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[11] The prisoners urge this court to hold that thermoregulation is a major bodily function (and thus a major life activity) because the ADA's list is non-exhaustive. *See* 42 U.S.C. § 12102(2)(B). Before the passage of the ADAAA, this court left undecided whether "the regulation of body temperature constitutes a major life activity under the ADA." *EEOC v. Argo Distribution, LLC*, 555 F.3d 462, 469 n.8 (5th Cir. 2009). Post-ADAAA, no court has held that thermoregulation is a major bodily function, nor do EEOC regulations list thermoregulation as a major bodily function. 29 C.F.R. § 1630.2(i)(1)(ii). Accordingly, we take the cautious route and assume without deciding that thermoregulation is a major life activity.

impaired. According to Dr. Vassallo, thermoregulation is "the capacity of the body to maintain the temperature of 98.6 within half a degree or so." There is no evidence that the prisoners' ailments have ever caused their body temperatures to rise above 98.6º F. In fact, Dr. Vassallo testified that the prisoners' symptoms are consistent with normal body temperatures, there is no indication that these prisoners have ever had elevated body temperatures, and there is no evidence that these prisoners ever experienced difficulty in thermoregulating.

That the record is devoid of such evidence is unsurprising. Over the course of the three-day trial, there is hardly any mention of the prisoners' disability claims. The overwhelming majority of the testimony related to the future risk of heatstroke, not the prisoners' present inability to maintain regular body temperature. As a result, the medical testimony focused generally on the risks to individuals with the same ailments as these prisoners, not on any limitations the prisoners presently experience. The prisoners' counsel, moreover, never asked the three medical experts whether the prisoners' thermoregulatory systems are *actually* impaired, probably because evidence in the record precludes any such assertion. This lapse is fatal to their disability claims. As this court has said before, although the current definition of disability "expresses Congress's intention to broaden the definition and coverage of the term 'disability,' it in no way eliminated the term from the ADA or the need to prove a disability on a claim of

disability discrimination." *Neely*, 735 F.3d at 245.[12] The disability claims are insupportable as a matter of law even under the expanded legal definition of disability.

IV. The Injunction

To remedy the Eighth Amendment violation, the district court ordered Louisiana to "develop a plan to reduce and maintain the heat index in the Angola death row tiers at or below 88 degrees Fahrenheit." *Ball*, 988 F. Supp. 2d at 689. Effectively, the plan requires the State to install air conditioning throughout death row housing. The State attacks the district court's order in two ways. First, it contends that the requirements for injunctive relief are not present here. Second, it argues that the injunction is overbroad because air conditioning is beyond the measures endorsed in *Gates v. Cook* and facility-wide relief violates the PLRA.

This court reviews permanent injunctions for abuse of discretion. *Symetra Life Ins. Co. v. Rapid Settlements, Ltd.*, 775 F.3d 242, 254 (5th Cir. 2014) (citing *N. Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 916-17 (5th Cir. 1996)). An abuse of discretion occurs when the district court "'(1) relies on clearly erroneous factual findings when

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[12] Ball also argues that he is disabled because diabetes impairs his endocrine system and his sight. Although this might be true, that Ball's endocrine system and sight are impaired does not entitle him to relief from the *heat*. Only if Ball's diabetes limits his ability to thermoregulate, can Ball get the only relief he requested—an order requiring Louisiana to keep the prison at or below 88 degrees. As for that claim—that Ball's diabetes impairs thermoregulation—there is no evidence in the record.

deciding to grant or deny the permanent injunction[,] (2) relies on erroneous conclusions of law when deciding to grant or deny the permanent injunction, or (3) misapplies the factual or legal conclusions when fashioning its injunctive relief.'" *Id*. (quoting *N. Alamo Water Supply Corp.*, 90 F.3d at 916-17).

The court did not abuse its discretion by deciding to issue an injunction. The State's first argument is that an injunction is improper because conditions to which these prisoners were subjected do not violate the Eighth Amendment. This contention fails in light of our sustaining the district court's Eighth Amendment analysis. Moreover, in *Gates* as in other cases, courts have upheld injunctions in Eighth Amendment cases alleging unreasonably risky exposure to extreme temperatures. *See Graves v. Arpaio*, 623 F.3d 1043, 1045 (9th Cir. 2010) (per curiam) (leaving an injunction in place requiring a prison to keep inmates on certain medications in cells with temperatures below 85 degrees); *Jones-El v. Berge*, 374 F.3d 541, 542 (7th Cir. 2004) (upholding order to install air conditioning in Wisconsin's "supermax" prison).

The scope of the injunction is another matter. The PLRA greatly limits a court's ability to fashion injunctive relief. Before a district court can award such relief, it must find 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." 18 U.S.C. § 3626(a)(1)(A). The court must also "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id*. If, after making the necessary

findings and weighing the adverse impact on the criminal justice system, the court still feels injunctive relief is required, such relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." *Id*.

The district court's injunction violates the PLRA in two ways. First, the district court ordered a type of relief—air conditioning—that is unnecessary to correct the Eighth Amendment violation. Under the PLRA, plaintiffs are not entitled to the most effective available remedy; they are entitled to a remedy that eliminates the constitutional injury. *See Westefer v. Neal*, 682 F.3d 679, 683-84 (7th Cir. 2012) (vacating an injunction under the PLRA because it exceeded what was required under the Due Process Clause). In Eighth Amendment cases, plaintiffs can only obtain a remedy that reduces the risk of harm to a socially acceptable level. Some risk is permissible and perhaps unavoidable. Here Plaintiffs' own expert, Dr. Vassallo, explained that there are many acceptable remedies short of facility-wide air conditioning. For example, the Defendants could divert cool air from the guards' pod into the tiers; allow inmates to access air conditioned areas during their tier time; allow access to cool showers at least once a day; provide ample supply of cold drinking water and ice at all times; supply personal ice containers and individual fans; and install additional ice machines. These are precisely the types of remedies this court endorsed in *Gates v. Cook* and that the PLRA requires. *See* 376 F.3d at 339-40. Accordingly, on remand the district court must limit its relief to these types of remedies.

The district court also erred because it awarded relief facility-wide, instead of limiting such relief to

Ball, Code, and Magee. The district court apparently understood that it could not order facility-wide relief. At the start of trial, the district court said:

> This is not, contrary to widespread belief, an effort to require the state to install air-conditioning for all of the tiers that house all death row inmates. I think the application for injunctive relief made clear that it's only these three inmates that are of issue. And so, of course, the evidence in this case will pertain to any facts that are relevant as to these three . . . . plaintiffs and these three plaintiffs only. This is not a class action lawsuit. This is not, again, an effort to seek relief for anyone other than these three inmates.

It is unclear why the district court changed its mind when it fashioned the injunction. The PLRA limits relief to the particular plaintiffs before the court. 18 U.S.C. § 3626(a)(1)(A). This is not a class action; Ball, Code, and Magee are the only plaintiffs before the court. As a result, any relief must apply only to them, if possible. *Brown v. Plata*, --- U.S. ---, 131 S. Ct. 1910, 1940 (2011) (holding that "the scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court"); *Gates*, 376 F.3d at 339 (vacating an injunction that purportedly applied to prisoners outside the class of plaintiffs because "it exceeds the scope of the litigation"); *see also Graves*, 623 F.3d at 1049-50 & n.2 (noting that if the district court can limit relief to an affected class-member, it must do so under the PLRA).

Nevertheless, the district court ordered relief to all 85 death-row inmates because "the Defendants may move any death row inmate to a different tier and/or cell at any time." *Ball*, 988 F. Supp. 2d at 688-89. Essentially, it felt the only way to provide effective relief to these three plaintiffs is to provide facility-wide relief. The district court's determination, however, is erroneous. Even assuming that air conditioning is an acceptable remedy here—and it is not—it is possible to provide air conditioning solely to these three inmates. As the Defendants acknowledged at oral argument, Plaintiffs could be placed in cells next to the officers' pod, which are cooler than those farther down the tiers. Louisiana could also air condition one of the four tiers for the benefit of prisoners susceptible to heat-related illness. When coupled with an order not to move the Plaintiffs from these cells unless certain conditions are met, these options could adequately remedy the Plaintiffs' constitutional violation. Moreover, the *Gates*-type remedies available on remand—increased access to water, ice, cold showers, etc.—ought to (and must) be tailored to these three prisoners.

Because the district court's injunction provides an unnecessary type of relief and applies beyond these three Plaintiffs, it violates the PLRA. Accordingly, the district court abused its discretion.

Finally, we note the substantial disparity between the relief ordered in *Gates* and the scope of the injunction in this case. The *Gates* court did not mandate a maximum heat index applicable in the Mississippi prison. It required particular heat measures, including fans, ice water, ice, and showers, "if the heat index reaches 90 degrees or above." *Gates*,

376 F.3d at 336. The injunction here requires relief that is far more extensive, applies even during months when there is no heat risk to the Plaintiffs, covers the entire facility, and of course is expensive. Since *Gates* upheld an injunction providing narrower relief, and there is no showing that the Constitution mandated more relief for these prisoners for the same prison condition in this case, on remand the court must craft relief more closely aligned with *Gates* as well as consistent with the PLRA.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's resolution of the Eighth Amendment and disability claims, but **VACATE** and **REMAND** the district court's injunction for reconsideration under the principles stated here.

REAVLEY, Circuit Judge, dissenting.

I agree with almost all of the opinion, but I would affirm the injunction which in principal only orders the heat index in the Angola death row tiers to be maintained below 88 degrees.

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 13-00368-BAJ-SCR

ELZIE BALL, ET AL.

v.

JAMES M. LEBLANC, ET AL.

[FILED Dec. 19, 2013]

RULING AND ORDER

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

[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.

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 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.

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[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.

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.

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[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.

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.

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]

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[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

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

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> 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.

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, 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.

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 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.

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 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 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.

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[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).

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

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[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

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 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]

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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. 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

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[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.

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.

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]

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[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.

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.

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[24] Ball testified that he has keloid scars that become inflamed and painful due to the heat.

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]

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

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[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.

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 vists?
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, 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,

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[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.

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 QUESTemp° 46 Waterless Heat 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

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[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.

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

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[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.

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 indices are in the NWS's "extreme caution" or "danger" zones. *See* Exhibit 1.

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[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.*

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.

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[38] *Heat: A Major Killer*, *supra* note 37.

[39] One monitor was installed in cell 8 of tier B.

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

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[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.

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 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

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[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.

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,

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[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.

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 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

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[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.

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 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

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[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.

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, 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.

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[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.

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,

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[62] For reasons unknown to the Court, no data was recorded in tier G, cell 16 on July 23, 2013.

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 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

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[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.

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.

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]

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[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).

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-

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[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.

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.

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 (1997) (citing *Maine v. Thiboutot*, 448 U.S. 1 (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 (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 (1994); *Rhodes v. Chapman*, 452 U.S. 337, 349 (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.

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; *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 (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 (stating that "the temperature [a prisoner] is subjected to in his cell" 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.

10. First, the deprivation alleged must be sufficiently serious. *Wilson*, 501 U.S. at 298. "[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).

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 (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 (1978).

12. Second, the prison official must have acted with a sufficiently culpable state of mind. *See Farmer*, 511 U.S. at 838; *Wilson*, 501 U.S. at 305. 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 ("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.").

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).

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 ("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 F. 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 F. 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 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 humidty, 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 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

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

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[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.

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 exposure to heat indices in the "extreme caution" or "danger" zones[73]:

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[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

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 heath 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

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[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).

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 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 heathy 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 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 medica-

tion, 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 infarc-

tion 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 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 (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*

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[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.

provided by Defendants. *See* Trial 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 overexposed 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

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[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.").

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,

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[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*].

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 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

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[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.

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 75-80° 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

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[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.*

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 and/or medications, the conditions of confinement in Angola's death row tiers create a substantial risk of serious harm to Plaintiffs.

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[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.

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

[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.

> 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 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 F. 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

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.

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.

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 (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.").

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.

1.) The Evidence Establishes that Defendants Had Knowledge of the Substantial Risk of Serious Harm to Plaintiffs

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 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 F. 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

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[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.

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]

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[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

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.

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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.

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 regarding Defendants'

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[94] Cain testified as follows:

BY MR. VORA: How long have you been the Warden at Angola?

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

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> 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.

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

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[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.

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:

> 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

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

[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.

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?

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 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]

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[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."

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.

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

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[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.

> 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 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,

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[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 (2002).

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.*

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[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

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 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 F. Appx. at 235-36 (affirming the district court's denial of summary judgment to prison officials at Texas's Beeville State Prison on an

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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.

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 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.

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[102] The district court also determined that the inmates failed to satisfy the subjective prong. *Chandler*, 379 F.3d at 1297 n.27.

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 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?
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> 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.

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[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.

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.

. . .

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) ("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.)

98. The ADA and related statutes afford certain rights to incarcerated individuals in state facilities.[104]

99. Title II of the ADA provides: "no qualified individual with a disability shall, by reason of such

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[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.

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 (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 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]

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 (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,

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[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).

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)).

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, 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.

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 (2006) (citing cases).

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 (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 instrusive 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. Tex. 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 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. 1972) ("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 **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 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.

Baton Rouge, Louisiana,
this 19th day of December, 2013.

s/_____
BRIAN A. JACKSON, CHIEF JUDGE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30052

ELZIE BALL; NATHANIEL CODE;
JAMES MAGEE, Plaintiffs–Appellees,

v.

JAMES M. LEBLANC, Secretary, Department of Public Safety and Corrections; DARREL VANNOY, Warden, Louisiana State Penitentiary; LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; Warden JAMES CRUZ,
Defendants–Appellants.

Appeal from the United States District Court
for the Middle District of Louisiana

[FILED March 9, 2018]

ON PETITION FOR REHEARING EN BANC

(Opinion January 31, 2018, 5th Cir., ___, ___ F.3d ___)

Before SMITH, BARKSDALE, and HIGGINSON Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/

UNITED STATES CIRCUIT JUDGE