**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MISSOURI**

| | | |
|---|---|---|
| STEPHANIE GASCA, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Case No. 17-cv-4149-SRB |
| | ) | |
| ANNE L. PRECYTHE, et al., | ) | |
| | ) | |
| Defendants. | ) | |

**PLAINTIFFS' SUGGESTIONS IN OPPOSITION**
**TO DEFENDANTS' MOTION FOR STAY PENDING APPEAL**

The State conceded liability in this case. The Missouri Department of Corrections ("MDOC") and its Parole Board admitted they were routinely violating the constitutional rights of a class of thousands of Missourians. These same class members remain at risk every day of being thrown back behind bars under a parole revocation process that denies them due process rights guaranteed under the Constitution. And the State consented to certification of that class of plaintiffs. Now, after announcement of an injunctive order requiring the State to cure those admitted deficiencies, it has sought appeal to the Eighth Circuit and asked this Court to stay its November 12, 2020 order (Doc. 232, the "Remedial Order") pending appeal, despite the fact that it is unlikely to succeed on the merits of the appeal and despite the fact that the plaintiff class will suffer irreparable harm absent the stay. For reasons discussed more fully below, the State's motion should be denied.[1]

**LEGAL STANDARD**

Courts consider four equitable factors when determining whether to stay a district court's order pending appeal:

[1] As used throughout, the term "State" refers collectively to the named defendants in this case.

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*Hilton v. Braunskill*, 481 U.S. 770, 776-77 (1987) (*citing*, *e.g.*, *Virginia Petroleum Jobbers Assn. v. FPC*, 104 U.S.App.D.C. 106, 110, 259 F.2d 921, 925 (1958); *Washington Metropolitan Area Comm'n v. Holiday Tours, Inc.*, 182 U.S.App.D.C. 220, 221–222, 559 F.2d 841, 842–844 (1977); *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986); *Accident Fund v. Baerwaldt*, 579 F.Supp. 724, 725 (WD Mich.1984); *see generally* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2904 (1973)); *Organization for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020) ("*OBS*"). "The most important factor is likelihood of success on the merits, although a showing of irreparable injury without a stay is also required." *OBS*, 978 F.3d at 607 (quoting *Brakebill v. Jaeger*, 905 F.3d 553, 557 (8th Cir. 2018)).

## ARGUMENT

### 1. The State is not entitled to a stay because they have not made a "strong showing" of likelihood of success on the merits.

The State is appealing eight different orders from this Court, including its orders granting class certification and summary judgment, and the Remedial Order itself. *See* Doc. 325. But the State consented to both class certification (Doc. 132) and summary judgment (Doc. 146). Having conceded liability, it strains credulity to suggest that the State could now make a "strong showing" of likelihood of success in overturning these orders to which they consented. Indeed, their motion to stay makes no attempt to demonstrate likelihood of success on appeal.

Because the State's response to the Class' motion for summary judgment did not properly address any assertions of fact as required by Fed. R. Civ. P. 56(c), all facts presented by the Class are considered undisputed. Fed. R. Civ. P. 56(e)(2); L.R. 56.1(b)(1) ("Unless specifically

controverted by the opposing party, all facts set forth in the statement of the movant are deemed admitted for the purpose of summary judgment."). This includes the following key facts:

- Defendants are not screening for or providing State-funded counsel in compliance with *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). *See, e.g.,* Doc. 130 at ¶¶32-40.
- Defendants are systemically violating class members' due process rights by failing to provide adequate notice of alleged parole violations and the basis for revocation decisions. *Id.* at ¶¶42, 67-76.
- Defendants routinely fail to advise class members of their rights during revocation proceedings. *Id.* at ¶¶58-64, 81-85.
- Defendants deny the Class due process by securing waivers of preliminary hearings and final revocation hearings that are not knowing, voluntary and intelligent. *Id.* at ¶¶16, 32-42, 50-64, 91.
- Defendants violate the Class's due process rights by refusing to disclose to a parolee evidence against them and denying them the opportunity to present witnesses or confront adverse witnesses at both the preliminary hearing and revocation hearing. *Id.* at ¶¶11, 22-23, 45-46, 88-90.
- Defendants fail to conduct revocation hearings within a reasonable time after a parolee is taken into custody, in violation of the Fourteenth Amendment. *See, e.g., id.* at ¶¶5, 48-49.

These constitutional violations occur on a daily basis, and impact over 6,000 people every year. *Id.* at ¶2.

At the June hearing, the Court heard evidence regarding the State's "corrective measures" and the ongoing constitutional violations suffered by Class members. This evidence included expert testimony, the results of a survey from hundreds of class members, live testimony and affidavits from class members regarding their more recent experience with the parole revocation process, and numerous MDOC employees. *See*, *generally*, Remedial Order; Doc. 316, 319. The overwhelming evidence produced at both summary judgment and remedial stages weighs heavily in Plaintiffs' favor; the State has not made and simply cannot make a strong showing of likelihood

of success on appeal—the "most important factor" in determining whether a stay is appropriate. *OBS*, 978 F.3d at 607.

**2. A stay of the Remedial Order is against public interest.**

Faced with this overwhelming evidence and its own prior concessions, the State's motion to stay focuses largely on a public-interest-based argument, claiming that the Remedial Order violates public interest because it enjoins the State from complying with Missouri statute. *See* Doc. 337 at 3-4. But this is a misinterpretation of state law; and, in any case, it is not in the public interest to allow ongoing constitutional violations to continue in the name of compliance with state law. In truth, public interest lies in favor of *denying* the motion for stay.

Complying with the Remedial Order would not require the State to violate any state statute. As has already been established in this litigation, MDOC is responsible for securing counsel for eligible class members. In *Gagnon*, the Supreme Court placed the onus for securing counsel for eligible parolees on "the state authority charged with [the] responsibility for administrating the probation and parole system." 411 U.S. at 790. Defendants' counsel argued at the evidentiary hearing that the Court was referring in this passage to the State more generally, not specifically to the Defendants here. Tr. 527:22-528:23. But *Gagnon* went on to note that certain factors were to be considered by "the responsible agency" when passing on a request for appointment of counsel. 411 U.S. at 790-91. The Court used the phrase "responsible agency" twice in the *Gagnon* opinion, both in the context of determining whether and under what circumstances a parolee is eligible for counsel, and in the context of providing counsel to eligible parolees. *Id*. Here, the Missouri Department of Corrections is that "responsible agency."[2] In its motion to stay, the State argues that

[2] Furthermore, Defendants are agents of the State of Missouri, named in their official capacities. Therefore, this lawsuit is no different from a suit against the State itself. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no

MDOC has no authority to "appoint counsel" to eligible class members. But this Court has already rejected this argument on two occasions. As previously argued before the Court, Section 600.042—the provision of Missouri law specifying the powers and duties of the Director of the Missouri State Public Defender ("MSPD")—was revised in 2013 and is currently silent about whether MSPD must or may represent alleged parole violators. *Compare* RSMo. § 600.042.4(3) (2008) *with* RSMo. § 600.042.4; *see also* H.B. 215, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013); Doc. 194-15 at n1. Yet again, the State can cite to no authority indicating the MSPD is the exclusive means for providing representation to indigent parolees facing revocation. In the criminal defense context, when passing on an appointment of counsel to an indigent defendant, courts are required to consider whether counsel would be able to offer competent representation. *State ex rel. Missouri Public Defender Comm'n v. Waters*, 370 S.W.3d 592, 597 (Mo. banc 2012) (citing *State ex rel. Missouri Public Defender Comm'n v. Pratte*, 298 S.W.3d 870, 875 (Mo. banc 2009)). The same consideration is warranted here; and, indeed, MSPD Director Fox testified that MSPD is not in a position to be able to provide competent representation to class members given its ongoing workload issues. Fortunately, MDOC has the authority to contract with private attorneys to satisfy the State's obligations under *Gagnon*. *See* RSMo. § 217.035(4). The Remedial Order does not enjoin the State from effectuating state statutes (*see* Doc. 337 at 3)—the actions it requires the State to take to address the proven due process violations are expressly provided for and in compliance with Missouri statute.

---

different from a suit against the State itself.") (internal citations omitted); *see also Brandon v. Holt,* 469 U.S. 464, 471 (1985); *Hafer v. Melo*, 502 U.S. 21, 25 (1991). The State should not be able to pit its various agencies against one another in an effort to avoid responsibility for ensuring the constitutional rights of its most vulnerable citizens.

In reality, the public has a strong interest in ensuring that Plaintiffs' constitutional rights are protected. *See*, *e.g.*, *Hoffer v. Jones*, 290 F. Supp. 3d 1292, 1304 (N.D. Fla. 2017) (citing *Laube v. Haley*, 234 F. Supp. 2d 1227, 1252 (M.D. Ala. 2002) ("[T]here is a strong public interest in requiring that the plaintiffs' constitutional rights no longer be violated ….")). That interest is particularly strong here, given the liberty interest at stake for a person on parole supervision—an interest which "includes many of the core values of unqualified liberty," and the termination of which "inflicts a '*grievous loss*' on the parolee and often on others." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (emphasis added). The public has an interest in ensuring the State complies with due process before inflicting a "grievous loss" on any one of the class members. Thus, this factor weighs in favor of Plaintiffs, not the State. This is especially true given the irreparable harm that will befall Plaintiffs if a stay is granted. *See* section 3, *infra*.

**3. The imposition of a stay will irreparably harm the Class; conversely, absence of one will not irreparably harm the State.**

The State's motion asks this Court for the ability to ignore the Court's Remedial Order and continue reincarcerating persons on parole under an admittedly unconstitutional revocation scheme while they ask the Eighth Circuit to overturn orders to which they consented. The State's argument that it would suffer irreparable harm absent a stay is dispensed with above: the premise of that argument, that it would be forced to violate state law absent a stay, is demonstrably false. If no stay is entered, the State will finally be held responsible for complying with decades' old precedent regarding due process rights during parole revocation proceedings. This is not an irreparable injury—it is a redress of rights.

If a stay is imposed, on the other hand, serious and irreparable harm will befall innumerous class members. Thousands of class members face revocation every year, and at the time of summary judgment in this case, approximately 90% have their parole revoked and are sent back

to prison, through MDOC reception and diagnostic centers. Even those who do not have their parole revoked may spend many months at these prison facilities. *See* Doc. 130 at ¶¶ 18-20 (some preliminary hearings occur at MDOC diagnostic facilities), 48 (there may be many months' delay between being taken into custody and the date of any revocation hearing); Transcript of Evidentiary Hearing at 43:7-44:7, 89:24-91:6 and Pltfs' Exh. P-17 (demonstrating that the State continues to conduct hearings well beyond 60 days after a class members' admission to MDOC custody); Tr. at 90:17-91:2 (average time from return to custody to revocation hearing was 74 days at time of the June 2020 hearing on remedy). Staying the Remedial Order would mean that hundreds of people would risk reincarceration every month under a concededly unconstitutional parole revocation system. Such an outcome is unacceptable under any circumstances, and causes irreparable harm to Missourians who will lose their liberty, their jobs, their connections to their communities, all while having their due process rights trampled on. But in light of the ongoing COVID-19 pandemic, subjecting class members to this unconstitutional revocation process does not just take away their liberty without due process—it imposes a potential death sentence.

By now, the incredible health risks presented by the novel coronavirus are well documented and well known. As detailed more fully in Plaintiffs' Emergency Motion for Relief Pursuant to All Writs Act (Doc. 251), prison settings are particularly conducive to the spread of infectious diseases such as coronavirus. Further, many of those who are incarcerated suffer from underlying health conditions, including, among many others, asthma, diabetes and hypertension, that place them at elevated risk for contracting serious COVID-19. *Id*. at 5. And prisons and jails are notoriously unsanitary. *Id*. At the time Plaintiffs filed their All Writs Act motion, there was just a single confirmed positive case among MDOC prisoners. *Id*. at 4. **As of December 17, 2020, there have been at least 4,952 confirmed positive cases among incarcerated persons, and at least**

**1,873 confirmed positive cases among MDOC staff.**[3] At least 37 people incarcerated in MDOC have died from COVID-19, along with 4 staff.[4] The reception and diagnostic centers—where new admissions to MDOC are first received, including class members facing revocation—are particularly hard hit by COVID-19, both directly and indirectly. Eastern Reception and Diagnostic Correctional Center in Bonne Terre experienced an outbreak earlier this year.[5] High rates of infection are causing staffing issues across the state, leading to an increase in assaults.[6] For example, on November 5, a prison guard was attacked at Western Reception and Diagnostic Correctional Center; three days later two guards were attacked at the Eastern Reception and Diagnostic Correctional Center.[7]

[3] *See MDOC COVID-19 Cases in State Adult Institutions*, at https://doc.mo.gov/media-center/newsroom/covid-19/data (last accessed Dec. 17, 2020).
[4] *Id*.
[5] Dan Greenwald, *COVID-19 outbreak reported at prison in Bonne Terre, Mo.*, KMOV (June 19, 2020) at https://www.kmov.com/news/covid-19-outbreak-reported-at-prison-in-bonne-terre-mo/article_f7851c40-b25f-11ea-a0d3-83a31be98b0a.html.
[6] Ryan Krull, *Low Staff Levels Blamed for Assaults in Missouri Prisons*, Riverfront Times (Nov. 20, 2020) at https://www.riverfronttimes.com/newsblog/2020/11/20/low-staff-levels-blamed-for-assaults-in-missouri-prisons.
[7] *Id*.

As of December 17, 2020, all four of MDOC's reception and diagnostic centers made the list of the six adult institutions with the highest active and recovered COVID-19 cases among incarcerated persons:

COVID-19 CASES IN STATE ADULT INSTITUTIONS

| Facility | Staff Active Cases | Staff Recovered | Offender Active Cases | Offenders Recovered |
|---|---|---|---|---|
| ACC Jefferson City | 3 | 0 | 0 | 137 |
| BCC Boonville | 6 | 74 | 0 | 149 |
| CCC Chillicothe | 15 | 77 | 21 | 272 |
| CTCC Fulton | 2 | 9 | 2 | 21 |
| ERDCC Bonne Terre | 8 | 160 | 35 | 448 |
| FCC Farmington | 8 | 176 | 3 | 529 |
| FRDC Fulton | 6 | 76 | 55 | 520 |
| JCCC Jefferson City | 3 | 129 | 6 | 335 |
| KCRC Kansas City | 3 | 7 | 0 | 5 |
| MCC Moberly | 5 | 72 | 4 | 229 |
| MECC Pacific | 3 | 54 | 1 | 189 |
| MTC Maryville | 2 | 43 | 0 | 50 |
| NECC Bowling Green | 8 | 119 | 3 | 96 |
| OCC Fordland | 3 | 36 | 5 | 149 |
| PCC Potosi | 5 | 117 | 1 | 140 |
| SCCC Licking | 4 | 64 | 41 | 71 |
| SECC Charleston | 3 | 120 | 10 | 251 |
| TCC Tipton | 1 | 58 | 3 | 157 |
| TCSTL St. Louis (Probation & Parole) | 4 | 37 | 0 | 4 |
| WERDCC Vandalia | 10 | 51 | 12 | 479 |
| WMCC Cameron | 4 | 144 | 5 | 203 |
| WRDCC St. Joseph | 6 | 128 | 30 | 281 |

*Cumulative cases totaled since March 2020*

Indeed, these reception and diagnostic centers are where the most "prison churn" occurs, and, as a result are most likely points of entry for the coronavirus. Dr. Stern, a correctional public health expert who provided a declaration in this case, notes that "release from custody is a critically important way to meaningfully mitigate" the risk of serious illness or death to prisoners. Doc. 251-1 at ¶9. This includes the risk of serious illness or death to persons on parole when they are returned to MDOC custody for revocation proceedings.

**CONCLUSION**

This case was filed over three years ago. The State consented to class certification and conceded liability almost two years ago. All that time, it has been permitted to continue operating an unconstitutional parole revocation system, even during an unprecedented pandemic. Now the

State asks this Court to stay its remedial order and allow the constitutional violations ton continue. But the State has not demonstrated it is entitled to a stay of the Remedial Order. It has not demonstrated a likelihood of success on appeal. Public interest lies in protecting Plaintiffs' due process rights, not imposing a stay of an order redressing those rights. Lastly, and most importantly, the balance of harms weighs heavily in Plaintiffs' favor here.

The parties do not know how the Eighth Circuit will ultimately decide the State's vast appeal. But what we do know is that if the Remedial Order is stayed, hundreds of people on parole supervision will suffer a grievous loss of liberty under a decidedly unconstitutional parole system, and face risk of serious harm or death while incarcerated due to the COVID-19 pandemic. That is unconscionable. The State's motion should be denied.

Dated: December 21, 2020

Respectfully submitted,

RODERICK AND SOLANGE MACARTHUR
JUSTICE CENTER

By: /s/ Amy E. Breihan
Amy E. Breihan, #65499
Megan G. Crane, #71624
W. Patrick Mobley, #63636*
3115 South Grand Blvd., Suite 300
St. Louis, MO 63118
Phone: (314) 254-8540
Fax: (314) 254-8547
amy.breihan@macarthurjustice.org
megan.crane@macarthurjustice.org
pat.mobley@macarthurjustice.org

Locke E. Bowman*
Sheila A. Bedi*
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-1271
l-bowman@law.northwestern.edu
sheila.bedi@law.northwestern.edu

*Admitted Pro Hac Vice

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 21st day of December, 2020, a true and correct copy of the foregoing was electronically filed using the Court's online case filing system, which will send notice to all counsel of record.

By: /s/ Amy E. Breihan
One of Plaintiffs' Attorneys