

# Climate Change and the Carceral System: How Extreme Weather Threatens Inmates' Eighth Amendment Rights

Vaughn Ford-Plotkin\*

## ABSTRACT

This article will analyze the impact of climate change on the carceral system of the United States. More specifically, how extreme weather events and conditions exacerbated by climate change are causing incarcerated individuals to endure abhorrent conditions that are in violation of their Eighth Amendment rights. Additionally, this article will examine the Prison Litigation Reform Act and how it prevents incarcerated individuals from having legal recourse to rectify the violations of their Eighth Amendment rights caused by climate change. Via a two-factor approach of federal laws requiring safe conditions (with a focus on what is safe during extreme heat waves and cold fronts) and the abolition of the Prison Litigation Reform Act; this article will lay the framework for a course of action to prevent incarcerated individuals from having their constitutional rights violated in the future and provide a legal avenue to those incarcerated individuals and their families who have already suffered cruel and unusual punishment at the hands of an under prepared carceral system.

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\* Vaughn Ford-Plotkin is a third-year law student at Vermont Law School, pursuing a career in indigent defense post-grad. I would like to thank Dean Jennifer Rushlow for all of her guidance as the professor overseeing the drafting of this note. I would like to thank BJCL for the opportunity to have this note published. I would like to also thank my family and friends who have supported me, allowing me to have a successful law school career. Finally, I would like to recognize the strength and value of all people in prison and to emphasize the need for mass decarceration.

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## INTRODUCTION

Extreme weather events triggered by climate change are slowly becoming the new normal in the United States. August of 2021 exemplified this shift, with Hurricane Ida flooding the East Coast of the United States while, simultaneously, wildfires on the West Coast forced entire neighborhoods to evacuate their homes.<sup>1</sup> Hotter summers, colder winters, and an increase in natural disasters loom on the United States

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<sup>1</sup> Rachael Ramirez, *Hurricanes, Wildfires and Drought: US Finds Itself Battling Climate Disasters on Several Fronts*, CNN (Aug. 31, 2021), <https://www.cnn.com/2021/08/31/us/hurricane-wildfires-climate-change-emergency-response/index.html>.

horizon, and while little is being done to prevent these changes from occurring, even less is being done to mitigate their effects.<sup>2</sup> Extreme weather events are felt first—and most drastically—by disenfranchised groups in the United States, with unhoused individuals, minorities, and lower income populations having less protection from the effects of extreme weather events.<sup>3</sup> This reality is even more apparent in the prison system of the United States,<sup>4</sup> where said groups represent a disproportionate amount of all incarcerated persons.<sup>5</sup>

As the effects of climate change increase, the need for climate adaptation has become apparent. Climate adaptation policies for prisons across the country should be implemented to prevent injuries from extreme weather in prisons. The aged infrastructure of most prisons offers little to no mitigation against the hazardous effects of extreme weather.<sup>6</sup> Employing adaptation strategies such as weatherization will make prisons less susceptible to extreme weather and better protect incarcerated individuals from breaches of their Eighth Amendment rights.<sup>7</sup>

The Eighth Amendment protects people in the United States from excessive bail, exorbitant fines, and cruel and unusual punishment.<sup>8</sup> Climate change leads to extreme weather conditions, threatening people's constitutional protection from cruel and unusual punishment.<sup>9</sup> Extreme weather is not limited to just heat; every winter new evidence surfaces of freezing conditions in prisons across the country.<sup>10</sup> People imprisoned in

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<sup>2</sup> *Climate Change Widespread, Rapid, and Intensifying*, IPCC (Aug. 9, 2021), <https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/>.

<sup>3</sup> Adrién Salazar, *In Climate Disaster, the Most Vulnerable Continue to be Disenfranchised*, DEMOS (Sept. 20, 2018), <https://www.demos.org/blog/climate-disaster-most-vulnerable-continue-be-disenfranchised>.

<sup>4</sup> Kristin Toussaint, *Extreme Heat is Turning Prisons Into Ovens*, FAST COMPANY (Aug. 17, 2021), <https://www.fastcompany.com/90664656/extreme-heat-is-turning-prisons-into-ovens>.

<sup>5</sup> Kim Kelly, *Prisoners Are Among the Most Vulnerable People in the U.S.*, WASH. POST (Feb. 10, 2019), <https://www.washingtonpost.com/outlook/2019/02/10/prisoners-are-among-most-vulnerable-people-us/>.

<sup>6</sup> Sierra Garcia, *Climate Change and the Criminal Justice System*, JSTOR DAILY (Sept. 24, 2021), <https://daily.jstor.org/climate-change-criminal-justice-system/>.

<sup>7</sup> See *Weatherize*, U.S. DEP'T OF ENERGY, <https://www.energy.gov/energysaver/weatherize> (last visited Apr. 5, 2022).

<sup>8</sup> U.S. CONST. amend. VIII.

<sup>9</sup> See Toussaint, *supra* note 4 (quoting court records that described prison conditions as “cruel and unusual”).

<sup>10</sup> Erica Bryant, *Winter in Prison: Icy Conditions, No Blankets, Illness, and Death*, VERA INST. OF JUST. (Feb. 18, 2022), <https://www.vera.org/news/winter-in-prison-icy-conditions-no-blankets-illness-and-death>.

Texas were also evacuated when the prisons were flooded during Hurricane Harvey.<sup>11</sup> Such events suggest that Eighth Amendment rights of incarcerated persons are being violated by their exposure to the effects of extreme weather without proper mitigation. Unfortunately, the Prison Litigation Reform Act (PLRA) has enacted restrictions that only apply to incarcerated individuals and have made it nearly impossible for the incarcerated to litigate against prisons.<sup>12</sup> The United States is the only country with national legislation to create excessive barriers for incarcerated individuals in particular to protecting their legal rights in court.<sup>13</sup>

Creating and passing federal laws requiring prisons to meet certain quality standards for prisons will establish a baseline of safety, with threat of withdrawal of funding as punishment for not meeting these standards.<sup>14</sup> Enacting such laws would ensure that climate adaptation strategies are followed and would create a separate safety net for people in prison, allowing them to avoid the harsh requirements of the PLRA.<sup>15</sup> The PLRA should be repealed so that incarcerated persons can more readily protect their rights. The effect of these changes will be less injury and deaths in prison caused by poor infrastructure and inadequate adaptation to extreme weather conditions along with securing the constitutional rights of the incarcerated.

What courts have historically deemed to be violations of Eighth Amendment rights will be looked at to establish precedence. Once context has been established, it will be evident that mitigating the effects of extreme weather events and conditions is necessary to protect the Eighth Amendment rights of incarcerated individuals. How the PLRA interferes with lawsuits against prisons in cases of Eighth Amendment rights violations caused by climate change will be explored to show the need for the removal of the PLRA. Different steps prisons can take to comply with

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<sup>11</sup> Jolie McCullough, *Two More Texas Prisons Evacuate as Hurricane Harvey Flooding Continues*, TEX. TRIB. (Aug. 29, 2017), <https://www.texastribune.org/2017/08/29/two-more-texas-prisons-evacuated-harvey-flooding-continues/>.

<sup>12</sup> *See generally No Equal Justice: The Prison Litigation Reform Act in the United States*, HUM. RTS. WATCH (June 16, 2009), <https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states>.

<sup>13</sup> *Id.* § I. Summary.

<sup>14</sup> Ram Subramanian et. al., *A Federal Agenda for Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (Dec. 9, 2020), <https://www.brennancenter.org/our-work/policy-solutions/federal-agenda-criminal-justice-reform>.

<sup>15</sup> *Why it's Time to Repeal the Prison Litigation Reform Act*, KENT STATE ONLINE (Aug. 23, 2021), <https://onlinedegrees.kent.edu/sociology/criminal-justice/community/why-its-time-to-repeal-the-prison-litigation-reform-act>.

incarcerated individuals' Eighth Amendment rights along with the potential challenges of implementing those steps will be discussed to evaluate whether prisons in the United States have the capacity to uphold the constitutional rights of those they imprison.

## I. BACKGROUND

Global warming and climate change are developing at a rapid rate, and their effects are felt far and wide.<sup>16</sup> Global warming is connected to an increase in the speed and severity of climate change.<sup>17</sup> Climate change is driven by greenhouse gases released into the ozone layer of the Earth's atmosphere through industrial production of fossil fuels, animal waste, and many other means of production.<sup>18</sup> Greenhouse gasses, such as carbon dioxide, trap solar radiation in the earth's atmosphere.<sup>19</sup> The higher the amount of gasses that trap solar radiation within the atmosphere, the warmer the planet gets. The global average surface temperature of Earth has begun to increase at double the yearly rate it was before 1980.<sup>20</sup> This increased heat leads to hotter heat waves, increased precipitation, longer and more severe droughts, more intense hurricanes, and heavier snowfall with colder temperatures in the winter.<sup>21</sup> The National Aeronautics and Space Administration (NASA) and the National Oceanic and Atmospheric Administration (NOAA) reported that 2010 to 2019 was the hottest decade on record since tracking began 140 years ago.<sup>22</sup> "These 10 years were punctuated by a series of deadly, dramatic, devastating events. Hurricanes like Sandy, Maria, and Harvey fundamentally changed the communities they barreled into, leaving behind scars that have yet to heal. Stronger and stronger heat waves forced communities across the country and world into dangerous swelter."<sup>23</sup> Greenhouse gasses and other emissions have been proved to be the cause of these

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<sup>16</sup> *What is Climate Change?*, U.N., <https://www.un.org/en/climatechange/what-is-climate-change> (last visited Oct. 8, 2021).

<sup>17</sup> *How Climate Change is Fueling Extreme Weather*, EARTHJUSTICE (Sept. 28, 2022), <https://earthjustice.org/features/how-climate-change-is-fueling-extreme-weather>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Rebecca Lindsey & Luann Dahlman, *Climate Change: Global Temperature*, NOAA (Jan. 18, 2023), <https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature>.

<sup>21</sup> *How Climate Change is Fueling Extreme Weather*, *supra* note 17.

<sup>22</sup> Alejandra Borunda, *Past Decade was the Hottest on Record*, NAT'L GEOGRAPHIC (Jan. 15, 2020), <https://www.nationalgeographic.com/science/article/the-decade-we-finally-woke-up-to-climate-change>.

<sup>23</sup> *Id.*

temperature increases.<sup>24</sup>

While everyone on the planet suffers from these increases in extreme weather and natural disasters, they affect certain groups at a disparate rate.<sup>25</sup> One of the groups that is most susceptible to injury from climate change is incarcerated people.<sup>26</sup> As these natural disasters and heat waves continue, people in prisons in the United States are subject to their effects without adequate protection.<sup>27</sup> Climate change puts people in prison at risk of serious health issues and violations of their constitutional rights.<sup>28</sup> As a marginalized group, incarcerated individuals are often left out of conversations regarding the effects of climate change, which contributes to violations of their rights being overlooked.<sup>29</sup> Extreme weather and the increase of natural disasters are felt disproportionately by those in prison,<sup>30</sup> who are entitled to protections against cruel and unusual punishment under the Eighth Amendment.<sup>31</sup> Due to the PLRA, a person in prison may be unable to file a lawsuit on violations of their Eighth Amendment rights.

Prisons in the United States have a long history of facing lawsuits for alleged Eighth Amendment violations.<sup>32</sup> It was not until the 1970s that courts began applying the cruel and unusual standard to prisons.<sup>33</sup> Before applying this standard, courts gave great deference to state legislatures and prison officials regarding their treatment of incarcerated persons.<sup>34</sup> After applying this standard, by 1990, forty-one states had some or all of

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<sup>24</sup> *Id.*

<sup>25</sup> *Prisons in Crises: Natural Hazards and Extreme Weather*, PENAL REFORM INT'L, <https://www.penalreform.org/global-prison-trends-2021/special-focus-2021-prisons-in-crises/natural-hazards-and-extreme-weather/> (last visited Oct. 8, 2021).

<sup>26</sup> Mattea Mrkusic & Daniel Gross, *Incarcerated People Remain Vulnerable to the Worst Ravages of a Warming World*, PBS (Dec. 5, 2018), <https://www.pbs.org/wgbh/nova/article/climate-change-mass-incarceration-prison/>.

<sup>27</sup> *Prisons in Crises*, *supra* note 25.

<sup>28</sup> *See id.*

<sup>29</sup> *See* Salazar, *supra* note 3 (detailing which groups are most affected by extreme weather and how disparities in impact follow the history of marginalization); *See also* Kim Kelly, *The Climate Disaster Inside Americas Prisons*, THE NEW REPUBLIC (Sept. 18, 2019), <https://newrepublic.com/article/155092/climate-disaster-inside-americas-prisons>. (referencing how inmates are “left out” of discussions regarding climate change)

<sup>30</sup> *Id.*

<sup>31</sup> U.S. CONST. amend. VIII.

<sup>32</sup> Andrew DeSimone & Janie W. Dittert, *Eighth Amendment Claims*, STURGILL TURNER (Dec. 6, 2016), <https://www.sturgillturner.com/our-insights/2019/1/24/eighth-amendment-claims>.

<sup>33</sup> Daniel Yves Hall, Note, *The Eighth Amendment, Prison Conditions and Social Context*, 58 MO. L. REV. 207, 209 (1993).

<sup>34</sup> *See generally id.*

their prisons operating under court order because of violations of constitutional rights regarding the conditions of confinement.<sup>35</sup> There are even examples of courts releasing people from prison due to a failure by prisons to ameliorate unconstitutional conditions.<sup>36</sup> Attempted lawsuits by people in prison against the institutions holding them were so prevalent that in 1995 Congress passed the Prison Litigation Reform Act (PLRA).<sup>37</sup>

The PLRA mandates an exhaustion requirement, the payment of court filing fees in full, a three-strike provision if the case is dismissed and a physical injury requirement.<sup>38</sup> The most reprehensible requirement of the PLRA is that an inmate attempting to sue for Eighth Amendment violations must meet the “exhaustion requirement.”<sup>39</sup> This requirement requires that someone wishing to bring a lawsuit against a correctional facility must first use all other remedial options, such as prisons grievance systems.<sup>40</sup> These grievance systems, however, are designed and implemented by prison officials, the very defendants in a possible law suit brought by the inmate.<sup>41</sup>

The effect of this requirement is that inmates are hesitant to bring forth complaints regarding the conditions of their confinement as they fear possible retaliatory actions by the very prison administrators they complain of. As such, the PLRA has squelched many attempts to bring lawsuits against prisons for potential violations of Eighth Amendment protections.<sup>42</sup> Because plaintiffs must meet all exhaustion requirements before bringing a lawsuit, the PLRA’s requirements may weaken their standing to sue the prison for the injuries they suffered. As time elapses between the injury and the lawsuit, their injury may lessen or heal, leading a court to see no opportunity for redress for the claimed injury, and as such threatening an incarcerated person’s standing to bring a lawsuit.

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<sup>35</sup> Richard D. Nobleman, *Wilson v. Seiter: Prison Conditions and the Eighth Amendment Standard*, 24 PAC. L. J. 275, 276 (1992).

<sup>36</sup> *Id.*

<sup>37</sup> *No Equal Justice*, *supra* note 12, § I. Summary.

<sup>38</sup> *Know Your Rights: The Prison Litigation Reform Act*, ACLU, [https://www.aclu.org/sites/default/files/images/asset\\_upload\\_file79\\_25805.pdf](https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf) (last visited Apr. 19, 2023).

<sup>39</sup> *See generally No Equal Justice*, *supra* note 12 § V. The Exhaustion Requirement (addressing the exhaustion requirement as a whole and what it entails).

<sup>40</sup> *Id.*

<sup>41</sup> *See id.*

<sup>42</sup> *See generally id.* § VIII. The PLRA’s Effect on Prisoners’ Access to the Courts (discussing the stark decline in lawsuits from incarcerated persons because the PLRA discourages inmates from using the judicial system).

## II. EXAMPLES

Extreme weather caused by climate change has created dangerous and deadly conditions in United States prisons.<sup>43</sup> Incarcerated people face the effects of these weather events with little to no physical or legal protection.<sup>44</sup> These events range from record high temperatures, to catastrophic natural disasters like hurricanes and wildfires.<sup>45</sup> Incarcerated people are among those most severely impacted by these weather events as they do not have any choice in their ability to mitigate the effects felt.<sup>46</sup> There are numerous examples of incarcerated people's injuries caused by extreme weather, and this number will continue to rise as the frequency and severity of extreme weather events increase due to climate change.<sup>47</sup>

One of the most common and apparent examples of climate change affecting prisoners is the extreme heat in the summers, leading to some prisoners describing the inside of prisons as oven-like.<sup>48</sup> Prison heat indexes in Texas have reached 149 degrees Fahrenheit.<sup>49</sup> Prolonged exposure to a heat index at or above 103 degrees Fahrenheit can lead to heat stroke and heat exhaustion. A report by the University of Texas School of Law's Human Rights Clinic found that between 2007 and 2014, when the report was filed, at least fourteen inmates in nine different Texas prisons died from heat-related illnesses.<sup>50</sup>

Robert Allen Webb is just one example of an incarcerated individual who suffered from the effects of extreme weather brought about by climate change.<sup>51</sup> Robert was held in a Texas state prison known as the "Hodge Unit" after being convicted of robbery.<sup>52</sup> While in prison, Robert was diagnosed with below average cognitive ability, and was

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<sup>43</sup> Maurice Chammah, "*Cooking Them to Death*": *The Lethal Toll of Hot Prisons*, THE MARSHALL PROJECT (Oct. 11, 2017), <https://www.themarshallproject.org/2017/10/11/cooking-them-to-death-the-lethal-toll-of-hot-prisons>.

<sup>44</sup> *Id.*

<sup>45</sup> Borunda, *supra* note 22.

<sup>46</sup> *Prisons in Crises*, *supra* note 25.

<sup>47</sup> See *What is Climate Change?*, *supra* note 16 (explaining that the Earth's temperature is predicted to rise by 2.8 degrees Celsius in the next century).

<sup>48</sup> See Chammah, *supra* note 43.

<sup>49</sup> *Reckless Indifference: Deadly Heat in Texas Prisons*, U. TEX. SCH. L. HUM. RTS. CLINIC (Oct. 15, 2014), <https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2015-HRC-USA-Reckless-Indifference-Report.pdf>.

<sup>50</sup> *See id.*

<sup>51</sup> Chammah, *supra* note 43.

<sup>52</sup> *Id.*



housed with other individuals with developmental disabilities.<sup>53</sup> Robert's brother detailed Robert's poor condition when he and his mother visited Robert, stating that Robert looked pale and gaunt.<sup>54</sup> Robert requested sodas during this visit and drank them quickly, explaining that he would not get sodas from commissary, because the extreme heat in his cell would cause the soda cans to explode.<sup>55</sup> Robert told his mother and brother that he might not make it out of prison alive due to the extreme heat.<sup>56</sup> A few months later, Robert's prediction became reality, as a call came from the prison chaplain informing Robert's brother of Robert's death.<sup>57</sup> The chaplain explained Robert's body was hot to the touch when found and that he believed the heat killed Robert.<sup>58</sup>

Unfortunately, this was not an isolated incident. Throughout the country, many suffer from the dangerous and sometimes deadly effects of extreme weather inside prisons. *Ball v. LeBlanc* illustrates the injuries caused by extreme weather in prison.<sup>59</sup> In *Ball*, three people on death row in Louisiana sued over the conditions the prison subjected them to in the summer months.<sup>60</sup> For instance, the prison facility required the people on death row, such as the plaintiffs, to spend 23 hours a day in their cells without any cooling mechanisms and with limited access to water.<sup>61</sup> The extreme heat led to an increase in the severity of the plaintiff's underlying medical conditions. One plaintiff stated that he would "lay as still as possible" to avoid overheating and the subsequent dizziness, confusion, and headaches.<sup>62</sup> A Louisiana district court found that holding the death row inmates in excessive heat without mitigating factors violated their Eighth Amendment rights.<sup>63</sup>

In September 2020, wildfires decimated the Pacific Northwest, destroying over 1.2 million acres of land in Oregon.<sup>64</sup> According to the Oregon Office of Emergency Management, these wildfires "ignited under

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *See generally* 792 F.3d 584 (5th Cir. 2015).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (see 988 F. Supp. 2d 639 at 648 (M.D. La. 2013)).

<sup>62</sup> *Id.* (see 988 F. Supp. 2d 639 at 651 (M.D. La. 2013)).

<sup>63</sup> *Id.* at 596.

<sup>64</sup> *2020 Oregon Wildfire Recap: 9 Deaths, 1.2 Million Acres Burned, 4K Homes Destroyed, 25K Claims Filed*, KXL (Dec. 16, 2020), <https://www.kxl.com/pacific-nw-wildfires-2020/>.

critically hot and dry conditions” and they “spread dramatically during multiple days of dry winds”.<sup>65</sup> Four Oregon prisons were evacuated due to these wildfires.<sup>66</sup> Coffee Creek Correctional facility gave the incarcerated people plastic bags and told them to “take what [they] can.”<sup>67</sup> The evacuation of the prison was unorganized and disjointed; some incarcerated people were loaded into school buses and forced to wait in the parking lot with zip ties on their wrists for hours before making the journey to safety.<sup>68</sup> A woman who had been incarcerated in the prison facility reported being held on a bus for 8 and a half hours, with no access to a restroom, and subsequently being told by officers to “go to the bathroom in [her] pants.”<sup>69</sup> Tara Herivel, an attorney for one of the incarcerated individuals who endured the evacuation in Oregon, said, “It appears there wasn’t a plan for this evacuation . . . it appears as if [the evacuation] was extremely haphazard and ad-hoc. And [sic] the harm that’s arisen is significant.”<sup>70</sup>

Not only does extreme heat subject incarcerated people to dangerous conditions, but so does cold weather, as the storm front that froze Texas in February 2021 illustrates.<sup>71</sup> When Texas endured a snowstorm and freezing temperatures in February 2021, the entire state faced massive power outages that lasted weeks,<sup>72</sup> including in prisons. The prison facilities left incarcerated people freezing, with no running water, no extra blankets, and a scarce food supply.<sup>73</sup> Incarcerated people reported that during this outage they went without meals, their toilets were overflowing, and when backup generators intermittently provided power

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<sup>65</sup> 2020 *Oregon Wildfire Spotlight*, OR. OFF. EMERGENCY MGMT., <https://storymaps.arcgis.com/stories/6e1e42989d1b4beb809223d5430a3750> (last visited Apr. 20, 2023).

<sup>66</sup> Conrad Wilson, *Oregon Prisoners Describe ‘Insane’ Fire Evacuation, Looming COVID-19 Threat*, OR. PUB. BROAD. (Sept. 16, 2020), <https://www.opb.org/article/2020/09/16/oregon-wildfires-evacuation-prison-coronavirus/>.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Paul Weber & Jill Bleed, *Power Outages Linger for Millions as Another Icy Storm Looms*, HUFFINGTON POST (Feb. 17, 2021), [https://www.huffpost.com/entry/power-outages-texas-winter-snow\\_n\\_602d8719c5b673b19b65c341](https://www.huffpost.com/entry/power-outages-texas-winter-snow_n_602d8719c5b673b19b65c341).

<sup>72</sup> *Id.*

<sup>73</sup> Sarah Ruiz-Grossman, *Texas Prisoners Freeze Without Hot Food or Running Water*, HUFFINGTON POST (Feb. 18, 2021), [https://www.huffingtonpost.co.uk/entry/texas-winter-storm-prisons\\_uk\\_602e5519c5b67c32961b905e](https://www.huffingtonpost.co.uk/entry/texas-winter-storm-prisons_uk_602e5519c5b67c32961b905e).

to the prison, they caused the vents to blow cool air.<sup>74</sup> Lack of adequate nutrition, exposure to dangerous living conditions, and the subsequent lack of heat created conditions which were in their very nature cruel and unusual.

Prison facilities are similarly ill-prepared to respond to flooding. When Hurricane Harvey hit Texas in 2017, five prisons had to evacuate incarcerated people due to the severe flooding caused by the storm.<sup>75</sup> A report by the National Lawyers Guild in Texas detailed the people in prison's first-hand accounts of what the conditions they suffered after Harvey.<sup>76</sup> These conditions included "power outages, insufficient access to food, water and medicine" as well as "cells flooded with knee high water contaminated by urine and feces" and "the inability to flush toilets, shower or change clothes for two weeks."<sup>77</sup> These same prisons were evacuated due to flooding in the Spring before Hurricane Harvey as well, with the evacuations being necessary to prevent the health and safety risks associated with people being forced to live in standing water left from the flooding.<sup>78</sup>

Reports from incarcerated persons who were evacuated during Hurricane Ida described unsanitary and unsafe conditions.<sup>79</sup> These conditions included the areas that they were evacuated to having animal feces covering the floors, only having two bathrooms for 150 people, and some being stuck in the same dirty clothes for 10 days without access to hygienic supplies.<sup>80</sup>

These examples display the threat that extreme weather and climate change cause to people in prison. As the number and severity of extreme weather events increase, the instances of injuries and inhumane living conditions will also rise.<sup>81</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> McCullough, *supra* note 11.

<sup>76</sup> John Washington, *After Harvey, Texas Inmates Were Left in Flooded Prisons Without Adequate Food or Water*, THE NATION (Oct. 13, 2017), <https://www.thenation.com/article/archive/after-harvey-texas-inmates-were-left-in-flooded-prisons-without-adequate-water-or-food/>.

<sup>77</sup> *Id.*

<sup>78</sup> McCullough, *supra* note 11.

<sup>79</sup> Alleen Brown, *Hurricane Ida Prison Evacuations in Louisiana Left People Without Medication in Bird-Infested Shelter*, THE INTERCEPT (Sept. 22, 2021), <https://theintercept.com/2021/09/22/hurricane-ida-louisiana-evacuation-prison/>.

<sup>80</sup> *See id.*

<sup>81</sup> *See What is Climate Change?*, *supra* note 16 (predicting that climate change will continue to worsen).

### III. ARGUMENT

#### A. Legal Framework

##### 1. *The Eighth Amendment and Cruel and Unusual Punishment*

The Eighth Amendment states: “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>82</sup> This amendment exists to protect incarcerated people from unduly harsh punishment, both monetary and physical, by the hands of the Government.<sup>83</sup> There is debate about what the language “cruel and unusual” means, and what standard is appropriate to apply. The standard in 1791 when this amendment was ratified, or the modern standard at the time of invoking the amendment’s protections? The Supreme Court has answered specific questions of what constitutes cruel and unusual punishment, but there is no current overarching definition.<sup>84</sup> Routinely cited in Eighth Amendment cases is the holding of *Trop v. Dulles*: “the (Eighth) Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”<sup>85</sup> and “(the) basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>86</sup>

The *Gregg* Court added further language to this standard referenced in *Trop* stating: “[A]n assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. . . [T]his assessment does not call for a subjective judgement. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.”<sup>87</sup> The Court’s holding in *Gregg* was that the imposition of the death penalty as punishment for murder does not constitute cruel and unusual punishment

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<sup>82</sup> U.S. CONST. amend. VIII.

<sup>83</sup> See Bryan Stevenson & John Stinneford, *Common Interpretation: The Eighth Amendment*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-viii/clauses/103> (last visited Jan. 23, 2022) (detailing the different arguments and interpretations for the definition of “cruel and unusual” punishment).

<sup>84</sup> *Id.*

<sup>85</sup> 356 U.S. 86, 101 (1958) (in this holding Justice Warren states “the words of the Eighth Amendment are not precise, and that their scope is not static.” This supports the idea of applying new meanings to cruel and unusual punishment that are influenced by the events transpiring in the surrounding world).

<sup>86</sup> *Id.* at 100.

<sup>87</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

in all circumstances.<sup>88</sup>

In *Estelle v. Gamble*, the court established that the Eighth Amendment can be violated by factors relating to an incarcerated person's confinement.<sup>89</sup> The Court further held that "deliberate indifference" from prison staff towards an incarcerated individual's illness or injury constitutes cruel and unusual punishment.<sup>90</sup>

In *Wilson v. Seiter*, the Court said that the constitution "does not mandate comfortable prisons" and that only the deprivation of "the minimal civilized measure of life's necessities" is sufficient to claim a violation of the Eighth Amendment.<sup>91</sup> The court also concluded that inflictions of pain that are "totally without penological justification" are included under the umbrella of punishments that are "unnecessary and wanton" and are thus in violation of the Eighth Amendment protections against cruel and unusual punishment.<sup>92</sup>

In *Hudson v. McMillian*, the Court considered whether an incarcerated person must have suffered "significant injury" from excessive force for that use of force to be deemed unconstitutional.<sup>93</sup> The Court held that the injury is only one of many factors looked at when determining if a prisoner's Eighth Amendment protections have been violated, and that the degree of injury does not need to be severe to prove cruel and unusual punishment.<sup>94</sup> This holding laid out a clearer definition of when the Eighth Amendment is violated, and expanded its protections to cover more examples of cruel and unusual punishment.<sup>95</sup>

In *Farmer v. Brennan*, the Court held that prison officials have a duty under the Eighth Amendment to provide humane conditions of confinement.<sup>96</sup> The exact language states, "[prison officials] must ensure that inmates receive adequate food, clothing, shelter, and medical care . . ."<sup>97</sup> With this holding, the Court made prison officials liable for violations of prisoners' Eighth Amendment rights.<sup>98</sup> In *Farmer*, the

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<sup>88</sup> *Id.* (supporting the need to update what constitutes cruel and unusual punishment as the world changes).

<sup>89</sup> 429 U.S. 97, 102-03 (1976).

<sup>90</sup> *Id.* at 104.

<sup>91</sup> 501 U.S. 294, 298 (1991).

<sup>92</sup> *Id.* at 102-03.

<sup>93</sup> 503 U.S. 1, 5 (1992).

<sup>94</sup> *Id.* at 4

<sup>95</sup> *See id.* at 5-7 (in their holding, the Court describes more, and different situations than previously explored that can constitute cruel and unusual punishment).

<sup>96</sup> 511 U.S. 825, 832 (1994).

<sup>97</sup> *Id.*

<sup>98</sup> *See id.*

defendant was a transgender woman, diagnosed as a “transsexual” by prison medical personnel.<sup>99</sup> In accordance with prison policy, Farmer was transferred into the general male population of a penitentiary, where they were subsequently subject to rape and assault.<sup>100</sup> Farmer brought a lawsuit against the prison, alleging that the prison officials deliberately and indifferently failed to protect a prisoner.<sup>101</sup> Farmer argued that this was a violation of their Eighth Amendment rights.<sup>102</sup> The Court held that prison officials may be held liable if they showed “deliberate indifference” to a substantial risk of serious harm when the official was subjectively aware of the risk to the prisoner.<sup>103</sup> The Court in *Farmer* stated that, “[under the test we adopt today] an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.”<sup>104</sup> This means that there is no objective test for deliberate indifference to risk, and rather a subjective test looking at circumstantial evidence is used to show that serious risk of substantial harm, and deliberate indifference to that risk existed. The decision in *Farmer* laid out the standard that prisons must meet to avoid violating prisoners’ Eighth Amendment rights.<sup>105</sup> This standard restated the requirement that prisons must maintain humane living conditions for inmates, including adequate access to food, shelter, medical care, and safety.<sup>106</sup>

In *Hope v. Pelzer*, the Court addressed mistreatment of prisoners by guards, further defining their own standard that some punishment went beyond the allowed amount of “restor[ing] order.”<sup>107</sup> *Hope* involved prison guards tying prisoners to a hitching post outside in the sun for 7 hours, without access to a restroom and with little access to water.<sup>108</sup>

In *Brown v. Plata*, prison overcrowding was deemed unconstitutional due to the living conditions which resulted in medical care violations.<sup>109</sup> The living conditions created the possibility that people

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<sup>99</sup> See generally *id.* (petitioner’s status as transsexual mentioned throughout case).

<sup>100</sup> *Id.* at 830.

<sup>101</sup> See *id.*

<sup>102</sup> *Id.* at 830.

<sup>103</sup> See *id.* at 831 (the Court mentions the standard of “deliberate indifference” throughout the holding).

<sup>104</sup> See *id.* at 842.

<sup>105</sup> See generally *id.*

<sup>106</sup> *Id.* at 832.

<sup>107</sup> 536 U.S. 730, 736 (2002).

<sup>108</sup> *Id.* at 734-35.

<sup>109</sup> 563 U.S. 493, 502 (2011).

in prison could die if they weren't able to receive adequate medical care due to overcrowding of the facilities.<sup>110</sup>

The above cases provide the history of how the Court has interpreted and applied Eighth Amendment protections.<sup>111</sup> The facts and holdings from the above-mentioned cases gives framework for what the effects of extreme weather on people in prison can be compared to.<sup>112</sup>

## 2. The PLRA and the Barriers it Creates

While there is evidence of past support for incarcerated people being able to sue prisons to enforce their rights, the Supreme Court's decision in *Wilson v. Seiter*, shortly before the implementation of the PLRA, created stricter barriers for inmates to be able to bring Eighth Amendment claims against prisons and established the standard that the PLRA closely followed.<sup>113</sup> In *Wilson*, the Court held that someone in prison claiming that their confinement violated the Eighth Amendment must show a culpable state of mind of the prison officials.<sup>114</sup> This standard creates a hurdle that is virtually impossible for plaintiffs to clear, as they must speak to the state of mind of prison officials at the time of the alleged injury, and they must show that the officials acted with "deliberate indifference" to the inmates' welfare.<sup>115</sup> The PLRA was implemented after this case but contains requirements that create similar hurdles to those of *Wilson*.<sup>116</sup>

The Prison Litigation Reform Act (PLRA) was passed in 1996, and it created new and arduous barriers for people in prison to bring lawsuits against prisons in federal court.<sup>117</sup> The public rarely hears about examples of poor prison conditions in part because of the hurdles imposed by the Prison Litigation Reform Act (PLRA).<sup>118</sup>

The PLRA is inflexible in its administration, as it prevents many incarcerated people from enforcing their Eighth Amendment protections

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<sup>110</sup> *See id.*

<sup>111</sup> *See supra* Part II.

<sup>112</sup> *Id.*

<sup>113</sup> *See generally* Yves Hall, *supra* note 33.

<sup>114</sup> 501 U.S. 294, 305-06 (1991).

<sup>115</sup> *See generally* Estelle v. Gamble, 429 U.S. 97 (1976); Yves Hall, *supra* note 33.

<sup>116</sup> *See generally id.*

<sup>117</sup> *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 132-66 (codified as amended at 42 U.S.C. § 1997e and scattered titles and sections of the U.S.C.).

<sup>118</sup> Fenster & Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), [https://www.prisonpolicy.org/reports/PLRA\\_25.html](https://www.prisonpolicy.org/reports/PLRA_25.html).

from cruel and unusual punishment.<sup>119</sup> These barriers included monetary conditions which require people in prison to contribute to the costs of civil litigation, including court fees, lawyer fees and filing fees.<sup>120</sup> An exception exists for people in prison that cannot pay, as the PLRA provides that, “in no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgement for the reason that the prisoner is unable to pay the initial partial filing fee.”<sup>121</sup> Nonetheless, the PLRA also notes that if a person in prison’s “allegation of poverty is untrue” or the court finds the action to be “frivolous or malicious,” the court shall dismiss the case.<sup>122</sup> The judge decides whether the suit was frivolous or malicious, and, if so, decides the penalties the prisoner would incur, which can deter nonfrivolous cases from even being filed.<sup>123</sup> Additionally, the PLRA caps the possible attorney fees winnable for a plaintiff to below the market value, but allows defendants to recover full attorney fees at any value from a plaintiff in these cases.<sup>124</sup> The PLRA creates an actual and metaphorical price tag for prisoners that try to exercise their constitutional rights, alienating and further punishing a group of people that are already facing punishment.

There may be additional penalties if a court finds a person’s claims to be frivolous, malicious, or purely meant to harass, that go beyond monetary punishment. The court may order revocation of the person’s earned good time credit.<sup>125</sup> This means that a court may strip a person in prison’s earned time towards early release based on the court’s opinion of the validity of the claim brought. This creates a possible punishment for incarcerated people exercising their constitutionally protected rights, based on a judge’s opinion of the merit of their claims. If a person in prison misses a submission date or files improperly, they may lose their right to sue forever.<sup>126</sup>

The hurdles created by the PLRA for people in prison do not end there. The portion of the PLRA codified at 42 U.S.C. § 1997e requires that people in prison exhaust all administrative remedies available to them

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<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

<sup>121</sup> Prison Litigation Reform Act of 1995 § 804 (amending 28 U.S.C. § 1915).

<sup>122</sup> *Id.*

<sup>123</sup> *See id.*

<sup>124</sup> *See id.* (highlighting the monetary fines suffered by inmates if they lose the case).

<sup>125</sup> *Id.* (amending 28 U.S.C. § 123).

<sup>126</sup> *See id.* (describing the grievance systems in prisons, the exhaustion requirement and how hard it is to satisfy).



before bringing a lawsuit in federal court.<sup>127</sup> This language means that people in prison facing possible violations of their Eighth Amendment rights must face the very people who are violating their rights, and request that administrative procedures be employed to stop these violations.<sup>128</sup> The inflexibility of the PLRA is exacerbated by the lack of a uniform system across prisons to file grievances about prison conditions, which makes it less likely that incarcerated individuals would be aware about the grievance procedure needed to satisfy the PLRA's exhaustion requirement. This creates an almost insurmountable hurdle for people in prison as they must file at every level of the prison's grievance system and comply with all the technical requirements imposed. As a result, many incarcerated people suffer from violations of their Eighth Amendment rights, without any means of legal recourse.

The language of the PLRA states that a person in prison may not seek to recover damages for "mental or emotional injury suffered while in custody" without a "prior showing of physical injury."<sup>129</sup> This requirement has left courts with discretion to determine when an injury is physical, threatening the availability of relief for inmates.

In *McCarthy v. Madigan*, Justice Blackmun wrote, "Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most 'fundamental political right, because preservative of all rights.'"<sup>130</sup> In *Johnson v. Avery*, Justice Fortas said, "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."<sup>131</sup> Clearly this standard has been affected by the PLRA.

During a Senate debate on the implementation of the PLRA, Senator Robert Dole stated, "This amendment will help put an end to the inmate litigation fun-and-games."<sup>132</sup> Dole's comment encapsulates the thought process behind limiting incarcerated people's rights in the United States and reveals an inherent flaw in the PLRA's implementation: the statute is based on the assumption that the majority of lawsuits brought by people in prison are simply "litigation fun-and-games," rather than legitimate challenges to constitutional rights violations.<sup>133</sup>

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<sup>127</sup> 42 U.S.C. § 1997e.

<sup>128</sup> *No Equal Justice*, *supra* note 12, § V. The Exhaustion Requirement.

<sup>129</sup> 42 U.S.C. § 1997e(e).

<sup>130</sup> 503 U.S. 140, 153 (1992) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

<sup>131</sup> 393 U.S. 483, 485 (1969).

<sup>132</sup> *No Equal Justice*, *supra* note 12, § I. Summary.

<sup>133</sup> *Id.*

## B. Failure to Mitigate the Effects of Extreme Weather is a Violation of the Eighth Amendment

### 1. How Climate Change Could be Covered by the Court's Language on the Eighth Amendment

Using the Court's definition of the Eighth Amendment, the "evolving standards of decency"<sup>134</sup>, and "public attitude"<sup>135</sup>, climate change's effects on the conditions of incarceration can be seen as a violation of the Eighth Amendment rights provided to people in prison. If the modern standard dictates that the effects of extreme weather have created conditions that are a form of cruel and unusual punishment, then the prisons who offered little to no mitigation against the effects of extreme weather are liable for the injuries suffered.

While prisons are not directly responsible for the climate change that causes extreme weather and natural disasters, they are responsible for the lack of mitigation and poor evacuation plans that cause injury to people in prison.<sup>136</sup> Prisons are unprepared for such extremes for several reasons: inadequate emergency response training for staff, lack of resources available for proper emergency response, and lack of communication with government agencies for emergency response plans.<sup>137</sup> These injuries amount to cruel and unusual punishment as the exposure to extreme weather, poor resources, and poor evacuation plans lead to unsanitary and dangerous conditions that have been established as unconstitutional.<sup>138</sup>

The Court in *Gregg* held that current opinions and conditions should be looked at when applying the Eighth Amendment, it follows that when addressing a current and ever advancing event like climate change that the Court should reevaluate what are cruel and unusual conditions.<sup>139</sup> A report from the Pew Research Center shows where public opinion and perception stands, as 67% of Americans perceive a rise in extreme weather.<sup>140</sup> The Court's language in the *Gregg* holding makes clear that

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<sup>134</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>135</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

<sup>136</sup> See generally Melissa A. Savilonis, Prisons and Disasters (Dec. 2013) (DLP thesis, Northeastern University),

<https://repository.library.northeastern.edu/files/neu:1039/fulltext.pdf> (detailing the shortcomings of prison administration and infrastructure that leads to inmates' injuries).

<sup>137</sup> See generally *id.* (describing the elements that have led to these issues within prisons).

<sup>138</sup> Chammah, *supra* note 43.

<sup>139</sup> *Gregg*, 428 U.S. at 173.

<sup>140</sup> Cary Funk & Alec Tyson, *67% of Americans Perceive a Rise in Extreme Weather, but Partisans Differ Over Government Efforts to Address it*, PEW RSCH. CTR. (Oct. 14, 2021),

“public attitude” is an important part of what constitutes cruel and unusual punishment.<sup>141</sup>

The Court’s language in *Estelle* can be applied to show a violation of Eighth Amendment rights in cases of people in prison being subject to abhorrent conditions due to extreme weather events.<sup>142</sup> It has been established that the public is aware that extreme weather is on the rise, and that the effects of extreme weather will continue to get worse. It follows that the people in charge of prisons and keeping people incarcerated would be aware as well. Knowing this, the “deliberate indifference” shown towards people in prison to not have proper mitigation factors in place to prevent suffering from the conditions caused by climate change is a form of cruel and unusual punishment.

In *Wilson*, the Court said that the deprivation of “the minimal civilized measure of life’s necessities” constitutes a violation of the Eighth Amendment.<sup>143</sup> As extreme weather becomes more common, the need for climate mitigation strategies becomes a “minimal civilized measure of life’s necessities”. The updated definition should include protections from living conditions that present a possibility of injury, especially when those conditions are ones that could be mitigated by prisons. As people in prison have no other choice but to endure whatever conditions the prisons force them to live in, it is paramount that the bare minimum standard of living reflects the reality of the outside world.

From *Hudson*, the severity of one’s injury does not affect whether a violation of the Eighth Amendment has occurred.<sup>144</sup> People suffering from heat-related illness in prisons in the summer or those that are freezing in the winter may have their Eighth Amendment rights violated despite their injuries not being severe. It does not take dying from the conditions present to show cruel and unusual punishment.

Applying the Court’s holding from *Farmer* to cases involving injury from extreme weather events and climate change is the logical progression to ensure prisoners’ Eighth Amendment rights are protected.<sup>145</sup> While the facts in *Farmer* differ from cases of injury stemming from extreme weather, the Court’s holding is still applicable.<sup>146</sup>

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<https://www.pewresearch.org/fact-tank/2021/10/14/67-of-americans-perceive-a-rise-in-extreme-weather-but-partisans-differ-over-government-efforts-to-address-it/>.

<sup>141</sup> *Gregg*, 428 U.S. at 173.

<sup>142</sup> See generally *Estelle v. Gamble*, 429 U.S. 97 (1976).

<sup>143</sup> *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

<sup>144</sup> *Hudson v. McMillian*, 503 U.S. 1, 4-5 (1992).

<sup>145</sup> See *Farmer v. Brennan*, 511 U.S. 825 (1994).

<sup>146</sup> See *id.*

In cases where extreme weather causes people in prison to suffer, the same factors should be considered to determine if their Eighth Amendment protections from cruel and unusual punishment have been violated. If an extreme heat wave causes people in prison to suffer, it should be determined if prison officials should have been subjectively aware of the risk posed to incarcerated people. If so, then it should be determined if the prison officials showed deliberate indifference to the substantial risk of serious harm. If both of those elements are met, then the prison officials should be liable for the injury as the prisoners' Eighth Amendment protections were violated.

In *Hope*, the Court reasoned that the use of the hitching post was generally cruel and unusual.<sup>147</sup> One example of the Court using 20<sup>th</sup> century standards that most likely would not have applied when the Eighth Amendment was created. It reasons that other 20<sup>th</sup> century standards like climate mitigation strategies would be required as part of the humane conditions demanded by the constitution.

In *Brown*, overcrowding conditions were deemed a violation of the Eighth Amendment due to the unsafe conditions that overcrowding creates.<sup>148</sup> The effects of climate change create similarly unsafe conditions which have been shown to violate the Eighth Amendment. Applying the original holding to cases where prisons have poorly handled evacuations during natural disasters like hurricanes or wildfires, creating unsafe and unsanitary conditions through overcrowding, shows a clear violation of prisoners' Eighth Amendment rights.

## 2. *How the PLRA Stifles Challenges to Eighth Amendment Violations Related to Climate Change*

The adverse effects of climate change in prisons are well documented, but the enforcement of protections for people in prison is not. When speaking about prisoners dying from the excessive heat in Texas prisons, Lance Lowry, the head of the State Correctional Officer Union, said "the incarceration is [the person's] punishment, not cooking them to death."<sup>149</sup> While this is a shared belief among many incarcerated rights advocates and prison officials alike, the PLRA's hurdles prevent the proper avenue of legal enforcement and accountability for people in prison's climate change related injuries.<sup>150</sup>

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<sup>147</sup> *Hope v. Pelzer*, 536 U.S. 730, 745 (2002).

<sup>148</sup> *Brown v. Plata*, 563 U.S. 493, 502 (2011).

<sup>149</sup> See Chammah, *supra* note 43.

<sup>150</sup> See *generally id.* (detailing opinions of many advocates for change within prisons and cites prison officials and their shared beliefs of inmates not facing cruel and unusual

People in prison who suffer from the effects of climate change have been negatively treated due to the physical injury requirement of the PLRA.<sup>151</sup> While exposure to excessive heat and other unsafe conditions can create injuries, it must meet a particular threshold of tangible harm.<sup>152</sup> The physical injuries caused by these weather events are often severe and deadly, as such it is difficult to meet the physical injury requirement of the PLRA before serious harm is done. The PLRA's requirement of an existence of a "physical injury" requires people in prison to suffer the effects of extreme weather and natural disasters, to survive them with tangible injury, and then bring a lawsuit for their Eighth Amendment protections. Arguments that exposure to situations caused by climate change and natural disaster constitute cruel and unusual punishments are hard to make when they cannot be heard in court due to the PLRA's requirements. Since physical injuries heal over time, the physical injury requirement blocks prisoners who have suffered injuries from extreme weather events and conditions but recovered from them before their cases get to court. By repealing the PLRA, more people in prison will be able to bring suit to protect their rights.

In *Ball v. LeBlanc*, a Louisiana district court found that holding people on death row in excessive heat without mitigating factors violated their Eighth Amendment rights.<sup>153</sup> The court then instructed prisons to maintain a heat index below 88 degrees for death row inmates between the dates of April 1st and October 31st every year.<sup>154</sup> The Fifth Circuit addressed this ruling on appeal and overturned the district court's injunctive relief.<sup>155</sup> They confirmed that the conditions violated their Eighth Amendment rights, but referenced the PLRA's language that the remedy for the alleged violations must be "narrowly drawn to be the least intrusive means necessary."<sup>156</sup> By applying this language, the Fifth Circuit held that the district court's injunctive relief was not narrow enough and

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punishment).

<sup>151</sup> See Daniel W. E. Holt, *Heat in U.S. Prisons and Jails: Corrections and the Challenge of Climate Change*, COLUMBIA L. SCH. SABIN CTR. FOR CLIMATE CHANGE L. 1, 46 (Aug. 2015),

[https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1123&context=sabin\\_climate\\_change](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1123&context=sabin_climate_change).

<sup>152</sup> See *id.* at 33 (differentiating between tangible and physical harm and addressing considerations for the determination of such).

<sup>153</sup> *Ball v. LeBlanc*, 988 F. Supp. 2d 639, 690-91 (M.D. La. 2013).

<sup>154</sup> *Id.* at 689.

<sup>155</sup> *Ball v. LeBlanc*, 792 F.3d 584, 598-600 (5th Cir. 2015).

<sup>156</sup> *Id.* at 598.

violated the PLRA.<sup>157</sup> The Fifth Circuit's holding stated that, on remand, the district court could make a more narrowly tailored injunction that did not apply to the entire facility. This provision of the PLRA would still be a roadblock for many other prisoners to bring lawsuits.<sup>158</sup> This requirement stems from 18 U.S.C. § 3626(a)(1)(a), which describes the remedies that are appropriate for suits regarding prison conditions.<sup>159</sup> This statute limits the remedies available for people in prison who sue for the living conditions in prison to remedies that will only fix their injury.<sup>160</sup>

This means that people in prison are not able to bring lawsuits for damages extending beyond repair of their injury. This narrows the possible recourse for people in prison who have suffered from conditions created by climate change, families who have lost loved ones due to the conditions of their incarceration and limits prisons' liability for the living conditions they provide. In effect, this makes courts unable to grant people in prison adequate injunctive relief. If the relief extends beyond a remedy for that individual's injury, then it is not likely to be considered narrowly drawn and could be overturned by subsequent court action.

*Ball* is the most applicable and clear-cut example of how the PLRA prevents the enforcement of Eighth Amendment protections when it comes to extreme weather injuries.<sup>161</sup> A court can find that the conditions suffered by prisoners violate their protections from cruel and unusual punishment, but that the PLRA prevents the enforcement of relief from these conditions.<sup>162</sup> If only the specific injuries suffered by prisoners may be remedied by the court, then the causes of the injuries will not be addressed. This will lead to more inmates suffering similar injuries as they have no recourse for protection until they are injured. In its current state, the PLRA is nothing more than a shield for prisons who violate prisoners' constitutional rights.

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<sup>157</sup> *Id.* at 600.

<sup>158</sup> *See id.* (the requirement that the remedy must be "narrowly drawn" creates more issues, as a remedy for an inmate suffering the effects of climate change would usually not meet this requirement).

<sup>159</sup> Appropriate Remedies with Respect to Prison Conditions, 18 U.S.C. § 3626(a)(1)(a).

<sup>160</sup> *See id.*

<sup>161</sup> *See* 792 F.3d (2015).

<sup>162</sup> Holt, *supra* note 151, at 46.

## C. Solutions

### 1. Climate Adaptation and Weatherization

The first and most important step to protecting the incarcerated from the effects of extreme weather and natural disaster is climate adaptation by the prisons that house them. With over half the states in the United States not having a climate change adaptation strategy in place, this step is vital for more than just prisons.<sup>163</sup> In his 2015 report “Heat in U.S. Prisons and Jails,” Daniel Holt states, “the first step in preparing for the impacts of climate change is committing to a policy of adaptation and assigning administrative responsibility for research, decision making implementation, and collaboration.”<sup>164</sup> This adaptation is needed to protect people in prison from the effects of extreme weather, as it will help maintain the facilities at appropriate living conditions. With the implementation of adaptation policies, prisons will be able to protect people in prison from suffering injuries from climate change and extreme weather, while protecting incarcerated individuals’ Eighth Amendment rights.

Weatherization is an example of a climate change adaptation strategy. Weatherization is a catch-all term for the use of more efficient designs and better building materials to create buildings that can withstand extreme weather and natural disasters.<sup>165</sup> This strategy is so urgently needed throughout the United States that there are government assistance programs through which people who meet certain criteria may apply for assistance in weatherizing their homes.<sup>166</sup> President Biden has even included climate change adaptation measures, including weatherization, in his infrastructure plan.<sup>167</sup> If weatherization is imperative for an average citizen, it must be crucial for people in prison who have no control over the living conditions provided by prisons.

Further examples of climate adaptation include the use of new construction methods and designs for natural temperature control within

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<sup>163</sup> See *State Adaption Progress Tracker*, GEO. CLIMATE CTR, <https://www.georgetownclimate.org/adaptation/plans.html> (last visited Mar. 5, 2022).

<sup>164</sup> See Holt, *supra* note 151, at 66.

<sup>165</sup> See *Weatherize*, *supra* note 7.

<sup>166</sup> See *Weatherization Assistance Program for Low-Income Persons*, BENEFITS.GOV, <https://www.benefits.gov/benefit/580> (last visited Mar. 5, 2022) (showing that there is an extreme need for weatherization and adaptation across the United States).

<sup>167</sup> Joseph W. Kane & Tara Pelton, *Weatherizing Homes Could Be One of the Most Vital Legacies of Biden’s Infrastructure Plan*, BROOKINGS (Apr. 22, 2021), <https://www.brookings.edu/blog/the-avenue/2021/04/22/weatherizing-homes-could-be-one-of-the-most-vital-legacies-of-bidens-infrastructure-plan/>.

prisons to mitigate the effects of extreme weather. For instance in New York, four buildings of a prison near Syracuse had their roofs replaced with new materials, varying the amount and color between the buildings, to test the mitigation effects of different construction methods and designs.<sup>168</sup> The results showed a lower roof temperature in the summer months when using a white membrane, causing the inside of the prison to stay cooler.<sup>169</sup> The test also showed that properly insulated roofs would prevent heat loss in the winter, regardless of the membrane color, allowing it to be cheaper and require less energy overall to heat the prison.<sup>170</sup> These results prove that proper insulation and newer materials can be used in roofing to ensure prison facilities maintain a more consistent temperate environment even with extreme temperatures outside.

## 2. How to Get Prisons to Implement Climate Adaptations

While the results of climate adaptation are promising, the next hurdle is addressing how to get prisons to undertake this adaptation. The best way to ensure that prisons comply with adaptations is by making it a requirement attached to their receipt of federal funds. The Justice Department distributes over 5 billion dollars annually through grants to state and local governments.<sup>171</sup> Money from the Homeland Security Department goes towards military-grade weapons to state police agencies, and the Department of Agriculture provides over 360 million dollars to rural communities to build jails.<sup>172</sup>

Attaching a requirement for the modernization of prisons and adoption of climate adaptation to the receipt of federal funds is the most efficient way to ensure that climate adaptation goals are met. This idea derives from *South Dakota v. Dole*, where the Supreme Court held that Congress was allowed to act indirectly by withholding highway funds to states that would not raise their drinking age to 21.<sup>173</sup> The Court held that this was allowed because raising the age to 21 was for the general welfare

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<sup>168</sup> James R. Kirby, *Green, Greener, Greenest?*, ROOFING CONTRACTOR (June 4, 2013), <https://www.roofingcontractor.com/articles/89570-green-greener-greenest>.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Lauren-Brooke Eisen, *The Federal Funding that Fuels Mass Incarceration*, BRENNAN CTR. FOR JUST. (June 7, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/federal-funding-fuels-mass-incarceration>.

<sup>172</sup> *Id.*

<sup>173</sup> *See* 483 U.S. 203, 211-12 (1987).



and the means to do so were not unduly coercive.<sup>174</sup> Using the Court's reasoning here, it can be argued that the implementation of climate adaptation is beneficial for the general welfare, and the means that aim to achieve it are "not unduly coercive" as the Federal funding to prisons comes in addition to State funding.

This means that a condition attached to the receipt of Federal funds for prisons is not in violation of the Supreme Court's holding in *National Federation of Independent Business v. Sebelius*, as it does not threaten the withdrawal of the entirety of the funding, just the additional funding that prisons receive from the Federal government.<sup>175</sup> A similar idea was put forward in an article from the Brennan Center for Justice, which suggested that new federal funding for prisons come with conditions of detailing their plans to reduce mass incarceration.<sup>176</sup> An example of this sort of condition is the Violent Crime Control and Law Enforcement Act of 1994.<sup>177</sup>

In 1994, Congress passed the "Violent Crime Control and Law Enforcement Act," which authorized incentive grants for the construction and expansion of new and old prisons.<sup>178</sup> The effect of this Act was the distribution of over 12.5 billion dollars to prisons, with nearly half of the funds delegated specifically for states that adopted sentencing laws requiring inmates to serve substantial portions of their sentences.<sup>179</sup> Here, a federal bill can use this same strategy to incentivize prisons to undertake climate adaptation procedures to protect incarcerated individuals. The funding could be limited only to the prisons that adapt their facilities to withstand the effects of extreme weather. This would give the prisons an incentive to comply and, in turn, protect inmates living within them.

There are two options for the implementation of these

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<sup>174</sup> *Id.* (This ruling is important because it showed that conditional funding does not violate states constitutional rights if the state has the realistic option to say no; this applies as funding and control of state prisons is a state right, and federal funding is given as extra, rather than exclusive funding.).

<sup>175</sup> See generally 567 U.S. 519 (2012) (holding that a complete withdrawal of federal funds as a penalty for noncompliance with a condition attached to them is unconstitutionally coercive).

<sup>176</sup> Lauren-Brooke Eisen & Hernandez D. Stroud, *How the Federal Government Can Incentivize States to Reverse Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 14, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-federal-government-can-incentivize-states-reverse-mass-incarceration>.

<sup>177</sup> See generally Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (as amended through P.L. 117-315).

<sup>178</sup> *Id.* tit. II, § 20101.

<sup>179</sup> Eisen & Stroud, *supra* note 176.

requirements. First, the federal government could take the *Dole* route and attach the requirement to the funds already delegated for prisons.<sup>180</sup> This would likely raise constitutional arguments from states arguing that the separation of powers is abridged by the constraint applied to the funds and that the new requirements would be “unduly coercive.”

The second option, which is more appealing since it could avoid the constitutional challenge, is the creation of new funding bills that attach climate adaptation requirements to the ability to get federal grants for prisons. Congress has used this strategy many times before, as it is laid out as a power delegated to them by the Spending Clause of the Constitution.<sup>181</sup> The difficulty here is creating a new avenue of funding specifically for prisons in the United States, as it would require the Senate and House to agree on a bill for the protection of people in prison.

### 3. Add Prisons to Infrastructure Bills

To date, one of President Biden’s largest allocations of federal dollars has been the Bipartisan Infrastructure Law, which was signed into law in November 2021.<sup>182</sup> This bill was a roughly \$1 trillion investment into the United States’ transportation system, electric grid, and water quality/conservation efforts.<sup>183</sup> Infrastructure bills are common at the federal and state levels and are used to fund the construction and maintenance of everyday utilities that keep the country running.<sup>184</sup> In his infrastructure bill, President Biden allocated funds specifically addressing climate change but did not make any direct mention of prisons.<sup>185</sup> Infrastructure and climate change go hand in hand, and prisons fall directly in the middle. Outdated prison infrastructure is unequipped to handle the effects of climate change, such as natural disasters and extreme weather, which put incarcerated people and correctional staff at risk of

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<sup>180</sup> See generally *South Dakota v. Dole*, 483 U.S. 203 (1987).

<sup>181</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>182</sup> Brian Naylor & Deirdre Walsh, *Biden Signs the \$1 Trillion Bipartisan Infrastructure Bill into Law*, NPR (Nov. 15, 2021), <https://www.npr.org/2021/11/15/1055841358/biden-signs-1t-bipartisan-infrastructure-bill-into-law>.

<sup>183</sup> *President Biden’s Bipartisan Infrastructure Law*, THE WHITE HOUSE, <https://www.whitehouse.gov/bipartisan-infrastructure-law/> (last visited Jan. 2022).

<sup>184</sup> Naylor & Walsh *supra* note 182.

<sup>185</sup> Chandra Bozelko, *Infrastructure Plan Should Include Prisons and Jails*, THE SAULT NEWS (Apr. 12, 2021), <https://www.soeveningnews.com/story/opinion/columns/2021/04/12/bozelko-column-infrastructure-plan-should-include-prisons-and-jails/7188077002/>.

injury.<sup>186</sup> Adding prisons under the climate change portion of future infrastructure bills would allow prisons to make the changes necessary to mitigate the effects of extreme weather and climate change, such as investing in air conditioning for summer months, better insulation for winter months, and proper irrigation/better constructed buildings to avoid the effects of heavy rain and snow.

Another way to use infrastructure bills to protect Eighth Amendment rights would be to incorporate conditional funding for correctional facilities.<sup>187</sup> This would effectively give states the money needed to update their prison facilities and make them safer. Additional funding for advancements in prisons, such as constructing better temperate environments within facilities, would prevent inmates from suffering the effects of climate change.<sup>188</sup> The addition of prisons to infrastructure bills will allow facilities to modernize, protecting incarcerated people from extreme weather and thus preserving their Eighth Amendment rights.

This would not be the first time that prisons have been added to infrastructure bills. In October 2021, Alabama Governor Kay Ivey signed state prison infrastructure bills into effect.<sup>189</sup> The bills included funding for the renovation of existing prisons, construction of new prisons, and the closure of six state facilities.<sup>190</sup> California has also worked towards addressing its prison infrastructure. California's Legislative Analyst's Office (LAO) compiled a report detailing how money is spent in the state's 34 correctional facilities and where it could be spent to correct prison infrastructure issues.<sup>191</sup> Reports like that of the LAO could be done at a national level to identify where resources are most needed to improve prison infrastructure, which could result in repairs that protect incarcerated individuals from extreme weather effects.

While increased funding to improve the quality of prisons is

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<sup>186</sup> *See id.* (protecting prison facility may be a more appealing argument as many people may not care about the living conditions of inmates specifically).

<sup>187</sup> Dr. Marayca López, *How to Build for Success: Prison Design and Infrastructure as a Tool for Rehabilitation*, PENAL REFORM INT'L (July 24, 2014), <https://www.penalreform.org/blog/build-success-prison-design-infrastructure-tool-rehabilitation/>.

<sup>188</sup> *See generally id.*

<sup>189</sup> Erin Davis, *Ivey Signs \$1.3 Billion of Prison Infrastructure Bills into Law*, WSFA12 NEWS (Oct. 1, 2021), <https://www.wsfa.com/2021/10/01/alabama-senate-passes-prison-infrastructure-package-adds-amendment/>.

<sup>190</sup> *Id.*

<sup>191</sup> *The 2020-21 Budget: Effectively Managing State Prison Infrastructure*, CAL. LEGIS. ANALYST'S OFF. (Feb. 28, 2020), <https://lao.ca.gov/Publications/Report/4186>.

important in addressing the protection of incarcerated people's Eighth Amendment rights, this money must come with conditions. Conditions prevent facilities from using federal dollars to increase prison populations or build additional facilities without the closure of others. Funding for infrastructure plans should be expressly limited to the modernization, maintenance, and repair of existing facilities.

#### 4. Create or Expand Federal Policy Mandating Prison Living Standards

The next step in preventing the violation of incarcerated people's Eighth Amendment rights is expanding federal mandates to set standards for prison living conditions.<sup>192</sup> Currently, the power to regulate prison conditions is split between the Federal Bureau of Prisons, state prisons, and private prisons.<sup>193</sup> This split of power has created different standards of living for incarcerated people held in different prisons.<sup>194</sup> This division also creates issues in tracking and observing prison conditions, allowing many issues to go unseen and unreported.<sup>195</sup> These issues apply to jails and prisons alike, meaning that it is not only incarcerated people in prison who suffer these violations, but also any person held in jail.<sup>196</sup>

There are approximately 2 million people held in prisons in the United States, with an average of 600,000 people added every year.<sup>197</sup> There are also over 500,000 people in jails who have not yet been convicted of a crime.<sup>198</sup> Because of the fragmentation of power between state, federal, and private prisons, there is little continuity in the oversight and regulation of prisons.<sup>199</sup> When incarcerated people are able to report the conditions that they are subjected to, complaints usually go nowhere—either held up in the prison administrative system or barred from court until all other options are exhausted as required by the PLRA.<sup>200</sup> Federal guidelines for conditions would alleviate many of these

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<sup>192</sup> See Holt, *supra* note 151, at 62-63.

<sup>193</sup> Mackenzie Buday & Ashley Nellis, *Private Prisons in the United States*, THE SENTENCING PROJECT (Aug. 2022), <https://www.sentencingproject.org/publications/private-prisons-united-states/>.

<sup>194</sup> See generally *id.* (detailing how prisons across the country are run different, and the lack of uniform oversight between them).

<sup>195</sup> Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html>.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

issues.

A federal statute creating guidelines ensuring the protection of incarcerated people's Eighth Amendment rights would not only largely prevent the injuries they currently face, but also provide recourse when injuries arise. In 2011, the American Bar Association (ABA) House of Delegates approved a new set of suggested standards for the treatment of incarcerated people.<sup>201</sup> These standards should be adopted in a new federal statute that regulates the entire carceral system in the United States.

The ABA's approved standards include definitions for the quality of living conditions that should be afforded to incarcerated people—detailing how living conditions should be adequate to protect their health and safety and that of staff; including appropriate heating/cooling and ventilation systems, and providing for adequate access to hygienic supplies and clean water.<sup>202</sup> The ABA goes a step further and suggests that prisons should be monitored and regularly inspected by independent government agencies to ensure that these standards are met.<sup>203</sup> The adoption of these standards would help prevent incarcerated people suffering climate change-related Eighth Amendment violations.

The adoption of the ABA's suggested standards would give incarcerated people seeking to protect their Eighth Amendment rights greater access to courts. For instance, Part IX: Grievances and Access to Courts of the ABA's standards states that "Prisoners should be entitled to present any judicially cognizable issue, including: (i) Challenges to the legality of their conviction, confinement, extradition, deportation, or removal."<sup>204</sup> Additional language states that if an incarcerated person were to attempt to bring suit without first completing the entirety of the grievance process, their suit should be given a 90-day stay and the opportunity to use the grievance system.<sup>205</sup> This suggestion is in stark contrast to the current PLRA rule banning claims if the incarcerated person has not used all grievance systems available.<sup>206</sup> The language used

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<sup>201</sup> *Treatment of Prisoners*, A.B.A. (June 2011), [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_treatmentprisoners/#23-1.1](https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners/#23-1.1).

<sup>202</sup> *See id.* (The agreement between delegates of the ABA is important as it shows the need for change is acknowledged by attorneys who have first-hand experience and knowledge of the prisons conditions.).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *See* 42 U.S.C. § 1997e(a).

in the ABA suggestions show an attempt to appease the PLRA requirements by giving people in prison a chance to use the grievance system to its full extent, but as it has been established, the grievance systems are convoluted and have no standards between different prison. This emphasizes the need for repealing the PLRA.

In 2019, the Vera Institute of Justice, reported that 153 jails operating in the United States were constructed before 1945—34 of which were built before the 20th century.<sup>207</sup> The age of prisons, along with overcrowding and lack of resources, create many risks and issues that threaten the Eighth Amendment rights of people in correctional facilities.<sup>208</sup> These risks are exacerbated by the effects of climate change and extreme weather. Prisons are not prepared to deal with the fall-out that comes along with extreme weather events as shown by the poor evacuation efforts during recent hurricanes and wildfires that left people in unconstitutional conditions.<sup>209</sup> For these reasons, including prisons in infrastructure spending is an essential step in protecting incarcerated people's Eighth Amendment rights from being violated because of climate change.

#### *5. Repealing the Prison Litigation Reform Act*

A crucial step to enforcing people's Eighth Amendment protections against cruel and unusual punishment in cases affected by climate change is repealing the PLRA. Lawmakers who supported the PLRA alleged that there were too many people behind bars filing frivolous lawsuits, and that this new statute would prevent them from doing so.<sup>210</sup> While the accuracy of the alleged number of frivolous claims made by people in prison is up for debate, the effect of the PLRA is not. When the PLRA was passed, there were approximately 24 civil rights cases filed per 1,000 people in prison.<sup>211</sup> Over the twenty-five years of existence of the PLRA, prison populations have increased by over 1 million, but the rate of civil right lawsuits per 1,000 people in prison has

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<sup>207</sup> Chris Mai et al., *Broken Ground: Why America Keeps Building More Jails and What It Can Do Instead*, VERA INST. OF JUST. (Nov. 2019), <https://www.vera.org/downloads/publications/broken-ground-jail-construction.pdf>.

<sup>208</sup> *See id.*

<sup>209</sup> *See generally id.*

<sup>210</sup> Fenster & Schlanger, *supra* note 118.

<sup>211</sup> Margo Schlanger et al., *Table A: Incarcerated Population and Prison/Jail Civil Rights/Conditions Filings, FY 1970 – FY 2021*, INCARCERATION AND THE LAW (Apr. 2022), <https://incarcerationlaw.com/resources/data-update/#TableA> (showing the number of incarcerated individuals compared to the number of civil rights lawsuits brought per year by these individuals).

dropped to 12.1 as of 2018, with the number going below 10 civil rights lawsuits per 1,000 people in prison during multiple years.<sup>212</sup> This statistic does not mean that the PLRA has done its job in preventing frivolous lawsuits. Rather, it means that it has prevented nonfrivolous lawsuits from being filed.<sup>213</sup> The reason for the downtrend in suits is because of the arduous requirements set by the PLRA and the fear of bringing a case.<sup>214</sup>

Because the PLRA sets out these barriers and possible punishments for people who attempt to enforce their Eighth Amendment protections, the practical effect is that people in prison will likely not attempt to bring cases. For example, if an individual is being held in prison and certain conditions of confinement threaten their protections from cruel and unusual punishment, the individual must find the appropriate prison authority to file the complaint with.<sup>215</sup> After this, if there is no response or resolution, the individual must continue finding their way up the ladder of prison officials to seek relief. If there continues to be no response, or if the individual does not believe the response was sufficient, they may attempt to use the judicial system for enforcement. Yet enforcement through the judicial system is associated with certain risks. A judge's opinion whether the individual has exercised all possible administrative relief required by the PLRA is the sole factor in deciding if the individual's case is frivolous or not. The possible risk of a frivolous suit includes the loss of earned early release credits, defendant's attorney's fees, and a bar from refiling the case. These requirements and possible penalties act to prevent people in prison from bringing cases for enforcement of their Eighth Amendment protections.

The resolution to these issues is a full repeal of the PLRA because the requirements set out by the Act are unduly harsh and protect institutions from being held accountable for violating constitutionally protected rights. While being in prison inherently means losing certain rights and constitutional protections, prisoners do not lose their Eighth Amendment rights. The Eighth Amendment's purpose is to protect people

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<sup>212</sup> *See id.* (The number of lawsuits per 1,000 inmates decreasing while the number of total inmates increasing shows that the PLRA has had a profound effect that limits the number of lawsuits; but this is an indictment of the PLRA as conditions of prisons have largely remained unchanged, and alleged civil rights violations continue to occur, but cases are not heard as inmates fail to satisfy the PLRA's requirements.).

<sup>213</sup> *See* Fenster & Schlanger, *supra* note 118 (arguing that inmates are overall a non-litigious group, and that the PLRA hasn't stopped just frivolous lawsuits but rather has stopped lawsuits in general).

<sup>214</sup> *See supra* part III.A.2.

<sup>215</sup> *See* 42 U.S.C. § 1997e.

from inhumane conditions at the hands of the government, and the PLRA effectively blocks the only avenue that people in prison can use to seek enforcement of these protections.<sup>216</sup> Repealing the PLRA is imperative to preventing people in prison from facing cruel and unusual conditions caused by climate change. The repeal will give prisoners an opportunity to have a leg to stand on, by allowing them to use the courts to enforce the protection of their rights and seek the appropriate redress of grievances just as the Constitution intended.<sup>217</sup>

## D. Limitations

### 1. Time

The proposed solutions, while necessary to ameliorate the abhorrent conditions suffered by incarcerated persons, do have limitations that must be addressed. The National Centers for Environmental Information releases a yearly report that tracks global climate change, and the events associated with it. In the “2022 Global Climate Report” it is shown that climate change as a result of global warming, and the extreme weather events associated with it, continue to increase each year.<sup>218</sup> As such, there is cause for concern about how effective improved infrastructure and climate adaptive construction can be if it requires constant improvement to mitigate the effects of climate change. This coupled with the time it will take to implement these changes, and the expected non-compliance of some States, causes further concern for these solutions’ efficacy.

### 2. Cost and Backlash

A 2019 report on California’s prison infrastructure found that 12 of the oldest prisons needed over one billion dollars in total repairs to bring them up to date.<sup>219</sup> While this is a small sample size of prisons, it shows the enormous cost associated with upgrading the dilapidated buildings. As the funding to update and repair prisons nationwide would be funded directly from tax dollars, it is likely that there will be some opposition to tax money being allocated in this way. Because of this, the

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<sup>216</sup> Fenster & Schlanger, *supra* note 118.

<sup>217</sup> See U.S. CONST. amend. I (guaranteeing citizens the right to “petition the Government for a redress of grievances”).

<sup>218</sup> *Annual 2022 Global Climate Report*, NOAA NAT’L CTRS. FOR ENV’T INFO. (Jan. 2023), <https://www.ncei.noaa.gov/access/monitoring/monthly-report/global/202213>.

<sup>219</sup> Don Thompson, *Study: California’s 12 Oldest Prisons Need Major Fixes*, AP NEWS (July 16, 2019), <https://apnews.com/article/7a645cb047464bfd83d301770daadfa4>.



likelihood of funding the needed repairs on a consistent basis will face hurdles of public opinion, and political gridlock.

Further backlash will come from the prisons themselves, as prisons across the country have shown unwillingness to make the required changes. An example of this is shown in Texas, where the Texas Department of Corrections fought a losing legal battle to avoid having to implement any measures to lower the temperatures in their facilities.<sup>220</sup> Despite losing this battle, Texas prisons continued without making the changes that were ordered by the court and required further judicial intervention before making any ordered changes.<sup>221</sup> This is a trend that many prisons would likely follow in the United States, creating many legal battles and an even slower adaptation to protect incarcerated people.

### 3. Will Prisons Change?

The American carceral system is already well funded, with funding totaling over 80 billion dollars yearly.<sup>222</sup> Many prisons are intentionally constructed on areas of land in desolate locations, that lack adequate emergency services and infrastructure.<sup>223</sup> Further indication of society's view of incarcerated people is exemplified by the fact that "32% of State and federal Prisons are located within 3 miles of Federal Superfund sites, the most serious contaminated places requiring extensive cleanup."<sup>224</sup> Exposure to the chemicals at these sites has been shown to be toxic, causing illness and lowering life expectancy.<sup>225</sup> With the location of prisons seeming to intentionally be in areas that are less habitable, it raises the question of if the institutions that created or allowed these violations to occur, can be trusted to ever truly fix them?

While much is needed to be done to protect currently incarcerated people from the effects of climate change, there is an argument to be made that more investment directly into disenfranchised communities, and less

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<sup>220</sup> Jolie McCullough, *A Judge Told Texas to Put Some Inmates in Air Conditioning. Lawyers Say Prison Officials Are Violating that Order*, TEX. TRIB. (Sept. 5, 2019), <https://www.texastribune.org/2019/09/05/33exas-prison-air-conditioning-heat-contempt-motion/>.

<sup>221</sup> *Id.*

<sup>222</sup> Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

<sup>223</sup> Leah Wang, *Prisons Are a Daily Environmental Injustice*, PRISON POL'Y INITIATIVE (Apr. 20, 2022),

[https://www.prisonpolicy.org/blog/2022/04/20/environmental\\_injustice/](https://www.prisonpolicy.org/blog/2022/04/20/environmental_injustice/).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

investment into policing and incarceration, would better protect the Eighth Amendment rights of Americans.<sup>226</sup> As such, a substantial change in the way the carceral system is viewed, and used, is needed to ensure that future generations won't suffer these same injustices at the hand of their government.

## CONCLUSION

Mainstream media in the United States has sensationalized crime and fostered a stigma surrounding incarcerated people, but incarcerated people are human beings with constitutional rights that are equally important as those of people who are not incarcerated.

While incarceration comes with the loss of certain rights, it does not come with the deprivation of all rights—including Eighth Amendment protections. Incarcerated individuals are already being punished by the loss of basic freedoms and, upon release, the imposition of future restrictions due to their criminal records. Climate change and global warming are making life in prison especially tortuous, leading to cruel and unusual punishment. Laws that compel prisons to undertake mitigating actions to protect incarcerated people from the effects of extreme weather events, such as climate adaptation, are essential for the protection of people's Eighth Amendment rights. Along with mitigating actions, repealing the PLRA to allow people in prison to uphold their Eighth Amendment rights is a necessary step in dealing with the effects of climate change. "The true measure of any society can be found in how it treats its most vulnerable members."<sup>227</sup>

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<sup>226</sup> See Laura Hawks et al., *Community Investment Interventions as a Means for Decarceration: A Scoping Review*, 8 LANCET REG'L HEALTH - AMERICAS (Apr. 2022), <https://www.sciencedirect.com/science/article/pii/S2667193X21001460>.

<sup>227</sup> Paul Knight, *Letter: Quote from Humphrey, not Gandhi*, THE COLUMBIAN (Nov. 11, 2016), <https://www.columbian.com/news/2016/nov/11/letter-quote-from-humphrey-not-gandhi/> (this quote is attributed to Gandhi all over the Internet, but some resources call into doubt who said it; nevertheless, it is still applicable).