

A SONG OF ICE AND FIRE: THE CLIMATE CRISIS INSIDE AMERICA'S PRISONS

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I. INTRODUCTION

One morning in the spring of 2011, Sidney Webb visited his younger brother Robert at a state prison in Texas.¹ Sidney had not seen his brother for almost two years and was astonished by his pale and gaunt appearance.² During their meeting, Robert expressed fear that he might not make it out of prison alive.³ It was not violence, sexual assault, or abusive correctional officers that he feared—it was the heat.⁴

That summer, to survive a stifling heatwave that lasted nearly three weeks and featured days with temperatures exceeding one hundred degrees, Robert and his cellmate tried to cool down by using towels they soaked in the toilet or sink.⁵ Robert made several complaints to the staff, informing them of his dizziness.⁶ At the time, he was taking Thorazine, a medication used to treat mental illness that significantly interferes with body temperature regulation and renders its users more susceptible to the heat.⁷ But his grievances went unanswered and, ultimately, Robert's worst fears became a tragic reality. In the midst of a record-breaking summer for high temperatures in Texas, Robert died on the floor of his prison cell.⁸

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¹ Maurice Chammah et al., “Cooking Them to Death”: *The Lethal Toll of Hot Prisons*, THE MARSHALL PROJECT (Oct. 11, 2017, 7:00 AM), <https://www.themarshallproject.org/2017/10/11/cooking-them-to-death-the-lethal-toll-of-hot-prisons>.

² See *id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Chammah et al., *supra* note 1.

⁸ *Id.*

Sidney later learned that, at the time of his brother's death, his body was "hot to the touch."⁹

Robert's undignified suffering was not an isolated tragedy. Every year, thousands of people in prison¹⁰ nationwide languish in their cells during extreme weather events that create unbearable and life-threatening conditions of confinement. Yet, the intersection between incarceration and climate change is often overlooked.

Extreme heat is just one of the many consequences of climate change creating deplorable conditions in America's prisons. Recently, after catastrophic winter storms descended upon New York and Texas, members of the prison population endured days in the freezing cold, either because correctional officers failed to repair damaged heating systems before the storms or because the power went out altogether.¹¹ When Hurricane Katrina struck New Orleans, the Orleans Parish Prison flooded.¹² Deputies fled their posts, leaving hundreds of incarcerated people behind in locked cells that were filled to chest level with water contaminated by urine and feces.¹³ Those left behind

⁹ *Id.*

¹⁰ This Comment will use interchangeably the terms "members of the prison population," "people in prison," "incarcerated individuals," or "incarcerated people" to refer to persons currently housed in carceral facilities across the United States. The Comment purposely refrains from using other terms, such as "inmate," "felon," or "convict" because of their dehumanizing connotations. Recently, many prison reform activists and organizations have moved away "from using terms that objectify and make people's involvement with [the carceral system] the defining feature of their identities" because they only serve to facilitate the systemic and grossly inhumane treatment suffered by people in jails and prisons. Erica Bryant, *Words Matter: Don't Call People Felons, Convicts, or Inmates*, VERA INST. OF JUST. (Mar. 31, 2021), <https://www.vera.org/news/words-matter-dont-call-people-felons-convicts-or-inmates>.

¹¹ See Ronnie K. Stephens, *Historic Winter Storm Leaves Texas Prisoners Battling Extreme Temperatures in State Prisons*, INTERROGATING JUST. (Feb. 20, 2021), <https://interrogatingjustice.org/prisons/historic-winter-storm-leaves-texas-prisoners-battling-extreme-temperatures-in-state-prisons>; Kim Kelly, *The Climate Disaster Inside America's Prisons*, THE NEW REPUBLIC (Sept. 18, 2019), <https://newrepublic.com/article/155092/climate-disaster-inside-americas-prisons>.

¹² Michael Patrick Welch, *Hurricane Katrina Was a Nightmare for Inmates in New Orleans*, VICE (Aug. 29, 2015, 1:56 AM), <https://www.vice.com/en/article/5gjdxn/hurricane-katrinawas-a-nightmare-for-inmates-in-new-orleans-829>.

¹³ See ACLU NAT'L PRISON PROJECT ET AL., ABANDONED AND ABUSED: ORLEANS PARISH PRISONERS IN THE WAKE OF HURRICANE KATRINA 9 (2006) [hereinafter ABANDONED AND ABUSED], <https://www.aclu.org/sites/default/files/pdfs/prison/oppreport20060809.pdf>.

spent the next few days without food, water, or ventilation, breaking windows for air, carving holes in the walls to escape, and even setting fire to bed sheets and clothing as a hopeful signal to rescuers.¹⁴

As scientists, heads of state, religious leaders, and the United Nations have all acknowledged, climate change is one of the most pressing crises of the twenty-first century.¹⁵ Each of the last four decades has been successively warmer than any decade that preceded it since 1850.¹⁶ In addition, the “[g]lobal surface temperature has increased faster since 1970 than in any other [fifty]-year period over at least the last [two thousand] years.”¹⁷ Rising temperatures are “associated with widespread changes in weather patterns[,]” leading to more extreme weather events, such as heat waves, storms, floods, droughts, etc.¹⁸

Yet, politicians, judges, and other institutional decisionmakers seldom consider the disproportionate effect that these climatic developments have on the prison population.¹⁹ Indeed, scholars have

¹⁴ *Id.*

¹⁵ Cynthia Golembeski et al., *Climate Change and Incarceration*, THINK GLOB. HEALTH (Apr. 29, 2022), <https://www.thinkglobalhealth.org/article/climate-change-and-incarceration>; see also Devin Watkins, *Pope: Nations Must Work Together to Adapt to Climate Change*, VATICAN NEWS (July 13, 2022), <https://www.vaticannews.va/en/pope/news/2022-07/pope-francis-climate-change-resilience-ecosystems-biodiversity.html#:~:text=Pope%20Francis%20sends%20a%20message,people%20adapt%20to%20climate%20change> (“The Pope said the world is facing the twin challenges of ‘lessening climate risks by reducing emissions’ and of ‘assisting and enabling people to adapt to progressively worsening changes to the climate.’”); Louise Boyle, *Biden Says Hurricane Ian ‘Ends Discussion’ Over Climate Change as DeSantis Looks On*, THE INDEP. (Oct. 5, 2022, 10:12 PM), <https://www.independent.co.uk/climate-change/news/hurricane-ian-joe-biden-ron-desantis-fort-myers-b2196216.html> (“President Joe Biden has said that Hurricane Ian—and other extreme events like wildfires and droughts—has ended the discussion ‘about whether or not there’s climate change and we should do something about it.’”); *UN Chief: Countries Bound for COP27 Must Make Climate Action ‘The Top Global Priority,’* UN NEWS (Oct. 3, 2022), <https://news.un.org/en/story/2022/10/1129127> (“[Secretary-General] Guterres warned, ‘we are in a life-or-death struggle for our own safety today and our survival tomorrow’”).

¹⁶ RICHARD P. ALLAN ET AL., CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 5 (2021).

¹⁷ *Id.* at 8.

¹⁸ *Climate Change Indicators: Weather and Climate*, U.S. ENV’T PROT. AGENCY [hereinafter *Indicators*], <https://www.epa.gov/climate-indicators/weather-climate> (July 26, 2023); see also ALLAN ET AL., *supra* note 16, at 15.

¹⁹ See Alleen Brown et al., *Climate and Punishment*, THE INTERCEPT (Feb. 12, 2022, 9:00 AM), <https://theintercept.com/2022/02/12/video-climate-and-punishment>.

historically assessed the phenomena of incarceration and climate change in isolation,²⁰ effectively disregarding the prison population's unique susceptibility to climate change-induced weather events. Many incarcerated individuals enter prison with preexisting health conditions.²¹ Once there, they often experience accelerated aging and develop serious chronic comorbidities, which make them even more vulnerable to extreme temperatures.²² Moreover, unlike members of the general population, incarcerated individuals are limited in what measures they can take to prepare for natural disasters,²³ leaving them with no alternative but to rely on the protection of authorities in situations that pose a risk of danger.²⁴ Since they are unable to plan for or respond to climate catastrophes, their safety during extreme climate events is at stake and must become a paramount legislative priority.

This Comment will demonstrate that congressional intervention is imperative to address the devastating effects that extreme weather events have on the prison population—particularly in light of the burgeoning climate crisis and the challenges of obtaining relief through litigation. The Comment begins, in Part II, by providing an overview of how climate change-induced weather events have created dangerous conditions in prisons and jails across the United States and explains why people in prison are more vulnerable to climate change than the general population. Part III discusses the constitutional implications of these conditions—in particular, it surveys court decisions that address whether these conditions violate the Eighth Amendment's ban on cruel and unusual punishment and describes the limitations of judicial relief available to people in prison. Part IV

²⁰ Golembeski et al., *supra* note 15.

²¹ Devin O'Donnell, *Gray, Graying, Grayer*, PUB. HEALTH POST (Jan. 18, 2022) (alteration in original), <https://www.publichealthpost.org/research/aging-prisoners>.

²² *Id.*; see also Leah Wang, *Chronic Punishment: The Unmet Health Needs of People in State Prisons*, PRISON POL'Y INITIATIVE (June 2022), <https://www.prisonpolicy.org/reports/chronicpunishment.html>. The Bureau of Justice Statistics' 2016 Survey of Prison Inmates indicates that people in prison face higher rates of certain chronic conditions and infectious diseases compared to the general U.S. population. *Id.*

²³ See Golembeski et al., *supra* note 15; PENAL REFORM INT'L, GLOBAL PRISON TRENDS 2021, at 5 (7th ed. 2021) [hereinafter PRISON TRENDS], <https://cdn.penalreform.org/wp-content/uploads/2021/05/Global-prison-trends-2021.pdf>.

²⁴ PENAL REFORM INT'L, NATURAL HAZARDS AND PRISONS 8 (2021) [hereinafter NATURAL HAZARDS], https://www.euopris.org/wp-content/uploads/2022/01/PRI_Natural_hazards_and_prisons_WEB-1.pdf.

consequently argues that Congress must legislate to address climate change-induced prison conditions *proactively*. More specifically, it (i) identifies Congress's constitutional authority to legislate in this area; (ii) explains why federal legislation is not only preferable but necessary; (iii) outlines critical goals and policies for Congress to consider when drafting legislation; and (iv) confronts some of the main anticipated counterarguments.

II. CLIMATE CHANGE-INDUCED WEATHER EVENTS AND PRISON CONDITIONS

Over the last fifty years, climate change has “contributed globally to a fivefold increase” in weather-related disasters.²⁵ In particular, studies indicate that climate change will produce more extreme weather events like heat waves, heavy precipitation, hurricanes, cyclones, floods, fires, and droughts.²⁶ According to the Intergovernmental Panel on Climate Change, the Earth's surface temperature will continue to rise until at least the middle of the century notwithstanding any reduction in emissions.²⁷ Section A of this Part explores the ways in which extreme weather events create poor conditions in America's prisons, while Section B discusses the prison population's increased vulnerability to the effects of these climate change-induced events.

A. *The Devastating Impact of Climate Change-Induced Weather Events on Prison Conditions*

This Section examines the dramatic effect that global warming has on weather patterns and describes how these climatic changes threaten the prison population. While there is a wide range of climate change-induced weather events that have appreciable impacts on people in prison,²⁸ the discussion herein focuses on three conditions—heat waves, freezing temperatures, and hurricanes.

²⁵ Golembeski et al., *supra* note 15.

²⁶ *Indicators*, *supra* note 18; see also ALLAN ET AL., *supra* note 16, at 8; PRISON TRENDS, *supra* note 23, at 5.

²⁷ ALLAN ET AL., *supra* note 16, at 14.

²⁸ See, e.g., C1 Staff, *More than 500 Calif. Inmates Evacuated Due to Dam Flooding Dangers*, CORRECTIONS1 (Feb. 14, 2017), <https://www.corrections1.com/prisoner-transport/articles/more-than-500-calif-inmates-evacuated-due-to-dam-flooding-dangers-E45FX9tKQYT7HK5w>; see also Jacques Leslie, *In an Era of Extreme Weather, Concerns Grow Over Dam Safety*, YALE ENV'T 360 (July 9, 2019), <https://e360.yale.edu/features/in-an-era-of-extreme-weather-concerns-grow-over-dam-safety> (noting that extreme precipitation is likely to increase the risk of dam

1. Heat Waves

As a result of global warming, heat waves are becoming more frequent, more intense, and longer in duration.²⁹ Extreme heat has direct health risks, such as heatstroke, which is potentially fatal, as well as more remote consequences, such as the aggravation of preexisting chronic conditions like respiratory and cardiovascular illnesses.³⁰ Some studies have even linked higher temperatures to an increased prevalence of aggression, self-harm, and suicide attempts.³¹ Research indicates that all of these “heat-related risks may be exacerbated in” the prison milieu.³²

For example, Texas prisons, two-thirds of which do not have air-conditioning in living areas,³³ have recorded twenty-three deaths as a result of heat stroke since 1998.³⁴ But because heat exacerbates underlying physical and mental health conditions, researchers believe

failure and threats to human life); Jessica Pishko, *In the Face of Drought, California Prisons Are Restricting Inmates' Shower and Toilet Use*, VICE (July 14, 2015, 6:30 PM), <https://www.vice.com/en/article/exqnjw/california-prisons-are-restricting-shower-and-toilet-use-to-fight-the-historic-drought-626> (explaining how individuals in San Quentin State Prison were restricted to three showers a week for a maximum of five minutes each after California's governor ordered mandatory drought restrictions).

²⁹ *Indicators*, *supra* note 18.

³⁰ Daniel W. E. Holt, *Heat in US Prisons and Jails: Corrections and the Challenge of Climate Change*, SABIN CTR. FOR CLIMATE CHANGE L. 2–3 (2015), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1123&context=sabin_climate_change.

³¹ *Id.* at 3; DAVID CLOUD ET AL., VERA INST. OF JUST., THE SAFE ALTERNATIVES TO SEGREGATION INITIATIVE: FINDINGS AND RECOMMENDATIONS FOR THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, AND PROGRESS TOWARD IMPLEMENTATION 39–40, 41 fig.11 (2019).

³² CLOUD ET AL., *supra* note 31, at 39.

³³ Jolie McCullough, “It’s a Living Hell”: Scorching Heat in Texas Prisons Revives Air-Conditioning Debate, TEX. TRIB. (Aug. 24, 2022, 5:00 AM) [hereinafter *Scorching Heat in Texas Prisons*], <https://www.texastribune.org/2022/08/24/texas-prisons-air-conditioning>. Other areas, such as administrative offices and infirmaries, are air-conditioned at all units. Jolie McCullough, *After Sweltering Temperatures Killed Texas Prisoners, Lawmakers Vote to Install Air Conditioning*, THE TEX. TRIB. (May 14, 2021, 12:00 PM) [hereinafter *Sweltering Temperatures Killed Texas Prisoners*], <https://www.texastribune.org/2021/05/14/texas-prison-air-conditioning-legislature>.

³⁴ Jolie McCullough, *Texas Spent \$7 Million to Fight Against A/C in a Prison. It May Only Cost \$4 Million to Install*, TEX. TRIB. (Aug. 29, 2018, 6:00 PM) [hereinafter *Texas Spent \$7 Million*], <https://www.texastribune.org/2018/08/29/texas-prison-heat-air-conditioning-cost-drop>.

the true figure could be much higher.³⁵ Texas is not alone. At least forty-four states lack universal air-conditioning, including some in the hottest regions of the country.³⁶

In the summer of 2012, incarcerated individuals at Rikers Island reported being denied cold showers and cold water for drinking.³⁷ To make matters worse, they alleged that guards retaliated against anyone who complained about the situation.³⁸ In August 2013, Susi Vassallo, an associate professor who studied extreme temperatures in Texas state prisons, monitored the temperatures on Rikers Island and called the situation a “serious health threat.”³⁹ Because of its extraordinarily high temperatures in the summertime, Rikers has been nicknamed “The Oven.”⁴⁰ More recently, in the summer of 2022, the Northwest experienced an unprecedented heat wave.⁴¹ Dozens of incarcerated individuals in solitary confinement in Washington State Penitentiary “spent [twenty-three] hours a day locked in small concrete and metal cells” even after the air-conditioning had stopped working.⁴² But

³⁵ Jamiles Lartey, *Why Record Heat Can Be Deadlier in Prisons*, THE MARSHALL PROJECT (Sept. 10, 2022, 12:00 PM), <https://www.themarshallproject.org/2022/09/10/why-record-heat-can-be-deadlier-in-prisons>; J. Carlee Purdum, *Prison Conditions During Heat Waves Pose Deadly Threats to Incarcerated People*, COLUM. MISSOURIAN (Sept. 6, 2022), https://www.columbiamissourian.com/opinion/guest_commentaries/prison-conditions-during-heat-waves-pose-deadly-threats-to-incarcerated-people/article_14881108-2acc-11ed-adcf-4377d42e5af6.html.

³⁶ Jeanine Santucci, *Most US States Don't Have Universal Air Conditioning in Prisons. Climate Change, Heat Waves Are Making It 'Torture,'* PHYS ORG (Sept. 12, 2022), <https://phys.org/news/2022-09-states-dont-universal-air-conditioning.html>; see also Alexi Jones, *Cruel and Unusual Punishment: When States Don't Provide Air Conditioning in Prison*, PRISON POL'Y INITIATIVE (June 18, 2019), <https://www.prisonpolicy.org/blog/2019/06/18/air-conditioning> (noting that, as of 2022, thirteen states in the hottest regions of the country lack universal air-conditioning in their prisons).

³⁷ Raven Rakia, *A Sinking Jail: The Environmental Disaster That Is Rikers Island*, GRIST (Mar. 15, 2016), <https://grist.org/justice/a-sinking-jail-the-environmental-disaster-that-is-rikers-island>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Elizabeth Castillo, *People in Washington Prisons Faced Dangerous Temperatures During Last Year's Heat Dome*, OPB, <https://www.opb.org/article/2022/06/10/washington-prisons-heat-wave-response> (June 17, 2022, 3:29 PM).

⁴² Sarah Sax, *'Like Sitting in a Sauna': Heat Waves Cause Misery in WA Prison*, CROSSCUT (June 9, 2022), <https://crosscut.com/equity/2022/06/sitting-sauna-heat-waves-cause-misery-wa-prisons>. The problem is not limited to these few instances.

whether or not these heat waves were unprecedented is immaterial, as climate experts predict that soon “extreme heat waves won’t be unusual—and that prisons should brace for a future in which potentially deadly temperatures are the norm.”⁴³

2. Freezing Temperatures

Although winters are generally becoming warmer and shorter because of global warming, winter storms are becoming more frequent and more intense because warmer atmospheres hold more water, thus producing heavier rain and snow.⁴⁴ Between 2008 and 2018, “there were [twenty-seven] major Northeast winter storms, three to four times the totals for each of the previous five decades.”⁴⁵ An increase in the severity and frequency of winter storms will lead to what legal scholar Robert Pistone describes as “more instances where prisoners are simply left to fend for themselves in cells that lack the proper framework to handle . . . low temperatures.”⁴⁶ This is because many prisons do not have the requisite insulation or robust power structures necessary to provide adequate heating. Moreover, low temperatures place higher

People held in the Louisiana State Penitentiary have described the grueling conditions and exceedingly high temperatures both in and outside of their cells. Makaela Walters, *Heat Waves Create Dire Conditions for the South’s Incarcerated*, FACING S. (Aug. 11, 2022), <https://www.facingsouth.org/2022/08/south-prisons-air-conditioning-heat-wave>. After years of litigation, a judge ordered the installation of air-conditioning in all units, but the decision was later overturned and advocates settled for smaller reforms. *Id.* In addition, according to a federal investigation, indoor temperatures soared as high as 145 degrees inside the Mississippi State Penitentiary. *Id.* In the summer of 2022, the Mississippi State Penitentiary had air-conditioning for the first time in 121 years. Charles P. Pierce, *Parchman Prison, a House of Horrors Real and Imagined, Finally Gets A/C*, ESQUIRE (July 21, 2022), <https://www.esquire.com/news-politics/politics/a40680983/parchman-prison-air-conditioning>.

⁴³ Chammah et al., *supra* note 1.

⁴⁴ *Winter Weather and the Climate Crisis: Explained*, CLIMATE REALITY PROJECT (Nov. 17, 2022), <https://www.climateRealityproject.org/blog/winter-weather-and-climate-crisis-explained>; *Maybe It’s Cold Outside*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/maybe-its-cold-outside> (“On average, winters are getting warmer and shorter, with fewer places experiencing extremely cold temperatures. [But], because the warmer atmosphere holds more moisture, blizzards are more likely to occur and be more severe in places where temperatures are still cold enough for snow.”).

⁴⁵ John Schwartz, *How Climate Change Is Affecting Winter Storms*, N.Y. TIMES, <https://www.nytimes.com/2020/12/17/climate/climate-change-winter.html> (Feb. 14, 2021).

⁴⁶ Robert Pistone, *Violations of the Eighth Amendment: How Climate Change Is Creating Cruel and Unusual Punishment*, 28 HASTINGS ENV. L.J. 213, 217 (2022).

demand on power grids, thereby increasing the incidence of power blackouts.⁴⁷

For example, in January of 2019, a polar vortex descended upon New York, with outdoor temperatures “plummeting close to zero degrees Fahrenheit and nearly [twenty] below with windchill.”⁴⁸ After a partial power outage at the Metropolitan Detention Center, a federal prison in Brooklyn, more than one thousand incarcerated people were “plunged into cold and darkness for a week.”⁴⁹ The warden’s spokesperson was quick to claim that the power outage had only “minimally impacted” housing units.⁵⁰ On the other hand, those detained in the facility, as well as the staff, described a different version of events—they stated that there was no heat, hot water, or hot food for days.⁵¹ Because of limited electricity, the commissary was closed, and detainees could not use computers to communicate with their families—further concealing the crisis from the outside world and isolating the impacted individuals in their misery.⁵²

Meteorologists predicted that a historic winter storm would devastate the South in mid-February of 2021.⁵³ Yet, private energy companies in Texas chose not to follow federal regulations to winterize

⁴⁷ *Id.*

⁴⁸ Nick Pinto, *Inspector General Treated Freezing Federal Jail as a PR Blunder Rather than a Humanitarian Disaster*, THE INTERCEPT (Sept. 28, 2019, 6:00 AM), <https://theintercept.com/2019/09/28/mdc-brooklyn-jail-heat>.

⁴⁹ *Id.*; Richard Winton, *Terminal Island Prison Inmates Went Without Heat During the Coldest February in Decades*, L.A. TIMES (Feb. 27, 2019, 7:45 PM), <https://www.latimes.com/local/lanow/la-me-terminal-island-freezing-prison-20190226-story.html>.

⁵⁰ Annie Correal, *No Heat for Days at a Jail in Brooklyn Where Hundreds of Inmates Are Sick and Frantic*, N.Y. TIMES (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/nyregion/mdc-brooklyn-jail-heat.html>.

⁵¹ *Id.*; see also JB Nicholas, *Just Leave Them to Die*, THE APPEAL (Feb. 22, 2019), <https://theappeal.org/mdc-brooklyn-jail-prison-emergency-preparedness>. In 2022, several New York elected officials wrote to the United States Attorney General and the Bureau of Prisons pressing for reforms to address to deplorable conditions. See John Annese, *Several NY-10 Primary Candidates Call for Reforms at Troubled Metropolitan Detention Center in Brooklyn: ‘Humanitarian Crisis Must Be Addressed Now’*, N.Y. DAILY NEWS (Aug. 15, 2022, 5:25 PM), <https://www.nydailynews.com/new-york/nyc-crime/ny-ny10-democrat-candidates-call-for-reform-of-mdc-jail-20220815-7hd6joxdnjh57l6kxd4moxtuclu-story.html>; Courtney Gross, *Congressional Hopefuls Call for Reform Outside Brooklyn Federal Jail*, SPECTRUM NEWS (Aug. 16, 2022, 7:15 PM), <https://www.nyl.com/nyc/all-boroughs/politics/2022/08/16/congressional-hopefuls-call-for-reform-outside-brooklyn-federal-jail>.

⁵² Correal, *supra* note 50.

⁵³ Stephens, *supra* note 11.

their power grids, perhaps because temperatures in Texas rarely drop below freezing.⁵⁴ When the storm hit, there was a swift political response to provide emergency relief for Texans, but thousands of people in prison were simply forgotten.⁵⁵ Ultimately, “a third of the State’s prisons lost power[,]” and twenty reported shortages of food, water, and blankets.⁵⁶

Similarly, after a steam line failure, hundreds of incarcerated people at Terminal Island, a federal prison in Los Angeles, “spent one of the coldest periods in decades in frigid cells with no heat and only blankets for warmth” for over a *month* before being transferred to another correctional facility.⁵⁷ Prison authorities provided them with blankets that “offered little protection against the chilly harbor air.”⁵⁸ As a result, several people became sick from the constant cold.⁵⁹

Sustained low temperatures are not a mere inconvenience—they can have fatal consequences.⁶⁰ In 2019, incarcerated people inside the Dauphin County Prison in Pennsylvania alleged that cell temperatures were “so cold they [could] see their breath.”⁶¹ Jamal Crummel’s cell, for example, became so cold that ice formed on the inside of his window, and his fingertips turned “blue.”⁶² On the night of January 30, Jamal succumbed to the cold and died in the bed of his prison cell.⁶³

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ PRISON TRENDS, *supra* note 23, at 6.

⁵⁷ Winton, *supra* note 49; Ben Feuerherd, *Warden Failed to Fix Camera System, Heat at California Federal Lockup: Watchdog*, N.Y. POST (Aug. 22, 2022, 7:00 PM), <https://nypost.com/2022/08/22/warden-let-heat-cameras-fail-at-federal-lockup-watchdog>.

⁵⁸ Winton, *supra* note 49.

⁵⁹ *Id.*

⁶⁰ Paloma Wu & D. Korbin Felder, *Hell and High Water: How Climate Change Can Harm Prison Residents and Jail Residents, and Why COVID-19 Conditions Litigation Suggests Most Federal Courts Will Wait-and-See When Asked to Intervene*, 49 FORDHAM URB. L.J. 259, 268–69 (2022).

⁶¹ Brett Sholtis, *Dauphin County Jail Cells Were ‘Ice Cold’ Days Before a Prisoner Died*, WITF (June 7, 2022, 3:17 PM), <https://www.witf.org/2022/06/07/dauphin-county-jail-cells-were-ice-cold-days-before-a-prisoner-died>.

⁶² *Id.*

⁶³ *Id.*

3. Hurricanes

Unlike the general population, people in prison cannot decide how to respond to natural disasters, and many prisons do not have adequate evacuation plans.⁶⁴ While natural disasters present obvious physical risks of harm, research in the public health, social science, and environmental domains indicates that people in prison also face inconspicuous, long-term repercussions due to natural disaster exposure, such as heightened levels of trauma, anxiety, and depression.⁶⁵ As Hurricane Katrina approached New Orleans, there was no attempt to evacuate the Orleans Parish Prison.⁶⁶ When the hurricane finally struck, people were abandoned in locked cells filled with sewage-tainted water and “spent days without power, food[,] or water[.]”⁶⁷ Immediately following the evacuation, 517 people who were being held in the facility went missing.⁶⁸ While the official story was that there was “no loss of life,”⁶⁹ it remains unclear whether these individuals died or escaped.

Incarcerated people in Texas reported similarly harsh conditions in the aftermath of Hurricane Harvey.⁷⁰ “As the wettest storm on record in US history,” Hurricane Harvey resulted in the evacuation of “at least five prisons on the east coast of Texas.”⁷¹ But the Texas Department of Criminal Justice (TDCJ) and the Bureau of Prisons (BOP) opted not to evacuate four units that housed over eight thousand people.⁷² Upon discovery of unconstitutional conditions of

⁶⁴ NATURAL HAZARDS, *supra* note 24, at 2.

⁶⁵ Mia A. Benevolenza & LeaAnne DeRigne, *The Impact of Climate Change and Natural Disasters on Vulnerable Populations: A Systematic Review of Literature*, 29 J. HUM. BEHAV. SOC. ENV'T 266, 266 (2019).

⁶⁶ ABANDONED AND ABUSED, *supra* note 13, at 23.

⁶⁷ *Prison Conditions and Prisoner Abuse After Katrina*, AM. C.L. UNION (Dec. 14, 2005), <https://www.aclu.org/other/prison-conditions-and-prisoner-abuse-after-katrina>.

⁶⁸ *New Orleans: Prisoners Abandoned to Floodwaters*, HUM. RTS. WATCH (Sept. 21, 2005, 8:00 PM), <https://www.hrw.org/news/2005/09/21/new-orleans-prisoners-abandoned-floodwaters>.

⁶⁹ Charles Shaw, *Hurricane Katrina and the Lost Prisoners of New Orleans*, HUFFPOST, https://www.huffpost.com/entry/hurricane-katrina-and-the_b_541639 (May 25, 2011).

⁷⁰ See John Washington, *After Harvey, Texas Inmates Were Left in Flooded Prisons Without Adequate Water or Food*, 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>.

⁷¹ *Id.*

⁷² See *id.*

confinement—“[in]adequate drinking water, food, medical care, and sanitation”—legal advocates from the Prison Legal Advocacy Network and National Lawyers Guild notified the TDCJ and the BOP that they intended to file a lawsuit.⁷³ They “claim[ed] the agency had ‘adequate foreknowledge of the flood risk’ and ‘ample notice of the widespread concerns’ about constitutional violations during previous hurricanes” but failed to warn, evacuate, or provide those held in the prison with necessities in anticipation of the storm.⁷⁴

The responses to Hurricane Katrina and Hurricane Harvey are but two instances of poor decision-making⁷⁵ that cannot be written off as negligent oversight. To the contrary, the decision not to evacuate carceral facilities in the face of impending natural disasters reflects a conscious disregard of known and established risks.

B. *The Increased Vulnerability of the Prison Population*

As noted in Part II.A, extreme weather events can result in serious injury, death, property damage, displacement, and disruption of essential services.⁷⁶ Members of the prison population are often defenseless against these threats. Unlike the general population, they are not in a position to decide whether to evacuate, stockpile emergency items, or communicate with their support networks on the outside. Even when climate change creates conditions that do not require evacuation—such as heat waves or freezing temperatures—people in prison are at a disadvantage relative to the general population because they do not have the opportunity to select accommodations with heat or air-conditioning. Consequently, they “face not only the immediate threat of the hazard itself” but also other

⁷³ Letter from Prisoners Legal Advocacy Network & National Lawyers Guild to Dale Wainwright et al. (Sept. 13, 2017), <https://www.nlg.org/wp-content/uploads/2017/09/09-13-2017-DE-NJ-NLG-PLAN-Notice-to-TDCJ-re-Post-Harvey-Conditions-w-Exhibits.pdf>.

⁷⁴ Washington, *supra* note 70. These reports came just six weeks after a federal judge ordered the state of Texas to improve prison conditions because intense summer heat had killed twenty-three people since 1998. Daniel A. Gross, *Weathering a Hurricane in Prison*, NEW YORKER (Sept. 8, 2017), <https://www.newyorker.com/sections/news/weathering-a-hurricane-in-prison>.

⁷⁵ See Taylor Dolven, *Thousands of Inmates Are Left in Miami’s Irma Evacuation Zone*, VICE (Sept. 9, 2017, 6:34 AM), <https://www.vice.com/en/article/zmygb3/thousands-of-inmates-are-left-in-miamis-irma-evacuation-zone> (discussing how Florida state and local officials urged residents to evacuate as the state braced for Hurricane Irma but left nearly 4,500 incarcerated people inside facilities in some of Miami-Dade County’s most vulnerable evacuation zones).

⁷⁶ *Indicators*, *supra* note 18.

indirect risks.⁷⁷ The latter include threats to their physical health as well as the havoc that these extreme weather events wreak “on prison infrastructure, staffing[,] and the provision of basic goods and services.”⁷⁸ Subsection 1 of this Section describes the combined negative effects of extreme temperatures and incarceration on physical health, while Subsection 2 explains how poor prison infrastructure and siting decisions exacerbate these problems.

1. The Threat to Physical Health

Extreme weather and incarceration have a “combined negative effect on health.”⁷⁹ People in prison tend to be overwhelmingly poor even prior to incarceration,⁸⁰ and poverty is linked to greater health risks.⁸¹ Extreme temperatures pose some of the most apparent health risks to members of the prison population, especially among the elderly.⁸² Nationwide, almost 20 percent of incarcerated people are over the age of fifty-one and suffer from underlying health conditions, such as obesity, hypertension, and asthma.⁸³ And the number of aging people in prison is growing.⁸⁴ In addition, many incarcerated people who suffer from serious mental health conditions take psychotropic medications that interfere with the body’s thermoregulation

⁷⁷ PRISON TRENDS, *supra* note 23, at 5.

⁷⁸ *Id.*

⁷⁹ Golembeski et al., *supra* note 15.

⁸⁰ See Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned*, PUB. POL’Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> (indicating that, in 2014, the pre-incarceration median income of incarcerated people was 41 percent less than that of non-incarcerated people of similar ages); *Connections Among Poverty, Incarceration and Inequality*, INST. FOR RSCH. ON POVERTY (May 2020), <https://www.irp.wisc.edu/resource/connections-among-poverty-incarceration-and-inequality>.

⁸¹ Peter J. Cunningham, *Why Even Healthy Low-Income People Have Greater Health Risks than Higher-Income People*, COMMONWEALTH FUND (Sept. 27, 2018), <https://www.commonwealthfund.org/blog/2018/healthy-low-income-people-greater-health-risks>.

⁸² See Julia Vitale, *A Look at the United States’ Aging Prison Population Problem*, INTERROGATING JUST. (Apr. 7, 2021), <https://interrogatingjustice.org/ending-mass-incarceration/aging-prison-population>.

⁸³ Sax, *supra* note 42.

⁸⁴ Vitale, *supra* note 82.

mechanisms—putting them at a significantly higher risk of overheating.⁸⁵

Inadequate contingency plans for natural disasters “create negative ripple effects beyond just potential flooding” that have significant health ramifications.⁸⁶ For example, storms frequently contaminate sewage systems—“a particularly alarming issue considering that incarcerated people are unable to adequately treat impotable water by boiling it, as those on the outside can.”⁸⁷ In addition, major storms result in shortages of food and clean drinking water, as well as overflowed toilets, which “facilitate the spread of disease and the development of infections.”⁸⁸

2. The Problem of Inadequate Infrastructure and Poor Siting Decisions

Significant problems with prison infrastructure and siting compound the physical risks of harm that climate change-induced weather events can produce. Many prisons were constructed years ago⁸⁹ out of heat-retaining materials, which magnify climate-related harm for incarcerated people.⁹⁰ For example, “[t]he concrete floors, steel doors, and cinder block walls of the cells in Rikers” retain heat, leading to exorbitantly high indoor temperatures.⁹¹ Many prisons fail to provide adequate cooling and heating under normal circumstances,⁹² a choice that becomes even more troublesome when facilities are faced with natural hazards and extreme weather.

⁸⁵ Kellie Chudzinski, *Why Temperatures in Prisons and Jails Matter*, VERA INST. OF JUST. (Aug. 10, 2018), <https://www.vera.org/news/why-temperatures-in-prisons-and-jails-matter>.

⁸⁶ Tamar Sarai, *Climate Change Puts the Health and Lives of Incarcerated People at Risk*, PRISM (Nov. 18, 2020), <https://prismreports.org/2020/11/18/climate-change-puts-the-health-and-lives-of-incarcerated-people-at-risk>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ INT’L COMM. OF THE RED CROSS, WATER, SANITATION, HYGIENE AND HABITAT IN PRISONS 15 (2013).

⁹⁰ Kelly, *supra* note 11; *see also* Jones, *supra* note 36.

⁹¹ Rakia, *supra* note 37.

⁹² *See* Katie Rose Quandt, *As Temperature Drops, Incarcerated People Brace for Dangerously Cold Conditions*, TRUTHOUT (Dec. 25, 2022), <https://truthout.org/articles/as-temperature-drops-incarcerated-people-brace-for-dangerously-cold-conditions>; Jolie McCullough, *Relatives Report Inadequate Heating at More than 30 Texas Prisons*, THE TEX. TRIB. (Jan. 3, 2018, 5:00 PM), <https://www.texastribune.org/2018/01/03/relatives-report-inadequate-heating->

Increased reliance on incarceration as well as poor siting decisions have led to the construction of prisons on land rife with environmental hazards.⁹³ For example, many prisons are constructed alongside rivers, exacerbating the risk of flood and the need for evacuation.⁹⁴ In addition, “[n]early [six hundred] federal and state prisons are located within three miles of a Superfund site.”⁹⁵ An estimated 60 percent of nonfederal Superfund sites are located in areas that are highly susceptible to climate change-induced weather events, such as floods, storms, wildfires, and rising sea levels.⁹⁶ Thus, climate change presents significant health risks for those living in the vicinity of these sites,⁹⁷ including people in prison. Despite these concerns, national disaster plans almost never contemplate the safety of the prison population.⁹⁸

more-30-texas-prisons; Santucci, *supra* note 36; Jones, *supra* note 36; Pistone, *supra* note 46, at 216–17.

⁹³ Brenna Helppie-Schmieder, *Toxic Confinement: Can the Eighth Amendment Protect Prisoners from Human-Made Environmental Health Hazards?*, 110 NW. L. REV. 647, 650 (2016); see also Juliet Schulman-Hall, *The Confining Nature of Climate Change on Incarcerated People*, MS. MAG. (Mar. 9, 2022), <https://msmagazine.com/2022/03/09/climate-change-incarcerated-people-jail-prison-detention-center-flooding-fires-water-contamination>.

⁹⁴ See Hannah Hauptman, *Prisons and Floods in the United States: Interrogating Notions of Social and Spatial Control*, 8 CHI. J. HIST. 99, 99 (2017); Matt Clarke, *In the Eye of the Storm: When Hurricanes Impact Prisons and Jails*, PRISON LEGAL NEWS (May 17, 2018), <https://www.prisonlegalnews.org/news/2018/may/17/eye-storm-when-hurricanes-impact-prisons-and-jails>.

⁹⁵ *Investigation Reveals Environmental Dangers in America’s Toxic Prisons*, EQUAL JUST. INITIATIVE (June 16, 2017), [hereinafter *America’s Toxic Prisons*] <https://ej.org/news/investigation-reveals-environmental-dangers-in-toxic-prisons>. A superfund site is an area that is contaminated “due to hazardous waste being dumped, left out in the open, or otherwise improperly managed.” *What is Superfund?*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/superfund/what-superfund> (Nov. 1, 2022).

⁹⁶ *Climate Change Could Spell Disaster for Superfund Sites*, THE CLIMATE REALITY PROJECT (Feb. 17, 2022), <https://www.climateRealityproject.org/blog/climate-change-could-spell-disaster-superfund-sites>.

⁹⁷ *Id.* (“Studies over the years have shown higher levels of cancer, birth defects, developmental disabilities, and other serious health issues in communities located near Superfund sites. . . . As . . . natural hazards become even more frequent due to climate change, the potential for these sites to release contaminants into unsuspecting communities rises.”); see also *America’s Toxic Prisons*, *supra* note 95 (discussing a report that found that over 80 percent of people held in a Pennsylvania state prison “were suffering from exposure to coal ash, including respiratory, throat, and sinus conditions, gastrointestinal problems, and adverse skin conditions”).

⁹⁸ See Kim Kelly, *The Climate Disaster Inside America’s Prisons*, THE NEW REPUBLIC (Sept. 18, 2019), <https://newrepublic.com/article/155092/climate-disaster-inside-americas-prisons> (“[I]ncarcerated people have been largely left out of the

III. THE SUCCESSES AND SHORTCOMINGS OF EIGHTH AMENDMENT LITIGATION

Given such abysmal and, in some cases, deadly conditions, it is not surprising that many people in prison have sued to obtain damages for harm suffered or injunctive relief to improve conditions.⁹⁹ Litigants often invoke the Eighth Amendment's prohibition of cruel and unusual punishment,¹⁰⁰ which requires prisons and jails to provide humane conditions of confinement under the relevant constitutional standards.¹⁰¹ In the context of climate change-induced weather events, however, litigants have been largely unsuccessful in proving violations.¹⁰² Eighth Amendment jurisprudence often presents formidable barriers for litigants and significantly limits the circumstances under which courts are willing to grant relief.

When plaintiffs seek to challenge their conditions of confinement under the Eighth Amendment, they have a two-fold burden of proof under the "deliberate indifference" standard. First, plaintiffs must satisfy an objective component by proving that they faced a substantial

conversations around ambitious climate justice proposals like the Green New Deal, which neglects to engage with decarceration, prison abolition, or demilitarization.").

⁹⁹ The Prison Litigation Reform Act (PLRA) places certain administrative requirements on plaintiffs and limits on judicial relief that are further discussed in Part IV.B of this Comment.

¹⁰⁰ In claims involving state prisons, the Eighth Amendment's prohibition of cruel and unusual punishment is applicable to the states by reason of the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 675 (1962) (Douglas, J., concurring).

¹⁰¹ See *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) ("The [Eighth] Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .,' against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" (citation omitted)).

¹⁰² See, e.g., *Woods v. Edwards*, 51 F.3d 577, 581 (5th Cir. 1995) (finding no Eighth Amendment violation where plaintiff alleged high temperatures contributed to health problems but failed to present medical evidence of significance and the deprivation of a basic human need); see also *Dixon v. Godinez*, 114 F.3d 640, 645 (7th Cir. 1997) (finding no Eighth Amendment violation where plaintiff alleged poor ventilation in the prison during the summer but failed to present medical evidence that rank air exposed him to diseases and caused respiratory problems); *Chandler v. Crosby*, 379 F.3d 1278, 1295 (11th Cir. 2004) (plaintiffs on death row alleged high temperatures in their cells because the unit lacked fans and air-conditioning, building was constructed of heat-retaining material, and exhaust vents were not designed to cool the air, but the court found no Eighth Amendment violation because the prisoners alleged "mere discomfort").

risk of harm.¹⁰³ If plaintiffs are looking to obtain an injunction, they “need not await a tragic event” before seeking relief.¹⁰⁴ With respect to this element, courts must measure the challenged conditions of confinement against “the evolving standards of decency that mark the progress of a maturing society.”¹⁰⁵ Some conditions of confinement “may establish a . . . violation ‘in combination’ where each would not do so alone.”¹⁰⁶ Second, plaintiffs must satisfy a subjective component by proving that the defendant(s) acted with “deliberate indifference” to the risk of harm.¹⁰⁷

Section A of this Part surveys several cases to demonstrate that the outcome of conditions-of-confinement claims can vary widely because there is no consensus as to whether extreme weather poses a substantial risk of harm. Section B explains how the requirement of proving “deliberate indifference” undermines the very purpose of the Eighth Amendment. Finally, Section C addresses the unique issues that a culpable mental state requirement imposes in the context of climate change-induced weather events. The obstacles that the “deliberate indifference” standard presents in obtaining judicial relief implies that litigation will not be the most effective tool for achieving lasting institutional reform.

A. *The Objective Element: Substantial Risks of Harm*

While courts use slightly different language to describe actionable conditions under the Eighth Amendment,¹⁰⁸ courts tend to agree that conditions must deprive someone of a “basic human need” to warrant constitutional protection.¹⁰⁹ At present, there is no consensus as to

¹⁰³ *Farmer v. Brennan*, 511 U.S. 825, 828 (1994).

¹⁰⁴ *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

¹⁰⁵ *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

¹⁰⁶ *Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

¹⁰⁷ *Farmer*, 511 U.S. at 828 (“A prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.”).

¹⁰⁸ *Helling*, 509 U.S. at 29–31 (“unreasonable risk”); *Wilson*, 501 U.S. at 303 (“inhumane”); *Rhodes*, 452 U.S. at 347 (“minimal civilized measure of life’s necessities”); *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976) (“unnecessary suffering”).

¹⁰⁹ See, e.g., *Lockamy v. Rodriguez*, 402 F. App’x 950, 951 (5th Cir. 2010); *Renchenski v. Williams*, 622 F.3d 315, 338 (3d Cir. 2010); *Muñiz v. Richardson*, 371 F. App’x 905, 908 (10th Cir. 2010). The courts’ reluctance to interpret the Eighth Amendment as guaranteeing “more than prisoners’ basic needs” has contributed to limited success of prison conditions litigation. Alexander A. Reinert, *Release as Remedy*

whether extreme temperatures can deprive incarcerated people of a “basic human need” under the objective element of the “deliberate indifference” standard. For example, the Eleventh Circuit in *Chandler v. Crosby* held that “severe discomfort” from inside temperatures during Florida summers did not violate the Eighth Amendment.¹¹⁰ But in *Dixon v. Godinez*, the Seventh Circuit held that the Eighth Amendment entitles people in carceral facilities “not to be confined in a cell at so low a temperature as to cause severe discomfort.”¹¹¹

Some courts do recognize extreme temperatures as violative of the Eighth Amendment, but only when the plaintiff or plaintiffs suffer from serious medical conditions.¹¹² In *Cole v. Livingston*, several people incarcerated in a medical and geriatric prison filed a class action lawsuit, alleging that their exposure to extreme heat during the summer months in Texas amounted to an Eighth Amendment violation.¹¹³ The plaintiffs alleged that the “sweltering temperatures” caused “at least twelve prisoners in the Texas prison system to die from heat stroke and hundreds more. . . to suffer from heat-related illnesses since 2011.”¹¹⁴ The district court issued an emergency injunction directing the prison to lower temperatures in areas housing heat-sensitive persons and to develop an appropriate heat wave policy.¹¹⁵ Although exposure to extreme heat can present substantial health risks to all incarcerated people, the court in *Cole* seemingly rested its decision upon the fact that all plaintiffs were sixty years or older and suffered from underlying medical conditions that rendered them

for *Excessive Punishment*, 53 WM. & MARY L. REV. 1575, 1631–32 (2012) (emphasis added).

¹¹⁰ *Chandler v. Crosby*, 379 F.3d 1278, 1296–97 (11th Cir. 2004).

¹¹¹ *Dixon v. Godinez*, 114 F.3d 640, 644 (7th Cir. 1997) (quoting *Del Raine v. Williford*, 32 F.3d 1024, 1035 (7th Cir. 1994)).

¹¹² *Compare* *Ball v. LeBlanc*, 792 F.3d 584, 596 (5th Cir. 2015) (finding that housing people on death row in high-temperature cells without any “access to heat-relief measures, while knowing that *each suffers from medical conditions which render [them] vulnerable to heat-related injury*” violated the prohibition on cruel and unusual punishment) (emphasis added), *with* *Woods v. Edwards*, 51 F.3d 577, 582 (5th Cir. 1995) (finding no Eighth Amendment violation where plaintiff alleged that high temperatures aggravated his sinus conditions but failed to provide medical evidence).

¹¹³ *Cole v. Livingston*, No. 4:14-CV-1698, 2016 WL 3258345, at *1 (S.D. Tex. June 14, 2016).

¹¹⁴ *Id.*

¹¹⁵ *Cole v. Collier*, No. 4:14-CV-1698, 2017 WL 3049540, at *46 (S.D. Tex. July 19, 2017).

more susceptible to heat-related illnesses.¹¹⁶ In fact, the court certified a general class, as well as disability and heat-sensitive subclasses.¹¹⁷

Even when plaintiffs demonstrate that extreme temperatures violate the Eighth Amendment, the Prison Litigation Reform Act (PLRA) imposes limits on injunctive relief: injunctions must employ the least intrusive means available to remedy the violation.¹¹⁸ Accordingly, widespread injunctive relief can be hard to obtain in institutional reform litigation.¹¹⁹ In *Gates v. Cook*, several people on death row filed a lawsuit alleging that excessively high temperatures violated the Eighth Amendment.¹²⁰ The district court found that the Mississippi Delta experienced high average temperatures in the summer and death row was primarily not an air-conditioned facility.¹²¹ Moreover, “[t]he probability of heat-related illness is extreme on Death Row, and is dramatically more so for mentally ill inmates” who take medications that interfere with thermoregulation.¹²² The district court ordered the prison to provide Unit 32, which housed people on death row, with fans, ice water, and cold showers when the heat index reached or exceeded ninety degrees or during the months of May through September, finding that the provision of small fans was not enough.¹²³ The Fifth Circuit affirmed the injunction but restricted its application to Unit 32-C, where the plaintiffs were housed.¹²⁴

While extreme heat is one of the most commonly challenged conditions, courts have also recognized that freezing temperatures can violate the Eighth Amendment. In *Gaston v. Coughlin*, a man incarcerated at Auburn Correctional Facility in New York alleged that his conditions of confinement violated the Eighth Amendment because the broken windows on his cell block went unrepaired for the entire winter season, subjecting him to prolonged periods of subzero

¹¹⁶ *Livingston*, 2016 WL 3258345, at *1–2, *10.

¹¹⁷ *Id.* at *1.

¹¹⁸ 18 U.S.C. § 3626(a)(1)(A).

¹¹⁹ See Allison M. Freedman, *Rethinking the PLRA: The Resiliency of Injunctive Practice and Why It's Not Enough*, 32 STAN. L. & POL'Y REV. 317, 317 (2021) (“This Article demonstrates that despite advocates’ and judges’ best efforts to circumvent the Act’s limitations, the PLRA continues to hamper necessary prison reform.”).

¹²⁰ 376 F.3d 323, 327 (5d Cir. 2004).

¹²¹ *Id.* at 334.

¹²² *Id.*

¹²³ *Gates*, 376 F.3d at 327, 336.

¹²⁴ *Id.* at 339.

temperatures.¹²⁵ After the district court dismissed the claims on summary judgment, the Second Circuit reinstated the claims, finding that Eighth Amendment claims have been established where incarcerated people could prove they were subjected to prolonged periods of bitter cold.¹²⁶

These cases reveal that the confluence of poor prison infrastructure and extreme weather patterns exposes people in prison to substantial risks of harm and constitutional violations. As climate change intensifies, this reality is only likely to worsen.¹²⁷

B. *The Subjective Element: Deliberate Indifference*

The subjective element of the “deliberate indifference” standard arguably presents even greater evidentiary burdens for incarcerated people who challenge threats to their health and well-being on account of exposure to extreme weather conditions. In *Farmer v. Brennan*, the Supreme Court resolved a circuit split by defining the circumstances under which a prison official acts with “deliberate indifference” towards an incarcerated person’s safety.¹²⁸ The Court concluded that prison officials act with “deliberate indifference” when they disregard a risk that they are aware of or should have been aware of.¹²⁹ Justice Souter determined that “deliberate indifference” is akin to criminal recklessness, as it entails something “more than mere negligence,” but “something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.”¹³⁰

Nearly twenty years before *Farmer* was decided, Justice Stevens criticized the requirement of a culpable mental state to make a successful Eighth Amendment claim.¹³¹ Notably, he stated that constitutional violations “should turn on the character of the punishment rather than the motivation of the individual who inflicted

¹²⁵ 249 F.3d 156, 161 (2d Cir. 2001).

¹²⁶ *Id.* at 162.

¹²⁷ See Alleen Brown, *Trapped in the Floods*, THE INTERCEPT (Feb. 12, 2022, 9:18 AM), <https://theintercept.com/2022/02/12/prison-climate-crisis-flood/>; Wu & Felder, *supra* note 60, at 261–62.

¹²⁸ Lori A. Marschke, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U. L. REV. 487, 513 (2004).

¹²⁹ *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

¹³⁰ *Id.* at 835.

¹³¹ *Estelle v. Gamble*, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting).

it.”¹³² Whether prison conditions are the result of “design, negligence, or mere poverty” is irrelevant if they are cruel and inhumane.¹³³

Following *Farmer*, scholars have argued that the particularized requirement of subjective deliberate indifference by prison officials misperceives the nature of state-sanctioned punishment given that inadequate conditions of confinement are often the result of “legislative neglect rather than prison policy.”¹³⁴ As legal scholar Melvin Gutterman has argued, the transformation of the Eighth Amendment’s ban on cruel and unusual punishment “from a substantive limit on state-imposed punishment to a provision that basically polices the warden’s conduct” raises the concern that the needs of incarcerated people will be overlooked in the “meaningless search for ‘deliberate indifference.’”¹³⁵ Consequently, people in prison who bring “‘conditions-of-confinement’ [lawsuits] must be cautioned that they may be able to show an objectively horrific environment but not be able to prove the ‘state of mind’ requirement.”¹³⁶

C. *Whodunit? “Deliberate Indifference” in the Context of Climate Change*

There is ample scholarship examining the drawbacks of the “deliberate indifference” standard as a whole. One critique is that the standard places an unfair administrative burden on people in prison,¹³⁷ as they might not be able to articulate their perceived threat with

¹³² *Id.*

¹³³ *Id.* at 116–17.

¹³⁴ Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence*, 48 S. METHODIST U. L. REV. 373, 395 (1995).

¹³⁵ *Id.* at 396 (alteration in original).

¹³⁶ Jeffrey M. Lipman, *Eighth Amendment and Deliberate Indifference Standard for Prisoners: Eighth Circuit Outlook*, 31 CREIGHTON L. REV. 435, 452 (1998). This Article discusses the deliberate indifference standard in the context of “failure to protect” claims under the Eighth Amendment, but the author’s argument about the difficulty of articulating a threat in terms that are sufficient to charge prison officials with knowledge is also applicable to “conditions of confinement” claims. *Id.*

¹³⁷ See *id.*; Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1817 (2012) (“Determining an individual’s intent is difficult in any context, but the prison setting is especially challenging because it often implicates the practices and policies of the entire correctional system. In many cases, neither the policy’s initial enactment nor the actions of the prison staff required to follow the policy resulted from a specific intent to harm prisoners, which makes the intent analysis very challenging for jurists.”).

sufficient specificity to charge prison officials with knowledge.¹³⁸ Instead, they typically report perceived threats to their safety in general terms, a problem “compounded by the fact that there is little authority [that] requires a prison official to follow up on the ‘general’ or unspecific information, allowing for appropriate preventive steps.”¹³⁹ Other scholars have called for replacing the standard altogether because its failure to define what exactly constitutes a sufficiently serious condition invites inconsistent application and, therefore, discordant outcomes.¹⁴⁰

The already fraught deliberate indifference standard presents especially unique problems in the context of climate change-induced events, such as natural disasters. In *Brooks v. Gusman*, the plaintiff alleged that the untimely evacuation of the prison and the hazardous conditions he endured during Hurricane Katrina—cells flooded with sewage water and electrical outages that caused ventilation and air-conditioning systems to fail—amounted to an Eighth Amendment violation.¹⁴¹ When he was finally evacuated, he alleged that he was not given food, water, or medication for his asthma and high blood pressure for three days.¹⁴² The plaintiff contended that the sheriff and other prison staff left everyone in the prison to fend for themselves in life-threatening conditions despite being charged with their safety.¹⁴³ But the court rejected these claims, summarily holding that, “[g]iven the exigencies and unprecedented emergency circumstances surrounding Hurricane Katrina and its aftermath, the Court cannot agree that the actions of the defendants rise to the level of ‘deliberate indifference.’”¹⁴⁴

¹³⁸ Lipman, *supra* note 136, at 446.

¹³⁹ *Id.*

¹⁴⁰ *E.g.*, Glidden, *supra* note 137, at 1816 (“The Eight[h] Amendment conditions of confinement test is confusing, inconsistent, and ultimately lacks a sound theoretical basis, which prevents it from serving its intended purpose.”); Christopher E. Smith, *The Malleability of Constitutional Doctrine and Its Ironic Impact on Prisoners’ Rights*, 11 B.U. PUB. INT. L.J. 73, 81–87 (2001) (describing different Justices’ approaches to the Eighth Amendment conditions of confinement standard); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 475 (2005) (criticizing the Court’s interpretation of the Eighth Amendment’s Cruel and Unusual Punishment Clause).

¹⁴¹ *Brooks v. Gusman*, No. 06-5752, 2009 WL 511997, at *1–2 (E.D. La. Mar. 2, 2009).

¹⁴² *Id.* at *2.

¹⁴³ *Id.* at *1–2.

¹⁴⁴ *Id.* at *1.

There is an important takeaway implicit in the *Brooks* decision. At present, most prisons are not equipped to withstand the force of natural disasters,¹⁴⁵ so unless they opt to weatherize, most claims will probably lead to an undesirable outcome resemblant to *Brooks*. But, as a practical matter, the court's reasoning in *Brooks* can no longer stand—in light of empirical evidence that natural disasters are occurring with greater frequency, natural disasters in the future cannot be written off as “unprecedented.”¹⁴⁶ Accordingly, prisons that fail to weatherize should not be permitted to point to “lack of preparedness” as a valid excuse because they have fair warning of their obligations.

While courts have held that climate change-induced weather events can create conditions of confinement that pose a risk of harm,¹⁴⁷ relief is difficult to obtain where a plaintiff does not suffer from serious health conditions that render them more vulnerable, where the defendant has minimal decision-making authority over prison policy, or where the conditions of confinement are the result of “unprecedented” natural disasters. Even where plaintiffs *are* successful in alleging Eighth Amendment violations, the PLRA steps in to diminish the effects of relief by requiring courts to tailor injunctions narrowly to the person(s) seeking relief.¹⁴⁸ Of course, these claims remain consequential in the fight for better prison conditions. It is pivotal to bring these conditions to light to generate public awareness as well as the political incentive to tackle the crisis. But litigation alone is insufficient; in order to achieve meaningful reform and eradicate ongoing constitutional violations, Congress must assume a more active role and adopt comprehensive legislation that addresses the issue proactively.

¹⁴⁵ See generally Kelly, *supra* note 11 (discussing the inadequacies of prison infrastructure in the face of extreme heat, winter storms, and hurricanes); Jones, *supra* note 36 (indicating that some of the hottest states in the United States lack universal air-conditioning in prison); Hauptman, *supra* note 94 (explaining that the construction of prisons near rivers creates flood risks); Clarke, *supra* note 94 (detailing the ways in which hurricanes put incarcerated people at risk, including exposure to fatal conditions, loss of electricity, inadequate sanitation, and dwindling food and water supply).

¹⁴⁶ See Golembeski et al., *supra* note 15; *Indicators*, *supra* note 18; ALLAN ET AL., *supra* note 16, at 8–9, 15–16; PRISON TRENDS, *supra* note 23, at 5–6.

¹⁴⁷ See, e.g., *Gates v. Cook*, 376 F.3d 323, 339–40 (5th Cir. 2004); *Cole v. Livingston*, No. 4:14-CV-1698, 2016 WL 3258345, at *8 (S.D. Tex. June 14, 2016).

¹⁴⁸ See *Gates*, 376 F.3d at 329; 18 U.S.C. § 3626(a)(1)(A).

IV. CALLING CONGRESS TO ACTION

Considering that 91 percent of the nation's prison population is housed in local jails and state prisons,¹⁴⁹ it is critical that any legislation Congress enacts on the matter be applicable to the states. This Part first identifies Congress's constitutional authority to pass such legislation. It then argues that federal legislation is not only preferable but necessary. Indeed, a federal spending program that seeks to ensure safe conditions of confinement during extreme weather events is advantageous because it would reduce Congress's significant financial obligations and administrative burdens of providing assistance to the states. These benefits aside, a federal spending program is *necessary* because many states lack the financial incentive and political will to address these issues on their own—a grave injustice for people in prison who are disenfranchised and stripped of their right to elect representatives who could advocate for their needs. Finally, this Part recommends key measures for the proposed legislation and rebuts some of the anticipated counterarguments.

A. *Congress's Constitutional Authority to Legislate*

A threshold question is whether Congress has the constitutional authority to pass legislation that is not limited to the regulation of federal prisons. The federal government's direct interference with state criminal justice systems would likely raise a host of federalism concerns. But pursuant to its spending power,¹⁵⁰ Congress has broad authority to attach conditions of compliance with federal directives on the receipt of federal funds to further broad policy objectives, so long as the conditions comply with certain limits as set forth in *South Dakota*

¹⁴⁹ 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>.

¹⁵⁰ U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts[,] and Excises, to pay the Debts and provide for the common [Defense] and general Welfare of the United States . . ."). Congress might not be limited to the Spending Clause. Research suggests that Black and Brown incarcerated persons are at greater risk for environmental threats. See Adam Mahoney, *America's Biggest Jails Are Frontline Environmental Justice Communities*, GRIST (Apr. 15, 2021), <https://grist.org/equity/toxic-jails-environmental-justice-los-angeles-new-york-chicago>. If Congress can demonstrate that the impacts of climate change have racially discriminatory effects, it may be able to regulate pursuant to its Section 5 enforcement power under the Fourteenth Amendment. See U.S. CONST. amend. XIV, § 5.

v. Dole.¹⁵¹ First, the conditions imposed must serve the general welfare.¹⁵² Second, the conditions must make a clear, unambiguous statement of the funding conditions, such that the states are cognizant of the consequences of their participation.¹⁵³ Third, the conditions must bear some relation to the federal interest in the spending program.¹⁵⁴ Lastly, there must be no other constitutional provisions that serve as an independent bar to the grant of funds.¹⁵⁵

It is well established that the legislative purpose of safeguarding the Eighth Amendment rights of incarcerated people falls within the purview of Congress's pursuit of the general welfare.¹⁵⁶ What is more ambiguous, however, is whether Congress can devise a spending program with conditions that are sufficiently related to the interest of protecting the rights of incarcerated individuals and conserving federal resources. The legislation proposed herein would pass constitutional muster: by offering grants to encourage states to take action on their own or withholding funds allocated towards state corrections or disaster relief, the legislation incentivizes states to adopt measures that mitigate the effects of climate change on the prison population. Each year, Congress appropriates approximately \$2 billion "to fund [Department of Justice] [s]tate and local law

¹⁵¹ 483 U.S. 203, 207–08 (1987). When Congress exercises its spending power, it "generates legislation 'much in the nature of a contract: in return for federal funds, the state agrees to comply with federally imposed conditions.'" *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999).

¹⁵² *Dole*, 483 U.S. at 207.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 207–08.

¹⁵⁵ *Id.* at 208.

¹⁵⁶ Congress has already exercised its spending power in comparable situations to protect other constitutional rights of people in prison. A number of circuit courts have held that the Religious Land Use and Institutionalized Persons Act (RLUIPA) was a valid exercise of Congress's spending power. *See, e.g., Mayweathers v. Newland*, 314 F.3d 1062, 1066–67 (9th Cir. 2002) (holding that RLUIPA was a valid exercise of Congress' spending power); *Charles v. Verhagen*, 348 F.3d 601, 611 (7th Cir. 2003) (same). In *Charles*, the Seventh Circuit held that the RLUIPA passed muster under *Dole*. (1) protecting the constitutional right to religious freedom and promoting the rehabilitation of people in prison are purposes that fall within Congress's pursuit of the general welfare; (2) the legislation clearly and unambiguously conditioned the receipt of federal assistance upon a state's commitment not to impose burdens on incarcerated individuals' religious exercise (unless the burdens pass strict scrutiny); (3) Congress had an interest in allocating funds to facilities who do not infringe upon individual liberties; and (4) the RLUIPA did not violate other constitutional provisions. *Charles*, 348 F.3d at 607–08.

enforcement activities.”¹⁵⁷ Congress may withhold a portion of these funds from states for failure to comply with its proposed initiatives.¹⁵⁸ Alternatively, Congress may offer grants in the form of subsidies to induce state compliance, something it is already doing in both the criminal justice and climate change spheres.¹⁵⁹

¹⁵⁷ See *Oversight of the Department of Justice Grant Programs: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Sec., and Investigations of the H. Comm. on the Judiciary*, 115th Cong. 2 (2017), <https://www.govinfo.gov/content/pkg/CHRG-115hhrg27070/html/CHRG-115hhrg27070.htm>.

¹⁵⁸ If Congress opts to use its spending power to encourage states to adopt its regulatory scheme by withholding funds already allocated towards corrections spending, the amount withheld cannot comprise such a large percentage of the state’s total budget such that Congress’s conduct amounts to de facto commandeering. See *Dole*, 483 U.S. at 211. A spending condition is coercive and unconstitutional if it leaves the states with no real choice but to comply. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580–82 (2012) (“It is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota’s budget left that State with a ‘prerogative’ to reject Congress’s desired policy, ‘not merely in theory but in fact.’ The threatened loss of over 10 percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.” (citation omitted)).

¹⁵⁹ See *Byrne Criminal Justice Innovation (BCJI) Program*, BUREAU OF JUST. ASSISTANCE, <https://bjja.ojp.gov/program/byrne-criminal-justice-innovation-bcji-program/overview> (Mar. 9, 2023) (describing the BCJI model, which provides grants to engage in a wide range of crime prevention and intervention strategies to address conditions that contribute to crime in neighborhoods with hot spots of crime); *Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, BUREAU OF JUST. ASSISTANCE, <https://bjja.ojp.gov/program/jag/overview> (Sept. 1, 2023) (describing the JAG model, which provides funding to state and local jurisdictions for law enforcement, indigent defense, crime prevention and education, community corrections, mental health programs, etc.); Press Release, Fed. Emergency Mgmt. Agency, Biden-Harris Administration Announces More than \$3 Billion in Funding for Two FEMA Programs to Increase Climate Resilience Nationwide (Aug. 12, 2022), <https://www.fema.gov/press-release/20220812/biden-harris-administration-announces-more-3-billion-funding-two-fema> (describing the Building Resilient Infrastructure and Communities (BRIC) annual grant program, which funds projects that protect people and infrastructure from natural hazards and the effects of climate change, and the Flood Mitigation Assistance (FMA) program, which funds projects that mitigate flood risks facing homes and communities). Some of the major climate bills considered by Congress in 2009 and 2010 also conditioned the receipt of funds on compliance with federal directives. See, e.g., Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. § 383 (2009) (as introduced by Sen. Kerry, Sept. 30, 2009) (conditioning receipt of cost-share grants to assist in wildfire protection practices on compliance with requirements concerning cooperative fire agreements, community wildfire protection plan, etc.); American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. §§ 479–480 (2009) (as received by Senate, July 6, 2009) (conditioning funding from Natural Resources Climate Change Adaptation Fund on

B. *The Need for Federal Legislation*

Congress must confront how criminal justice might converge with climate justice—people in prison are increasingly put at risk as climate change worsens, but their safety is frequently swept under the rug or disregarded entirely. This Section argues that Congressional intervention is necessary, and even advantageous, for several reasons. Subsection 1 highlights the drawbacks of leaving the problem to the judicial system. Subsection 2 explains how Congressional intervention could have the net effect of alleviating administrative and financial burdens on the federal government. Subsection 3 explains why states have inadequate incentives or political will to protect prison populations on their own. Finally, Subsection 4 discusses the importance of protecting people in prison given that they are frequently stripped of their voting rights and the ability to advocate for their needs.

1. The Limits of Litigation

As demonstrated by the nuances of the case law discussed in Part III, “climate-change-related prison and jail conditions litigation is, in most geographic areas, unlikely to be an effective bulwark against the chronic, increasing risk of harm to prison and jail residents attributable to climate change.”¹⁶⁰ Eighth Amendment litigation can certainly play a role in improving conditions, particularly in prisons with the most deficient infrastructure, prisons in areas most vulnerable to climate disasters, and prisons in dire need of depopulation. But overreliance on Eighth Amendment litigation as a venue of relief is unlikely to bring about true systemic reform. Aside from the evidentiary challenges that the “deliberate indifference” standard presents, plaintiffs often face other insurmountable barriers in challenging their conditions through litigation.

“The PLRA is a unique statute that singles out imprisoned and detained individuals for substandard treatment under the law” by imposing additional requirements on plaintiffs who seek to challenge their conditions of confinement in court.¹⁶¹ For members of the prison population filing individual lawsuits, the PLRA requires filing fees for plaintiffs proceeding *in forma pauperis*, judicial screening and dismissal of frivolous complaints, and limits on damages for mental or emotional

state preparation of natural resources adaptation plan to address impacts of climate change).

¹⁶⁰ Wu & Felder, *supra* note 60, at 325.

¹⁶¹ *Id.* at 313 (footnote omitted).

injury without a showing of physical injury.¹⁶² In addition, the PLRA requires incarcerated people to exhaust all administrative remedies before turning to the courts,¹⁶³ which is perhaps the most significant barrier to relief. The exhaustion requirement limits the role of the federal courts by confining resolution of complaints to within the prison and, as a result, has contributed to a significant “decline in broad institutional reform litigation in favor of more precise and tailored conditions litigation.”¹⁶⁴ For incarcerated people seeking prospective relief, the PLRA requires courts to draw injunctions narrowly and utilize the least intrusive means necessary to correct the violation.¹⁶⁵ The limits on injunctive relief effectively prevent judges from remedying conditions that impact the entire prison population and from mandating necessary improvements to deficient prison infrastructure. Finally, the PLRA requires extensive and complex procedures for the release of incarcerated individuals.¹⁶⁶

Monetary damages and injunctions may afford relief to some people in prison, but remedial action is insufficient on its own.¹⁶⁷ All too often, complaints about prison conditions come “only after media attention or activism—and that results in quick fixes, instead of permanent change.”¹⁶⁸ In light of such limitations, combined with the anticipated increase in catastrophic weather events, Congress should *proactively* address the issue by incentivizing the states to take action through a federal spending program.

¹⁶² 42 U.S.C. § 1997e; Freedman, *supra* note 119, at 329.

¹⁶³ See Freedman, *supra* note 119, at 329.

¹⁶⁴ Reinert, *supra* note 109, at 1633 (noting a decline in institutional reform litigation since the passage of the PLRA because the Act limits the power of federal courts to enter remedial orders); see also Kiira J. Johal, *Judges Behind Bars: The Intrusiveness Requirement’s Restriction on the Implementation of Relief Under the Prison Litigation Reform Act*, 114 COLUM. L. REV. 715, 751 (2014) (arguing that the current state of American prisons warrants judicial flexibility in affording relief).

¹⁶⁵ 18 U.S.C. § 3626(a)(2).

¹⁶⁶ *Id.* § 3626(a)(3). The prison release process under the PLRA is discussed further in *infra* Part IV.C.

¹⁶⁷ See Roxanna Asgarian, *Why People Are Freezing in America’s Prisons*, VOX (Dec. 13, 2019, 9:20 AM), <https://www.vox.com/identities/2019/12/13/21012730/cold-prison-incarcerated-winter>.

¹⁶⁸ *Id.*

2. The Burden on the Federal Government

Congress should enact a federal spending program because it will have the net effect of reducing the financial and administrative burdens on the federal government. As a general matter, disaster preparedness is less costly than disaster relief.¹⁶⁹ While the benefit-cost ratio differs from state to state because of variances in mitigation dollars spent relative to actual disasters, all states save taxpayer dollars by preparing for disasters.¹⁷⁰ States typically assist local governments in paying for damage in the aftermath of a natural disaster, but as the scale of destruction worsens and costs increase, many states turn to the Federal Emergency Management Agency (FEMA) for direct federal assistance in the form of cost-sharing agreements, which permit states and localities to be partially or fully reimbursed for recovery-related expenditures.¹⁷¹ Sometimes, federal assistance is available even without a Presidential declaration of disaster, and sometimes, the federal government provides assistance even *before* a disaster occurs.¹⁷² FEMA has occasionally stepped in to provide funds expressly for the purpose of aiding prisons.¹⁷³

Recently, federal policymakers have expressed discontent with the current state of federal spending on disaster relief for the states, contending that states ought to have an increased role in preparing for

¹⁶⁹ See Daniel Cusick, *Some Disaster Prevention Spending Reaps Higher Rewards*, SCI. AM. (June 24, 2019), https://www.scientificamerican.com/article/some-disaster-prevention-spending-reaps-higher-rewards_

¹⁷⁰ *Id.*

¹⁷¹ PEW, HOW STATES PAY FOR NATURAL DISASTERS IN AN ERA OF RISING COSTS 2–3 (2020), <https://www.pewtrusts.org/-/media/assets/2020/05/how-states-pay-for-natural-disasters-in-an-era-of-rising-costs.pdf>; JARED T. BROWN & DANIEL J. RICHARDSON, FEMA’S PUBLIC ASSISTANCE GRANT PROGRAM: BACKGROUND AND CONSIDERATIONS FOR CONGRESS 8 (2015) (“[A]t the request of the governor . . . federal government agencies may be tasked with providing emergency work assistance whenever states, tribes, and local governments cannot provide the assistance themselves or through contract support.”).

¹⁷² FED. EMERGENCY MGMT. AGENCY, A CITIZEN’S GUIDE to DISASTER ASSISTANCE 3–6, 3–15, 3–28 (2003) [hereinafter CITIZEN’S GUIDE], <https://training.fema.gov/emiweb/downloads/is7complete.pdf>.

¹⁷³ See Press Release, Fed. Emergency Mgmt. Agency, FEMA Reimburses Department of Corrections \$6.4 Million for Hurricane Michael Expenses (Aug. 28, 2019), <https://www.fema.gov/press-release/20210318/fema-reimburses-department-corrections-64-million-hurricane-michael-expenses>; Julie O’Donoghue, *Louisiana Breaks Ground on New Women’s Prison*, LA. ILLUMINATOR (Sept. 1, 2022, 5:43 PM), <https://lailluminator.com/2022/09/01/louisiana-breaks-ground-on-new-womens-prison>.

and recovering from natural disasters.¹⁷⁴ At a FEMA National Advisory Council meeting in November 2019, “then-acting FEMA Administrator Peter Gaynor described current federal spending on natural disasters as ‘unsustainable.’”¹⁷⁵

Federal aid is not strictly limited to monetary relief. In the face of natural disasters, federal assistance also comes in the form of food commodity programs, housing assistance, medical care, and transportation, among other things.¹⁷⁶ The federal government bears too much responsibility in the preparation for and the aftermath of natural disasters. In light of predictions that extreme weather events will increase as global warming intensifies, Congress has a substantial interest in a spending program that reduces not only its financial obligations but also its administrative burden by inducing states to spearhead relief efforts on their own.

3. The Lack of State Incentives

Without congressional intervention, states have little to no incentive to take action on their own. Congress plays a major financial role in disaster relief, especially when the states are unable to handle costs and expenditures on their own.¹⁷⁷ As a result, states have no financial motive to invest in managing the climate crisis because they know they can rely on the federal government to bail them out.

Moreover, some states lack the political will to protect the prison population against the effects of climate change. For example, incarcerated individuals in Texas recently filed a lawsuit seeking air-conditioning in their facility, and the state spent over \$7 million on litigation to block their efforts, despite an estimated installation cost of only \$4 million dollars.¹⁷⁸ Although Texas recently approved a bill that would install air-conditioning in dozens of prisons within the next seven years, the state prison agency only has to abide by the measure if lawmakers set aside state or federal funds toward cooling costs.¹⁷⁹ Similarly, people on death row in Louisiana filed a lawsuit seeking lower temperatures in their cells, and the state spent more than \$1 million over the course of three years defending the action—roughly

¹⁷⁴ PEW, *supra* note 171, at 3.

¹⁷⁵ *Id.*

¹⁷⁶ See CITIZEN’S GUIDE, *supra* note 172, at 3-5.

¹⁷⁷ See discussion *supra* Part IV.B.2.

¹⁷⁸ *Texas Spent \$7 Million*, *supra* note 34.

¹⁷⁹ *Sweltering Temperatures Killed Texas Prisoners*, *supra* note 33.

the same amount it have would cost the state to install air-conditioning in the facility.¹⁸⁰

Clearly, costs are not the issue. The failure to act is more likely attributable to a lack of political will in states that either do not think climate change poses a real or substantial threat¹⁸¹ or simply wish to appear “tough on crime.”¹⁸² Federal legislation is thus necessary to set a standardized floor of protections. Thereafter, states are free to impose additional protections tailored to the needs of their locality—but they may not reduce their obligations to protect their incarcerated populations.

In fairness to the states, the federal government has also overlooked the prison population in climate justice reform.¹⁸³ President Biden’s Build Back Better Act, which addresses climate change generally, did not indicate that any funding would be used to improve prison infrastructure.¹⁸⁴ Despite receiving extensive criticism, complaints, and lawsuits after Hurricane Katrina, FEMA failed to offer any guidelines regarding emergency preparedness for correctional facilities, “demonstrating again that the underserved and underprivileged in society were largely cast aside and bereft of assistance when it was most needed for tending to severe” health conditions.¹⁸⁵ In 2018, Congress enacted the Disaster Reform Recovery Act (DRRA), which requires the implementation of FEMA procedures for evacuating special needs populations, including people in prison.¹⁸⁶ While this was a small step towards recognizing the

¹⁸⁰ Michael Kunzelman, *\$1 Million Spent to Avoid Cooling Death Row*, THE ASSOCIATED PRESS (June 13, 2016, 4:53 PM), <https://apnews.com/article/274b1f8c1fab498aabddb2a182ab4e86>.

¹⁸¹ See generally Michael Casey, *These States Are Least Concerned About Global Warming*, CBS NEWS (Apr. 6, 2015, 3:29 PM), <https://www.cbsnews.com/news/these-states-are-least-concerned-about-global-warming> (identifying the states that are least concerned about climate change).

¹⁸² Anita Mukherjee & Nicholas J. Sanders, *Hotter Temperaments: Prisons and Violence in a Warming World*, ECONOFACT (Nov. 10, 2021), <https://econofact.org/hotter-temperaments-prisons-and-violence-in-a-warming-world>.

¹⁸³ Kelly, *supra* note 98 (“[I]ncarcerated people have been largely left out of the conversations around ambitious climate justice proposals like the Green New Deal, which neglects to engage with decarceration, prison abolition, or demilitarization.”).

¹⁸⁴ *The Build Back Better Framework: President Biden’s Plan to Rebuild the Middle Class*, WHITE HOUSE, <https://www.whitehouse.gov/build-back-better> (last visited Sept. 29, 2023).

¹⁸⁵ Benevolenza & DeRigne, *supra* note 65, at 275.

¹⁸⁶ CONG. RSCH. SERV., THE DISASTER RECOVERY REFORM ACT OF 2018 (DRRA): A SUMMARY OF SELECTED STATUTORY PROVISIONS 5 (2019).

vulnerability of the prison population, it is rather underinclusive of the risks that climate change presents. Not all climate-related threats, such as heat waves or freezing temperatures, require evacuation. Moreover, evacuation is a temporary solution that fails to address the root of the problem or the long-lasting effects of natural disasters.

4. The Prisoner's Dilemma: The Want of Political Power

The absence of incentives for states to address climate issues facing prisons is augmented by the fact that people in prison are stripped of their right to vote while incarcerated, “impairing access to standard political channels to press for their communities’ interests.”¹⁸⁷ As of 2022, only two states, Maine and Vermont, allow people in prison to vote.¹⁸⁸ Furthermore, incarcerated individuals lack not only the political agency to drive change on their own but also the ability to build coalitions that could adequately represent their interests from outside the prison walls. Society has historically regarded people in prison as pariahs—outcasts undeserving of humane treatment and unworthy of legal protection.¹⁸⁹ Although lawmakers represent even their constituents in prison, in practice many do not recognize the needs and interests of this segment of the population—since incarcerated people cannot vote, their demands do not matter.¹⁹⁰

¹⁸⁷ Wu & Felder, *supra* note 60, at 262.

¹⁸⁸ CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS 3 (2022), <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights>.

¹⁸⁹ See JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 3–6 (2014) (detailing the history of “common sense” notions about prisoners and how they have resulted in a “crass disregard” for humane treatment); James Ridgeway, *American Outcasts: US Prisons and Modern Day Banishment*, THE INTERCEPT (Apr. 22, 2015, 6:26 AM), <https://theintercept.com/2015/04/22/banishment> (“[T]he impetus behind banishment—to permanently remove individuals from society, and subject them to a kind of ‘social death’—flourishes today in the American criminal justice system, where prisons and jails are the settings for a new kind of internal exile.”).

¹⁹⁰ See Dana Liebelson, *In Prison, and Fighting to Vote*, THE ATL. (Sept. 6, 2019), <https://www.theatlantic.com/politics/archive/2019/09/when-prisoners-demand-voting-rights/597190>.

C. *The Prison Climate Justice Act: Critical Components*

For the reasons discussed throughout Section B, Congress must intervene. Congress's spending program, which could be styled as the "Prison Climate Justice Act," should require, at a minimum, mandatory heating and cooling in prisons nationwide and mandatory evacuation plans. At present, the United States has no federal standards for temperature regulation¹⁹¹ and no uniform policy for protecting people in prison during emergencies.¹⁹² This Part outlines other key legislative proposals for the "Prison Climate Justice Act" that could mitigate the effects of climate change on the prison population—namely, decarceration, disaster readiness, and increased reporting requirements.

1. Reduce the Prison Population

One of the first tools Congress should employ when enacting comprehensive legislation is decarceration. Decarceration is a powerful proactive mechanism that can be used to mitigate the effects of climate change-induced weather events on the prison population on the front end. As of 2023, the United States detains approximately 1.9 million people.¹⁹³ Under normal circumstances, overcrowding substantially interferes with a prison's ability to provide for the needs of its population, an issue that is naturally magnified during extreme weather events.¹⁹⁴ Some proposed measures to reduce the prison population include, among other things, using noncustodial alternatives, diverting those convicted of minor or nonviolent offenses out of the criminal justice system, investing in long-term crime prevention strategies, and prioritizing the closure of prisons that require significant hazard mitigation measures.¹⁹⁵ By reducing the

¹⁹¹ Golembeski et al., *supra* note 15 ("Although the Bureau of Prisons has adopted operational *guidelines* for federal prisons of 76°F for cooling and 68°F for heating, there are no other national or federal temperature regulation standards or requirements." (emphasis added)).

¹⁹² See Njideka C. Motanya & Pamela Valera, *Climate Change and Its Impact on the Incarcerated Population: A Descriptive Review*, 31 SOC. WORK PUB. HEALTH 348, 354 (2016).

¹⁹³ See WENDY SAWYER & PETER WAGNER, PRISON POL'Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2023 (2023), <https://www.prisonpolicy.org/reports/pie2023.html>.

¹⁹⁴ NATURAL HAZARDS, *supra* note 24, at 14; *see also* Holt, *supra* note 30, at iv ("Bringing down inmate numbers would advance adaptation by reducing security problems, lowering population densities, easing pressures on correctional budgets, and making it possible to retire problematic facilities.").

¹⁹⁵ NATURAL HAZARDS, *supra* note 24, at 14.

physical prison population, decarceration guarantees that fewer people will be subjected to poor prison conditions. But decarceration would also free up funds that could be used towards making prisons safer—the Bureau of Justice estimates that the United States spends over \$80 billion each year to incarcerate, and some experts suggest this figure is a gross underestimate.¹⁹⁶

The Supreme Court has already acknowledged the dire effects of overcrowding in prison and has recognized the benefits decarceration has to offer in *Brown v. Plata*.¹⁹⁷ *Brown* involved two consolidated cases.¹⁹⁸ In the first case, *Coleman v. Wilson*, a class of incarcerated people with severe mental illnesses alleged that the state of California failed to provide them with adequate mental health care.¹⁹⁹ A subsequently appointed special master ascribed the deterioration of mental health care in California prisons to increased overcrowding.²⁰⁰ The district court ultimately found that the state’s “systemic failure to provide adequate mental health care” posed a risk of injury to thousands of prisoners.²⁰¹ In the second case, *Plata v. Brown*, California conceded that deficiencies in prison medical care violated the Eighth Amendment but subsequently failed to comply with a remedial injunction.²⁰² When both cases reached the Supreme Court, the Court noted that overcrowding “creates unsafe and unsanitary living conditions” that interfere with the effective delivery of care.²⁰³ As such, the Court granted the release of some incarcerated individuals to remedy Eighth Amendment violations.²⁰⁴

¹⁹⁶ Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, THE MARSHALL PROJECT (Dec. 17, 2019, 5:00 AM), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration>.

¹⁹⁷ See *Brown v. Plata*, 563 U.S. 493, 502 (2011).

¹⁹⁸ *Id.* at 506.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 507.

²⁰¹ *Coleman v. Wilson*, 912 F. Supp. 1282, 1315 (E.D. Cal. 1995).

²⁰² *Brown*, 563 U.S. at 507.

²⁰³ *Id.* at 519.

²⁰⁴ *Id.* at 502. The Court’s decision to reduce the prison population in *Plata* rested on the fact that the circumstances described met the requirements of the PLRA. *Id.* The prison release order process under the PLRA requires a three-judge panel to determine whether the order is necessary and narrowly tailored to address the constitutional violations arising from the issue. 18 U.S.C. § 3626(a)(2). Before a panel may be convened, however, the district court must enter an order for less intrusive relief that failed to remedy the constitutional violation after a reasonable allocation of time. *Id.* § 3626(a)(3)(A)(i)–(ii). Once convened, the panel must find by clear and

In 2020, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) enabled the Department of Justice to release over eleven thousand people from federal prisons and place them on home confinement.²⁰⁵ Out of these people, just *seventeen* subsequently committed new crimes—a 0.15 percent recidivism rate.²⁰⁶ This astoundingly low rate bespeaks a harsh yet hopeful truth—the American criminal justice system currently imprisons thousands of low-risk individuals who can and must be released to the community.²⁰⁷

2. Implement Disaster Readiness Strategies

Planning, prevention, and mitigation are critical to disaster risk reduction.²⁰⁸ The Penal Reform Institute, drawing from strategies adopted by justice ministries and prison administrations around the world, has made several recommendations for effective disaster-risk-reduction policies.²⁰⁹ First, prisons ought to conduct risk assessments that identify the specific threats they face and the measures they require to mitigate effects.²¹⁰ A proper risk assessment considers both the prison's location and its exposure to natural hazards, as well as the vulnerability of the prison infrastructure and population.²¹¹ Once the risk assessment phase is complete, prisons should take steps to reduce the impact of natural hazards.²¹² When designing or renovating a facility, authorities ought to consider factors including, but not limited

convincing evidence that overcrowding was the primary cause of the violation and determine that no other relief would remedy the violation such that the order is the least intrusive means necessary to correct the violation. *Id.* § 3626(a)(3)(E), (a)(1)(A). Some might argue that the PLRA's imposition of judicial limits on reduction of the prison population suggests that Congress would be reluctant to adopt legislation that proposes decarceration as a measure for preventing or mitigating harms caused by climate change-induced weather events. A better reading of the PLRA warrants the inference that Congress simply wished to limit the *federal judiciary's* ability to order the remedy. Concerns about judicially-mandated release orders are obviated if Congress is incentivizing states to decarcerate.

²⁰⁵ Molly Gill, *Thousands Were Released From Prison During Covid. The Results Are Shocking.*, THE WASH. POST (Sept. 29, 2022, 7:00 AM), <https://www.washingtonpost.com/opinions/2022/09/29/prison-release-covid-pandemic-incarceration>.

²⁰⁶ *Id.*

²⁰⁷ *See id.*

²⁰⁸ NATURAL HAZARDS, *supra* note 24, at 11.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *See id.* at 12.

²¹² *Id.* at 13.

to, ground water levels, climatic conditions affecting infrastructure, and expected seasonal weather changes.²¹³ Such assessments should be conducted periodically to ensure that facilities remain up to date with their particular needs.

In 2005, the National Institute of Corrections published *A Guide to Preparing for and Responding to Prison Emergencies*.²¹⁴ The guide contains a checklist of questions that correctional facilities should review in the event of an emergency or national disaster, including, among other things, whether there are adequate emergency generators, offsite evacuation plans, alternate housing, medical services, and stored supplies of food, water, blankets, and portable toilets.²¹⁵ But as proponents of legislation in this field have pointed out, the guidelines are simply guidelines—not enforceable laws.²¹⁶ Prison officials are not obligated to consider them, which is why it is important for Congress to statutorily mandate them.²¹⁷

3. Mandate Reporting Requirements for Greater Transparency

Given that prisons and jails are essentially “closed institutions holding an ever-growing disempowered population,”²¹⁸ there is a distinct possibility that Congress is not fully aware of the scope and extent of the problems occurring therein. As such, the transparency of prison operations is of vital importance to promoting awareness and ensuring accountability. In another prison conditions context, Congress adopted the Prison Rape Elimination Act (PREA) to “increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape”²¹⁹ by implementing a system

²¹³ *Id.* For a discussion of climatic considerations in prison construction and maintenance, see generally INT’L COMM. OF THE RED CROSS, *supra* note 89.

²¹⁴ JEFFREY A. SCHWARTZ & CYNTHIA BARRY, NAT’L. INST. OF CORRECTIONS, *A GUIDE TO PREPARING FOR AND RESPONDING TO PRISON EMERGENCIES* (2005).

²¹⁵ Maya Habash, *Locked Up in the Eye of the Storm: A Case for Heightened Legal Protections for Incarcerated People During Hurricanes*, 21 U. MD. J. RACE, RELIGION, GENDER & CLASS 156, 157–58 (2021).

²¹⁶ *Id.* at 157.

²¹⁷ *Id.*

²¹⁸ Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 139 (2008).

²¹⁹ 34 U.S.C. § 30302.

for reporting incidents of sexual assault in prison and improved methods of data collection, among other things.²²⁰

The standards promulgated by the PREA could readily be extended from sexual assault to other conditions of confinement and provide the framework for how Congress can encourage the states to investigate and report on their correctional facilities' climate infrastructure needs and extreme weather event-related deaths and injuries. Specifically, Congress should: (1) develop internal monitoring systems that encourage incarcerated people to report their complaints to prison staff, encourage prison staff to respond adequately, and require correctional facilities to collect accurate uniform data that permits improved self-analysis and monitoring; (2) supplement with external monitoring systems, as "even the most rigorous internal monitoring cannot replace the value of opening up correctional facilities to review by outsiders"; (3) require periodic audits; and (4) make data available to the public because "the public has a right and a responsibility to know what is going on in correctional institutions operated in its name" and because such transparency can increase community confidence in the steps that correctional institutions are taking to remedy poor conditions and can generate public support for the cause.²²¹

D. *Addressing the Counterarguments*

Some will inevitably question why Congress ought to prioritize the prison population when there are other vulnerable groups in need of protection during extreme weather events. This Comment by no means suggests that these other groups are undeserving of additional legislative protections. It does argue, however, that people in prison are uniquely defenseless against the effects of climate change as compared to members of the general population in two ways. First, people in prison have fewer choices. Several examples illustrate this proposition: Members of the general population can upgrade their homes to include air-conditioning or heating to adapt to the surrounding climate. People in prison, on the other hand, do not have the luxury of making such improvements to their prison cells. Members of the general population can relocate. To the contrary, as wards of the state, people in prison are confined to their cells. And in the event of impending natural disasters, members of the general

²²⁰ *Id.* § 30306.

²²¹ See Jamie Fellner, *Ensuring Progress: Accountability Standards Recommended by the National Prison Rape Elimination Commission*, 30 PACE L. REV. 1625, 1630–41 (2010).

population can stockpile emergency items or evacuate their premises. People in prison not only lack the autonomy to make these kinds of decisions but are also frequently left behind by authorities charged with their protection.²²² Second, unlike members of the general population, people in prison have no political power—they are barred from voting in most states and their status as outcasts hinders their ability to garner support for their cause on the outside. Thus, leaving the protection of their rights to the “political process” is a wholly inadequate solution.

States may object to the proposed federal spending program on the grounds that, based on the unique geographical landscape of their territory, they are not prone to certain extreme weather events. But no state is immune from the ravages of climate change. For example, in 2021, Texas—one of the *hottest* states in America—experienced a devastating winter storm that left thousands of incarcerated people starving and without heat for days.²²³ And Alaska, the country’s northernmost state, has warmed more than twice as fast as the rest of the country in the last sixty years.²²⁴ Other states may object on the grounds that they are not the worst offenders in terms of prison conditions or that they are already investing in measures to combat climate change. But the spending program proposed in this Comment would not operate as a direct regulation of the states. Rather, it preserves their integral role in our political system by providing them with the autonomy to *choose* whether to accept the federal government’s conditions.

V. CONCLUSION

The verdict is unambiguous: climate change is only going to worsen. As a result, extreme weather events are only going to become more frequent. Incarcerated people across the United States have a constitutional right to safe and healthy conditions of confinement. As members of one of the most vulnerable cohorts of society, people in prison are uniquely susceptible to the dangers presented by climate change-induced weather events. Their constitutional rights are currently at stake because of the significant limits to obtaining relief through litigation, the absence of political incentives to prioritize their

²²² See ABANDONED and ABUSED, *supra* note 13, at 9.

²²³ Stephens, *supra* note 11.

²²⁴ *How Climate Change Has Affected Each State*, CHI. TRIB. (Oct. 22, 2021, 4:25 PM), <https://www.chicagotribune.com/weather/weather-news/sns-stacker-climate-change-affecting-each-state-20211022-rwpa3fwtc5aydjle42utxfu3ge-photogallery.html>.

safety, and their inability to advocate for their own needs. In light of this bleak reality, Congress must enact comprehensive legislation if it hopes to extirpate the ongoing constitutional violations of their rights.

