Fordham Urban Law Journal

Volume 49
Number 2 *The Calm before the Storm: The Connection between Mass Incarceration and Climate Change*

Article 1

2022

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

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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

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[*] Deputy Director of Impact Litigation, Mississippi Center for Justice; former Legal Director, ACLU of Mississippi. Thanks to Margo Schlager of the University of Michigan's Civil Rights Litigation Clearinghouse for feedback about data and case analysis approaches; to Cliff Johnson, co-counsel and friend, for identifying ways to make the Article more useful to practitioners; to our clients in COVID-19 conditions litigation, including Erik Lewis, Brittany Waddell, Jamarcus Davis, Daniel Hatten, and Roger Ewing, for insights and terminology used in this Article; to Rukia Lumumba for sharing expertise; to Rob McDuff at MCJ; to Lauren Foley for edits; and to Matt Kutcher for review of statistical language. For Jane Kahn, former *Coleman v. Brown* counsel and mentor, for the light she brought to the fight; a prison law fellowship fund honors her legacy. *See Contributing to the Jane Kahn Prison Law Fellowship Fund at UCLA Law*, ROSEN BIEN GALVAN & GRUNFELD LLP (Apr. 5, 2019), https://rbgg.com/contributing-to-the-jane-kahn-prison-law-fellowship-fund-at-ucla-law/.

[**] UCLA Law Class of 2023 & UCLA Department of African American Studies, M.A. 2023. Thank you to my co-author Paloma Wu, along with Rob McDuff and the Mississippi Center for Justice. Thank you to Dr. Kelly-Lytle Hernandez, Dr. Danielle Dupuy and the entire Million Dollar Hoods team, Professor Sharon Dolovich, and the UCLA Prison Law and Policy Program. Thank you to my family and friends for their continued love and support. Lastly, thank you to all those people directly impacted by the criminal punishment system that I've had the privilege of learning from and working alongside.

INTRODUCTION

This Article proposes that COVID-19 prison and jail conditions litigation provide insights into how federal courts may analyze future climate-related prison and jail litigation. The global COVID-19 pandemic and the exogenous threats associated with global climate change differ in critical ways. However, both pose grave public health hazards to people worldwide yet pose a greater risk of serious harm to prison and jail residents because they are confined without the physical ability to mitigate on their own or at all. Plaintiffs in both suit types will bring the same claims and types of actions to enforce their right to be free from illegal conditions of confinement or disability-based discrimination. Both will seek preliminary relief. To prevail, both will need to overcome the same thorny jurisdictional and remedial barriers imposed by the Prison Litigation Reform Act (PLRA) or habeas statutes. Observations about outcomes in COVID-19 prison and jail conditions litigation — when considered together with geographic projections of future climate change-related harm that predict the U.S. South will be hardest hit — suggest that prison and jail residents living in the Fifth and Eleventh Federal Circuit Courts of Appeals, who are disproportionately Black Americans, may be particularly disadvantaged when seeking preliminary relief from life-threatening climate-related crises.

The Article first discusses three ways that climate change can harm prison and jail residents, and by extension their home communities, with uniquely adverse impacts in the U.S. South. The Article then provides an analysis of the structure, claims, and relative success of a group of 70 COVID-19 prison and jail conditions cases, filed in 2020 and 2021, seeking preliminary or emergency injunctive relief or release on behalf of multiple persons. The Article concludes that prison and jail residents in most parts of the country will have difficulty using the courts to obtain preliminary relief to prevent climate-related injuries and harms, and that Black Americans in custody in the U.S. South — particularly in states within the Fifth and Eleventh Circuits — are overrepresented within an underprotected population that is uniquely at risk of climate-related harm.

I. THREE WAYS THAT CLIMATE CHANGE CAN HARM PRISON AND JAIL RESIDENTS AND, BY EXTENSION, HOME COMMUNITIES

Millions of prison and jail residents[1] in the United States are living through an era of record-breaking heatwaves, increasingly destructive

1. This Article uses, among others, the term "prison resident" to refer to individuals who are incarcerated; the term "incarcerated community" to refer to people who reside in the same prison or jail facility at the same time; and the term "home community" to refer to

floods, more frequent and deadlier storms, deeper freezes, and dangerous weather-related infrastructure failures. However, individual prison and jail residents and imprisoned communities are prohibited from engaging in climate-adaptive behavior while warehoused in locked facilities, so they are uniquely vulnerable to climate change-related harms.[2] For example, prison residents cannot prepare for the increased likelihood of episodic resource scarcity or extreme weather conditions by taking basic steps to reduce harm, like planning ahead or getting out of harm's way. They cannot collect and keep emergency supplies or work towards achieving a higher degree of self-sufficiency for meeting their own or their loved ones' basic needs. They cannot plan collectively at the community level to develop mutual aid-sharing plans. Prison facilities are run by prison officials who do not live alongside them and are not accountable to them. Many residents have been stripped of the right to vote while in prison, impairing access to standard political channels to press for their communities' interests at a political level.

Prison and jail residents are thus prevented from protecting themselves and each other from potentially harmful impacts of climate change, and forced to rely on institutional personnel, structures, and practices that are largely outside of their control. This Article discusses three reasons why: (1) chronic understaffing will worsen in the face of climate-driven occupational hazards and economic pressures; (2) dangerously deteriorating and under-maintained facilities are becoming more deadly; and (3) racial disparities in incarcerated populations are increasing.

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the communities where prison residents lived prior to incarceration, to which they will likely return post-release. Referring to people by their temporary custodial status, i.e., prisoner, inmate, detainee, offender, could obscure one of the aims of this Article — to discuss how prison conditions impact people after their imprisonment, and how they impact people who were never imprisoned, including families and communities who may struggle with a loved ones' trauma, illness, or death related to conditions of confinement during or after a period of incarceration.

2. Imprisoning individuals creates a manufactured relationship of complete resource dependency between individuals and the state, such that people cannot protect themselves in the most fundamental of ways. *See, e.g.*, Georgina Rannard, *Hurricane Florence: Prisons in Hurricane's Path Not Evacuated*, BBC NEWS (Sept. 13, 2018), https://www.bbc.com/news/world-us-canada-45509303 [https://perma.cc/4VLG-SVCN]; 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-katrina-was-a-nightmare-for-inmates-in-new-orleans-829 [https://perma.cc/9FBR-8ZBM] (describing the night Hurricane Katrina hit the Orleans Parish Jail with over 1,000 detainees trapped inside: first the jail's generators failed, then all the lights went out, the under-ventilated jail became stifling, and the storm hit, sounding to a guard "like the building was gonna come down").

These harms will have wide-ranging impacts, beyond prison walls, in urban and rural communities alike.[3] The United States has the highest incarceration rate in the world and is home to the highest number of incarcerated individuals on the planet.[4] Many prison residents have family at home who need them. The overwhelming majority will return to their home communities from prison, and the conditions they experience inside prisons will shape who they can be for those they come home to.[5] When prison residents are injured, disabled, traumatized,[6] or die as a result of

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3. *See, e.g.*, Jerry Mitchell, *Inside the Prison Where Inmates Set Each Other on Fire and Gangs Have More Power than Guards*, PROPUBLICA (Aug. 19, 2019, 1:00 PM), https://www.propublica.org/article/leakesville-south-mississippi-correctional-institution-prison-gangs [https://perma.cc/MYU7-FAGS] (proving that prison officials must use lockdowns to maintain order due to inadequate staffing, but that extended lockdowns "create 'an unsafe environment for . . . staff'"); Sonya R. Porter, Johhn L. Voorheis & William Sabol, *Correctional Facility and Inmate Locations: Urban and Rural Status Patterns* 9–11 (U.S. Census Bureau Ctr. For Admin. Recs. Rsch. And Applications, Working Paper 2017-08, 2017), https://www.census.gov/content/dam/Census/library/working-papers/2017/adrm/carra-wp-2017-08.pdf [https://perma.cc/2E4S-HVGJ] (discussing their definitions and data analysis approach to interpreting Census Bureau data that the authors interpret as showing (1) that 87 percent of prison residents lived in urban zip codes prior to incarceration; (2) that about 50 percent of prison residents who lived in urban areas prior to incarceration were incarcerated in a prison in a rural area; and (3) a majority of state prisons and prisoners, which house the largest number of prisoners, are located in rural areas).

4. *United States Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/US.html [https://perma.cc/JU7H-Z6ZJ] (last visited Sept. 9, 2021) ("With over two million people behind bars at any given time, the United States has the highest incarceration rate of any country in the world.").

5. In the United States, as of this writing, incarceration is more than twenty-fold more common than hospitalization for COVID-19; this comparison (of incidence proportion to incidence proportion) may help illustrate for readers whose friends and family have not been disproportionately targeted for incarceration due to race or class the ubiquitous nature of incarceration in the United States. *Compare* TODD D. MINTON, LAUREN G. BEATTY & ZHEN ZENG, BUREAU JUST. STAT., NCJ 300655, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2019-STATISTICAL TABLES 1 (2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cpus19st.pdf [https://perma.cc/7QQ2-XN5T] (showing that the most recent, and lowest since 1991, U.S. incarceration rate is 2,480 per 100,000 of adults under correctional supervision), *with Rates of COVID-19-Associated Hospitalization, Preliminary Weekly Rates as of Jan 08, 2022*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://gis.cdc.gov/grasp/covidnet/covid19_3.html [https://perma.cc/SG4B-LY74] (last visted Jan. 18, 2022) (showing that the peak weekly hospitalization rate for the week ending on January 9, 2022, was 111.8 per 100,000 people across the United States).

6. For people living every day for years inside violent facilities lacking core operational capabilities, sometimes in conditions amounting to solitary confinement, the psychological impacts can last a lifetime. *See, e.g.*, Meghan A. Novisky & Robert L. Peralta, *"Gladiator School: Returning Citizens' Experiences with Secondary Violence Exposure in Prison,"* 15 VICTIMS & OFFENDERS 1, 18 (2020) (finding that exposure to prison violence undermines rehabilitation, reentry, and lifetime mental and physical health of the incarcerated). Prison conditions-related trauma can compromise a reentering citizen's ability

exposure to climate-related impacts, it exacerbates the already overwhelmingly negative intergenerational impacts of incarceration in their homes and communities.[7]

A. Understaffing

Understaffing is a root cause of many unconstitutional conditions in prisons.[8] Climate change will make it even harder than it is now to fully

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to take care of themselves and loved ones and to learn, work, and thrive. *See, e.g.*, Johanna E. Elumn Madera, The Cumulative Impact of Trauma Exposure and Recidivism After Incarceration Among Black Men (Sept. 2016) (Ph.D. dissertation, City University of New York), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=2588&context=gc_etds [https://perma.cc/DL7R-HPMA] (finding that the symptoms associated with trauma exposure that many formerly incarcerated people have when returning from prison can interfere with their ability to "reconnect with family, interact with parole/probation, stay free from drugs/alcohol, or find and maintain stable housing and employment"). In this way, unconstitutional conditions in U.S. prisons have had intergenerational impacts, including of persistent poverty and vicarious trauma. *See, e.g.*, Ram Sundaresh et al., *Exposure to Family Member Incarceration and Adult Well-Being in the United States*, JAMA NETWORK (May 28, 2021), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2780438 [https://perma.cc/4F67-CFGD] (concluding that having one or more family members in prison is associated with disproportionately lower household income, higher rates of drug or alcohol addiction, and shorter average life expectancy for family members in the community).

7. *See, e.g.*, Manudeep Bhuller et al., *Intergenerational Effects of Incarceration* 1–12 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24227, 2018), https://www.nber.org/papers/w24227 [https://perma.cc/UZ89-M6PY] (documenting that the impact of parental incarceration can spillover into the lives of children, creating emotional trauma, increasing social stigma and alienation, and imposing financial hardships on the family). Harms of trauma, injury, disability, or death to prison residents, who number in the millions in the United States, accrue to the families and home communities to which prison residents are tied and to which they will return. The absence of prison residents in families and home communities is ubiquitous, and harm to prison residents is replicated through those ties: a child without a parent to provide day-to-day connection and support; a family making do with much less; a workplace or church without the absent individual's wisdom, inventiveness, or knowhow for solving particular problems; the loss of kinship and mentorship ties. *See, e.g.*, Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT'L INST. JUST. J. (Mar. 2017), https://www.ojp.gov/pdffiles1/nij/250349.pdf [https://perma.cc/ZG5X-WGGU] (documenting that children who have parents or caregivers who are incarcerated poses threats to children's emotional, physical, educational and financial well-being and places children at higher risk for criminal involvement, psychological problems and antisocial behavior, difficulties with educational attainment, economic well-being, and maintaining familial connections and relationships).

8. In April 2019, the U.S. Department of Justice's Civil Rights Division issued a report in which it cited the Alabama Department of Corrections (ADOC) for "egregious" and "dangerous" systemwide understaffing that contributed to likely violations of the Eighth Amendment rights of Alabama prisoners. *See* U.S. DEP'T OF JUST., INVESTIGATION OF ALABAMA'S STATE PRISONS FOR MEN 9–10 (2019) [hereinafter ALABAMA'S STATE PRISONS INVESTIGATION], https://www.justice.gov/crt/case-document/file/1149971/download [https://perma.cc/8HT4-VZZF].

staff prisons if projections are accurate regarding shrinking state and local economies. Cash-strapped state governments do not typically increase corrections staff salaries or invest in improving prison conditions to make them safer workplaces, which are the two greatest barriers to successful staff hiring and retention.[9] Many corrections staff positions are dangerous with low pay,[10] sometimes below the federal poverty line,[11] and many are filled by people who are statistically vulnerable to climate-related labor market dislocations.[12] If climate change makes staffing prisons harder than it already is — and in some of the United States's most dangerous prisons, 50% staff vacancy rates are not uncommon — prison residents will suffer harm.[13]

Prison understaffing causes systems-level breakdowns of core facility operations.[14] These operations include delivery of medical and mental

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9. *See* Mary Ellen Klas, *Florida Prisons Can't Go on Like This, New Chief Says*, TAMPA BAY TIMES (Dec. 1, 2019), https://www.tampabay.com/florida-politics/buzz/2019/12/01/florida-prisons-cant-go-on-like-this-new-chief-says/ [https://perma.cc/NBP4-DSWX] (explaining that for eight years, since 2011, the Florida Legislature has been extracting money from the prison system and shifted staff from an eight-hour shift to a 12-hour shift which resulted in an 150% increase in officer turnover).

10. *See* Joseph Neff & Alysia Santo, *What Happened When No One Wanted Dangerous, Low-Paying Guard Jobs? Wilkinson County Prison Put Gangs in Charge*, MISS. TODAY (June 26, 2019), https://mississippitoday.org/2019/06/26/what-happened-when-no-one-wanted-dangerous-low-paying-guard-jobs-wilkinson-county-prison-put-gangs-in-charge/ [https://perma.cc/C5V8-D3G3].

11. *See, e.g.*, Annual Update of the HHS Poverty Guidelines, 84 Fed. Reg. 1167–68 (Feb. 1, 2019) (providing the federal poverty line for a family of four, which is higher than the $24,900 entry level salary of a Mississippi correctional officer); *Occupational Employment and Wages, May 2020*, U.S. BUREAU LAB. STAT., https://www.bls.gov/oes/current/oes333012.htm [https://perma.cc/H4SJ-JP36] (last visited Mar. 31, 2021); *Low Pay Contributes to Staffing Problems at Mississippi Prisons*, WLOX (Aug. 22, 2019, 9:47 PM), https://www.wlox.com/2019/08/23/low-pay-contributes-staffing-problems-mississippi-prisons/ [https://perma.cc/MCD3-2TNB].

12. *See, e.g.*, ANTHONY LEISEROWITZ & KAREN AKERLOF, YALE PROJECT ON CLIMATE CHANGE, RACE, ETHNICITY AND PUBLIC RESPONSES TO CLIMATE CHANGE 4 (2010), https://climatecommunication.yale.edu/wp-content/uploads/2016/02/2010_04_Race-Ethnicity-and-Public-Responses-to-Climate-Change.pdf [https://perma.cc/6HAS-3FL6].

13. *See, e.g.*, Jerry Mitchell, *Violent, Ongoing Hell: Mississippi Prisons May Be Worse than Alabama's. Will DOJ Step In?*, CLARION LEDGER (Aug. 21, 2019, 8:11 AM), https://www.clarionledger.com/story/news/2019/08/21/mississippi-prisons-conditions-worse-than-alabama-doj-violence-cruel-unusual-punishment/2055478001/ [https://perma.cc/XD5C-V3VP]; *SMCI Staffing Crisis Prompts Lockdown and Visitation Cancellation*, MISS. DEP'T CORR. (Jan. 25, 2019), https://www.mdoc.ms.gov/Pages/SMCI-Staffing-Crisis-Prompts-Lockdown-and-Visitation-Cancellation-.aspx [https://perma.cc/86ME-G46A].

14. *See, e.g.*, Expert Report of Eldon Vail at 4, Dockery v. Hall, No. 3:13-cv-326, ECF No. 801-1 (S.D. Miss. Nov. 16, 2018). Eldon Vail, the former commissioner of the Washington Department of Corrections, analyzed a Mississippi prison's staffing patterns and testified about how systemic understaffing created dangerous and unconstitutional conditions. *See id.*

healthcare, provision of food and water, execution of suicide prevention protocols, and monitoring and intervention as required for resident safety and facility security. If there are not enough staff to open and close doors, watch and call for help, or escort providers or residents to appointments, a cascade of basic needs goes unmet: ambulances do not get called, medical and psychiatric appointments are missed, medication and meals are skipped, and fires burn unchecked.[15]

Understaffing also causes increased violence and prolonged lockdowns, which makes entire prisons function like long-term segregation and solitary confinement units. Extended lockdowns due to understaffing may violate the federal rights of people in prison, particularly when restrictions and deprivations amount to conditions of long-term segregation or solitary confinement.[16] Subjecting people in prison to prolonged periods of de jure or de facto solitary confinement creates a known and substantial risk of serious psychological harm that courts have recognized as constitutionally cognizable, finding that conditions of solitary confinement can violate the Eighth Amendment's prohibition of cruel and unusual punishment.[17]

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15. *See, e.g.*, Jerry Mitchell, *Ticking Time Bomb: Violence Surges Among Guard Shortage, Lockdown at Mississippi Prison*, USA TODAY (Aug. 20, 2019, 8:34 PM), https://www.usatoday.com/story/news/investigations/2019/08/19/prison-violence-surges-mississippi-prison-amid-guard-shortage/2054554001/ [https://perma.cc/K7EN-MFDT]; *SMCI Staffing Crisis Prompts Lockdown and Visitation Cancellation*, *supra* note 13 (providing that near-capacity prison populations and extreme staff vacancy rates had created a "staffing crisis," which threatened a "pressure cooker type situation" in Mississippi Department of Corrections's three state-run prisons (quoting the former Commissioner of the Mississippi Department of Corrections)).

16. *See, e.g.*, Turley v. Rednour, 729 F.3d 645, 652 (7th Cir. 2013) (alleging prisoner residents stated an Eighth Amendment claim involving "a pattern of prison-wide lockdowns, which . . . occurred for flimsy reasons or no reason at all").

17. *See, e.g.*, Sandin v. Conner, 515 U.S. 472, 484 (1995) (liberty interest may exist where regulations provide for "freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" (citations omitted)); Palokovic v. Wetzel, 854 F.3d 209, 226 (3d Cir. 2017); Wilkerson v. Goodwin, 774 F.3d 845, 848–49 (5th Cir. 2014) (liberty interest implicated by extended placement in solitary confinement for 23 hours per day without full exercise privileges or human contact); Lopez v. Smith, 203 F.3d 1122, 1133 (9th Cir. 2000) (six-and-a-half-week denial of outdoor recreation could constitute Eighth Amendment violation); Porter v. Clarke, 290 F. Supp. 3d 518, 529, 532 (E.D. Va. 2018) (citing "rapidly evolving information available about the potential harmful effects of solitary confinement" in holding Virginia Department of Corrections' practices unconstitutional); Order at 299, Braggs v. Dunn, No. 2:14CV601-MHT(WO) (M.D. Ala. June 27, 2017) (regarding Alabama Department of Corrections' solitary confinement practices regarding mentally ill prisoners violate the Eighth Amendment); Ind. Protection & Advoc. Servs. Comm'n v. Comm'r, No. 1:08-CV-01317, 2012 WL 6738517 (S.D. Ind. Dec. 31, 2012); Norwood v. Woodford, 661 F. Supp. 2d 1148, 1155–56 (S.D. Cal. 2009) (five-week denial of outdoor recreation could constitute Eighth Amendment violation); Jones 'El v. Berge, 164 F. Supp. 2d 1096, 1122–23 (W.D. Wis. 2001).

For prison residents who experience trauma as a result of exposure to chronic violence and isolation, the effects on them and their home communities will extend across both urban and rural spaces as a disproportionate share of U.S. prison residents are from urban areas and a disproportionate share of prisons and prisoners are located in rural areas.[18]

B. Deadlier Facilities

Prisons are already prone to flooding, vulnerable to fire, and capable of staying hot, cold, or wet enough to cause residents harm. Facility-related hazards caused by climate-related stress will become more dangerous and disruptive as the frequency and amplitude of extreme weather increase.[19] These dangers include failures at the physical plant level, such as brown-outs,[20] black-outs, and burst water pipes or gas lines; increased incidents of death, injury, or illness caused by exposure; and institutional unrest or interpersonal violence triggered by the pain and stress of living in environmentally dangerous conditions.[21]

As the climate changes, "food and water supplies will be put at risk" and "[p]eak energy use during heat waves will likely cause more frequent brownouts and blackouts."[22] We will likely see increasingly powerful

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18. *See* Porter et al., *supra* note 3. The harms referenced may present as persistent injury, work-prohibitive disability, or loss of invaluable familial or intergenerational relationships and supportive resources.

19. *See, e.g.*, U.S. DEP'T OF JUST., U.S. DEPARTMENT OF JUSTICE CLIMATE CHANGE ADAPTATION PLAN 2-1, 2-2 (2014), https://www.cakex.org/sites/default/files/documents/doj-climate-change-adaptation-plan.pdf [https://perma.cc/3AQ9-29RM] (determining that the highest-risk areas were "buildings, utilities infrastructure . . . , and personnel" (emphasis removed)).

20. *See Brownout*, MERRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/brownout [https://perma.cc/BQQ6-GRKJ] (last visited Jan. 8, 2022) (providing that a brown-out is "a period of reduced voltage of electricity caused especially by high demand and resulting in reduced illumination" in or restriction in the availability of electrical power in a particular area).

21. *See, e.g.*, U.S. DEP'T OF JUST., *supra* note 19, at 2-6, B-3 (providing that the Bureau of Prisons must "ensure that prisons continue to function in the case of energy disruption, heat waves, drought, or coastal storm impacts," and plan for "[d]isruption of operations resulting from potential unrest (and increased violence) among populations affected by severe weather, extreme heat, and drought" (emphasis removed)).

22. DANIEL W. E. HOLT, SABIN CTR. FOR CLIMATE CHANGE L., COLUMBIA L. SCH., HEAT IN US PRISONS AND JAILS: CORRECTIONS AND THE CHALLENGE OF CLIMATE CHANGE 6 (2015), https://web.law.columbia.edu/sites/default/files/microsites/climate-change/holt_-_heat_in_us_prisons_and_jails.pdf [https://perma.cc/VU4S-64AQ] ("As temperatures rise and the climate changes, food and water supplies will be put at risk. Peak energy use during heat waves will likely cause more frequent brownouts and blackouts. Buildings, paved surfaces, and mechanical systems are all vulnerable to damage from high heat. And these and other impacts will be compounded by other effects of climate change, such as flooding.").

hurricanes, rising sea levels, and floods that will compromise electrical infrastructure. The effects of climate change can have dangerous health consequences, from extreme heat that causes heat stroke and heat-related illness and death, to extreme cold that causes hypothermia and death, and to wildfires that create the risk of severe smoke inhalation for prison and jail residents and staff.[23]

Some extreme environmental prison conditions already seasonally cause injury or death; some have been held to be cruel and unusual punishment in violation of the constitutional rights of residents. Below are a few examples of dangerous facility conditions that are created or exacerbated by climate-change-related conditions and a brief discussion of likely longer-term consequences to prison residents and their home communities.

Flooding. During Hurricane Katrina in 2005, the Orleans Parish Prison was flooded with hundreds of detained individuals trapped inside.[24] People were locked inside cells as they flooded, jail staff fled, and people locked within spent days without food, water, or power — some were trapped up to their chests or necks in sewage-contaminated water.[25] The jail had a contingency plan — that their backup generators could remain operational — but some of the generators failed because they were not physically placed above the 100-year flood levels. The entire jail went dark during and after the hurricane.[26] The flooding destroyed the jail's electrical systems.[27] Other generators failed due to staff's inability to operate them or because fuel ran out.[28] The lack of power made it impossible to open

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23. *See generally id.*

24. *See Prison Conditions and Prisoner Abuse After Katrina*, ACLU, https://www.aclu.org/other/prison-conditions-and-prisoner-abuse-after-katrina [https://perma.cc/4GWY-J8YM] (last visited Nov. 5, 2021).

25. *See, e.g.*, NAT'L PRISON PROJECT, ACLU, ABANDONED & ABUSED: ORLEANS PARISH PRISONERS IN THE WAKE OF HURRICANE KATRINA 17 (2006), https://www.aclu.org/sites/default/files/field_document/oppreport20060809.pdf [https://perma.cc/77DR-MQ9M].

26. In the days prior to Hurricane Katrina, the sheriff of the Orleans Parish Prison (OPP) refused to evacuate the jail residents, despite that New Orleans' mayor declared a mandatory city-wide evacuation. Notably, as the hurricane approached, OPP continued to accept new detainees, including children under 18 years of age (juvenile detainees), into the jail during this time from other facilities. When the storm hit and floodwaters entered the facility, many sheriff's deputies fled their posts leaving people locked inside cells, with no means of getting out or of getting help — some trapped for days without food, clean water, or ventilation, some in cells where floodwaters reached chest height. Days passed before the jail was evacuated by order of the state, and the rescued residents were transferred to other facilities across the state of Louisiana. At the time, OPP sheriff's deputies were not aware of any evacuation plan and had no training in how to respond to an emergency. *See id.* at 26.

27. *See id.* at 24.

28. *See id.* at 26.

certain cell doors and, in several jail buildings, detained individuals were left trapped in flooded cells without ventilation.[29]

Extreme Temperatures and Fire. In 2021, the winter's deep freeze damaged lines conveying water, gas, and electricity to prisons in Mississippi.[30] In 2020, the state of Oregon ordered a delayed and crash evacuation of Coffee Creek Correctional Facility while wildfires raged.[31] For decades, long before the extreme temperatures associated with climate change were common, people imprisoned in extremely hot facilities or restrainted in hot prison yards without the ability to cool down were bringing and winning cases alleging that such conditions amount to cruel and unusual punishment.[32] More than a dozen individuals in Texas prisons have recently died of heat stroke and as many individuals have brought excessive heat suits.[33] Louisianans in prison have long litigated heat cases.[34] In Mississippi, plaintiff prison residents successfully challenged the constitutionality of the excessive heat in the now-closed death row unit at Mississippi State Penitentiary at Parchman.[35] The Fifth Circuit found that the heat, humidity, and the presence of mosquitos in cells during the Mississippi summers constituted cruel and unusual punishment in locations

29. *See id.*

30. *See Frigid Temps Cause Some Problems in Mississippi Prisons*, JACKSON FREE PRESS (Feb. 18, 2021, 11:56 AM), https://www.jacksonfreepress.com/news/2021/feb/18/frigid-temps-cause-some-problems-mississippi-priso/ [https://perma.cc/KP5B-FLP7].

31. *See* Whitney Woodworth, *1,303 Inmates Evacuated from Coffee Creek Prison Due to Wildfires*, SALEM STATESMAN J. (Sep. 10, 2020, 6:21 PM), https://www.statesmanjournal.com/story/news/2020/09/10/oregon-wildfires-inmates-evacuated-coffee-creek-prison-santiam-riverside/3463532001/ [https://perma.cc/K9KC-3ERS].

32. *See* Brock v. Warren Cnty., 713 F. Supp. 238, 243 (E.D. Tenn. 1989) (finding that the jail could be held liable for damages for an incarcerate person dying of heat prostration when the jail officials "made no effort to rectify the excessive heat and lack of ventilation problem in the jail" when they knew that the conditions existed and represented a "serious health problems in inmates"); *see also* Hope v. Pelzer, 536 U.S. 730, 738 (2002) (finding "obvious" Eighth Amendment violations for the use of the hitching post in Alabama prisons and providing that the most common complaint from victims of the hitching post was "unnecessary exposure to the heat of the sun").

33. *See* Blackmon v. Garza, 484 F. App'x 866, 867 (5th Cir. 2012); *see also* Hinojosa v. Livingston, 807 F.3d 657, 666 (5th Cir. 2015) (referencing that between 2007 and 2012, 13 people died in Texas state prisons from heat-related causes).

34. *See, e.g.*, Ball v. LeBlanc, 792 F.3d 584, 596 (5th Cir. 2015) (finding that housing death row residents in very hot cells without access to heat-relief measures while knowing that each suffers from medical conditions which render them "extremely vulnerable to serious heat-related injury" violates the prohibition against cruel and unusual punishment).

35. *See* Gates v. Cook, 376 F.3d 323, 340 (5th Cir. 2004).

without air conditioning where it was dangerous to keep windows open due to endemic mosquito-borne West Nile virus.[36]

Academics, medical professionals, and law enforcement professionals have developed what some refer to as the "heat hypothesis."[37] The hypothesis posits that hot temperatures can cause increased incidents of aggressive behaviors and violence.[38] In 2001, researchers suggested that this increased frequency of violence associated with excessive heat should be characterized as a negative social consequence of global warming, and that schools, prisons, and a variety of workplaces should prepare for increased violence and develop interventions accordingly.[39] In general, crime rates rise during the warmer summer months.[40] A team of economists studying the impact of climate change at a county level across all geographic regions of the country predicted that — as a consequence of rising temperatures — northern regions of the country will experience an increase in the frequency of property crimes because property crime rates are at their lowest when it is cold outside.[41]

During summers in Louisiana's solitary confinement units, high temperatures frequently interfere with the delivery of mental health services and are blamed for higher rates of self-harm.[42] The Vera Institute of Justice found that the average number of self-harm incidents were significantly higher when the average heat index was above 100 degrees, mainly in June, July, and August.[43] Temperatures inside segregated and

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36. *See id.* at 334. This and other litigation also raises the issue that living in excessively hot places can be especially dangerous for people who must take medications that interfere with one's ability to effectively maintain and regulate one's body temperature.

37. *See* Craig A. Anderson, *Heat and Violence*, 10 CURRENT DIRECTIONS IN PSYCH. SCI. 33, 33 (2001).

38. *See id.*

39. *See id.* at 37 (suggesting that schools, prisons, and workplaces are good targets for heat-related intervention and the research on better climate control show that the additional costs for climate control are outweighed by the benefits of better learning, lower costs, less property damage, and increased productivity).

40. *See* JANET L. LAURITSEN & NICOLE WHITE, BUREAU OF JUST. STAT., SEASONAL PATTERNS IN CRIMINAL VICTIMIZATION TRENDS 1 (2014), https://bjs.ojp.gov/content/pub/pdf/spcvt.pdf [https://perma.cc/U6CC-T9KR].

41. *See* SOLOMON HSIANG ET AL., ESTIMATING ECONOMIC DAMAGE FROM CLIMATE CHANGE IN THE UNITED STATES, 356 SCI. 1362, 1364 fig.2G (2017) (predicting that property crime increases as the amount of cold days decrease, and the Northern American regions will lose cold days due to climate change).

42. *See, e.g.*, 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 (2019), https://www.vera.org/downloads/publications/safe-alternatives-segregation-initiative-findings-recommendations-ldps.pdf [https://perma.cc/Y6CT-UBNX].

43. *See id.* at 41 fig.11.

death row cells in Louisiana state prisons sometimes exceed 100 degrees.[44] Mental healthcare providers have attributed the increasing frequency of self-harming behavior during hot summer months to prison residents' physical discomfort, heat-related psychological deterioration, and desires to get out of their overly hot cells.[45]

Less money for facility maintenance, repairs, and replacement. Climate change is expected to shrink gross domestic product (GDP) and cause substantial economic damage to local and state governments, particularly in the Southeast,[46] which is home to a number of facilities with chronically inadequate or already failing prison and jail facilities.[47] Economists anticipate that the poorest 30% of all counties in the United States will lose between 2% and 20% of their income as a result of the progression of climate change during the twenty-first century.[48]

The predicted concentration of economic damage due to climate change within the Southern states and the Gulf Coast has been widely reported. In 2020, *ProPublica* and *The New York Times Magazine*, with other authors, analyzed climate change data and research from the Rhodium Group and other sources. They generated a number of projections and a series of

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44. *See* Ball v. LeBlanc, 988 F. Supp. 2d 639, 664 (M.D. La. 2013), *aff'd in part, vacated in part*, 792 F.3d 585 (5th Cir. 2015) (stating that "uncontroverted" data "established that inmates housed in each of the death row tiers were frequently subjected to heat indices above 100 degrees").

45. *See* CLOUD ET AL., *supra* note 42, at 40.

46. *See* Brad Plumer & Nadja Popovich, *As Climate Changes, Southern States Will Suffer More than Others*, N.Y. TIMES (June 29, 2017), https://www.nytimes.com/interactive/2017/06/29/climate/southern-states-worse-climate-effects.html [https://perma.cc/C5XH-8G4P] (observing that with each increasing degree rise in global temperature the United States can face losses in GDP and the worst-hit counties are projected to be in the southeast United States).

47. *See, e.g.*, Lewis v. Cain, No. 15-cv-318, 2021 WL 1219988, at *14, *47 (M.D. La. Mar. 31, 2021) (finding the medical care at Louisiana State Prison in Angola violates residents' federal rights on a number of grounds, including due to physical plant inadequacies); Cole v. Livingston, No. 14-CV-1698, 2016 WL 3406439, at *2 (S.D. Tex. June 21, 2016), *vacated sub nom.*, Yates v. Collier, 677 F. App'x. 915 (5th Cir. Jan. 30, 2017) (noting the dangers of having Texas prison residents drink water containing between two and four-and-a-half times the levels of arsenic permitted by the United States EPA in order to cope with the chronic extreme heat); Complaint at 6, Amos v. Hall, No. 20-CV-00007 (N.D. Miss. Jan. 14, 2020) (alleging a range of infrastructure failures at Mississippi's oldest, plantation-style prison, including exposure to raw sewage, contaminated food and water, and widespread rat and mice infestations).

48. *See e.g.*, Robinson Meyer, *The American South Will Bear the Worst of Climate Change's Costs*, ATLANTIC (June 29, 2017), https://www.theatlantic.com/science/archive/2017/06/global-warming-american-south/532200/ [https://perma.cc/8P99-XSLQ]; Pam Wright, *Southern U.S., Poor Counties Will Take the Biggest Hit from Climate Change*, WEATHER CHANNEL (July 1, 2017), https://weather.com/science/environment/news/climate-change-southern-states-counties [https://perma.cc/BG6L-UUE5].

graphics (ProPublica Maps) illustrating those projections, which depict the predicted consequences of selected climate-related impacts under conditions of continued moderate and high emissions.[49] Two ProPublica Maps in particular show concentrated economic damage in the U.S. South and the Gulf Coast. In "Economic Damages from Climate: 2040–2060,"[50] the authors explain that "[r]ising energy costs, lower labor productivity, poor crop yields and increasing crime are among the climate-driven elements that will increasingly drag on the U.S. economy, eventually taking a financial toll that exceeds that from the COVID-19 pandemic in some regions."[51] In "Farm Crop Yields: 2040–2060,"[52] the authors explain, "[w]ith rising temperatures, it will become more difficult to grow food," and parts of Texas "may see yields drop by more than 70%."[53] Such severe economic loss attributable to climate change is likely to make less money available for prison and jail facility maintenance, repairs, and replacement, with potentially harmful results in already substandard facilities.

Prison and jail residents in the United States are more vulnerable to being harmed if exposed to environmental stressors. People with underlying health conditions are disproportionately represented in the U.S. prison population.[54] Forty percent of those incarcerated in state and federal prisons and local jails report having a current chronic medical condition, and approximately 50% report that they currently have or previously had a chronic medical condition.[55] Prison residents are also more likely than the U.S. general population to report having a chronic condition or infectious disease.[56]

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49. Al Shaw, Abrahm Lustgarten & Jeremy W. Goldsmith, *New Climate Maps Show a Transformed United States*, PROPUBLICA (Sept. 15, 2020), https://projects.propublica.org/climate-migration/ [https://perma.cc/CH8D-6WV4]. A number of these graphics are reproduced in the Appendixes with permission of the copyright owner.

50. *See* app. A, fig.1.

51. *See* Shaw et al., *supra* note 49.

52. *See* app. B, fig.2.

53. *See* Shaw et al., *supra* note 49.

54. *See e.g.*, LAURA M. MARUSCHAK, MARCUS BERZOFSKY & JENNIFER UNANGST, BUREAU OF JUST. STAT., NCJ 248491, MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011–12 1 (2015), https://bjs.ojp.gov /content/pub/pdf/mpsfpji1112.pdf [https://perma.cc/L57K-ZMTW] (finding that comparing the incarcerated population of the United States to the general, free U.S. population, that incarcerated people are more likely to "report ever having a chronic condition or infectious disease"); 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/ [https://perma.cc/SLU8-S3MA].

55. *See* MARUSCHAK ET AL., *supra* note 54.

56. *See, e.g.*, *id.*

The U.S. prison population is also aging. The percentage of people who are 55 or older has been growing consistently, accounting for over 10% of the U.S. prison population in 2016.[57] In state prison systems, people age 55 and older now outnumber the population of young adults between the ages of 18 and 24.[58]

People living in state and federal prisons and local jails suffer from a range of chronic medical conditions, including cancer, high blood pressure, stroke, diabetes, heart and cardiovascular related problems, kidney problems, arthritis, asthma, and liver cirrhosis.[59] Overweightness and obesity are common in incarcerated persons, and obesity is a pre-existing condition that can cause dangerous complications related to heat-related illness.[60] The most common chronic condition for prison residents is high blood pressure, and taking high blood pressure medications increases the likelihood that one will suffer from heat-related illnesses if exposed.[61]

In sum, the higher frequency of pre-existing conditions and medical vulnerabilities within prison resident populations makes it more likely that people within that group will face more serious and long-lasting consequences as a result of additional climate change-related harms. Corrections officials have a duty to prison residents under the U.S. Constitution to maintain reasonably safe facilities — they cannot simply "await a tragic event."[62] The federal government has taken initial steps towards recognizing the risks posed by climate change to people held in correctional settings. In 2014, the Department of Justice (DOJ) promulgated an updated safety manual regarding climate related safety protocols.[63] The DOJ determined that the most serious threats from climate change that its prisons faced were related to severe weather, flooding, drought, high temperatures, and rising sea levels.[64] It also identified related risks to human health, including risks due to excessive heat, inability to

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57. *See, e.g.*, Weihua Li & Nicole Lewis, *This Chart Shows Why the Prison Population Is So Vulnerable to COVID-19*, MARSHALL PROJECT (Mar. 19, 2020, 2:45 PM), https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19 [https://perma.cc/2LZG-SC9H].

58. *See id.*

59. *See, e.g.*, MARUSCHAK ET AL., *supra* note 54, at 1.

60. *See id.*

61. *See, e.g.*, HOLT, *supra* note 22, at ii, 24 (analyzing data from health surveys of incarcerated populations and explaining that hypertension, obesity, and asthma are commonplace amongst U.S. prison populations, and that many of the medications prison residents are prescribed to treat these conditions compromise their body's ability to handle heat).

62. Helling v. McKinney, 509 U.S. 25, 33 (1993) (providing that "Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event").

63. *See* U.S. DEP'T OF JUST., *supra* note 19, at ii.

64. *See id.* at 2-2.

maintain hygienic conditions of confinement, and increased unrest and violence amongst imprisoned people as a result of environmentally stressful effects of climate change.[65] The Bureau of Prisons (BOP) was directed to address human health and safety concerns relating to extreme weather events[66] and to be prepared for climate change-related energy source disruptions due to excessive heat or cold, drought, and storms and hurricanes likely to compromise the structural integrity of their buildings.[67]

Consequences to home communities. Finally, unnecessarily exposing prison residents to more dangerous conditions as a result of climate change will hurt their home communities. Formerly incarcerated individuals' home communities are more likely to be poorer than others and have fewer employment opportunities.[68] About 49% of formerly incarcerated people earn less than $500 as reported on W2s or tax returns, and 32% earn between $500 to $15,000 annually; only 20% of formerly incarcerated people earn more than $15,000 a year after their return home from prison.[69] These already low annual earnings — combined with anticipated economic damage due to climate change — make it more likely that climate change will both exacerbate poverty in the communities prison residents return to and make it less likely that incarcerated residents harmed by climate-related dangers get the support and care they need when they come home.[70] It is already particularly difficult for returning citizens to obtain the

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65. *See id.* at 2-2, 2-6, B-3 (providing that the Bureau of Prisons must "ensure that prisons continue to function in the case of energy disruption, heat waves, drought, or coastal storm impacts," and plan for "[d]isruption of operations resulting from potential unrest (and increased violence) among populations affected by severe weather, extreme heat, and drought").

66. *See id.* at 2-4.

67. *See id.* at 2-6.

68. *See, e.g.*, ADAM LOONEY & NICHOLAS TURNER, BROOKINGS INST., WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION 2, 7 fig.1 (2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf [https://perma.cc/8KTL-BEWF] (explaining that individuals who are incarcerated are much more likely to come from the poorest communities, and that "the incarcerated fare poorly in the formal labor market after they are released").

69. *See id.* at 7.

70. *See* Sarah Figgatt, *Reentry Reforms Are More Critical than Ever amid the Coronavirus Pandemic*, CTR. FOR AM. PROGRESS (Apr. 30, 2020, 9:03 AM), https://www.americanprogress.org/issues/poverty/news/2020/04/30/484168/reentry-reforms-critical-ever-amid-coronavirus-pandemic/ [https://perma.cc/93MH-WPC6] (explaining the need for reentry reforms and expanded support for returning citizens, especially following a natural disaster or public health emergency such as the COVID-19 pandemic: returning citizens may experience chronic unemployment, homelessness, and be unable to afford healthcare; by not providing local resources reentry support, a government "merely transitions formerly incarcerated people from one harmful environment to another, jeopardizing both their and their communities' health, safety, and security").

healthcare they need.[71] Moreover, jobs that provide health insurance are more difficult to obtain with a felony record, and insurance premiums for people with pre-existing injuries are often higher and more burdensome for returning citizens and their families to pay.[72]

C. Racial Disparities

Babies born today to parents of color, or into poorer families, already face a higher risk of incarceration.[73] Climate change will hit poor families the hardest,[74] and, because of the effects of past and present systemic racial discrimination, that burden on the poor will disproportionately fall on people of color. Poor people of color are already at greater risk of being unnecessarily incarcerated due to racial disparities in policing, prosecution, and plea deals.[75] With the additional downward economic and social

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71. *See* KAMALA MALLIK-KANE, ELLEN PADDOCK & JESSE JANNETTA, NAT'L INST. OF CORR. & DEP'T OF HEALTH & HUM. SERVS., HEALTH CARE AFTER INCARCERATION (2018), https://www.urban.org/sites/default/files/publication/96386/health_care_after_incarceration.pdf [https://perma.cc/FH6A-NHFL] (surveying a group of formerly incarcerated people shortly after coming home who had applied for healthcare insurance and ran into issues with coverage and difficulties accessing and scheduling).

72. *See, e.g.*, *id.* (explaining that "most people returning from prison lacked health insurance, impeding receipt of care for chronic health conditions and leading to high levels of emergency room use").

73. *See, e.g.*, LOONEY & TURNER, *supra* note 68, at 2, 12 (finding that (1) "boys from the poorest families are 40 times more likely to end up in prison compared to boys from the richest families"; (2) "there are more men in prison from the bottom 1 percent than from the top 15 percent of the income distribution"; and (3) "individuals incarcerated in their early 30s are much more likely to have grown up in poverty, in single parent families, and in neighborhoods of concentrated economic distress and with large minority populations").

74. *See, e.g.*, S. Nazrul Islam & John Winkel, *Climate Change and Social Inequality* 2, 4 (United Nations Dep't of Econ. & Soc. Aff., Working Paper No. 152, 2017), https://www.un.org/esa/desa/papers/2017/wp152_2017.pdf [https://perma.cc/3G3N-WTPR] (providing that climate change is expected to increase poverty disproportionately among the already-poor, and explaining a three-step cycle: (1) "inequality increases the *exposure* of the disadvantaged social groups to the 'adverse effects of climate change' ('climate hazards,' for short)"; (2) "given the exposure level, inequality increases the disadvantaged groups' *susceptibility* to damages caused by climate hazards"; and (3) "inequality decreases these groups' relative ability to *cope* with and *recover* from the damages they suffer").

75. *See, e.g.*, THE SENT'G PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM 5 (2016) [hereinafter SENT'G PROJECT 2016], https://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf [https://perma.cc/M884-SA7Q] (noting the impact that race and class have on the likelihood of criminal legal system involvement, and that "low-income individuals are generally overrepresented at every stage of the criminal justice system, and [that] it is widely acknowledged that people of color are disproportionately low-income").

pressures projected to accompany climate change, it is expected that the trend of increasing racial disparities in incarceration will worsen.[76]

At all stages of the U.S. criminal legal system, poor people, Black, Brown, and Native people are overrepresented.[77] Within the U.S. prison population (state and federal prisons), people in prison are mostly poor or working class, and disproportionately Black and Brown.[78] Black and Hispanic[79] people together constitute 29% of the U.S. general population, but 57% of the U.S. prison population.[80] The national imprisonment rates for Black and Hispanic people are nearly 5 times and 1.3 times the rate for white adults, respectively, with even higher relative rates in certain states.[81] In 12 states, more than half the prison population is Black, even though there are no states in the country that have a majority Black population.[82] Almost half, 48.3%, of people sentenced to life imprisonment or "virtual"

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76. *See, e.g.*, Islam & Winkel, *supra* note 74, at 2 ("[T]he relationship between climate change and social inequality is characterized by a vicious cycle, whereby *initial* inequality makes disadvantaged groups suffer *disproportionately* from the adverse effects of climate change, resulting in greater *subsequent* inequality.").

77. *See, e.g.*, THE SENT'G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018) [hereinafter SENT'G PROJECT 2018], https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ [https://perma.cc/3B9P-ZGKJ] (noting that there is "racial disparity that permeates every stage of the United States criminal justice system, from arrest to trial to sentencing to post prison experiences").

78. *See* E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2018 (2020), https://bjs.ojp.gov/content/pub/pdf/p18.pdf [https://perma.cc/NXQ2-Z3DU] (showing that the rate of imprisonment for Black and Hispanic people is higher than the national average, and the national average is higher than the rate of imprisonment for white people).

79. The Authors considered recent polling of the Hispanic or Latino population in the U.S. by the *Pew Research Center*, as well as personal experience, in using the terms "U.S. Hispanics" or "Hispanics" to refer to the U.S. population of people tracing their roots to Mexico, Latin America, and Spain; the Authors acknowledge that no single term is adequate, and that terminology is evolving. *See e.g.*, Luis Noe-Bustamante, Lauren Mora & Mark Hugo Lopez, *About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, PEW RSRH. CTR. (Aug. 11, 2020), https://www.pewresearch.org/hispanic/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it/ [https://perma.cc/466E-UXXT] (finding that the majority (61%) of U.S. Hispanics say they prefer Hispanic to describe the Hispanic or Latino population in the United States; 29% say they prefer Latino; 4% say they prefer Latinx).

80. *See* SENT'G PROJECT 2018, *supra* note 77.

81. *See* ASHLEY NELLIS, THE SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS (2021), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/ [https://perma.cc/KW4Q-ZSUC] (showing that in Minnesota, New Jersey, Vermont, and Wisconsin, the disparity of Black incarceration to white is a rate of more than ten to one).

82. *See id.*

life sentences — where sentences are so long that people will die imprisoned — are Black.[83]

Structural racism in policing, charging, prosecution, plea deals, and at other critical stages of the criminal legal system have created a system where Black, Brown, and Native people are overrepresented in the nation's prisons and jails.[84] However, people living in poverty are also overrepresented in the system, and being born a person of color into a poor family compounds the already high risk of incarceration.[85] Young men from the poorest families in the country are 40 times more likely to end up in prison compared to young men from the richest families.[86] People who are incarcerated are significantly more likely to have grown up impoverished, in single-income families, and in neighborhoods with concentrated poverty and large populations of people of color.[87]

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83. *See e.g.*, ASHLEY NELLIS, THE SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 5, https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf [https://perma.cc/7KFJ-AA8E] (last visited Jan. 11, 2022) (noting that almost half of all people sentenced to life are Black, giving a rate of one out of every five Black prison residents has a life sentence and in the states of Alabama, Georgia, Illinois, Louisiana, Maryland, Mississippi, and South Carolina two thirds or more of everyone with a life sentence is Black).

84. *See* Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System Is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/ [https://perma.cc/69Y4-SAA3]; *see also* NELLIS, *supra* note 83, at 5; Leah Wong, *The U.S. Criminal Justice System Disproportionately Hurts Native People: The Data, Visualized*, PRISON POL'Y INITIATIVE (Oct. 8, 2021), https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday/ [https://perma.cc/94V9-WRPA] ("The latest incarceration data, however, shows that American Indian and Alaska Native people have high rates of incarceration in both jails and prisons as compared with other racial and ethnic groups. In jails, Native people had more than double the incarceration rate of white people, and in prisons this disparity was even greater.").

85. *See, e.g.*, SENT'G PROJECT 2016, *supra* note 75, at 5 (noting that issues of race and class have an impact on the likelihood of involvement within the criminal justice system and that "low-income individuals are generally overrepresented at every stage of the criminal justice system, and [that] it is widely acknowledged that people of color are disproportionately low-income").

86. *See, e.g.*, LOONEY & TURNER, *supra* note 68, at 12 (finding that (1) "boys from the poorest families are 40 times more likely to end up in prison compared to boys from the richest families" and (2) "there are more men in prison from the bottom 1 percent than from the top 15 percent of the income distribution").

87. *See id.* ("[I]ndividuals incarcerated in their early 30s are much more likely to have grown up in poverty, in single parent families, and in neighborhoods of concentrated economic distress and with large minority populations.").

i. Examples of Racial Disparities in Imprisonment

Racial disparities: The victims at Orleans Parish Prison during Hurricane Katrina. The flooding and abandonment of the Orleans Parish Prison, and the people locked inside, during Hurricane Katrina are disturbing examples of how the disparate treatment of people of color in the U.S. criminal legal system makes them more likely to be harmed by dangerous facility conditions that are attributable to climate change. In New Orleans, prior to Katrina, only 66.6% of the parish was Black, yet the Orleans Parish Prison population at the time of the hurricane was almost 90% Black.[88] The Orleans Parish Prison also held children in its juvenile unit, some as young as ten years old, and the population of children held in Orleans Parish Prison was over 95% Black.[89] Most individuals held at Orleans Parish Prison when Hurricane Katrina hit were non-violent pre-trial detainees.[90] This means that most were being held simply because they could not afford to post bail, and that they were presumed innocent of the charges on which they were being held (including attachments, traffic violations, and municipal charges).[91] Such charges included parking violations, public drunkenness, and failure to pay a fine.[92] The individuals deetained were overwhelmingly — and disproportionately — poor Black people, who on account of structural racism were vastly overrepresented among those trapped in an abandoned, unsafe jail for days during one of the largest and most deadly weather events in U.S. history.[93]

Racial disparities: Imprisonment in Alabama. In 2016, the DOJ launched an investigation into Alabama men's prisons for suspected violations of federal and constitutional law, and after 20 months of failed negotiations, the DOJ sued.[94] The DOJ suit claimed that the Alabama Department of Corrections is failing to protect prison residents from

88. *See* NAT'L PRISON PROJECT, *supra* note 25, at 17.

89. *See id.* at 29.

90. *See id.* at 13.

91. *See id.*

92. *See id.*

93. *See id.* at 29 (explaining that Orleans Parish Prison's "population at the time of the storm was almost entirely African-American," and "[m]ore than 300" of the incarcerated people in the jail during the Hurricane "had been arrested and booked between August 26–28, when the City of New Orleans and the State of Louisiana were under states of emergency" showing that even Hurricane Katrina could not stop the criminal legal system in New Orleans at the time from targeting and confining poor Black people).

94. *See, e.g.*, ALABAMA'S STATE PRISONS INVESTIGATION, *supra* note 8, at 3 ("[T]he Department opened a CRIPA investigation into the conditions in ADOC facilities housing male prisoners."); Press Release, U.S. Dep't of Just., Justice Department Files Lawsuit Against the State of Alabama for Unconstitutional Conditions in State's Prisons for Men (Dec. 9, 2020), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-state-alabama-unconstitutional-conditions-states [https://perma.cc/XR5K-BDYP].

violence at the hands of staff and residents, failing to protect them from sexual violence, and failing to provide sanitary and safe conditions in violation of the constitutional and federal rights of prison residents.[95]

The range of harms described by the DOJ — unnecessary injuries, trauma, and death resulting from harmful prison conditions — fall disproportionately on people of color. For example, the homicide rate for Black men in Alabama prisons is three times the rate for white men.[96] From 2014 to 2020, 77% of Alabama prison homicides were of Black men.[97] Black people in Alabama prisons are also disproportionately represented within the death statistics, not just from homicides within the prisons,[98] and, because Black people are overrepresented, they are more likely to be among those infected by COVID-19 in the Alabama prisons system.[99]

ii. Racial Disparities in Imprisonment Due to Poverty Resulting from Structural and Historical Racism

Climate change will exacerbate already-existing racial disparities related to poverty and, by extension, to imprisonment. People of color are more vulnerable to harm in the face of environmental crisis because of structural and historical racism; this in turn increases the risk of intergenerational poverty-associated incarceration. For example, the United States has a long history of enforcing racial segregation, through laws, policies, and violence, that have resulted in Black U.S. residents being more likely to live in less desirable, low-lying, flood-prone areas.[100]

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95. *See* ALABAMA'S STATE PRISONS INVESTIGATION, *supra* note 8, at 3 (explaining the scope of the investigation "focused on whether ADOC (1) adequately protects prisoners from physical harm and sexual abuse at the hands of other prisoners; (2) adequately protects prisoners from use of excessive force and staff sexual abuse by correctional officers; and (3) provides prisoners with sanitary, secure, and safe living conditions").

96. *See* ALA. APPLESEED CTR. FOR L. & JUST., DEATH TRAPS: AN EXAMINATION OF THE ROUTINE, VIOLENT DEATHS OF PEOPLE IN THE CUSTODY OF THE STATE OF ALABAMA, 2014–2020 3 (2020), https://www.alabamaappleseed.org/wp-content/uploads/2020/11/Death-Traps-Report-2020-FINAL.pdf [https://perma.cc/RPM5-8NAV].

97. *See id.*

98. *See id.*

99. *See* Eddie Burkhalter et al., *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. TIMES (Apr. 10, 2021), https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html?smid=url-share [https://perma.cc/6EZ4-Q4WY] ("While racial data is not available for cases of coronavirus in prisons, African-Americans are overrepresented in the system, account for 33 percent of inmates but making up just 13 percent of the nation's population. For that reason, public health officials say, they are more likely to be among those infected in prison. The virus has killed prisoners at higher rates than the general population, the data shows . . . .").

100. *See* Jeff Ueland & Barney Warf, *Racialized Topographies: Altitude and Race in Southern Cities*, 96 GEOGRAPHICAL REV. 50, 50 (2006) (analyzing land acquisition in

The geographic impacts of structural and historical racism in the United States are often evident in the wake of natural disasters, including during Hurricane Katrina[101] and the Great Mississippi Flood of 1927.[102] The Great Mississippi Flood displaced thousands and made more than 200,000 Black U.S. residents refugees, many of whom were in the Mississippi Delta.[103] After the flood, Black residents of the refugee camps, along with incarcerated people, were forced to work to repair the levees for no pay and under deplorable conditions.[104] Today, the Mississippi River still operates as the country's "drain": 31 states and two Canadian provinces drain water into the Mississippi River; these states comprise 41% of the contiguous United States and 15% of North America.[105] Climate change will only increase the risk of flooding to these communities along the Mississippi.[106] Since 1958, the amount of precipitation during heavy rainstorms has

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Southern cities and discussing the various means by which Black U.S. residents have historically been segregated into geographic areas with land that is more difficult to use and develop, which is more vulnerable to damage from natural disasters).

101. *See* Troy D. Allen, *Katrina: Race, Class, and Poverty: Reflections and Analysis*, 37 J. BLACK STUD. 466, 466 (2007).

102. *See generally* Susan Scott Parrish, *The Great Mississippi Flood of 1927 Laid Bare the Divide Between North and the South*, SMITHSONIAN MAG. (Apr. 11, 2017), https://www.smithsonianmag.com/history/devastating-mississippi-river-flood-uprooted-americas-faith-progress-180962856/ [https://perma.cc/32UZ-X2GV].

103. *See* Laura Coyle, *The Great Mississippi River Flood of 1927*, NAT'L MUSEUM AFRICAN AM. HIST. & CULTURE (Jan. 11, 2019), https://nmaahc.si.edu/explore/stories/collection/great-mississippi-river-flood-1927 [https://perma.cc/R8LG-A7JH].

104. *See, e.g.*, Ron Grossman, Opinion, *The Mississippi River Flood of 1927*, CHI. TRIB. (Jan. 9, 2016, 11:22 AM), https://www.chicagotribune.com/opinion/commentary/ct-mississippi-river-1927-flood-flashback-per-0110-jm-20160107-story.html [https://perma.cc/6CHF-TWCM]; *see also* Myles McMurchy, *"The Red Cross Is Not All Right!": Herbert Hoover's Concentration Camp Cover-Up in the 1927 Mississippi Flood*, 5 YALE HIST. REV. 87, 88 (2015), https://historicalreview.yale.edu/sites/default/files/files/McMurchy.pdf [https://perma.cc/JS5E-D834] (describing the treatment of Black Americans in the flood refugee camps: "Black refugees were forced to perform the heavy labor that supported the camps and were barred from escaping by National Guard members, who oversaw their work with guns at the ready").

105. *See generally The Mississippi/Atchafalaya River Basin (MARB)*, EPA, https://www.epa.gov/ms-htf/mississippiatchafalaya-river-basin-marb [https://perma.cc/Q8TX-MEWP] (last visited Nov. 8, 2021).

106. *See generally* EPA, EPA 430-F-16-026, WHAT CLIMATE CHANGE MEANS FOR MISSISSIPPI (2016), https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-ms.pdf [https://perma.cc/EN7Q-23PT]. *See also Top Story of 2019: Impact from Historic Backwater Flood and Recovery Shaped 2019*, VICKSBURG POST (Jan. 1, 2020, 2:30 PM), https://www.vicksburgpost.com/2020/01/01/top-story-of-2019-impact-from-historic-backwater-flood-and-recovery-shaped-2019/ [https://perma.cc/DG6U-N8QA] (recapping the impact of the 2019 Vicksburg MS. flood that killed two people, flooded 686 homes, and flooded 548,000 total acres and sent three highways underwater).

increased by 27% in the Southeast United States.[107] Increasing precipitation as far as the Midwest can increase flood potential in Mississippi as streamflow drains from these far upriver regions down the Mississippi River.[108] Many prison and jail communities currently live in locked facilities built on and around the Mississippi River flood plain, sometimes near majority-minority home communities; in this way, geography and intergenerational structural racism combine to recapitulate place- and race-based harms of the past — overexposing already disproportionately Black and Brown prison and jail communities to climate-related injuries by locking them in facilities built on flood plains in the U.S. South.[109]

In summary, Black Americans in the U.S. South have been disproportionately forced to reside where increased flooding causes property damage and displacement; associated economic instability increases the risk of incarceration; in prisons and jails, residents are prohibited from mitigating climate-related threats to themselves and to their home communities, to which most will return; and in this way, historical racism and structural racism are mutually reinforcing, with incarceration perpetuating intergenerational overexposure to climate-related harm.

iii. Racial Disparities in Harm Due to Imprisonment

People of color come to prison more medically vulnerable as a population and are therefore more likely to suffer serious harm as a result of exposure to environmental stressors caused by climate change. Poor people and people of color already have significantly worse health outcomes compared to white or middle to upper-class U.S. residents, and climate change will only exacerbate those disparities.[110] For example,

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107. *See* EPA, *supra* note 106.

108. *See id.*

109. *See* Hannah Hauptman, *Prisons and Floods in the United States: Interrogating Notions of Social and Spatial Control,* 7 CHI. J. HIST. 99, 103-107 (2017) (explaining that "the historical record of the twentieth century confirms that floods frequently affected prisons, especially those located along the Mississippi River and its tributaries," and providing an example: Louisiana State Penitentiary (Angola) "sits nestled into an oxbow on the east bank of the Lower Mississippi," so "floods consistently threatened Angola's acres; fears of evacuation surfaced in 1927,1973, 1983, 1997 and 2011").

110. *See* LINDA RUDOLPH ET AL., AM. PUB. HEALTH ASS'N, CLIMATE CHANGE, HEALTH, AND EQUITY: A GUIDE FOR LOCAL HEALTH DEPARTMENTS 4 (2018), https://www.apha.org/-/media/files/pdf/topics/climate/apha_climate_equity_introduction.ashx?la=en&hash=B40A6A0109D9C5474B7C7362176BEA9E9DFC16CC#:~:text=Climate%20change%20exacerbates%20existing%20health,that%20most%20impact%20disadvantaged%20communities [https://perma.cc/VS9R-VZBX] (explaining that "critical components of climate vulnerability are pre-existing health status and living conditions" which are not distributed equally in the United States and that "[t]hey differ by place, race

climate change-related increase in air pollution levels are anticipated; Black and other communities of color already disproportionately live in areas with poor air quality, which is known to be associated with an increased incidence of respiratory illness.[111] Black U.S. residents are 40% more likely to have asthma than white U.S. residents and are almost three times more likely to die from asthma-related causes than the white population.[112] Black children are five times more likely to be admitted to the hospital for asthma as compared to white children.[113] The increased temperatures associated with climate change will also disproportionately impact people of color — including the overrepresented population of people of color in U.S. prisons — by making them more likely to suffer harms associated with high heat, including heat stroke and dehydration.[114]

Climate change will disproportionately harm the home communities of prison and jail residents of color, particularly in the U.S. South. Climate change will hit U.S. residents hardest in the geographic regions that have the highest rates of incarceration, which disproportionately house prison residents of color. Since the overwhelming majority of those residents will return to their communities,[115] the climate change related injuries that residents experience inside will likely follow them home to their communities, which are more likely to be comprised of people of color.

The majority of Black U.S. residents live in the U.S. South[116] and the South is the region anticipated to be most impacted by climate change.[117]

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and income" which results in "low-income communities and communities of color [being] disproportionately affected by the health impacts of climate change").

111. *See* LEISEROWITZ & AKERLOF, *supra* note 12 (noting that for low-income and minority communities "many suffer greater impacts from air pollution" and "will have the most to gain from policies that will improve air quality").

112. *See generally Asthma and African Americans*, U.S. DEP'T HEALTH & HUM. SERVS. (Feb. 11, 2021, 11:16 AM), https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=15 [https://perma.cc/4W4J-ZDAZ].

113. *See id.*

114. *See, e.g.*, EPA, *supra* note 106 (explaining that vulnerable populations such as children, the elderly, the sick, and the poor are at risk from high temperatures which "can cause heat stroke and dehydration and affect people's cardiovascular and nervous systems" and that warmer air helps to "increase . . . ground-level ozone" which aggravates lung diseases like asthma).

115. *See generally* MINTON ET AL., *supra* note 5 (noting statistics for community correctional supervision in the United States).

116. *See, e.g.*, CHRISTINE TAMIR, PEW RSCH. CTR., THE GROWING DIVERSITY OF BLACK AMERICA 1, 11 (2021), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2021/03/RE_2021.03.25_Black-Americans_FINAL.pdf [https://perma.cc/KVB5-MGDL] (finding that in 2019, 56% of the Black population resided in the South).

117. *See* Meyer, *supra* note 48 (summarizing economists' projections of the consequences of climate change on U.S. counties and regions until 2100, and concluding that the greatest consequences will be seen in the American South).

Hurricanes, floods, rising temperatures, droughts, and food shortages attributable to climate change are projected to disproportionately impact the U.S. South.[118] The South has the highest Black population in the country, and the region consists of states with the highest per capita incarceration rates in the country.[119] Fifty-six percent of Black U.S. residents live in the South and current migration patterns show that the Black population in the South has been increasing since 1970 — from an increase from 52% in 1970 to 56% in 2019.[120] Researchers have noted this trend, in recent decades, is the reverse of the "The Great Migration."[121]

The U.S. South will bear the worst of climate change across a range of risk categories.[122] Economists estimate that every county between North Carolina and Texas could see their mortality rate rise by more than 20 people out of every 100,000 people.[123] Some counties could also see agricultural yields fall by more than 50%.[124] Southern counties are expected to lose between 2% to 20% of county-wide income as climate change effects worsen over the twenty-first century.[125] Poverty in these majority-minority regions is projected to increase. Simultaneously, there is projected to be a decrease in accessibility of critical and lifesaving services

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118. *See, e.g.*, *id.* ("Harvests will dwindle, summer energy costs will soar, rising sea will erase real-estate holdings, and heatwaves will set off epidemics of cardiac and pulmonary disease.").

119. *See* E. ANN CARSON, BUREAU OF JUST. STAT., NCJ 255115, PRISONERS IN 2019 11 (2020) (finding that for the second consecutive year Louisiana had the highest imprisonment rate, then Oklahoma, then Mississippi, then Arkansas).

120. *See* TAMIR, *supra* note 116, at 11–12 (finding that last available data, from 2019, shows that 56% of all Black Americans reside in the South).

121. *See* William H. Frey, *The Black Exodus from the North-and West*, BROOKINGS (Feb. 2, 2015), https://www.brookings.edu/blog/the-avenue/2015/02/02/the-black-exodus-from-the-north-and-west/ [https://perma.cc/983Y-YN2D] ("As a consequence, the 2010 census showed absolute declines in the black populations of the previous black migrant destinations of New York, Illinois, Michigan and California — literally a reversal of history."); *see also* William H. Frey, *The New Great Migration: Black Americans' Return to the South, 1965–2000*, BROOKINGS (May 1, 2004), https://www.brookings.edu/research/the-new-great-migration-black-americans-return-to-the-south-1965-2000/ [https://perma.cc/3BPK-ENC4] ("The South scored net gains of [B]lack migrants from all three of the other regions of the U.S. during the late 1990s, reversing a 35-year trend.").

122. *See, e.g.*, Meyer, *supra* note 48 (quoting lead researcher Solomon Hsiang stating: "The South is really, really negatively affected by climate change, much more so than the North.").

123. *See, e.g.*, HSIANG ET AL., *supra* note 41, at 1364 fig.2B.

124. *See, e.g.*, *id.* at 1364 fig.2A.

125. *See id.* at 1366 (projecting that there is a 90% chance that "the poorest third of counties are projected to experience damage between 2 and 20% of county income" based on current emissions rates).

to returning prison residents and their home communities, based in disproportionately Black and Brown geographic regions of the country.[126]

II. COVID-19 PRISON AND JAIL CONDITIONS LITIGATION PROVIDES INSIGHTS INTO HOW FEDERAL COURTS MAY RESPOND WHEN RESIDENTS SEEK PRELIMINARY RELIEF FROM EMERGENT CLIMATE-RELATED DANGERS

The global COVID-19 pandemic and the exogenous threats associated with global climate change differ in critical ways, including because prison and jail officials often know far in advance of a crisis the type of climate-related harm most likely to threaten the wellbeing of residents in their care, and they may have prepared adequate emergency evacuation, release, and mitigation plans. Nevertheless, the pandemic and global climate change pose exogenous public health hazards that are similar in scale and scope, and which are more deadly to people locked in congregate settings; in some circumstances, potentially catastrophic events may unfold within similarly condensed timeframes.

Both suit types also implicate similar or identical legal claims and jurisdictional hurdles from a conditions-of-confinement litigation perspective: (1) the right to be free from cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution; (2) the right of individuals with disabilities to be free from disability-based discrimination; (3) a narrow and jurisdiction-dependent right to "enlargement" of custody to home confinement or release under 28 U.S.C. § 2241 (petition for writ of habeas corpus on the basis of unlawful conditions of confinement); and (4) the thorny jurisdictional and remedial barriers imposed by the PLRA and habeas statutes. Climate change and a global pandemic pose a public health threat to most people living on the planet, but as to both, prison and jail residents are at a greater risk of serious harm because they are housed together in close quarters without the ability, on their own, to take rational steps to mitigate future harm. Based on these similarities, this Part provides an analysis of litigation strategies and outcomes relevant to both contexts. The analysis suggests that federal courts, particularly in the Southern U.S. and in parts of the Rust Belt, lying within the geographic boundaries of the Fifth, Sixth, and Eleventh U.S. Courts of Appeal, will likely be hesitant to intervene with a grant of preliminary relief, leading to notably race-disproportionate impacts.

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126. *See* Islam & Winkel, *supra* note 74, at 2, 4, 12 (reaffirming that "people living in poverty suffer disproportionately more from the adverse effects of climate change than the rich," including specifically from rises in food prices and insurance premiums).

A. *The Clearinghouse Subset*: Seventy Prison and Jail Conditions Cases Seeking Relief Related to COVID-19.

This Section provides an analysis of the structure, claims, and relative success of a group of 70 COVID-19 prison and jail conditions cases, filed in 2020 and 2021, seeking preliminary or emergency injunctive relief or release on behalf of multiple persons.

The University of Michigan Law School's Civil Rights Litigation Clearinghouse (Clearinghouse) compiles, codes, analyzes, and topically organizes data on prison conditions litigation in which injunctive relief[127] "affecting multiple persons"[128] is sought. There is no automated means by which to monitor the subject matter of all prison and jail litigation, filed in all federal jurisdictions, at all times. While the Clearinghouse does not limit its coverage to successful cases, such cases are somewhat more likely to come to its attention.[129] Cases that succeed rather than fail are typically longer-lived and more widely discussed.[130]

The group of 70 cases reviewed in this Article is a subset of the larger pool of 463 cases that are within the Clearinghouse's "COVID-19 special collection." As of September 2021, that collection included 463 cases. Of these, 99 were jail or prison conditions cases. Of those, excluding three cases that sought only individual relief, 70 were federal court cases.[131] This subset of 70 federal court prison and jail conditions cases, through which residents sought relief from COVID-19-related dangers, is referred

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127. *See Case Category Specifics*, UNIV. MICH. L. SCH. C.R. LITIG. CLEARINGHOUSE, https://clearinghouse.net/about.php?s=types [https://perma.cc/M3EZ-HGJJ] (last visited Nov. 7, 2021); *see also What Is the Clearinghouse?*, UNIV. MICH. L. SCH. C.R. LITIG. CLEARINGHOUSE, https://www.clearinghouse.net/about.php [https://perma.cc/2S32-UVDB] (last visited Jan. 16, 2022) (providing that the Clearinghouse "brings together and analyzes information and documents about important civil rights cases across the United States"; that it "is organized by case category"; and that it "is dedicated to injunctive relief rather than damages litigation").

128. *See Special Collection: COVID-19 (Novel Coronavirus)*, UNIV. MICH. L. SCH. C.R. LITIG. CLEARINGHOUSE, https://clearinghouse.net/results.php?searchSpecialCollection=62 [https://perma.cc/M6HP-9EEH] (last visited Nov. 12, 2021) (providing that the collection, which includes a supplemental CSV report, includes "cases that address the challenges posed by the COVID-19 pandemic, social distancing, etc.," but not "every single-person request for release"; instead, the collection includes "cases affecting multiple persons"). The site also directs users to two other sources: (1) *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE (Oct. 12, 2021), https://www.prisonpolicy.org/virus/virusresponse.html#resources [https://perma.cc/CJ5P-GFHC] and (2) *Covid Behind Bars Data Project*, UCLA L. SCH., https://uclacovidbehindbars.org [https://perma.cc/77YU-FJ54] (last visited Jan. 11, 2022).

129. From the Authors' discussions with the founder and Director of Clearinghouse, Margo Schlanger, during the fall and winter of 2021–2022.

130. *See id.*

131. *See infra* notes 132–43.

to in this Article as the "Clearinghouse subset" or the "Subset." Observations made in this Article about the Clearinghouse subset are based on a combination of novel data and Clearinghouse data.

The Subset includes cases from all U.S. Courts of Appeal except for the Federal Circuit: four cases from the First Circuit;[132] six cases from the Second Circuit;[133] five cases from the Third Circuit;[134] seven cases from the Fourth Circuit;[135] 11 cases from the Fifth Circuit;[136] six cases from the Sixth Circuit;[137] five cases from the Seventh Circuit;[138] three cases from the

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132. *See generally* Denbow v. Me. Dep't. of Corr., No. 1:20-cv-00175 (D. Me. May 15, 2020); Baez v. McDonald, No. 1:20-cv-10753 (D. Mass. Apr. 17, 2020); Grinis v. Spaulding, No. 1:20-cv-10738 (D. Mass. Apr. 15, 2020); Savino v. Hodgson, No. 1:20-cv-10617 (D. Mass. Mar. 27, 2020).

133. *See generally* Harper v. Cuomo, No. 9:21-cv-00019-LEK-ML (N.D.N.Y Jan. 8, 2021); Azor-El v. N.Y.C. Dep't of Corr., No. 1:20-cv-03650 (S.D.N.Y. May 11, 2020); Fernandez-Rodriguez v. Licon-Vitale, No. 1:20-cv-03315-ER (S.D.N.Y. Apr. 28, 2020); Martinez-Brooks v. Easter, No. 3:20-cv-000569 (D. Conn. Apr. 27, 2020); McPherson v. Lamont, No. 3:20-cv-00534-JBA (D. Conn. Apr. 20, 2020); Chunn v. Edge, No. 1:20-cv-01590 (E.D.N.Y. Mar. 27, 2020).

134. *See generally* Brown v. Warren, No. 1:20-cv-07907-NLH-AMD (D.N.J. June 26, 2020); Wragg v. Ortiz, No. 20-cv-05496-RMB (D.N.J. May 4, 2020); Remick v. Philadelphia, No. 2:20-cv-01959-BMS (E.D. Pa. Apr. 20, 2020); Brown v. Marler, No. 2:20-cv-01914-AB (E.D. Pa. Apr. 15, 2020); Graham v. Allegheny Cnty., No. 20-cv-00496 (W.D. Pa. Apr. 8, 2020).

135. *See generally* Catchings v. Wilson, No. 1:21-cv-00428-GLR (D. Md. Feb. 20, 2021); Baxley v. Jividen, No. 3:18-cv-01526 (S.D. W. Va. July, 27, 2020); Hallinan v. Scarantino, No. 20-hc-02088-FL (E.D.N.C. May 26, 2020); Seth v. McDonough, No. 20-cv-01028 (D. Md. Apr. 21, 2020); Whorley v. Northam, No. 20-cv-00255 (E.D. Va. Apr. 8, 2020); Hallinan v. Scarantino, No. 20-cv-00563-M (E.D.N.C. Oct. 26, 2020); Duvall v. Hogan, No. 1:94-cv-02541-ELH (D. Md. Sept. 14, 1994).

136. *See generally* Blake v. Carr, No. 4:20-cv-00807-P (N.D. Tex. Aug. 3, 2020) (cases consolidated June 4, 2021, then de-consolidated; the new case number assigned post-consolidation is 4:20-cv-854); Waddell v. Taylor, No. 20-cv-00340-TSL-RHW (S.D. Miss. May 14, 2020); Belton v. E. Baton Rouge Parish Prison, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. May 4, 2020); Gumns v. Edwards, No. 3:20-cv-00231-SDD-RLB (M.D. La. Apr. 14, 2020); Sanchez v. Brown, No. 20-cv-00832-E (N.D. Tex. Apr. 9, 2020); Livas v. Myers, No. 2:20-cv-00422-TAD-KK (W.D. La. Apr. 6, 2020); Valentine v. Collier, No. 20-cv-01115 (S.D. Tex. Mar. 30, 2020); Amos v. Hall, No. 4:20-cv-00007-DMB-JMV (N.D. Miss. Jan. 14, 2020); Russell v. Harris Cnty., No. 4:19-cv-00226 (S.D. Tex. Jan. 21, 2019); United States v. Hinds Cnty., No. 16-cv-00489-WHB-JCG (S.D. Miss. June 23, 2016); Lewis v. Cain, No. 15-cv-00318-BAJ-RLB (M.D. La. May 20, 2015).

137. *See generally* Busby v. Bonner, No. 2:20-cv-02359 (W.D. Tenn. May 20, 2020); Smith v. Dewine, No. 20-cv-02471-EAS-KAJ (S.D. Ohio May 15, 2020); Russell v. Wayne Cnty., No. 20-cv-11094-MAG-EAS (E.D. Mich. May 4, 2020); Abrams v. Chapman, No. 20-cv-11053-MAG-RSW (E.D. Mich. Apr. 29, 2020); Cameron v. Bouchard, No. 20-cv-10949-LVP-MJH (E.D. Mich. Apr. 17, 2020); Wilson v. Williams, No. 20-cv-00794-JG (N.D. Ohio Apr. 13, 2020).

138. *See generally* Mays v. Dart, No. 20-cv-02134 (N.D. Ill. Apr. 3, 2020); Money v. Jeffreys, No. 20-cv-02094 (N.D. Ill. Apr. 2, 2020); Money v. Pritzker, No. 20-cv-02093 (N.D. Ill. Apr. 2, 2020); Smith v. Barr, No. 20-cv-00630 (S.D. Ind. Nov. 25, 2020); Dobbey v. Weilding, No. 13-cv-01068 (N.D. Ill. Feb. 8, 2013).

Eighth Circuit;[139] 15 cases from the Ninth Circuit;[140] three cases from the Tenth Circuit;[141] three cases from the Eleventh Circuit;[142] and two cases from the D.C. Circuit.[143]

Most cases in the subset were brought in 2020, with a small number of additional cases brought in 2021. Just under a dozen of the subset cases are pre-existing jail or prison conditions lawsuits, filed prior to the emergence of COVID-19, in which litigants sought COVID-19-related relief as part of existing active litigation or existing settlement agreements.[144] The outcomes in these cases are notable, as it is likely that litigants in existing conditions cases would attempt to seek relief through them if a climate-related emergency threatened that incarcerated or detained community. Attempts by litigants to obtain COVID-19-related relief through existing jail and prison conditions cases were roughly half unsuccessful[145] and half

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139. *See generally* Frazier v. Kelley, No. 20-cv-00434-KGB-JJV (E.D. Ark. Apr. 21, 2020); Malcolm v. Starr, No. 20-cv-02503 (D. Minn. Dec. 9, 2020); Sabata v. Neb. Dep't of Corr. Servs., No. 17-cv-03107-RFR-MDN (D. Neb. Aug. 15, 2017).

140. *See generally* Criswell v. Boudreaux, No. 20-cv-01048-DAD-SAB (E.D. Cal. July 29, 2020); Fenty v. Penzone, No. 20-cv-01192-SPL-JZB (D. Ariz. June 16, 2020); Torres v. Milusnic, No. 20-cv-04450-CBM-PVC (C.D. Cal. May 16, 2020); Wilson v. Ponce, No. 20-cv-00451 (C.D. Cal. May 16, 2020); Lucero-Gonzalez v. Kline, No. 20-cv-00901-DJH-DMF (D. Ariz. May 8, 2020); Ahlman v. Barnes, No. 8:20-cv-00835 (C.D. Cal. Apr. 30, 2020); Alvarez v. LaRose, No. 20-cv-00782-DMS-AHG (S.D. Cal. Apr. 25, 2020); Cullors v. Los Angeles, No. 20-cv-03760-RGK-PLA (C.D. Cal. Apr. 24, 2020); Maney v. Brown, No. 20-cv-00570 (D. Or. Apr. 6, 2020); Mayes v. Sacramento, No. 18-cv-02081-TLN-KJN (E.D. Cal. July 31, 2018); Murray v. Santa Barbara, No. 17-cv-08805-GW-JPR (C.D. Cal. Dec. 6, 2017); Gray v. Cnty. of Riverside, No. 13-cv-00444-VAP-OP (C.D. Cal. Mar. 8, 2013); Parsons v. Ryan, No. 12-cv-00601-NVW-MEA (D. Ariz. Mar. 22, 2012); Plata v. Newsom, No. 01-cv-01351-JST (N.D. Cal. Apr. 5, 2001); Coleman v. Newsom, No. 2:90-cv-00520-KJM-DB (E.D. Cal. Apr. 23, 1990).

141. *See generally* Weikert v. Elder, No. 20-cv-03646 (D. Colo. Dec. 13, 2020); Carranza v. Reams, No. 20-cv-00977 (D. Colo. Apr. 7, 2020); Nellson v. Barnhart, No. 20-cv-00756 (D. Colo. Mar. 18, 2020).

142. *See generally* Jones v. Hill, No. 1:20-cv-02791-JPB-CCB (N.D. Ga. July 1, 2020); Barnett v. Tony, No. 0:20-cv-61113 (S.D. Fla. June 5, 2020); Swain v. Junior, No. 20-cv-21457 (S.D. Fla. Apr. 5, 2020).

143. *See generally* Williams v. Fed. Bureau of Prisons, No. 20-cv-00890 (D.D.C. Apr. 2, 2020); Banks v. Booth, No. 1:20-cv-00849 (D.D.C. Mar. 30, 2020).

144. *See infra* notes 145–46.

145. *See, e.g.*, Duvall v. Hogan, No. ELH-94-2541, 2020 WL 3402301, at *11 (D. Md. June 19, 2020) (bringing an emergency motion for relief within a pre-existing jail conditions settlement agreement retained under court jurisdiction; motion denied as speculative and unlikely to succeed on the merits of the Eighth Amendment's deliberate indifference component); Lewis v. Cain, No. 15-318-SDD-RLB, 2020 WL 1614424, at *3 (M.D. La. Apr. 2, 2020) (moving for a TRO to prevent the transfer of prison residents with COVID-19 to Angola (LSP); TRO denied as procedurally inappropriate within the existing litigation and as not likely to succeed on the merits of the Eighth Amendment claim); Amos v. Hall, No. 20-cv-00007, 2020 WL 1978382, at *11 (N.D. Miss. Mar. 24, 2020) (moving for a TRO within a pre-existing prison conditions case; TRO denied on multiple grounds: (a) not likely to succeed on the merits as to the Eighth Amendment's deliberate indifference component;

successful.[146] Therefore, as a group of cases, the pre-existing cases within the Clearinghouse subset were more successful in obtaining COVID-19 relief for litigants than were all litigants in the undivided Clearinghouse subset. In the undivided subset of 70 cases, approximately one third obtained some form of COVID-19 mitigation, either as preliminary relief or as court-ordered relief within an existing case.

The focus of this analysis is on litigants' success in obtaining emergency injunctive relief to address COVID-19 related hazards. Unless otherwise

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(b) failed to show irreparable harm would occur after accounting for protective measures as required by the Fifth Circuit in its reversal of the district court in *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020); and (c) the public interest would be harmed by granting the injunction); Order at 2, Parsons v. Shinn, No. 12-cv-00601-PHX-ROS (D. Ariz. Mar. 23, 2020), ECF No. 3540 (denying plaintiffs' emergency motion regarding COVID-19 because no provision in the existing stipulated agreement clearly authorized the type of order sought, however, the court subsequently found in *Parsons v. Shinn*, No. 12-cv-00601-PHX-ROS, 2020 WL 1640532 (D. Ariz. Apr. 2, 2020), the provision of certain COVID-19 information to be within the agreement and ordered it produced); Sabata v. Neb. Dep't of Corr. Servs., No. 17-cv-03107-BCB-MDN (D. Neb. Aug. 15, 2017) (filing an emergency motion for disclosure and discovery within a pre-existing prison conditions case, which does not appear to have been granted); Dobbey v. Weilding, No. 13-cv-01068 (N.D. Ill. Feb. 8, 2013) (seeking temporary appointment of a Special Master to oversee the COVID-19 response in the prison; motion not granted).

146. *See* Coleman v. Newsom, 455 F. Supp. 3d 926, 927 (E.D. Cal. 2020) (denying, in a statewide prison conditions case active for over 30 years, the *Coleman* Plaintiffs' motion to the three-judge court to modify the existing population cap in that case — a rarely-granted PLRA prisoner release order; but note these same plaintiffs subsequently successfully obtained broad COVID-19 protective measures from the district court enforcing their existing consent decree; *see* Coleman v. Newsom, No. 90-cv-00520 (E.D. Cal. Apr. 23, 1990)); Class-Action Order, Mays v. Cnty. of Sacramento, No. 2:18-cv-02081 (E.D. Cal. Apr. 27, 2020) (incorporating COVID-19 mitigation measures into the monitoring and requirements for complying with the pre-existing consent decree governing conditions at the jail); Gray v. Cnty. of Riverside, No. 13-cv-00444, 2020 WL 4249989, at *1 (C.D. Cal. May 8, 2013) (motion to modify or enforce existing consent decree in response to the pandemic was granted, resulting in promulgation of court-appointed expert recommendations and a robust stipulated agreement between the parties); Second Medical Monitoring Report, *Mays*, No. 2:18-cv-0208; Coleman v. Newsom, No. 90-cv-00520 (E.D. Cal. Apr. 23, 1990) (incorporating COVID-19 mitigation measures into the monitoring and requirements for complying with the pre-existing consent decree governing mental healthcare provision in California's prison system); Court-Appointed Monitor's 10th Monitoring Rep., United States v. Hinds Cnty., No. 16-cv-00489-JCG (S.D. Miss. June 23, 2016) (incorporating COVID-19 mitigation measures into the monitoring and requirements for complying with the pre-existing settlement agreement governing conditions at the jail); *see also* Transcript Order, Plata v. Newsom, No. 01-01351 (N.D. Cal. Apr. 11, 2021) (incorporating COVID-19 mitigation measures into the monitoring and requirements for compliance). Recently, the court issued an order, pursuant to the Receiver's recommendation, requiring vaccines for staff and incarcerated workers entering institutions and for residents who accept in-person visitation. *See* Plata, No. 01-cv-01351, 2021 WL 4448953 (N.D. Cal. Sept. 27, 2021). *But see* Plata v. Newsom, 445 F. Supp. 3d 557, 569 (N.D. Cal. 2020) (denying plaintiffs' initial motion for a reduction in population density within the pre-existing consent decree and receivership governing medical care provision in California's prison system).

stated, this Article uses the word "cases" to include the habeas petitions in the subset, and it uses "emergency relief" and "preliminary relief" interchangeably to include (a) preliminary injunctive relief sought in new and existing cases; (b) emergency court orders sought in pre-existing litigation; and (c) emergency release sought through class-wide petitions for habeas corpus.

The analysis asks (1) was emergency relief sought; (2) in what type of action; (3) bringing what claims; (4) was relief in any measure granted and why or why not; and (5) if granted and an appeal was taken, what was the outcome, and why.

B. *Similar Context*: An Emergent, Exogenous Threat to Public Health, with Substantially Increased Risk to People Living in Prisons and Jails

Part I of this Article discussed the unique health and safety threats posed by climate change to people in prison and jails. Millions of people are living in U.S. prisons and jails through an age of record-breaking heatwaves, increasingly destructive floods, more frequent and deadlier storms, deeper freezes, and weather-related infrastructure failures. Prison and jail residents and imprisoned communities are at greater risk of harm because they cannot leave unsafe geographic locations, build weatherproof structures to protect themselves, or engage in other climate-adaptive behaviors, such as stockpiling emergency supplies, while detained or imprisoned in locked facilities.

In the COVID-19 pandemic context, residents cannot fashion their own soap, source their own disinfectant, or leave crowded dorms to socially distance themselves.[147] According to *The Journal of the American Medical Association*, incarcerated people are infected by COVID-19 at a rate more than five times higher than the nation's overall infection rate, and the reported death rate for people in prison (39 deaths per 100,000) is substantially higher than the national rate (29 deaths per 100,000).[148] *The New York Times* reported that one in three people incarcerated in state prisons are known to have had COVID-19, and that prisons, jails, and detention centers in the United States have been among the most dangerous

147. *See generally Reducing Jail and Prison Populations During the Covid-19 Pandemic*, BRENNAN CTR. FOR JUST. (Oct. 14, 2021), https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic [https://perma.cc/89WD-MPNK].

148. Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 J. AM. MED. ASS'N 602, 602–03 (2020) (providing a standardized calculation accounting for the smaller population of individuals aged 65 and older in the U.S. prison population, that shows an adjusted death rate in the prison population of three times higher than would be expected if the age and sex distributions of the United States and prison populations were equal).

places in the country with regards to COVID-19 infection with more than 1,400 new infections and seven deaths, on average, reported inside those facilities each day.[149] According to researchers at the World Bank and Northwestern University, the U.S. jail and prison system acts, as described by National Public Radio, as an "epidemic engine" that "is driven by a massive number of people who . . . have been cycling between cramped detention facilities and their home communities," resulting in millions of preventable COVID-19 cases in the United States.[150]

COVID-19 is aggressively contagious,[151] it can survive outside of the human body,[152] and the disease can cause severe lung damage, respiratory failure, and require a patient be mechanically ventilated to stay alive.[153] COVID-19 can also disable other organs, including the heart, blood vessels, kidneys, and brain.[154] Individuals with particular medical conditions are at a higher risk of severe illness from COVID-19.[155] People with COVID-19 may be infectious days before symptoms appear, meaning that even by the time people report symptoms, many more people they

149. *See* Burkhalter et al., *supra* note 99.

150. Bill Chappell, *Crowded U.S. Jails Drive Millions of COVID-19 Cases, A New Study Says*, NPR (Sept. 2, 2021, 11:00 AM), https://www.npr.org/2021/09/02/1033326204/crowded-jails-drove-millions-of-covid-19-cases-a-new-study-says [https://perma.cc/MVJ6-ZPWW].

151. *See, e.g.*, E.J. Mundell, *Exhaled 'Aerosols' Spread Coronavirus up to 13 Feet — and Shoes Carry the Virus, Too*, MED. XPRESS (Apr. 17, 2020), https://medicalxpress.com/news/2020-04-exhaled-aerosols-coronavirusfeetand-virus.html [https://perma.cc/J6KS-K6NP]; Knvul Sheikh, *Talking Can Generate Coronavirus Droplets that Linger up to 14 Minutes*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/05/14/health/coronavirus-infections.html [https://perma.cc/XZQ6-57GC].

152. *See* Marilynn Marchione, *Tests Show New Coronavirus Lives on Some Surfaces for up to 3 Days*, ABC NEWS (Mar. 11, 2020, 3:41 PM), https://abcnews.go.com/US/wireStory/tests-show-virus-lives-surfaces-days-69534882 [https://perma.cc/R43Y-AFHM].

153. *See* Bruce Y. Lee, *How Does the COVID-19 Coronavirus Kill? What Happens When You Get Infected*, FORBES (Mar. 21, 2020, 10:00 PM), https://www.forbes.com/sites/brucelee/2020/03/21/how-does-the-covid-19-coronavirus-kill-what-happens-when-you-get-infected/#3abaaff56146 [https://perma.cc/BJT6-L4GL].

154. *See* Meredith Wadman et al., *A Rampage Through the Body*, SCI. (Apr. 17, 2020), https://www.sciencemag.org/news/2020/04/how-does-coronavirus-kill-clinicians-trace-ferocious-rampage-through-body-brain-toes# [https://perma.cc/UML2-WY8C].

155. *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 14, 2021), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html [https://perma.cc/LXC9-9PD8] (including individuals with asthma, heart conditions, immunocompromising diseases such as HIV or AIDS, diabetes, or kidney disease).

were in contact with may already have been infected.[156] A rapid response is therefore critical to preventing further spread. In a prison or jail setting, waiting even 24 hours between reporting of symptoms and isolation can substantially increase the risk of unnecessarily infecting scores of individuals housed with the symptomatic person.[157] A rapid response is also necessary to prevent irreparable harm because COVID-19 patients, particularly those with certain underlying medical conditions, can deteriorate rapidly and irreversibly after contracting the disease or presenting with symptoms.[158] One study, for example, found that 17% of their subjects developed Acute Respiratory Distress Syndrome shortly after the first onset of COVID-19 symptoms, and, among those, 65% rapidly worsened and died from multiple organ failure.[159]

Taken together, this Article hypothesizes that COVID-19 conditions litigation may be analyzed as a highly approximated partial simulation for what climate change-related litigation might look like when assessed as an exogenous public health threat that is uniquely dangerous to people confined in locked prison and jail facilities, who cannot leave a dangerous physical location or take rational steps on their own to mitigate potential harm.

C. *Similar Form*: Climate-Related and COVID-19 Conditions Litigants Will Seek Preliminary Relief in the Form of Release or Mitigation

This Article mainly focuses on preliminary injunctive relief and analogous emergency relief or release because many, though not all, climate-related threats will call for swift court intervention in the face of an anticipated climate change-related harm. The Subset includes actions seeking emergency release, injunctions, or court orders pursuant to emergency petitions and motions in both new and ongoing matters. In each, plaintiffs asked the court to require that prison or jail officials release

156. *See, e.g.*, Kelly MacNamara, *People with COVID-19 May Be Infectious Days Before Symptoms: Study*, MED. XPRESS (Apr. 15, 2020), https://medicalxpress.com/news/2020-04-people-covid-infectious-dayssymptoms.html [https://perma.cc/SMD5-NB5S].

157. *See, e.g.*, Report of Homer Venters at 12–13, Waddell v. Taylor, No. 3:20-cv-00340 (S.D. Miss. May 25, 2020). Homer Venters is a physician, internist, epidemiologist and former Medical Director, Assistant Commissioner, and Chief Medical Officer of the Correctional Health Services of New York City; in that role he was responsible for all aspects of health services including physical and mental health, addiction, quality improvement, re-entry and morbidity and mortality reviews as well as all training and oversight of physicians, nurses, and pharmacy staff caring for all persons held in New York City's 12 jails. *See id.* at 2–3.

158. *See, e.g.*, Sevim Zaim et al., *COVID-19 and Multiorgan Response*, 45 CURRENT PROBS. CARDIOLOGY 100618 (2020).

159. *See id.*

them from the facility and/or take affirmative steps to better protect them; in each, the outcome sought was injunctive relief or its functional equivalent on an emergency basis.

An injunction is a court order that requires the nonmovant to do or to abstain from doing a particular action.[160] Injunctive relief of any type is considered an extraordinary equitable remedy requiring that the applicant unequivocally show the need for issuance.[161] Plaintiffs seeking a permanent injunction at the merits stage of a lawsuit must prevail on the merits and establish that equitable relief in the form of an injunction is appropriate in all respects, including because state officials are unlikely to take required corrective action absent an injunction.[162] Plaintiffs seeking preliminary relief must satisfy an even higher burden because they seek a court's order requiring the outcome sought before the court has passed on the merits of the case.[163]

Federal Rule of Civil Procedure 65(b)(1) governs the issuance of a temporary restraining order (TRO), which may only last for a 14-day period.[164] If a plaintiff seeks preliminary relief beyond an initial 14-day period, the plaintiff may additionally move for a preliminary injunction, or a court may construe a motion for a TRO as a motion for a preliminary injunction. The plaintiff may also move only for a preliminary injunction. To obtain preliminary relief in the form of a TRO or a preliminary injunction, the plaintiff must satisfy the substantive requirements for a preliminary injunction.[165]

Federal Rule of Civil Procedure 65(a) governs the issuance of a preliminary injunction, which may be granted before or during trial and before the final judgment. In order to obtain a preliminary injunction, the applicant must demonstrate all four of the following elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is denied; (3) that

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160. *See* ROBERT HENLEY EDEN, A TREATISE ON THE LAW OF INJUNCTIONS 1–2 (Jacob D. Wheeler ed., 1822).

161. *See, e.g.*, Sepulvado v. Jindal, 729 F.3d 413, 417 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1789 (2014).

162. *See, e.g.*, Dresser-Rand Co. v. Virtual Automation Inc., 361 F.3d 831, 847–48 (5th Cir. 2004); Hay v. Waldron, 834 F.2d 481 (5th Cir. 1987).

163. *See* McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998) ("[A] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' as to each of the four requisites."); *see also* Justin Indus., Inc. v. Choctaw Sec., L.P., 920 F.2d 262, 269 n.7 (5th Cir. 1990) (providing that courts should compel certain actions through granting mandatory injunctive relief where the movant shows a clear entitlement to the relief under the facts and the law).

164. *See* FED. R. CIV. P. 65(b)(2).

165. *See* Clark v. Pritchard, 812 F.2d 991, 993 (5th Cir. 1987) (providing that the same standard applies to both a TRO and a preliminary injunction).

the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest.[166] All four elements are mixed questions of law and fact.[167]

In the 70 subset cases reviewed, nearly all sought preliminary relief in the form of a TRO, a preliminary injunction, or both. The handful that did not seek preliminary relief were uniquely situated, for example, as settlement monitoring phase or pro se litigation.[168] As would be expected in climate change conditions litigation, plaintiffs in COVID-19 conditions litigation sought preliminary relief in the form of either court-ordered release or court-ordered mitigation.[169]

Of the 70 cases in the subset, the overwhelming majority sought release of plaintiffs or of one or more plaintiff subclasses as a form of preliminary relief: only a few cases within the subset sought mitigation alone and not any form of release.[170] Of the 70 cases in the subset, approximately one

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166. *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); *see also* Jackson Women's Health Org. v. Currier, 760 F.3d 448, 452 (5th Cir. 2014).

167. *See* Hoover v. Morales, 164 F.3d 221, 224 (5th Cir. 1998).

168. *See, e.g.*, Court-Appointed Monitor's Tenth Monitoring Report, *supra* note 146 (addressing COVID-19 mitigation issues as part of ongoing jail conditions monitoring of existing settlement agreement); Complaint, Blake v. Carr, No. 20-cv-807-P (N.D. Tex. Aug. 3, 2020) (consolidated then deconsolidated action by over 70 women prison residents pro se regarding COVID-19 mitigation).

169. The type of mitigation requested and ordered as relief in the subset varied widely, but most content tracked the Centers for Disease Control and Prevention (CDC) guidance on measures that correctional facilities should take to mitigate risk of infection and severe illness due to COVID-19 infection in prisons and jail settings. *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 9, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html [https://perma.cc/S53D-23EM]. Suggested measures include steps facilities should take for prevention of the spread of COVID-19, including hygiene practices, routine cleaning, symptom screening, social distancing, and testing; they also include steps facilities should take when managing individuals with confirmed or suspected COVID-19 inside the facility, including regarding quarantining and medical isolation. Courts over-relied on the CDC Guidance in rejecting particular forms of relief sought as exceeding minimum constitutional standards if such relief was not specifically enumerated in the CDC Guidance. *See generally Conditions of Confinement, COVID-19, and the CDC*, 134 HARV. L. REV. 2233 (2021) (surveying COVID-19 prison conditions cases and concluding that courts throughout the pandemic have relied on and deferred to CDC Guidance to assess the viability of plaintiffs' conditions of confinement claims, in contravention of established norms within both administrative and constitutional law).

170. *See, e.g.*, Class Action Complaint for Injunctive & Declaratory Relief, Waddell v. Taylor, No. 20-cv-00340-TSL-RHW (S.D. Miss. May 14, 2020); Complaint, Gumns v. Edwards, No. 3:20-cv-00231-SDD-RLB (M.D. La. Apr. 14, 2020) (seeking mitigation and a court order preventing transfer of detainees with COVID-19 to Angola (LSP); TRO denied); Amos v. Hall, No. 4:20-cv-00007-DMB-JMV (N.D. Miss. Jan. 14, 2020) (seeking mitigation only within a pre-existing prison conditions case; TRO denied). Parties entered into a Memorandum of Understanding voluntarily withdrew their motion for a TRO and

third were granted some form of COVID-19 mitigation as preliminary relief within a new or existing case or as court-ordered relief within an existing case. However, only a few cases in the subset successfully obtained, as preliminary relief, some form of release or a court order requiring the defendant to implement a process for meaningfully considering applications for release; such relief was granted by federal district courts in Massachusetts, Connecticut, and California (which are within the First, Second, and Ninth Circuits, respectively).[171]

Request for release, in these cases, refers to a range of legal mechanisms by which plaintiffs sought to be allowed to leave prison or jail temporarily

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preliminary injunction. See Motion to Withdraw Motion for TRO, *Waddell*, No. 20-cv-00340, and the court granted a joint motion to stay proceedings pending negotiations. *See* Order, *Waddell*, No. 20-cv-00340; *see also* Stipulated Motion for Preliminary Injunction, Weikert v. Elder, No. 20-cv-03646 (D. Colo. Dec. 13, 2020); Order Granting Stipulated Motion, *Weikert*, No. 20-cv-03646.

171. *See, e.g.*, Memorandum of Decision at 2, Savino v. Hodgson, No. 20-cv-10617-WGY (D. Mass. May 12, 2020) (explaining that "[t]he Court has matched the unusual health emergency with an unusual procedural maneuver," and that "[b]efore addressing the merits of the petition, the Court relied on its inherent authority expeditiously to review bail applications for all of the detainees in the class, one by one, and released almost a third of them to house arrest under strict conditions"; the Court continued: "These releases have meaningfully reduced the crowding at the detention center and, one hopes, hindered the virus' spread"); *see also* Ruling on Motion for TRO and Motion to Dismiss at 3 n.1, 27–29, 31, 33, 55, 60, Martinez-Brooks v. Easter, No. 3:20-cv-000569 (MPS) (D. Conn. May 12, 2020) (ordering the federal prison defendants to implement "a process by which inmates would be evaluated promptly for transfer to home confinement," mandating "individualized consideration . . . on a basis more accelerated and more focused on the critical factors of inmate and public safety than the current home confinement review process," and explicitly holding that the Order (1) does not divest the Bureau of Prisons (BOP) of its sentencing authority or its statutory and regulatory discretion, but "merely directs the Respondents to exercise the authority already conferred on them to place inmates in home confinement and consider requests for compassionate release in a manner that does not violate the Eighth Amendment"; and (2) does not run afoul of the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626, res judicata, or claim preclusion); Torres v. Milusnic, 472 F. Supp. 3d 713, 746-747 (C.D. Cal. 2020) (ordering, along with other relief, BOP to institute a process through which it must consider people over the age of 50 for home confinement if they have at least one health condition that puts them at risk of serious illness from COVID-19); Plata v. Newsom, 445 F. Supp. 3d 557, 561–69 (N.D. Cal. 2020) (denying plaintiffs' initial motion for a reduction in population density within the pre-existing consent decree and receivership governing medical care provision in California's prison system). *But see* Transcript Order, *Plata*, No. cv-01-01351 (incorporating robust COVID-19 mitigation measures into the monitoring and requirements for compliance, including several early release programs designed to reduce population density); Order on Defendant's COVID-19 Plan at 8, 12, Gray v. Cnty. of Riverside, No. 13-cv-00444 (C.D. Cal. July 20, 2020) (motion to modify or enforce existing consent decree in response to the pandemic was granted, resulting in an April 14, 2020, court order (ECF No. 193) to develop a COVID-19 plan; the plan incorporates a requirement to consider release for vulnerable populations and a requirement to achieve physical distancing according to an adjusted capacity plan, including through use of the jail's electronic ankle monitor program and federal release for low level inmates).

or permanently to go to a location where social distancing was possible. These included, for example, unconditional or conditional release into the community, including through electronic ankle monitoring, home confinement, or house arrest.[172] The legal mechanisms varied, but included seeking compassionate release, implementation of expedited procedures to reconsider or increase the number of individuals released through existing release programs, and temporary enlargement of custody or bail pending habeas corpus (when sought via class-wide petition for writ of habeas corpus, which requires alleging an underlying violation of rights related to conditions of confinement).[173] The latter mechanism is discussed in a later Section of this Article.

Plaintiffs' requests for release as relief in cases requesting COVID-19-related emergency injunctions had a very low rate of success among the cases in the subset overall; however, there were successes, most notably within cases enforcing pre-existing consent decrees, some of which applied to incarcerated communities composed of tens of thousands of individuals.[174] The more typical denial of release as preliminary release during the COVID-19 pandemic suggests that future litigants facing threats of climate-related catastrophe should likely not solely request release as relief.

D. *Similar Content*: Climate-Related and COVID-19 Conditions Litigants Will Bring the Same or Similar Legal Claims

COVID-19 conditions litigation outcomes are relevant to future climate-related conditions litigation because there are a finite number of legal claims and action types that apply in prison and jail conditions jurisprudence, and because legal arguments made by plaintiffs in both contexts will arise from analogous factual scenarios: an exogenous public health and safety crisis poised to inflict more harm on incarcerated and detained people because of their confinement. This Section describes the three main claims brought, and one alternative type of action deployed, within the 70 COVID-19 prison and jail matters reviewed. It also considers

172. *See infra* note 174.

173. *See infra* note 174.

174. *See, e.g.*, *Plata*, 445 F. Supp. 3d at 561–69 (incorporating several early release programs designed to reduce population density in response to the pandemic within the pre-existing consent decree and receivership governing medical care provision in California's prison system); Order on Defendant's COVID-19 Plan, *supra* note 171, at 8, 12 (ordering a plan for the Riverside County adult jail system, comprising four correctional facilities and incorporating a requirement to consider release for vulnerable populations and a requirement to achieve physical distancing according to an adjusted capacity plan).

the implications of their outcomes as applied to potential future climate-related corrections litigation.

First, this Section discusses federal constitutional claims — Eighth Amendment and Due Process Clause claims (alleging violative conditions of confinement). Second, it discusses federal statutory claims brought under Title II of the Americans with Disabilities Act (ADA),[175] and pursuant to the regulations implementing Title II of the ADA in Section 504 of the Rehabilitation Act (RA), alleging unlawful discrimination against persons with disabilities.[176] Third, it discusses an alternative type of action brought by some plaintiffs in the COVID-19 prison and jail litigation subset: class-wide petitions for habeas corpus (seeking relief from unlawful conditions of confinement through alleging violations of the Eighth Amendment, Due Process Clause, the ADA, and/or the RA).

i. Eighth Amendment and Due Process Clause (Fifth and Fourteenth Amendment) Claims: Conditions of Confinement

People held in custody post-conviction, typically in prisons, have rights regarding conditions of confinement that arise from their constitutional right to be free from cruel and unusual punishment under the Eighth Amendment. The conditions in which they are confined may amount to punishment,[177] but those conditions may not amount to cruel and unusual punishment,[178] which is prohibited under the Eighth Amendment of the U.S. Constitution.[179] A resident must show "deliberate indifference" to a qualifying basic need.[180] Deliberate indifference has two prongs: (1) an objective element, the requirement of a serious medical need or a risk[181] of serious harm;[182] and (2) a subjective element, the requirement that prison

175. 42 U.S.C. §§ 12111.

176. 29 U.S.C. § 701.

177. *See, e.g.*, Wilson v. Seiter, 501 U.S. 294, 300 (1991) (explaining that "the Eighth Amendment . . . bans only cruel and unusual punishment," and that "[i]f the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the [defendant] before it can qualify" as cruel and unusual punishment).

178. *See, e.g.*, Gates v. Collier, 501 F.2d 1291, 1300–01 (5th Cir. 1974) (providing that the Eight Amendment prohibition against cruel and unusual punishment "is not limited to specific acts directed at selected individuals, but is equally pertinent to general conditions of confinement that may prevail at a prison").

179. *See* U.S. CONST. amend. VIII.

180. *See* Estelle v. Gamble, 429 U.S. 97, 103–04 (1976).

181. *See* Helling v. McKinney, 509 U.S. 25, 33–34 (1993) (providing that a risk of future harm is a cognizable injury under the Eighth Amendment: "It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them").

182. *See, e.g.*, *Estelle*, 429 U.S. at 103.

officials knew or should have known of a substantial risk of serious harm *and* that they disregarded it.[183] The standard is determined under modern, or evolving, standards of decency.[184] A resident will not be able to establish an Eighth Amendment violation if defendants can show that they responded reasonably to the risk of harm.[185] It is very difficult for a prison resident to prevail in establishing that a prison condition amounts to cruel and unusual punishment,[186] since the deliberate indifference standard requires one to establish that the defendants acted with subjective criminal recklessness.[187]

People held in custody prior to judgment, typically in jails or pretrial detention, are presumed innocent; their rights regarding conditions of confinement arise from their right to not be deprived of life, liberty, or

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183. *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994) ("We reject petitioner's invitation to adopt an objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'").

184. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 101 (1958); *see also Estelle*, 429 U.S. at 103.

185. *See, e.g.*, John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 457 (2017).

186. *See* Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [https://perma.cc/57JW-NNL4]; *see also* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015) (showing that nationally only 0.5% of judgments in plaintiff sided prisoner rights cases are decided pretrial for incarcerated plaintiffs, only 5.9% settle, and only 0.6% go to trial, 81.6% of prisoner rights cases are determined pretrial with judgments for the defendants).

187. *Farmer*, 511 U.S. at 839–40 ("[S]ubjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases, and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment."). *See generally* Rosalie Berger Levinson, Kingsley *Breathes New Life into Substantive Due Process as a Check on Abuse of Government Power*, 93 NOTRE DAME L. REV. 357, 358 (2017) (describing the subjective state-of-mind requirement of the deliberate indifference test as a "subjective criminal recklessness" standard requiring "proof that the official acted with malicious, sadistic intent to harm"). Courts often reason that when an informed prison official attempts *any degree* of intervention, even if known to be ineffective at materially reducing the risk of harm, the intervention constitutes conclusive evidence that the official could not have had the mens rea required to establish deliberate indifference. *See, e.g.*, Dockery v. Hall, 443 F. Supp. 3d 726, 743–44 (S.D. Miss. 2019) (holding that Department of Corrections officials were not deliberately indifferent to the risks associated with the indefinite, long-term solitary confinement of persons with serious mental illness because the prison routinely repaired damage to cells, "including light fixtures").

property absent due process of law,[188] as enshrined in the Due Process Clause of the Fifth Amendment, if in federal custody, or the Fourteenth Amendment, if in state or local custody.[189] In some jurisdictions, people held in custody prior to judgment who allege a violation of their rights under the Due Process Clause due to the conditions of their confinement must satisfy the onerous Eighth Amendment subjective deliberate indifference standard; in other jurisdictions, less strict standards may apply, such as objective unreasonableness or objective deliberate indifference.[190]

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188. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979) (holding that a pretrial detainee has a right under the Due Process Clause to be free from punishment prior to an adjudication of guilt).

189. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 316 (1982). The due process rights of people held in federal custody arise from the Fifth Amendment's Due Process Clause and the due process rights of people held in state or local custody arise from the Fourteenth Amendment's Due Process Clause. U.S. CONST. amend. V (ratified in 1791 as part of the Bill of Rights to limit the power and authority of the new U.S. federal government by requiring that: "No person shall . . . be deprived of life, liberty, or property, without due process of law"); *id.* amend. XIV (adopted in 1868 as one of the Reconstruction Amendments to limit the power and authority of states by requiring that no "State [shall] deprive any person of life, liberty, or property, without due process of law"); *see also Bell*, 441 U.S. at 554 (addressing the constitutionality of conditions of confinement in a pretrial federal detention facility and providing that the Due Process Clause of the Fifth Amendment protected the federal detainees "against the deprivation of their property without due process of law"); Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977) ("Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.").

190. *See, e.g.*, Order on Motions to Dismiss & Application for Injunctive Relief, Baez v. McDonald, No. 1:20-cv-10753 (D. Mass. May 18, 2020) (denying motion for TRO and preliminary injunction brought by federal criminal detainees awaiting trial or sentencing on multiple grounds, including because pre-trial (and post-trial) plaintiffs were not likely to succeed on the merits as to the Eighth Amendment deliberate indifference component, and explaining that plaintiffs "have not established that they are likely to succeed in showing that [the defendant] has been obdurate, wonton, or reckless with respect to that risk, or has otherwise failed to take reasonable steps aimed at preventing or mitigating the risk that COVID-19 presents to those detained at [the facility]"). In other jurisdictions, pretrial detainees need not establish subjective deliberate indifference to establish that their rights under the Due Process Clause were violated. For example, in the Ninth Circuit, an objective deliberate indifference is applied in the pre-trial detainee context with regards to a claim related to medical care. *See, e.g.*, Order at 15–16, Lucero-Gonzalez v. Kline, No. 20-cv-00901-PHX-DJH (DMF) (D. Ariz. June 2, 2020) ("[C]laims for violations of the right to adequate medical care brought by pretrial detainees against individual defendants under the Fourteenth Amendment must be evaluated under an objective deliberate indifference standard," and "[t]o state a medical care claim, a pretrial detainee must show (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved — making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries." (citing Gordon v. Cnty. of Orange, 888 F.3d 1118, 1124–25 (9th Cir. 2018) (internal quotations omitted))). See also *Carranza v. Reams*, No. 20-CV-00977-PAB, 2020 WL 2320174, *7 n.9

In the Clearinghouse subset of the 70 COVID-19 prison and jail conditions cases brought in federal court seeking relief affecting multiple persons, virtually all cases allege violations of the Eighth Amendment, the Due Process Clause, or both. The vast majority brought claims under the Eighth Amendment, the Due Process Clause, or both. A handful of cases in the Clearinghouse subset sought only release and only via writ of habeas corpus;[191] yet to support their habeas corpus petitions, they alleged unlawful confinement due to rights violations under the Eighth Amendment and/or Due Process Clause.

A significant majority, approximately two-thirds, of the Clearinghouse subset cases were not successful in obtaining any form of preliminary relief. The most common grounds for denial, sometimes cited alongside alternate sufficient grounds, was the failure to establish a likelihood of success as to the Eighth Amendment's deliberate indifference standard. Most commonly, courts agreed that plaintiffs were likely to succeed in establishing the objective prong of the deliberate indifference standard (substantial risk of serious harm) and the knowledge component of the subjective prong of the deliberate indifference standard (subjective knowledge of the risk); however, courts generally disagreed that plaintiffs were likely to succeed in establishing the "disregard" component of the

(D. Colo. May 11, 2020) for a district court's explanation of the circuit split on this issue in one jail COVID-19 case: plaintiffs' Eighth Amendment claim is brought on behalf of "persons in carceral custody," while their Fourteenth Amendment claim is brought on behalf of pretrial detainees. Although pretrial detainees are protected under the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment, in the Tenth Circuit, courts apply "an analysis identical to that applied in Eighth Amendment cases" in determining whether a pretrial detainee's rights were violated at the time he was assaulted. *See* Lopez v. LeMaster, 172 F.3d 756, 759 n.2 (10th Cir. 1999). Plaintiffs contend that *Kingsley v. Hendrickson*, 576 U.S 389, 397 (2015), which held that "the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one," changed the standard for pretrial detainees making deliberate indifference claims. The circuit courts have split on the applicability of *Kingsley* to the medical-care context. *See* Miranda v. Cnty. of Lake, 900 F.3d 335, 352 (7th Cir. 2018) (joining the Second and Ninth Circuits in concluding that "medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry" but acknowledging that the Fifth, Eighth, and Eleventh Circuits have confined *Kingsley* to the excessive-force context). The Tenth Circuit has declined to rule definitively on the issue. *See* Burke v. Regalado, 935 F. 3d 960, 991 n.9 (10th Cir. 2019) (finding that plaintiffs had satisfied their burden under the Eighth Amendment standard, which is more favorable to defendant, the court did not need to resolve this issue); *see also* Perry v. Durborow, 892 F.3d 1116, 1122 n.1 (10th Cir. 2018); Carranza v. Reams, No. 20-cv-00977, 2020 WL 2320174, at *7 n.9 (D. Colo. May 11, 2020).

191. *See* 28 U.S.C. §§ 2241–2253; *see also id.* §§ 2254, 2255.

subjective prong (wanton disregard of the risk by conduct exceeding mere negligence, failing to take reasonable measures to abate the risk).[192]

There are critically important exceptions to this general pattern: not all courts agreed with plaintiffs *as to the objective prong* (substantial risk of serious harm). For example, the Fifth Circuit in *Valentine v. Collier* stayed the district court's preliminary injunction because it found defendants were

192. *See, e.g.*, Fernandez-Rodriguez v. Licon-Vitale, 470 F. Supp. 3d 323, 355 (S.D.N.Y. 2020) (denying plaintiffs preliminary relief based on a lack of evidence on the "disregard" component of subjective deliberate indifference, finding a substantial risk to the health of residents due to defendants' lack of a sick-call system, lack of symptom screening in quarantine, lack of contact tracing, lack of following their own COVID-19 safety protocols, failure to provide testing or care to people with COVID-19 symptoms, and lack of attempts to use population reduction measures available to them); Order on Motion for Temporary Restraining Order at 1, 48–49, 49 n.10, Denbow v. Me. Dept. of Corr., No. 1:20-cv-00175 (D. Me. June 8, 2020) (denying plaintiffs motion for a TRO because "significant unresolved factual disputes preclude a finding that the incarcerated individuals have established a likelihood of success on the merits" of the Eighth Amendment and ADA and RA claims, including because the record before the court at the TRO stage did not "support a finding of the sort of 'wanton disregard' necessary to establish deliberate indifference"); Order at 14–15, Lucero-Gonzalez v. Kline, No. 20-cv-00901-PHX-DJH (DMF) (D. Ariz. June 2, 2020) (denying plaintiffs' motion for a TRO and preliminary injunction because defendants, as to the post-conviction plaintiff, "have enacted various policies in response to the risks posed by COVID-19," and without a significant analysis of adequacy, "*[t]he very fact that Defendants have enacted such policies* supports that they have not been subjectively indifferent to the risks posed by COVID-19 to Plaintiffs" (emphasis added)); Ruling at 30, 34, Gumns v. Edwards, No. 3:20-cv-00231-SDD-RLB (M.D. La. May 15, 2020) (denying plaintiffs motion for a TRO on multiple grounds, including plaintiffs' inability to satisfy the subjective deliberate indifference standard and extensively citing to the Fifth Circuit's decision to stay the preliminary injunction in *Valentine v. Collier*: "For the same reasons articulated in *Amos* and *Valentine*, the Court finds that, while the Camp J transfer and isolation plan is not a 'perfect' plan, the well-intentioned efforts to decrease the risk of harm and the spread of the coronavirus throughout Louisiana jails and prisons belies a claim of deliberate indifference"); Opinion & Order at 4, 12–17, 41–42, Money v. Brown, No. 20-cv-00570-SB (D. Or. Apr. 6, 2020) (discussing a range of facts that preclude a finding of deliberate indifference, including because defendant developed and implemented COVID-19 policies, protective equipment, suspended visitation, provided free soap, established respiratory clinics, and conducted asymptomatic testing and contact tracing; the court disagreed with plaintiffs that the lack of release measures could support a finding of deliberate indifference, since "[a]t this juncture, neither [defendant's] nor this Court's pen can reduce the prison population to save lives," because "[o]nly the Governor has that power"); Order at 24, 31–32, Jones v. Hill, No. 1:20-cv-02791-JPB (N.D. Ga. Dec. 24, 2020) (applying the Eighth Amendment standard in a jail case and denying a preliminary injunction because of a failure to establish success as to the second half of the subjective prong of the deliberate indifference standard: "the Court finds that Plaintiffs are likely to show both the objective component (substantial risk of serious harm) necessary to establish a deliberate indifference claim and that Defendants had subjective knowledge of that harm," however, given conflicting evidence available at the preliminary injunction stage of the proceedings, "this Court is not persuaded Plaintiffs have made a sufficient showing that Defendants disregarded the risk of serious harm by conduct more than mere negligence. Without this showing, Plaintiffs cannot establish a substantial likelihood of success on the merits").

likely to prevail on the merits for two main reasons: (1) the plaintiffs lacked evidence that "a substantial risk of serious harm" existed after accounting for the protective measure defendants had taken; and (2) the plaintiffs lacked evidence as to defendants' subjective deliberate indifference, assuming the requisite risk did exist.[193] Other courts followed suit, citing to the *Valentine* stay order to find a lack of evidence as to the objective prong of the deliberate indifference standard (substantial risk of serious harm) and inadequate evidence showing defendants were subjectively deliberately indifferent.[194]

A small minority of cases were successful in obtaining preliminary injunctive relief based on a finding that they were likely to successfully establish that defendants' conduct amounted to subjective deliberate indifference.[195]

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193. *Valentine I*, 956 F.3d 797, 806 (5th Cir. 2020) (granting stay of preliminary injunction).

194. *See, e.g.*, Order & Report-Recommendation at 17–18, Harper v. Cuomo, No. 21-cv-0019 (N.D.N.Y Mar. 1, 2021) (concluding that "the relevant inquiry is whether Plaintiffs have shown a substantial risk of serious harm from COVID-19 at Adirondack in light of the countermeasures that the facility has in place to mitigate the risk of harm," and finding a lack of evidence to support it exists because "Adirondack's response to COVID-19 has been aggressive" and includes dining hall social distancing, provision of hand sanitizer, random asymptomatic testing, additional cleaning supplies, distribution of masks and required masking out of cells, transfer restrictions, making sick staff stay home, designation of two isolation rooms); Chunn v. Edge, 465 F. Supp. 3d 168, 201 (E.D.N.Y. 2020) (denying plaintiffs' motion for a preliminary injunction, citing the stay order in *Valentine* for the rule and determining: "the relevant inquiry is whether petitioners have shown a substantial risk of serious harm from COVID-19 at the MDC in light of the countermeasures that the facility has in place," and plaintiffs were unlikely to succeed in making that showing because defendants' "response to COVID-19 has been aggressive and has included, among other steps, massively restricting movement within the facility, enhancing sanitation protocols, and creating quarantine and isolation units."). *But see Fernandez-Rodriguez*, 470 F. Supp. 3d at 350–55 (finding that "[t]he record shows, with the above guidelines in mind, that the conditions in the MCC — despite the MCC's attempts at protective measures — posed a substantial risk to the health of its inmates" because of its lack of a sick-call system, lack of symptom screening in quarantine, lack of contact tracing, lack of following their own COVID-19 safety protocols, failure to provide testing or care to people with COVID-19 symptoms, and lack of attempts to use population reduction measures available to them; nevertheless denying plaintiffs preliminary relief based on a lack of evidence on the "disregard" component of subjective deliberate indifference).

195. *See, e.g.*, Savino v. Souza, 459 F. Supp. 3d 317, 321 (D. Mass. 2020) (finding "the government's response likely amounts to deliberate indifference to a substantial risk of serious harm to detainees' health," due to facts including "the government's near-blanket opposition to the release of detainees throughout the bail process," and "its minimal efforts at testing and contact tracing"); Ruling on Motion for Temporary Restraining Order & Motion to Dismiss at 2, 47, 50–51, 64, Martinez-Brooks v. Easter, No. 3:20-cv-000569 (MPS) (D. Conn. May 12, 2020) (finding that a number of defendants' failures support a finding of deliberate indifference to a substantial risk of serious harm to prison residents, including the failure to use population reduction tools at defendants' disposal to place medically vulnerable residents on home confinement or to release them via compassionate

In *Valentine v. Collier*, plaintiffs living in a state geriatric prison sought a preliminary injunction mandating COVID-19 mitigation measures, and the court issued a preliminary injunction.[196] It never went into effect. The Fifth Circuit stayed the preliminary injunction pending completion of appellate review, and the U.S. Supreme Court denied plaintiffs' emergency application to vacate the Fifth Circuit's stay.[197] The Fifth Circuit stayed the preliminary injunction because the defendants were likely to prevail on the merits for two reasons. First, the plaintiffs had not accounted for the protective measures the defendants had taken when assessing whether a substantial risk of serious harm existed that amounted to cruel and unusual punishment. Second, the district court committed legal error in applying Eighth Amendment law because defendants had taken and were taking mitigation measures to control the spread of COVID-19, and plaintiffs lacked evidence of defendants' subjective deliberate indifference to a substantial risk of serious harm, assuming it existed.

The Fifth Circuit granted defendant's interlocutory appeal to vacate the preliminary injunction and remanded the proceedings to the district court.[198] The district court granted plaintiffs' request for a permanent injunction, defendants appealed, and the Fifth Circuit stayed the permanent injunction pending an appeal.[199] The U.S. Supreme Court denied two individuals' applications to vacate the Fifth Circuit's stay of the permanent

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release under Section 3582(c)(1)(A)); Order at 18 n.9, 25–26, 37, Carranza v. Reams, No. 20-cv-00977-PAB (D. Colo. Apr. 7, 2020) (finding that pre-adjudication plaintiffs in a jail had satisfied the more difficult Eighth Amendment standard but declined to resolve the dispute about what standard ought to apply; granting in part plaintiffs' motion for a TRO and preliminary injunction; finding plaintiffs were likely to succeed in establishing deliberate indifference, including because defendants failed to take specific social distancing and sanitation precautions to protect medically vulnerable residents).

196. *See* Preliminary Injunction Order at 2, Valentine v. Collier, No. 20-cv-01115 (S.D. Tex. Apr. 16, 2020) (granting preliminary injunction).

197. *See Valentine I*, 956 F.3d 797, 806 (5th Cir. 2020) (granting stay of preliminary injunction, finding that plaintiffs were unlikely to succeed because they did not comply with the PLRA's administrative exhaustion requirement and, in any event, their Eighth Amendment claim was likely to fail on the merits); *see also* Valentine v. Collier (*Valentine II*), 140 S. Ct. 1598, 1598 (2020) (mem.) (denying emergency application to vacate stay).

198. *See* Valentine v. Collier (*Valentine III*), 960 F.3d 707, 707 (5th Cir. 2020) (per curiam) (vacating preliminary injunction and remanding to district court for further proceedings on the permanent injunction; consists of three separate concurring opinions with differing views on the merits of the preliminary injunction).

199. *See* Valentine v. Collier, 490 F. Supp. 3d 1121, 1175 (S.D. Tex. 2020) (granting permanent injunction); *see also* Valentine v. Collier, 978 F.3d 154, 166 (5th Cir. 2020) (granting stay of permanent injunction pending appeal).

injunction.[200] One year after the case was filed, the Fifth Circuit reversed the permanent injunction and rendered judgment for the defendants.[201]

As to the Eighth Amendment claim, the Fifth Circuit reasoned that the district court had erred by accepting that defendants had acted with deliberate indifference because it was not unreasonable for officials to rely on policies created by healthcare experts, and because defendants implemented COVID-19 mitigation measures, some of which the court called "far from perfect."[202] The court determined that the plaintiffs did not show actual success on the merits of their disability rights claims under the ADA and RA.[203]

The Fifth Circuit's opinion granting a stay of the preliminary injunction in *Valentine* was issued in the Spring of 2020 when a high volume of COVID-19 jail and prison conditions cases were being filed and litigated across the country; it had an immediate impact on similar pending cases.[204] These impacts, along with the impact of the Fifth Circuit's subsequent opinion vacating the permanent injunction in *Valentine*,[205] strongly suggest

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200. *See* Valentine v. Collier, 141 S. Ct. 57, 57 (2020) (mem.) (denying application to vacate stay).

201. *See* Valentine v. Collier, 993 F.3d 270, 291 (5th Cir. 2021) (reversing judgment, vacating the permanent injunction, and entering judgment for defendants).

202. *Id*. at 283, 284, 286, 287–89; *see also id*. at 288 ("[Defendants'] response to COVID-19 in the crowded dormitories of the Pack Unit was far from perfect," yet, "[t]he same can be said for the response in most communities in the free world. Knowledge about the disease and how to combat it evolved over the nine months of this litigation.").

203. *See id*. at 290–91.

204. *See supra* note 194; *see also, e.g.*, Marlowe v. Leblanc, 810 F. App'x 302, 303 (5th Cir. 2020) (staying a preliminary injunction regarding COVID-19 mitigation issued by a district court in Louisiana to protect litigants in Louisiana prisons and citing the Fifth Circuit's stay of preliminary relief in *Valentine v. Collier*); Ruling at 30, 34, Gumns v. Edwards, No. 3:20-cv-00231-SDD-RLB (M.D. La. Apr. 14, 2020) ("For the same reasons articulated in *Amos* and *Valentine*, the Court finds that, while the Camp J transfer and isolation plan is not a 'perfect' plan, the well-intentioned efforts to decrease the risk of harm and the spread of the coronavirus throughout Louisiana jails and prisons belies a claim of deliberate indifference.").

205. Along with vacating the permanent injunction, the Fifth Circuit reversed the judgment in the case. While an injunction is forward looking, a court's judgment on the merits of a decision governs whether attorneys can recover attorney's fees and litigation costs under the civil rights statutes for having won a case on the merits. The Fifth Circuit's decision provided: "We are firmly convinced that this litigation generally and the district court's careful management and expedited handling of the case played a role in motivating the prison officials into action and saved countless lives. Injunctive relief is forward looking, and given the Defendants' response, including actions taken on the eve of and during trial, the permanent injunction is not warranted." *Valentine*, 993 F.3d at 289. Though plaintiffs have "saved countless lives" through the litigating their case, they (1) cannot recoup attorney's fees and litigation costs under Section 1988 as the non-prevailing party; and (2) may also be required to pay defendant's litigation costs under Federal Rule of Civil Procedure Rule 54 as the non-prevailing party. This disturbing logic underscores how ill-suited the deliberate indifference standard is for keeping people in jail and prisons from

that *Valentine* and similar court of appeals decisions in the Sixth and Eleventh circuits vacating preliminary relief due to lack of evidence of defendants' deliberate indifference will be a bulwark against the success of future climate-related prison and jail conditions litigants.[206]

ii. The Federal Rights of Persons with Disabilities: Non-Discrimination

Persons with disabilities are dramatically overrepresented in prisons, jails, and detention centers. According to reports published by the DOJ's Bureau of Justice Statistics, federal and state prisoners were between two and a half and three times more likely than adults in the general U.S. population to report having at least one disability.[207] While the prevalence

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unnecessary death: litigation can prompt defendants to take steps that save countless lives, but no judgment or injunction shall issue on their side because defendants took steps to save lives because of the litigation. "When there is a possible constitutional violation that is likely to continue over time as *in a prison injunction case*," the court must "consider the evidence from the time suit is filed to the judgment," as "[d]eliberate indifference is determined based on prison officials' current attitudes and conduct," and "[t]he evidence must show over the course of the timeline" that officials (1) "knowingly and unreasonably disregard[ed] an objectively intolerable risk of harm," (2) "that they will continue to do so," and (3) to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future." *Id.* at 282 (internal quotations omitted) (emphasis added) (reversing judgment in favor of defendants). Even if the requirements for an injunction cannot be satisfied at the time of judgment, courts should consider whether they may nonetheless issue *declaratory judgment* in favor of plaintiffs if constitutional violations existed at the time of filing or thereafter. The perverse effect of marrying the deliberate indifference standard to the injunctive relief standard has led to disturbing outcomes. In one district court decision, upheld by the Fifth Circuit, plaintiffs whose Eighth Amendment rights may well have been violated by defendants at and during the time of suit, according to the court, were nonetheless required to pay defendants' fees and costs under Rule 54 of the Federal Rules of Civil Procedure because the court did not, and was not required to, make a finding at the time of judgment on whether plaintiffs' Eighth Amendment rights were violated at the time of or during suit, since prison officials had also taken corrective steps by the time of judgment (and so were found not to be deliberately indifferent). *See* Dockery v. Hall*,* 443 F. Supp. 3d 726 (S.D. Miss. 2019).

206. *Valentine III*, 960 F.3d 707, 707 (5th Cir. 2020) (per curiam) (vacating preliminary injunction); *see also* Wilson v. Williams, 961 F.3d 829 (6th Cir. 2020) (vacating the preliminary injunction); Cameron v. Bouchard, 815 F. App'x 978 (6th Cir. 2020) (vacating preliminary injunction); Swain v. Junior, 961 F.3d 1276, 1289 (11th Cir. 2020) ("We simply cannot conclude that, when faced with a perfect storm of a contagious virus and the space constraints inherent in a correctional facility, the defendants here acted unreasonably by 'doing their best.'"); Swain v. Junior, 958 F.3d 1081, 1089 (11th Cir. 2020) (per curiam) (vacating preliminary injunction).

207. *See* LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, BUREAU OF JUST. STAT., NCJ 252642, DISABILITIES REPORTED BY PRISONERS: SURVEY OF PRISON INMATES, 2016 (2021), https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf [https://perma.cc/MX7M-HS47] (reporting that state and federal prison residents were about two and a half times more likely (38%) to report a disability than adults in the U.S. general population (15%) based on findings based on data collected in the 2016 Survey of Prison Inmates, a survey

of disability among the U.S. general population is 15%, the statistics are higher among state prison residents: in state prisons, more than half (57%) of residents ages 55 to 64 reported having a disability, and 7 in 10 (70%) age 65 or older reported a disability.[208]

Prison conditions suits, including many brought on behalf of imprisoned people during the COVID-19 pandemic, often include statutory claims brought under Title II of the ADA and pursuant to the regulations implementing Title II of the ADA in Section 504 of the RA.[209] Claims under the ADA and RA are both analyzed using the same legal standards.[210] Both prohibit disability-based discrimination. Both also "impose upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals."[211] While the same conduct that violates the Eighth Amendment may also violate Title II of the ADA, the Supreme Court recognizes that "Title II prohibits 'a somewhat broader swath of conduct' than what the Constitution itself forbids."[212]

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conducted through face-to-face interviews with a national sample of thousands of state and federal prison residents); *see also* JENNIFER BRONSON, LAURA M. MARUSCHAK & MARCUS BERZOFSKY, BUREAU OF JUST. STAT., NCJ 249151, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011–12 (2015), https://bjs.ojp.gov/content/pub/pdf/dpji1112.pdf [https://perma.cc/Z3DB-YFRW] (reporting that state and federal prison residents were almost three times more likely to report a disability than adults in the U.S. general population based on a national survey of almost 40,000 prisoners housed in over 200 state and federal prisons, including at least one facility located in each state).

208. *See* MARUSCHAK ET AL., *supra* note 207.

209. *See* 42 U.S.C. § 12111; *see also* 29 U.S.C. § 701.

210. *See* Cadena v. El Paso Cnty., 946 F.3d 717, 723 (5th Cir. 2020) ("The remedies, procedures, and rights available under the Rehabilitation Act parallel those available under the ADA . . . . Thus, jurisprudence interpreting either section is applicable to both." (citations and internal punctuation omitted)); *see also* Frame v. City of Arlington, 657 F.3d 215, 223 (5th Cir. 2011); Borum v. Swisher Cnty., No. 14-cv-127-J, 2015 WL 327508, at *3 (N.D. Tex. Jan. 26, 2015). Consequently, discussion of the legal standards applicable to the ADA and RA in the prison conditions context typically apply to ADA and RA claims alike, so long as the prison in question received any federal funding. The Rehabilitation Act "is operationally identical to the Americans With Disabilities Act of 1990 (ADA) in that both statutes prohibit discrimination against disabled persons; however, the ADA applies only to public entities while the [Rehabilitation Act] applies to any federally funded programs or activities, whether public or private." *Borum*, 2015 WL 327508, at *3 (citing Kemp v. Holder, 610 F.3d 231, 234 (5th Cir. 2010)). State prisons often receive federal funding. *See, e.g.*, Benning v. Georgia, 391 F.3d 1299, 1308 (11th Cir. 2004) (finding that the federal government has a substantial interest in providing federal funds to state prisons to protect the federal civil rights of incarcerated people); Jerry Mitchell, *Broken Promises and Lost Funding: How Mississippi Reform Failed*, GUARDIAN (May 9, 2019, 6:00 AM), https://www.theguardian.com/us-news/2019/may/09/mississippi-prison-reform-failed-first-step-act [https://perma.cc/4XKY-A93C].

211. Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 454 (5th Cir. 2005).

212. *See* United States v. Georgia, 546 U.S. 151, 157, 160 (2006) (citing Tennessee v. Lane, 541 U.S. 509, 533 n.24 (2004)).

Under these laws, public entities must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability,"[213] and prohibited discrimination occurs when an entity fails to make reasonable modifications that would allow a person with a disability to participate in a service, program, or activity,[214] which include the provision of medical care.[215] The cause of any failure to do so is not relevant to the liability analysis.[216] However, defendants are not required to undertake unreasonable modifications.[217]

In the Clearinghouse subset of 70 COVID-19 prison and jail conditions cases brought in federal court seeking relief affecting multiple persons, approximately a quarter of all cases included disability rights claims under the ADA and RA. In general, plaintiffs in the Clearinghouse subset were not successful in obtaining preliminary relief based on such claims.[218] Some courts explicitly ruled that plaintiffs were not likely to succeed on the

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213. 28 C.F.R. § 35.130(b)(7) (1998).

214. The ADA and the RA apply to "all of the operations" of a public entity. *Frame*, 657 F.3d at 225. Other courts have similarly construed the "services, programs, or activities" language in the ADA to encompass "anything a public entity does." *See, e.g.*, Bahl v. Cnty. of Ramsey, 695 F.3d 778, 787 (8th Cir. 2012); Barden v. City of Sacramento, 292 F.3d 1073, 1076 (9th Cir. 2002); Yeskey v. Pa. Dep't of Corr., 118 F.3d 168, 171 (3d Cir. 1997), *aff'd*, 524 U.S. 206 (1998). Department of Justice regulations provide that "Title II applies to anything a public entity does." Seremeth v. Bd. of Cnty. Comm'rs Frederick Cty., 673 F.3d 333, 338 (4th Cir. 2012) (quoting 28 C.F.R. § 35, App. B); *see also* H.R. REP. NO. 101-485(II) (1990), *as reprinted in* 1990 U.S.C.C.A.N. 367 (stating that Title II is intended to apply to "all actions of state and local governments").

215. *See* 28 C.F.R. § 35.130(b)(7)(i) (2021).

216. *See, e.g.*, *Bennett-Nelson*, 431 F.3d at 454–55 ("In addition to their respective prohibitions of disability-based discrimination . . . [w]here a defendant fails to meet this affirmative obligation, the cause of that failure is irrelevant." (citing Title II of the ADA)).

217. The requested modifications must be reasonable, "meaning that [they do] not impose undue financial or administrative burdens or 'fundamentally alter the nature of the service, program, or activity.'" Cadena v. El Paso Cnty., 946 F.3d 717, 724 (5th Cir. 2020) (citing 28 C.F.R. § 35.130(b)(7)(i) (2020)). Note that state departments of corrections have a constitutional obligation to provide for the medical care and reasonable safety of its inmates. *See* Helling v. McKinney, 509 U.S. 25, 32 (1993). Accordingly, accommodations required to facilitate provision of medical care and ensure reasonable safety cannot constitute a fundamental alteration or undue burden for purposes of the ADA or Rehabilitation Act.

218. While not a case within the Clearinghouse subset, the plaintiffs in Armstrong v. Newsom, No. 94-cv-02307-CW (N.D. Cal. Mar. 11, 2021), obtained COVID-19 mitigation measures and court expert monitoring of such measures through the longstanding consent decree in the case, which was brought under the ADA and RA and represents a class of all prison residents with disabilities within the California prison system. *See, e.g.*, Court Expert's Fifth Report and Recommendations Regarding Housing of Armstrong Class Members during the COVID-19 Pandemic, *Armstrong*, No. 94-cv-02307-CW (N.D. Cal. June 2, 2021) (providing a status update on mitigation measures and vaccination programs and commending the parties "for the collaborative and productive work they have done to address the needs of class members during the COVID-19 pandemic").

merits of their ADA or RA claims.[219] Other courts have not or did not rule on the likelihood of success on the ADA or RA claims in resolving motions for preliminary relief.[220]

In *Frazier v. Kelley*, for example, a federal district court in Arkansas concluded that the plaintiffs had failed to demonstrate a likelihood of success in establishing any of the elements required to show discrimination under the ADA.[221] The court assumed, arguendo, that the proposed plaintiff subclass were all qualified individuals with a disability, which was

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219. *See, e.g.*, Frazier v. Kelley, 460 F. Supp. 3d 799, 829 (E.D. Ark. 2020); Money v. Pritzker, 453 F. Supp. 3d 1103, 1132–33, 1133 n.14 (N.D. Ill. 2020) (concluding after analysis that plaintiffs "have no plausible allegations that ADA-qualified inmates have been discriminated against *because of* their disabilities," and that plaintiffs have no reasonable likelihood of success "under any of the three ways establishing an ADA discrimination claim," which are "(1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant's rule disproportionally impacts disabled people" (citing Washington v. Ind. High Sch. Athletic Ass'n, Inc., 181 F.3d 840, 847 (7th Cir. 1999)); Denbow v. Me. Dep't of Corr., No. 20-cv-00175, 2020 WL 3052220, at *24 (D. Me. June 8, 2020); *see also* Harper v. Cuomo, No. 21-cv-00019, 2021 WL 1821362, at *15 (N.D.N.Y Mar. 1, 2021) (finding after lengthy analysis that plaintiffs had not demonstrated a clear likelihood of success on their ADA and RA claims in a non-binding magistrate report and recommendation which was followed by plaintiffs' voluntary dismissal of suit).

220. *See, e.g.*, Jones v. Hill, No. 1:20-cv-02791-JPB (N.D. Ga. Dec. 24, 2020) (wherein plaintiffs brought ADA and RA claims (ECF No. 1), moved for a preliminary injunction on behalf of a disability subclass under ADA and RA claims (ECF No. 19), but following discovery and a hearing, "only the deliberate indifference claim remains," (ECF No. 128 at 8); the court denied a preliminary injunction because of a failure to show a likelihood of success on the deliberate indifference element of their Eighth Amendment (ECF No. 128)); Notice of Withdrawal of Motion, Waddell v. Taylor, No. 20-cv-00340-TSL-RHW (S.D. Miss. Sept. 15, 2020) (plaintiffs voluntarily withdrew their motion for a TRO and preliminary injuction (ECF No. 12) and the court granted a joint motion to stay proceedings pending negotiations (ECF No. 14)). *But see Valentine I*, 956 F.3d 797, 806–07 (5th Cir. 2020) (Higginson, J., concurring) (concurring on the grounds that defendants were likely to succeed on their claim that plaintiffs had failed to exhaust administrative remedies under the PLRA and explaining, "I would not reach the merits of Appellees' ADA and 42 U.S.C. § 1983 claims," because "[w]hereas those claims face high legal hurdles, they also are intensely fact-based," and "[t]he district court assessed lay and expert testimony before making extensive and careful findings of fact showing that mitigation deficiencies still exist"; therefore, "given the [Texas Department of Criminal Justice's] systemic and ongoing responses to fast-changing guidance, I would reserve for the merits panel the complex question of whether and which of these deficiencies amount to a cognizable violation.").

221. 460 F. Supp. 3d at 843–44. To show discrimination under the ADA, a plaintiff must prove:

> (1) that he is a qualified individual within the meaning of the ADA; (2) that he is being excluded from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination is by reason of his disability.

Smith v. Harris Cnty., 956 F.3d 311, 317 (5th Cir. 2020) (quoting Melton v. Dall. Area Rapid Transit, 391 F.3d 669, 671–72 (5th Cir. 2004)).

in dispute, but concluded that the plaintiffs (a) were not likely to successfully claim that defendants' action or inaction had the effect of denying plaintiffs "'the benefits of the services, programs, or activities' within [the prison] 'by reason of' those plaintiffs' disabilities," (b) were not likely to claim successfully that any "reasonable accommodations have been denied for plaintiffs in the proposed disability subclass"; and (c) were not likely to claim successfully that, "to the extent plaintiffs requested and were denied reasonable accommodations," the "defendants denied those requests because of plaintiffs' alleged disabilities."[222]

The Fifth Circuit gave the plaintiffs substantially more credit in their 2021 decision in *Valentine v. Collier* to vacate the permanent injunction and enter final judgment for the defendants.[223] Notably, the court determined that the plaintiffs had not succeeded on the merits of their disability rights claims under the ADA and RA, but that they had satisfied two of the three prongs of the ADA discrimination test: (1) being qualified individuals under the ADA, and (2) being excluded from "participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity."[224] As to the latter, the court explained that "the prison provided a heightened hand hygiene service to inmates to combat the virus," and that "in the context of the COVID-19 pandemic, wheelchair and walker-bound inmates did not have equal access to the benefits of the heightened hand hygiene service provided by the prison through the additional soap and handwashing stations."[225] The court found that the plaintiffs had failed to satisfy the third prong of the prima facie case, that of discrimination by reason of disability. The court agreed that plaintiffs had a unique disability-based need for supplemented hand hygiene supplies, but the court found that (a) the plaintiffs' need was not open and obvious, and (b) that plaintiffs had failed to "inform[] [defendants] of their unique

222. *Frazier*, 460 F. Supp. 3d at 843–44 (quoting 42 U.S.C. § 12132).

223. *See* 993 F.3d 270, 290–91 (5th Cir. 2021) ("Plaintiffs did not show actual success on the merits of their ADA claim. We therefore vacate the district court's injunction as it pertains to hand sanitizers.").

224. *Id.* at 289 (discussing that "[the court] has recognized that prison 'services, programs, or activities' include recreational services, medical services, and vocational programs," and that "[t]he Supreme Court has stated that a failure to accommodate 'such fundamentals as mobility, hygiene, medical care, and virtually all other prison programs constitute[s] . . . denial of the benefits of the prison's 'services, programs, or activities.'" (quoting Smith v. Harris Cty., 956 F.3d 311, 317 (5th Cir. 2020) then quoting United States v. Georgia, 546 U.S. 151, 157 (2006))).

225. *Id.* at 289–90.

inability to keep their hands clean" and request the accommodation — that hand sanitizer be provided to wheelchair users.[226]

Plaintiffs' overall lack of success in obtaining preliminary relief on disability rights claims suggests that prison and jail residents with disabilities who are threatened by climate-related harms should consider bringing additional conditions claims, if relevant, in suits to protect their rights. It also suggests that ADA and RA claims, though intensely fact-specific claims, may not provide a reliable path towards obtaining preliminary relief or avoiding the Eighth Amendment's deliberate indifference standard.

iii. Class-Wide Petition for Habeas Corpus Seeking Relief from Unlawful Conditions of Confinement

Approximately half of all 70 cases in the Clearinghouse subset include some form of a class-wide petition for habeas corpus,[227] which in a minority of circuits may be granted upon proof that the conditions of the petitioner's confinement violate his or her federal rights.[228] In nearly all of these, the petitioners assert Eighth Amendment violations as the basis for their petition. The availability of habeas corpus to challenge conditions of confinement was left open by the U.S. Supreme Court, and there is a circuit split on the question.[229]

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226. *Id.* at 290–91.

227. *See* 28 U.S.C. §§ 2241–2255.

228. A writ of habeas corpus extends to prisoners who are held in federal or state custody in violation of the Constitution or laws of the United States. *Id.* §§ 2241(c)(3), 2245. Traditionally, the function of the writ of habeas corpus is to trigger release of a person confined by the government absent legal authority — in other words, to challenge the fact or duration of one's confinement and seek release from it. *See, e.g.*, Wilkinson v. Dotson, 544 U.S. 74, 78 (2005); Woodall v. Fed. Bureau of Prisons, 432 F.3d 235, 241 (3d Cir. 2005) (providing that a federal prisoner may challenge the fact, duration or execution of his or her sentence in a petition for habeas corpus under Section 2241).

229. *See* Preiser v. Rodriguez, 411 U.S. 475, 499–500 (1973) ("This is not to say that habeas corpus may not also be available to challenge [unconstitutional] prison conditions."); *see also* Aamer v. Obama, 742 F.3d 1023, 1036 (D.C. Cir. 2014) (stating conditions claims may be brought in the habeas corpus context); United States v. DeLeon, 444 F.3d 41, 59 (1st Cir. 2006) ("If the conditions of incarceration raise Eighth Amendment concerns, habeas corpus is available."); Jiminian v. Nash, 245 F.3d 144, 146–47 (2d Cir. 2001) (conditions claims may be brought in the habeas corpus context). *Compare* Spencer v. Haynes, 774 F.3d 467, 470 n.6 (8th Cir. 2014) (collecting cases and concluding that "[t]he D.C. Circuit, the Second Circuit, the Third Circuit, the Fourth Circuit, and the Sixth Circuit firmly stand in the camp of allowing conditions-of-confinement claims to be brought in the habeas corpus context, with the First Circuit contributing dictum to this view"), *with* Wilborn v. Mansukhani, 795 F. App'x 157, 163–64 (4th Cir. 2019) (holding that challenges to conditions of confinement cannot be brought as a habeas petition).

In the most general terms, all petitioners sought some form of release, though as previously noted, the word "release" was usually not the applicable term of art. The relief requested varied widely but generally incorporated a request for temporary or permanent release or transfer to a place where social distancing was possible, including into the community, unconditionally or conditionally, or to a residence, via home confinement or house arrest. Some class-wide petitions also sought release pending adjudication of the petitions, framed as requests for temporary enlargement of custody or bail pending habeas corpus. Some sought court orders to expedite the use of programs or procedures through which defendants had pre-existing authority to modify certain custodial terms, including to effectuate transfers out of the facility and into the community.[230]

Of the approximately half of all subset cases that sought some form of release as preliminary relief pursuant to a habeas corpus claim, most were unsuccessful. There were five main grounds for denial: (1) petitions for habeas corpus cannot be brought to cure unlawful conditions of confinement; (2) conditions-based habeas petitions are cognizable, but the plaintiffs failed to prove or establish a likelihood of success as to the underlying conditions-related claim (usually due to a lack of evidence of subjective deliberate indifference); (3) conditions-based habeas was available, in fact or arguendo, but only in extreme cases where no possible set of confinement conditions could cure the violation, and the case did not qualify (and therefore the PLRA exhaustion and prisoner release order requirements apply);[231] and (4) regardless of availability, the court dismissed the petition due to petitioners' failure to exhaust applicable state remedies.[232] As to the latter, post-trial petitioners must exhaust available

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230. *See generally* Order on Motions to Dismiss & Application for Injunctive Relief at 2–5, Baez v. Moniz, No. 20-cv-10753-LTS (D. Mass. May 18, 2020) (denying defendant's motion to dismiss based on the unavailability of habeas to cure conditions and finding the PLRA's exhaustion requirement does not apply to conditions-based habeas petitions: "in the extraordinary circumstances presented by the COVID-19 pandemic," along with petitioners' claim that release is the only means of protecting them from unconstitutional treatment, "the Court finds that the petitioners' claims sound in habeas, and this Court has jurisdiction to consider them under § 2241"; describing conditions-based habeas corpus petitions as "present[ing] hybrid challenges aimed both at the conditions of confinement and at the ultimate fact or level of confinement are difficult to classify, as they are neither traditional or 'core' habeas claims nor straightforward conditions cases arising under 42 U.S.C. § 1983"); Money v. Pritzker, 453 F. Supp. 3d 1103, 1119 (N.D. Ill. 2020) (describing the "thick and tangled web" of statutes and case law defining the availability and scope of conditions-based habeas corpus petitions, which arise at "the intersection of habeas and civil rights claims" (internal quotations omitted)).

231. *See infra* Section II.E (discussing PLRA).

232. *See, e.g.*, *infra* Section II.E (discussing PLRA); Denbow v. Me. Dep't. of Corr., No. 20-cv-00175, 2020 WL 4736462, at *13 (D. Me. Aug. 14, 2020); Grinis v. Spaulding, No. 20-cv-10738, 2020 WL 3097360, at *4 (D. Mass. June 11, 2020) (finding conditions-based

state court remedies as a prerequisite for a federal court to consider a challenge to state detention, though courts may excuse non-exhaustion.[233] Of the handful of conditions-based habeas petitions that were successful, they were limited to a few district courts.[234]

Based on these observations about the outcomes of conditions-based habeas petitions in the Clearinghouse subset, future plaintiffs in climate-related conditions litigation may wish to bring class-wide habeas petitions

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habeas not cognizable in a scathing opinion: "[Petitioners] themselves say they do not necessarily want to be released, a very odd thing for habeas petitioners to say. This action is thus revealed as a false flag operation. Flying the banner of habeas corpus, it is nevertheless *in substance* a 'civil action with respect to prison conditions' that seeks the entry of a 'prisoner release order' as those terms are defined in the PLRA"); Wragg v. Ortiz, 462 F. Supp. 3d 476, 502 (D.N.J. 2020) ("Because Petitioners cannot show that the mitigated health risk at FCI Fort Dix is 'so grave' that it would 'violate[] contemporary standards of decency to expose anyone unwillingly to' it, habeas jurisdiction does not lie." (quoting Helling v. McKinney, 509 U.S. 25, 36 (1993))); Seth v. McDonough, 461 F. Supp. 3d 242, 256–57 (D. Md. 2020) (concluding that the plaintiffs claim, "at its core, is a challenge to prison conditions," and while a "dual designation" conditions-based habeas petition "may make sense in other contexts," the court is "not prepared to conclude that the challenge concerns both the fact and the conditions of confinement"); Hallinan v. Scarantino, 466 F. Supp. 3d 587, 602 (E.D.N.C. 2020) ("[A]lthough there 'may ultimately be an area of limited substantive overlap between . . . habeas corpus and § 1983,' petitioners have failed to establish that their paradigmatic conditions of confinement claims qualify for such special treatment and therefore are cognizable habeas claims." (citing Lee v. Winston, 717 F.2d 888, 892 (4th Cir. 1983))).

233. *See, e.g.*, Montano v. Texas, 867 F.3d 540, 542 (5th Cir. 2017); Dickerson v. Louisiana., 816 F.2d 220, 225 (5th Cir. 1987).

234. These include federal district courts in Massachusetts, Connecticut, and California, which fall within the First, Second, and Ninth Circuits, respectively. *See, e.g.*, Savino v. Souza, 459 F. Supp. 3d 317, 320 (D. Mass. 2020) (explaining that "[t]he Court has matched the unusual health emergency with an unusual procedural maneuver," and that "[b]efore addressing the merits of the petition, the Court relied on its inherent authority expeditiously to review bail applications for all of the detainees in the class, one by one, and released almost a third of them to house arrest under strict conditions"; the Court continued: "These releases have meaningfully reduced the crowding at the detention center and, one hopes, hindered the virus' spread"); *see also* Order re: Plaintiff-Petitioners' Motion for Preliminary Injunction, & Ex Parte Application for Provisional Class Certification at 48–50, Torres v. Milusnic, No. 20-4450-CBM-PVC(x) (C.D. Cal. July 14, 2020) (ordering, along with other relief, BOP to institute a process through which it must consider people over the age of 50 for home confinement if they have at least one health condition that puts them at risk of serious illness from COVID-19); Ruling on Motion for TRO & Moion. to Dismiss at 2, 29–30, 33–36, 60, 68, Martinez-Brooks v. Easter, No. 3:20-cv-000569 (MPS) (D. Conn. May 12, 2020) (ordering the federal prison defendants to implement "a process by which inmates would be evaluated promptly for transfer to home confinement," mandating "individualized consideration . . . on a basis more accelerated and more focused on the critical factors of inmate and public safety than the current home confinement review process," and explicitly holding that the Order (1) does not divest the BOP of its sentencing authority or its statutory and regulatory discretion, but "merely directs the Respondents to exercise the authority already conferred on them to place inmates in home confinement and consider requests for compassionate release in a manner that does not violate the Eighth Amendment" and (2) does not run afoul of the PLRA, 18 U.S.C. § 3626, res judicata, or claim preclusion).

for release with the understanding that success rates may be low because many jurisdictions have not yet recognized habeas corpus as a vehicle by which a court may order a jail or prison to relocate a resident in order to cure an unlawful condition of confinement. However, a few courts that denied relief to petitioners seeking escape from COVID-19-related dangers left open the possibility that future conditions-based habeas petitions may prevail if unlawful conditions of confinement were inextricably bound to the fact of confinement, in other words, if no version of possible jail or prison conditions could remedy the violation.[235]

Certain types of emergent climate-change-related crises could potentially satisfy this requirement and obtain a form of release as relief, but not likely on a preliminary, or pre-harm, basis. In other words, for the holdout courts, the ideal complete merger of conditions-of-confinement with fact-of-confinement presupposes that extensive damage has already been done. By applying this reasoning to past climate-related crises, certain limitations of this perfect merger requirement become clear. For example, in the days before Hurricane Katrina hit, the Orleans Parish Prison sheriff refused to evacuate the jail residents, which included children, despite the New Orleans's Mayor having declared a mandatory city-wide evacuation and widespread doubt that the levees would hold.[236] When the storm hit and floodwaters entered the facility, many sheriff's deputies left their posts and left people locked inside their cells; some flooded to chest height, for days, without food, clean water, or ventilation.[237] Applying the reasoning of Clearinghouse subset cases that denied conditions-based habeas relief but recognized its availability, hypothetical petitioners in the Orleans Parish Prison would likely only qualify for relief once locked in their flooded cells. Hypothetically, if a facility were in the undisputed path of a nearing megafire or volcanic eruption, maybe pre-harm relief could be obtained under the exacting standard discussed in jurisdictions where the availability of habeas to cure an illegal condition of confinement remains undecided. Regardless, in such courts, class-wide petitions should be brought, but not relied upon, particularly if residents face emergent, life-threatening climate-related conditions.

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235. *See, e.g.*, *Wragg*, 462 F. Supp. 3d at 505; *Hallinan*, 466 F. Supp. 3d at 602.
236. *See* NAT'L PRISON PROJECT, *supra* note 25, at 23.
237. *Id.* at 32, 35.

E. *Similar Jurisdictional Hurdles*: Climate-Related and COVID-19 Conditions Litigants Must Overcome Prison Litigation Reform Act Barriers to Accessing Courts and Meaningful Remedies

The PLRA is a unique statute[238] that singles out imprisoned and detained individuals for substandard treatment under the law by (1) imposing additional requirements on residents of prisons and jails who seek injunctive relief against prison officials[239] and (2) restricting available relief.[240] Any relief granted must be narrowly drawn and the least intrusive means necessary to correct the harm,[241] except that any relief that has the effect of requiring release may only be ordered by way of a procedure that has historically required decades to complete.[242]

As it was designed to do, the PLRA is effective at (1) preventing residents of prisons and jails from bringing lawsuits challenging conditions in federal court by requiring exhaustion of onerous administrative grievance procedures and restricting the ability to file *in forma pauperis*;[243] (2) preventing those who get to court and win from obtaining meaningful injunctive and compensatory relief;[244] and (3) preventing improvement in prison conditions over time.[245]

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238. The PLRA singles out a group of disfavored individuals for substandard legal protections in federal courts. *See generally* Pub. L. No. 104-34, 110 Stat. 1321 (1995) (codified as amended in scattered sections of 18 U.S.C.). Potentially only "enemy combatants" have likewise been singled out for substandard legal protections in the federal court system. *See, e.g.*, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (containing the implied statutory authority, according to the Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 681, 708 (2006), to try "enemy combatants" outside of Article III courts in extra-constitutional military commissions).

239. *See, e.g.*, *infra* note 243; 28 U.S.C. § 2255(h) (requiring prisoners to get certification from Court of Appeals before filing successive habeas petition).

240. *See, e.g.*, *infra* notes 242, 244, 245; 18 U.S.C. § 3626(a)(2).

241. *See id.*

242. Cases obtaining prisoner release orders from three-judge courts are exceptionally rare and long lived. *See, e.g.*, Plata v. Newsom, 455 F. Supp. 3d 557, 571 (N.D. Cal. 2020) (upholding release order after decades of failing to comply with consent decrees in two system-wide conditions cases brought on behalf of all California prison residents receiving or requiring medical and dental care and with mental illnesses).

243. *See* 42 U.S.C. § 1997e(a) (requiring that prisoners exhaust "such administrative remedies as are available" before filing suit). Some courts have blessed grievance systems that make it difficult or nearly impossible to achieve exhaustion at all or within a meaningful timeframe. *See, e.g.*, Wilson v. Epps, 776 F.3d 296, 300–01 (5th Cir. 2015) (finding no fault with arduous grievance backlogging procedure in Mississippi prisons). The PLRA's "three strikes" provision also excludes prison residents from filing *in forma pauperis* status if they have had cases dismissed on particular grounds. *See* 28 U.S.C. § 1915(g).

244. *See* 18 U.S.C. § 3626(a)(1) (barring courts from entering prospective relief in prison conditions cases unless they "find[] that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial

Some plaintiffs' motions for preliminary relief in COVID-19 conditions cases within the Clearinghouse subset were denied in whole or part because of failure to exhaust administrative remedies under the PLRA or to satisfy the prerequisites for a "prisoner release order."[246] In *Valentine v. Collier*, plaintiffs living in a state geriatric prison sought a preliminary injunction mandating COVID-19 mitigation measures, and the district court issued a preliminary injunction.[247] The Fifth Circuit stayed the preliminary injunction pending completion of appellate review, decided that the plaintiffs were unlikely to succeed because they did not comply with the PLRA's administrative exhaustion requirement and, in any event, their Eighth Amendment claim was likely to fail on the merits.[248]

Circuit Judge Higginson's concurring opinion staying the lower court's preliminary injunction noted that defendants were likely to succeed on their claim that plaintiffs had failed to exhaust administrative remedies under the PLRA and he would therefore not have reached the merits of plaintiffs substantive claims.[249] The Fifth Circuit stayed the preliminary injunction because the defendants were likely to prevail on the merits in satisfying the

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weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."). The Fifth and Eleventh Circuits have improperly held that particularized need-narrowness-intrusiveness findings are required to support prospective relief on a provision-by-provision basis, which holds relief hostage to a higher legal standard than liability in many cases. Liability, for example, in Eighth Amendment cases is determined according to a totality of the circumstances standard, but prospective relief in the Fifth and Eleventh Circuits may be struck down if the standard is not satisfied on an issue-by-issue (or provision-by-provision) basis. Also, to obtain compensatory damages for mental or emotional injuries, the PLRA requires that prevailing plaintiffs have suffered a physical injury that caused their mental or emotional injuries. 42 U.S.C. § 1997e(a).

245. Particularized need-narrowness-intrusiveness findings on a provision-by-provision basis are required to *retain* relief in the face of a motion to terminate. *See* Gates v. Cook, 376 F.3d 323, 336 n.8 (5th Cir. 2004); *see also* Jones v. Gusman, 296 F.R.D. 416, 455 (E.D. La. 2013) (following *Gates*).

246. *See e.g.*, Sanchez v. Brown, No. 20-cv-00832-E, 2020 WL 2615931, at *17 (N.D. Tex. May 22, 2020) (finding that "[t]here is no evidence that the named Plaintiffs exhausted the jail's grievance procedure," and that "[w]hile some of them started the process, they filed this action before letting that process play out"; concluding that because "[e]xhaustion is a prerequisite to Plaintiffs' § 1983 claims[,] [t]heir failure to exhaust the appropriate grievance procedures is fatal to their request for injunctive relief"); *see also* Nellson v. Barnhart, No. 20-cv-00756-PAB, 2020 WL 3000961, at *6–8 (D. Colo. June 4, 2020) (denying plaintiffs' motion for a preliminary injunction on June 4, 2020, citing plaintiffs' failure to exhaust administrative remedies under the PLRA); Wragg v. Ortiz, 462 F. Supp. 3d 476, 505 (D.N.J. 2020) (denying plaintiffs' motion for a preliminary injunction on multiple grounds, including because plaintiffs had failed to exhaust both their Eighth Amendment and RA claims).

247. *See* Preliminary Injunction Order at 4, Valentine v. Collier, No. 4:20-cv-01115 (S.D. Tex. Apr. 16, 2020) (granting preliminary injunction).

248. *See Valentine I*, 956 F.3d 797, 806 (5th Cir. 2020) (granting stay of preliminary injunction).

249. *See id.* (Higginson, J., concurring).

objective and subjective prongs of the deliberate indifference component of their Eighth Amendment claim.

The Fifth Circuit granted defendants' interlocutory appeal to vacate the preliminary injunction,[250] the district court granted plaintiffs' request for a permanent injunction, defendants appealed, and the Fifth Circuit stayed the permanent injunction pending an appeal.[251] The U.S. Supreme Court denied two individuals' applications to vacate the Fifth Circuit's stay of the permanent injunction.[252] Justice Sotomayor, joined by Justice Kagan, dissented, concluding that "[t]he Fifth Circuit demonstrably erred with respect to both the threshold issue of exhaustion under the PLRA and the merits of the inmates' Eighth Amendment claims."[253] As to the exhaustion analysis, the dissenters noted that the U.S. Supreme Court has held that "even if an internal process is 'officially on the books,' it is not 'available' if, as a practical matter, it 'is not capable of use to obtain relief.'"[254]

In an analysis that will be critical to future plaintiffs seeking relief from climate-related crises, the dissenters concluded that the Fifth Circuit erred in determining that defendants' 160-day grievance process was available to plaintiffs grieving COVID-19-related conditions. They determined that the administrative remedy procedure was not available to plaintiffs for grieving COVID-19-related conditions, under *Ross v. Blake*,[255] and therefore the PLRA's exhaustion requirement was satisfied.[256] The dissenters explained:

> Given the speed at which the contagion spread, the 160-day grievance process offered no realistic prospect of relief. In just 116 days, nearly 500 inmates contracted COVID-19, leading to 74 hospitalizations and 19 deaths. At least one inmate, Alvin Norris, died before the prison took any steps in response to his grievance. Both Valentine and another inmate, Gary Butaud, contracted COVID-19 while their grievances remained pending.
>
> The Fifth Circuit erred as a matter of law when it disregarded these findings by the District Court. The Fifth Circuit seized on language in

250. *See Valentine III*, 960 F.3d 707, 707 (5th Cir. 2020) (per curiam) (vacating preliminary injunction and remanding to district court for further proceedings on the permanent injunction; consists of three separate concurring opinions with differing views on the merits of the preliminary injunction).

251. *See* Valentine v. Collier, 490 F. Supp. 3d 1121, 1174 (S.D. Tex. 2020) (granting permanent injunction); *see also* Valentine v. Collier, 978 F.3d 154, 166 (5th Cir. 2020) (granting stay of permanent injunction pending appeal).

252. *See* Valentine v. Collier, 141 S. Ct. 57, 57 (2020) (mem.) (denying application to vacate stay).

253. *Id.* at 59 (Sotomayor, J., dissenting).

254. *Id.* (quoting Ross v. Blake, 578 U.S. 632, 643 (2016)).

255. 578 U.S. 632, 643 (2016).

256. *See Valentine*, 141 S. Ct. at 59–60 (Sotomayor, J., dissenting).

> Ross rejecting a judicially created exception to exhaustion for ''special circumstances,'' and concluded that "special circumstances — even threats posed by global pandemics — do not matter." But the special-circumstances exception rejected in Ross applied when inmates failed to exhaust available remedies.[257]

Other courts in COVID-19-conditions litigation echoed the dissenters' view that the nature of the COVID-19 epidemic rendered prolonged grievance procedures unavailable and the exhaustion requirement thus satisfied; these courts declined to grant preliminary relief on other grounds, but their reasoning may guide future plaintiffs in climate-related conditions suits who must seek preliminary relief before grievance procedures can be exhausted.[258]

However, taken together, many unsuccessful COVID-19 cases brought failed to survive on the basis of either (1) failure to establish the likelihood of success as to the deliberate indifference element of an Eighth Amendment claim; (2) failure to satisfy the PLRA requirements of a prisoner release order or of exhaustion;[259] or (3) both. The PLRA's jurisdictional restraints combined with the objective and subjective deliberate indifference requirements of an Eighth Amendment claim are a gauntlet: (1) the PLRA limits who gets into court; (2) the subjective criminal recklessness requirement of the deliberative indifference standard limits liability to defendants who have a low opinion of their own conduct; (3) the PLRA limits the scope of court-ordered relief; and (4) the PLRA limits the availability of lasting relief.[260]

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257. *Id.* at 60 (quoting *Ross*, 578 U.S. at 642, 643).

258. *See, e.g.*, Duvall v. Hogan, No. ELH-94-cv-02541, 2020 WL 3402301, at *8, *15 (D. Md. June 19, 2020) (denying plaintiffs' motion for a TRO or preliminary injunction, addressing the issue of exhaustion under the PLRA; explaining in the order that the grievance system at the jail was unavailable for multiple reasons, one of which was that it was composed of a four-step procedure that contained no deadlines and "therefore fails to assure that an inmate's grievance will be reviewed . . . before the inmate is affected by COVID-19"); McPherson v. Lamont, 457 F. Supp. 3d 67, 81 (D. Conn. 2020) (wherein a settlement was reached prior to a ruling on plaintiffs' motion for a preliminary injunction, but the court, in this Order, determined that, under *Ross v. Blake*, the administrative remedies for the relief plaintiffs sought related to COVID- 19 mitigation were not available because the grievance procedure can take up to 105 days to complete and lacks an emergency review process).

259. The PLRA creates significant barriers to the courts for lower-functioning prison residents who are more likely to need legal interventions and least likely to successfully exhaust. *See, e.g.*, Williams v. White, 724 F. App'x. 380, 383 (6th Cir. 2018) (holding "there is no mental-capacity exception to the PLRA"). Since administrative procedures are often strict and standardless at the same time, the PLRA exhaustion requirement often strips prison and jail residents of legal rights — not privileges — arbitrarily. *See, e.g.*, Gayle v. Gonyea, 313 F.3d 677, 682 (2d Cir. 2002) (citing a "constitutional right to file a grievance").

260. *See generally* Fenster & Schlanger, *supra* note 186; Schlanger, *supra* note 186.

Finally, for a court to order any relief that has the effect of requiring release, a "prisoner release order" must be obtained from a specially convened three-judge panel — a procedure that has historically taken decades to complete.[261] To obtain the relief of release under the PLRA, a conditions plaintiff must first exhaust all available administrative remedies,[262] file suit, prevail in proving a violation of a federal right, and win. Second, a court must order injunctive relief that is narrowly drawn and the least intrusive means to correct the proven violation.[263] Third, the court order(s) must fail to remedy the deprivation of the federal right.[264] Fourth, the court must give the defendant "a reasonable amount of time to comply with the previous court orders."[265] Fifth, plaintiffs seeking to correct the intractable rights violation by way of release or reducing the prison or jail population, including through a population cap,[266] must request to convene a specially constituted "three-judge court,"[267] which alone has the authority under the PLRA to issue such an order.[268] Sixth, plaintiffs must prevail in arguing that the prisoner release order procedure has been satisfied and that plaintiffs are entitled to relief in the form of a release order, which itself must be narrowly drawn and the least intrusive means to correct the long-standing violation.[269]

This procedure does not contemplate the needs of potential future plaintiffs seeking to avoid, on an emergency basis, an imminent and dangerous climate-related natural disaster. It contains no exception, even for certain death.[270] This PLRA procedure prompted petitioners in COVID-19 conditions-based habeas cases to employ an array of terms other than "release" to describe the relief they sought, to avoid a finding

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261. Cases obtaining prisoner release orders from three-judge courts are exceptionally rare and long lived. *See, e.g.*, Plata v. Newsom, 455 F. Supp. 3d 557, 571 (N.D. Cal. 2020) (upholding release order after decades of failing to comply with consent decrees in two system-wide conditions cases brought on behalf of all California prison residents receiving or requiring medical and dental care and with mental illnesses).

262. *See* 42 U.S.C. § 1997e(a).

263. *See* 18 U.S.C. § 3626(a)(2).

264. *See id.* § 3626(a)(3)(A)(i).

265. *See id.* §§ 3626(a)(3)(A)(i), (ii).

266. *See id.*; *see also id.* § 3626(g)(4).

267. *Id.* § 3626(a)(3)(B).

268. *See id.*

269. *See id.* § 3626(a)(2).

270. The statement is extreme but accurate. Upon proof of the likelihood of death to the point of certainty absent release, a court could find defendants were violating a resident's constitutional rights and order defendants to act or not act in particular ways, but the PLRA would still require death before release if the (potentially decades-long) three-judge court procedure had not yet been satisfied. *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-34, 110 Stat. 1321 (codified as amended in scattered sections of 18 U.S.C.).

that the PLRA prohibited courts from exercising their release authority under habeas statutes because the underlying violation of federal law alleged was a violation of a right relating to prison conditions.[271]

The observed low rate of success of conditions-based habeas petitions within the Clearinghouse subset — considered in conjunction with the PLRA's mandatory three-judge court process required to secure release — sets up the final issues addressed in this Article: What populations are very likely to encounter serious or life-threatening climate-related harm during confinement, and among them, what prison or jail conditions litigants are likely to have the most difficulty obtaining preliminary relief?

F. *Overexposed and Underprotected*: Black U.S. Residents in Custody in the Fifth and Eleventh Circuits May Be Overexposed to Climate-Related Harms and Underprotected by Federal Courts

The preceding observations about outcomes in the Clearinghouse subset cases — when considered together with geographic projections of future climate change-related harm — strongly suggest that prison and jail residents living in the Fifth and Eleventh Circuits, who are disproportionately Black U.S. residents, will be particularly disadvantaged when seeking preliminary relief from climate-related crises. This conclusion is based on observations about (1) outcomes in the Clearinghouse subset; (2) geographic projections of climate-related harm; and (3) demographic data describing populations in states within the Fifth and Eleventh Circuits.

First, this conclusion is supported by a number of observations about a number of observations about the 70 Clearinghouse subset cases:[272]

1. Three circuit courts vacated COVID-19-mitigating preliminary injunctions granted by district courts: the Fifth Circuit, the Sixth Circuit, and the Eleventh Circuit.[273] These decisions will act as firm ceilings on the

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271. For example, in *Grinis v. Spaulding*, the federal district court held that a conditions-based habeas petition was not cognizable because the PLRA applied to petitioners' request for release due to unconstitutional conditions; in doing so, the court commented on petitioners' avoidance of the term "release":

> [Petitioners] themselves say they do not necessarily want to be released, a very odd thing for habeas petitioners to say. This action is thus revealed as a false flag operation. Flying the banner of habeas corpus, it is nevertheless *in substance* a "civil action with respect to prison conditions" that seeks the entry of a "prisoner release order" as those terms are defined in the PLRA.

No. 20-cv-10738, 2020 WL 3097360-GAO, at *4 (D. Mass. June 11, 2020).

272. "Cases" in this list refers to cases and petitions within the Clearinghouse subset.

273. *See Valentine III*, 960 F.3d 707, 707 (5th Cir. 2020) (per curiam) (vacating preliminary injunction); *see also* Cameron v. Bouchard, 815 F. App'x 978 (6th Cir. 2020) (vacating preliminary injunction); Wilson v. Williams, 961 F.3d 829 (6th Cir. 2020)

frequency and scope of preliminary relief that district courts in these circuits will risk ordering in future prison conditions cases.

2. No cases within the Fifth, Sixth, and Eleventh Circuits successfully obtained court-ordered preliminary relief, which was not later stayed and vacated.

3. The Fifth and Eleventh Circuits do not recognize the availability of conditions-based habeas petitions to seek release, or its equivalents, to remedy unlawful conditions of confinement.[274]

4. The Fifth Circuit's opinions in *Valentine (I–III)* regarding *objective* deliberate indifference (substantial risk of serious arm) and exhaustion (that *Ross* held actual unavailability was still non-exhaustion) stand out as defendant-friendly to the point of open heavy-handedness, even in the context of Fifth Circuit deliberate indifference case law.[275]

5. In PLRA case law, the Fifth and Eleventh Circuits are substantially more draconian in their application of the needs-necessity-narrowness limitation on injunctive relief, which greatly limits the availability, scope, and longevity of relief that may be ordered.

Second, this conclusion is based on a number of observations about on a number of observations about projections of climate-related harm:

1. Climate change will impact the entire United States but differently according to geographic location and impact type. Certain climate change-related harms, not all,[276] will fall harder in the region of the Southeast/Gulf

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(vacating preliminary injunction); Swain v. Junior, 958 F.3d 1081, 1089 (11th Cir. 2020) (per curiam) (vacating preliminary injunction).

274. *See* Davis v. Fechtel, 150 F.3d 486, 490 (5th Cir. 1998); *see also Swain*, 958 F.3d at 1086 n.1; Vaz v. Skinner, 634 F. App'x 778, 781 (11th Cir. 2015) ("Petitioner's § 2241 petition is not the appropriate vehicle for raising an inadequate medical care claim, as such a claim challenges the conditions of confinement, not the fact or duration of that confinement."). The Sixth Circuit has said both. *See* Martin v. Overton, 391 F.3d 710, 714 (6th Cir. 2004); *see also* Adams v. Bradshaw, 644 F.3d 481, 482–83 (6th Cir. 2011) (per curiam) (holding that a state prisoner's Eighth Amendment challenge to the state of Ohio's lethal injection procedures was appropriate in the context of a habeas petition).

275. Courts' analyses of subjective deliberate indifference (disregard; no reasonable measures taken) were brutal to plaintiffs in cases across the United States, so this Article does not single out any particular case or court as being the least helpful on the subjective deliberate indifference analysis.

276. This Article focuses on climate change vulnerabilities in the U.S. South and part of the Rust Belt (the Fifth, Sixth, and Eleventh Circuits). A notable exception is wildfires, which are predicted to burn more frequently across the Western United States, falling primarily within the geographic bounds of the Ninth and Tenth Circuits. One of the ProPublica Maps, reproduced in the Appendix C as Figure 3, depicts the predicted prevalence of large wildfires between 2040 and 2071. The authors explain: "With heat and evermore prevalent drought, the likelihood that very large wildfires (ones that burn over 12,000 acres) will affect U.S. regions increases substantially, particularly in the West, Northwest and the Rocky Mountains, but also in Florida, Georgia and the Southeast," such that "[b]y midcentury, the northern Great Basin . . . will become the epicenter of large

Coast states, within the Fifth Circuits and Eleventh Circuits, where COVID-19 conditions litigation outcomes suggest federal courts may be less inclined to grant emergency relief in the face of natural disasters or emergent public health crises.

2. For example, as climate change progresses, the Intergovernmental Panel on Climate Change predicts that the sea level will rise over time; this will in turn make storm surge flooding during hurricanes more devastating.[277] Increased sea surface temperatures will cause hurricanes and tropical storms to be more destructive, with higher wind speeds and an increased ability to produce extreme rainfall.[278] Storm surges and intense rainfall, together, will cause more frequent and more devasting flooding,[279] particularly in the Gulf Coast.

3. There is also an increased geographic-based risk of harm from climate change to states in the Fifth and Eleventh Circuits,[280] including due to (1) extreme combined humidity plus heat ("wet bulb" conditions);[281] (2) extreme heat;[282] (3) northward climate-related migration;[283] (4) sea level rise;[284] and (5) being exposed to multiple instrumentalities of increased climate-related harm.[285]

Third, this conclusion is based on a number of observations about racial demographics in states within the Fifth Circuit:

1. The Fifth Circuit is unique in that people of color comprise a majority of the jurisdiction's general population.[286] Black Americans make up 17% of the Fifth Circuit's population, Asians make up 4.3%, and Hispanics make up 32%, such that a combined 55% of people who live within the

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wildfires" that can "easily rip through 10,000 acres a day with strong winds." Al Shaw et al., *supra* note 49.

277. *See Hurricanes and Climate Change*, UCAR CTR. FOR SCI. EDUC., https://scied.ucar.edu/learning-zone/climate-change-impacts/hurricanes-and-climate-change [https://perma.cc/2FFJ-MR2T] (last visited Jan. 11, 2021).

278. *See id.*

279. *See id.*

280. *See* app. D, fig.4.

281. *See* app. E, fig.5.

282. *See* app. F, fig.6.

283. *See* app. G, fig.7.

284. *See* app. H, fig.8.

285. *See* app. I, fig.9.

286. *See Examining the Demographic Compositions of U.S. Circuit and District Courts*, CTR. FOR AM. PROGRESS (Feb. 13, 2020, 12:01 AM), https://www.americanprogress.org/issues/courts/reports/2020/02/13/480112/examining-demographic-compositions-u-s-circuit-district-courts/ [https://perma.cc/QP78-2D82] (stating that "people of color comprise a majority of the jurisdiction's general population").

Fifth Circuit are people of color.[287] However, the Fifth Circuit Court of Appeals is among the least racially and ethnically diverse Circuit Court in the country; white judges comprise 85% of all sitting judges.[288]

2. The states with the largest numbers of Black residents in the country are Texas, Florida, and Georgia,[289] all of which are in the Fifth and Eleventh Circuits.

3. The Fifth Circuit is comprised of the states of Texas, Mississippi, and Louisiana.[290] It is comprised of the state with the single largest Black population, Texas, and two out of the three states with the highest Black percentage populations: Mississippi and Louisiana.[291] Thirty-eight percent of Mississippians identify as Black, making it the state with the highest proportion of Black residents in the country.[292] Texas has the most U.S. Hispanic-identifying residents — 11.5 million.[293]

4. In Louisiana, Black people represent 67% of all people incarcerated in state prisons, which is twice the percentage of Black Americans who reside in the state of Louisiana.[294] In Mississippi, 62% of the state's prison

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287. *See id.* (pulling from U.S. Census Bureau statistics on racial groups within Texas, Mississippi, and Louisiana).

288. *See id.*

289. *See, e.g.*, TAMIR, *supra* note 116, at 13 (finding that the last available data, from 2019, shows that Texas has 3.9 million Black people in the state making it the state with the most Black people, followed by Florida with 3.8 million Black people, and then Georgia with 3.6 million Black people).

290. *See Examining the Demographic Compositions of U.S. Circuit and District Courts*, *supra* note 286.

291. *See, e.g.*, Michael Harriot, *Where Did All the White People Go? Ranking the Blackest and Whitest Places in America, According to the New Census Data*, ROOT (Aug. 17, 2021, 9:00 AM), https://www.theroot.com/where-did-all-the-white-people-go-ranking-the-blackest-1847496551[https://perma.cc/5R8L-FA4Q] (using 2020 U.S. Census data to rank the Black Population Percentage by State found that Mississippi was the state with the highest Black population by percent at 37.8%, followed by Georgia at 34.2%, then Louisiana at 33.5%); *see also* TAMIR, *supra* note 116, at 13 (finding that Texas has 3.9 million Black people in the state making it the state, numerically with the most Black people).

292. *See, e.g.*, Harriot, *supra* note 291 (using 2020 U.S. Census data to rank the Black Population Percentage by State they found that aside from the District of Columbia, Mississippi was the state with the highest Black population by percent at 37.8%, followed by Georgia at 34.2%, then Louisiana at 33.5%, then Maryland at 33%, then Alabama at 27.1%).

293. *See, e.g.*, Jens Manuel Krogstad, *Hispanics Have Accounted for More than Half of Total U.S. Population Growth Since 2010*, PEW RSCH. CTR. (July 10, 2020), https://www.pewresearch.org/fact-tank/2020/07/10/hispanics-have-accounted-for-more-than-half-of-total-u-s-population-growth-since-2010/ [https://perma.cc/H9SX-R2NR] (following only California, which has 15.6 million Hispanic people, Texas is second with 11.5 million Hispanics).

294. *See, e.g.*, CHRISTIAN HENRICHSON ET AL., VERA INST. OF JUST., INCARCERATION TRENDS IN LOUISIANA 2, https://www.vera.org/downloads/pdfdownloads/state-incarceration-

population are Black.[295] In Texas, Black people account for 33% of the incarcerated population, even though they are only 13% of the state population.[296] Hispanic people in Texas state prisons also account for 33% of all those incarcerated in state prisons.[297] White people, while representing 44% of the Texas state population, only account for 33% of the prison population.[298]

Finally, this conclusion is based on a number of observations about racial demographics in states within the Eleventh Circuit:

1. The Eleventh Circuit is comprised of the states of Alabama, Georgia, and Florida.[299]

2. Georgia has the second-highest Black population of any state by percentage.[300] Georgia likewise has the third-highest number of Black people of any state, with 3.6 million Black people.[301] Within Georgia's prisons, Black people represent 60% of the state prison population, although they are only 34.2% of the overall state population.[302] While

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trends-louisiana.pdf [https://perma.cc/82RQ-WDB3] (last visited Jan. 11, 2022) (showing that Black people make up 67% of everybody incarcerated in Louisiana state prisons while they only account for 33% of the state population; white people make up 60% of the state population but only 33% of those incarcerated in state prisons).

295. *See, e.g.*, CHRISTIAN HENRICHSON ET AL., VERA INST. OF JUST., INCARCERATION TRENDS IN MISSISSIPPI 2, https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-mississippi.pdf [https://perma.cc/3EY3-KTV5] (last visited Jan. 11, 2022) (providing statistical data showing that Black people are incarcerated in Mississippi at 2.5 times the rate of white people and comprise 62% of the state prison population and 57% of the jail population across the state).

296. *See, e.g.*, CHRISTIAN HENRICHSON ET AL., VERA INST. OF JUST., INCARCERATION TRENDS IN TEXAS, https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-texas.pdf [https://perma.cc/2DJ9-XEV6] (last visited Jan. 11, 2022) (finding that while Black people only constitute 13% of all state residents they represent 33% of all those incarcerated in Texas state prisons).

297. *See id.*

298. *See id.* (finding that Black people are incarcerated at 3.4 times the rate of white people in Texas).

299. *See Examining the Demographic Compositions of U.S. Circuit and District Courts*, *supra* note 286.

300. *See, e.g.*, Harriot, *supra* note 291 (using 2020 U.S. Census data to rank the Black Population Percentage by State ranked Mississippi as the state with the highest Black population by percent at 37.8%, and is followed by Georgia at 34.2%, and then Louisiana at 33.5%).

301. *See, e.g.*, TAMIR, *supra* note 116 (finding that from the most recent census data, 3.6 million Black people reside in Georgia).

302. *See, e.g.*, CHRISTIAN HENRICHSON ET AL., VERA INST. OF JUST., INCARCERATION TRENDS IN GEORGIA 2, https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-georgia.pdf [https://perma.cc/JXQ9-4E7N] (last visited Jan. 11, 2022) (finding that Black people are incarcerated at 2.1 times the rate of white people and account for 60% of the state prison population).

white people represent 54% of Georgia's population, they account for only 36% of the state prison population.[303]

3. Alabama has the fifth-highest Black population by percentage, with 27% of its population identifying as Black.[304] However, Black people comprise 54% of its state prison population.[305]

4. Florida has the second-highest Black population of any state by population, with 3.8 million people living in Florida that identify as Black.[306] Black people represent 17% of Florida's state population, yet Black people represent 47% of its state prison population.[307] Florida likewise has the third-highest amount of Hispanics of any state in the country, with 5.7 million people identifying as Latino.[308] White people are significantly underrepresented in Florida's prison system: white people represent 54% of the entire state population but only 40% of the state prison population.[309] Black people in Florida are incarcerated at 3.6 times the rate of white people.[310]

5. The Eleventh Circuit bench is composed of primarily white judges: 90% of the sitting judges on the Eleventh Circuit are white.[311] Within the Eleventh Circuit, 45% of the population is people of color.[312]

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303. *See id.*

304. *See, e.g.*, Harriot, *supra* note 291 (compiling 2020 U.S. Census data to rank the Black population percentage by state revealed that Mississippi was the state with the highest Black population by percent at 37.8%, followed by Georgia at 34.2%, then Louisiana at 33.5%, then Maryland at 33%, and then Alabama at 27.1%).

305. *See, e.g.*, CHRISTIAN HENRICHSON ET AL., VERA INST. OF JUST., INCARCERATION TRENDS IN ALABAMA 1–2, https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-alabama.pdf [https://perma.cc/D5HP-F8FU] (last visited Jan. 11, 2022) (finding that Black people make up 54% of the state prison population and are incarcerated at 2.8 times the rate of white people).

306. *See, e.g.*, TAMIR, *supra* note 116 (finding that from the most recent census data, only Texas has more Black people than Florida with 3.9 million people, and Florida has 3.8 million Black people residing in the state).

307. *See, e.g.*, CHRISTIAN HENRICHSON ET AL., VERA INST. OF JUST., INCARCERATION TRENDS IN FLORIDA 1–2, https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-florida.pdf [https://perma.cc/4PKZ-ZCX9] (last visited Jan. 11, 2022) (finding that Black people make up 47% of the state prison population and are incarcerated at 3.6 times the rate of white people in Florida).

308. *See, e.g.*, Krogstad, *supra* note 293 (following California and Texas, "Florida has 5.7 million Latinos, the third-highest total in the country").

309. *See, e.g.*, HENRICHSON ET AL., *supra* note 307 (finding that Black people are incarcerated at 3.6 times the rate of white people in Florida).

310. *See id.*

311. *See Examining the Demographic Compositions of U.S. Circuit and District Courts*, *supra* note 286 (finding that most of the judges within the Eleventh Circuit are white, including 90% of sitting judges and 80% of active judges).

312. *See id.* ("looking at the combined populations of these three states, one finds that people of color and women comprise approximately 45 percent and 51 percent of the

CONCLUSION

COVID-19 prison and jail conditions litigation provides insights into how federal courts may respond when prison residents seek preliminary relief from emergent climate-related dangers. An observation of outcomes and trends from the 70 COVID-19 prison and jail conditions cases in the Clearinghouse subset — combined with information about projected impact zones of climate-related harms — suggests that prison and jail residents in most parts of the country will have difficulty using the courts to obtain emergency relief to prevent climate-related harms, and that residents in and around the U.S. South and Gulf Coast, who are more likely to be Black, may have more difficulty using the courts to obtain preliminary relief to prevent climate-related injuries and harms.than others. In short, Black prison and jail residents are overrepresented within an underprotected population that is uniquely at risk of climate-related harm due to geographic location..

There are three major mechanisms by which climate change is likely to materially increase the risk of serious harm to prison and jail residents: by (1) creating or exacerbating unconstitutional conditions caused by chronic understaffing; (2) making facilities more dangerous; and (3) causing increased racial disparity in imprisonment. Understaffing is a root cause of many unconstitutional conditions in prisons,[313] and climate change will make it even harder to staff prisons if projections are accurate regarding shrinking economies in the states with the highest rates of incarceration, which are expected to be among the most affected by climate-change-related harms. Facility-related hazards will become more dangerous and disruptive as will institutional unrest or interpersonal violence triggered by the pain and stress of living in environmentally dangerous conditions.[314] Racial disparities in imprisonment will increase[315] because the effects of

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general population," with Black people making up 21.5%, Asians making up 3%, and Latinos making up 18.5% of these combined state populations).

313. In April 2019, the U.S. Department of Justice's Civil Rights Division issued a report in which it cited the ADOC for "egregious" and "dangerous" systemwide understaffing that contributed to likely violations of the Eighth Amendment rights of Alabama prisoners. *See* ALABAMA'S STATE PRISONS INVESTIGATION, *supra* note 8, at 9–10.

314. *See, e.g.*, U.S. DEP'T OF JUST., *supra* note 19, at 2-6, 2-2 ("[T]he BOP must ensure that prisons continue to function in the case of energy disruption, heat waves, drought, or coastal storm impacts," and plan for "[d]isruption of operations resulting from potential unrest (and increased violence) among populations affected by severe weather, extreme heat, and drought." (emphasis removed)).

315. *See, e.g.*, LOONEY & TURNER, *supra* note 68, at 2, 12 (finding that (1) "boys from the poorest families are 40 times more likely to end up in prison compared to boys from the richest families"; (2) "there are more men in prison from the bottom 1 percent than from the top 15 percent of the income distribution"; and (3) "individuals incarcerated in their early

past and present systemic racial discrimination within the criminal legal system will be exacerbated by the additional downward economic and social pressures projected to accompany climate change.[316]

Future climate-change-related prison and jail conditions litigation will likely be based on, or at least cite extensively to, COVID-19 pandemic-related prison and jail conditions litigation. Both are public health crises on global scales that will cause greater harm to populations of imprisoned people due to irreducible realities of congregate imprisonment and because imprisonment prohibits residents from taking rational risk-reducing measures to protect themselves. In both contexts, the same types of legal actions, claims, and jurisdictional hurdles apply.

Because COVID-19-related prison and jail conditions litigation provides a predictive window into likely challenges facing future climate change-related litigation, the Authors derive the following insights and recommendations.

1. 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.

2. Prison and jail residents in geographic areas with the lowest likelihood of winning meaningful court intervention in climate change-related litigation will also be among the most vulnerable of all prison and jail residents due to their geographic location and the anticipated impacts of climate migration.

3. Given the high volume of recent judicial appointments on the federal bench, it is unlikely that circuit courts that took a less protective posture towards prison and jail residents during the COVID-19 pandemic will become more protective of prison residents in future climate-related litigation — it is more likely that even sympathetic circuits will become less so.

4. Observations about outcomes in the Clearinghouse subset cases — when considered together with geographic projections of future climate change-related harm — suggest that prison and jail residents living in the Fifth and Eleventh Circuits, who are disproportionately Black U.S. residents, may be particularly disadvantaged when seeking preliminary relief from climate-related crises.

30s are much more likely to have grown up in poverty, in single parent families, and in neighborhoods of concentrated economic distress and with large minority populations").

316. *See, e.g.*, Islam & Winkel, *supra* note 74, at 2 ("[T]he relationship between climate change and social inequality is characterized by a vicious cycle, whereby *initial* inequality makes disadvantaged groups suffer *disproportionately* from the adverse effects of climate change, resulting in greater *subsequent* inequality.").

To effectively confront the hazards that climate change poses to prison and jail residents, litigation must be one tool among many, and it is unlikely to be a reliably powerful one in the near future. Because harms suffered by prison and jail residents are suffered by their families and communities, the scope of the means to confront the harm — the most effective of which is decarceration — can likewise be community-wide in scope. For example, one effective way to help prison and jail residents avoid the harms of climate change is to increase efforts and resources expended on phasing in alternatives to imprisonment as a punishment for most crimes and simultaneously diverting funds used for imprisonment to (a) build local capacity to facilitate restorative justice alternatives to imprisonment according to terms set by survivors and their communities;[317] (b) pay survivors of crime cash compensation (up front from diversion dollars, not restitution) which they can immediately use to replace lost goods, cover crime-related medical expenses, or to pay for services to help

317. For example, the non-profit organization Common Justice operates a data-driven and survivor-centered restorative justice-based program that offers an alternative to incarceration for people who have committed violent crimes that is prescribed by the individuals who they hurt. Survivors of violent crimes who opt to participate in the program then set terms of program-completion which, if satisfied, they believe will result in holding the person who hurt them accountable and less likely to hurt others in the same way. Both the survivor and the responsible person are provided with services for healing and rehabilitation. *See* COMMON JUST., https://www.commonjustice.org [https://perma.cc/83VR-RGWQ] (last visited Jan. 16, 2022) (explaining that Common Justice "operate[s] the first alternative-to-incarceration and victim-service program in the United States that focuses on violent felonies in the adult courts"); *see also New Solutions for Violent Crime: Common Justice at the Vera Institute of Justice*, VERA INST. JUST., https://nycourts.gov/ip/justiceforchildren/PDF/RestorativePracticeConf/J3-Sered-New_Solutions_Violent_Crime.pdf [https://perma.cc/2T2D-5ALP] (lasted visited Jan. 16, 2022) (explaining that Common Justice "brings together . . . the harmed party (victim), the responsible party (perpetrator), and family and community members with a stake in the outcome — for a face-to-face dialogue to agree on sanctions other than incarceration to hold the responsible party accountable in ways meaningful to the person harmed," and that "[t]hese agreements — which include everything from education and employment to public speaking engagements and restitution to those harmed — replace the lengthy prison sentences the responsible parties would otherwise have served"); *Common Justice: New Solutions for Violent Crimes*, ROBERT WOOD JOHNSON FOUND. (Oct. 20, 2014), https://www.rwjf.org/en/library/research/2014/10/common-justice—new-solutions-for-violent-crimes.html [https://perma.cc/CZ5U-B6KN] (providing that, during Common Justice's grant period with the grantor, most responsible parties had graduated from the program; "[f]ewer than 5 percent had been terminated and sentenced for new crimes"; and quoting a responsible party (perpetrator) as explaining his or her perspective: "You owe your harmed party twice: once for what you did, and once for the chance they gave you to make it right. And both debts take your whole life to repay"); Common Justice, *The Fourth Guiding Principles for Making Our Cities Safer*, YOUTUBE (May 4, 2020), https://youtu.be/EQ3oyZ9w0fo [https://perma.cc/B2ZM-BC69] (discussing the framework informing their program, which is that solutions to violence should be (1) survivor centered; (2) accountability based; (3) safety driven; and (4) and racially equitable).

them recover and heal; (3) pay for rehabilitating responsible individuals who commit crimes so that they can live safely in the community; and (4) fund crime prevention technologies and supportive programs in the community in which the crime took place.[318] Communities will be safer than they are now, including as the frequency and scope of climate-related harms increase across the United States, if crime survivors are made whole when they get hurt; if responsible parties are rehabilitated and held responsible; and if addressing the root causes of crime and of climate change are prioritized over punishment.

However, so long as we have community members locked in prisons and jails who are disproportionately vulnerable to harm due to climate-related events, conditions-related litigation of the types described in this Article will be necessary. Given their outcomes on average, practitioners seeking future relief from climate change-related risks may wish to frame climate-related conditions cases, at the outset, as distinguishable from COVID-19 conditions cases in jurisdictions where unhelpful cases were decided or where relief granted was overturned.

First, the Authors suggest vigorously anticipating and undermining subjective deliberate indifference arguments, which pose *the most danger* of defeating confined plaintiffs' cases relating to climate change. Describe how the future harm your clients seek relief from was predicted and predictable; provide for how prison officials have long known about the substantial risk that this particular climate-related hazard would cause serious harm. Avoid describing the hazard as 'unprecedented' or fundamentally 'unpredictable.' If the event anticipated in fact threatens harm in excess of any previous similar event, consider making the case that the magnitude still falls well within the range of substantially likely harm — the risk of which is well known to prison or jail officials.

The scale of the threat posed must be tied to the scope of the remedy sought. But for residents seeking relief based on a claim or an allegation of an Eighth Amendment violation, making the argument it is a tightrope. Plaintiffs may need to seek rare or novel *remedies* in the face of potentially catastrophic climate-related harm, including emergency evacuation,

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318. For example, local "credible messenger" violence interrupter programs based on the Cure Violence model have been shown to reduce rates and incidence violence; such programs are led by individuals who have previously been convicted of crimes, and who have the expertise to deliver violence-prevention services — before harm occurs — within the communities they know and serve. *See, e.g.*, CURE VIOLENCE GLOB., https://cvg.org [https://perma.cc/9MSC-CK4L] (last visited Jan. 16, 2022); Seyma Bayram, *Credible Messengers Closer to Hitting Streets to Prevent Violence in Jackson*, JACKSON FREE PRESS (Nov. 27, 2019, 10:02 AM), https://www.jacksonfreepress.com/news/2019/nov/27/credible-messengers-closer-hitting-streets/ [https://perma.cc/2YTJ-J4NZ] (exemplifying a local credible messenger program based on the Cure Violence model).

relocation, or immediate release to save imminently threatened lives. These same plaintiffs, however, must avoid making the argument that prison or jail officials face a truly rare or novel *threat*. This is doubly difficult when seeking pre-merits relief because of the higher burden of persuasion.

Because of the difficulty of pre-harm litigation, the Authors suggest identifying and pursuing discrete pre-harm mitigation goals via (1) targeted advocacy efforts, and (2) discrete non-systemic conditions litigation when claims are cognizable, should advocacy efforts fail. As examples, these methods may be applied to improving facility preparedness and improving harm abatement mechanisms.

1. Improving facility plans. Prison and jail officials can avoid Eighth Amendment liability by, in essence, establishing that they negligently implemented an inadequate mitigation plan which they believed to be adequate at the time. As a harm-reduction measure, consider helping them to adopt better plans and implementation procedures: for mass evacuation; relocation; contingency plans for prolonged loss of food or utilities; protocols for swiftly identifying and tracking residents with serious medical conditions or disabilities; procedures for effectively communicating with residents in an emergency. Inclined advocates could offer to help raise money for an expert consultant to develop better preparedness plans. If officials decline, advocates should make a detailed record of how officials were apprised of their current plan's inadequacies—should you need to litigate subjective deliberate indifference in the future.[319]

2. Improving harm abatement mechanisms. Talk to residents of facilities in your area to create a list of the most likely mechanisms of serious harm to them due to climate change. Pursue mitigation of the worst ones however practicable. If advocacy efforts fail, heat-related conditions claims provide a template for how mechanism-specific climate-related cases can proceed, including on thorny constitutional grounds.[320] Also,

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319. Of interest is whether jailed and incarcerated people in certain localities currently suffer enough of the same climate-related harms such that they could theoretically sue on the basis of an inadequate plan alone — as itself posing a substantially likely risk of serious harm — separate from any impending or ongoing crisis, similar to conditions litigation challenging the lack of adequate suicide prevention procedures as a violation of Eighth Amendment guarantees.

320. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 738 (2002); Ball v. LeBlanc, 792 F.3d 584, 596 (5th Cir. 2015) (finding that housing death row residents in very hot cells without access to heat-relief measures while knowing that each suffers from medical conditions which render them "extremely vulnerable to serious heat-related injury" violates the prohibition against cruel and unusual punishment); Hinojosa v. Livingston, 807 F.3d 657, 666 (5th Cir. 2015) (referencing that between 2007 and 2012 13 people died in Texas state prisons from heat-related causes); Blackmon v. Garza, 484 F. App'x 866, 867 (5th Cir. 2012); Brock v. Warren Cnty., 713 F. Supp. 238, 243 (E.D. Tenn. 1989).

consider suits seeking harm-reducing measures that are designed to be resolved on the merits. Unlike the Clearinghouse subset cases analyzed in this Article, these would not be held to a higher burden of persuasion. If discrete enough, such cases can induce early settlement if adopting the harm-reducing measure is less expensive than litigating the case through the merits. Such suits would be non-systemic and seek clear, discrete, concrete relief, such as for fire alarms and posted evacuation plans that residents with disabilities can follow, or for a policy that provides residents with mobility impairments the option to be housed on a ground floor. Such claims must be cognizable but may not be clear winners; however, if framed realistically, they may have modest cumulative harm-reducing impacts, particularly if actions seeking narrow relief can be resolved more often and earlier by mediation or agreement. Separately, research whether any state laws, regulations, or building code sections can be leveraged to require that a facility be better prepared for the type of climate crises endemic to your area. For example, in geographic areas prone to deep-freezes or floods, perhaps facilities could be required, if not convinced, to maintain a two-day supply of bottled water and food for every resident held. In facilities where, during the COVID-19 pandemic, a lack of effective communication between residents and administrators was a factor contributing to low vaccination rates, perhaps advocates could offer to raise resources for an outside facilitator to help establish a joint body of administrative and resident leadership to co-plan around emergency preparedness — to ensure that residents have the information and opportunities that they need to take care of themselves and each other as well as can be hoped for in a climate-related crisis.

Decarceration, through restorative justice alternatives or otherwise, is the ethical and most effective way to prevent unnecessary climate change-related harm to our community members living in prisons and jails. But so long as people remain incarcerated, detained, and at increased risk of harm, we can undertake constructive efforts to pursue mitigation opportunities, wherever we can find or make them, and we can prepare for the certainty that we will need to litigate climate-related prison and jail conditions cases more often and urgently moving forward.

APPENDIX A

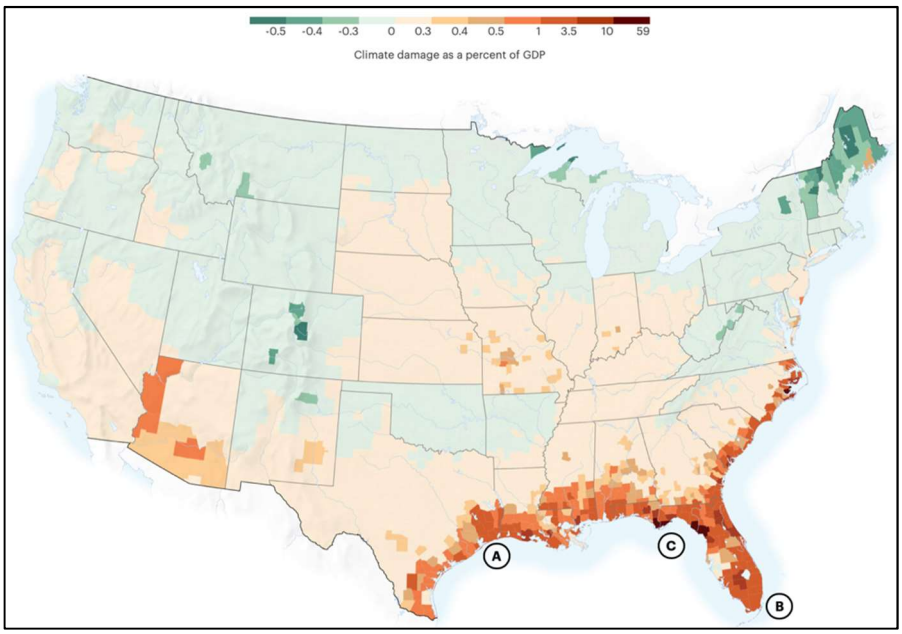

Figure 1: Map of "Economic Damages from Climate: 2040–2060." The ProPublica authors explain that climate change "will have a larger proportional impact in rural places like Gulf County, Florida (C), which might lose half its economy," and that factors such as "[r]ising energy costs, lower labor productivity, poor crop yields and increasing crime are among the climate-driven elements that will increasingly drag on the U.S. economy, eventually taking a financial toll that exceeds that from the COVID-19 pandemic in some regions."[321]

321. Al Shaw et al., *supra* note 49.

APPENDIX B

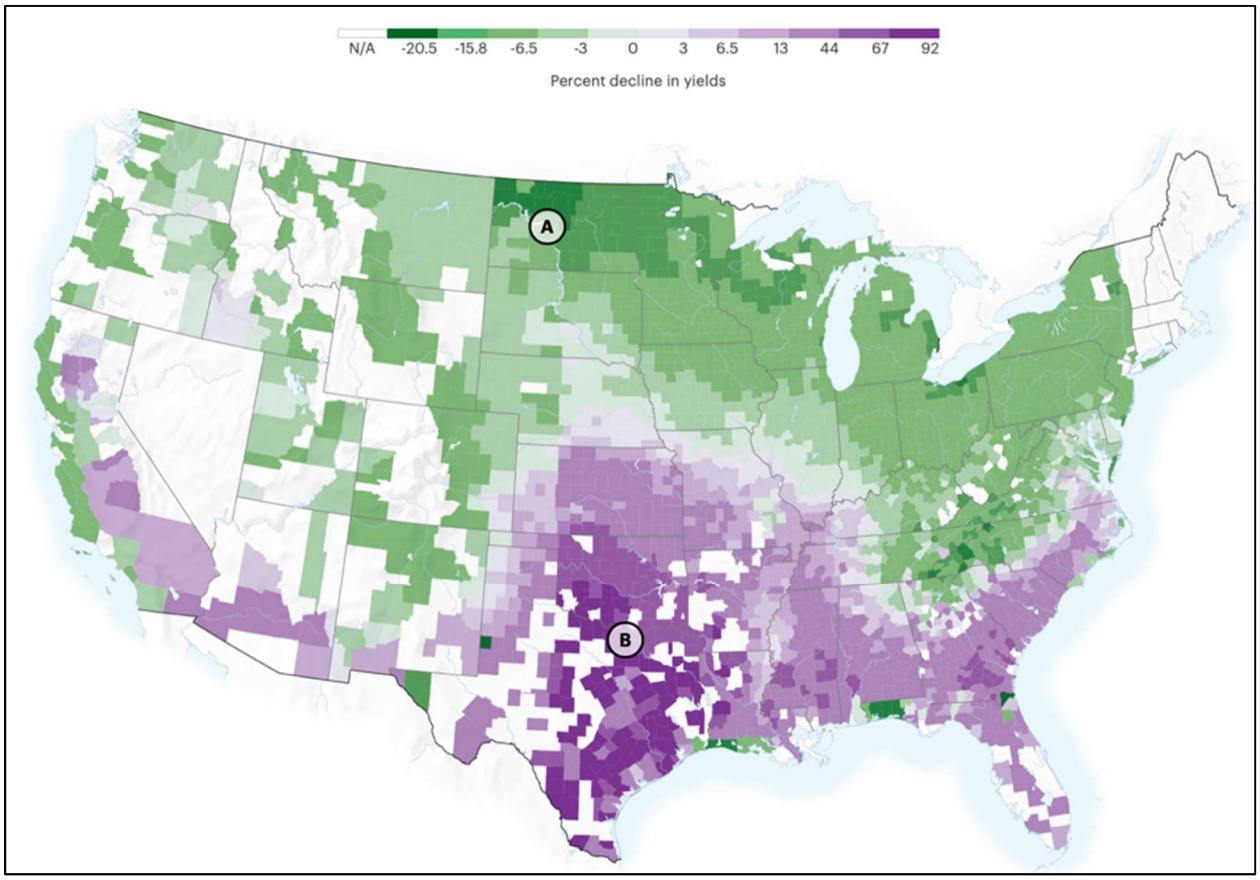

Figure 2: Map of "Farm Crop Yields: 2040–2060." The ProPublica authors explain: "With rising temperatures, it will become more difficult to grow food;" using corn and soy as indicator crops, the ProPublica authors project their production will "decrease for every degree of warming. By midcentury, North Dakota A, which already harvests millions of acres of both crops, will warm enough to allow for more growing days and higher yields. But parts of Texas and Oklahoma B may see yields drop by more than 70%."[322]

322. *Id.*

APPENDIX C

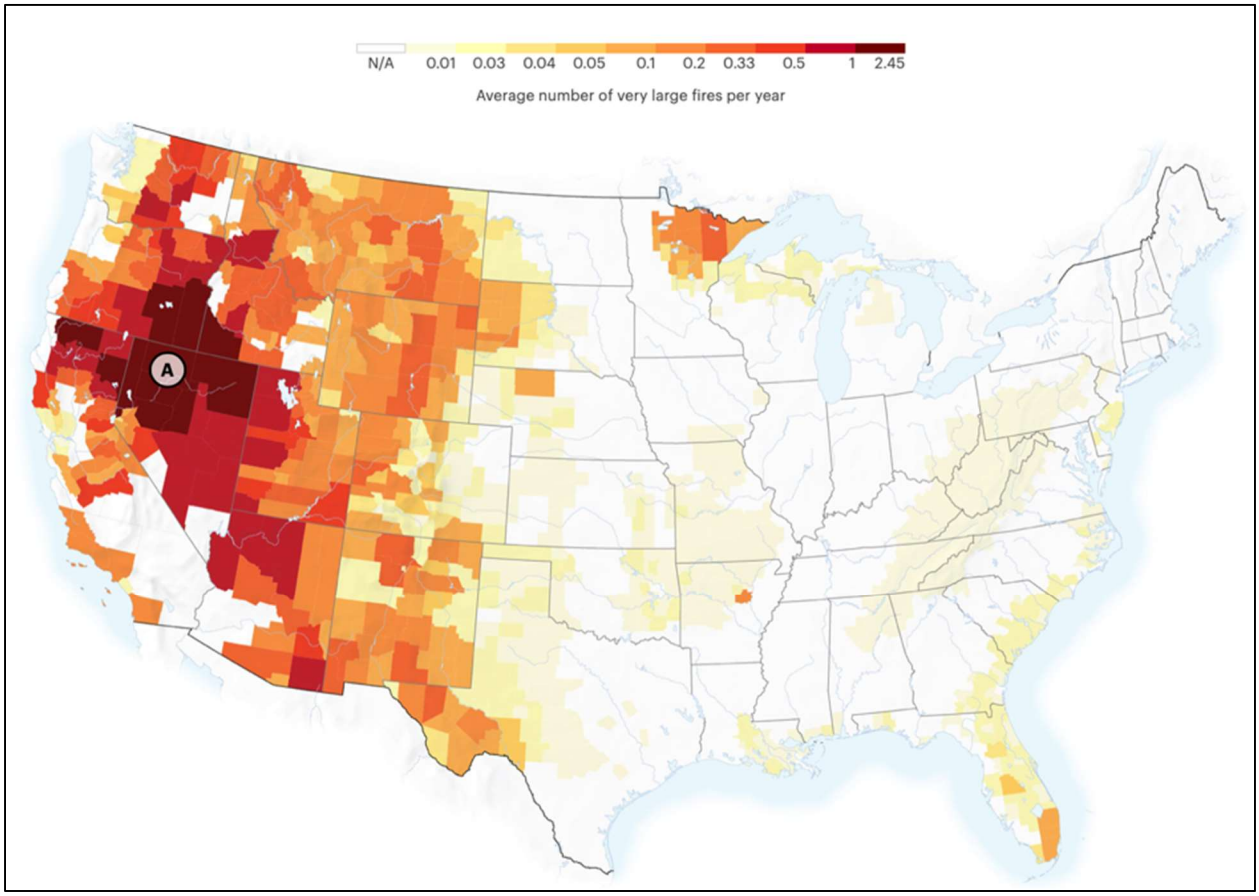

Figure 3: Map of "Large Wildfires: 2040–2071." The ProPublica authors explain: "With heat and evermore prevalent drought, the likelihood that very large wildfires (ones that burn over 12,000 acres) will affect U.S. regions increases substantially, particularly in the West, Northwest and the Rocky Mountains, but also in Florida, Georgia and the Southeast," such that "[b]y midcentury, the northern Great Basin . . . will become the epicenter of large wildfires" that can "easily rip through 10,000 acres a day with strong winds."[323]

323. *Id.*

APPENDIX D

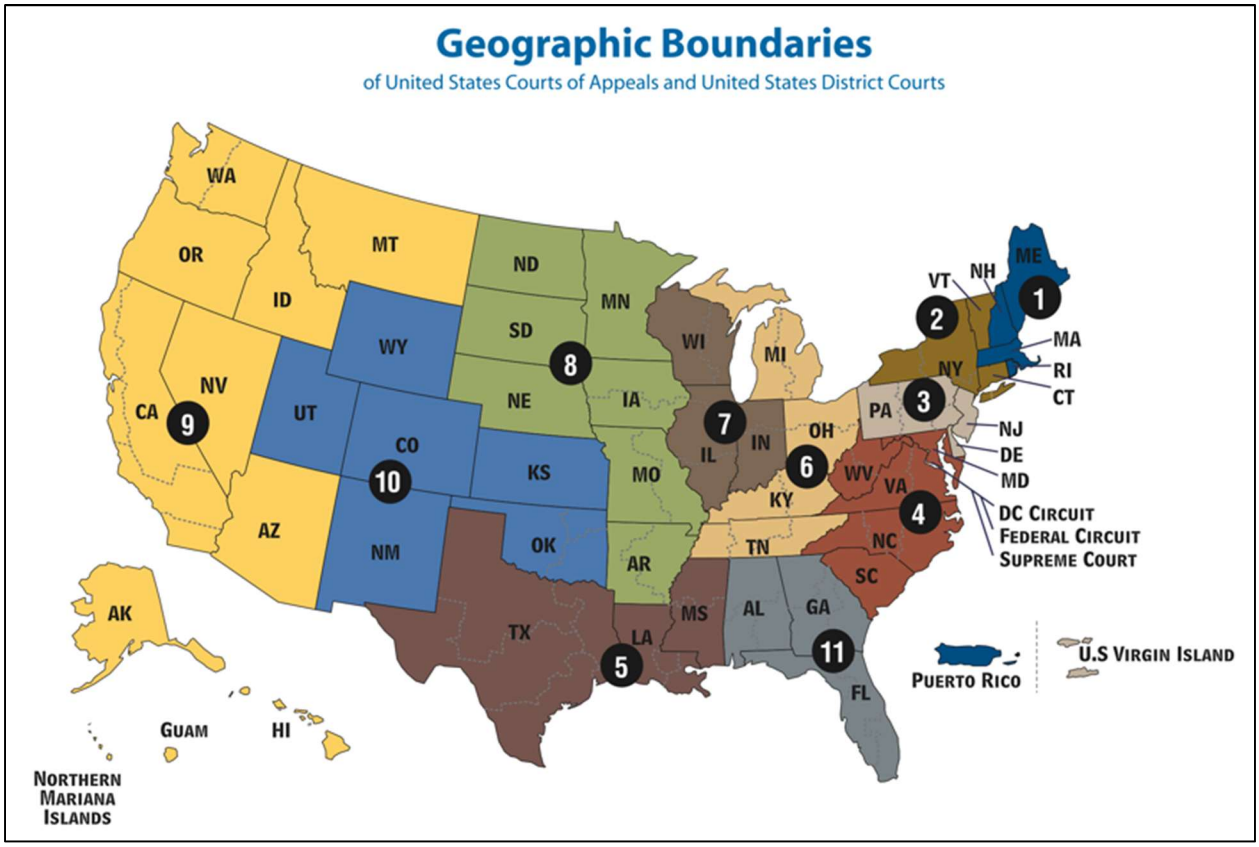

Figure 4: Geographic Boundaries of United States Courts of Appeals and United States District Courts.[324]

324. *Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links [https://perma.cc/T7GF-F4TD] (last visited Aug. 2, 2021).

APPENDIX E

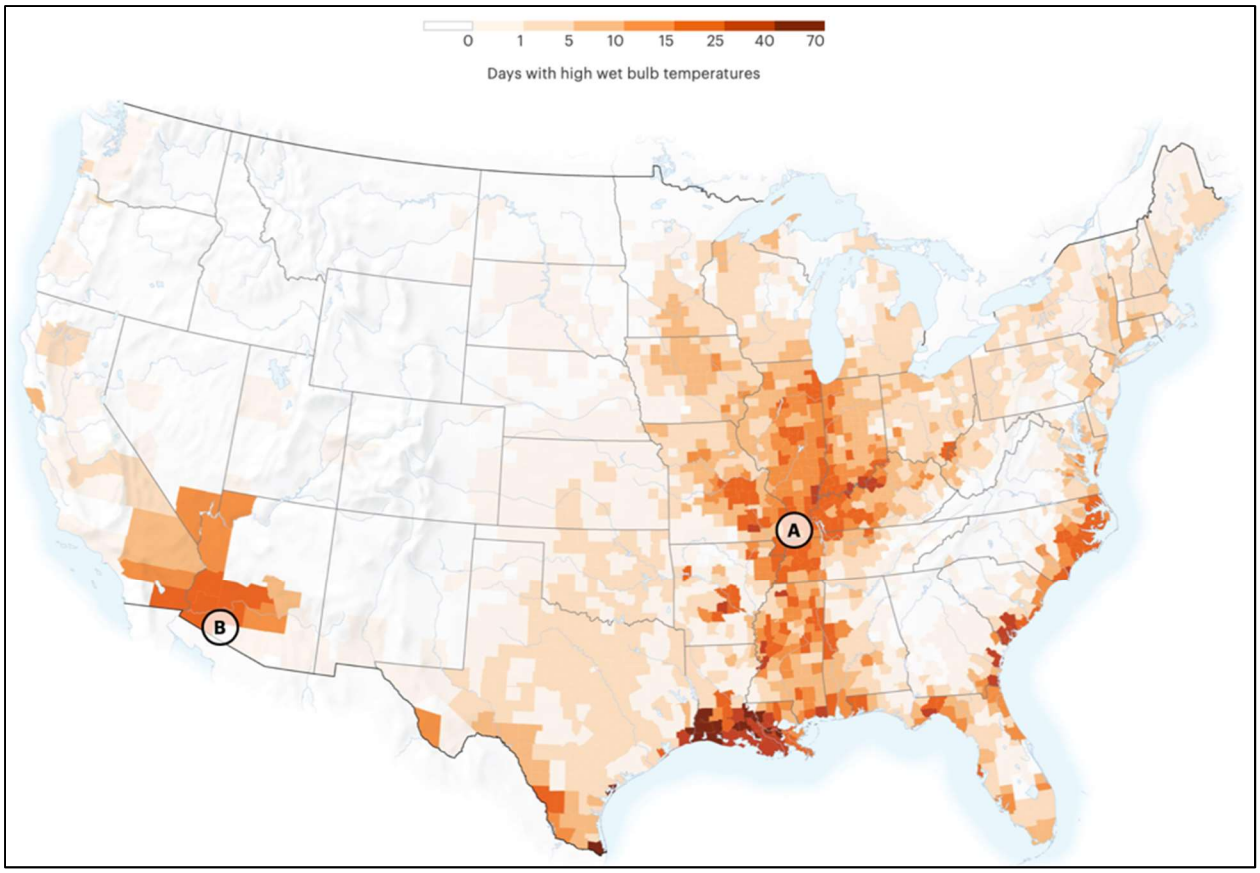

Figure 5: Map of "Extreme Heat and Humidity" that the ProPublica authors describe as "wet bulb" temperatures:[325]

> When heat meets excessive humidity, the body can no longer cool itself by sweating. That combination creates wet bulb temperatures, where 82 degrees can feel like southern Alabama on its hottest day, making it

325. Health risks posed by heat and humidity are extremely relevant in the prison conditions context. The ProPublica authors explain their climate change relevance: Today "the combination of truly dangerous heat and humidity is rare," but by "2050, parts of the Midwest and Louisiana could see conditions that make it difficult for the human body to cool itself for nearly one out of every 20 days in the year," and "[a]ll the while, sea level rise will transform the coasts." Al Shaw et al., *supra* note 49. "By midcentury, heat and humidity in Missouri (A) will feel like Louisiana does today, while some areas we don't usually think of as humid, like southwestern Arizona (B), will see soaring wet bulb temperatures because of factors like sun angle, wind speed and cloud cover reacting to high temperatures . . . ." *Id.*

> dangerous to work outdoors . . . . As wet bulb temperatures increase even higher, so will the risk of heat stroke — and even death.[326]

326. *Id.*

APPENDIX F

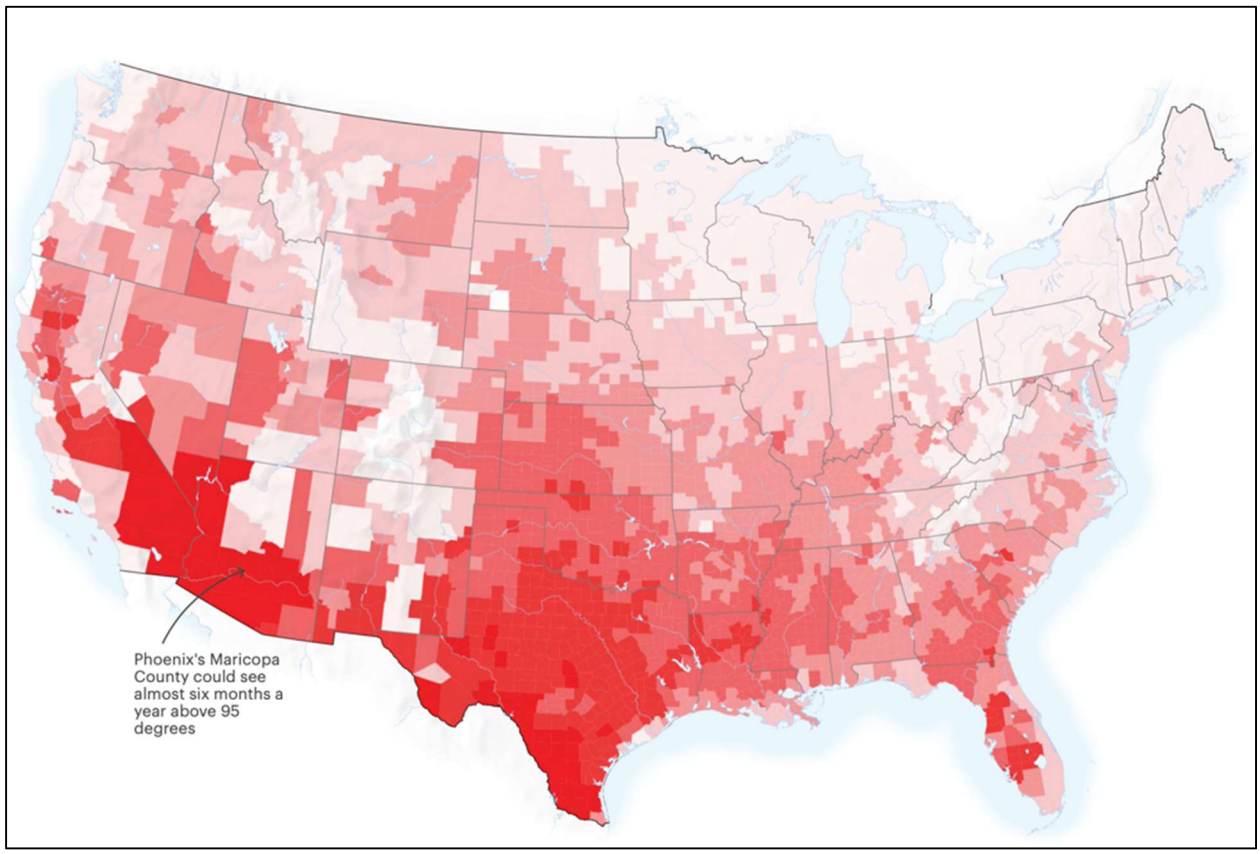

Figure 6: Temperature map showing that "between 2040 and 2060 extreme temperatures will become commonplace in the South and Southwest, with some counties in Arizona experiencing temperatures above 95 degrees for half the year."[327]

327. *Id.*

APPENDIX G

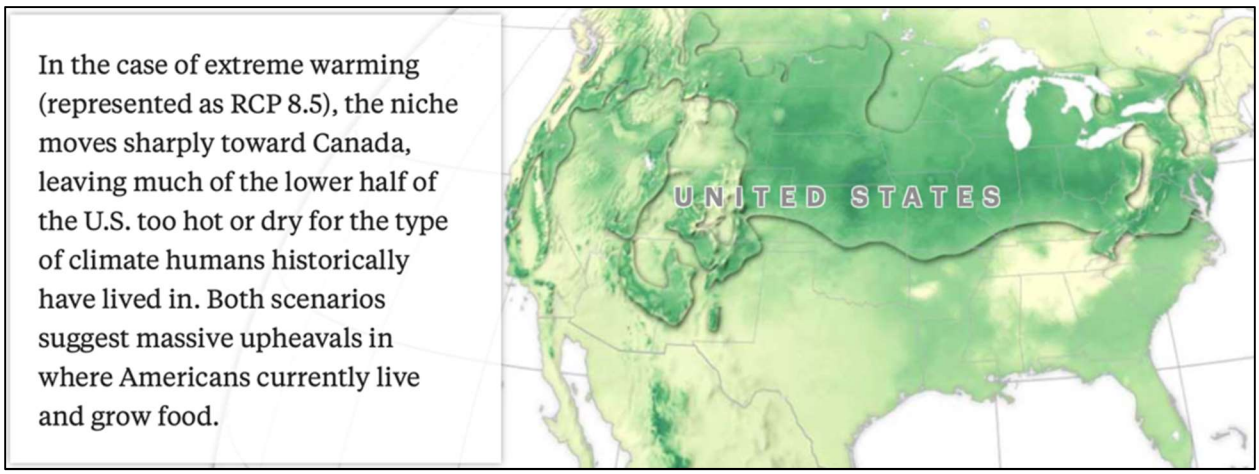

Figure 7: Map indicating likely net northward climate-related migration over time.[328]

328. *Id.*

APPENDIX H

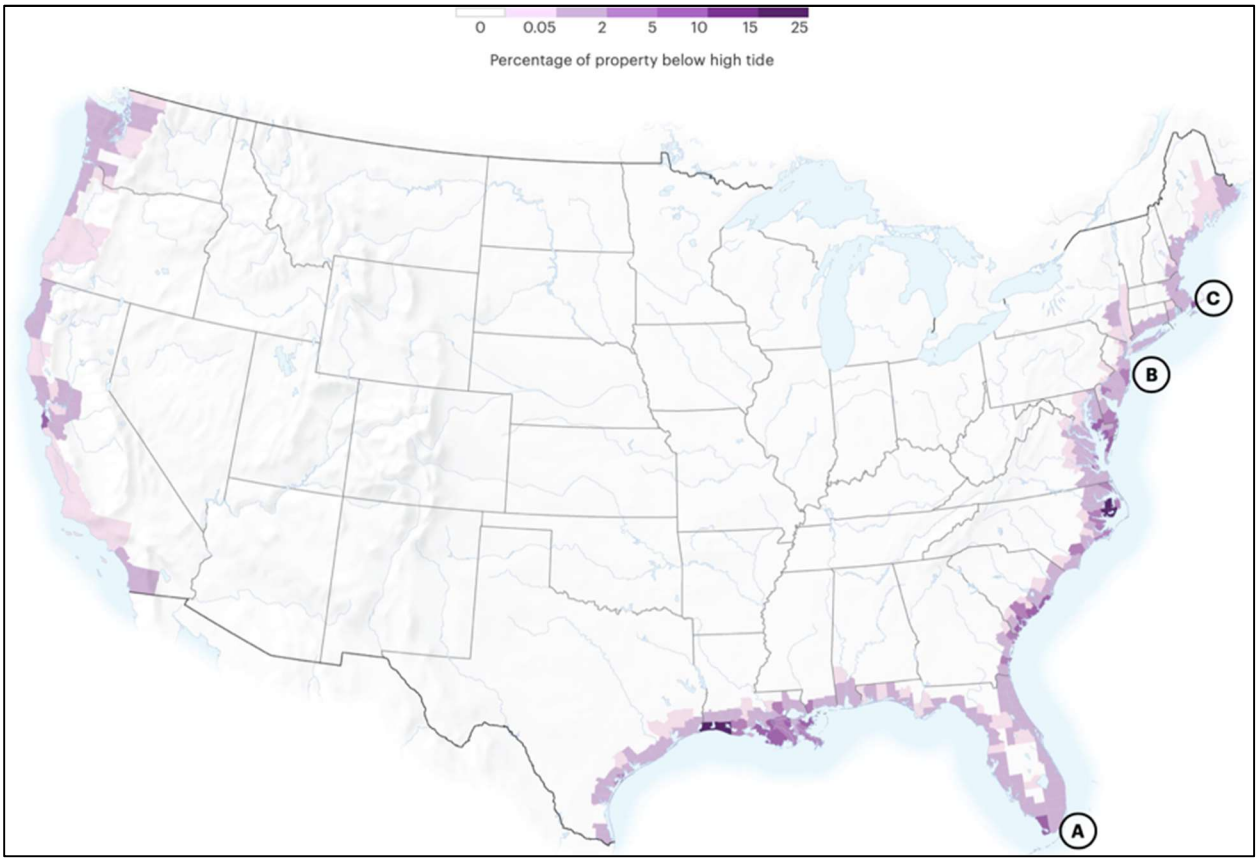

Figure 8: Map of "Sea Level Rise: 2040–2060." The ProPublica authors explain: "As sea levels rise, the share of property submerged by high tides increases dramatically, affecting a small sliver of the nation's land but a disproportionate share of its population," and that "some 50 million Americans live in eight of the largest U.S. metro areas — Miami (A), New York (B) and Boston (C) among them — which all lie in some of the most affected counties in the U.S."[329]

329. *Id.*

APPENDIX I

The Greatest Climate Risk? Compounding Calamities.

Taken together, some parts of the U.S. will see a number of issues stack on top of one another — heat and humidity may make it harder to work outside, while the ocean continues to claim more coastal land. The table below ranks the most at-risk counties in the U.S. if all of the perils were combined. You can also sort by individual climate risk to see how each one stacks up, with higher numbers being worse in all categories. The projections are for 2040-2060 under RCP 8.5.

County ⇕	Heat ⇕	Wet Bulb ⇕	Farm Crop Yields ⇕	Sea Level Rise ⇕	Very Large Fires ⇕	Economic Damages ⇕
Beaufort County, SC	6	9	8	7	3	9
Pinal County, AZ	10	6	8	1	6	7
St. Martin Parish, LA	7	10	8	4	3	7
Colleton County, SC	6	9	8	6	3	8
Wakulla County, FL	7	9	8	4	1	9
Assumption Parish, LA	6	9	7	7	2	9
Jefferson Davis Parish, LA	7	10	8	4	1	8
Livingston Parish, LA	7	9	8	6	1	8
St. John the Baptist Parish, LA	6	9	8	6	2	8
Jackson County, MS	6	9	8	4	3	8
Hyde County, NC	4	7	7	10	2	9
Jasper County, SC	6	9	8	4	3	8
Graham County, AZ	10	2	8	1	8	6
Camden County, GA	6	9	8	4	2	8
Calcasieu Parish, LA	6	10	8	4	1	8
Lafayette Parish, LA	7	10	8	3	2	7
St. James Parish, LA	6	10	8	6	2	6
St. Landry Parish, LA	7	9	8	3	3	7
Pamlico County, NC	4	7	8	6	2	10
Tyrrell County, NC	4	7	7	10	2	8
Charleston County, SC	3	7	8	7	3	8
Marion County, FL	9	4	8	3	4	8
Miami-Dade County, FL	4	5	8	4	6	8
Palm Beach County, FL	4	4	8	4	6	8
Charlton County, GA	9	6	8	1	3	8
Liberty County, GA	7	9	9	4	2	6
Beauregard Parish, LA	7	10	9	1	1	7
Lafourche Parish, LA	4	9	8	6	2	7
Harrison County, MS	7	7	8	4	2	7
Cameron County, TX	6	10	8	4	1	7
Galveston County, TX	6	7	9	4	1	8
Willacy County, TX	10	4	10	4	1	7
Mobile County, AL	6	7	8	4	2	7
Cochise County, AZ	7	2	8	1	9	6
Fresno County, CA	9	4	8	1	8	5
Tehama County, CA	9	4	8	1	7	5
Dixie County, FL	7	6	7	4	1	10
St. Johns County, FL	6	6	8	4	2	8
Taylor County, FL	7	6	8	4	1	8
Volusia County, FL	4	6	8	4	3	9
Effingham County, GA	6	6	9	3	3	7
East Baton Rouge Parish, LA	7	10	9	3	2	5
Iberville Parish, LA	7	9	8	4	2	6
Pointe Coupee Parish, LA	7	10	8	1	3	6
Tangipahoa Parish, LA	7	7	8	4	1	7

See fewer counties

Figure 9: A partial image of a large table entitled "The Greatest Climate Risk? Compounding Calamities." In it, the ProPublica authors list all counties in the United States and provide each counties' relative risk of harm from specific climate-related dangers.[330] We draw two data points in our analysis of COVID-19 prison conditions cases from this table. We use it to designate certain outcomes as (1) in geographic areas that bear an above-average risk of climate-related harm in at least one risk category, meaning a score of above a 5; and/or (2) in a geographic area that bears an above-average risk of climate-related harm in three or more risk categories.

330. *Id.*