No. ___

IN THE

Supreme Court of the United States

ELZIE BALL, NATHANIEL CODE, AND JAMES MAGEE,

Petitioners,

v.

JAMES M. LEBLANC ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Prison Litigation Reform Act of 1995 (PLRA) provides that before a district court may order prospective relief with respect to prison conditions, it must find "that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A).

Petitioners are three prisoners who, due to medical conditions, are uniquely susceptible to serious heat-related injury. After a trial, the district court found overwhelming evidence that respondents, who operate the prison, had violated petitioners' Eighth Amendment rights by housing them in excessively hot cells (often more than 100 degrees Fahrenheit)—and found that the only way to remedy the violation was for the prison to keep the heat index below 88 degrees. Respondents proposed to install air conditioning.

The Fifth Circuit affirmed that respondents were violating the Eighth Amendment, but held that the PLRA prohibits the district court from ordering a maximum heat index, and prohibits air conditioning. The court based its decision on circuit precedent endorsing lesser remedies. Those remedies were then tried, but they failed to cure the violation, so the district court again ordered a maximum heat index—achievable without air conditioning. Citing the mandate rule, the Fifth Circuit reversed.

The Question Presented is whether the PLRA's tailoring requirement prohibits a district court from ordering a prison to maintain a maximum heat index to remedy a constitutional violation caused by heat.

PARTIES TO THE PROCEEDING

Petitioners are Elzie Ball, Nathaniel Code, and James Magee.

Respondents are James M. LeBlanc, the Secretary of the Louisiana Department of Public Safety and Corrections; Darrell Vannoy, Warden of the Louisiana State Penitentiary in Angola, Louisiana; James Cruz, Warden of Death Row at the Louisiana State Penitentiary in Angola, Louisiana; and the Louisiana Department of Public Safety and Corrections. The individual respondents were sued below in their official capacities.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Elzie Ball, Nathaniel Code, and James Magee respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a-23a) is reported at 881 F.3d 346. The district court's opinion (Pet. App. 24a-59a) is reported at 223 F. Supp. 3d 529. The Fifth Circuit's opinion in the first appeal in this case (Pet. App. 60a-85a) is reported at 792 F.3d 584. A prior opinion of the district court in this case (Pet. App. 86a-206a) is reported at 988 F. Supp. 2d 639.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2018. The court denied a timely petition for rehearing en banc on March 9, 2018 (Pet. App. 207a). On May 29, 2018, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 9, 2018. On June 28, 2018, Justice Alito further extended the time to August 6, 2018. No. 17A1307. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Prison Litigation Reform Act of 1995 provides, in relevant part:

(a) REQUIREMENTS FOR RELIEF.—

(1) PROSPECTIVE RELIEF.—

(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of

> the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.
>
> (B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless—
>
> > (i) Federal law requires such relief to be ordered in violation of State or local law;
> >
> > (ii) the relief is necessary to correct the violation of a Federal right; and
> >
> > (iii) no other relief will correct the violation of the Federal right.
>
> (C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

18 U.S.C. § 3626(a)(1).

STATEMENT OF THE CASE

1. Located about an hour north of Baton Rouge, Louisiana State Penitentiary in Angola is the largest maximum security prison in the United States. Angola's death row facility was built in 2006. Pet. App. 60a-61a. Spanning 25,000 feet, the facility includes four housing wings, each containing two tiers. It also has offices, visitation rooms, medical facilities, and staff facilities. All of these places—except the housing tiers where inmates are kept—are air conditioned. *Id*. at 62a.

To say that South Louisiana gets hot in the summer understates the matter. It is hotter than Washington, D.C., and the combined heat and relative humidity regularly produce heat index values that give rise to "extreme caution" or even "danger" as categorized by the National Oceanic and Atmospheric Administration (NOAA). Pet. App. 115a-29a (reporting temperature data).[1] At these values, prolonged exposure to heat can cause serious illness or even death, especially to people who are more vulnerable to overheating—including the elderly and individuals with chronic medical conditions. *Id.* at 140a.

Unfortunately, confinement at Angola does not shield the inmates from summer heat; indeed, the

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[1] NOAA has prepared a chart showing these levels. *See* Nat'l Weather Serv., *Heat Index*, https://www.weather.gov/safety/heat-index (last visited Aug. 3, 2018). Heat index values between 91 and 103 correspond to "extreme caution," and values from 103 and 124 correspond to "danger." *Ibid.* This data was presented to the district court, which cited to it. Pet. App. 115a & n.37 (citing a prior version of the Web site).

prison's architecture exacerbates the problem. According to data collected by a neutral third-party expert in this case, the heat index in the tiers regularly ventures into dangerous territory, exceeding "104 degrees at various times during the data collection period" (July 15 through August 5, 2013). Pet. App. 113a-14a (footnote omitted).[2] Moreover, "the temperature, humidity, and heat index inside the death row tiers were, more often than not, the same or higher than the temperature, humidity, and heat index recorded outside of the death row tiers." *Id.* at 114a (emphasis omitted). Indeed, the tier walls "were hot to the touch." *Id.* at 131a.

Before this litigation began, prisoners had no refuge from this sweltering heat. Inmates were kept in small, windowless cells for 23 hours a day. During the remaining hour, inmates were permitted to go outside to the recreation cage (but only four times a week), spend time in the tier (which also lacks air conditioning), and/or take a hot shower. Pet. App. 102a-03a. Only during this one-hour period could inmates directly access the 48- or 68-ounce ice chest—if it was not broken or empty—available in each tier. *Ibid*. For the remaining 23 hours, inmates depended for the distribution of ice on guards or other inmates,

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[2] A report prepared by a Special Master and submitted to the district court on June 1, 2018, which is based on temperature data from 2016, 2017, and part of 2018, indicates that "June through September are the critical months in terms of excessive heat in the Death Row tiers at Angola. In fact, the heat index is excessive (between 88 and 103 degrees Fahrenheit) almost every day of those four months." Dist. Ct. Doc. 461, at 2 (emphasis omitted).

who may and did refuse inmates' requests. *Id.* at 103a-04a.

Petitioners Elzie Ball, Nathaniel Code, and James Magee suffer from diagnosed medical conditions and/or are prescribed medications that render them particularly susceptible to heat and less capable of thermoregulation. Pet. App. 35a. They are accordingly especially at risk for heat-induced illness or death. *Id*. at 2a, 18a, 26a-27a.

In the course of this litigation, petitioners experienced heat-related symptoms. All three petitioners report dizziness, lightheadedness, headaches, profuse sweating, and difficulty sleeping. Pet. App. 108a-12a. Petitioners Ball and Code, who are both in their sixties, also report unexplained tingling sensations throughout their body, as well as swelling and pain. *Id*. at 35a-36a, 108a-10a. Ball also experiences blood pressure spikes in the summer, and respondents' staff physician commented that sooner or later, Ball "is going to stroke out." *Id*. at 108a. Petitioner Magee also experiences nausea and sometimes has trouble breathing. *Id*. at 111a-12a.

All three petitioners are at serious risk of harm. Indeed, petitioners' expert, Dr. Suzi Vassallo, provided "largely uncontroverted" testimony that petitioners were at "imminent risk of severe physical harm" including stroke, heat stroke and myocardial infarction. Pet. App. 147a-49a. Dr. Vassallo further testified that the extreme heat at Angola worsened petitioners' underlying medical conditions. *Id*. at 141a-42a.

2. In 2013, after exhausting their administrative remedies, petitioners sued respondents for violations

of the Eighth Amendment based on exposure to excessive heat without adequate remedial measures. Pet. App. 63a. In addition to declaratory relief, petitioners sought an injunction requiring that the heat index be maintained at a safer level of 88 degrees Fahrenheit. *Id.* at 89a.

To be clear: a heat index of 88 degrees is not *comfortable*. As Dr. Vassallo explained, "none of us would tolerate being in a setting at 88 degrees heat index." Pet. App. 89a-90a n.8. But at any value above 88 degrees, peer-reviewed scientific literature indicates that "the morbidity and mortality from heat rises exponentially." *Ibid*.

After a bench trial, the district court determined, based on "overwhelming evidence," that the extreme heat in Angola subjected petitioners to a substantial risk of serious harm. Pet. App. 191a. The court also found that respondents had knowledge of but disregarded the risk, thus acting with deliberate indifference. *Id.* at 159a-62a. Accordingly, the court ruled that "the conditions of confinement at Angola's death row constitute cruel and unusual punishment, in violation of the Eighth Amendment." *Id.* at 191a.

In ordering relief, the district court was mindful of the requirements of the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to 1321-77 (1996), which provides that prospective relief with respect to prison conditions "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1)(A). Thus, the statute requires a court approving prospective relief to 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." *Ibid*.

In compliance with the PLRA, the district court noted that it was "uncontested that Defendants may move any death row inmate to a different tier and/or cell at any time," such that "a remedy aimed at ameliorating the heat conditions throughout the death row facility is necessary to adequately vindicate Plaintiffs' rights, and is not overbroad." Pet. App. 200a-01a. The court thus enjoined respondents to, among other things, "immediately develop a plan to reduce and maintain the heat index in the Angola death row tiers at or below 88 degrees Fahrenheit," the temperature beyond which Dr. Vassallo stated that the risk for heat-related illnesses rises exponentially—and to maintain that heat ceiling from April 1 through October 31. *Id.* at 90a, 201a.

Based on the district court's order, respondents proposed in their initial Heat Remediation Plan to "install[] air-conditioning throughout the death-row facility as a remedy to the constitutional violations" that the court had found. Pet. App. 24a. Although the court had not specifically ordered the installation of air conditioning, respondents concluded that it was the best way to comply with the court's order.

3. Respondents also appealed the district court's judgment. The United States filed an amicus brief supporting petitioners, arguing that the district court had correctly determined that the conditions at Angola violate the Eighth Amendment.

The Fifth Circuit agreed that a violation had occurred, affirming the district court's holding that

respondents violated the Eighth Amendment by "housing these prisoners in very hot cells without sufficient access to heat-relief measures, while knowing that each suffers from conditions that render him extremely vulnerable to serious heat-related injury." Pet. App. 75a.

The court of appeals nevertheless vacated the injunction on the grounds that its scope violated the PLRA. Pet. App. 61a. To determine the scope of permissible relief, the court did not rely principally on the facts of this case. Instead, it cited a prior Fifth Circuit case, *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004). In *Gates*, the district court found an extreme risk of heat-related illness in a Mississippi prison, and ordered the prison "to provide fans, ice water, and daily showers when the heat index is 90 degrees or above." *Id*. at 339. The Fifth Circuit in *Gates* affirmed the injunction insofar as it applied to the relevant part of the prison, holding that the district court's findings were not clearly erroneous. *Id*. at 339-40.

Here, the Fifth Circuit treated the relief afforded in *Gates* as a ceiling under the PLRA. Pet. App. 61a. Thus, the court held that because the district court in *Gates* had not required the prison to lower the heat index, the district court in this case was not permitted to do so. *Id.* at 82a. The court of appeals further held that because the district court's order had led to the installation of air conditioning—which was not mandated in *Gates*—the relief in this case was "unnecessary to correct the Eighth Amendment violation" as a matter of law. *Ibid.* Instead, the Fifth Circuit held that the district court was limited on remand to "the types of remedies this court endorsed in *Gates*." *Ibid.* It offered examples, such as diverting

cool air from the guards' pod into the tiers, allowing inmates to access air conditioning during tier time, allowing daily cool showers, providing cold drinking water and ice at all times, supplying personal ice containers and fans, and installing additional ice machines. *Id.* at 84a.

Judge Reavley dissented. He would have upheld the injunction, "which in principal only orders the heat index in the Angola death row tiers to be maintained below 88 degrees." Pet. App. 85a (Reavley, J., dissenting).

4. On remand, respondents submitted a Second Plan to the district court. Pet. App. 28a. The plan implemented some of the remedies discussed in the Fifth Circuit's opinion, allowing petitioners to take cold showers, have an individual fan, and have more ice. *Id.* at 28a-29a. Respondents asserted that diversion of cool air from guard pod, however, was infeasible. *See id.* at 29a-30a.

Unfortunately, the Second Plan failed to remedy the constitutional violation, and petitioners continued to experience heat-induced symptoms. Petitioners thus sought modification of the plan in the district court. Pet. App. 29a-30a.

In the background, respondents voluntarily implemented a provisional Third Plan, Pet. App. 5a, which expanded on the Second Plan by requiring the State to:

> (1) relocate plaintiffs to another tier, close to the guards' pod, (2) install an air vent in the guards' pod to divert cool air to plaintiffs' cells, (3) set up a plastic curtain around plaintiffs' cells to trap the cool air, (4) provide

> each plaintiff with an "IcyBreeze" unit, which is essentially an ice chest that blows cold air, and (5) regularly replenish the IcyBreeze units with ice.

Id. at 6a. The district court found that "[t]he total cost of implementing all of the measures pursuant to the Third Plan was less than $2,000." *Id.* at 44a.

5. Following two evidentiary hearings, the district court found that "Plaintiffs continued to experience heat-related symptoms during the implementation of the Second Plan." Pet. App. 35a. The court made detailed factual findings, explaining why the features of the Second Plan—whether considered individually or in combination—were inadequate to "sufficiently reduce the substantial risk of serious harm to Plaintiffs as a result of their exposure to the conditions of extreme heat present in Angola's death-row tiers." *Id.* at 36a. Thus, the court considered the efficacy of cold showers, *id.* at 43a-44a; fans, *id.* at 42a-43a; and ice, *id.* at 43a—all in detail, aided by expert and firsthand testimony, and concluded based on the "compelling and uncontroverted expert testimony" that the measures in the Second Plan, "whether standing alone or in combination, 'absolutely' do not reduce the substantial risk of serious harm to Plaintiffs due to the conditions of extreme heat present in Angola's death-row tiers." *Id.* at 51a-52a.

Based on this new testimony, the district court found, as a matter of fact, that "[t]he only sufficient means to reduce the substantial risk of serious harm to Plaintiffs as a result of their exposure to the conditions of extreme heat present in Angola's death-row tiers is to lower the temperature and heat indices to which Plaintiffs are exposed." Pet. App. 37a. That is

because, as Dr. Vassallo explained, the temperature and heat index are the "cause of risk," and the only way to ensure safety in the prison was to address the cause. *Ibid.* Based on these factual findings, the court held that "[t]he *only* means to reduce the substantial risk of serious harm to Plaintiffs, and thereby remedy the Eighth Amendment violation in this case, is to lower the temperatures and heat indices to which Plaintiffs are exposed." *Id.* at 53a.

The district court thus determined that the Second Plan was inadequate, but the Third Plan was sufficient to remedy the constitutional violation "consistent with the limitations of the PLRA." Pet. App. 54a. Thus, "the measures implemented under the Third Plan only afford relief to [petitioners] and no other portion of the death-row population at Angola," and are no broader than necessary to remedy the constitutional violation. *Ibid.* The court further explained that in requiring respondents to maintain the Third Plan, it was "not intruding upon the province of prison officials, but rather ordering Defendants merely to implement a Plan of their own creation." *Id.* at 55a. The court concluded that an injunction was necessary, however, because there was a real danger that without such an order, respondents would revert to the insufficient measures of the Second Plan. *Id.* at 56a-57a.

The district court thus ordered respondents to "implement the remedial measures under the Third Plan during any period in which the heat index in the death-row tiers exceeds 88 degrees Fahrenheit." Pet. App. 57a.

6. Respondents again appealed, arguing that they should not be required to maintain the Third Plan, and

contending that the Fifth Circuit's prior opinion foreclosed the use of a maximum heat index as part of any remedy. Pet. App. 7a. Respondents' principal concern was that requiring them to maintain a temperature ceiling would effectively require them to install mechanical air conditioning—which would impose an undue burden.

The Fifth Circuit rejected respondents' arguments that the measures in the Third Plan were inappropriate or tantamount to air conditioning. Pet. App. 12a-13a. But, citing the mandate rule, the Fifth Circuit agreed with respondents that the district court was not allowed to require the prison to maintain a maximum heat index of 88 degrees. *Id.* at 9a-11a. According to the court of appeals, its prior opinion had squarely foreclosed that remedy as inconsistent with *Gates*. *Id.* at 10a-12a. The Fifth Circuit also rejected petitioners' argument that new evidence (specifically the evidence relating to the failure of the Second Plan, which established that the Eighth Amendment violation persisted), created an exception to the mandate rule—holding that "the relevant testimony—especially Vassallo's critical testimony—was materially unchanged." *Id.* at 9a. The court thus reversed the order imposing the injunction and ordered the district court to fashion new relief, without incorporating a temperature ceiling into its analysis. *Id.* at 16a.

Judge Higginson concurred in part and dissented in part, explaining that "[t]o forbid the district court from considering a maximum safe heat index is to require that court to remedy the constitutional violation that we have found exists . . . without considering its cause." Pet. App. 17a-18a (Higginson,

J., concurring in part and dissenting in part). The "factual finding [that medically compromised plaintiffs face a risk of serious harm when they are exposed to heat indices above 88 degrees] must be considered when the district court assesses whether any heat-remediation plan is sufficient to remedy [petitioners'] Eighth Amendment injury." *Id.* at 18a.

Judge Higginson also highlighted the tension between the majority's categorical rule and this Court's precedents. Specifically, the notion that the Fifth Circuit's prior decision in *Gates* "set a ceiling for permissible heat-relief measures in prisons," Pet. App. 22a, conflicts with this Court's pronouncement that "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual," or absolves courts from considering the "totality of the circumstances," *ibid.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *id.* at 362-63 (Brennan, J., concurring in the judgment)).

7. Petitioners timely sought rehearing en banc, which was denied. This petition followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for four reasons. First, the Fifth Circuit's categorical rejection of a maximum heat index and air conditioning conflicts with the decisions of at least three other courts of appeals. Second, the Question Presented is important: across the country, and especially in the South, prisoners face unconstitutional exposure to oppressive heat; if they do not have access to robust remedies, many will be injured or die. Third, the decision below is at odds with this Court's precedents and misconstrues the PLRA. Finally, this case provides an

ideal vehicle to address these issues. The district court made detailed factual findings, teeing up the purely legal question whether the Fifth Circuit correctly interpreted the PLRA's tailoring requirement.

I. The Decision Below Conflicts With Other Circuits' Precedents.

The Fifth Circuit's decision has two essential attributes. First, it categorically rejects any rule setting a maximum heat index as inconsistent with the PLRA. Second, the court held that certain remedies—specifically air conditioning—are never permissible under the PLRA. Other courts of appeals have rejected both of these propositions.

1. In *Graves v. Arpaio*, 623 F.3d 1043, 1049 (9th Cir. 2010) (per curiam), the district court ordered that any detainees taking psychotropic drugs could only be housed in cells where the temperatures would "not exceed 85° F," because certain psychotropic drugs make it impossible for detainees to regulate their own body temperature, such that exposure to temperatures above 85 degrees creates a substantial risk of serious harm. The defendant argued that this relief was not "narrowly tailored" because it applied to all detainees taking psychotropic drugs, and not only those whose medications affected their bodies' ability to regulate heat. *Ibid*.

The Ninth Circuit rejected the defendant's argument, explaining that "[t]he PLRA does not require that prospective relief exactly map onto the requirements of the Eighth Amendment. Rather, the statute authorizes relief that is 'necessary to correct' the ongoing constitutional violation found by the district court." 623 F.3d at 1050 (quoting 18 U.S.C.

§ 3626(a)(1)(A), (b)(3)). Because the district court had found, as a matter of fact, that the jail's mental health screening capabilities were inadequate to sort the relevant prisoners, the court held that a narrower remedy was "impracticable"; the Ninth Circuit affirmed. *Ibid.*

There is no way to square the Ninth Circuit's holding in *Graves* with the decision below. Here, like the plaintiffs in *Graves*, petitioners have medical conditions that make them vulnerable to excessive heat. Here, as in *Graves*, the district court determined that the only way to address this substantial risk of serious harm is to maintain the heat index at or below a fixed level. Indeed, if anything, the relief ordered in this case is narrower than the relief in *Graves*: the injunction here protects only three inmates (as opposed to all detainees taking psychotropic drugs) and it takes effect only when the heat index reaches 88 degrees (as opposed to the temperature reaching 85). But where the Ninth Circuit affirmed the district court's injunction, the Fifth Circuit rejected the narrower injunction in this case as overbroad.

2. The Second Circuit has heard a number of cases about prison conditions in New York City jails. District courts have required the jails to place heat-sensitive inmates in air-conditioned housing any time the temperature exceeds 85 degrees, and to ensure that those air conditioning units cool the air to below 80 degrees. *See Benjamin v. Shriro*, 2009 WL 3464286, at *9-10 (S.D.N.Y. Oct. 26, 2009); *Benjamin v. Horn*, 2008 WL 2462027, at *1 (S.D.N.Y. June 18, 2008) (upholding as consistent with PLRA a Heat Order consent decree requiring "heat sensitive" inmates to move to air-conditioned housing when temperature

outside exceeded 85 degrees). Other orders require the jail system to maintain the ventilation and heating units in good working order because of extreme temperatures. *See Benjamin v. Fraser*, 343 F.3d 35, 52 (2d Cir. 2003), *overruled on other grounds by Caiozzo v. Koreman*, 581 F.3d 63 (2d Cir. 2009), *in turn overruled by Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017); *Benjamin v. Schriro*, 370 F. App'x 168, 171-72 (2d Cir. 2010). All of these orders have been upheld as consistent with the PLRA—and were terminated only upon the defendants' showing of compliance, subject to ongoing monitoring.

Importantly, the Second Circuit has emphasized that, "[a]lthough the [PLRA's] need-narrowness-intrusiveness requirement for prospective relief 'might at first glance seem to equate permissible remedies with constitutional minimums, a remedy may require more than the bare minimum the Constitution would permit and yet still be necessary and narrowly drawn to correct the violation,'" considering the need for a "practicable 'means of effectuation.'" *Schriro*, 370 F. App'x at 170 (quoting *Fraser*, 343 F.3d at 54) (brackets omitted). Accordingly, the Second Circuit's interpretation of the PLRA does not mandate a ceiling of permissible relief to remedy constitutional violations resulting from extreme temperatures—and of course it permits remedies including heating and air conditioning.

3. The Seventh Circuit has also refrained from the use of categorical exclusions in deciding whether lowering of overall temperatures using cooling systems may be "necessary" under the PLRA, and upheld a consent decree requiring the cooling of cells through air conditioning. *See Jones-El v. Berge*, 374

F.3d 541 (7th Cir. 2004), *aff'g* 2004 WL 420157, at *1 (W.D. Wis. Feb. 26, 2004) (where agreement required defendants to cool the cells to temperatures between 80 and 84 degrees, and there was no other way to reduce cell temperatures in the prison apart from air conditioning, defendants were ordered to install air conditioning). The consent decree at issue in *Jones-El* provided that the corrections department would "implement a means of cooling the cells during summer heat waves." *Id.* at 543. The agreement stated that it was consistent with the PLRA and provided for the district court's retention of jurisdiction to enforce.

The plaintiffs moved to enforce the agreement. In opposing the motion, the defendants admitted that the only practical way to implement the consent decree was by installing air conditioning—and so the district court ordered it. The Seventh Circuit upheld enforcement of the consent decree that incorporated the PLRA. 374 F.3d at 543. In doing so, the court did not reject as categorically impermissible the injunction that required that temperatures remain below 84 degrees, and further upheld the requirement of air conditioning as a means to cool the cells. Although the court did not directly confront the issue of PLRA compliance, it underscored the case-specific nature of the inquiry.

4. This circuit conflict calls out for this Court's review. Other courts of appeals recognize that in order to remedy an ongoing constitutional violation, a district court may have to order new forms of relief. More specifically, they routinely uphold the use of maximum temperatures, as well as the installation of air conditioning, as narrowly tailored means to cure Eighth Amendment violations arising from excessive

heat. The Fifth Circuit's categorical rejection of these remedies—for no reason other than the fact that they were not implemented in *Gates v. Cook*, 376 F.3d 232 (5th Cir. 2004)—is flatly at odds with these precedents, and represents an unduly restrictive understanding of the PLRA.

II. The Question Presented Is Important And Recurring.

The Question Presented is important in two ways. First, it affects a large number of prisoners who are at risk of heat-related illness. The warmest parts of the country, including Louisiana, Texas, the Southwest, and Florida, are seeing increases in extreme-heat days. These same regions also have some of the largest per capita prison populations in the country. The Sentencing Project, *State Data Map: State Imprisonment Rate* (2016), https://www.sentencingproject.org/the-facts/#map. Alongside increasing ambient temperatures, the prison population is aging. "Between 1999 and 2013, the number of state and federal prisoners age 55 and older increased by 234 percent[.]" *See* Daniel W.E. Holt, *Heat in US Prisons and Jails* 19 (2015), https://web.law.columbia.edu/sites/default/files/microsites/climate-change/holt_-_heat_in_us_prisons_and_jails.pdf. Age correlates with heat sensitivity, and so this demographic trend will aggravate the risk of heat-related illness and injury. More and more prisoners also have mental illnesses or other health conditions that make it difficult to thermoregulate (or require drug therapy that inhibits thermoregulation). *See id.* at 26.

Second, the potential consequences for affected prisoners are grave, including severe illness and

death. Heat- and humidity-related illness can result in kidney failure, respiratory problems, and heart issues. These injuries can arise suddenly and without warning. In fact, heat has been the number one weather-related killer over the past thirty years in the United States, and the risks are particularly salient for those with preexisting medical or mental health issues. *See* Nat'l Weather Serv., *Summer Weather Safety*, https://www.weather.gov/media/lsx/wcm/Heat/SummerWeatherSafetySummary2017.pdf (last visited Aug. 3, 2018). The Centers for Disease Control and Prevention warn of heat dangers, noting that, "every year on average, extreme heat causes 658 deaths in the United States—more than tornadoes, hurricanes, floods, and lightning combined." Press Release, Ctrs. for Disease Control & Prevention, *CDC Urges Everyone: Get Ready to Stay Cool Before Temperatures Soar* (June 6, 2013), https://www.cdc.gov/media/releases/2013/p0606-extreme-heat.html.

Importantly, the foregoing data establishes that exposure to heat injures and kills even free people, *i.e.*, people who are free to visit an air-conditioned shopping mall, or ride an air-conditioned bus, or visit a public swimming pool, or take other measures to address the heat.

The problems are much worse in prisons, where no such relief is available. Report after report documents injuries and deaths to prisoners who must suffer through summer heat without air conditioning. *See, e.g.*, Maurice Chapman, *"Cooking Them to Death": The Lethal Toll of Hot Prisons*, The Marshall Project (Oct. 11, 2017), https://www.themarshallproject.org/2017/10/11/cooking-them-to-death-the-lethal-toll-of-hot-prisons. Even when officers provide ice, water, and

fans (*i.e.*, the measures respondents sought to implement in the Second Plan), heat-related deaths occur because these measures are insufficient to offset the effects of the heat index. *See ibid.*

Indeed, the Fifth Circuit itself knows that heat poses a severe risk in prisons. The court held that respondents in this case violated the Eighth Amendment, affirming the district court's factual finding that petitioners are at risk of serious harm. Pet. App. 2a. And in other cases, the court has acknowledged that "inmates have died as a result of excessive heat." *Yates v. Collier*, 868 F.3d 354, 358 (5th Cir. 2017).

Allowing the Fifth Circuit's ruling to stand will effectively guarantee more heat-related deaths in state prisons, in clear violation of the Eighth Amendment. Every heat wave puts lives at risk—and the risk is only growing. The PLRA was never meant to stand as a barrier against access to basic human necessities, and this Court should grant certiorari to establish that rule. *See Brown v. Plata*, 563 U.S. 493, 511 (2011) ("A prison that deprives prisoners of basic sustenance . . . is incompatible with the concept of human dignity and has no place in civilized society.").

III. The Decision Below Conflicts With This Court's Decisions.

1. Certiorari should also be granted because the Fifth Circuit's opinion conflicts with this Court's holding and reasoning in *Plata*, 563 U.S. 493. There, the State tried and failed for years to cure ongoing constitutional violations resulting from overcrowding. This Court recognized that limiting the prison

population was the only viable remedy, and affirmed the district court's order granting that relief.

Addressing the PLRA's tailoring requirement, the Court explained that "[t]he scope of the remedy must be proportional to the scope of the violation, and the order must extend no further than necessary to remedy the violation." 563 U.S. at 531. But equally, the Court recognized that "a narrow and otherwise proper remedy for a constitutional violation" will not be deemed to violate the PLRA "simply because it will have collateral effects." *Ibid*. Applying this standard, the Court determined that a reduction in population was necessary, and not prohibited merely because it would benefit prisoners outside the plaintiff class.

The Court also upheld the district court's conclusion that the prison population should be reduced to 137.5% of design capacity. *See Plata*, 563 U.S. at 539, 541. The State argued that this figure expressed the "policy preferences" of the plaintiffs' expert witnesses, and not a constitutional analysis. *Id.* at 539. But the Court disagreed, holding that "[w]hen expert opinion is addressed to the question of how to remedy the relevant constitutional violations, as it was here, federal judges can give it considerable weight." *Id*. at 540. The Court further held that "[t]he PLRA's narrow tailoring requirement is satisfied so long as . . . equitable, remedial judgments are made with the objective of releasing the fewest possible prisoners consistent with an efficacious remedy." *Id*. at 541.

The Court emphasized that district courts cannot "shrink from their obligation to enforce the constitutional rights" of inmates, and "may not allow constitutional violations to continue simply because a

remedy would involve intrusion into the realm of prison administration." 563 U.S. at 511 (quotation marks omitted).

The Fifth Circuit in this case should have followed this Court's lead and affirmed the district court's judgment. As this Court recognized in *Plata*, remedies can and should address the root cause of constitutional violations. It follows that when the cause of a constitutional violation is exposure to heat above a certain threshold, requiring the prison to maintain the temperature below that threshold is a narrowly tailored remedy.

Consistent with that logic, the district court in this case twice determined that the *only* way to cure the ongoing violation of petitioners' constitutional rights was to require respondents to maintain the heat index below 88 degrees—and it made all of the factual findings expressly required by the PLRA. The court made these findings after a full trial where it heard detailed testimony from petitioners' expert witness, Dr. Vassallo, one of the foremost experts in this area. And in issuing the second injunction, the district court did even more: it specifically evaluated the efficacy of lesser remedies (the Second Plan), and found them inadequate—again based on compelling, uncontroverted evidence. It then issued an even narrower injunction that cost the prison only $2,000 to implement.

Under *Plata*, the district court did more than enough to satisfy the PLRA's tailoring requirements, and the Fifth Circuit was wrong to vacate the injunction.

2. The Fifth Circuit's approach also threatens to ossify the Eighth Amendment—a constitutional

provision that necessarily evolves over time. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion). This entire approach is inconsistent with the Eighth Amendment, and has no basis in the PLRA as interpreted by *Plata*.

In the context of heat specifically, there can be no question that evolving standards of decency favor the use of temperature ceilings, and air conditioning when necessary. The science about the dangers of overheating—described in detail above, and to the district court by Dr. Vassallo—is already clear. And every new report only finds greater risk from exposure to high heat. *See, e.g.*, Camilo Mora et al., *Global Risk of Deadly Heat*, 7 Nature Climate Change 501, 501 (2017) (conducting "a global analysis of documented lethal heat events" and explaining that "[a]n increasing threat to human life from excess heat now seems almost inevitable").

Moreover, our society's ability to manage heat has never been better, as air conditioning and other remedies have only become cheaper and more efficient over time. As petitioners explained at trial, in the South Census region (which covers Angola), 98 percent of multifamily units had air conditioning by 1974. *See* U.S. Census Bureau, *Number of Multifamily Units Completed with Air-Conditioning* 4 (2017), https://www.census.gov/construction/chars/pdf/mfu_aircond.pdf (from Characteristics of New Housing data project). Ever since the year 2000, the level of air-conditioning saturation in multifamily units has been 100 percent. *Ibid*. Thus, by 2006—when the State built its "state-of-the-art prison facility" at Angola, Pet. App. 60a—cool air in the summer was no longer a

luxury in the South, but instead "the minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

In prisons, too, the overwhelming trend is toward using air conditioning to reduce the maximum heat index. "Virtually all federal prisons have air conditioning," including the facilities at Guantanamo Bay. Jeff Edwards & Scott Medlock, *Air Conditioning Is a Human Right*, Time (July 21, 2016), http://time.com/4405338/air-conditioning-human-right/. Some States likewise require temperatures between or below certain thresholds, including cooler than 88 degrees. *See, e.g.*, 10A N.C. Admin. Code 14J.1217(a) ("Each jail shall have heating, ventilation, and air conditioning systems that are capable of maintaining temperatures in confinement units at not less than 68 degrees Fahrenheit during the heating season and not more than 85 degrees Fahrenheit during the cooling season."); Associated Press, *Kansas to Air-Condition Next Prison as Heat Becomes Concern*, KMUW (Aug. 14, 2017), http://kmuw.org/post/kansas-air-condition-next-prison-heat-becomes-concern.

A recent example illustrates that prisons can and do provide air conditioning for inmates. The U.S. District Court for the Southern District of Texas approved a settlement whereby the Texas Department of Criminal Justice (TDCJ) agreed "to air-condition the housing units in which the class members [inmates] reside." *Cole v. Collier*, 2018 WL 2766028, at *1 (S.D. Tex. June 8, 2018). Specifically, the settlement "requires TDCJ to air-condition the housing areas of the Pack Unit to maintain indoor heat indices at or below 88 degrees Fahrenheit between April 15 and October 15 each year." *Id*. at *2. The

settlement requires TDCJ to install temporary air conditioning, and, subject to legislative approval, permanent air conditioning "in all housing areas" of the affected prison, and to maintain access to temporary air conditioning during the relevant months "in perpetuity" if permanent air conditioning is not installed. *Ibid*. The settlement further requires "TDCJ to house all Class members in air-conditioned environments with heat indices at or below 88 degrees Fahrenheit at any other prison where TDCJ may incarcerate a Class member for the duration of the Class member's present term of incarceration." *Ibid*. It also imposes additional requirements on TDCJ to provide air-conditioned transportation, air-conditioned environments for parole-related programs, and air-conditioned medical facilities. *Id*. at *2-3.

Thus, the relief authorized by the settlement in *Cole* is substantially broader than the relief ordered by the district court in this case. Here, the district court gave limited relief, not including air conditioning, to three inmates in a discrete portion of Angola's death row. In *Cole*, the district court provided relief, including air conditioning, to a class of more than 1,285 people, that will follow them wherever they go within the Texas prison system. *See* 2018 WL 2766028, at *6 n.6. Yet the court in *Cole* found that the settlement was consistent with the PLRA, holding that "absent the relief agreed to in this Settlement, the extreme heat conditions described in the July 19, 2017 order will continue to exist every year between April 15 and October 15 in perpetuity," such that the "relief afforded extends no further than is necessary to correct the constitutional harms, and the relief will not

adversely impact public safety or the operation of the criminal justice system." *Id*. at *12.

Importantly, the outcome in *Cole* is a *settlement*, undertaken voluntarily by Texas even while appeals were pending. The State in that case "concur[red] that the Settlement meets the requirements of the PLRA." 2018 WL 2766028, at *12. This settlement outcome belies any suggestion that modern prisons cannot maintain heat indices below 88 degrees, using air conditioning if necessary.

Correctional officers, who experience the heat in prisons firsthand, have also advocated for mechanical cooling in prisons. Indeed, the Texas Correctional Employees Union filed an *amicus* brief supporting petitioners in the first Fifth Circuit appeal. The brief sought to "convey to the Court that [the officers] support the district court's findings based on the experience of . . . the correctional officers charged with safeguarding and safekeeping Texas prisons." 14-30067 Employees' C.A. Amicus Br. ix. It argued that "the lack of mechanical cooling and climate control in prison facilities makes them less safe and secure for correctional officers and inmates alike." *Id*. at 12.

The officers specifically took issue with respondents' claim that "any order requiring more than" the remedies approved in *Gates*, *supra*, would run afoul of the PLRA. 14-30067 Employees' C.A. Amicus Br. 7. The officers explained that whatever the merit of the decision in *Gates* in 2004, "the district court's findings [in this case] reflect current standards." *Id*. at 9. Thus, the officers explained that:

> Today, society knows more about the effects of heat than it did 10 years ago when the Court decided *Gates*. Public advisories about heat-related stress and injuries have been posted by federal agencies, non-profit groups, and academic institutions. The American Bar Association has published a report directly addressing heat in prisons. Several international reports have documented the effects of excessive heat in jails and prison facilities. These public sources combined show an evolving standard when it comes to heat in prisons.

Id. at 10 (footnotes omitted). The officers further observed that "all Texas county and municipal jails—maximum to minimum security—are simply not permitted to allow temperatures to exceed 85 degrees." *Id*. at 12.

The United States also supported petitioners—both in the district court and on appeal. Thus, the government emphasized to the district court that it had "broad authority to order injunctive relief to remedy constitutional violations at Angola," Dist. Ct. Doc. 64, at 4, and it urged the Fifth Circuit to affirm the district court's finding of an Eighth Amendment violation, 14-30067 U.S. C.A. Amicus Br. 13.

In sum, the case against the Fifth Circuit's rule is overwhelming. In light of the information available to respondents and the courts today, there is no justification for allowing the heat index in prisons to ever reach dangerous territory. The harms are real; the solutions are simple. The Fifth Circuit's attempt to place an artificial ceiling on relief from excessive heat should be rejected, and its decision reversed.

IV. This Case Is An Ideal Vehicle To Decide The Question Presented.

Finally, certiorari should be granted because this case is an ideal vehicle to address the Question Presented. All of the material factual issues have been resolved by detailed findings in the district court—and none of those findings were deemed erroneous. Thus, the sole question for this Court's review is a purely legal one: whether the Fifth Circuit incorrectly held that the PLRA does not allow a district court to impose a maximum heat index on a prison. And it is important to decide that question now because the Fifth Circuit's decision, if allowed to stand, will only encourage prisons not to implement remedies for excessive heat.

Petitioners anticipate two potential vehicle-based arguments—neither of which has merit.

First, respondents may argue that the case is interlocutory because the matter has been remanded to the district court to fashion new relief consistent with the Fifth Circuit's opinion. But nothing that happens on remand will address the crux of the case: the district court has twice found that the *only* way to cure the constitutional violation is to avoid housing petitioners in cells where the heat index exceeds 88 degrees—and the Fifth Circuit has twice held that, notwithstanding this finding, the PLRA does not permit the district court to set a temperature ceiling. The Fifth Circuit has also denied rehearing on the question, indicating that it does not intend to change its position.

On remand, the district court can attempt to fashion the most effective relief available under the Fifth Circuit's rule—but the Fifth Circuit's decision

will prevent the district court from doing the one thing that it has found necessary to cure the constitutional violation. Whether that limitation is appropriate is ripe for adjudication now. Indeed, it would be remarkably wasteful of party and judicial resources for the district court to fashion ineffective relief, and for petitioners to then file a doomed appeal for the purpose of filing this petition anew.

Second, respondents may argue that the Fifth Circuit's most recent opinion was based on the mandate rule—and not a de novo interpretation of the PLRA. But nothing about the procedural posture of the case would preclude this Court from deciding the statutory question. It is well settled that "law of the case cannot bind this Court in reviewing decisions below," and that a "petition for writ of certiorari can expose the entire case to review." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988); *see also Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (holding that even when law of the case applies below, "this court, at least, is free when the case comes here"). Thus, when this Court grants certiorari, it "can reach back and correct errors in the interlocutory proceedings below, even though no attempt was made at the time to secure review of the interlocutory decree." Stephen M. Shapiro et al., *Supreme Court Practice* 84 (10th ed. 2013); *see also Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals.") (citing *Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964) (per curiam); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240

U.S. 251, 258 (1916)). That makes sense, because it is well-settled that the mandate rule, which is merely a specific manifestation of the law-of-the-case doctrine, is not a limitation on courts' power—and especially not on this Court's power. Consequently, this Court can ignore the mandate-rule issue on review.

In the alternative, the Court has the option to address the issue head-on, which it may wish to do because the Fifth Circuit's application of the mandate rule was clearly wrong. The Fifth Circuit determined that the mandate rule applied because, in its view, "all of the relevant testimony—especially Vassallo's critical testimony—was materially unchanged," Pet. App. 9a, and so there was no new evidence that would warrant reconsideration of its prior conclusion that a maximum heat index was impermissible. That is wrong on its face. Prior to the district court's first injunction, Dr. Vassallo, as well as petitioners themselves, testified about prison conditions as they had been prior to the implementation of any heat remediation plan. *See id.* at 142a-43a (Dr. Vassallo); *id*. at 107a-12a (petitioners). Prior to the second injunction, Dr. Vassallo and petitioners testified specifically about the Second Plan's failure to cure the ongoing constitutional violation, and that testimony was supported by additional evidence. *See id.* at 31a-34a, 36a-37a (Dr. Vassallo testifies that the Second Plan is ineffective, discussing each of its features in detail); *id.* at 34a-36a (observational data and petitioners' testimony confirms that the Second Plan was ineffective). That is material new evidence because it showed, based on experience and expert testimony, that the lesser remedies of the Second Plan

were insufficient to remedy the constitutional violation.

As explained by the dissent, the Fifth Circuit's application of the mandate rule deprives district courts of the flexibility they need to address ongoing constitutional violations. Pet. App. 17a-18a (Higginson, J., concurring in part and dissenting in part). That is inconsistent with a host of this Court's precedents, which hold that district courts have the discretion to modify injunctions to account for factual developments and ensure that injunctions remain effective. *See United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248-49 (1968) (holding that injunctions can be modified when they "fail[] to accomplish" their intended result); *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) (Injunctions are "subject always to adaptation as events may shape the need."); *see also Amado v. Microsoft Corp.*, 517 F.3d 1353, 1360 (Fed. Cir. 2008) (stating that the mandate rule "does not preclude the district court from modifying, or dissolving, the injunction if it determines that it is no longer equitable").

Under these precedents, the Fifth Circuit was wrong to use the mandate rule to ignore the district court's findings that the Second Plan had failed to cure the constitutional violation. After the Fifth Circuit's first opinion, the district court considered substantial new evidence, *i.e.*, uncontroverted expert and lay testimony establishing the Second Plan's failure to remedy the ongoing constitutional violation. It considered those facts in light of new and uncontroverted expert testimony that the only way to actually remedy the constitutional violation is to lower the heat index to 88 degrees. And it again analyzed

that remedy in light of the PLRA's requirements, issuing a narrower injunction than before, which cost the prison all of $2,000 to implement. But again, the Fifth Circuit reversed—for no reason other than it had reversed before. That was error under this Court's precedents, and this Court can easily say so (although it need not do so to decide this case).

CONCLUSION

This case presents an important legal question that has divided the courts of appeals. This Court should grant certiorari and hold that the PLRA's tailoring requirement does not prohibit a district court from ordering a maximum heat index as a remedy for Eighth Amendment violations caused by exposure to excessive heat.

Respectfully submitted,

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