CASE NO. 14-30067

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ELZIE BALL; NATHANIEL CODE; JAMES MAGEE,

Plaintiffs-Appellees,

v.

JAMES M. LEBLANC, SECRETARY, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY; ANGELIA NORWOOD, WARDEN OF DEATH ROW; LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS,

Defendants-Appellants.

Appeal from The United States District Court,
Middle District of Louisiana, Case No. 3:13-cv-00368
Hon. Brian A. Jackson

APPELLEES' PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

1. *PLAINTIFFS-APPELLEES*: ELZIE BALL, NATHANIEL CODE, AND JAMES MAGEE;

2. *ATTORNEYS FOR PLAINTIFFS-APPELLEES*: MERCEDES MONTAGNES, ELIZABETH COMPA, AND THE PROMISE OF JUSTICE INITIATIVE;

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7. *DEFENDANTS*-APPELLANTS: JAMES M. LEBLANC, SECRETARY OF THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; BURL CAIN, WARDEN OF THE LOUISIANA STATE PENITENTIARY; ANGELIA NORWOOD, WARDEN OF DEATH ROW; AND THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS;

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STATEMENT OF COUNSEL IN SUPPORT OF REHEARING *EN BANC*

In this case, the panel vacated the injunctive relief developed by Defendants which relied on uncontroverted expert evidence of its necessity to correct a constitutional violation. *En banc* review is warranted because the panel's decision conflicts with (1) established Supreme Court precedent and numerous federal courts that have addressed the issue, and (2) a July 17, 2015, decision of this Court in *Webb v. Livingston*, No. 14-40579.

Mssrs. Ball, Code, and Magee (together, "Plaintiffs") succeeded at trial in the Middle District of Louisiana on claims that prison officials' deliberate indifference to extreme heat levels on Angola's Death Row violated the Eighth Amendment. Consistent with the Supreme Court's guidance in *Brown v. Plata*, 131 S. Ct. 1910 (2011), the district court fashioned its injunctive relief to comply with the PLRA by (1) determining what objective, measurable changes to the conditions of confinement would be necessary to remove the unreasonable risks to Plaintiffs' health—in this case, maintaining a heat index at or below 88°—then (2) providing the prison officials with full latitude to achieve that objective. The district court's injunctive order was appropriate under Supreme Court precedent, and because the panel's decision conflicts with that precedent, this Court should review this matter *en banc*.

The panel undertook an abuse of discretion review of the district court's

determination as to what would be "necessary" to remove the substantial risk of serious harm to Plaintiffs, even though the Supreme Court has said that clear error review applies to the Prison Litigation Reform Act's ("PLRA") "necessary" requirement. 18 U.S.C. § 3626. Moreover, the panel's ultimate finding that establishing an objective maximum heat level was not necessary to remedy the constitutional injury because it requires installation of air-conditioning is inconsistent with decisions of other federal courts, including the Second, Seventh, and Ninth Circuits.

Second, the panel found that the district court's injunctive relief violated the PLRA's narrow-tailoring requirement merely because it had collateral benefits to prisoners other than Plaintiffs. This finding is explicitly inconsistent with Supreme Court precedent and conflicts with other federal courts that have considered the issue. Indeed, it would even be inconsistent with the PLRA's stated goal of judicial economy in litigation.

Given that the substantial harm at issue here encompasses paralysis or death, and given the district court's finding that risk of such harm was virtually inevitable under current conditions, this case presents an issue of exceptional importance. The panel's instructions on remand, which limit the district court to relief that the district court itself found to be ineffective in removing unreasonable risks of paralysis or death, should be addressed *en banc*. Without effective relief, Plaintiffs

face a substantial risk of suffering serious harm, as barred by the Eighth Amendment.

Finally, this Court's recent decision in *Webb v. Livingston* recognizes a "constitutional right to be free from extreme temperatures" and finds that where *Gates*-type relief is "inadequate to protect inmates from extreme heat," the Eighth Amendment is violated. No. 14-40579, Slip Op. at 11-12 & n.7 (June 17, 2015). The panel's decision warrants *en banc* review because it conflicts with *Webb*. The district court here found that *Gates*-type remedies are indeed insufficient to prevent unreasonable risks associated with extreme heat. Despite this evidence, the panel states that there was "no showing that the Constitution mandated more relief for these prisoners for the same prison condition" as in *Gates*. *Id.* at 21-22.

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Whether a Court can vacate relief developed by the Defendants to remedy a constitutional violation found by the district court and supported by expert testimony absent a finding of clear error.

STATEMENT OF COURT PROCEEDINGS AND DISPOSITION

In 2013, Plaintiffs filed suit alleging that the extreme heat they suffered as a condition of their confinement violated their Eighth Amendment rights. The district court ordered collection of heat index data on Death Row (the "Data").

Defendants were sanctioned for discovery misconduct in two areas: (1) modifying Death Row facilities in "bad faith" while the court ordered Data was being recorded and (2) failing to disclose "the cost of installation of air-conditioning" on Death Row despite having "put the cost of installing air-conditioning at issue." ROA.5059-5109.

The district court held a three-day trial and conducted a site visit of Death Row. In its 102-page ruling, the district court found that Defendants were deliberately indifferent to substantial risks of serious harm to Plaintiffs' health caused by the extreme heat levels on the tiers. ROA.5003-5012; ROA.5019-5044.

In crafting an injunction (the "Injunction"), the district court adopted expert

recommendations to establish a maximum heat index of 88ºF[1] on the tiers and ordered Defendants to develop a plan to achieve this objective. ROA.5053. Defendants' proposed plan used existing ductwork with air conditioning units. The district court ordered it be implemented virtually unchanged. ROA.6839.

Defendants appealed, asserting that the district court had erred in finding an Eighth Amendment violation and that the Injunction violated the PLRA. This Court stayed the Injunction pending appeal. The panel upheld the district court's finding of an Eighth Amendment violation, vacated the Injunction, and remanded for *Gates*-type relief (i.e. water, ice, showers, fans, etc.).

STATEMENT OF RELEVANT FACTS

In 2006, Louisiana constructed a new Death Row facility at Angola. ROA.4968. The 25,000 square foot facility includes four housing wings, each of which contains two housing tiers (the "tiers") where inmates' cells are located. ROA.4968. Six of these constitute Death Row. Air conditioning is provided in all areas except the tiers where inmates are housed. ROA.2831, ROA.4968-69. Instead, the tiers have a ventilation system that uses "outside air" to ventilate the space. ROA.4970, ROA.4973, ROA.5732. "Heat alerts" at Angola are issued when the outdoor temperature exceeds 90º, and these alerts are issued daily in the summer. ROA.5740. The facility's architect stated the temperature and humidity in

[1] All following references to temperature or heat index are in degrees Fahrenheit.

the cells are "subject to" the conditions outside of the facility, and it "would not be any cooler inside than it is outside." ROA.4973-4974, ROA.5730-5732.

The Data showed that the "heat index *inside* the tiers were . . . the same or higher than . . . *outside* the tiers." ROA.4979-4980. The heat index on each tier exceeded 104º at various times. For extended periods, the heat index did not drop below 99º, including five consecutive days on Tier G and three on Tier C.[2]

Plaintiffs are incarcerated on Death Row and collectively suffer from hypertension, diabetes, hepatitis, high cholesterol, and depression and are required to take various medications to treat their conditions. It is undisputed that Plaintiffs are frequently moved between tiers. ROA 5053.[3] Plaintiffs are confined to their cells for 23 hours per day. ROA.4970.[4] Plaintiffs have extremely limited access to ice and their drinking water is lukewarm. Plaintiffs' single daily shower is maintained between 100º and 120º and therefore cannot lower body temperature. ROA.4971. The tiers are equipped with one non-oscillating 30-inch fan for every two inmates. ROA.4970. The fans do not provide equal air flow to each cell. ROA.4996. The "windows" on the tiers are louvers, do not open wide, and do not provide for the same air flow as traditional windows. ROA.4970.

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[2] *See* ROA.4981-4993 (district court summary of the Data); JOINT_EX_1 (the Data).

[3] *See also* ROA.5677 (Code was housed on H-tier at time of trial, and had previously been housed on F- and C-tiers); ROA.5747 (Ball was housed on H-tier at time of trial, and had previously been housed on C-, F-, and G-tiers); ROA.6203 (Magee was housed on A-tier at time of trial, and had previously been housed on C-tier).

[4] A description of Plaintiffs' cells is in the record at ROA.4968-72.

The district court's personal observation was that "the windows, fans, and cell vents did not provide a cooling effect or relief from the heat conditions in the tier." ROA.4995. Other evidence confirmed that the relief upheld in *Gates v. Cook*, 323 F.3d 323 (5th Cir. 2004) would not remove the unreasonable risks to Plaintiffs' health and could even exacerbate the risk of heat-related illness. ROA.5015; PLS_EX_127-037.

Dr. Vassallo, a leader in the field of thermoregulation, the ability of the body to deal with environmental heat, stated that the only way to remove the extreme risk of heat related illness is through an 88º maximum heat index. Pl_Ex_99.

ARGUMENT AND AUTHORITIES

I. THE PANEL ERRED IN VACATING THE INJUNCTION

A. Modifying the Type of Relief in the Injunction is Inconsistent with Supreme Court Precedent and Every Federal Court to Consider the Issue.

Plata makes clear that an injunction complies with the PLRA if it (1) orders specific, measurable changes based on expert recommendations to remove the unreasonable risks, and then (2) permits the prison full latitude in the means of achieving the necessary objective. *Brown v. Plata*, 131 S. Ct. 1910, 1939-44 (2011). The district court's factual determination of the "necessary," objective, measurable changes is subject to clear error review and is not clearly erroneous if based on expert recommendations. *Id.* at 1930 (2011) (district court is "well situated to make the difficult factual judgments necessary to fashion a remedy" that

may be reversed only for clear error); *id.* at 1945 (district court's finding that 137.5% population cap was "necessary" was "not clearly erroneous" where district court gave "considerable weight" to expert opinion "addressed to the . . . remedy").

Here, the district court explicitly adopted expert opinion addressed to the necessity of the remedy for unreasonable risks created by the extreme heat. ROA.4959-4960 n.8 (citing Dr. Vassallo's testimony that "morbidity and mortality from heat rises exponentially" over 88º); ROA.5053 (adopting 88° threshold). The district court found that these conditions of confinement created an inevitable and therefore unreasonable risk of an irreversible heat-related medical emergency and could cause serious injury or death. ROA.4999-5019.[5] The district court also found that access to *Gates*-type relief would not be sufficient to remedy the constitutional violation. ROA.4995; ROA.5015; PLS_EX_127-037. Evidence in the district court proceedings also showed that a maximum heat index was supported by contemporary standards of decency, including expert testimony, public health and architectural standards, state legislation[6] and other federal court decisions.[7]

[5] Similar findings based on similar expert evidence have been upheld. *See, e.g.*, *Graves v. Arpaio*, 623 F.3d 1043, 1049 (9th Cir. 2010) (upholding finding that temperatures in excess of 85° are dangerous for pretrial detainees taking psychotropic drugs based on expert testimony).

[6] PLS_EX_127; PL_EX_97-0004; ROA.5942 (Plaintiff's expert David Garon defining an upper limit of 78º with 50% relative humidity as normal); ROA.6309 (Defendants' expert Henry Eyre III identifying a similar temperature and humidity range); ROA.4954-4956 (district court's judicial notice of state policies) and ROA.2901-3186 (state policies judicially noticed).

[7] The panel's "socially acceptable" standard, Slip Op. at 19, appears to refer to the Supreme Court's decision in *Helling v. McKinney*, which requires prisoners to show the risk "is not one

The panel found that the Injunction, which incorporated a remedy proposed by the Defendants, violated the PLRA because it "ordered a type of relief—air conditioning—that is unnecessary." Slip Op. at 19. As the dissent noted, the district court did not order air conditioning. Slip Op. at 22. The district court made factual findings that a maximum heat index of 88º was necessary to remove unreasonable risks, then gave the prison full latitude in the method of achieving this objective. Defendants chose air-conditioning.[8] This distinction is critical.

The panel's analysis of the PLRA's "necessary" requirement incorrectly focuses on the means chosen by Defendants[9] to remove the unreasonable risk instead of the district court's factual finding that an 88º maximum heat index was necessary to remove the unreasonable risk. This misplaced focus resulted in modifying the Injunction, a result inconsistent with *Plata*.

The panel was required to conduct clear error review of the district court's

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that today's society chooses to tolerate." 509 U.S. 25, 36 (1993). Here, the district court determined, based on information from multiple sources (*see supra* notes 5-6 and accompanying text) and the nature of the risk, that today's society does not tolerate the risk of heat related illness created by heat index levels over 88º in a prison context. The panel did not even address—let alone find any error in—this finding by the district court.

[8] Indeed, the panel acknowledges the need to cool the temperatures on the tiers when they suggest that "Defendants could divert cool air from the guard's pod into the tiers," Slip Op. 19, but fails to acknowledge that the Defendants were free to consider crafting the relief in this manner and instead chose air conditioning as the least intrusive remedy.

[9] Defendants' expert testified, "There's many, many ways to skin a cat. . . . There are many different systems that can be utilized to provide cooling" that would accommodate Plaintiffs (ROA.6315), and specifically stated that "spot coolers" or window units could have lowered the heat index to a safe level. ROA.6309, ROA.6314-6315.

factual finding that an unreasonable risk of serious harm occurs at heat indices over 88º. Instead, the panel improperly adopted the role of factfinder and undertook a *de novo* review of the expert evidence. The Supreme Court has made clear that:

> [The clear error] standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps [. . .] if it undertakes to duplicate the role of the lower court. In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*

Anderson v. Bessemer City, 470 U.S. 564, 573 (1985). Such *de novo* review is particularly inappropriate where the factual finding deals with scientific evidence:

> Clear error review is particularly important . . . where so much depends upon familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience. . . . A district court judge who has presided over, and listened to, the entirety of a proceeding has a comparatively greater opportunity to gain that familiarity than an appeals court judge who must read a written transcript or perhaps just those portions to which the parties have referred.

Teva Pharm. USA, Inc. v. Sandoz, Inc., 135 S. Ct. 831, 838-39 (2015) (citations and quotations omitted).

The panel's improper *de novo* review underlies the panel's incorrect finding that alternative measures are the only "necessary" remedy, despite the total lack of evidence in the record that this would remedy the unreasonable risk of harm. Slip

Op. at 19.[10] Indeed, every other federal court to consider the issue has upheld injunctions establishing a maximum temperature range, even if it would "effectively" require installation of air conditioning, as Defendants proposed here.[11] Given the conflict with the Supreme Court and other circuits, *en banc* review is appropriate.

B. Modifying the Scope of Relief in the Injunction is Inconsistent with Supreme Court Precedent and Other Federal Courts.

In limiting the injunctive relief, the panel commits three errors: (1) it considers issues that were waived; (2) it mischaracterizes the scope of the relief; and (3) it misinterprets the PLRA's "need-narrowness" rule to forbid any collateral benefit to non-parties. In *Plata*, the Supreme Court foreclosed this interpretation; likewise, decisions from other circuits have found that injunctive relief can inure to the benefit of non-parties.

1. Arguments against the scope of the remedy were waived.

The panel erred in considering whether the district court erroneously applied relief to the Death Row tiers because this argument was never briefed by

[10] See Appellees' Petition for Panel Rehearing ("Panel Rehearing") § I.

[11] *See Graves*, 623 F.3d at 1049 ("Accepting the district court's factual finding that temperatures in excess of 85° F greatly increase the risk of heat-related illness for pretrial detainees taking psychotropic medications, it follows that the Eighth Amendment prohibits housing such pretrial detainees in areas where the temperature exceeds 85° F."); *Jones-El v. Berge*, 374 F.3d 541, 545 (7th Cir. 2004) (upholding enforcement order requiring installation of air-conditioning); *Hadix v. Caruso*, 492 F. Supp. 2d 743, 753 (W.D. Mich. 2007) (requiring maximum heat index of 90º and ordering installation of air conditioning). *See also Benjamin v. Fraser*, 343 F.3d 35, 54 (2d Cir. 2003) (upholding injunction requiring heating to prevent extremely cold temperatures).

Defendants; it was only raised by the Court at oral argument. "Arguments presented for the first time at oral argument are waived." *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F. 3d 540, 553 (5th Cir. 2014) (internal citations omitted). Indeed, when asked at oral argument about the scope of relief being limited to the three Plaintiffs, Defendants conceded it was never considered:

> **[By the Court:]** Well, irrespective of what's in the record though, the PLRA … says that you use the narrowest possible remedy, and I just wondered whether that – given the fact that these fellows are particularly vulnerable, whether that is something that the district court should have considered. Maybe you didn't bring it to his attention.
>
> **[By defense counsel:]** To my knowledge, your honor, that was not the consideration. The consideration was the general population. ***What's good for these three inmates needs to be good for the other 88 prisoners – or the other 85 prisoners.***[12]

Arguments concerning the scope of the injunction were therefore waived.

2. The panel decision inaccurately describes the relief ordered by the district court.

The panel modified the scope of the injunction relying on language in *Gates* which limited facility-wide relief. First, Plaintiffs contest the panel's characterization of the relief as "facility-wide." Slip Op. at 20. The Injunction is narrowly drawn to Death Row, comprising 85 inmates out of the prison population

[12] Oral Argument at 45:50, *Ball v. Leblanc*, (No. 14-30067), *available at* www.ca5.uscourts.gov/OralArgRecordings/14/14-30067_2-3-2015.MP3.

of more than 6,000.[13] Second, this case is distinct from *Gates*, which vacated a remedy with respect to relief for inmates who were held under different conditions than plaintiffs in that matter. 376 F.3d at 339. Here, the relief is narrowly limited to the identical tiers where Plaintiffs could be housed. ROA.5053 ("Here, it is uncontested that Defendants may move any Death Row inmate to a different tier and/or cell at any time. Accordingly, the Court finds 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."). For this reason, the panel's reliance on *Gates* was misplaced. Furthermore, to the extent the panel relies on a finding that only three inmates complained of the heat, this is inconsistent with the evidence in the record.[14]

3. Nothing in the PLRA limits injunctive relief to only benefit the Plaintiffs.

Plata, the most comprehensive guidance on the scope of prison injunctions, made clear that the PLRA's "need-narrowness" rule does not forbid injunctive relief from benefiting non-parties. Indeed, *Plata* endorsed the view that systemic remedies are sometimes necessary. After rejecting the idea that the court must identify a "particular deficiency" to order relief, the Court explained that, "Plaintiffs rely on systemwide deficiencies in the provision of medical and mental

[13] Indeed, two tiers within the same facility are not used to house Death Row prisoners and were not encompassed in the order of the district court. ROA.4969, ROA.5056.
[14] See Panel Rehearing at 10, n.9.

health care that . . . subject sick and mentally ill prisoners in California to 'substantial risk of serious harm,'" and therefore broad relief was appropriate. 131 S. Ct. at 1925 n.3. The Court further reasoned, "The population limit imposed . . . does not fail narrow tailoring simply because it will have positive effects beyond the plaintiff class. Narrow tailoring requires a fit between the [remedy's] ends and the means chosen to accomplish those ends." *Id.* at 1939-40 (citing *Bd. of Tr. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). As in this case, *Plata* explained that relief can appropriately benefit even presently healthy prisoners (i.e. those beyond the class) because they are "that system's next potential victims." *Id.* at 1940.

Other circuits agree that once "the district court's orders establish that the court evaluated the record as a whole and identified evidence that fully supports the scope of the injunctive relief granted," the PLRA is satisfied. *Fields v. Smith*, 653 F.3d 550, 558 (7th Cir. 2011).[15] Indeed,

> where a court has explained clearly the factual circumstances underlying an order and its understanding of the relevant law as applied to the facts, to require more than a determination that it has found the requisite need, narrowness and lack of intrusiveness for that order would give rise to unwarranted challenges to the findings no matter how detailed those findings were.

[15] As *Williams v. Edwards* made clear, "[t]he limitations codified in the [PLRA] do not depart from pre-existing law of this circuit." 87 F.3d 126, 133 (5th Cir.1996). Thus, the PLRA is not a significant departure from the burden placed on injunctive cases.

Armstrong v. Schwarzenegger, 622 F.3d 1058, 1071 (9th Cir. 2010).

In *Benjamin v. Fraser*, the Second Circuit reasoned that:

> Although the PLRA's requirement that relief be "narrowly drawn" and "necessary" to correct the violation 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.

343 F.3d 35, 54 (2d Cir. 2003).[16] Numerous federal courts have upheld prison injunctions that have benefits beyond the plaintiffs, contrary to the panel's decision here. *See, e.g.*, *Fields v. Smith*, 653 F.3d 550, 554 (7th Cir. 2011) (upholding a district court's system-wide relief in finding one medical policy unconstitutional); *Clement v. Cal. Dep't of Corr.*, 364 F. 3d 1148 (9th Cir. 2004) (upholding statewide injunction overturning unconstitutional mail policy); *accord Asher v. Cal. Dep't of Corr.*, 350 F. 3d 917, 924 (9th Cir. 2003); *Crawford v. Clarke*, 578 F.3d 39, 43 (1st Cir. 2009).[17] In *Smith v. Ark. Dep't of Corr.*, the Court found that the recently passed PLRA would not alter the outcome and:

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[16] In a later decision the Second Circuit further explained that "[a] remedy may be deemed to be properly drawn if it provides a practicable 'means of effectuati[on]' even if such relief is over-inclusive." *Handberry v. Thompson*, 446 F.3d 335, 346 (2d Cir. 2006).

[17] As the record demonstrates, illnesses that cause increased susceptibility to heat are widespread on Death Row. *See supra* note 14 and Panel Rehearing § III(A). In order to remedy these individual violations, the panel's decision would require roughly 80 individual lawsuits which violates the spirit of the PLRA; it cautions judicial economy. *See, e.g., Blakely v. Wards*, 738 F.3d 607, 616 (4th Cir. 2013) (additional procedural hurdles violates the spirit of the PLRA which at its core emphasizes judicial economy); cf. *Thomas v. Bryant*, 614 F.3d 1288, 1322 (11th Cir. 2010)(injunction was proper to avoid "unnecessary and costly duplicative litigation").

> [a]ll the inmates living in the same room are similarly subjected to the same unconstitutional condition, and no individual remedy will be adequate unless it eliminates the unconstitutional condition in the barracks as a whole, which necessarily benefits all the inmates residing there. It would have made little sense to further narrowly tailor the remedy by ordering a guard whose duty would be to protect just [one plaintiff]. . . .[W]e conclude that the district court 'carefully tailored' the remedy to the specific harm suffered by the plaintiff.

103 F.3d 637, 646 (8th Cir. 1996). This case presents the same circumstance: where an existing constitutional violation is repeated throughout Death Row, the remedy is necessarily extended throughout Death Row.

Should this Court determine that the type of remedy ordered below should be upheld, the arguments in this section become stronger. In that case, any relief that reaches beyond the three plaintiffs would be purely incidental:

> [T]he precedents do not suggest that a narrow and otherwise proper remedy for a constitutional violation is invalid simply because it will have collateral effects. Nor does anything in the text of the PLRA require that result. The PLRA states that a remedy shall extend no further than necessary to remedy the violation of the rights of a "particular plaintiff or plaintiffs." This means only that the scope of the order must be determined with reference to the constitutional violation established by the specific plaintiffs before the court.

Plata, 131 S.Ct. at 1940 (internal citations omitted). The remedy originally ordered by the district court is thus consistent with Supreme Court precedent.

II. THE PANEL'S DECISION CONFLICTS WITH A RECENT FIFTH CIRCUIT DECISION

The panel's decision is inconsistent with a Fifth Circuit panel decision establishing that inmates have a "constitutional right to be free from extreme

temperatures." *Webb v. Livingston*, 14-40579, Slip Op. at 11-12 & n.7 (right to be free of extreme temperatures clearly established by Supreme Court precedent and Fifth Circuit precedent). If extreme temperatures are constitutional violations, an injunction can require temperatures that do not create an unreasonable risk of harm. This Court recognized that the measures upheld in *Gates* may be inadequate to remove the unreasonable risk of harm. *Id.* (where *Gates*-type relief is "inadequate to protect [inmates] from extreme heat," the Eighth Amendment is violated) (citing *Blackmon v. Garza*, 484 F.App'x 866, 871-72 (5th Cir. 2012)).

This panel's decision warrants *en banc* review because it conflicts with *Webb*. The evidentiary record, which included medical expert testimony, public health guidelines from federal agencies, and the district court's personal site visit, supported the district court's findings that *Gates*-type remedies are insufficient to prevent unreasonable risks associated with extreme heat. Despite this evidence, the panel states that there was "no showing that the Constitution mandated more relief for these prisoners for the same prison condition" as in *Gates* and directs the district court to order relief "more closely aligned with *Gates*." Slip Op. at 20-22. In so doing, the panel's decision conflicts with the *Webb* decision.[18]

[18] Additionally, the panel's remand instructions limit injunctive relief to measures that would be ineffective to treat heat-related illness and therefore violate Supreme Court and Fifth Circuit precedent. In *Estelle v. Gamble*, the Supreme Court established that "denying" effective medical treatment for a known "serious medical need" violates the Eighth Amendment. 429 U.S. 97, 103-

CONCLUSION

WHEREFORE, for the foregoing reasons, the panel's opinion should be vacated, and the case reheard *en banc*.

/s/ Mercedes Montagnes
Mercedes Montagnes

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04 (1976). *See also Domino v. Texas Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001) (Constitution would be violated where prison officials or medical staff "intentionally treated [prisoner] incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs."). Here, the panel itself credited Dr. Vassallo's testimony that heat-related illness is "dramatic and catastrophic" and "occurs suddenly" and can cause serious harm. Slip Op. at 10. Dr. Vassallo's testimony also made clear that the types of remedial measures to which the district court would be limited on remand would not be sufficient to treat heat-related illness. *See supra* § I. Because the limitations on injunctive relief would ensure ineffective treatment for catastrophic heat-related illness, *en banc* review is warranted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 22, 2015, a copy of the foregoing has this date been served upon all parties through their respective counsel of record by operation of the Court's electronic filing system and has been filed electronically with the Clerk of the Court using the CM/ECF system.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
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No. 14-30067

ELZIE BALL; NATHANIEL CODE; JAMES MAGEE,

Plaintiffs - Appellees Cross-Appellants

v.

JAMES M. LEBLANC, SECRETARY, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY; ANGELA NORWOOD, Warden of Death Row; LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS,

Defendants - Appellants Cross-Appellees

Appeals from the United States District Court
for the Middle District of Louisiana

Before REAVLEY, JONES and ELROD, Circuit Judges.

EDITH H. JONES, Circuit Judge:

In 2006, Louisiana built a new state-of-the-art prison facility to house death-row inmates. The cells in that facility, located in Angola, Louisiana, lack air conditioning. Three inmates sued the Louisiana Department of Corrections (the "State") and various prison officials in their official capacities,[1] claiming

[1] The officials include James M. LeBlanc, Secretary of the Louisiana Department of Public Safety and Corrections; Nathan Burl Cain, Warden of the Louisiana State Penitentiary in Angola; and Angela Norwood, Assistant Warden in charge of death row. We refer to all appellants collectively as "the State" because suit against officials in their official capacity only is essentially against the State of Louisiana.

that the heat they endure during the summer months violates the Eighth Amendment because of their pre-existing medical problems. They also assert that the failure to provide air conditioning violates the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, and the Rehabilitation Act ("RA"), 29 U.S.C. § 794. After a bench trial, the district court sustained the prisoners' Eighth Amendment claims, rejected their disability claims, and issued an injunction effectively ordering the Defendants to install air conditioning throughout death row.

Although the trial court's findings of deliberate indifference by prison officials to these particular inmates' serious heat-related vulnerability suffice to support a constitutional violation, the scope of its injunctive relief exceeds our prior precedent, *Gates v. Cook*, 376 F.3d 323, 339 (5th Cir. 2004), and the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. Despite an oversight concerning applicable law, the court did not err in rejecting the prisoners' disability claims. We affirm in part, but vacate and remand the court's injunction for further consideration.[2]

BACKGROUND

Angola's 25,000 square-foot death-row facility[3] consists of a pod surrounded by four housing wings. Inside the pod are administrative offices, visitation rooms, a medical and dental clinic, a control center, and an execution chamber. Within each of the four housing wings, two tiers of cells sit back-to-back. Each tier is lettered A through H. None of the housing tiers are air conditioned, but the rest of the facility is. To alleviate the summer heat, windows (which can be opened) line the exterior wall of each housing tier. Next

[2] Our issuance of this ruling renders moot the Plaintiffs' request that we lift the stay pending appeal.

[3] The death row unit is one of several buildings collectively known as the "Louisiana State Penitentiary" or "Angola." Only the death-row facility is implicated here, however.

to the windows are 30-inch fans, which serve two adjoining cells. Inside each cell is a six-by-eight-inch vent that draws air into the cell from the window across the tier and vents outside.

Although death-row inmates spend twenty-three hours a day in their cells, in-cell sinks provide unlimited access to potable water. Inmates also enjoy access to ice. Each housing tier has an ice chest, which the Angola staff maintains. Inmates can only access the chest themselves during the one hour a day they are allowed to walk the tiers. The rest of the time inmates depend on guards or other inmates for ice.[4] The uncontroverted evidence shows that the ice chests run out from time to time, either because the lone ice machine cannot generate enough ice or it breaks.

The three plaintiffs here, Elzie Ball, Nathaniel Code, and James Magee, are long-time residents of Angola's death-row facility. Magee lives on tier A, while Ball and Code live on tier H. Each suffers from various conditions: all three prisoners have hypertension; Ball has diabetes and is obese; Code is also obese and has hepatitis; and Magee is depressed and has high cholesterol. They take a variety of medications to control their ailments. According to the inmates, the extreme heat, not ameliorated by air conditioning, exacerbates their ailments, causing dizziness, headaches, and cramps.

Each inmate filed administrative complaints explaining that the heat was exacerbating his conditions and requesting air conditioning. The Defendants denied their requests. Internal appeals of the rulings were unsuccessful. Consequently, in June 2013, the inmates sued the Louisiana Department of Corrections and prison officials asserting claims under the

[4] Inmates can distribute ice to other inmates during the one hour they are allowed to walk the tiers. If, however, those inmates spend their free hour in recreation or showering, then the other inmates may not receive ice.

Eighth Amendment's ban on cruel and unusual punishment and violations of the ADA and RA. As relief, the prisoners sought an injunction requiring the state to keep the heat index at or below 88° F.

A month later, the district court appointed United States Risk Management ("USRM") to monitor the temperature at the facility. During the monitoring period, July 15 to August 5, the temperature on tiers A and H ranged from 78.26° to 92.66° F.[5] Meanwhile, the heat index ranged from 81.5° to 107.79° F. On five separate days the heat index on tier A surpassed 100° F. On tier H, the heat index surpassed 100° F on seven days.

After the data collection period, the district court held a three-day bench trial. Experts testified about the Plaintiffs' medical conditions, the conditions on death row, the design and construction of the facility, and the effectiveness of current practices and procedures. The judge personally toured the facility to observe the conditions first-hand. Several months later, the district court issued a 100-page ruling that concluded the conditions on death row are cruel and unusual because of extreme heat during parts of the year. The court denied the prisoners' ADA and RA claims because they are not disabled. Based on the constitutional violation, the court issued a permanent injunction, requiring the state to develop a plan to keep the heat index at or below 88° F. Effectively, the district court ordered Louisiana to install air conditioning. Both sides now appeal.

[5] USRM monitored the temperature on all the tiers. But because the Plaintiffs only reside on tiers A and H, and because this is not a class-action, only readings from those tiers are relevant to this appeal.

DISCUSSION

The parties present four issues. The Defendants assert that the district court made several erroneous evidentiary rulings, wrongly found a constitutional violation, and issued an overbroad injunction contrary to the PLRA, 18 U.S.C. § 3626, and *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004). The inmates' cross-appeal contends that the district court used a superseded definition to determine whether they are disabled under the ADA and RA. We review the liability issues first, then the scope of the injunction.

I. Evidence

The State's evidentiary objections are easily resolved. It contends that the heat index, on which the district court based its ruling, is inherently unreliable and inappropriate in prison settings. It also contends that the court should not have taken judicial notice of other facts without providing the State an opportunity to respond. The objections are meritless.

We review evidentiary rulings for abuse of discretion. *Battle ex rel. Battle v. Mem'l Hosp. at Gulfport*, 228 F.3d 544, 550 (5th Cir. 2000) (citing *Jon-T Chemicals, Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1417 (5th Cir. 1983)). Even if the court abused its discretion, this court will presume the error is harmless. *See* FED. R. CIV. P. 61; *Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 584 (5th Cir. 2003). The party asserting the error has the burden of proving that the error was prejudicial. *See Dietz v. Consol. Oil & Gas, Inc.*, 643 F.2d 1088, 1093 (5th Cir. 1981) (quoting *Liner v. J.B. Talley and Co., Inc.* 618 F.2d 327, 329 (5th Cir. 1980)).

The district court did not abuse its discretion by admitting evidence of or relying on the heat index. The thrust of the State's argument is that because heat index is a derived number, courts cannot use it as a basis for ruling. Although the State's expert meteorologist, Jay Grymes, testified that the heat index is "not a real number," the rest of his testimony bolsters the use of the

heat index. For example, Grymes testified that the heat index is a "guideline number" and that he "provide[s] heat index as a guide to [his] viewers to make better decisions." Dr. Susi Vassallo, the Plaintiffs' expert, testified that peer reviewed scientific articles measure the correlation between heat index and morbidity and mortality. This court also has relied on the heat index before. *See Gates*, 376 F.3d at 339 (upholding increased access to ice, water, and showers when the heat index exceeds 90º F.). In the absence of further proof, the court did not abuse its discretion.

The State's complaint about the court's taking judicial notice of publicly available evidence is similarly weak. The court cited an article from the National Weather Service's website called *Heat: A Major Killer* and referred to temperature readings from the Baton Rouge Regional Airport.

Because the district court did not warn the State that it would be taking judicial notice of these materials, the State complains it was "deprived of the opportunity to request an opportunity to be heard regarding the data." Rule 201, however, expressly contemplates courts' taking judicial notice without prior warning. *See* FED. R. EVID. 201(e) ("If the court takes judicial notice *before notifying a party*, the party, on request, is still entitled to be heard." (emphasis added)); 21B KENNETH W. GRAHAM, JR., FED. PRAC. & PROC. EVID. § 5109 (2d ed.) (Rule 201 does "not require any notice to the parties that judicial notice [is] about to be taken," and "a party might get no advance notice at all"). The State, moreover, did not avail itself of the Rule's provision requiring the court to provide an opportunity to be heard. *See* FED. R. EVID. 201(e); *See also* FED. R. CIV. P. 59(a)(2) ("After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment."). In any event, the State's explanation of prejudice is vague, cursory and unpersuasive. It makes no showing that the

district court's consideration of the National Weather Service article or Baton Rouge temperature readings altered the outcome. *See Dietz*, 643 F.2d at 1093. The judicial notice objections fail as well as the heat index objection.

II. Eighth Amendment

Turning to the Plaintiffs' Eighth Amendment claims, the Constitution " 'does not mandate comfortable prisons,' but neither does it permit inhumane ones." *Farmer v. Brennan*. 511 U.S. 825, 832, 114 S. Ct. 1970, 1976 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349, 101 S. Ct. 2392, 2400 (1981)). Extreme cell temperatures, therefore, can violate the Eighth Amendment. To be tantamount to the infliction of cruel and unusual punishment, prison conditions must pose "an unreasonable risk of serious damage" to a prisoner's health – an objective test – and prison officials must have acted with deliberate indifference to the risk posed—a subjective test. *Helling v. McKinney*, 509 U.S. 25, 33-35, 113 S. Ct. 2475, 2481-82 (1993) (holding exposure to an "unreasonable risk of damage to [a plaintiff's] health" actionable under the Eighth Amendment); *see also Wilson v. Seiter*, 501 U.S. 294, 304, 111 S. Ct. 2321, 2327 (1991) (postulating that "a low cell temperature at night combined with a failure to issue blankets" can violate the Eighth Amendment); *Gates*, 376 F.3d at 339. Without the requisite proof of both subjective and objective components of an Eighth Amendment violation, however, merely "uncomfortable" heat in a prisoner's cell does not reflect "a basic human need that the prison has failed to meet" and is not constitutionally suspect. *Woods v. Edwards*, 51 F.3d 577, 581 (5th Cir. 1995).

The predicate findings of a substantial risk of serious harm and officials' deliberate indifference to the risk are factual findings reviewed for clear error. *Gates*, 376 F.3d at 333; *Thomas v. Bryant*, 614 F.3d 1288, 1312 (11th Cir. 2010) (citing *Farmer*, 511 U.S. at 842, 114 S. Ct. at 1981). " 'A finding is clearly erroneous if it is without substantial evidence to support it, the court

misinterpreted the effect of the evidence, or this court is convinced that the findings are against the preponderance of credible testimony.' " *Petrohawk Props., L.P. v. Chesapeake La., L .P.*, 689 F.3d 380, 388 (5th Cir. 2012) (quoting *French v. Allstate Indem. Co.*, 637 F.3d 571, 577 (5th Cir. 2011)). This court reviews *de novo* whether the facts so found violate the Eighth Amendment. *Gates*, 376 F.3d. at 333.

For various reasons, the State asserts that the Plaintiffs are not at substantial risk of serious harm and its officials were not deliberately indifferent to this risk. Further, the State contends that, because it provides the remedies this court mandated in *Gates*, there can be no Eighth Amendment violation as a matter of law. We reject these challenges to the trial court's findings.

Based mainly on Dr. Vassallo's testimony, the district court found that the heat puts these plaintiffs at substantial risk of serious harm. According to Dr. Vassallo, the cardiovascular system is critical for maintaining normal body temperature. Dr. Vassallo testified that both hypertension and diabetes can adversely affect this critical system. "The heart has to be able to pump very hard to meet the demands of heat." Hypertension generally can decrease "the ability of the blood vessels to open and close." As a result, those vessels are "not as compliant as they should be," "they can't open like they should and have to in response to heat," and blood therefore cannot circulate to cool the body. Therefore, people with hypertension generally can have a hard time controlling their body temperature. The same is true for people with diabetes. Cardiovascular disease, which can result from diabetes, can harden the arteries and blood vessels, thus inhibiting circulation. As a result, diabetics can lose ability to circulate blood properly and thus the ability to maintain normal body temperature.

The treatments for hypertension can further inhibit these prisoners' ability to regulate body temperature. Specifically, beta blockers, which help control blood pressure, can compound the effects hypertension has on the cardiovascular system. Beta blockers prevent blood vessels from dilating properly while at the same time "decreas[ing] the heart's ability to pump as hard and to meet the requirements of heat or exercise." Likewise, diuretics decrease the total amount of water and salt in the body, resulting in less fluid around which the heart can contract. According to Dr. Vassallo, without sufficient fluid to contract, the heart is unable to meet the increased demands heat places on the cardiovascular system. Therefore, even if prisoners receive proper care for their ailments, they may be at increased risk of heat stroke. This evidence of the Plaintiffs' heightened vulnerability to high temperatures, combined with the USRM temperature data showing the high temperatures on tiers A and H, led the court to find that the Plaintiffs are at substantial risk of serious harm.

The State argues that the totality of the record evidence refutes Dr. Vassallo's opinion. Specifically, the district court discounted the State's arguments that no death-row prisoner has ever suffered a heat-related incident; these prisoners' medical records show no signs of heat-related illness; the prisoners' poor dietary choices and failure to exercise caused their health problems; and the prisoners' suffer high blood pressure all year, not just in the summer months. Thus, the State contends, the prisoners do not suffer an unreasonable risk of serious heat-related injury at all.

These facts fail to show that the district court clearly erred. First, that no one at Angola, including these plaintiffs, has ever had a heat-related incident and that these prisoner's medical records do not show signs of heat-related illness are insufficient. To prove unconstitutional prison conditions, inmates need not show that death or serious injury has already occurred. *See*

Helling, 509 U.S. at 33, 113 S. Ct. at 2481 ("That the Eighth Amendment protects against future harm to inmates is not a novel proposition."). They need only show that there is a "substantial risk of serious harm." *Gates*, 376 F.3d at 333. Further, Dr. Vassallo provided a reasonable explanation for the lack of past harm to these plaintiffs: "heat stroke is a failure of thermoregulation which is dramatic and catastrophic. It occurs suddenly . . . . People can suffer suddenly from heat stroke without ever having complained about the weather." As a result, the district court plausibly concluded that the Plaintiffs here are at a substantial risk of serious harm.[6]

Second, because the Plaintiffs forego exercise and overeat junk food, the State asserts that their ailments and any accompanying risk are their own creation. Prison canteen records confirm these inmates' consumption of unhealthy foods with high sugar and salt content. Although this may be true, the evidence is at best conjectural about the connection between these plaintiffs' conditions and their lifestyle. We are constrained to agree with the district court's finding that, canteen food comprises only part of the prisoners' diets, and their medical conditions arise from a combination of factors, many of which are outside their control. Thus, the district court did not clearly err when, in the face of conflicting evidence, it found that these prisoners are at substantial risk of serious harm.

Finally, that the prisoners suffer year-round high blood pressure is simply irrelevant to the district court's substantial-risk finding. The prisoners' complaint is that their high blood pressure places them at an abnormally high risk of heat stroke during Louisiana's extended hot season. The lower risk in other months does not offset their vulnerability during the summer any more

[6] We emphasize, however, that the finding of substantial risk regarding a heat-related injury is tied to the individual health conditions of these inmates.

than an allergy to insect bites ceases to exist when the bugs are dormant in winter.

The second element for Eighth Amendment liability requires "prison official[s] [to] have a 'sufficiently culpable state of mind.' " *Farmer*, 511 U.S. at 834, 114 S. Ct. at 1977 (quoting *Wilson*, 501 U.S. at 297, 111 S. Ct. at 2323). "In prison conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety." *Id*. (quoting *Wilson*, 501 U.S. at 302-303, 111 S. Ct. at 2326). Deliberate indifference is itself a two-prong inquiry. An 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." *Id*. at 837, 114 S. Ct. at 1979. "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id*. at 842, 114 S. Ct. at 1981 (internal citations and quotation marks omitted).

The district court relied on a variety of evidence showing that the State knew of and disregarded a substantial risk to the Plaintiffs. Medical personnel routinely monitor prisoners and administer medication daily. Correctional officers "closely monitor" the temperature on death row, recording the temperature every two hours. Defendant Norwood, moreover, testified that the prison maintains a list of, and monitors more closely, inmates particularly susceptible to heat-related illness. None of the Plaintiffs was on the list, although Norwood personally reviewed the ARPs for each prisoner, inspected each prisoner's medical records, interviewed both Ball and Code, and admits Magee should have been on the list. Defendant Cain admitted that he was always thinking about "how to overcome the heat" and that he considered adding extra fans and ice on the tiers. Most strikingly, after this suit was filed,

and during the court-ordered monitoring period the Defendants surreptitiously installed awnings and began soaking some of the tiers' exterior walls with water in an attempt to reduce the interior temperature. Their trick backfired. Based on these facts, the district court reasonably inferred that the Defendants knew of a substantial risk of serious harm to the Plaintiffs.

Yet the State complains that the deliberate indifference finding is fundamentally flawed because the district court relied solely on the prisoners' administrative remedy requests, which are required under the PLRA. *See* 42 U.S.C. § 1997e(a). If that is sufficient to prove deliberate indifference, the State continues, then there is no need for a court to separately analyze the deliberate indifference prong. As a statutory necessity, *see Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012), every case includes an administrative remedy request. Whenever a court finds that a prisoner's complaint was justified—*i.e.*, that there is a substantial risk of harm—the defendant will be guilty of violating the Eighth Amendment.

We agree with the Defendants' premise—a request for administrative relief cannot alone prove deliberate indifference. A request for administrative relief is at best only circumstantial evidence that a prison official is aware of facts from which he can deduce a risk of harm; it is not even particularly strong evidence of that. Because grievances are essentially pleadings, not evidence, they must have independent verification before they become probative. Separating the few meritorious complaints from the mountain of frivolous complaints is as difficult work for prison officials as for federal courts. A legitimate complaint can go unrecognized by even the most diligent official. As a result, a prison administrator who has received an administrative remedy request is not necessarily made aware, without factual corroboration, that there is a substantial risk of serious harm.

Although the State's premise is correct, its conclusion that the district court's deliberate indifference finding is erroneous does not follow. The district court did not base its finding solely on the prisoners' administrative requests, but on the totality of the record evidence. There is more than enough, particularly in light of the State's attempt to cool down the cells with awnings and misting without telling the court, to prove subjective awareness of a substantial risk of serious harm. Therefore, the district court's deliberate indifference finding is not clearly erroneous.

Even if it cannot overcome the district court's factual findings, the State argues that this court's decision in *Gates v. Cook* precludes liability. *Gates* upheld an injunction requiring Mississippi to equip each cell with fans, provide inmates with additional access to ice water, and allow daily showers when the heat index in the cells exceeded 90º F. 376 F.3d at 339. The State claims to offer these exact remedies year-round.

The district court, however, demonstrated that *Gates* is distinguishable. Where *Gates* approved fans for each cell, each fan in Angola's death row serves two cells. *Ball v. LeBlanc*, 988 F. Supp. 2d 639, 680 n.100 (M.D. La. 2013). Although a seemingly minor difference, the district court found that "the fans [at Angola] [do] not provide equal amounts of air flow to each cell, nor [do] the fans provide a detectable cooling effect." *Id.* The district court in *Gates* also ordered increased in-cell access to ice. 376 F.3d at 339. Here, by contrast, inmates have unfettered access to ice only during the one hour a day they can walk the tiers.[7] *Ball*, 988 F. Supp. 2d at 680 n.100. When the prisoners are in their cells, they depend on other inmates or guards for ice. *Id.* And while the State allows prisoners to shower once a day, as approved in *Gates*, the water

[7] Even then, obtaining ice is no guarantee. The record suggests that the ice machine occasionally breaks down leaving the tier ice chests empty.

temperature is maintained between 100 and 120º F. for sanitation purposes, thus providing little relief from the heat. *Id.* Given these material differences, *Gates* does not preclude holding that the State violated the Eighth Amendment.

Based on its findings of fact, we affirm the district court's conclusion that 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, violates the Eighth Amendment.

III. Disability Claims

The inmates assert that the State's failure to alleviate the heat violates their rights to a reasonable accommodation for their "disabilities" under the ADA and RA.[8] The district court rejected the prisoners' claims because they presented no *evidence* that they are disabled.[9] *Ball*, 988 F. Supp. 2d at 687. The prisoners argue that the district court's conclusion rests on an abbreviated definition of disability and superseded case law. Although the prisoners are correct, there is still no evidence that the prisoners are disabled under the correct definition, so any error was harmless.

We review the district court's conclusions of law *de novo*, and its factual findings for clear error. *Lightbourn v. Cnty. Of El Paso, Tex.*, 118 F.3d 421,

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[8] On appeal, the prisoners also assert a disparate-impact claim. But the prisoners' complaint does not allege a disparate-impact claim and, as far as we can tell, this appeal is the first time the prisoners have asserted such a claim. "It is a bedrock principle of appellate review that claims raised for the first time on appeal will not be considered." *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctr., Inc.*, 200 F.3d 307, 316-17 (5th Cir. 2000). Accordingly, we will not address the prisoners' disparate-impact claim.

[9] To succeed on a failure-to-accommodate claim, a plaintiff must prove: (1) he is a qualified individual with a disability; (2) the disability and its consequential limitations were known by the covered entity; and (3) the entity failed to make reasonable accommodations. *Neely v. PSEG Tex., Ltd. P'ship*, 735 F.3d 242, 247 (5th Cir. 2013). The ADA applies to

426 (5th Cir. 1997). If the district court made a legal error that affected its factual findings, "remand is the proper course unless the record permits only one resolution of the factual issue." *Pullman-Standard v. Swint*, 456 U.S. 273, 292, 102 S. Ct. 1781, 1792 (1982); *see also Aransas Project v. Shaw*, 775 F.3d 641, 658 (5th Cir. 2014), *cert. denied*, No. 14-1138, 2015 WL 1255228, at *1 (June 22, 2015).

Under both the ADA and RA,[10] a person is disabled if he has "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). The statute defines a major life activity in two ways. First, major life activities include, but are not limited to:

> caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

Id. § 12102(2)(A). Second, a major life activity includes "the operation of a major bodily function." *Id.* § 12102(2)(B). Such functions include, but are not limited to:

> the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Id. The prisoners can prove themselves disabled if their ailments substantially limit either a major life activity or the operation of a major bodily function.

The prisoners point out that the district court considered whether they are disabled only under the first definition of major life activities; it did not

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prisoners. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213, 118 S. Ct. 1952, 1956 (1998). The district court found each prisoner failed to prove the first prong—*i.e.*, that they are disabled.

[10] The RA incorporates the ADA definition of disability by reference. *See* 29 U.S.C. § 705(20)(B). Accordingly, if the prisoners are disabled, they are disabled under both statutes.

consider whether their impairments affect a major bodily function. We agree. The district court quoted only the first definition of a disability, but it overlooked that "a major life activity also includes the operation of a major bodily function." *Id.* § 12102(2)(B). The district court also partially relied on *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197, 122 S. Ct. 681 (2002), which Congress superseded in the Americans with Disabilities Amendments Act of 2008 ("ADAAA"). *Neely v. PSEG Tex., Ltd. P'ship*, 735 F.3d 242, 245 (5th Cir. 2013).

Although this error may have affected the district court's determination, the question remains whether any evidence supports the prisoners' disability claims. The prisoners argue that "thermoregulation" is a major life activity, there is ample evidence in the record showing their thermoregulatory functions are impaired, and therefore they are disabled.

Assuming *arguendo* that thermoregulation is a major life activity,[11] there is no *evidence* that these prisoners' thermoregulatory systems are actually impaired. According to Dr. Vassallo, thermoregulation is "the capacity of the body to maintain the temperature of 98.6 within half a degree or so." There is no evidence that the prisoners' ailments have ever caused their body temperatures to rise above 98.6° F. In fact, Dr. Vassallo testified that the prisoners' symptoms are consistent with normal body temperatures, there is no indication that these prisoners have ever had elevated body temperatures,

[11] The prisoners urge this court to hold that thermoregulation is a major bodily function (and thus a major life activity) because the ADA's list is non-exhaustive. *See* 42 U.S.C. § 12102(2)(B). Before the passage of the ADAAA, this court left undecided whether "the regulation of body temperature constitutes a major life activity under the ADA." *EEOC v. Argo Distribution, LLC*, 555 F.3d 462, 469 n.8 (5th Cir. 2009). Post-ADAAA, no court has held that thermoregulation is a major bodily function, nor do EEOC regulations list thermoregulation as a major bodily function. 29 C.F.R. § 1630.2(i)(1)(ii). Accordingly, we take the cautious route and assume without deciding that thermoregulation is a major life activity.

and there is no evidence that these prisoners ever experienced difficulty in thermoregulating.

That the record is devoid of such evidence is unsurprising. Over the course of the three-day trial, there is hardly any mention of the prisoners' disability claims. The overwhelming majority of the testimony related to the future risk of heatstroke, not the prisoners' present inability to maintain regular body temperature. As a result, the medical testimony focused generally on the risks to individuals with the same ailments as these prisoners, not on any limitations the prisoners presently experience. The prisoners' counsel, moreover, never asked the three medical experts whether the prisoners' thermoregulatory systems are *actually* impaired, probably because evidence in the record precludes any such assertion. This lapse is fatal to their disability claims. As this court has said before, although the current definition of disability "expresses Congress's intention to broaden the definition and coverage of the term 'disability,' it in no way eliminated the term from the ADA or the need to prove a disability on a claim of disability discrimination." *Neely*, 735 F.3d at 245.[12] The disability claims are insupportable as a matter of law even under the expanded legal definition of disability.

[12] Ball also argues that he is disabled because diabetes impairs his endocrine system and his sight. Although this might be true, that Ball's endocrine system and sight are impaired does not entitle him to relief from the *heat*. Only if Ball's diabetes limits his ability to thermoregulate, can Ball get the only relief he requested—an order requiring Louisiana to keep the prison at or below 88 degrees. As for that claim—that Ball's diabetes impairs thermoregulation—there is no evidence in the record.

IV. The Injunction

To remedy the Eighth Amendment violation, the district court ordered Louisiana to "develop a plan to reduce and maintain the heat index in the Angola death row tiers at or below 88 degrees Fahrenheit." *Ball*, 988 F. Supp. 2d at 689. Effectively, the plan requires the State to install air conditioning throughout death row housing. The State attacks the district court's order in two ways. First, it contends that the requirements for injunctive relief are not present here. Second, it argues that the injunction is overbroad because air conditioning is beyond the measures endorsed in *Gates v. Cook* and facility-wide relief violates the PLRA.

This court reviews permanent injunctions for abuse of discretion. *Symetra Life Ins. Co. v. Rapid Settlements, Ltd.*, 775 F.3d 242, 254 (5th Cir. 2014) (citing *N. Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 916-17 (5th Cir. 1996)). An abuse of discretion occurs when the district court " '(1) relies on clearly erroneous factual findings when deciding to grant or deny the permanent injunction[,] (2) relies on erroneous conclusions of law when deciding to grant or deny the permanent injunction, or (3) misapplies the factual or legal conclusions when fashioning its injunctive relief.' " *Id.* (quoting *N. Alamo Water Supply Corp.*, 90 F.3d at 916-17).

The court did not abuse its discretion by deciding to issue an injunction. The State's first argument is that an injunction is improper because conditions to which these prisoners were subjected do not violate the Eighth Amendment. This contention fails in light of our sustaining the district court's Eighth Amendment analysis. Moreover, in *Gates* as in other cases, courts have upheld injunctions in Eighth Amendment cases alleging unreasonably risky exposure to extreme temperatures. *See Graves v. Arpaio*, 623 F.3d 1043, 1045 (9th Cir. 2010) (per curiam) (leaving an injunction in place requiring a prison to keep inmates on certain medications in cells with temperatures below 85 degrees);

Jones-El v. Berge, 374 F.3d 541, 542 (7th Cir. 2004) (upholding order to install air conditioning in Wisconsin's "supermax" prison).

The scope of the injunction is another matter. The PLRA greatly limits a court's ability to fashion injunctive relief. Before a district court can award such relief, 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." 18 U.S.C. § 3626(a)(1)(A). The court must also "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id.* If, after making the necessary findings and weighing the adverse impact on the criminal justice system, the court still feels injunctive relief is required, such relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." *Id.*

The district court's injunction violates the PLRA in two ways. First, the district court ordered a type of relief—air conditioning—that is unnecessary to correct the Eighth Amendment violation. Under the PLRA, plaintiffs are not entitled to the most effective available remedy; they are entitled to a remedy that eliminates the constitutional injury. *See Westefer v. Neal*, 682 F.3d 679, 683-84 (7th Cir. 2012) (vacating an injunction under the PLRA because it exceeded what was required under the Due Process Clause). In Eighth Amendment cases, plaintiffs can only obtain a remedy that reduces the risk of harm to a socially acceptable level. Some risk is permissible and perhaps unavoidable. Here Plaintiffs' own expert, Dr. Vassallo, explained that there are many acceptable remedies short of facility-wide air conditioning. For example, the Defendants could divert cool air from the guards' pod into the tiers; allow inmates to access air conditioned areas during their tier time; allow access to cool showers at least once a day; provide ample supply of cold drinking water and ice at all times; supply personal ice containers and individual fans;

and install additional ice machines. These are precisely the types of remedies this court endorsed in *Gates v. Cook* and that the PLRA requires. *See* 376 F.3d at 339-40. Accordingly, on remand the district court must limit its relief to these types of remedies.

The district court also erred because it awarded relief facility-wide, instead of limiting such relief to Ball, Code, and Magee. The district court apparently understood that it could not order facility-wide relief. At the start of trial, the district court said:

> This is not, contrary to widespread belief, an effort to require the state to install air-conditioning for all of the tiers that house all death row inmates. I think the application for injunctive relief made clear that it's only these three inmates that are of issue. And so, of course, the evidence in this case will pertain to any facts that are relevant as to these three . . . . plaintiffs and these three plaintiffs only. This is not a class action lawsuit. This is not, again, an effort to seek relief for anyone other than these three inmates.

It is unclear why the district court changed its mind when it fashioned the injunction. The PLRA limits relief to the particular plaintiffs before the court. 18 U.S.C. § 3626(a)(1)(A). This is not a class action; Ball, Code, and Magee are the only plaintiffs before the court. As a result, any relief must apply only to them, if possible. *Brown v. Plata*, --- U.S. ---, 131 S. Ct. 1910, 1940 (2011) (holding that "the scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court"); *Gates*, 376 F.3d at 339 (vacating an injunction that purportedly applied to prisoners outside the class of plaintiffs because "it exceeds the scope of the litigation"); *see also Graves*, 623 F.3d at 1049-50 & n.2 (noting that if the district court can limit relief to an affected class-member, it must do so under the PLRA).

Nevertheless, the district court ordered relief to all 85 death-row inmates because "the Defendants may move any death row inmate to a different tier and/or cell at any time." *Ball*, 988 F. Supp. 2d at 688-89. Essentially, it felt the only way to provide effective relief to these three plaintiffs is to provide facility-wide relief. The district court's determination, however, is erroneous. Even assuming that air conditioning is an acceptable remedy here—and it is not—it is possible to provide air conditioning solely to these three inmates. As the Defendants acknowledged at oral argument, Plaintiffs could be placed in cells next to the officers' pod, which are cooler than those farther down the tiers. Louisiana could also air condition one of the four tiers for the benefit of prisoners susceptible to heat-related illness. When coupled with an order not to move the Plaintiffs from these cells unless certain conditions are met, these options could adequately remedy the Plaintiffs' constitutional violation. Moreover, the *Gates*-type remedies available on remand—increased access to water, ice, cold showers, etc.—ought to (and must) be tailored to these three prisoners.

Because the district court's injunction provides an unnecessary type of relief and applies beyond these three Plaintiffs, it violates the PLRA. Accordingly, the district court abused its discretion.

Finally, we note the substantial disparity between the relief ordered in *Gates* and the scope of the injunction in this case. The *Gates* court did not mandate a maximum heat index applicable in the Mississippi prison. It required particular heat measures, including fans, ice water, ice, and showers, "if the heat index reaches 90 degrees or above." *Gates*, 376 F.3d at 336. The injunction here requires relief that is far more extensive, applies even during months when there is no heat risk to the Plaintiffs, covers the entire facility, and of course is expensive. Since *Gates* upheld an injunction providing narrower relief, and there is no showing that the Constitution mandated more

relief for these prisoners for the same prison condition in this case, on remand the court must craft relief more closely aligned with *Gates* as well as consistent with the PLRA.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's resolution of the Eighth Amendment and disability claims, but **VACATE** and **REMAND** the district court's injunction for reconsideration under the principles stated here.

REAVLEY, Circuit Judge, dissenting.

I agree with almost all of the opinion, but I would affirm the injunction which in principal only orders the heat index in the Angola death row tiers to be maintained below 88 degrees.