No. 14-30067

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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ELZIE BALL, NATHANIEL CODE, and JAMES MAGEE,

Plaintiffs-Appellees/Cross-Appellants

v.

JAMES M. LEBLANC, Secretary of the Louisiana Department of Public Safety and Corrections, *et al.*,

Defendants-Appellants/Cross-Appellees

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

---

# BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLEES/CROSS-APPELLANTS AND URGING AFFIRMANCE IN PART

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## TABLE OF CONTENTS

**PAGE**

## TABLE OF AUTHORITIES

**CASES:** **PAGE**

**CASES (continued):** **PAGE**



**CONSTITUTION:**



**STATUTES:**

**STATUTES (continued):** **PAGE**



**REGULATIONS:**

**REGULATIONS (continued):** **PAGE**



**LEGISLATIVE HISTORY:**

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## INTEREST OF THE UNITED STATES

This case concerns the application of the Eighth Amendment to inmates' claims that they have been subjected to life-threatening heat conditions. The Justice Department is charged with enforcing the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 *et seq.*, which allows the Attorney General to investigate and seek equitable relief for a pattern or practice of unconstitutional conditions in, among other institutions, state and local prisons. Pursuant to its

CRIPA authority, the Justice Department frequently investigates prison conditions, including those in high-security units. Thus, the United States has a substantial interest in ensuring courts properly apply the Eighth Amendment in this context.

This case also concerns the interpretation and application of Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504). Title II of the ADA applies to state and local governments and prohibits disability-based discrimination in their services, programs, and activities, including the operation of prison systems. 42 U.S.C. 12131-12134; *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 210 (1998). Section 504 prohibits disability-based discrimination by recipients of federal funding, which include many prison systems. 29 U.S.C. 794. The Justice Department has authority to issue regulations implementing Title II of the ADA and Section 504, including regulations implementing the definition of disability, and can bring civil actions to enforce both statutes. See 29 U.S.C. 794, 794a; 42 U.S.C. 12133-12134, 12205a; 28 C.F.R. Pts. 35 & 41. It also coordinates the implementation and enforcement of Section 504 by all federal agencies. See Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980). Thus, the United States has a substantial interest in ensuring courts properly construe both statutes.

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

## STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether the district court correctly found that defendants violated the Eighth Amendment by consistently subjecting inmates who are susceptible to heat-related illnesses to extreme heat.

2. Whether the district court applied the wrong legal standard when it denied plaintiffs' claims under Title II of the ADA and Section 504.

## STATEMENT OF THE CASE

1. Plaintiffs are three death row inmates incarcerated at the Louisiana State Penitentiary in Angola, Louisiana (Angola). ROA.24-25; ROA.4958. All three have hypertension and take diuretic medication for their condition. ROA.4974-4978. In addition, Elzie Ball is approximately 60 years old, has diabetes, and is obese; Nathaniel Code is approximately 57 years old, has hepatitis, and is obese; and James Magee is approximately 35 years old and has high cholesterol and depression. ROA.4974-4978.

Angola's death row facility was constructed in 2006. ROA.4968. It is composed of four housing wings, each consisting of two single-level tiers that radiate from a control center and central administrative area. ROA.4968-4969. Between the walls of the two back-to-back housing tiers are the plumbing, electrical wires, and duct work for that wing. ROA.4969. Each tier consists of 12

to 16 windowless, concrete cells separated from a tier walkway by metal security bars on one side of the cells. ROA.4969. On the other side of the approximately nine-foot-wide walkway is an outer wall with louvered windows. ROA.4969. The slats on the windows can be adjusted to admit varying degrees of air or light; non-oscillating fans are mounted above the windows and serve two cells each. ROA.4969-4970. Each cell contains an eight-by-six inch vent through which air from the louvered window is drawn into the cell, through the vent, into the wing's exhaust system, and out of the building. ROA.4970. Although the control center and central administrative area are air-conditioned, there is no mechanical cooling system in the death row tiers that permits the temperature or humidity to be lowered, nor does the ventilation system lower the temperature or humidity. ROA.4968-4969, ROA.4972-4974, ROA.5041-5043.

Death row inmates spend 23 hours per day in their cells, which include a sink, mirror, toilet, bed, desk, and chair. ROA.4970. During the hour in which inmates are allowed to leave their cells (tier time), they may engage in outdoor recreation up to four times per week, spend time in the tier walkway, or shower. ROA.4970. Each tier has two shower stalls; Angola maintains the water temperature at 100 to 120 degrees. ROA.4971. Tiers also have a portable ice chest where staff stores ice. ROA.4971. Inmates may access the chest, but only during their tier time. ROA.4971. Correctional officers are not required to

distribute ice to the inmates; instead, inmates on tier time usually distribute ice to fellow inmates confined to their cells. ROA.4971. If an inmate elects outdoor recreation time, declines to distribute ice to fellow inmates, or exhibits habits that other inmates find so unsanitary that they will not accept ice from him, inmates do not receive ice during that hour unless an officer agrees to distribute it. ROA.4971-4972. Inmates also lack access to ice when the tiers are locked down overnight and when the ice runs out, which happens frequently. ROA.4972.

2. On June 10, 2013, plaintiffs filed a complaint seeking declarative and injunctive relief against the Louisiana Department of Public Safety and Corrections, its Secretary, Angola's Warden, and Angola's Death Row Warden. ROA.24-35; ROA.4958-4960.[1] Plaintiffs alleged that, given their susceptibility to heat-related illnesses, they face a substantial risk of serious harm, including permanent injury or death, because of extremely hot conditions on death row. ROA.27-32. Plaintiffs alleged that, because of the extreme heat, they have experienced, among other things, dizziness, loss of appetite, difficulty breathing, difficulty sleeping, profuse sweating, headaches, chest pain, weakness, nausea, numbness in the hands, anxiety, dehydration, and loss of concentration. ROA.30-

[1] The parties do not dispute that plaintiffs exhausted their administrative remedies in accordance with the Prison Litigation Reform Act, 42 U.S.C. 1997e(a). ROA.25; ROA.5052.

32. Plaintiffs asserted they cannot alleviate the excessive heat themselves, and that defendants do little or nothing to alleviate it for them. ROA.27.

Plaintiffs alleged an Eighth Amendment violation based on defendants' deliberate indifference to their health and safety. ROA.32-33; ROA.4959. They also alleged that defendants violated Title II of the ADA and Section 504 by failing to provide them with reasonable accommodations despite knowing of their medical conditions and the effects of those conditions. ROA.33-34; ROA.4959. Plaintiffs sought an injunction ordering defendants to maintain the heat index in the death row tiers at or below 88 degrees, ensure plaintiffs have regular access to uncontaminated ice and drinking water during summer months, and provide for cold showers. ROA.34; ROA.4959-4960.

Plaintiffs then moved for a preliminary injunction, but the court deferred issuing a ruling until after it conducted an evidentiary hearing and trial on the merits. ROA.4961; ROA.6587-6595. The court ordered the parties to gather information it considered essential to resolving plaintiffs' claims, including the outdoor temperature, humidity, and heat index at Angola, and the temperature, humidity, and heat index as recorded in the six death row tiers inmates currently occupy. ROA.4961, ROA.4979; ROA.6589-6592. A third-party contractor placed electronic monitors outside the facility and in the six occupied tiers; it also placed a second monitor in one of those tiers to determine whether the heat index differed

based on a cell's location in the front or rear of a tier. ROA.4979-4980, ROA.4988. In August 2013, during the subsequent trial, the parties presented evidence regarding the data collected, conditions on Angola's death row, plaintiffs' health, and heat-related warnings and precautions that federal and state agencies issue when the heat index is high. ROA.4961, ROA.4968-4994, ROA.5003-5018.

3. On December 19, 2013, the court issued findings of fact and conclusions of law. ROA.4957-5058. It held that plaintiffs established an Eighth Amendment violation (ROA.4996-5044), but rejected plaintiffs' claims under the ADA and Section 504 (ROA.4957, ROA.5044-5050).

a. As to plaintiffs' Eighth Amendment claim, the court found plaintiffs consistently are subjected to heat indices in "extreme caution" and "danger" zones, which "may cause increasingly severe heat disorders with continued exposure or physical activity." ROA.4982; see ROA.4980-4994 (detailed findings of fact for each tier). The court found that although "the temperature, humidity, and heat index in each tier varied from day-to-day, the heat index in all of the tiers exceeded 104 degrees at various times during the collection period." ROA.4980. The court also found that the heat indices inside at least two of the housing tiers were sometimes up to 20 degrees higher than the heat indices recorded outside the facility, and that inmates housed at the rear of the tiers were subjected to hotter conditions than those housed closer to the tier's entrance. ROA.4994. Plaintiffs

testified that they cope with the extreme heat by drinking water, lying on the floor, avoiding direct sunlight, removing unnecessary clothing, and draping wet towels over their bodies. ROA.4975-4978.

The district judge visited Angola a week after the data collection period ended. ROA.4994. The court stated that the temperature inside death row felt appreciably higher than the outside temperature; that "windows, fans, and cell vents did not provide a cooling effect or relief from the heat conditions"; that when the tier's entrance was opened, air-conditioning could be detected briefly near the entrance of the tier, but not at the rear of the tier; that the cold water from the cell faucets was lukewarm; that the mounted fans did not provide equal amounts of air flow to each cell; and that the concrete walls of the tiers were "hot to the touch" and the metal security bars "very warm to the touch." ROA.4995-4996.

The court found that the extreme heat on death row presented a substantial risk of serious harm to plaintiffs, who provided uncontroverted temperature, humidity, and heat index data, as well as credible medical evidence regarding their susceptibility to heat-related illnesses. ROA.5001-5012. The court cited the testimony of plaintiffs' expert witness, Dr. Susan Vassallo, who concluded that the heat conditions on death row put plaintiffs' health at serious risk and exacerbated plaintiffs' underlying medical conditions. ROA.5006. According to Dr. Vassallo, plaintiffs' medical conditions and related medication inhibit their body's ability to

thermoregulate (*i.e.*, respond to heat), and their ages, especially for plaintiffs Ball and Code, further increase the risk of harm. ROA.5006-5009.[2]

The court stated that plaintiffs did not need to establish that death or serious illness had already occurred in order to establish a substantial risk of harm. ROA.5011. Rather, it sufficed that plaintiffs had filed multiple formal written complaints about the excessive heat. To the extent defendants argued that plaintiffs had not made "sick call" requests about the heat, the court stated that monetary and disciplinary consequences discouraged them from doing so. ROA.5011. The court also rejected defendants' argument that plaintiffs' lifestyle and diet choices, and not the heat conditions on death row, contributed to plaintiffs' risk of harm. ROA.5012.

Finally, the court stated that many federal and state agencies have recognized that overexposure to extreme heat increases the risk of serious harm to individuals. ROA.5012. For example, the National Weather Service, CDC, and Louisiana Office of Public Health have warned that higher-risk individuals are susceptible to serious illness with prolonged exposure to dangerously high heat indices. ROA.5004, ROA.5013-5014. In addition, FEMA has stated that

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[2] Dr. Vassallo testified in detail regarding how plaintiffs' medical conditions and related medication make them particularly susceptible to heat-related illnesses, including heat stroke, heart attack, and stroke. ROA.5996-6006, ROA.6012-6021, ROA.6028, ROA.6047-6055.

"stagnant atmospheric conditions and poor air quality" can trigger heat-related illnesses, and that "asphalt and concrete store heat longer and gradually release heat at night, which can produce higher nighttime temperatures." ROA.5014.

The court also held that plaintiffs had shown that defendants acted with deliberate indifference to this danger. ROA.5019-5020. First, the court concluded that, because of the obvious risk of serious harm to plaintiffs, defendants knew of a substantial risk of serious harm. ROA.5020. The court also concluded that defendants' knowledge of the risk of harm could be inferred from circumstantial evidence presented at trial. ROA.5020. In particular, the court cited plaintiffs' numerous administrative complaints, and the fact that defendants closely monitored temperatures on death row and regularly visited its housing tiers. ROA.5021-5027.

The court further concluded that defendants unlawfully disregarded the substantial risk of serious harm to plaintiffs. ROA.5027. The court stated Angola's Warden testified that he had "often 'thought' of ways to reduce the heat in the death row tiers, yet failed to take any action" to do so. ROA.5027. Indeed, Angola's Warden first attempted to reduce the temperatures in the hottest tiers only after the court ordered ongoing data collection. ROA.5029-5031. The court stated that this action demonstrated defendants' knowledge of the extreme heat on death row, emphasizing that Angola's Warden did not take any action until the data

exposed the extremely high and dangerous temperatures. ROA.5031-5034. Accordingly, the court concluded that plaintiffs had shown that defendants acted with deliberate indifference to the substantial risk of serious harm to their health and safety. ROA.5034-5035, ROA.5044.

b. The court rejected plaintiffs' disability discrimination claims under Title II of the ADA and Section 504. The court held that plaintiffs did not establish they are "qualified individuals with a disability." ROA.5047-5050. Relying on *Toyota Motor Manufacturing* v. *Williams*, 534 U.S. 184, 197 (2002), to define "[m]ajor life activities," the court found that plaintiffs had not shown any physical or mental impairment that substantially limits one or more of their life activities. ROA.5047-5048.

Defendants did not dispute that plaintiffs suffer from chronic diseases, including hypertension, diabetes, obesity, high cholesterol, depression, and hepatitis. ROA.5048. The court stated, however, that plaintiffs had not shown how these chronic diseases "substantially limit their ability to care for themselves, perform manual tasks, walk, see, hear, speak, breath[e], learn, working, eat, sleep, stand, lift, bend, read, concentrate, think, or communicate." ROA.5048-5049. Rather, according to the court, plaintiffs' evidence was "limited to how the *heat conditions* in the death row tiers limit [their] major life activities, and how [their] underlying medical conditions put them at increased risk of developing heat-

related illnesses." ROA.5049. Thus, the court concluded plaintiffs had failed to establish a prima facie case of disability-based discrimination. ROA.5049-5050.

c. The court issued declaratory and injunctive relief. ROA.5050-5055. Defendants were ordered to immediately develop a plan to maintain the heat index on death row at or below 88 degrees; record and report the temperature, humidity, and heat index on the death row tiers at two hour intervals between April 1 and October 31; provide plaintiffs and other heat-susceptible inmates at least one cold shower per day and direct access to clean, uncontaminated ice and/or cold drinking water during their tier time and while confined to their cells; and provide whatever other relief was necessary to comply with constitutional standards. ROA.5053-5054. Because of defendants' deliberate indifference to the substantial risk of serious harm to plaintiffs and defendants' manipulation of the heat data during the data collection period, the court stated it would retain jurisdiction to monitor implementation of the final plan and would appoint a special master to report on defendants' compliance. ROA.5054-5055.

4. Defendants appealed. ROA.5178-5180. On May 23, 2014, the district court approved defendants' heat remediation plan and ordered its implementation. ROA.6839. After the court entered final judgment (ROA.6851-6852), plaintiffs cross-appealed the denial of their ADA and Section 504 claims (ROA.6853-6854). This Court granted a stay pending appeal. ROA.6860.

## SUMMARY OF ARGUMENT

The district court properly held that subjecting inmates susceptible to heat-related illnesses because of their physical conditions to dangerously hot conditions violates the Eighth Amendment where the prison officials here knew of and disregarded a substantial risk of serious, heat-related harm to inmate health and safety. Plaintiffs in this case presented reliable temperature and humidity data, as well as credible medical evidence substantiating their claims that current conditions on Angola's death row constitute a sufficiently serious risk of harm. The record supports the court's finding that defendants acted with deliberate indifference to that substantial risk of serious harm to plaintiffs. Thus, the judgment in favor of plaintiffs under the Eighth Amendment should be affirmed.

The court erred, however, in analyzing plaintiffs' claims under Title II of the ADA and Section 504. In examining whether plaintiffs are qualified individuals with a disability, the court failed to apply the standard Congress established when it enacted the ADA Amendments Act of 2008. The court's decision conflicts with the text and purpose of the ADA and Section 504, and the regulations implementing both statutes. Thus, the judgment in favor of defendants under the ADA and Section 504 should be vacated, and the case remanded to the district court to consider plaintiffs' claims under the correct legal standard.

## ARGUMENT

## I

## THE DISTRICT COURT PROPERLY HELD THAT LIFE-THREATENING HEAT CONDITIONS ON ANGOLA'S DEATH ROW VIOLATE PLAINTIFFS' EIGHTH AMENDMENT RIGHTS

The Eighth Amendment prohibits "cruel and unusual punishments." U.S. Const. Amend. VIII; *Robinson* v. *California*, 370 U.S. 660, 675 (1962). To determine whether a punishment is cruel and unusual, "courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham* v. *Florida*, 560 U.S. 48, 58 (2010) (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 102 (1976)). The Supreme Court has recognized that, consistent with the Eighth Amendment, "the State must respect the human attributes even of those who have committed serious crimes." *Id.* at 59.

It is well-established that "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Farmer* v. *Brennan*, 511 U.S. 825, 832 (1994) (quoting *Helling* v. *McKinney*, 509 U.S. 25, 31 (1993)); see also *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981). Accordingly, prison officials must provide humane conditions of confinement and take reasonable measures to protect inmate health and safety. See *Farmer*, 511 U.S. at 832-833.

To establish an Eighth Amendment violation, an inmate must show (1) a deprivation that is "sufficiently serious," in that "he is incarcerated under conditions posing a substantial risk of serious harm," and (2) that prison officials have acted with "deliberate indifference to inmate health or safety." *Farmer*, 511 U.S. at 834 (citations and internal quotation marks omitted); see also *Herman* v. *Holiday*, 238 F.3d 660, 664 (5th Cir. 2001) (applying this test). Under the first prong, a deprivation is "sufficiently serious" when a prison official's act or omission results in the denial of "the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834 (citation omitted). The second prong requires a showing that officials had a "sufficiently culpable state of mind." *Ibid.* (citation omitted).

*A. Extreme Heat On Death Row Poses A Substantial Risk Of Serious Harm To Plaintiffs*

This Court has already recognized that being subjected to extreme temperatures, either alone or in combination with other conditions of confinement, can violate the Eighth Amendment. For example, in *Gates* v. *Cook*, 376 F.3d 323, 339-340 (5th Cir. 2004), this Court recognized an Eighth Amendment claim based in part on high heat indices in Mississippi's death row facility. See also *Blackmon* v. *Garza*, 484 F. App'x 866 (5th Cir. 2012) (per curiam) (reversing directed verdict and remanding for a new trial on prisoner's claim that Texas authorities inadequately protected him from substantial health risks associated with extreme

heat); *Valigura* v. *Mendoza*, 265 F. App'x 232, 235 (5th Cir. 2008) (per curiam) (recognizing claim based in part on high heat indices in high-security unit with limited inmate access to water). This Court also has recognized that medications can impact a prisoner's ability to withstand extreme heat, stating that "the medications often given to deal with various medical problems interfere with the body's ability to maintain a normal temperature." *Gates*, 376 F.3d at 334; see also *Blackmon*, 484 F. App'x at 871.

Under this Court's cases, whether certain conditions constitute a substantial risk of serious harm is a fact-specific inquiry that examines the totality of circumstances, including the severity and duration of inmates' exposure to the challenged conditions. See *Gates*, 376 F.3d at 333; compare, *e.g.*, *Blackmon*, 484 F. App'x at 869-872 (discussing facts and citing cases that would allow a reasonable juror to find for inmate on excessive-heat claim), with *Powers* v. *Clay*, 560 F. App'x 290, 292 (5th Cir. 2014) (per curiam) (rejecting claim that six-hour detention on a sun-exposed concrete yard constitutes sufficiently serious harm). Other courts of appeals likewise have recognized that extreme temperatures can violate the Eighth Amendment, and that whether conditions give rise to a violation is particularly appropriate for the fact finder's resolution. See, *e.g.*, *Walker* v. *Schult*, 717 F.3d 119, 126-127 (2d Cir. 2013); *Bennett* v. *Chitwood*, 519 F. App'x 569, 574 (11th Cir. 2013) (per curiam); *Graves* v. *Arpaio*, 623 F.3d 1043, 1048-

1049 (9th Cir. 2010) (per curiam); *Skelton* v. *Bruce*, 409 F. App'x 199, 204 (10th Cir. 2010); *Chandler* v. *Crosby*, 379 F.3d 1278, 1294-1295 (11th Cir. 2004); *Dixon* v. *Godinez*, 114 F.3d 640, 642-643 (7th Cir. 1997); *Mitchell* v. *Maynard*, 80 F.3d 1433, 1441-1443 (10th Cir. 1996).

Here, the district court correctly applied governing law to the facts of this case to conclude that plaintiffs established that their conditions of confinement create a substantial risk of serious harm. The court's findings are well supported by the record, including the heat data, trial testimony, medical evidence, federal and state warnings, and the court's credibility determinations and own observation of death row tiers. Moreover, the court's reliance on temperature and humidity data and expert testimony detailing the ways in which consistently high heat indices interact with plaintiffs' ages, medical conditions, and medication to increase their susceptibility to heat-related illnesses comports with the types of information this Court has relied upon in the past to hold that plaintiffs had proven a sufficiently serious deprivation under the Eighth Amendment. See, *e.g.*, *Blackmon*, 484 F. App'x at 871; *Gates*, 376 F.3d at 333-340.

The cases defendants rely upon to argue that the district court erred in finding that conditions on Angola's death row create a substantial risk of serious harm to plaintiffs actually support the court's conclusion in this case. As the district court correctly explained (ROA.5000-5002), this Court's decisions in

*Woods* v. *Edwards*, 51 F.3d 577 (5th Cir. 1995) (per curiam), and *Gates* v. *Cook*, *supra*, do not mandate a decision for defendants. In *Woods*, this Court affirmed the grant of summary judgment against an Angola inmate who claimed that high temperatures and inadequate cooling in extended lockdown aggravated his sinus condition. 51 F.3d at 581. In so doing, the Court stated that the defendants had presented evidence that they used fans to circulate the air in that area of Angola's housing and that the inmate, on the other hand, had "failed to present medical evidence of any significance" or identify "a basic human need that the prison has failed to meet." *Ibid.* Subsequently, in *Gates*, this Court, in upholding the finding of an Eighth Amendment violation, stated that *Woods* "does not stand for the proposition that extreme heat can never constitute cruel and unusual punishment." *Gates*, 376 F.3d at 339. This Court expressly distinguished *Woods* from *Gates* on its facts, stating that the inmate in *Woods* "had not presented medical evidence sufficient to state an Eighth Amendment violation." *Ibid.* Here, in plaintiffs' case, the district court found that, unlike in *Woods*, plaintiffs presented credible medical evidence and heat data to support their claim that conditions on death row constituted a substantial risk of serious harm to their health and safety. ROA.5002.

Nor does *Chandler* v. *Crosby*, *supra*, support disturbing the court's holding. In *Chandler*, death row inmates in Florida challenged high cell temperatures and inadequate ventilation as unconstitutional. 379 F.3d at 1282-1286. The Eleventh

Circuit acknowledged that extreme heat and inadequate cooling can alone, or in combination with other conditions, create unconstitutional conditions, but affirmed the district court's finding that the inmates had failed to satisfy the first prong of their claim. See *id.* at 1294-1297. The *Chandler* court cited three findings in particular: (1) summertime temperatures were not excessive, where cell temperatures were mostly in the eighties, and where it was at times cooler in the cells than outdoors; (2) the ventilation system effectively managed air circulation and humidity, with relative humidity rarely raising above seventy percent; and (3) other conditions, including the lack of exposure to direct sunlight, the availability of hot and cold water in each cell, and the limited opportunity to gain relief in air-conditioned visiting areas, alleviated the heat. *Id.* at 1297-1298. Here, the evidence reasonably led the district court to a contrary conclusion that is neither clearly erroneous nor incorrect as a matter of law. ROA.5039-5043.

Finally, the fact that plaintiffs have not yet suffered medical emergencies as a result of the extreme heat does not mandate a different conclusion. Cf., *e.g.*, Defs.' Br. 17-19. The Eighth Amendment is not limited to addressing harm that has already occurred; it also prevents serious future harm. As the Supreme Court stated in *Helling*, an inmate may "successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery." 509 U.S. at 33. Given the Eighth Amendment's assurance that inmates be afforded reasonable

safety, "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Ibid.* This Court likewise has stated that "the inmate need not show that death or serious illness has occurred." *Gates*, 376 F.3d at 333. Contrary to defendants' suggestion, plaintiffs asserting an Eighth Amendment violation need not show they have suffered prior injuries to establish a substantial risk of serious harm to their health.

### *B. Defendants Acted With Deliberate Indifference To The Substantial Risk Of Serious Harm To Plaintiffs*

The Supreme Court has explained that a prison official acts with deliberate indifference if he "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837; see also *Wilson* v. *Seiter*, 501 U.S. 294, 303 (1991) (applying this standard to prison-conditions cases). An inmate does not have to show that an official "acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer*, 511 U.S. at 842. An official's knowledge is a question of fact, and the "factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Ibid*.

Here, the district court correctly concluded that defendants acted with deliberate indifference to a substantial risk of serious harm based on the obvious risk to plaintiffs as well as evidence permitting the court to infer defendants' knowledge of such harm. ROA.5019-5020. For example, plaintiffs submitted numerous administrative complaints to defendants, who denied the requests despite acknowledging plaintiffs' claims that it is extremely hot on death row and that they are susceptible to heat-related illnesses. ROA.5021-5024. In finding defendants deliberately indifferent, the court correctly rejected defendants' argument that plaintiffs sought only air conditioning, and not relief from the health risks the extreme heat triggered. ROA.5021-5022. Moreover, the district court in this case found that defendants closely monitored the temperatures on death row and regularly visited plaintiffs' tiers, thereby allowing the court to find that defendants knew of the extreme heat. ROA.5024-5027. Although defendants argue there was no evidence showing that they knew of and disregarded the excessive heat, ample evidence supports the court's factual determination.

The evidence also supports the court's conclusion that defendants disregarded the substantial risk of serious harm to plaintiffs. Defendants failed to take any action to reduce the extreme heat on death row, despite testifying that they had often thought of ways to do so. ROA.5027-5028. Indeed, the court emphasized defendants' belated attempts, during the data collection period, to

modify the two tiers with the highest recorded temperatures and heat indices as evidence of defendants' knowledge of the extreme heat. ROA.5029-5031, ROA.5065-5067; ROA.5091-5096. The court also noted that defendants had provided no individual ice chests to death row inmates, and had not complied with their own policies and procedures with respect to Plaintiff Magee, who should have been included on defendants' "Heat Precautions List" based on his use of psychotropic medication. ROA.5030-5034. Thus, the court correctly concluded that plaintiffs had shown that defendants acted with deliberate indifference to a substantial risk of serious harm to their health and safety. ROA.5034-5035.

Contrary to defendants' argument, the fact that defendants were making available to plaintiffs some of the remedies that this Court found appropriate to remedy the constitutional violation in *Gates* does not mandate a different conclusion.[3] Indeed, the court expressly distinguished the facts in this case from those in *Gates*, noting that here plaintiffs' cells were not each equipped with a fan, that the fans mounted on the tiers provided inadequate relief, that plaintiffs had direct access to ice for only one hour each day, that the cold water in plaintiffs' sinks was lukewarm, and that the shower temperature was between 100 and 120 degrees. ROA.5036; cf. *Gates*, 376 F.3d at 336, 339-340. In addition, the court

[3] Mississippi ultimately closed the unit at issue in *Gates*. See Order of Dismissal Without Prejudice by Agreement of the Parties, Doc. 136, *Presley* v. *Epps*, No. 05cv148 (N.D. Miss. Aug. 2, 2010).

credited the testimony of plaintiffs' expert that the cooling provisions defendants here made available to plaintiffs were inadequate to safeguard plaintiffs' health. ROA.5002, ROA.5005-5011; ROA.6030-6033, ROA.6051-6052. Plaintiffs' medical expert testified that, short of exposing plaintiffs to any air-conditioning, defendants still could ensure that inmates had personal ice chests, increased numbers of fans and cooling towels, the ability to take cold showers a couple of times per day, and access to a prison health system that does not charge or penalize inmates for requesting medical care. ROA.6006-6009, ROA.6032-6035, ROA.6054-6055. These expert recommendations were consistent with warnings that federal and state agencies issue to the public, and especially to those individuals at an increased risk for heat-related illness and death, when the heat index is high. ROA.5012-5019.

Accordingly, this Court should affirm that portion of the district court's judgment holding that plaintiffs established an Eighth Amendment violation.

## II

## THE DISTRICT COURT ERRED IN ANALYZING PLAINTIFFS' ADA AND SECTION 504 CLAIMS

The district court erred in its method of analyzing whether plaintiffs are qualified individuals with a disability under Title II of the ADA and Section 504.[4] In holding that plaintiffs failed to establish that they are qualified individuals with a disability, the court imposed an overly narrow definition of "disability" that conflicts with the ADA, as amended by the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553. The court also ignored the ADA's mandate that "[a]n impairment that substantially limits one major life activity," *e.g.*, thermoregulation or cardiovascular or endocrine function, "need not limit other major life activities in order to be considered a disability." 42 U.S.C. 12102(4)(C). Accordingly, this Court should vacate the judgment dismissing plaintiffs' ADA and Section 504 claims and remand the case for the district court to consider those claims under the appropriate legal standard.

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[4] Title II of the ADA is interpreted and applied consistently with the rights, procedures, and remedies set forth under Section 504 and applies a no lesser standard than the standards applied under Title V of the Rehabilitation Act, 29 U.S.C. 791 *et seq.*, or the regulations issued pursuant to that Act. See 42 U.S.C. 12201(a); 28 C.F.R. 35.103. Thus, while the discussion that follows focuses primarily on the ADA, our analysis is informed by the Rehabilitation Act and applies to both statutes. See *Frame* v. *City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011) (stating the ADA and Section 504 "generally are interpreted *in pari materia*"), cert. denied, 132 S. Ct. 1561 (2012).

*A. The ADA's Definition Of "Disability" Favors Broad Coverage Of Individuals*

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "disability" includes any "physical or mental impairment that substantially limits one or more major life activities" of an individual. 42 U.S.C. 12102(1)(A); see 28 C.F.R. 35.104. Under the ADA, the definition of "disability" must be "construed in favor of broad coverage of individuals," and the term "substantially limits" must be "interpreted consistently with" the ADAAA's findings and purposes. 42 U.S.C. 12102(4)(A) and (B). A court's "determination of whether an impairment substantially limits a major life activity" must be made "without regard to the ameliorative effects of mitigating measures such as -- medication." 42 U.S.C. 12102(4)(E)(i)(I).

The ADA, as amended by the ADAAA, includes a non-exhaustive list of activities considered to be major life activities. These include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. 12102(2)(A). "Major life activities" also include "[m]ajor bodily functions" such as "functions of the immune system,

normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U.S.C. 12102(2)(B).

The ADAAA responded to two Supreme Court cases that interpreted the ADA's definition of "disability" in a manner that Congress determined conflicted with the statute's broad remedial purpose by narrowing the Act's coverage. See ADAAA § 2(a)(3)-(7) and (b)(2)-(5), 122 Stat. 3553-3554. The first decision, *Sutton* v. *United Air Lines*, 527 U.S. 471 (1999), required courts examining whether an impairment substantially limits a major life activity to take into account the ameliorative effects of mitigating measures. *Id.* at 475, 481-489. In amending the ADA, Congress made clear that a court's determination of whether an individual has a "disability" must be made without regard to the effect of mitigating measures such as medication. See ADAAA § 2(b)(2), 122 Stat. 3554 (codified at 42 U.S.C. 12102(4)(E)(i)(I)).

The second decision, *Toyota Motor Manufacturing* v. *Williams*, 534 U.S. 184 (2002), imposed a demanding showing for the terms "substantially" and "major" in the ADA's definition of disability. Under *Toyota Motor Manufacturing*, for an individual to have a "disability," he or she had to show that the claimed impairment "prevents or severely restricts" him or her "from doing activities that are of central importance to most people's daily lives." *Id.* at 195-198; see ADAAA § 2(a)(5)-(7) and (b)(4), 122 Stat. 3553-3554. In rejecting that

demanding standard by amending the ADA, Congress explained that *Toyota Motor Manufacturing* had "created an inappropriately high level of limitation necessary to obtain coverage under the ADA." ADAAA § 2(b)(5), 122 Stat. 3554. In amending the ADA to restore its broad protections, Congress stated that the "primary object of attention in [ADA] cases * * * should be whether entities covered under the ADA have complied with their obligations," and that "whether an individual's impairment is a disability under the ADA should not demand extensive analysis." ADAAA § 2(b)(5), 122 Stat. 3554.

*B. The Court Imposed An Overly Narrow Definition Of "Disability"*

In this case, the court imposed the more demanding standard from *Toyota Motor Manufacturing*. Although the court correctly required plaintiffs to establish that their chronic medical conditions "substantially limit[ ] one or more major life activities," 42 U.S.C. 12102(1)(A), the court defined "major life activities" as "those activities that are of central importance to daily life" (ROA.5047) and stated that to be "substantially limited" in the performance of a major life activity, an individual must be "unable to perform" or "significantly restricted in the ability to perform" a major life activity (ROA.5048). In so stating, however, the district court relied on *Toyota Motor Manufacturing*, which was superseded by the ADAAA, and *EEOC* v. *Chevron Phillips Chemical Co.*, 570 F.3d 606, 614 (5th Cir. 2009), which applied pre-ADAAA regulations that Congress specifically

instructed the EEOC to amend under the ADAAA.[5] See ADAAA § 2(b)(4)-(6), 122 Stat. 3554. In amending the ADA, Congress rejected the application of these more demanding statutory and regulatory standards for assessing whether an individual has a disability. While the limitation an impairment imposes must be substantial, Congress made clear that it need not significantly or severely restrict the performance of a major life activity in order to qualify as a disability. See ADAAA § 2(a)(5)-(8) and (b)(4)-(6), 122 Stat. 3553-3554.

Compounding its mistake, the court relied on the EEOC's pre-ADAAA regulations implementing Title I of the ADA for a list of "major life activities." In so doing, the court ignored the more inclusive statutory definition of "major life activities," which recognizes that "the operation of a major bodily function," including circulatory and endocrine functions, is "a major life activity." 42 U.S.C. 12102(2)(B). Compare ROA.5047-5048 (failing to recognize "major bodily functions" as "major life activities"), with 42 U.S.C. 12102(2) (ADA text, as

[5] *Chevron Phillips* arose under Title I of the ADA and also applied the EEOC's prior Title I regulations setting forth three factors for determining whether an individual is substantially limited. Although the EEOC's current regulations that became effective May 24, 2011, permit courts to examine the condition, manner, or duration of an individual's impairment in appropriate cases, they no longer include the list of factors that the prior regulations delineated. Compare ROA.5048 (citing these factors), with 29 C.F.R. Pt. 1630, App. ("Section 1630.2(j)(4) Condition, Manner, or Duration"), and 29 C.F.R. 1630.2(j)(1) and (4). By relying on these outdated factors (ROA.5048), the district court again erred.

amended), and 29 C.F.R. 1630.2(i)(1)(i)-(ii) and (2) (current EEOC regulations implementing Title I in accordance with the ADAAA).[6] In amending the ADA, Congress specifically included this expanded definition of "major life activity" in order "to ensure that the impact of an impairment on the operation of major bodily functions is not overlooked or wrongly dismissed as falling outside" the ADA's broad scope. H.R. Rep. No. 730, Pt. 2, 110th Cong., 2d Sess. 16 (2008).

Because the district court failed to apply the correct legal standard consistent with the plain text of the amended statute and its implementing regulations, this Court should vacate that portion of the judgment dismissing plaintiffs' ADA and

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[6] Earlier this year, the Justice Department issued a Notice of Proposed Rulemaking to revise its Title II and Title III regulations in order to implement the ADAAA. See Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, 79 Fed. Reg. 4839 (proposed Jan. 30, 2014) (to be codified at 28 C.F.R. Pts. 35 & 36). Among other things, the Department proposes to expand its regulatory definition of "major life activities" to include the operation of major bodily functions. See 79 Fed. Reg. at 4840, 4844. The Department's proposed revisions also add rules of construction that should be applied when determining whether an impairment "substantially limits" a major life activity. See 79 Fed. Reg. at 4840, 4844-4846. Consistent with Executive Order 13,563's instruction to federal agencies to coordinate rules across agencies and harmonize regulatory requirements where appropriate, the Department has proposed to adopt, wherever possible, regulatory language that is identical to the EEOC's regulations implementing Title I in light of the ADAAA. See 79 Fed. Reg. at 4840, 4843, 4850. Even in the absence of regulations implementing Title II in accordance with the ADAAA, however, defendants must comply with their statutory obligations. Accord *Fortyune* v. *City of Lomita*, No. 12-56280, 2014 WL 4377467, at *3 (9th Cir. Sept. 5, 2014).

Section 504 claims and remand to the district court to consider those claims under the correct legal standard in the first instance.

In applying the correct legal standard on remand, the district court must make an individualized determination as to each plaintiff. In analyzing whether plaintiffs are "qualified individuals with a disability," the district court should examine, for example, the impact of plaintiffs' hypertension, diabetes, and other conditions on the operation of their cardiac, endocrine, and other major bodily functions. See 42 U.S.C. 12102(2)(B) (stating "a major life activity" for purposes of establishing a disability "also includes the operation of a major bodily function"). In addition, it should consider any side effects of plaintiffs' medication that might make them more susceptible to harm from excessive heat. Cf. 29 C.F.R. 1630.2(j)(4)(ii) (stating "the way an impairment affects the operation of a major bodily function" and the "negative side effects of medication" are relevant to assessing whether an impairment substantially limits a major life activity). Moreover, because the ADA expressly extends to impairments that are episodic in nature so long as the impairments "would substantially limit a major life activity when active," 42 U.S.C. 12102(4)(D), the court on remand should consider whether plaintiffs' reduced ability to cool down in extreme heat is itself a substantially limiting impairment. See *EEOC* v. *Agro Distribution, LLC*, 555 F.3d

462, 469 n.8 (5th Cir. 2009) (assuming without deciding that "the regulation of body temperature constitutes a major life activity").

## CONCLUSION

This Court should affirm that portion of the judgment finding defendants violated the Eighth Amendment. This Court should vacate that portion of the judgment dismissing plaintiffs' ADA and Section 504 claims and remand to the district court for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLEES/ CROSS-APPELLANTS AND URGING AFFIRMANCE IN PART with the Clerk of the Court using the appellate CM/ECF system on September 30, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

Dated: September 30, 2014

## CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure, that the attached BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLEES/CROSS-APPELLANTS AND URGING AFFIRMANCE IN PART:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6880 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14-point Times New Roman font.

s/ Erin H. Flynn
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