

Engulfed in Flames: Palliative Strategies for Prison Climate Adaptation

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From Hurricane Katrina to the 2021 West Coast wildfires, recent history shows that prisons are unprepared for natural disasters. As a result, incarcerated people experience smoke-filled cells, toxic flooding, and abandonment in unplanned evacuations. Climate change is accelerating the occurrence of natural disasters, creating pressing issues for modern prison infrastructure. Previous scholarship has explored systemic solutions to the issue of prison climate adaptation, such as climate change mitigation and decreasing prison populations. However, long-term solutions fail to address the immediacy of climate emergencies, which affect prisons now. Incarcerated people trapped in the path of today's floods and fires need short-term solutions while systemic efforts develop.

Drawing on interviews with incarcerated people, judges, and leading prison condition litigators, this Note suggests palliative strategies to reduce the harmful impacts of climate change on incarcerated people. This Note uses the term "palliative" to describe these strategies for incremental change because, like palliative medical treatments, they prioritize short-term quality of life over long-term systemic cures. Palliative strategies draw on constitutional, administrative, and tort law to make climate injuries more manageable for courts. They also rely on the interests of prison employees in climate-safe prisons to access claims that are unavailable to incarcerated people alone. This Note proposes promising applications of palliative strategies and explains how advocates can use these approaches to save lives.

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INTRODUCTION

As the August 2021 Dixie Fires approached Susanville, California, people incarcerated in the town’s two prisons sat in the dark without power, breathing in toxic smoke and wondering what would happen when the flames reached the prison.¹ They had never participated in an evacuation drill or heard of an evacuation plan.² If the fire reached the prison, many feared that prison officials would flee and abandon them to die.³ These concerns were not unfounded. One inmate reported that when he and others voiced evacuation concerns to correctional officers (COs), “The COs would laugh at us and tell us, ‘You efferes are going to stay in your cell.’”⁴

American prisons, like the ones in Susanville, are unprepared for the risks of climate change. In a 2023 report, the Ella Baker Center (EBC) found that incarcerated populations were consistently left out of California’s state disaster preparedness plans.⁵ Seventy-seven percent of survey respondents—563 people incarcerated in California facilities—were unfamiliar with their prison’s emergency plans, and over 80 percent had never participated in an evacuation

1. Alleen Brown, *Dark, Smoky Cells*, THE INTERCEPT (Feb. 12, 2022), <https://theintercept.com/2022/02/12/wildfires-prisons-climate-california/> [<https://perma.cc/Y5XT-P6P2>].

2. *Id.*

3. *Id.*; see also Tim Arango, ‘Lots of Prayers’ in Susanville, the Largest Town to be Threatened by the Dixie Fire, N.Y. TIMES (Aug. 17, 2021), <https://www.nytimes.com/2021/08/17/us/susanville-dixie-fire.html> [<https://perma.cc/R569-7856>] (reporting that, as the mayor and townspeople evacuated, a state prison spokesperson said there were no plans to evacuate the prisons).

4. Brown, *supra* note 1.

5. AISHAH ABDALA, ABHILASHA BHOLA, GUADALUPE GUTIERREZ, ERIC HENDERSON & MAURA O’NEILL, ELLA BAKER CTR. FOR HUM. RTS., HIDDEN HAZARDS: THE IMPACTS OF CLIMATE CHANGE ON INCARCERATED PEOPLE IN CALIFORNIA STATE PRISONS 22 (2023) [hereinafter ELLA BAKER CTR. REP.].

drill.⁶ Prison officials refused to respond to the EBC's Public Records Act requests for emergency plans.⁷ The EBC found that officials had done little to protect incarcerated populations that are especially vulnerable to climate change, such as people on heat-risk medications.⁸ When prison officials refused to follow an order to evacuate Solano State Prison in 2020, prisoners' rights advocates found themselves "trying to get [prison officials] to get people out and not just leave people to burn alive."⁹

Natural disasters are not waiting for prisons to be prepared. In 2023, at least 41 people died in their cells during record-breaking heatwaves in Texas.¹⁰ Conditions during heatwaves in one Louisiana prison were so bad that officials had to increase suicide watch by a third.¹¹ In 2020 alone, more than 4.3 million acres of wildfires burned across California,¹² while over 65,000 people were imprisoned within five miles of a fire hazard zone.¹³ In coastal regions, warming sea air threatens the rapid deterioration of prison infrastructure.¹⁴ Meanwhile, people incarcerated in Texas prisons were deprived of food and running water during a 2021 winter storm for which prison administrators were unprepared.¹⁵

Judges treat novel natural disasters as unforeseeable "Acts of God."¹⁶ This is particularly dangerous in the context of prisons because incarcerated people

6. *Id.* at 29, 31.

7. *Id.* at 29.

8. *Id.* at 35.

9. *Id.* at 37.

10. Jolie McCullough, *As the Death Roll in Stifling Texas Prisons Climbs, Congressional Democrats Ask for Investigation*, TEX. TRIBUNE (Aug. 21, 2023), <https://www.texastribune.org/2023/08/21/texas-prison-heat-deaths/> [<https://perma.cc/22W7-23LG>] (reporting that, while the prisons denied a connection between prisoner deaths and the heatwaves, family members of the deceased believed that some of the deaths were caused by the heatwaves).

11. David H. Cloud, Brie Williams, Regine Haardörfer, Lauren Brinkley-Rubinstein & Hannah L. F. Cooper, *Extreme Heat and Suicide Watch Incidents Among Incarcerated Men*, JAMA NETWORK. OPEN 7–8, <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2808211> [<https://perma.cc/QDT9-C6VL>] (reviewing suicide watch incidents during heatwaves in a three-year period).

12. THOMAS W. PORTER, WADE CROWFOOT, GAVIN NEWSTOM & CAL. DEP'T OF FORESTRY & FIRE PROT., 2020 WILDFIRE ACTIVITY STATISTICS 1 (2021) [<https://perma.cc/5L27-9BLM>].

13. *Id.* at 13; Heather Harris, Alexandria Gumbs, & Joseph Hayes, *What Can California Prisons Do When Wildfires Close In?*, PUB. POL'Y INST. OF CAL. (Nov. 13, 2020), <https://www.ppic.org/blog/what-can-california-prisons-do-when-wildfires-close-in/> [<https://perma.cc/8MMQ-NTH5>].

14. See Laurie L. Levenson, *Climate Change and the Threat to U.S. Jails and Prisons*, 33 VILL. ENV'T L.J. 143, 143 (2022).

15. See Sarah Ruiz-Grossman, *People In Texas Jails Are 'Freezing,' Without Hot Food Or Running Water*, HUFFPOST (Feb. 17, 2021), https://www.huffpost.com/entry/texas-winter-storm-jails-prisons-power-outage_n_602db1dbc5b66da5db9ee685 [<https://perma.cc/GY58-5EDW>].

16. See, e.g., *Simmons v. Lexington Ins. Co.*, No. CIV.A. 07-5911, 2010 WL 1254638, at *2 (E.D. La. Mar. 19, 2010) (denying a negligence claim because "[f]ederal and state courts have held that Hurricane Katrina was an 'Act of God'"), *aff'd sub nom. Simmons v. Berglin*, 401 F. App'x 903 (5th Cir. 2010); *Conagra Trade Grp., Inc. v. AEP MEMCO, LLC*, No. CIV. A. 07-2222, 2009 WL 2023174, at *3 (E.D. La. July 9, 2009) ("[I]t is uncontested that Hurricane Katrina was an unexpected and

“are entirely reliant upon [prison administrations] for preparedness, response, and recovery.”¹⁷ Hurricane Katrina exemplifies the dangers of prison administrators failing to prepare for climate disasters.¹⁸ Among other abuses during and following Katrina, inmates reported being left for days in cells full of sewage water after deputies abandoned their posts.¹⁹ Nonetheless, Louisiana’s Court of Appeal held that prison officials’ actions did not violate the Eighth Amendment’s prohibition on cruel and unusual punishment because of the novelty of the disaster.²⁰ The court explained that “considering the unprecedented and catastrophic aftermath of the hurricane, the methods employed to safely care for and evacuate the prisoners were reasonable.”²¹ However, as climate change amplifies the severity and frequency of extreme weather emergencies, courts will be forced to acknowledge that such events are no longer unprecedented. If incarcerated people are to vindicate their constitutional rights, their attorneys need strategies to make addressing the harms of climate change more manageable for courts.

This Note proposes a palliative framework for achieving climate adaptation in prisons. Palliative treatments are those that “reduce the violence of a disease” or “ease [the] symptoms without curing the underlying disease.”²² Palliative strategies can reduce the harm of climate change for people who are currently incarcerated. Attorneys can use strategies from existing legal frameworks to make the challenges of climate change less novel and thus more manageable for courts. For example, advocates can litigate poor wildfire evacuation planning under existing disability law precedent before mismanaged wildfire evacuations occur.²³

This Note uses the California Department of Corrections and Rehabilitation (CDCR) as an example of a state prison system that is unprepared for, and has already encountered, a variety of large-scale climate emergencies.²⁴ Part I discusses previous scholarship on the impacts of climate change in prisons, and

extraordinary force of nature, which is capable of being classified as an Act of God at law.”); *Earl v. Gusman*, 228 So. 3d 268, 272 (La. Ct. App. 2017) (dismissing Eighth Amendment claims brought by incarcerated people following Katrina).

17. ELLA BAKER CTR. REP., *supra* note 5, at 7.

18. NAT’L PRISON PROJECT OF THE AM. C.L. UNION, ABANDONED & ABUSED: ORLEANS PARISH PRISONERS IN THE WAKE OF HURRICANE KATRINA 81, 86 (2007) [hereinafter *ACLU Katrina Report*] (reporting that, among other abuses, hundreds of incarcerated people said deputies abandoned their posts before and during the storm, that prisoners climbed on top of their bunks to avoid sewage-filled water rising up to six feet high, and that a woman who miscarried during the storm was refused medical service, left to lie in urine, and passed out from blood loss).

19. *Id.* at 32, 37, 42.

20. *Earl*, 228 So. 3d. at 272.

21. *Id.* at 271.

22. See *Palliate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/palliate> [https://perma.cc/V6MA-8MXR] (cleaned up) (last visited Apr. 17, 2024).

23. See *Armstrong v. Newsom*, 58 F.4th 1283 (9th Cir. 2023) (issuing broad injunctions against the California prison system based on the Americans with Disabilities Act).

24. See *generally* ELLA BAKER CTR. REP., *supra* note 5 (documenting the historical failures of the CDCR in dealing with climate emergencies).

Part II defines palliative strategies. Part III uses wildfire smoke, mismanaged evacuations, and water toxicity as case studies for the application of three palliative strategies. These strategies are rooted in constitutional, administrative, and tort law. Finally, Part IV discusses the limitations of palliative strategies.

I. BACKGROUND

Incarcerated people are uniquely threatened by climate change because they are completely reliant on prison administrators to protect them.²⁵ Environmental science scholars refer to approaches aimed at reducing human suffering from climate change as adaptation strategies, in contrast with mitigation strategies which target the root causes of climate change.²⁶ In the prison context, adaptive or mitigative change is stymied by statutory and administrative barriers to adaptation. Previous scholars have proposed meaningful solutions to remove the systemic barriers to prison adaptation, but many such strategies fail to adequately account for the short-term needs of currently incarcerated people.²⁷ This Section discusses the barriers to prison adaption and suggests that a focus on long-term prison adaption, which I discuss as “curative” strategies, fails to address the climate harms that affect our prisons now.

A. *Barriers to Prison Climate Adaptation*

Prisoners’ rights advocates argue that the Prison Litigation Reform Act of 1995 (PLRA) makes it prohibitively difficult for incarcerated people to bring environmental claims.²⁸ The PLRA requires, *inter alia*, that an incarcerated person exhaust all administrative remedies before suing prison officials for the

25. *See id.* at 65 (“Incarcerated people are both entirely dependent on the state to respond in the event of an emergency and unable to take protective actions that the general population can take before, during, and after a climate hazard.”); Ghada Waly, *Prisons and the Climate Crisis: More than 40 Member States Gather on Nelson Mandela Day 2023*, UNITED NATIONS OFF. ON DRUGS & CRIME (July 18, 2023), <https://www.unodc.org/unodc/en/justice-and-prison-reform/cpcj-prison-reform/news/prisons-and-the-climate-crisis-more-than-40-member-states-gather-on-nelson-mandela-day-2023.html> [<https://perma.cc/BPE9-Y5T8>] (reporting a speech by Ms. Ghada Waly, Executive Director of the United Nations Office on Drugs and Crime, where she said that “[t]hose who are in prisons often have no escape from increasingly extreme weather conditions and natural hazards,” and called for financial support for a dedicated initiative due to the pressing need).

26. *See, e.g.*, Sanjairaj VijayaVenkataRaman, Selvarasan Iniyar & Ranko Goic, *A Review of Climate Change, Mitigation and Adaptation*, 16 RENEWABLE & SUSTAINABLE ENERGY REVS. 878, 890 (2012).

27. *See generally* Vaughn Ford-Plotkin, *Climate Change and the Carceral System: How Extreme Weather Threatens Inmates’ Eighth Amendment Rights*, 28 BERKELEY J. CRIM. L. 1 (2023) (explaining that barriers to prisoner litigation should be eliminated to effectuate the meaning of the Eighth Amendment’s prohibition on cruel and unusual punishment); Levenson, *supra* note 14, at 167–68 (arguing that the federal government should fund prison climate repairs and reconstructions because of infrastructure risks like a prison collapse in Florida).

28. *See, e.g.*, Ford-Plotkin, *supra* note 27, at 4.

conditions of their confinement.²⁹ Exhausting administrative remedies means “using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits).”³⁰ Incarcerated people must exhaust all remedies as to each defendant for every claim to bring their claims to court.³¹ Yet, the Supreme Court dismissed concerns that the PLRA is overly harsh to incarcerated people because of “the informality and relative simplicity of prison grievance systems.”³²

Some scholars disagree with the Court’s claim that exhausting prison grievance systems is simple. In an article in the *Berkeley Journal of Criminal Law*, Vaughn Ford-Plotkin argued that the PLRA keeps constitutional violations out of court by incentivizing complicated and slow administrative remedy processes.³³ Ford-Plotkin explained that administrative remedies also lead incarcerated people to fear retaliation for complaining, because the complaint processes are administered by the prisons themselves.³⁴ Because its requirements are “unduly harsh” and prevent incarcerated people from bringing suit, he wrote that repealing the PLRA is a “crucial step to enforcing people’s Eighth Amendment protections against cruel and unusual punishment in cases affected by climate change.”³⁵ However, Ford-Plotkin recognized that repealing the PLRA is a long-term goal and suggested that more immediate solutions are necessary to combat the pressing issue of climate change.³⁶

In addition to the PLRA’s barriers, prison officials have also resisted complying with existing orders to prepare for climate change. In California, Governor Gavin Newsom issued an executive order in 2015 requiring state agencies, including CDCR, to create a climate adaptation plan.³⁷ The order required agencies to “protect the state’s most vulnerable populations” and “build climate preparedness” through infrastructure investments.³⁸ CDCR created a

29. 42 U.S.C. § 1997(e) (2013).

30. *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (internal quotations omitted); *see* Ford-Plotkin, *supra* note 27, at 7.

31. *See, e.g.*, *Bey v. Pa. Dept. of Corrs.*, 98 F. Supp. 2d 650, 661 (E.D. Pa. 2000) (explaining that an incarcerated person “must exhaust his or her administrative remedies, regardless of whether exhaustion would be futile”) (internal quotations omitted); *Johnson v. Rivera*, 272 F.3d 519, 522 (7th Cir. 2001) (dismissing an incarcerated man’s claim that he was beaten by a correctional officer, requiring medical treatment, because the statute of limitations expired while he was in the process of exhausting administrative remedies).

32. *Woodford*, 548 U.S. at 103.

33. *See* Ford-Plotkin, *supra* note 27, at 6–7.

34. *Id.* at 7.

35. *Id.* at 30–31.

36. *See id.* at 32–33.

37. Cal. Exec. Order B-30-15 (Apr. 29, 2015).

38. *Id.*

publicly available plan in response.³⁹ But the plan is messy,⁴⁰ conclusory,⁴¹ and out of date per CDCR's own update standard.⁴² Regarding particularly vulnerable populations, the plan states:

A significant number of [CDCR's] offenders have either mental or medical health issues and those often include learning disabilities. They are more likely to have experienced some neglect prior to being housed with CDCR. Some of these individuals may be prescribed medications that do not react well with extreme heat conditions. Because these individuals are within the care and custody of CDCR, the unique needs and circumstances of this population are addressed as part of the standard offering of services, including provision of food, housing and education, or as part of their case management plan for those with mental and medical health needs. Once released and/or paroled, these same individuals may once again be subject to risks other vulnerable population's [*sic*] experience.⁴³

This section alone gives readers several reasons to believe that CDCR is not complying with Governor Newsom's order. First, the second and final sentences of this section seem to imply that disabled people are safer while incarcerated at CDCR facilities than when living freely.⁴⁴ This is inconsistent with the pervasive abuse of disabled people in California prisons, as evidenced by major disability rights litigation that took place after the climate plan's publication.⁴⁵ Second, while the fourth sentence claims that CDCR is taking steps to protect its vulnerable populations, such as those taking heat-sensitive medications, the EBC survey found that only 19.8 percent of their respondents who take those medications received any training on what to do in extreme heat.⁴⁶

39. See generally CAL. DEP'T OF CORRS. & REHAB., CHAPTER ONE: CLIMATE CHANGE ADAPTATION (2021), <https://www.cdcr.ca.gov/green/cdcr-green/climate-change-adaptation/> [<https://perma.cc/YTU6-Y6S>].

40. See *id.* at 5 (seemingly containing instructions from a drafting stage for a reviewer to fill in a table).

41. See *id.* at 17 (the section on wildfires which reads that “[m]ost CDCR institutions have on-site fire departments that are capable of fire responses under a number of circumstances”).

42. See *Sustainability Roadmap*, CAL. DEP'T OF CORRS. & REHAB., <https://www.cdcr.ca.gov/green/cdcr-green/sustainability-roadmap/> [<https://perma.cc/L2AW-9DFD>] (explaining in 2024 that these plans will be updated every two years, yet only displaying the 2020–21 plan) (last visited Apr. 17, 2024). While not obviously tied to the plan's defects, the plan also begins with an uncredited image of a grassy field morphing into a desert which a Google reverse image search shows appearing in only one other place on the internet: a Catholic blog post decrying Pope Francis' environmentalism because “[m]an was to have ‘dominion’ over creation.” See James V. Schall, S.J., *Concerning the “Ecological” Path to Salvation*, CATH. WORLD REP. (June 21, 2015), <https://www.catholicworldreport.com/2015/06/21/concerning-the-ecological-path-to-salvation/> [<https://perma.cc/V6AC-87UR>].

43. CAL. DEP'T OF CORRS. & REHAB., *supra* note 39, at 20.

44. See *id.*

45. See *Armstrong v. Newsom*, 58 F.4th 1283, 1290 (9th Cir. 2023) (finding that correctional officers beat incarcerated people with disabilities in retaliation for asking for accommodations, among other abuses).

46. ELLA BAKER CTR. REP., *supra* note 5, at 35; CAL. DEP'T OF CORRS. & REHAB., *supra* note 39, at 20.

Incarcerated people also perceive the lack of care and preparation for climate change in their institutions. As one incarcerated man in San Quentin explained in an interview for this Note,

No matter what the emergency related to climate change, the response by the government officials regarding the well-being of its incarcerated population is to ignore the crisis as long as possible, then delay acknowledging it to the media, until people start dying, then shift responsibility by plausible deniability [. . .] I believe that most correctional officers do not think about how climate change affects the incarcerated population.⁴⁷

In the face of imminent floods, storms, and wildfires, the prison system seems unprepared to ensure the safety of incarcerated people. Institutional legal barriers to accountability compound the issue, disincentivizing costly systemic change. If prison officials decline to plan for climate adaptation, advocates may need to seek judicial intervention to force necessary changes before more incarcerated people are harmed.

B. The Problem with Curative Strategies

There is a disconnect between academic literature on environmental harm in prisons and how litigators at leading prisoners' rights organizations bring the issue to court. In academic literature, criminal justice reform scholars call for abolition and decarceration to cure climate injustice in prisons. They argue that prisons operate as "little towns" comprised of large numbers of people who are both especially vulnerable to climate disasters and largely invisible to the public, which makes safety within prisons "extremely difficult if not impossible."⁴⁸ Because "the injustice of the legal system is inherent and intentionally produces harm," these scholars believe that only abolition will solve the impending harm of climate disasters in prisons.⁴⁹ Other scholars have suggested that reducing incarceration is a climate mitigation strategy itself because of the highly industrial and consumptive nature of prisons.⁵⁰ Short of immediate decarceration, EBC suggested prioritizing strategies that do not further fund prisons, such as developing a rapid release plan for emergencies or requiring the cost of climate updates to come out of existing prison funding.⁵¹

47. E-mail from Valerie Kiebala (Managing Editor, Solitary Watch, March 25, 2024) (on file with author).

48. Carlee Purdum, Felicia Henry, Sloan Rucker, Darien Alexander Williams, Richard Thomas, Benika Dixon & Fayola Jacobs, *No Justice, No Resilience: Prison Abolition as Disaster Mitigation in an Era of Climate Change*, 14 ENV'T JUST. 418, 420 (2021).

49. *Id.* at 424.

50. See, e.g., Julius Alexander McGee, Patrick Trent Greiner & Carl Appleton, *Locked into Emissions: How Mass Incarceration Contributes to Climate Change*, 8 SOC. CURRENTS 326, 327 (2021) (arguing that low-cost prison labor contributes to industrial climate change and that "as the percentage of people incarcerated increases over time, the demand to construct and maintain prisons will increase the amount of fossil fuels used in industrial development").

51. ELLA BAKER CTR. REP., *supra* note 5, at 45.

Contrastingly, some prisoners' rights litigators take an incremental approach that involves giving new funding to prisons. In an email interview, David Fathi, Director of the ACLU's National Prison Project, wrote:

This is of course a generalization, but I think some academics are more focused on longer-term goals like prison abolitions, while litigators are more focused on reducing suffering and death through incremental improvements in health care, environmental safety, and other conditions of confinement. I don't think those goals are in conflict, and I think advocacy on both fronts is needed. Even as we work toward a world without cages, we cannot ignore the hundreds of thousands of people who are suffering behind bars right now, for whom any abolition victory will come too late.⁵²

Climate change is particularly challenging to approach from an abolitionist angle alone, because it is already harming currently incarcerated people and will require significant investments in prison infrastructure to remediate. The issue for people incarcerated in the path of wildfires is not a matter of principles alone—it could be a matter of life and death. Incremental changes also do not happen in a vacuum. As a man who is currently incarcerated at San Quentin, explained, “The lifestyle changes are the most immediate and important aspects of reform, because culture changes lead to structural changes.”⁵³

Sympathetic courts can also implement incremental strategies more readily than decarceration remedies. The Honorable Judge Ellen Chaitin, now retired after twenty years on the bench of the San Francisco Superior Court, named some of the reasons that release remedies can be complicated for judges in an email interview.⁵⁴ She explained that criminal trial judges faced with jail condition complaints cannot order the jail to correct the condition, so “[t]he court's remedy is to release the defendant but it is unlikely.”⁵⁵ Judge Chaitin wrote, “Judges are reluctant to release a defendant for bad jail conditions because by releasing the defendant, they are accepting that conditions are bad. Thus, they alienate the prison authorities and open the door for other defendants to make the same demand.”⁵⁶ While relief differs in civil cases, civil trial judges considering release as a remedy must similarly consider the complex relationships with prison authorities and potential allegations of unequal application of justice that Judge Chaitin describes. In the short-term, incarcerated people need to seek remedies that judges are more prepared to grant.

52. E-mail from David Fathi, Dir., ACLU Nat'l Prison Project, to Hannah Trumbull (Feb. 25, 2024) (on file with author).

53. E-mail from Valerie Kiebala, Managing Ed., Solitary Watch, to Hannah Trumbull (Mar. 25, 2024) (on file with author). The currently incarcerated man is kept anonymous here for safety purposes.

54. E-mail from The Honorable Ellen Chaitin, Cal. Super. Ct. (Ret.), to Hannah Trumbull (Feb. 24, 2024) (on file with author).

55. *Id.*

56. *Id.*

Environmental justice attorneys fight to mitigate the worst effects of climate change through impact litigation targeting large polluters and government.⁵⁷ These strategies are better categorized as climate mitigation, not adaptation, because they aim to decrease the emissions that cause climate change.⁵⁸ Mitigation can only, at best, slow or stop the progression of climate change. It is ill suited for helping incarcerated people who are already experiencing climate disasters, who are forced to rely on prison administrators to protect them from climate disasters that can no longer be mitigated.

II.

DEFINING PALLIATIVE STRATEGIES

The term “palliative,” borrowed from the medical context, describes treatments that prioritize reducing a person’s suffering and improving their quality of life.⁵⁹ In the context of prisons, an incarcerated person’s attorney takes a palliative approach when prioritizing incremental improvements to the client’s quality of life. Palliative strategies for prison climate adaptation prioritize short-term realizable goals⁶⁰ by (1) obtaining short-term relief through litigating the tangible injuries and foreseeable risks that climate change causes; (2) making these risks familiar to court through analogies and the extension of established legal frameworks; and (3) creating strong coalitions on narrow shared climate issues through alliances with correctional officers.

Because of Article III standing requirements, the discrete tangible harms of climate change are much easier to litigate than dignity interests or climate change as a whole.⁶¹ In federal courts, plaintiffs must demonstrate that their injuries are distinct and palpable, fairly traced to the actions of the defendant, and redressable by a favorable decision.⁶² A currently pending case, *Juliana v. United States*, may extend the possibilities for more conceptual climate litigation in the United States.⁶³ For now, however, attorneys for currently incarcerated people should litigate foreseeable climate risks and tangible climate injuries that courts are better prepared to recognize.

57. See JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2022 SNAPSHOT 1 (2022) (highlighting efforts to make governments adhere to international climate commitments and hold fossil fuel companies accountable for resource depletion).

58. See VijayaVenkataRaman, Iniyana & Goic, *supra* note 26, at 890.

59. See MERRIAM-WEBSTER, *supra* note 22.

60. The phrase “short-term realizable goals” is borrowed from Eric Single, a harm reduction practitioner, who wrote that “[h]arm reduction is neutral about the long term goals of intervention while according a high priority to short-term realizable goals.” Eric Single, *Defining Harm Reduction*, 14 DRUG & ALCOHOL REV. 287 (1995).

61. See Timothy C. Hodits, *The Fatal Flaw of Standing: A Proposal for an Article I Tribunal for Environmental Claims*, 84 WASH. U. L. REV. 1907, 1907 (2006) (explaining the challenges environmental suits face in showing standing).

62. *Id.* at 1911–12.

63. See 217 F. Supp. 3d 1224, 1242–48 (D. Or. 2016) (holding that plaintiffs had standing for their climate change case).

Analogies to well-established bodies of law are critical to achieving incremental change for those currently suffering behind bars. David Fathi explained that courts have resisted environmental claims because such claims are “less familiar to courts than claims arising out of inadequate health care or staff brutality, and that can lead to some resistance or hesitancy.”⁶⁴ Thus, analogies to established precedent make environmental injuries more manageable for courts. “[W]e progress by persuading courts that new claims are similar to more familiar claims on which incarcerated people have prevailed in the past.”⁶⁵

Litigating for incremental change can also create opportunities for alliances between incarcerated people and correctional officers, a strategy that Prison Law Office used successfully in *Schwarzenegger v. Plata*.⁶⁶ The California Correctional Peace Officers Association (CCPOA) is widely regarded as America’s most powerful correctional officers’ union.⁶⁷ As of 2016, CCPOA employed twenty full-time staff and spent around \$8 million annually on lobbying alone.⁶⁸ In *Plata v. Schwarzenegger*, prisoners brought a case alleging that the overcrowding of California prisons led to a pervasive failure to provide medical care.⁶⁹ On appeal to the Supreme Court, CCPOA intervened in support of the prisoners, writing that correctional officers were responsible for prison operations and “CCPOA’s members cannot adequately perform these duties given the current state of overcrowding.”⁷⁰

Rita Lomio is a senior staff attorney at Prison Law Office, the organization that represented the *Plata* plaintiffs. In an email interview, Lomio wrote:

Prison conditions affect all people who live and work in the prisons. Put differently, prison conditions affect the safety and well-being of incarcerated people *and* staff. Too often, disputes are falsely politicized as an us-versus-them, zero-sum game. But more often than not, interests are aligned—or would be, with good faith effort to understand problems and their consequences, and to find common ground.⁷¹

When asked what circumstances lead to successful alliances between officers and incarcerated people, David Fathi wrote that “prison staff are more likely to be supportive [of prisoners’ rights litigation] if they are affected (even if

64. E-mail from David Fathi, Dir., ACLU Nat’l Prison Project, to Hannah Trumbull (Feb. 25, 2024) (on file with author).

65. *Id.*

66. *See* 560 U.S. 964 (2010).

67. Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 103 (2016).

68. *Id.*

69. 603 F.3d 1088, 1091 (9th Cir. 2010).

70. Brief for Appellee Intervenor California Correctional Peace Officers’ Association at 2, *Schwarzenegger v. Plata*, *aff’d sub nom. Brown v. Plata*, 563 U.S. 493 (2011) (No. 09-1233), 2010 WL 4253495, at *2.

71. E-mail from Rita Lomio, Senior Staff Att’y, Prison L. Off., to Hannah Trumbull (Feb. 28, 2024).

differently or to a lesser degree) by the conditions being challenged by incarcerated people.”⁷² To that end, this Note frames environmental issues in terms of the foreseeable risks and tangible injuries that impact correctional officers as well as incarcerated people. As Judge Chaitin put it, “As to unified interests with prison guards, the prison guard union is powerful. Lawyers for prisoners may pursue that strategy as a winning one.”⁷³

III.

APPLICATIONS

Incarcerated people, prisoners’ rights organizations, and correctional officers can use palliative strategies arising under various bodies of federal law. Each Section below uses one type of plaintiff (or combination thereof in a class), and one climate-related risk or injury as a case study for applying distinct bodies of law. In addition to the applications of federal law discussed below, advocates should explore state-specific laws like taxpayer standing that are less generally applicable.⁷⁴

A. *Constitutional Law*

Incarcerated people have a constitutional right to be free from cruel and unusual punishment under the Eighth Amendment.⁷⁵ Courts call inmates’ allegations that their prison conditions violate the Eighth Amendment “conditions of confinement” claims.⁷⁶ Courts traditionally use a “wait-and-see” approach in regards to conditions of confinement claims for speculative or novel issues, which suggests they will also do so in cases arising from climate change.⁷⁷

72. E-mail from David Fathi, Dir., ACLU Nat’l Prison Project, to Hannah Trumbull (Feb. 25, 2024) (on file with author).

73. E-mail from The Honorable Ellen Chaitin, Cal. Super. Ct. (Ret.), to Hannah Trumbull (Feb. 24, 2024) (on file with author).

74. See, e.g., 3 CAL. CIV. PROC. CODE § 526a (West 2019) (creating taxpayer standing in California to challenge illegal expenditures); *Blair v. Pitchess*, 5 Cal.3d 258, 267 (1971) (explaining that section 526(a) “authorizes actions by a resident taxpayer against officers of a county, town, city, or city and county to obtain an injunction restraining and preventing the illegal expenditure of public funds,” and that “California courts have consistently construed section 526a liberally to achieve this remedial purpose”). Prisoners’ rights advocates in California could use Public Records Act Requests to inquire into records like expenditure of climate adaptation funds and accommodations for particularly vulnerable prison populations to determine whether CDCR is complying with Governor Newsom’s executive order for all California agencies to create climate adaptation plans that prioritize particularly vulnerable populations. See CAL. GOV’T CODE § 72921-23; Cal. Exec. Order B-30-15 (Apr. 29, 2015). If advocates determined that CDCR is not complying with the executive order or any state laws, a taxpayer could sue for illegal expenditure of tax dollars. See 3 CAL. CIV. PROC. CODE § 526a (West 2019).

75. See U.S. CONST. amend. VIII.

76. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (“[A] prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement . . .”).

77. See Paloma Wu & D. Korbin Felder, *Hell and High Water: How Climate Change Can Harm Prison and Jail Residents, and Why COVID-19 Conditions Litigation Suggests Most Federal Courts*

However, incarcerated people may have more success by using analogies, such as comparing wildfire smoke inhalation to cigarette smoke inhalation, to vindicate their Eighth Amendment rights in court.

Environmental conditions of confinement cases are subject to a well-established two-pronged test.⁷⁸ First, the plaintiff must meet an objective prong by showing that the conditions in question pose “a substantial risk of serious harm.”⁷⁹ The plaintiff meets the objective prong by showing that the environmental risk is (1) “not one that today’s society chooses to tolerate”;⁸⁰ (2) the risk is “so grave that it violates contemporary standards of decency to expose *anyone* unwilling to such a risk;”⁸¹ and (3) “that he himself is being exposed at unreasonably high levels.”⁸² Second, the plaintiff must show that the defendant official’s subjective state of mind was one of deliberate indifference to the risk of harm.⁸³ To meet this subjective prong, the plaintiff must show that the official was “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.”⁸⁴ An official’s knowledge is a question of fact that is “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.”⁸⁵ Courts interpret the subjective prong to require a very specific showing of knowledge in environmental conditions of confinement cases.⁸⁶

Incarcerated people can meet the objective prong of an Eighth Amendment claim by showing that wildfire smoke is at least as dangerous as cigarette smoke—a danger that courts already recognize. In *Helling v. McKinney*, the Supreme Court held that involuntary exposure to tobacco smoke could form the basis of an Eighth Amendment claim.⁸⁷ There, an incarcerated man successfully alleged that prison officials’ failure to abate the environmental tobacco smoke from his cellmate’s cigarette use constituted cruel and unusual punishment that

Will Wait-And-See When Asked to Intervene, 49 FORDHAM URB. L.J. 259, 303–04 (2022). A “wait-and-see” approach in this context refers to waiting to see the impact of a climate issue instead of issuing preventative injunctions based on risks. *Id.* at 261.

78. *Farmer*, 511 U.S. at 834.

79. *Id.*

80. *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

81. *Id.*

82. *Id.* at 35.

83. *Id.* at 36–37.

84. *Farmer*, 511 U.S. at 837.

85. *Id.* at 842.

86. *See, e.g., Thompson v. Upshur County*, 245 F.3d 447, 459 (5th Cir. 2001) (explaining that the deliberate indifference prong “cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm”); *see also Carter v. Smith*, No. C–13–4373 EMC (pr), 2015 WL 432231 (N.D. Cal. July 15, 2015) (holding that a plaintiff who was injured while power-washing asbestos-wrapped pipes in prison could only proceed if the plaintiff could prove the specific defendant knew about the specific asbestos-wrapped pipes in question, despite showing that a broader group of defendants knew that there were asbestos-wrapped pipes in the building generally).

87. *Helling*, 509 U.S. at 35.

risked damage to his health.⁸⁸ Like secondhand cigarette smoke, wildfire smoke can cause both immediate and future harm to those forced to breathe it.⁸⁹ The harm is at least as dangerous as cigarette smoke because wildfire smoke exposure can be equivalent to smoking about seven cigarettes per day.⁹⁰ As in *Helling*, incarcerated plaintiffs should be entitled to relief from the long-term effects of wildfire smoke because “the Eighth Amendment protects against future harm.”⁹¹ *Helling* also shows that smoke can form the basis of a cruel and unusual punishment claim even if some free members of society do not protect themselves against it.⁹²

Incarcerated plaintiffs should be able to show subjective awareness of wildfire smoke more easily than in cigarette smoke cases due to the pervasive nature of wildfire smoke. Plaintiffs can use now-familiar images of red skies and people wearing masks as exhibits to demonstrate that the risk is obvious.⁹³ Plaintiffs can also use Public Record Act requests to look for evidence that CDCR is aware of the risks of smoke, such as increased purchases of masks and air filters during wildfire seasons.⁹⁴

Making the harms of wildfires digestible for courts allows incarcerated people to seek injunctions and put financial pressure on prisons through mass Eighth Amendment litigation. In *Washington v. Denney*, a court granted an asthmatic man \$40,000 in compensatory damages for injuries he suffered when prison officials housed him with a known smoker.⁹⁵ CDCR houses more than 65,000 incarcerated people within five miles of fire zones.⁹⁶ If every prisoner within five miles of a fire zone in California were entitled to the same damages as the plaintiff in *Denney*, it would cost the CDCR \$2.6 billion, 17 percent of its 2023-24 budget.⁹⁷ While incarcerated plaintiffs would likely appreciate compensatory damages for their injuries, they may prefer a remedy like air filtration that prevents future harm. To that end, plaintiffs may choose to use the threat of damages to obtain a settlement involving air filtration. They can also seek injunctive remedies through the courts. Courts are at times willing to grant broad injunctive remedies for pervasive issues in prisons, as illustrated in the

88. *Id.* at 28.

89. Devon Ryan, *Health Impacts of Wildfire Smoke*, STAN. UNIV. WOODS INST. FOR THE ENV'T (Oct. 15, 2020), <https://woods.stanford.edu/news/health-impacts-wildfire-smoke> [<https://perma.cc/8Q7H-V7CC>].

90. *See id.*; *Helling*, 509 U.S. at 35.

91. *Helling*, 509 U.S. at 33.

92. *Id.* at 29.

93. *See, e.g.*, Pendarvis Harshaw, *The Sign Outside of California Medical Facility State Prison in Vacaville, on a Smoky Hot August Afternoon* (photograph), in *Let's Talk About Wildfires and Prisons*, KQED (Aug. 24, 2020), <https://www.kqed.org/arts/13885195/lets-talk-about-wildfires-and-prisons> [<https://perma.cc/A7WV-P67Y>] (showing a dark, smoke-filled sky outside a CDCR facility).

94. *See* CAL. GOV'T CODE § 72920 et seq.

95. 900 F.3d 549, 555 (8th Cir. 2018).

96. Harris, Gumbs & Haye, *supra* note 13.

97. *See* GABRIEL PETEK, LEGIS. ANALYST'S OFF., THE 2023-24 BUDGET: THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION 2 (Feb. 2023).

following Section through two recent administrative law cases brought by the Prison Law Office.

B. Administrative Law

Administrative law provides unique pathways to enforcing safe prison conditions for incarcerated people and prison employees alike. Disabled inmates can sue prisons for failing to plan for their safe evacuation in climate disasters under the Department of Justice regulations deriving from the Americans with Disabilities Act (ADA).⁹⁸ Prison employees can seek regulatory enforcement of Occupational Health and Safety Administration (OSHA) standards, or their state equivalents, to keep them safe from smoke inhalation and mismanaged evacuations.⁹⁹ While enforcement challenges persist with regulatory solutions, administrative strategies can also provide important issue-specific leverage for particularly vulnerable populations.¹⁰⁰

1. Americans with Disabilities Act Regulations

Mismanaged evacuations are disastrous for incarcerated people with mobility impairments or those who require ongoing medical care.¹⁰¹ The ADA may provide opportunities for injunctive relief. The PLRA still applies to claims brought under the ADA, but some ADA class actions have proceeded without discussion of exhaustion where named plaintiffs have exhausted remedies or prison defendants have agreed to waive the exhaustion defense.¹⁰² Additionally, two California cases brought by the Prison Law Office illustrate that courts are willing to fashion broad injunctive relief to disability justice issues in prisons.¹⁰³ The willingness to grant injunctions can be extended to climate issues.

First, existing medical care injunctions should be extended to cover evacuation safety for incarcerated people with disabilities. In *Brown v. Plata*, the Supreme Court upheld a broad court order for California to reduce its prison population because overcrowding was a primary cause of Eighth Amendment violations related to medical care failures.¹⁰⁴ At the time of the lower court's

98. See 42 U.S.C. § 12101 (2009).

99. See 29 U.S.C. § 654 (1970).

100. Regulatory solutions are also subject to change following the Supreme Court's overturning of the *Chevron* doctrine in *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024). Due to the challenge of predicting the future of administrative law, this Article discusses existing regulatory powers as if they will continue to be applicable.

101. See ELLA BAKER CTR. REP., *supra* note 5, at 37.

102. See *Bernard v. Wrenn*, No. 07-cv-327-SM, 2009 WL 44205, at *1 (D.N.H. Jan. 6, 2009) (“[E]ven if plaintiff had an ADA claim, it would be subject to the PLRA.”); *O’Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1059–60 (9th Cir. 2007) (“[W]e agree that O’Guinn pleaded claims under the ADA and Rehabilitation Act rather than under § 1983, but conclude that the PLRA requires administrative exhaustion of ADA and Rehabilitation Act claims.”). *But see* *Armstrong v. Newsom*, 58 F.4th 1283 (9th Cir. 2023) (allowing a broad class of incarcerated people to bring suit under the ADA).

103. See, e.g., *Brown v. Plata*, 563 U.S. 493, 502 (2011); *Armstrong*, 58 F.4th at 1283.

104. *Brown*, 563 U.S. at 502.

decision, California's state prisons were filled to nearly double their capacity.¹⁰⁵ In the initial suits, starting in 1990, the State conceded that prison medical care was deficient and the parties stipulated to a remedial injunction.¹⁰⁶ In 2005, when the injunction failed to remedy the problem, the court appointed a Receiver to oversee the changes to the state prison system.¹⁰⁷ When the Receiver still reported deficiencies in medical care from overcrowding three years later, a three judge panel ordered the California prison system to create and submit a plan to reduce its population to 137.5 percent of its capacity within two years.¹⁰⁸

Moreover, disabled inmates can use *Brown v. Plata* to seek further injunctions, namely for evacuation, by comparing evacuation concerns to the medical care claims in the initial case. Like in *Plata*, individual interventions are insufficient because 40 percent of incarcerated people have a disability,¹⁰⁹ making evacuation concerns pervasive. The EBC found that most of its incarcerated respondents had never heard of an evacuation plan.¹¹⁰ This shows that, like medical care in *Plata*, lack of evacuation planning is an "extensive and ongoing constitutional violation" that "requires a remedy" justifying broad injunctive relief.¹¹¹ Furthermore, overcrowding itself leads to evacuation issues, such as packed hallways slowing people down or leading to crowd crushing in an emergency, and California prison facilities are still over capacity.¹¹² Within California, incarcerated people with disabilities can directly petition the receivership created by *Plata* to review the CDCR's evacuation plans as a medical issue for people with disabilities.¹¹³ Outside of California, incarcerated people can use *Plata* as persuasive authority to show how courts can intervene in issues related to disability.

Second, incarcerated people with disabilities should use the success of *Armstrong v. Newsom* to enforce the state's responsibility to plan for safe prison evacuations. In February of 2023, in the latest in a series of cases and appeals under *Armstrong*, the Ninth Circuit Court of Appeals affirmed a lower court's grant of injunctive relief for a broad class of disabled incarcerated people at six California prisons.¹¹⁴ The *Armstrong* class was first certified in 1994 as consisting of "all present and future California state prison inmates . . . with mobility, sight, hearing, learning[,] and kidney disabilities that substantially limit

105. *Id.* at 501.

106. *Id.* at 507.

107. *Id.*

108. *Id.* at 509–10.

109. See Laura M. Maruschak & Jennifer Bronson, *Survey of Prison Inmates, 2016 – Disabilities Reported by Prisoners*, U.S. DEPT. OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATS. (Mar. 2021), <https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf> [<https://perma.cc/3G2T-GSUJ>].

110. See ELLA BAKER CTR. REP., *supra* note 5, at 31.

111. *Brown*, 563 U.S. at 545.

112. See ELLA BAKER CTR. REP., *supra* note 5, at 7.

113. *Overview and Update on the Prison Receivership*, LEGIS. ANALYST'S OFF. (Nov. 8, 2023), <https://lao.ca.gov/Publications/Report/4813> [<https://perma.cc/2QTM-826V>].

114. 58 F.4th 1283, 1288 (9th Cir. 2023).

one or more of their major life activities.”¹¹⁵ Defendants in the first case created the *Armstrong* Remedial Plan, detailing their plan to “remedy the violations of the [*Armstrong*] class member’s rights.”¹¹⁶ But the state prison system failed to comply with this plan, leading to further injunctions clarifying and adding detail to the system’s responsibilities to the class.¹¹⁷ Nonetheless, a 2020 State “strike team” found that class members continued to report consistent and pervasive violations arising from staff misconduct, including staff beating or pepper-spraying inmates for requesting accommodations or for saying they wished to file a complaint.¹¹⁸ While motions related to those violations were pending, the plaintiffs moved for similar relief at five other state prisons.¹¹⁹ The declarations in those motions pertained to some *Armstrong* members and a separately certified class containing “all [California state] inmates with serious mental disorders.”¹²⁰ The district court ordered broad injunctive relief ranging from the installation of cameras to outside review of prison conditions and continuing disclosures to plaintiffs’ counsel.¹²¹

On appeal, the Ninth Circuit consolidated the cases and largely affirmed the lower court’s rulings.¹²² The court explained that the new allegations in the motion were sufficiently closely related to the original *Armstrong* complaint even though they included novel use of force claims because, among other reasons, “[r]efusing to communicate in writing with a deaf inmate and beating a deaf inmate who requests such a method of communication are both denials of a reasonable accommodation.”¹²³ The court upheld almost all of the district courts’ grants of injunctive relief¹²⁴ as not violating the PLRA because they were necessary, narrow, and the least intrusive means given the prison’s pervasive failure to comply with earlier legal orders.¹²⁵

115. *Armstrong*, 58 F.4th at 1288.

116. *Id.*

117. *Id.* at 1289.

118. *Id.*

119. *Id.* at 1290–91.

120. *Id.* at 1291.

121. *Id.*

122. *Id.* at 1292.

123. *Id.* at 1293.

124. *Id.* at 1293–95. The court did not uphold the district court’s injunctions relating to issues where necessity was not sufficiently proven (for example, tear gas training at five later-added prisons, because the lower court did not have enough factual basis for tear gas injuries at those prisons).

125. *Id.* at 1297. Section 3626(a)(1)(A) of the PLRA requires courts to make a “need-narrowness-intrusiveness” finding that the relief extends no further than necessary, is narrowly drawn, and is the least intrusive means to correct the violation of a federal right. The Ninth Circuit explained that the lower courts’ injunctions met the need requirement because the motions showed severe violations of inmate rights. *Armstrong*, 58 F.4th at 1297. On intrusiveness, the court explained that a district court may “provide specific instructions to the state without running afoul of the PLRA,” including “specific mechanisms,” particularly when the district court has previously tried less intrusive means to correct those deficiencies and they have failed. *Id.*

While the *Armstrong* court did not address evacuations, its order opens the door for appropriate remedies in the climate context.¹²⁶ The EBC was unable to assess the safety of CDCR's evacuation plans because CDCR denied its public records requests.¹²⁷ CDCR argues that it cannot share its evacuation plans due to security concerns.¹²⁸ However, the *Armstrong* court ordered CDCR to share information about its policies with plaintiffs' counsel with protective orders in place to protect information related to security.¹²⁹ A similar order could compel CDCR to share evacuation plans with relevant prisoners' advocates or safety planning experts for evaluation, with a protective order in place to abate CDCR's security concerns. The *Armstrong* court also ordered CDCR to increase staff training,¹³⁰ which could include training correctional officers how to safely evacuate disabled prisoners in an emergency.

Evacuation concerns are more speculative than the injuries in *Armstrong*, but incarcerated people can use past failed evacuations as cautionary examples. Prison evacuations during Katrina, for example, were particularly disastrous for incarcerated people with disabilities.¹³¹ One wheelchair user reported: "I was in a wheelchair and my whole unit was fill[ed] with sewer water. The deputies left the[ir] post and we had to kick on the door to get help. It took for the water to get over our beds before we were moved."¹³² Another mobility-impaired man said that he was left "in a wheelchair in such a dangerous situation and [he] actually drowned. Fortunately a guy on the tier knew CPR and brought [him] back to life."¹³³ Another incarcerated man reported that people with mobility impairments "had to be carried out by other inmates due to shortage or refusal of deputies."¹³⁴

CDCR is seemingly not complying with its own evacuation planning rules, leading advocates to fear that a wildfire evacuation of prisons could be as disastrous as the Katrina evacuations.¹³⁵ Incarcerated people should use the mismanaged evacuations during Katrina to argue that courts need to order CDCR to comply with its own evacuation preparedness rules before extreme climate events occur. They can strengthen this claim by working together with correctional officers to bring several administrative law claims through different venues at the same time.

126. *See id.* at 1291–92.

127. ELLA BAKER CTR. REP., *supra* note 5, at 27.

128. *Id.*

129. *Armstrong*, 58 F.4th at 1291–92, 1306 n.15.

130. *See id.* at 1291.

131. *ACLU Katrina Report*, *supra* note 18, at 39.

132. *Id.* at 43.

133. *Id.*

134. *Id.*

135. *See* ELLA BAKER CTR. REP., *supra* note 5, at 31 (explaining that the CDCR's Department Operations Manual requires quarterly evacuation drills, but eighty percent of the Center's survey respondents had never participated in an evacuation drill).

2. *Workplace Safety Regulations*

Administrative bodies can order changes to prison workplace conditions and impose fines for unsafe working conditions.¹³⁶ Regulatory actions may be more effective than employment law litigation for environmental workplace hazards because employment law claims may be dismissed if the employee was not required to work with the toxic substance itself.¹³⁷ All prison employees can use OSHA to seek regulatory remedies, and correctional officers also can use their powerful union, the CCPOA, to seek enforcement of workplace safety regulations for both smoke inhalation and evacuation planning. Incarcerated people who work in prisons are also nominally protected by workplace safety regulations, but are “functionally exempted” by courts failing to enforce such regulations against prisons.¹³⁸ The United States Department of Labor’s Occupational Safety and Health Administration (OSHA) governs federal workplace safety law.¹³⁹ Twenty-nine states also have their own workplace safety divisions approved under OSHA.¹⁴⁰ California is one such state, and its division, Cal/OSHA, has adopted standards specific to wildfire smoke.¹⁴¹

Cal/OSHA’s wildfire smoke regulations apply when the Air Quality Index (AQI) for particulate matter of 2.5 micrometers or smaller (PM2.5) reaches unhealthy levels.¹⁴² In such situations, Cal/OSHA requires all employers to use engineering controls to reduce PM2.5 levels “whenever feasible.”¹⁴³ If engineering controls are not feasible, the regulation requires employers to provide administrative controls like relocating work, changing work schedules, reducing work intensity, or providing more rest periods.¹⁴⁴ When PM2.5 levels are unhealthy but not hazardous, employers must also provide respirators for voluntary use and encourage employees to use them.¹⁴⁵

To seek relief under Cal/OSHA, a prison employee must first file a complaint with a Cal/OSHA committee created by the prison.¹⁴⁶ The committee

136. See, e.g., Martin Ricard, *Prison Faces Fines After Members Speak Up About Workplace Safety*, AFSCME COUNCIL 57 (May 10, 2018), <https://www.afscme57.org/news/prison-faces-fines-after-members-speak-about-workplace-safety> [<https://perma.cc/JUU3-Y897>] (reporting that Cal/OSHA fined the California State Prison in Lancaster several thousand dollars for workplace safety violations after an incarcerated man injured a correctional officer).

137. See *Adair v. United States*, 497 F.3d 1244, 1258 (Fed. Cir 2020) (holding that hazard pay is not available for environmental tobacco smoke because hazard pay is only available for exposure to toxic substances where the employee was working *with* the hazardous substance—i.e. as tools for work—as part of their job duties, which is not possible with smoke).

138. Megan Hauptman, *The Health and Safety of Incarcerated Workers: OSHA’s Applicability in the Prison Context*, 37 ABA J. LAB. & EMP. L. 71, 72 (2023).

139. 29 U.S.C. § 651 (1970).

140. See *State Plans*, OSHA, <https://www.osha.gov/stateplans/> [<https://perma.cc/7DPR-FGSJ>] (last visited Apr. 17, 2024).

141. See CAL. CODE REGS. tit. 8, § 5141.1 (2019).

142. *Id.* § 5141.1(a).

143. *Id.* § 5141.1(f)(1).

144. *Id.* § 5141.1(f)(2).

145. *Id.* § 5141.1(f)(3)(A).

146. CAL. CODE REGS. tit. 8, § 344.41.

is required to address the complaint within fifteen days by either recommending corrective measures, referring the matter to the Division of Occupational Safety, or dismissing the complaint as being without merit.¹⁴⁷ The person who filed the complaint receives notice of the decision and has the right to have the decision reviewed by the Cal/OSHA Division.¹⁴⁸ The Division has jurisdiction to investigate complaints, conduct hearings, and create special orders and regulations if it determines that the Department of Corrections has failed to comply with its recommendations.¹⁴⁹

Prison employees can raise Cal/OSHA complaints to make everyone in prisons more protected against wildfire smoke. Cal/OSHA's order of recommendations reflects a preference for engineering solutions over administrative solutions or masking, which is aligned with prison employees' and incarcerated people's interest in breathable prison air.¹⁵⁰ However, prison officials may be incentivized to offer respiratory protection to free employees alone because it would be less expensive than engineering solutions like comprehensive air filtration. To do so legally under Cal/OSHA, prison officials would claim that engineering solutions are less feasible than administrative solutions.¹⁵¹ Prison employees can rebut this claim by showing in their complaint that (1) smoke with dangerous levels of PM2.5 is so pervasive in the area that administrative solutions will be ineffective, and (2) voluntary masking will be insufficient to protect workers. To support the second point, employees can highlight the ineffectiveness of masks due to the burden of wearing them properly at all times.¹⁵² Masks alone are particularly ineffective for people with facial abnormalities or beards, and can make it harder to breathe.¹⁵³ Engineering controls like air filtration are more effective because they remove smoke closer to the source and negate the issues that arise with uncomfortable and ill-fitting masks.¹⁵⁴

Prison employees are also in danger during evacuations, which are the subject of significant workplace law. OSHA workplace standards require that employers train their employees in evacuation procedures that employees should follow.¹⁵⁵ Cal/OSHA requires that all businesses have fire safety plans detailing evacuation procedures that are accessible to all employees and the Division

147. *Id.* § 344.42.

148. *Id.*

149. *Id.* § 344.46.

150. *See id.* § 5141.1(f).

151. *See id.* § 5141.1(f)(3)(a).

152. *See* Robert J. Laumbach, *Clearing the Air on Personal Interventions to Reduce Exposure to Wildfire Smoke*, 16 ANNALS AM. THORACIC SOC'Y 815, 817 (2019), <https://www.atsjournals.org/doi/full/10.1513/AnnalsATS.201812-894PS> [https://perma.cc/ED3G-AQUQ].

153. *Id.*

154. *Id.*

155. 29 C.F.R. § 1910 (1974).

itself.¹⁵⁶ As explained above, the EBC survey data indicates the CDCR is not complying with these rules.¹⁵⁷ The ACLU's Katrina report shows that mismanaged evacuations are upsetting and physically dangerous for prison employees.¹⁵⁸ A medical staff member reported arriving at a prison after the hurricane and watching correctional officers shoot at inmates trying to escape out of windows: "I remember thinking: 'What in the hell have I gotten myself into?' I thought it was a war zone. . . . The medical staff took turns using one another's cell phones and chargers to make calls for help."¹⁵⁹ An incarcerated person said, "They had deputies sitting in the dark with the inmates. . . . No radios or ways to call for help. People were so scared."¹⁶⁰ Thus, incarcerated people and prison employees have shared interests in safe evacuations that advocates can use to form alliances that use both ADA precedent and workplace regulations. While palliative strategies using regulatory law would have the two groups raise separate claims, they can also combine their interests in a class action when their interests are sufficiently aligned.

C. Tort Law

Incarcerated people and prison employees have common interests in prison safety that they can use to sue prisons for negligently providing toxic drinking water through class action litigation in tort. Forty-six percent of prisons are in rural communities,¹⁶¹ many of which rely heavily on groundwater for drinking.¹⁶² A UC Berkeley study assessing twenty years of water quality data found that arsenic levels in Kern Valley State Prison's drinking water had exceeded recommended levels for years at a time.¹⁶³ Kern Valley State Prison even has a sign telling visitors not to drink the water, despite that same water being provided to inmates.¹⁶⁴ Water toxin levels are indirectly connected to climate change: when surface water availability decreases, cities extract more groundwater which leads to land subsidence and corresponding increases in

156. CAL. CODE REGS. tit. 8, § 8397.11.

157. See ELLA BAKER CTR. REP., *supra* note 5, at 31.

158. ACLU Katrina Report, *supra* note 18, at 45.

159. *Id.* at 24.

160. *Id.* at 45.

161. Sonya R. Porter, John L. Voorheis & William Sabol *Correctional Facility and Inmate Locations: Urban and Rural Status Patterns* 7 (U.S. Census Bureau Ctr. For Admin. Recs. Rsch. & Applications, Working Paper No. 2017-08, 2017).

162. Ryan Sabalow, Dale Kasler & Wes Venteicher, *Toxic Water in California Prisons: Sickening Inmates and Costing Taxpayers Millions*, SACRAMENTO BEE (May 3, 2019), <https://www.sacbee.com/news/politics-government/capitol-alert/article229294374.html> [<https://perma.cc/54ER-QGM9>].

163. Jenny Rempel, Isha Ray, Ethan Hessel, Jasmine Vazin, Zeihui Zhou, Shin Kim, Xuan Zhang, Chiyu Ding, Ziyi He, David Pellow & Alasdair Cohen, *The Human Right to Water: A 20-Year Comparative Analysis of Arsenic in Rural and Carceral Drinking Water Systems in California*, 130 ENV'T HEALTH PERSPS., Sept. 21, 2022, at 097701-1.

164. Sabalow et al., *supra* note 162.

groundwater toxin levels.¹⁶⁵ The PLRA makes it difficult for incarcerated people to litigate toxic drinking water on their own.¹⁶⁶ While prison employees have access to bottled water, they still have a strong interest in clean water in their workplaces and have litigated the issue in the past.¹⁶⁷ Incarcerated people and prison employees alike can therefore sue prisons for negligently failing to protect them from water toxicity using toxic tort class actions.

Incarcerated people, correctional officers, and people who live near prisons may form a consolidated class for toxic tort litigation.¹⁶⁸ In *Crooks vs. LCS Corrections Services*, the Louisiana Court of Appeals affirmed the consolidation of two class actions arising from a toxic train derailment near a prison, where one of the classes consisted of both incarcerated people and prison employees and the other consisted of people from a nearby town.¹⁶⁹ There, a train full of toxic chemicals derailed near a prison, causing headaches and skin irritation to incarcerated people, prison employees, and people who lived near the prison.¹⁷⁰ The court explained that certification of the consolidated classes was proper because the injuries suffered were common to both classes, their claims were plausible, and the claims of the representative party (a former prisoner) were typical of the claims of all class members.¹⁷¹ The case settled out of court.¹⁷² All told, the railway paid \$65 million to 10,000 claimants including the *Crooks* class and other parties.¹⁷³

Advocates can use *Crooks* as a model for correctional officers and incarcerated people to bring water toxicity class actions against prisons. To achieve class certification in California courts, plaintiffs must show (1) “the existence of both an ascertainable and sufficiently numerous class,” (2) “a well-defined community of interest,” and (3) substantial benefits from certification that render proceeding as a class superior to the alternatives.¹⁷⁴ Advocates can meet the first element by showing that, like in *Crooks*, the number of people impacted by arsenic in a particular groundwater source is high enough that

165. Ryan Smith, Rosemary Knight & Scott Fendorf, *Overpumping Leads to California Groundwater Arsenic Threat*, 9 NAT. COMMUN. 1, 2 (2018).

166. See *Yates v. Collier*, 677 F. App’x 915, 917–18 (5th Cir. 2017) (holding that a prison’s appeal of a district court’s injunction requiring the prison to reduce arsenic in prison drinking water was moot because the injunction automatically expired under the PLRA).

167. See *Abarca v. Merck & Co.*, No. 1:07cv0388 OWW DLB, 2009 WL 2390583, at *1 (E.D. Cal. Aug. 3, 2009) (in which a group of Merced County Jail employees filed a claim regarding unsafe arsenic levels in the drinking water).

168. See *Crooks v. LCS Corrs. Servs., Inc.*, 994 So. 2d 101, 113 (La. Ct. App. 2008).

169. *Id.* at 105.

170. *Id.*

171. See *id.* at 108–13.

172. *In re Eunice Train Derailment*, No. 6:00CV1267, 2005 U.S. Dist. LEXIS 46237 (W.D. La. Jan. 3, 2012).

173. *UP Settles Class Action Suit Related to Louisiana Derailment*, PROGRESSIVE RAILROADING (May 26, 2004), https://www.progressiverailroading.com/union_pacific/news/UP-settles-class-action-suit-related-to-Louisiana-derailment--6125 [<https://perma.cc/AEK7-ZQ7G>].

174. *Lockheed Martin Corp. v. Superior Court*, 29 Cal. 4th 1096, 1102, 1104, concurrence at 1121 (Cal. 2003) (internal quotations omitted).

“separate suits would unduly burden the courts.”¹⁷⁵ Advocates can meet the third element by showing that, like in *Crooks*, a class action is superior to individual actions because it allows the parties to comprehensively litigate shared issues—here, the negative health impacts of water toxins and the prison’s negligence in failing to provide clean drinking water.¹⁷⁶

Unfortunately, where the PLRA applies, the second element may preclude class certification. A well-defined community of interest requires that class members share important questions of law and fact.¹⁷⁷ Prisons could argue that class certification is not appropriate because the PLRA defense is an important question of law that is available against incarcerated people but not against employees.¹⁷⁸ Thus, there is a chance that all currently incarcerated people could be dismissed from the class as not being a member of the well-defined community of interest.¹⁷⁹

Currently incarcerated people could benefit from a class action even if their own claims were dismissed under the PLRA.¹⁸⁰ First, advocates could seek judicial condemnation of prison conditions by strategically including formerly incarcerated people in the class.¹⁸¹ In a few cases, courts have ruled that formerly incarcerated people are not subject to the PLRA for claims that arose while they were incarcerated.¹⁸² This is because a free person’s amended complaint supersedes their previous unexhausted complaint and obviates the PLRA exhaustion defense,¹⁸³ even if the new claims were unexhausted at initial filing.¹⁸⁴ Obtaining judicial rulings that a prison was negligent in providing toxic

175. See *Crooks v. LCS Corrs. Servs., Inc.*, 994 So. 2d 101, 108 (La. Ct. App. 2008) (finding that 800 claimants met the numerosity requirement); see, e.g., Rempel, et al., *supra* note 164, at 097701-2 (showing that the population of Kern Valley State Prison was 5,300 and the population of neighboring towns totaled around 68,500).

176. *Crooks*, 994 So. 2d at 112; Chin-Chi Kuo, Katherine A. Moon, Shu-Li Wang, Ellen Silbergeld & Ana Navas-Acien, *The Association of Arsenic Metabolism with Cancer, Cardiovascular Disease, and Diabetes: A Systemic Review of the Epidemiological Evidence*, 125 ENV’T HEALTH PERSPS., Aug. 1, 2017, at 087001-1.

177. *Sav-On Drug Stores v. Superior Court*, 96 P.3d 194, 199 (Cal. 2004).

178. See 18 U.S.C. 3626(a)(1)(A) (1997).

179. *Id.*

180. *Id.*

181. See generally E-mail from The Honorable Ellen Chaitin, Cal. Super. Ct. (Ret.), to Hannah Trumbull (Feb. 24, 2024) (on file with author) (explaining that judges are hesitant to grant remedies to incarcerated people that show prison conditions are bad because others would bring similar claims).

182. See *Jackson v. Fong*, 870 F.3d 928, 934–35 (9th Cir. 2017); *Ricker v. Salas*, No. 19-CV-807 TWR (LL), 2020 WL 6484639, at *1 (S.D. Cal. Nov. 3, 2020); *Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010).

183. *Jackson*, 870 F.3d at 934–35 (explaining that “[e]xhaustion requirements apply based on when a plaintiff files the operative complaint,” so an “amended complaint, filed when [the plaintiff] was no longer a prisoner, obviates an exhaustion defense”).

184. *Rhodes*, 621 F.3d at 1005 (stating that, “[a]s a general rule, when a plaintiff files an amended complaint, ‘[t]he amended complaint supercedes the original, the latter being treated thereafter as non-existent,’” meaning that the amended complaint could not be dismissed on the ground of the initial complaints failure to exhaust); see also *Cano v. Taylor*, 739 F.3d 1214, 1220 (9th Cir. 2014) (“If,

drinking water to formerly incarcerated people would help people who were still incarcerated bring future claims.¹⁸⁵ Second, court-ordered measures to remove toxins from the prison water supply would benefit incarcerated people even if they were dismissed from the suit.¹⁸⁶ Finally, if the suit caused prisons to provide bottled water to correctional officers in lieu of engineering solutions, incarcerated people could also use that as evidence of the objective harmfulness of the water for future Eighth Amendment claims.¹⁸⁷

IV. LIMITATIONS

Palliative strategies do not address the root causes of climate change and mass incarceration.¹⁸⁸ This makes them ineffective at fixing problems embedded in the legal system, like the challenges incarcerated people can face testifying in court. Incremental remedies are also less likely than systemic remedies to reduce the harm of novel emergencies, like COVID-19, before they occur. Finally, incremental remedies are ineffective if prison officials are recalcitrant in the face of judicial and policy interventions.

First, palliative strategies are limited by the fact that judges sometimes disregard inmates' testimony, which places prisons outside of the law. In *Rouse v. Caruso*, a Michigan court ruled against an incarcerated man alleging an Eighth Amendment violation based on his own testimony that prisons' ventilation only worked half of the time, leaving the air full of cigarette smoke.¹⁸⁹ The court did not allow the man's testimony to meet the objective element of his claim because "although plaintiff [could] testify as to how he felt, he [was] not qualified to give an opinion of the actual quality of the ventilation."¹⁹⁰ The court also declined to

however, a plaintiff files an amended complaint adding new claims based on conduct that occurred after the filing of the initial complaint, the plaintiff need only show that the new claims were exhausted before tendering the amended complaint to the clerk for filing.").

185. *But see Ricker*, 2020 WL 6484639 at *6 (refusing to "impute bad faith" on the motive to amend after becoming free on the plaintiff's part because "[i]f [d]efendants felt that [p]laintiff's motion for leave to amend was an effort to gain the benefit of escaping the exhaustion requirement under *Jackson*, they could have opposed the motion on that ground," which implies the appearance of gamesmanship under this strategy could be problematic) (internal quotations omitted).

186. *See generally* Jia-Qian Jiang, S. M. Ashekuzzaman, Anlun Jiang, S.M. Sharifuzziman & Sayedur Rahman Chowdhury, *Arsenic Contaminated Groundwater and Its Treatment Options in Bangladesh*, 10 INT. J. ENV'T RSCH. & PUB. HEALTH 1, 18 (2013) (explaining simple and low-cost measures to remove arsenic from a population's water supply).

187. *See Helling v. McKinney*, 509 U.S. 25, 36–37 (1993).

188. *See* Tiffany H. Morrison, W. Neil Adger, Arun Agrawal, Katrina Brown, Matthew J. Hornsey, Terry P. Hughes, Meha Jain, Maria Carmen Lemos, Lucy Holmes McHugh, Saffron O'Neill & Derek Van Berkel, *Radical Interventions for Climate-Impacted Systems*, 12 NATURE CLIMATE CHANGE 1100, 1100 (2022) (identifying the root drivers of climate change as "capitalism and materialism, asymmetrical power relations and lock-in of exploitative and extractive systems"); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 22–39 (2003) (tying the creation of the American prison system to racism and the need for labor).

189. No. 06–CV–10961–DT., 2011 WL 918327, at *26–28 (E.D. Mich. Feb. 28, 2011).

190. *Id.* at *21.

hold the prison accountable for its failure to meet fire safety standards, such as egress codes, explaining that “the Eighth Amendment does not require that prisons meet fire and electrical codes.”¹⁹¹ The court justified its holding by arguing that “the federal courts must avoid becoming enmeshed in the minutiae of prison operations, and should decline to second-guess prison administrators in the operation of correctional facilities.”¹⁹² Incarcerated people can try to circumvent this by collaborating with prison employees to bring claims. However, that workaround is less helpful when incarcerated people accuse prison employees themselves of abuse or negligence as part of their claim.¹⁹³

Second, incremental quality-of-life improvements do not protect against novel emergencies if they do not fix the underlying factors that make prisons dangerous. An example of an unforeseen emergency is the COVID-19 pandemic, which killed at least 260 incarcerated people in California alone.¹⁹⁴ During the pandemic, CDCR officials transferred incarcerated people with COVID between prisons.¹⁹⁵ This led to an outbreak at San Quentin where 75 percent of inmates became infected.¹⁹⁶ Systemic changes—like increased oversight of prison officials’ decision making, crisis planning, and decarceration—would likely have made the COVID-19 pandemic less deadly for incarcerated people.¹⁹⁷ Incarcerated people who win quality of life cases for incremental prison condition improvement are still subject to the judicial system’s “wait-and-see” approach when novel issues arise.¹⁹⁸

Third, even when incarcerated people win, prison officials are often resistant to change. Even when an inmate’s conditions of confinement claim meets all other necessary criteria, officials avoid “liability if they responded reasonably to the risk, even if the harm ultimately was not averted.”¹⁹⁹ The *Armstrong* case shows that prison officials can neglect to institute changes despite years of litigation and increasingly strict judicial orders.²⁰⁰ Rita Lomio, who represented the *Armstrong* class during her tenure at Prison Law Office, wrote:

Even after ‘winning’ in court, it is very difficult to implement a court

191. *Id.* at *26 (internal quotation omitted). Egress refers to unobstructed paths out of a building, especially for emergency exit situations such as fires. See *What is a Means of Egress?*, CERTIFIED COM. PROP. INSPECTORS ASS’N, <https://ccpia.org/what-is-a-means-of-egress/> [<https://perma.cc/AF8T-J5J5>].

192. *Rouse*, 2011 WL 918327 at *26 (quoting *Coniglio v. Thomas*, 657 F. Supp. 409, 414 (S.D.N.Y. 1987)).

193. See, e.g., *Cooper v. Casey*, 97 F.3d 914, 915–926 (7th Cir. 1996) (affirming a judgment in favor of incarcerated people for correctional officers beating them and denying them medical care, where the correctional officers denied the severity of the beating). Note that this case arose before the PLRA took effect, and the court declined to apply the PLRA retroactively. *Id.* at 921.

194. ELLA BAKER CTR. REP., *supra* note 5, at 15.

195. *Id.*

196. *Id.*

197. *Id.* at 3, 20, 29.

198. Wu & Felder, *supra* note 77, at 303–04.

199. *Farmer v. Brennan*, 511 U.S. 825, 844 (1994).

200. See *Armstrong v. Newsom*, 58 F.4th 1283 (2023).

order in a complete and durable manner. The devil, as they say, is in the details. And new policies and procedures only work with buy-in from those affected by them, meaningful review and oversight, and accountability mechanisms.²⁰¹

While some palliative strategies can build buy-in from correctional officers, they are still subject to the challenging process of implementing change even after a judicial order. Thus, while incarcerated people can use palliative strategies to seek short-term relief from the harms of climate change, that relief is still limited by underlying systemic issues with the prison system.

CONCLUSION

In *Parable of the Sower*, a prescient novel from 1994 about preserving humanity in a climate dystopia, Octavia Butler wrote that “[t]he only lasting truth is Change.”²⁰² In *Emergent Strategy*, writer adrienne maree brown interpreted Butler’s words to mean that organizers should plan around adaptation.²⁰³ “Adaptation reduces exhaustion. No one bears the burden alone of figuring out the next move and muscling towards it. There is an efficiency at play—is something not working? Stop. Change. If something is working, keep doing it—learning and innovating as you go.”²⁰⁴

Climate emergencies in prisons exist at the intersection of some of the most complex and divisive issues of modern times. Since their inception, American prisons have been a key ideological battleground in the national struggle for equality.²⁰⁵ The country is also deeply divided over whether and how to address climate change.²⁰⁶ Nonetheless, Americans from across the political divide agree that systemic prison reform is necessary, even if they disagree on how those reforms should take place.²⁰⁷ Still, systemic change happens slowly. The principle of adaptation²⁰⁸ suggests that incarcerated people and at least some of their allies seek incremental changes that have a chance of saving lives before the next wildfire hits a California prison.

Palliative strategies prioritize short-term goals and incremental change to improve quality of life for incarcerated people facing the effects of climate

201. E-mail from Rita Lomio, Senior Staff Att’y, Prison L. Off., to Hannah Trumbull (Feb. 28, 2024).

202. OCTAVIA E. BUTLER, *PARABLE OF THE SOWER* 3 (Grand Cent. Publ’g ed., 2019) (1994).

203. ADRIENNE MAREE BROWN, *EMERGENT STRATEGY* 75, 156 (2017). brown intentionally stylizes her name in all lower-case letters. See Shannon Thomas, *precisely irresistible: in conversation with Angela Davis and adrienne maree brown*, JUST MEDIA (Nov. 18, 2020), <https://www.justmedia.online/post/making-every-word-irresistible> [https://perma.cc/GV65-7REL].

204. BROWN, *supra* note 207, at 70.

205. See DAVIS, *supra* note 191, at 22–39.

206. See Hari M. Osofsky & Jacqueline Peel, *Energy Partisanship*, 65 EMORY L.J. 695, 696–700 (2016).

207. See Sharon Stern Gerstman, *What Do John Legend, the Koch Brothers, and NYSBA Have in Common?*, 89 N.Y. ST. B.A. J. 5, 5 (2017).

208. See BROWN, *supra* note 207.

change.²⁰⁹ The tools available under this approach take familiar forms like constitutional law, administrative law, and tort law that courts can readily apply.²¹⁰ They are designed to address foreseeable risks and tangible injuries including, but not limited to, smoke inhalation, evacuation planning, water toxicity, and infrastructure damage.²¹¹ Palliative strategies create opportunities for alliances with correctional officers who have common interests with incarcerated people, such as their shared interest in clean air and water in prisons.²¹² The strategies proposed in this Note are an answer to the question brown asks: How can we adapt towards what works?²¹³

209. *See infra* Part II.

210. *See infra* Part III.

211. *Id.*

212. *Id.*

213. *See* BROWN, *supra* note 207, at 70.