



HUMAN RIGHTS CLINIC

THE UNIVERSITY *of* TEXAS SCHOOL *of* LAW



Deadly Heat in Texas Prisons

**A report from the Human Rights Clinic
at the University of Texas School of Law**

April 2014

This report does not represent the official position of the School of Law or of The University of Texas, and the views presented here reflect only the opinions of the individual authors and of the Human Rights Clinic.

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Acronyms & Abbreviations

(In order of first appearance)

TDCJ	Texas Department of Criminal Justice
NWS	National Weather Service
CDC	Centers for Disease Control
ACA	American Correctional Association
OSHA	Occupational Safety and Health Administration
TCJS	Texas Commission on Jail Standards
ASHRAE	American Society of Heating, Refrigerating and Air-Conditioning Engineers
ABA	American Bar Association
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant of Civil and Political Rights
UDHR	United Nations' Universal Declaration of Human Rights
ADRDM	American Declaration of the Rights and Duties of Man
IACtHR	Inter-American Court of Human Rights
CAT	Committee Against Torture
ACHR	American Convention on Human Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
OAS	Organization of American States
CPT	European Committee on the Prevention of Torture
UN	United Nations

Executive Summary

The Texas Department of Criminal Justice (TDCJ) is currently violating the human and constitutional rights of inmates in Texas by exposing them to dangerously high temperatures and extreme heat conditions. Extreme heat in TDCJ-run correctional facilities has long caused heat-related injuries and deaths of inmates during the hot Texas summers. Since 2007, at least fourteen inmates incarcerated in various TDCJ facilities across the state of Texas have died from extreme heat exposure while imprisoned. Many of these inmates had preexisting health conditions or were taking medications that rendered them heat-sensitive, yet properly cooled living areas were not provided to them by the TDCJ. These fourteen victims, along with other TDCJ prisoners and even TDCJ personnel, were and continue to be exposed to dangerously high heat levels on a regular basis. This practice violates individuals' human rights, particularly the rights to health, life, physical integrity, and dignity.

In spite of repeated, serious, and egregious incidents, the TDCJ has yet to implement measures that effectively mitigate heat-related injury in inmate housing. While the TDCJ has installed fans and allowed for ventilation in inmate living areas, the Centers for Disease Control (CDC) has proven these measures to be ineffective in preventing heat-related injuries in very hot and humid conditions, such as those present in TDCJ facilities. Despite these findings, TDCJ facilities largely do not provide air conditioning to the living areas of the general inmate population, many of whom are serving time for non-violent offenses. At the same time, the TDCJ has spent money on air conditioning for its warden offices and for its armories. Additionally, the TDCJ has not promulgated any maximum temperature policies for inmate housing, even though the Texas Commission on Jail Standards and numerous other state departments of corrections across the country have done so. As a result, TDCJ inmates continue to suffer through Texas summers, and are forced to risk heatstroke and other heat-related injuries while incarcerated with the TDCJ.

This Report, prepared by the Human Rights Clinic of the University of Texas School of Law, concludes that current conditions in TDCJ facilities constitute a violation of Texas's duty to guarantee the rights to health, life, physical integrity, and dignity of detainees, as well as its duty to prevent inhuman or degrading treatment of its inmates. These duties have been affirmed by countless human rights bodies and instruments such as the United Nations Human Rights Committee, the Universal Declaration of Human Rights, the Inter-American Commission on Human Rights, and the American Declaration on the Rights and Duties of Man, to mention just a few. Many international human rights decisions have found that extreme heat similar to situations in Texas contributes to a finding of inhuman or degrading prison conditions. The TDCJ's continued incarceration of inmates in extreme heat conditions violates its duties to inmates, and constitutes inhumane treatment of such prisoners in violation of international human rights standards.

The Human Rights Clinic concludes that current extreme heat conditions in TDCJ facilities also violate inmates' constitutional right to be free from cruel and unusual punishment.

The United States Court of Appeals for the Fifth Circuit has recognized time and again that extreme heat in prisons can constitute a violation of inmates' Eighth Amendment rights. In a 2012 case, a 63 year old Texas prisoner presented with a preexisting blood pressure condition, and was taking medication that would affect his body's ability to regulate temperature. The court decided that a reasonable jury could conclude that a failure to provide air conditioning, among other things, to an individual with these conditions was a violation of the prisoner's constitutional rights. Most recently, the Middle District of Louisiana issued a decision in 2013 condemning the extreme heat conditions in a Louisiana prison facility similar to those conditions present in TDCJ facilities as a violation of the Constitution. There is therefore clear and recent precedent for denouncing the hot conditions in TDCJ facilities as violating the guarantees and rights of inmates under the Eighth Amendment.

Given that the TDCJ's current treatment of its prisoners is a violation of the Constitution and international human rights law, the Human Rights Clinic recommends the following actions to immediately eliminate the TDCJ's current practice of inhumane treatment of its prisoners in extreme heat conditions:

1. The Texas Department of Criminal Justice should immediately codify and implement preventative policy measures for the coming summer months to prevent exposing inmates to extreme heat conditions and, particularly, to avoid additional heat-related injuries and deaths. Permanent and adequate measures should, at the least, include installation of air conditioning units to keep temperatures in inmate housing areas below 85 °F. Until this is completed, TDCJ should take additional precautions to reduce the risk of injury and death, including:
 - a. Immediate screening of all new inmates for health conditions or medications that could make them more susceptible to heat-related illness;
 - b. Immediate movement of more susceptible new inmates to housing areas that do not have temperatures exceeding 85 °F;
 - c. If areas at a safe temperature are not yet available, continuous monitoring of susceptible new inmates which starts immediately after screening;
 - d. Frequent monitoring of any inmates housed in non-air-conditioned units when temperatures in inmate housing areas exceed 85 °F;
 - e. Provision of constant inmate access to cool liquids and ice; and
 - f. Uniform documentation of these practices, including number of inmates classified as susceptible to heat-related illness and quantity of cool liquids provided per inmate.
2. In the long term, either by promulgation of new TDCJ policy or by amendment of the Texas Administrative Code, a maximum temperature standard should be set for all TDCJ facilities. This standard should mirror the standards promulgated by the Texas

Commission on Jail Standards and the standards TDCJ currently has in place for the prison workplace. Specifically, the standard should follow widespread precedent and adopt a maximum temperature standard of 85 °F throughout its facilities, including in prison cells and inmate housing areas.

3. The TDCJ Board and Texas Legislature should approve funding as necessary for installation of permanent air-conditioning at TDCJ prison facilities, as needed, to ensure temperatures do not exceed 85 °F.

By continuing to disregard the plight of TDCJ inmates subject to extreme heat, Texas and the Texas Department of Criminal Justice are in violation of both international human rights standards as well as the Constitution. The TDCJ therefore must take immediate action to protect the human rights of its prisoners.

Introduction

Since 2007, at least fourteen inmates have died from extreme heat exposure while detained in correctional facilities run by the TDCJ.¹ These deaths have taken place in various prisons and transfer facilities throughout Texas, including the Gurney, Michael, Hutchins, Huntsville, Hodges, and Garza West Units. Aside from the Huntsville Unit,² these facilities were opened in the past thirty years, but still lack safe climatic and temperature conditions for inmates detained within them. The families of some of the inmates who have died have brought complaints in federal district court, seeking justice for the inhumane treatment and overheated prison conditions that contributed to the death of their loved ones.³

Exposure to extreme heat in detention conditions such as those present in Texas prisons violates several human rights of those incarcerated and constitutes cruel and unusual punishment under the Eighth Amendment. This Report discusses how Texas ignores current scientific findings regarding the dangers of extreme heat and how extreme temperatures are an ongoing threat to the lives of many inmates in Texas prisons. The findings of the Report demonstrate how the current situation is contrary to Texas's constitutional obligations to protect inmates from cruel and unusual punishment are discussed. The Report also demonstrates that Texas has not met the obligations arising from international human rights standards relating to the treatment of prisoners under extreme heat conditions. Texas also falls short in comparison with the standards developed by other states. Finally, the Report proposes heat-mitigating standards and procedures for Texas prisons, and urges the TDCJ to implement such standards in order to prevent future human rights violations in its facilities.

Current standards for mitigating extreme heat in TDCJ facilities (or lack thereof) are woefully inadequate by any comparative measure. Not only do the conditions in TDCJ facilities violate international standards for detention conditions, but these conditions also constitute violations of the Constitution. Texas lags behind many other southern states with regard to enacting and enforcing adequate standards to deal with extreme heat in its prisons. Even Texas county jails have standards for maximum allowable heat.

This Report from the Human Rights Clinic of the University of Texas School of Law was co-written by Albert Suarez IV, Kyle Shen, Samantha Chen, and Alex Goeman under the supervision and guidance of the Clinic's Director Ariel Dulitzky.

¹ For purposes of this report, reference to "Texas prison(s)," "correctional facilities run by the TDCJ," "TDCJ-run correctional facilities," "TDCJ facilities" shall mean "state prisons, state jails[,] and private correctional facilities that contract with the TDCJ." *About the Texas Department of Criminal Justice*, TEX. DEP'T. OF CRIMINAL JUSTICE, https://www.tdcj.state.tx.us/about_tdcj.html (last visited March 29, 2014).

² The Huntsville Unit was established in 1849. *Unit Directory: Huntsville Unit*, TEX. DEP'T OF CRIMINAL JUSTICE, http://www.tdcj.state.tx.us/unit_directory/index.html (last visited Feb. 27, 2014).

³ These cases are: *Adams v. Livingston*, *Marone v. Livingston*, *McCollum v. Livingston*, *Togonidze v. Livingston*, *Webb v. Livingston*, and *Hinojosa v. Livingston*. Each case is brought on behalf of the family of a person whose family member has died in a prison in Texas, and seeks compensatory, punitive, presumed, and nominal damages to which the family member is entitled for the wrongful death of their kin.

I. Texas Prison Inmates and Staff Are Exposed to Dangerous Heat Conditions

In Texas, average summer temperatures frequently reach over 90 °F,⁴ and are often combined with humidity levels that can approach 100%.⁵ These temperatures produce concerns for health among the general population.⁶ Air conditioning in these conditions becomes very important, particularly for children, the elderly, and people with disabilities or medical conditions that make them vulnerable to the heat.⁷ It is estimated that by the year 2011, 88% of newly built single family homes in the United States were equipped with air conditioning.⁸ Prisoners with certain physical or medical conditions are at an even higher risk for heat-related illnesses, as they are incarcerated in enclosed environments with limited freedom of movement. Nevertheless none of the TDCJ facilities in which inmates died of heat illnesses were equipped with air conditioning for the general inmate population.⁹

The National Weather Service (NWS) recognizes the danger of heat-related injury, calling excessive heat “one of the leading weather-related killer[s] in the United States, resulting in hundreds of fatalities each year.”¹⁰ As humidity increases, the chances of heat-related injury rise to dangerous levels, even at relatively low summer temperatures.¹¹ The NWS offers a chart¹² to identify the risks of heat-related injury in different climates, which shows a sharp increase in the likelihood of heat-related injury when high humidity coincides with high temperatures.¹³ Despite these risks, Texas prison staff has recorded prison internal heat indices that fall squarely in the “extreme danger” category identified by the NWS, illustrating the TDCJ’s continued indifference to endangering the health or lives of heat-vulnerable inmates.¹⁴

⁴ *Climatology Comparison*, THE WEATHER CHANNEL, <http://www.weather.com/weather/wxclimatology/compare/77002?sfld1=Palestine,%20TX&sfld2=Rusk,%20TX&clocid1=&clocid2=> (last visited Feb. 27, 2014).

⁵ See *infra* Figure 2.

⁶ *Hot Weather Exercise Tips*, TEXAS HEART INSTITUTE (December 2013), <http://www.texasheart.org/hic/topics/hsmart/hydrate.cfm> (last visited Feb. 27, 2014).

⁷ *Heat: A Major Killer*, NAT’L WEATHER SERV. OFFICE OF CLIMATE, WATER, AND WEATHER SERVICES (Jan. 14, 2014), <http://www.nws.noaa.gov/os/heat/index.shtml> (last visited Feb. 27, 2014) [hereinafter NWS].

⁸ U.S. Dep’t of Commerce, *Heating and Cooling the Home*, U.S. CENSUS BUREAU NEWS: FACTS FOR FEATURES, April 22, 2013, available at https://www.census.gov/newsroom/releases/pdf/cb13ff-08_earthday.pdf.

⁹ *Frequently Asked Questions*, TEX. DEP’T OF CRIMINAL JUSTICE, https://www.tdcj.state.tx.us/faq/faq_cid.html#air (last visited Feb. 27, 2014).

¹⁰ NWS, *supra* note 7.

¹¹ *Id.*

¹² See *infra* Figure 1.

¹³ *Id.*

¹⁴ See *infra* Figure 2.

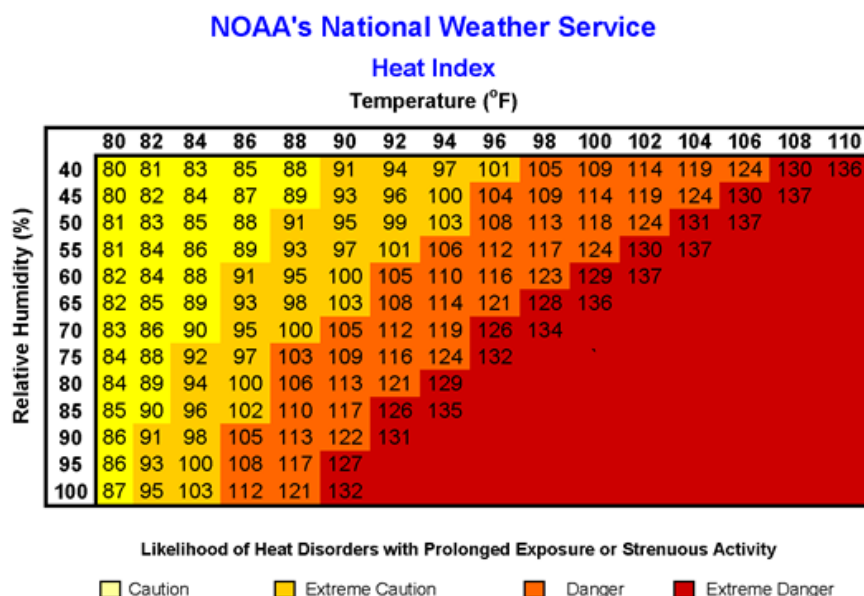


Figure 1: NWS Heat Index Chart¹⁵

Texas has one of the highest imprisonment rates and one of the largest inmate populations in the country.¹⁶ The TDCJ's latest published statistics show that there were 152,303 incarcerated individuals in TDCJ facilities as of August 31, 2012,¹⁷ located in 109 TDCJ units throughout the state.¹⁸ Most of these inmates are exposed to extreme heat. Recent TDCJ temperature logs have recorded heat indices surpassing 100 °F by 8:30 in the morning.¹⁹ Even if the climate remained in this state for the entire day, inmates already would be facing heat indices that the NWS has identified as approaching with extreme caution due to an increased likelihood of heat-related injury.²⁰ In some instances, records also show that air temperatures outside some TDCJ facilities have spiked above 110 °F by 10:30AM, resulting in a heat index exceeding 149 °F.²¹ These temperatures can remain at that level for several hours;²² indeed, investigations into heat-related deaths at TDCJ facilities have found temperatures above 90 °F even past midnight.²³ This heat far exceeds any levels of extreme danger identified by the NWS.²⁴

¹⁵ NWS, *supra* note 7.

¹⁶ E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012 – ADVANCE COUNTS 1 (July 2013), *available at* <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>.

¹⁷ TEX. DEP'T OF CRIMINAL JUSTICE, FISCAL YEAR 2012 STATISTICAL REPORT 1, *available at* http://www.tdcj.state.tx.us/documents/Statistical_Report_FY2012.pdf.

¹⁸ *Unit Directory*, TEX. DEP'T OF CRIMINAL JUSTICE, http://www.tdcj.state.tx.us/unit_directory/index.html (last visited Feb. 27, 2014).

¹⁹ *See infra* Figure 2.

²⁰ NWS, *supra* note 7.

²¹ *See infra* Figure 2.

²² *Id.*

²³ Complaint at 130–31, *Hinojosa v. Livingston*, No.2:13-cv-00319 (S.D. Tex. Dec. 15, 2013); UNIVERSITY OF TEXAS MEDICAL BRANCH, FINAL AUTOPSY REPORT: HINOJOSA, ALBERT 2 (2012).

²⁴ *See supra* Figure 1.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
Temperature Log

Unit: H5

7-19-11

Date:	Outside Air Temperature	Humidity or Wind Speed	Heat Index or Wind Chill	Person Recording
9:30 a.m.	99°	64%	120°	BURST
10:30 a.m.	112	65%	149° +	BURST
11:30 a.m.	124°	65%	149° +	BURST
12:30 p.m.	112°	65%	149° +	BURST
1:30 a.m.	114°	59%	160° +	BURST
2:30 p.m.	104°	48%	117°	ETIAS COS
3:30 p.m.	105°	45%	117°	ETIAS COS

Figure 2: Temperature Log, Hutchins Unit, Texas Department of Criminal Justice²⁵

Additionally, almost half of TDCJ facilities are built with outer walls that are either partially or fully constructed from metal.²⁶ Temperatures in these metal-constructed facilities are consistently higher than ambient temperatures or temperatures in concrete facilities.²⁷ Inmates housed in these facilities have no way of escaping the heat, and are placed at risk of suffering heatstroke as a result.

Despite extreme temperatures, TDCJ-run correctional facilities (with the exception of hospitals and psychiatric facilities) generally do not provide air conditioning to prison inmates, as would be the proper and adequate measure to take.²⁸ While the commissaries in TDCJ

²⁵ TEX. DEP'T OF CRIMINAL JUSTICE, TEMPERATURE LOG HUTCHINS UNIT (July 19, 2011).

²⁶ Joseph Torey Nalbone, Evaluation of Building and Occupant Response to Temperature and Humidity: Non-Traditional Heat Stress Considerations: A Comparison of Different Construction Types Used by the Texas Department of Criminal Justice 7 (Dec. 2004) (unpublished Ph.D. dissertation, Texas A&M University), available at <http://repository.tamu.edu/bitstream/handle/1969.1/1504/etd-tamu-2004C-ITDE-Nalbone.pdf?sequence=1>.

²⁷ *Id.* at 29.

²⁸ *Frequently Asked Questions*, *supra* note 9.

facilities sell fans to inmates for \$22.50,²⁹ those fans are the fifth most expensive item on a list that is largely populated with items costing less than a dollar each.³⁰ Not only is this price prohibitively expensive to many suffering inmates, the use of fans in extremely hot and humid conditions may not even mitigate the situation for these prisoners. Studies conducted by the CDC have reported that fans will not protect a person from heatstroke and heat-related illnesses when temperatures are above 90 °F and humidity is above 35%.³¹ In fact, using fans in extremely hot and humid conditions may actually increase heat stress on the body.³² As already stated, TDCJ records³³ show that temperatures and humidity in its prison units many times exceed these levels in the summer months, causing danger to inmates that can quickly progress to death.³⁴

²⁹ TEX. DEP'T OF CRIMINAL JUSTICE, COMMISSARY AND TRUST FUND PRICE LIST (Nov. 22, 2013), *available at* http://www.tdcj.state.tx.us/documents/finance/Commissary_Price_List_11-22-2013.pdf.

³⁰ *Id.* Texas Citizens United for Rehabilitation of Errants (TX-CURE) runs a fan program through which indigent prisoners are provided fans at no cost to them. *Texas CURE Fan Program*, TEXAS CURE, <http://www.texascore.org/fanprogram.html> (last visited Apr. 3, 2014). However, the availability of the fans is dependent on donations received by TX-CURE, and “the group never has enough funding to help everyone who requests [a fan].” Bob Ray Sanders, *When Summer arrives, Texas inmates suffer more*, FORT WORTH STAR-TELEGRAM, (Jun. 1, 2013), <http://www.star-telegram.com/2013/06/01/4899449/sanders-when-summer-arrives-texas.html>.

³¹ Ctr.s for Disease Control and Prevention, *Heat-Related Illnesses, Deaths, and Risk Factors --- Cincinnati and Dayton, Ohio, 1999, and United States, 1979-1997*, MORBIDITY AND MORTALITY WEEKLY REPORT (June 2, 2000), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4921a3.htm> (last visited Feb. 27, 2014) [hereinafter MORBIDITY AND MORTALITY WEEKLY REPORT].

³² *See, e.g., Precautions Can Prevent Heat-Related Illnesses*, CITY OF HOUSTON, <http://www.houstontx.gov/health/heatillness.html> (last visited Apr. 2, 2014); *Fans*, NATIONAL COLLABORATING CENTRE FOR ENVIRONMENTAL HEALTH (March 2011), http://www.ncceh.ca/en/major_projects/heat_advice/fans (last visited Apr. 2, 2014).

³³ *See supra* Figure 2.

³⁴ *See* R. Sari Kovats & Shakoob Hajat, *Heat Stress and Public Health: A Critical Review*, 29 ANNUAL REV. OF PUB. HEALTH 9.1, 9.2 (2008), *available at* <http://cgch.lshtm.ac.uk/Heat%20Stress%20and%20Public%20Health%20A%20critical%20review.pdf>.



Figure 3: Small Fan in Inmate Cell³⁵

Deadly Texas prison temperatures have been a long-standing, ongoing issue in TDCJ-run facilities, and the TDCJ is well aware of this issue. For example, at least sixteen Texas prison inmates experienced symptoms related to hyperthermia in the summer of 1998, three of whom died from their symptoms.³⁶ Many of those inmates had preexisting health conditions and were receiving psychotropic medications, yet were housed in units that were not cooled to their medical needs.³⁷ Over the years, TDCJ facilities seem to have seen little improvement, completely disregarding the rights and dignity of its inmates. Since 2007, at least fourteen inmates have died from extreme heat³⁸ in nine different TDCJ prisons.³⁹ All fourteen inmates had preexisting health circumstances that rendered them more vulnerable to heat-related illnesses, such as obesity, diabetes, and history of hypertension.⁴⁰ ⁴¹ Thirteen of the fourteen

³⁵ Photograph, Tex. Dep't of Criminal Justice, Polunsky Unit Fan, Livingston, TX (Jan. 1, 2006) (on file with author).

³⁶ HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 125 (2003), available at <http://www.hrw.org/reports/2003/usa1003/13.htm>; Letter from Dr. Jeffrey L Metzner to attorney Donna Brorby (December 31, 1998) 17, available at <http://www.clearinghouse.net/chDocs/public/PC-TX-0003-0015.pdf>.

³⁷ HUMAN RIGHTS WATCH, *supra* note 36.

³⁸ Amended Complaint at 14–15, *Adams v. Livingston*, No.3:13-cv-00217 (S.D. Tex. July 24, 2013). There may well be more heat-related deaths that have not been reported as such. See Abderrezak Bouchama & James P. Knochel, *Heat Stroke*, 346 NEW ENG. J. MED. 1978, 1978 (2002) (stating that heat stroke is an underdiagnosed illness).

³⁹ *Id.* at 14–15. These units are Byrd Unit, Gurney Unit, Hutchins Unit, Coffield Unit, Hodge Unit, Michael Unit, Huntsville Unit, Connally Unit, and Garza West Unit.

⁴⁰ RICHARD BEEBE & JEFFREY MYERS, PROFESSIONAL PARAMEDIC, VOLUME III: TRAUMA CARE & EMS OPERATIONS 271 (2011); *Extreme Heat: A Prevention Guide to Promote Your Personal Health and Safety Continued*, CTR.S FOR DISEASE CONTROL AND PREVENTION (July 31, 2009), http://www.bt.cdc.gov/disasters/extremeheat/heat_guide-page-2.asp (last visited Feb. 27, 2014); *Frequently Asked*

inmates were also on prescribed medication at the time of their deaths.⁴² These medications included diuretics, psychotropics, and beta-blockers,⁴³ all of which can further inhibit the body's ability to sweat or otherwise cool down, and should have alerted medical staff of inmates' susceptibility to heatstroke. Five of the inmates spent less than a week in TDCJ custody before the dangerously hot conditions in the prison facilities, and the lack of proper TDCJ preventative measures, killed them.⁴⁴ All inmates whose body temperatures were measured had body temperatures of over 105 °F at the time of their deaths.⁴⁵

High temperatures have not only exposed inmates to dangerous situations and caused multiple deaths, but have also consistently and systematically harmed prison personnel. In 2012, 92 TDCJ correctional officers suffered heat-related injuries or illnesses, and 55 additional injuries and illnesses were recorded by the TDCJ by September of 2013.⁴⁶ Many of these same officers also filed workers' compensation claims with the Texas Department of Insurance.⁴⁷ In 2011, 66 heat-related workers' compensation claims were filed by TDCJ correctional officers, 66 were filed in 2012, and 40 in 2013.⁴⁸ The situation has become so egregious that in October of 2013, union officials representing corrections officers in Texas prisons publicly supported lawsuits filed by families of prisoners who had died, citing the stifling heat and heat-related injuries among prison guards.⁴⁹ The union reported that corrections officers complained of temperatures as high as 130 °F, and were especially incensed that Texas had spent \$750,000 on exhaust fans and misters for pig farms to keep swine cool, while neglecting extreme heat conditions for inmates and guards inside the prisons.⁵⁰ Not only does this heat cause significant injury to guards, but it also precludes them from properly managing inmates by discouraging prolonged exposure to the extremely hot inmate housing areas of the prisons.

The dangerous heat situation in Texas prisons is well documented. Almost every audit report of the American Correctional Association (ACA)⁵¹ performed on TDCJ facilities during

Questions About Extreme Heat, CTR.S FOR DISEASE CONTROL AND PREVENTION (Aug. 15, 2006), <http://www.bt.cdc.gov/disasters/extremeheat/faq.asp> (last visited Feb. 27, 2014).

⁴¹ Amended Complaint, *supra* note 38, at 15.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 23.

⁴⁵ *Id.* at 21.

⁴⁶ Brittney Martin, *Guards May Join Inmates in Complaints Over Heat in Texas Prisons*, DALLAS NEWS (Sept. 17, 2013), <http://www.dallasnews.com/news/state/headlines/20130917-guards-may-join-inmates-in-complaints-over-heat-in-texas-prisons.ece> (last visited Feb. 27, 2014).

⁴⁷ *Id.*

⁴⁸ E-mail from Roslan Daniels, Program Supervisor I, Risk Management, ARRM Division, Texas Department of Criminal Justice, to author (March 27, 2014, 4:00 CST) (on file with author). These numbers may be higher. See Martin, *supra* note 46 (stating that 72 “heat prostration” claims were filed by corrections employees in 2012).

⁴⁹ Ann Zimmerman, *Extreme Heat Tests Prisons*, WALL ST. J., Oct. 17, 2013, *available at* <http://online.wsj.com/news/articles/SB10001424052702304441404579123381202026834>.

⁵⁰ *Id.*

⁵¹ The ACA promulgates national standards applicable to domestic correctional facilities. *Standards & Accreditation*, AMERICAN CORRECTIONAL ASSOCIATION, https://www.aca.org/standards/faq.asp#overview_what (last visited Feb. 27, 2014). For a facility to become ACA accredited, it must comply with a certain percentage of ACA standards. *Id.* Compliance is based largely on the results of an ACA audit. *Id.* If a facility is found to be in

the summer months mention the hot conditions inside TDCJ prisons.⁵² The audit for the Cole-Moore unit, in particular, mentions that the inmate living areas were “uncomfortably warm in spite of the use of large fans.”⁵³ In addition, the ACA’s audit of the Gurney Unit noted the deaths of five inmates in the “very hot summer” of 2011, stating that “[e]ach of these persons had medical and/or mental health conditions that placed him at risk, and excessive heat was judged to have been a significant contributing factor in the deaths.”⁵⁴ While the ACA accredited these units, the subject of heat was brought up time and again, showing that extreme heat is a tangible and noticeable issue in TDCJ facilities.⁵⁵ Despite these findings, the TDCJ has failed to take any proper action.

II. Extreme Heat in TDCJ Facilities is Unhealthy

Extreme heat injuries are widely studied in medical and scientific literature, as well as by government and regulatory bodies. The effect of excessive heat on the human body is called hyperthermia.⁵⁶ One result of hyperthermia is heat stroke,⁵⁷ the most extreme type of heat-related injury and the sort suffered by those who died in TDCJ prisons. Heat stroke occurs once the body is no longer able to reduce its internal temperature.⁵⁸ When this occurs, the body’s internal temperature rises to 106 °F within ten to fifteen minutes; two inmates who died from heat stroke in TDCJ facilities had body temperatures above 109 °F at time of death.⁵⁹ ⁶⁰ The pulse becomes strong and rapid,⁶¹ and his or her skin will feel very hot.⁶² Eventually, the person may become

compliance and is subsequently accredited, the accreditation award will last up to three years, at which point the facility must become re-accredited. *Id.*

⁵² See, e.g., AMERICAN CORRECTIONAL ASSOCIATION COMMISSION ON ACCREDITATION FOR CORRECTIONS, ACCREDITATION REPORT: BRISCOE/COTULLA UNIT 7 (2012); AMERICAN CORRECTIONAL ASSOCIATION COMMISSION ON ACCREDITATION FOR CORRECTIONS, ACCREDITATION REPORT: COLE/MOORE UNIT 7 (2012) [hereinafter COLE/MOORE UNIT]; AMERICAN CORRECTIONAL ASSOCIATION COMMISSION ON ACCREDITATION FOR CORRECTIONS, ACCREDITATION REPORT: EASTHAM UNIT 6 (2011). Despite these issues, every TDCJ-run facility subject to ACA audits in the last three years has been accredited by the ACA.

⁵³ COLE/MOORE UNIT, *supra* note 52, at 7.

⁵⁴ AMERICAN CORRECTIONAL ASSOCIATION COMMISSION ON ACCREDITATION FOR CORRECTIONS, ACCREDITATION REPORT: GURNEY UNIT 9 (2012).

⁵⁵ There has been some criticism among significant organizations such as the ABA about the accreditation process of prison accreditation bodies. See American Bar Association Criminal Justice Section, *Key Requirements for the Certification of Correctional Accrediting Agencies* (2011), available at http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/2011a_resolution_105b.authcheckdam.pdf (critiquing currently available accreditation processes and calling for more transparency and accountability of accreditation bodies).

⁵⁶ NWS, *supra* note 7.

⁵⁷ Ctr.s for Disease Control and Prevention, *Heat Stress*, THE NAT. INST. FOR OCCUPATIONAL SAFETY AND HEALTH (Nov. 7, 2013), <http://www.cdc.gov/niosh/topics/heatstress/> (last visited Feb. 27, 2014) [hereinafter NIOSH].

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Amended Complaint, *supra* note 38, at 15.

⁶¹ *Heat Illness*, U.S. NAT’L LIBRARY OF MEDICINE NAT’L INST.S OF HEALTH (Feb. 25, 2014), <http://www.nlm.nih.gov/medlineplus/heatillness.html> (last visited Feb. 27, 2014).

⁶² *Heatstroke: Symptoms*, MAYO CLINIC (Sept. 2, 2011), <http://www.mayoclinic.org/diseases-conditions/heat-stroke/basics/symptoms/con-20032814> (last visited Feb. 27, 2014).

unconscious.⁶³ At a certain point, the organs, including the brain, will stop functioning.⁶⁴ Given prompt and proper treatment, a person may recover from this condition, but if left untreated, the person risks permanent disability or death, sometimes within ten to fifteen minutes.⁶⁵

Several other types of injuries can result from exposure to excessive heat. At any stage of heat-related illness, prompt treatment is important to stave off more dangerous symptoms.⁶⁶ Heat-related illness can manifest in relatively mild conditions, like heat rash, where a person's skin breaks out in rough, itchy patches of red blemishes.⁶⁷ More than just an uncomfortable inconvenience, these red splotches impede the skin's ability to sweat, which further exacerbates the body's overheating problem.⁶⁸ If the person has been involved in strenuous physical activity, heat cramps may also occur.⁶⁹ These are painful and uncontrollable muscle spasms in the legs or the abdomen.⁷⁰ More serious conditions include heat exhaustion, where a person becomes sluggish and very weak as their body pushes to cool itself.⁷¹ The person develops cold and clammy skin, a weak and rapid pulse, and may even faint.⁷² Because the body's primary coping mechanism for heat is sweating, dehydration often accompanies heat-related illnesses.⁷³ Dehydration is dangerous not only because it means the body can no longer sweat properly, but also because it can independently lead to organ failure through the loss of important electrolytes and nutrients on which the body relies to function properly.⁷⁴

The effect of heat on an individual's physiology will vary from person to person. However, organizations such as the Department of Labor's Occupational Safety and Health Administration (OSHA) and the CDC have outlined conditions where the likelihood of heat-related illness increases across the broader population.

The OSHA recommends that even workers involved in light, sedentary work like writing or knitting should avoid continuous work in temperatures higher than 87 °F.⁷⁵ The OSHA states that ample supplies of liquids should be made available to these workers, and that workers should drink small amounts frequently (such as one cup every twenty minutes) to replace lost fluids.⁷⁶ Furthermore, efforts at climate control like proper ventilation, air conditioning and fans

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ NWS, *supra* note 7.

⁶⁷ NIOSH, *supra* note 57.

⁶⁸ *Id.*

⁶⁹ NWS, *supra* note 7.

⁷⁰ *Id.*

⁷¹ NIOSH, *supra* note 57.

⁷² *Id.*

⁷³ NWS, *supra* note 7.

⁷⁴ *Dehydration*, MAYO CLINIC (Feb. 12, 2014),

<http://www.mayoclinic.com/health/dehydration/DS00561/DSECTION=complications> (last visited Feb. 27, 2014).

⁷⁵ *OSHA Technical Manual (OTM) Section III: Chapter 4*, UNITED STATES DEPARTMENT OF LABOR OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, *available at*

https://www.osha.gov/dts/osta/otm/otm_iii/otm_iii_4.html#iii:4_3.

⁷⁶ *Id.*

should be used to avoid heat-related injury.⁷⁷ The CDC has adopted similar recommendations. Any time heat-related injury may become an issue, the CDC recommends the frequent replacement of fluids and taking breaks from prolonged exposure to extreme heat and humidity.⁷⁸ The CDC has also found that while fans may be helpful and may increase comfort when temperatures are below 90 °F, they will not protect against heatstroke and heat-related illnesses when temperatures are above 90 °F and humidity is above 35%.⁷⁹

For instance, in 2006, the CDC investigated climatic conditions at an aluminum smelter in Texas during late July.⁸⁰ The CDC investigation discovered that workers in the smelting plant were exposed to indoor temperatures ranging from 83 °F to 120 °F, accounting for humidity, radiant heat, and wind.⁸¹ These temperatures are similar to those present in TDC facilities.⁸² Many participants in the investigation reported symptoms of heat-related injury like rapid heartbeat, headache, muscle cramps, and lightheadedness,⁸³ and showed signs of inadequate hydration and acute kidney injury from fluid depletion.⁸⁴ Given these findings, the CDC report recommended the installation of a cooling area and the elimination of long overtime shifts that exposed workers to overheated conditions for prolonged periods.⁸⁵ By continuing to subject TDCJ inmates to extreme heat for hours at a time, the TDCJ has clearly not followed the recommendations of this CDC report. Additionally, the CDC found that personal protective equipment⁸⁶ was considered “the least effective means for controlling employee exposures,” “should not be relied upon as the sole method for limiting employee exposures,” but rather was to be used “until engineering and administrative controls can be demonstrated to be effective in limiting exposures to acceptable levels.”⁸⁷ Therefore, while provision of lightweight or “appropriate”⁸⁸ clothing may be helpful in mitigating heat-related injury, it is, on its own, not enough to adequately limit inmate heat exposure.

The TDCJ Risk Management Department is well aware of the risks of heat-related illnesses when temperatures and humidity rise. In its May 2013 Training Circular, a publication

⁷⁷ *Id.*

⁷⁸ NIOSH, *supra* note 57.

⁷⁹ MORBIDITY AND MORTALITY WEEKLY REPORT, *supra* note 31.

⁸⁰ BICH DANG ET AL., NAT’L INST. FOR OCCUPATIONAL SAFETY AND HEALTH, HEAT STRESS AND STRAIN EVALUATION AMONG ALUMINUM POTROOM EMPLOYEES – TEXAS iv (2011), *available at* <http://www.cdc.gov/niosh/hhe/reports/pdfs/2006-0307-3139.pdf>.

⁸¹ *Id.* at 5.

⁸² *See supra* Figure 1.

⁸³ *Id.* at 6.

⁸⁴ *Id.* at 7.

⁸⁵ *Id.* at 10–11.

⁸⁶ Personal protective equipment is defined as equipment worn to minimize exposure to serious workplace injuries and illnesses. *Personal Protective Equipment*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/SLTC/personalprotectiveequipment/> (last visited March 29, 2014). The CDC report suggests the use of lightweight, reflective aprons as personal protective equipment for aluminum plant workers. DANG ET AL., *supra* note 80, at 11. Personal protective equipment protecting against heat stress can include, among other things, reflective clothing or wetted clothing. *Heat Stress Guide*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/SLTC/emergencypreparedness/guides/heat.html> (last visited March 29, 2014).

⁸⁷ DANG ET AL., *supra* note 80, at 11.

⁸⁸ ADMIN. DIRECTIVE AD-10.64 (REV. 6) 5 (2008).

distributed among TDCJ employees to manage risk and to raise awareness in TDCJ prisons, the TDCJ admits that risks for heatstroke can begin at temperatures as low as 91 °F, and that temperatures of 95 °F can create an imminent danger of developing heatstroke.⁸⁹ Despite this training, the TDCJ has failed to adopt comprehensive measures to prevent or minimize risk of heat-related injury. The Risk Management Department has even trained its employees in heat injury prevention for their pets, asking employees if their homes were air conditioned and if fresh, cool water was available to their pets at all times.⁹⁰ Unfortunately for TDCJ inmates, these measures are not made available to them in their cells, and temperatures in TDCJ-run correctional facilities continue to pose a threat to the lives of TDCJ inmates.

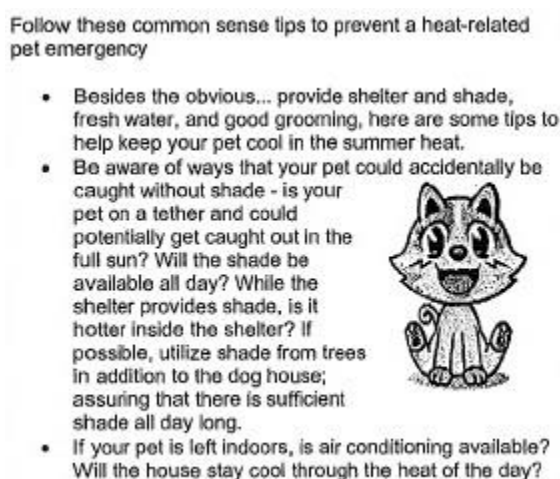


Figure 4: TDCJ Risk Management Department: Injury Prevention—Heat Awareness Training⁹¹

III. Texas Prisons Lack Adequate and Effective Policies to Protect Inmates from Exposure to Extreme Heat and Heat-Related Injuries

Despite the obvious need for procedures to mitigate heat-related situations in Texas prisons, the TDCJ does not have standards in place to protect inmates from life-threatening temperatures in their cells, and has failed to adopt effective measures to do so.

While the Executive Director of TDCJ has a statutory responsibility to establish or to delegate the establishment of guidelines for the treatment of prisoners under TDCJ care,⁹² currently promulgated procedures controlling inmate exposure to extreme temperatures apply

⁸⁹ Tex. Dep't of Criminal Justice, *May Hot Weather*, TDCJ RISK MGMT.'S TRAINING CIRCULAR, May 2013, at 4, available at https://www.tdcj.state.tx.us/documents/training_circular/Training_Circular_2013-05.pdf.

⁹⁰ SHERILYN EPPERSON, TEX. DEP'T OF CRIMINAL JUSTICE, INJURY PREVENTION—HEAT AWARENESS TRAINING 9, 10 (2010).

⁹¹ *Id.* at 9.

⁹² TEX. GOV'T CODE § 493.006 (2011).

only to the working conditions of inmates, not to their living areas.⁹³ According to those procedures, when inmates are placed in work environments where temperatures cannot be controlled by the TDCJ (such as outdoor work), the Warden and the Department Supervisors must ensure that appropriate measures are taken to prevent temperature-related injury.⁹⁴ When there exists a possibility of heat exhaustion or heatstroke, the Warden must instruct staff to initiate precautionary measures.⁹⁵ At heat indices as low as 90 °F, staff is required to implement five minute rest breaks per hour for inmates on work assignment.⁹⁶ When the heat index reaches 110 °F, staff must promote high water intake, implement five minute rest breaks every half hour during which inmates must lie down with their feet raised, and work is to be reduced by one third.⁹⁷ When the heat index reaches 130 °F, work pace should be reduced by one half to two thirds, excessive water intake is required, and ten minute rest breaks are implemented every half hour, during which inmates must lie down with their feet raised.⁹⁸ Staff is also is instructed to conduct a special medical evaluation on inmates taking diuretics or other sweat-inhibiting drugs before assigning them to work assignments in extreme heat conditions.⁹⁹ Although these detailed standards are useful to both staff and inmates in prison work environments, no similar TDCJ standard is available for inmate cells and living areas, where inmates spend a large part of their time. Given that many of the most heat-vulnerable prisoners may not be allowed to work due to their health issues, heat-mitigating measures in work environments do not help the situation of the most heat-sensitive inmates.¹⁰⁰

This is not to say that all Texas governmental agencies have failed to act with regard to inmate housing conditions. While the TDCJ is responsible for operation of many state correctional facilities, the Texas Commission on Jail Standards (TCJS) regulates and monitors county jails and privately operated municipal jails in the state of Texas.¹⁰¹ The TCJS has promulgated temperature standards in the Texas Administrative Code in order to protect county and municipal jail inmates. These standards require that “temperature levels shall be reasonably maintained between 65 degrees Fahrenheit and 85 degrees Fahrenheit in all occupied areas.”¹⁰²

In contrast, the TDCJ has failed to adopt any heat-related policies or procedures applicable to inmate housing spaces in its own facilities, despite the Department’s awareness of the dangers of heat to inmates’ health and well-being.¹⁰³ Air conditioning is available in TDCJ warden offices¹⁰⁴ and even in prison armories¹⁰⁵ but not for the general inmate population.¹⁰⁶

⁹³ ADMIN. DIRECTIVE AD-10.64 (REV. 6) (2008).

⁹⁴ *Id.* at 1.

⁹⁵ *Id.* at 5.

⁹⁶ *Id.* at 10.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 5.

¹⁰⁰ *See id.* at 5 (“Offenders under treatment with diuretics or drugs inhibiting sweating require special medical evaluation prior to assignment to work in extreme heat.”).

¹⁰¹ TEX. ADMIN. CODE § 251.1 (2011).

¹⁰² TEX. ADMIN. CODE §§ 259.160, 261.160, 261.255, 261.350 (2011).

¹⁰³ *May Hot Weather*, *supra* note 89.

¹⁰⁴ Deposition of Robert Eason at 111, *McCollum et al. v. Livingston*, No. 3:12-CV-02037 (N.D. Tex. 2013).

While air conditioning is also available in some TDCJ medical facilities,¹⁰⁷ the majority of prisoners, such as those serving short-term sentences for nonviolent offenses, suffer in inadequately cooled environments.¹⁰⁸ Although some ventilation is provided in inmates' cells, when the climate becomes too hot and humid, providing ventilation without adequate measures for cooling does not provide relief. Ventilation and electric fans cannot guarantee that conditions are maintained at safe temperatures, particularly once temperatures exceed 90 °F.¹⁰⁹

Without a statute or administrative policy setting maximum allowable temperatures for TDCJ prison cells, TDCJ officials currently ignore the effects of extreme temperatures on inmates without risking immediate consequences. This practice has fostered an environment that subjects inmates to human rights violations and extremely dangerous and life-threatening conditions.

IV. Texas Lags Behind Other States in Protecting Inmates from Extreme Heat

Many state prison administrative bodies, in states with similar weather conditions as Texas, have established heat-related standards for prisons that are compatible with the requirements of international law and the Eighth Amendment. The Arkansas Department of Corrections mandates summertime cell temperatures to be between 74 °F and 78 °F, and all prisons have been air-conditioned since the late 1970s.¹¹⁰ The Arizona Department of Corrections requires indoor temperatures of its prison facilities to be maintained at a maximum temperature of 78 °F through the use of mechanical cooling. This maximum temperature is allowable only when it falls within the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) “summer comfort zone” standard; a lower air temperature may be required of the facility if exacerbating factors, such as high humidity levels, are present.¹¹¹ ASHRAE, a leading and widely respected international building technology society, defines “summer comfort zones” through the use of parameters such as air temperature, humidity, and air speed.¹¹² Similarly, both the New Mexico Department of Corrections and the Oklahoma Department of Corrections require prison inmate housing areas to be maintained at

¹⁰⁵ Deposition of Richard Thaler at 180, McCollum et al. v. Livingston, No. 3:12-CV-02037 (N.D. Tex. 2013).

¹⁰⁶ *Id.*

¹⁰⁷ *Frequently Asked Questions*, *supra* note 9.

¹⁰⁸ Elizabeth Koh, *Climate-Controlled Swine Buildings Dismay Inmates' Advocates*, THE TEXAS TRIBUNE (Aug. 16, 2013), <http://www.texastribune.org/2013/08/16/cooling-tdcj-swine-units-dismays-inmate/> (last visited Feb. 27, 2014).

¹⁰⁹ NIOSH, *supra* note 57.

¹¹⁰ Mike Ward, *Guards to join convict litigation over hot state prisons*, AUSTIN AMERICAN-STATESMAN (Aug. 29, 2013), <http://www.statesman.com/news/news/guards-to-join-convict-litigation-over-hot-state-p/nZgSD/> (last visited Feb. 27, 2014).

¹¹¹ PHYSICAL PLANT STANDARDS TECHNICAL MANUAL 1.5.1.3.2.1 (Ariz. Dep't of Corrections 2012).

¹¹² See Hoyt Tyler et al., *CBE Thermal Comfort Tool*, CTR. FOR THE BUILT ENVIRONMENT AT UNIV. OF BERKELEY (2013), available at <http://cbe.berkeley.edu/comforttool/> (showing ASHRAE-compliant “comfort zones”).

temperatures appropriate to both summer and winter comfort zones.¹¹³ While this language is open to interpretation, use of the ASHRAE definition of “comfort zones” would produce specific maximum temperatures for straightforward staff implementation.¹¹⁴ All these states, like Texas, experience extremely hot temperatures in the summer, but are still committed to setting humane temperatures for inmates incarcerated in their state prisons.

While the above departments of corrections run facilities are analogous to those run by the TDCJ, multiple states have also established specific temperature standards for county and municipal jails. As previously discussed, the Texas Administrative Code requires that county and municipal jails maintain “temperature levels... between 65 degrees Fahrenheit and 85 degrees Fahrenheit.”¹¹⁵ The Tennessee Corrections Institute, under the authority of the Tennessee Administrative Code, requires local jails, lock-ups, workhouses, and detention facilities to maintain inmates’ sleeping and activity areas at temperatures between 65 °F and 80 °F.¹¹⁶ North Carolina county jails and municipal lockups are required to have ventilation and air conditioning systems capable of keeping confinement areas at 85 °F or below.¹¹⁷ The Illinois Administrative Code provides that municipal jails must routinely provide temperatures between 67 °F and 85 °F.¹¹⁸

Even when correctional facilities are not bound by directives or statutes specifically delineating maximum allowable cell temperatures, departments of corrections in other states have publicly recognized the dangers of extreme heat to their inmates. In the recent investigation of the heat-related death of Jerome Murdough, a mentally-ill homeless man who was put in a Rikers Island jail for trespassing “after trying to curl up and sleep in an enclosed stairwell on a

¹¹³ PHYSICAL PLANT REQUIREMENTS CD-163000 FF (N.M. Dep’t of Corrections 2011); STANDARDS FOR INSPECTIONS OP-130107.IV.B.16 (Okla. Dep’t of Corrections 2012).

¹¹⁴ The Adult Correctional Facilities manual from the American Correctional Association currently applies the same language seen in the New Mexico and Oklahoma policies to all adult correctional institutions, noting that “[t]emperatures in indoor living areas” must be “appropriate to the summer and winter comfort zones.” AMERICAN CORRECTIONAL ASSOCIATION, 2012 STANDARDS SUPPLEMENT § 4-4153 (2012) [hereinafter STANDARDS SUPPLEMENT]. However, the ACA has recently discussed potential improvements to its current facility standards. While suggested changes from the current standard have yet to be accepted by the ACA Standards Committee, suggestions over the past year have included requiring ASHRAE standards compliance and requiring a maximum temperature of 78 °F in new construction living areas. AMERICAN CORRECTIONAL ASSOCIATION, STANDARDS COMMITTEE MEETING MINUTES ACA File No. 2012-067 (July 2012) *available at* http://www.aca.org/standards/pdfs/Standards_Committee_Meeting_August_2012.pdf; ACA AMERICAN CORRECTIONAL ASSOCIATION, STANDARDS COMMITTEE MEETING MINUTES: PHYSICAL PLANT STANDARDS SUBCOMMITTEE UPDATE – JANUARY 2013 2 (Jan. 2013), *available at* http://www.aca.org/standards/pdfs/Standards_Committee_Meeting_Minutes_January_2013.pdf; ACA AMERICAN CORRECTIONAL ASSOCIATION, STANDARDS COMMITTEE MEETING MINUTES: PHYSICAL PLANT STANDARDS SUBCOMMITTEE UPDATE – AUGUST 2013 1–2 (Aug. 2013), *available at* http://www.aca.org/standards/pdfs/Standards_Committee_Meeting_August_2013.pdf. This ongoing discussion shows concern for the lack of specificity in the current ACA standards and the fear that some facilities, such as TDCJ-run prisons, will not adequately adhere to the inmate living standards expected by the ACA and the international community.

¹¹⁵ TEX. LOCAL GOV’T CODE § 351.004 (2011).

¹¹⁶ RULES OF THE TENNESSEE CORRECTIONS INSTITUTE CORRECTIONAL FACILITIES INSPECTION 1400-1.04(1)(d) (Tennessee Corrections Institute 2004).

¹¹⁷ N.C. ADMIN. CODE § 14J.1217 (2013).

¹¹⁸ 22 ILL. REG. 19227 § 720.40 (2013).

chilly winter night,” the New York City Department of Correction found that several cells in the jail were warmer than 80 °F.¹¹⁹ As a result of these findings, the department said that it had taken steps to fix overheating issues, such as correcting any mechanical issues in the facility, despite not being bound by a specific maximum temperature standard.¹²⁰ The lack of written maximum temperature standards for TDCJ facilities is therefore no excuse for the extreme heat conditions in prisoners’ living areas.

The American Bar Association (ABA) has also addressed the issue of extreme heat in the *Standards on the Treatment of Prisoners*.¹²¹ While these standards have no binding authority on the TDCJ or any other jurisdiction, they were developed and approved as a set of workable standards by a diverse group of legal and correctional practitioners with the intention of guiding courts in their interpretation of constitutional requirements that apply to prisoners. These standards can help guide correctional departments towards safe, humane, and effective facilities.¹²² The standards provide that the physical plant of the correctional facility should have appropriate ventilation systems.¹²³ In its commentary, the ABA adds that “cooling should be appropriate to maintain *humane* comfort and safety in *all living and work areas*” (emphasis added).¹²⁴ It also specifically notes that prisoners who are “particularly vulnerable to heat-related illnesses”¹²⁵ should be safely accommodated, and says that “a prison without air conditioning... poses acute dangers to prisoners who are taking certain psychoactive medications.”¹²⁶ Thirteen of the TDCJ inmates who have died since 2007 were in fact on such medications. It is clear that the TDCJ, by allowing these individuals to live in non-air conditioned facilities, has not adequately provided for the safety and health of its heat-vulnerable inmates.

In fact, the TDCJ has itself set administrative guidelines for extreme heat conditions when inmates are on prison work assignment. As previously mentioned, the Warden and the Department Supervisors have a duty to monitor temperatures when prisoners are working in extreme heat, and to notify medical staff immediately when temperature-related injury occurs.¹²⁷ TDCJ staff procedures require implementation of different heat-mitigating measures for different

¹¹⁹ Matt Pearce, *Report: New York man ‘basically baked to death’ in Rikers Island Jail*, L.A. TIMES, March 19, 2014, available at <http://www.latimes.com/nation/nationnow/la-na-nn-new-york-jail-death-20140319,0,1996037.story#axzz2wnl1NWTk>.

¹²⁰ *Id.*

¹²¹ See AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 79–81 (3d. 2011), available at

http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf (discussing standards of housing prisoners); AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 70–78 (3d. 2011), available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf (discussing standards of treatment of prisoners potentially vulnerable to heat-related illnesses).

¹²² *Id.* at 1.

¹²³ *Id.* at 63.

¹²⁴ *Id.* at 65.

¹²⁵ *Id.* at 70.

¹²⁶ *Id.* at 78.

¹²⁷ ADMIN. DIRECTIVE AD-10.64 (REV. 6) 6–7, 9–12 (2008).

temperatures,¹²⁸ clearly demonstrating the TDCJ’s knowledge of how extreme heat can harm individuals, as well as its ability to promulgate specific standards when it wants to do so.

The ACA has promulgated standards for inmate housing areas in ACA-accredited facilities.¹²⁹ Its overarching principle for these standards states, “Inmate housing areas are the foundation of institutional living and must promote the safety and well-being of both inmates and staff.”¹³⁰ The strong language of this statement suggests that the TDCJ’s failure to promote the safety of inmates and staff is itself a deviation from the ACA’s expectations for its accredited facilities. The ACA has also specifically addressed heating and cooling in inmate housing areas, stating that temperatures in housing areas must be “appropriate to the summer and winter comfort zones.”¹³¹ The ACA official comment to this nonmandatory standard notes that “temperature and humidity should be capable of being mechanically raised or lowered to an acceptable comfort level.”¹³² As previously discussed, fans are largely useless in high temperature and high humidity conditions, and are not capable of mechanically lowering extreme temperatures to a level that will protect inmates from the risk of heat injury.¹³³ The TDCJ’s failure to protect its inmates from heat injury through adequate mechanical measures such as air conditioning therefore does not meet ACA’s heating and cooling standards for inmate housing areas, nor its expectations for how these standards should be reached.

Therefore, the TDCJ’s failure to promulgate cohesive policies and procedures to ensure safe temperatures are maintained in inmate living quarters is a clear and inexcusable departure from best practices—and widely-adopted practices—around the country and in Texas, as evidenced by other states’ practices regarding climate control, the ACA’s critiques of TDCJ facilities on this front, the ABA standards with regard to humane temperatures, and the regulations applicable to other types of correctional facilities in Texas.

V. Current Texas Prison Conditions are Unconstitutional

Texas’ failure to guarantee adequate treatment of prisoners and safe climatic conditions during detention is both unconstitutional and an international human rights violation. The Eighth Amendment’s “cruel and unusual punishment” provision incorporates the requirement that detention conditions respect human dignity.¹³⁴ Indeed, the Supreme Court has said that, “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”¹³⁵ In *Farmer v. Brennan* the Supreme Court held that “deliberate indifference” to conditions of confinement constitutes a violation of the Eighth Amendment when a prison official demonstrates a subjective deliberate indifference to conditions posing a substantial risk of

¹²⁸ *Id.*

¹²⁹ AMERICAN CORRECTIONAL ASS’N, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (4th ed. 2003).

¹³⁰ *Id.* at 36.

¹³¹ STANDARDS SUPPLEMENT, *supra* note 114, § 4-4153, at 58.

¹³² *Id.* § 4-4153 cmt. at 58.

¹³³ MORBIDITY AND MORTALITY WEEKLY REPORT, *supra* note 31.

¹³⁴ *Furman v. Georgia*, 408 U.S. 238, 241 (1972).

¹³⁵ *Trop v. Dulles*, 356 U.S. 86, 100 (U.S. 1958).

serious harm to the inmate.¹³⁶ In defining the subjective element of deliberate indifference, the Court held that the mental state of the prison official should be analyzed according to the criminal law standard of “reckless.”¹³⁷ As such, if a prison official has “actual knowledge of a potential danger” to a prisoner and fails to prevent this danger, then that official has acted with deliberate indifference to the safety of the prisoner in violation of the Eighth Amendment.¹³⁸ As has already been stated, TDCJ officials have extensive knowledge of the extreme heat and the danger that it poses to inmates. Specifically, TDCJ officials know that inmates with certain health conditions are at a particularly high risk. TDCJ has been and continues to be acting with deliberate indifference.

The Fifth Circuit has repeatedly held that high temperatures in a detention facility can constitute a violation of the Eighth Amendment.¹³⁹ In *Smith v. Sullivan*, the court held that relief should be granted under the Eighth Amendment “if the proof shows the occurrence of extremes of temperature that are likely to be injurious to inmates’ health.”¹⁴⁰ Drawing on this principle, in the 2004 case *Gates v. Cook*, the Fifth Circuit upheld a district court decision that granted an injunction to Mississippi death row inmates requiring provisions to cool themselves from May through September or, alternatively, whenever the heat index was above 90 °F.¹⁴¹ Expert testimony in that case showed that even though in that case no prisoner had ever died of heat stroke, the extreme heat in detention combined with the prison’s “deliberate indifference” to such a significant risk of harm constituted an Eighth Amendment “cruel and unusual punishment” violation.¹⁴²

Following this holding, in *Valigura v. Mendoza* the Fifth Circuit stated that “we have held that temperatures consistently in the nineties without remedial measures, such as fans, ice water, and showers, sufficiently increase the probability of death and serious illness so as to violate the Eighth Amendment.”¹⁴³ The most recent opinion of the Fifth Circuit applying Eighth Amendment obligations to temperature extremes in TDCJ facilities found that the prisoner-plaintiff in that case had alleged sufficient facts to justify a finding that the state violated his constitutional rights.¹⁴⁴ Specifically, the prisoner was 63 years old, had a preexisting blood pressure condition, and was taking medication that would affect his body’s ability to regulate temperature.¹⁴⁵ On 51 days during the prisoner’s confinement, the heat index reached levels

¹³⁶ *Farmer v. Brennan*, 511 U.S. 825, 828 (1970).

¹³⁷ *Id.* at 839.

¹³⁸ *Id.* at 831.

¹³⁹ See, e.g., *Smith v. Sullivan*, 553 F.2d 373, 381 (5th Cir. 1977); *Gates v. Cook*, 376 F.3d 323, 336 (5th Cir. 2004); *Valigura v. Mendoza*, No. 07-40284 (5th Cir. 2008), available at <http://www.ca5.uscourts.gov/opinions/unpub/07/07-40284.0.wpd.pdf>; *Blackmon v. Garza*, No. 11-40316 (5th Cir. 2012), available at <http://www.ca5.uscourts.gov/opinions%5Cunpub%5C11/11-40316.0.wpd.pdf>.

¹⁴⁰ *Smith v. Sullivan*, 553 F.2d at 381 (5th Cir. 1977).

¹⁴¹ *Gates v. Cook*, 376 F.3d at 336 (5th Cir. 2004).

¹⁴² *Id.* at 339.

¹⁴³ *Valigura v. Mendoza*, No. 07-40284, at 5 (5th Cir. 2008), available at <http://docs.justia.com/cases/federal/appellate-courts/ca5/07-40284/07-40284.0.wpd-2011-02-25.pdf?1301264190>.

¹⁴⁴ *Blackmon v. Garza*, No. 11-40316 (5th Cir. 2012), available at <http://www.ca5.uscourts.gov/opinions%5Cunpub%5C11/11-40316.0.wpd.pdf>

¹⁴⁵ *Id.* at 10.

considered a “danger” by the NWS, and on 11 of these days, the heat index was considered an “extreme danger.”¹⁴⁶ The court found that the TDCJ failed to provide remedial measures, including failure to provide air conditioning, lack of personal fans, and windows that were unable to open.¹⁴⁷ Prisoners were forced to drink from their sinks because insufficient water was provided to them.¹⁴⁸ The court concluded that a reasonable jury could find that this failure to provide protective and remedial measures constituted deliberate indifference to the health and safety of the prisoner, and therefore a violation of his Eighth Amendment rights.¹⁴⁹

In light of these decisions by the Fifth Circuit, the United States District Court for the Middle District of Louisiana issued a decision in December 2013 stating that officials at a death row detention facility violated the Eighth Amendment.¹⁵⁰ The court determined that inmates were subjected to multiple consecutive days in which the heat index reached well over 100 °F¹⁵¹—levels considered by the National Weather Service to constitute conditions that warranted “extreme caution” and “danger.”¹⁵² Furthermore, the court found that the officials at the facility disregarded the substantial risk of serious harm to the inmates in spite of their knowledge of that risk.¹⁵³ This disregard, the court found, constituted deliberate indifference in violation of officials’ Eighth Amendment obligations.¹⁵⁴

Such conditions are present in many of the facilities operated by the TDCJ. On many summer days the heat index is over 90 °F.¹⁵⁵ Of those inmates who have died from hyperthermia in Texas since 2007, the TDCJ was aware that all had preexisting conditions that rendered them more vulnerable to heat-related illnesses, such as obesity, diabetes, and history of hypertension.¹⁵⁶ As mentioned, thirteen of the fourteen inmates were also on prescribed medication at the time of their deaths.¹⁵⁷ These medications should have alerted medical staff to inmates’ susceptibility to heatstroke. All inmates whose body temperature was measured had body temperatures of over 105 °F at the time of their deaths.¹⁵⁸

TDCJ officials were aware that these factors made people more susceptible to hyperthermia.¹⁵⁹ Furthermore, TDCJ officials and medical personnel knew of the medical conditions and prescription drugs taken by the inmates who passed away while the inmates were under their care.¹⁶⁰ Nevertheless, TDCJ officials did not protect these particularly vulnerable individuals from heat injury and death. To cite one example, the regional director of the TDCJ

¹⁴⁶ *Id.* at 8.

¹⁴⁷ *Id.* at 9.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 11.

¹⁵⁰ *Ball v. LeBlanc*, 3:13-cv-13-00368-BAJ-SCR 97 (M.D. La. 2013).

¹⁵¹ *Id.* at 25.

¹⁵² NWS, *supra* note 7.

¹⁵³ *Ball v. LeBlanc*, 3:13-cv-13-00368-BAJ-SCR at 31.

¹⁵⁴ *Id.* at 12.

¹⁵⁵ *Climatology Comparison*, *supra* note 4.

¹⁵⁶ Amended Complaint, *supra* note 38, at 15.

¹⁵⁷ *Id.*

¹⁵⁸ Deposition of Robert Eason at 76, *McCollum et al. v. Livingston*, No. 3:12-CV-02037 (N.D. Tex. 2013).

¹⁵⁹ Amended Complaint, *supra* note 38, at 16.

¹⁶⁰ Deposition of Glenda Adams, M.D. at 86, *McCollum et al. v. Livingston*, No. 3:12-CV-02037 (N.D. Tex. 2013).

Region II was aware that eight detainees died in 2011 in his region, yet stated his belief that the TDCJ did not have a problem with heat related deaths. He went so far as to say the TDCJ was doing a “wonderful job.”¹⁶¹ This is clearly a case in which prison officials were aware of an actual danger to inmates and failed to prevent this danger. These conditions have not changed in TDCJ facilities, and as such the continuing threat to current and future TDCJ inmates constitutes an ongoing deliberate indifference to the risks faced by these inmates. Even if inmates do not actually die, current and future inmates are subjected to actual risks to their lives, and failing to address these risks constitutes deliberate indifference on the part of TDCJ officials. The Fifth Circuit has unequivocally held that this deliberate indifference to the risks of extreme heat on inmates constitutes a violation of the Eighth Amendment.

VI. Texas Prison Conditions Violate Inmates’ Human Rights

The Supreme Court has long held that when interpreting the concept of “cruel and unusual punishment” under the Eighth Amendment, it is instructive and appropriate to look to International Human Rights norms.¹⁶² In the seminal case establishing that international concepts of justice are relevant to interpreting the Eighth Amendment, the Supreme Court noted that the constitutional prohibition on “cruel and usual punishment” traces its origin directly to the laws of another nation.¹⁶³ For this reason, said the Court, the Eighth Amendment’s meaning must be drawn from the “evolving standards of decency that mark the progress of a maturing society.”¹⁶⁴

In later cases, the Supreme Court noted that “the climate of international opinion concerning the acceptability of a particular punishment” is an additional consideration which is “not irrelevant.”¹⁶⁵ Furthermore, the Court has “recognized the relevance of the views of the international community”¹⁶⁶ in determining which punishments a “civilized society will not tolerate,”¹⁶⁷ and has said that “the overwhelming weight of international opinion... provides respected and significant confirmation to the Court’s determination” that the penalty violates the Eighth Amendment.¹⁶⁸ The Court states that “it does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by

¹⁶¹ Deposition of Robert Eason at 110, *McCollum et al. v. Livingston*, No. 3:12-CV-02037 (N.D. Tex. 2013).

¹⁶² *See, e.g.*, *Trop v. Dulles*, 356 U.S. 86, 102–03 (U.S. 1958); *Coker v. Georgia*, 433 U.S. 584, 596 n. 10 (1977); *Enmund v. Florida*, 458 U.S. 782, 788 (U.S. 1982); *Thompson v. Oklahoma*, 487 U.S. 815, 830 n. 31 (U.S. 1988); *Atkins v. Virginia*, 536 U.S. 304, 325 (2002); *Roper v. Simmons*, 543 U.S. 551, 554 (2005). The Supreme Court has also looked to international norms in interpreting other portions of the Constitution besides the Eighth Amendment. *See Lawrence v. Texas*, 539 U.S. 558, 573 (U.S. 2003) (noting that the European consensus on repealing sodomy bans undermined the notion that banning sodomy was a fundamental aspect of Western civilization).

¹⁶³ Specifically, the foundation for the phrase “cruel and unusual” stemmed from the “Anglo-American tradition of criminal justice,” was taken directly from the English Declaration of Rights of 1688, and the principle itself came from the Magna Carta. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

¹⁶⁴ *Id.* at 101.

¹⁶⁵ *Coker v. Georgia*, 433 U.S. at 596 n. 10.

¹⁶⁶ *Id.* at 596 n. 31.

¹⁶⁷ *Thompson v. Oklahoma*, 487 U.S. 815, 831–32 n. 34 (1988).

¹⁶⁸ *Roper v. Simmons*, 543 U.S. 551, 554 (2005).

other nations and peoples underscores the centrality of those same rights within our own heritage of freedom.”¹⁶⁹

Thus, the Supreme Court has been unequivocal in stating that human rights are highly persuasive in guiding Eighth Amendment analysis.

VII. Texas Violates Human Rights Obligations Regarding Detention Conditions

The lack of adequate TDCJ policies and standards for dealing with hyperthermia and exposing inmates to extreme heat constitutes a violation of international human rights standards and of the requirements of the Eighth Amendment. States, including Texas, have both positive and negative obligations¹⁷⁰ to not only respect the right to life and the right to humane detainment, but also to guarantee that these rights be respected. Because the State exercises total control over individuals deprived of their liberty, the State bears an additional heightened obligation to guarantee these several rights of inmates.¹⁷¹ Furthermore, where the State is aware of a real and imminent danger for a specific individual or group, the State has an obligation to adopt additional reasonable prevention and protection measures.¹⁷² TDCJ officials are aware of the increased risk of heat-related injury and death faced by detainees with pre-existing medical conditions and those taking psychotropic medications, yet the TDCJ continues to fail its obligation to implement proper preventative measures.

¹⁶⁹ *Id.*

¹⁷⁰ Report on Citizen Security and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II, doc. 57 ch. IV ¶ 35 (2009), *available at* <https://www.oas.org/en/iachr/docs/pdf/CitizenSec.pdf>.

¹⁷¹ Pacheco Teruel et al. v. Honduras, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 121 ¶ 64 (2012), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_241_ing1.pdf.

¹⁷² Pueblo Bello Massacre v. Colombia, Interpretation of the Judgment of Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 140 ¶ 120 (2006), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_140_ing.pdf.



Figure 5: Polunsky Unit, Livingston, TX¹⁷³

Although persons who are incarcerated have been deprived of their right to liberty, these individuals still retain most of their fundamental human rights, most notably the rights to dignity, life, security of person,¹⁷⁴ the right to be free of inhuman or degrading treatment, and the right to health.¹⁷⁵ Nearly every body of human rights law includes provisions specifically for the protection of prisoners' rights.¹⁷⁶ The fact that this idea has such universal support demonstrates that guaranteeing the protection of basic rights of inmates has become part of customary international law, which comes from a general and consistent practice by other nations. In briefs submitted to the Inter-American Commission on Human Rights (IACHR), the United States has relied on the concept of customary international law, showing that the the United States accepts the binding nature of customary international law.¹⁷⁷

¹⁷³ Photograph, Tex. Dep't of Criminal Justice, Polunsky Unit Interior, Livingston, TX (Jan. 1, 2006) (on file with author).

¹⁷⁴ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III), art. 3 (Dec. 10, 1948).

¹⁷⁵ *Id.* art. 5.

¹⁷⁶ *See, e.g., id.* art. 3; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, art. 10 (Dec. 10, 1948); Inter-Am. Comm'n H.R. [IACHR], *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Res. 1/08 (March 13, 2008), available at http://www.cidh.oas.org/pdf%20files/RESOLUTION%201_08%20-%20PRINCIPLES%20PPL%20FINAL.pdf [hereinafter *Principles and Best Practices*]; American Declaration on the Rights and Duties of Man, Ninth International Conference of American States (1948), OEA/Ser.L.V/II.82, doc. 6 rev. 1 art. XV (1992).

¹⁷⁷ Response of the Government of the United States of America to Inter-American Commission on Human Rights, Digest of United States Practice in International Law 2004, Ch. 18, doc. 60 (2004); RESTATEMENT (THIRD) OF THE LAW OF THE FOREIGN RELATIONS OF THE UNITED STATES § 101 cmt. c (1987).

Texas' first obligation to persons deprived of liberty and under its control is to guarantee the right to life. Various human rights bodies have unanimously affirmed the right of all people to preserve their lives. As was noted before, the State bears an increased duty in guaranteeing this right to those deprived of liberty and under the control of the State.¹⁷⁸ The reason for placing an increased burden on the State to guarantee prisoners' rights was summarized by the IACHR:

The State, by depriving a person of his liberty, places itself in the unique position of guarantor of his right to life and to humane treatment. All this means that the act of imprisonment carries with it a specific and material commitment to protect the prisoner's human dignity so long as that individual is in the custody of the State, which includes protecting him from possible circumstances that could imperil his life, health and personal integrity, among other rights.¹⁷⁹

This quote also illustrates that the State also has the equally important duty of guaranteeing prisoners' health and dignity. The International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (UDHR), and the American Declaration on the Rights and Duties of Man (ADRDM) all acknowledge the basic and unalienable dignity that every individual possesses.¹⁸⁰ Likewise, both the UDHR and the ADRDM include the right to health as one of the fundamental rights retained by all human beings.¹⁸¹ There are no justifications for a State to fail to meet these basic obligations, not even financial constraints. Both the Inter-American Court of Human Rights (IACtHR) and IACHR have steadfastly maintained that economic hardship and financial difficulties may not be invoked by States in order to justify detention conditions that fail to meet international standards.¹⁸²

It is also important to note that the human rights bodies have repeatedly held that the State's obligation to avoid "torture and inhuman or degrading treatment or punishment" are banned in absolute terms, irrespective of the victim's conduct or the financial situation of the State.¹⁸³ The reason that the right to be treated with dignity is considered so fundamental to prisoners' rights is because being stripped of dignity can result in, "feelings of anguish and inferiority capable of humiliating and debasing [prisoners] and possibly breaking [their] physical

¹⁷⁸ Pacheco Teruel et al. v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 121, ¶ 64 (2012), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_241_ing1.pdf.

¹⁷⁹ Minors in Detention v. Honduras, Case 11.491, Inter. Am. Comm'n H.R., Report No. 41/99, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 135 (1998), *available at* <http://www1.umn.edu/humanrts/cases/1998/honduras41-99.html>.

¹⁸⁰ International Covenant on Civil and Political Rights, *supra* note 176, art. 1; Universal Declaration of Human Rights, *supra* note 174, art. 1; American Declaration on the Rights and Duties of Man, *supra* note 176, art. I.

¹⁸¹ Universal Declaration of Human Rights, *supra* note 174, at 25; American Declaration on the Rights and Duties of Man, *supra* note 176, art. XI.

¹⁸² Report of the Inter-American Commission on Human Rights on the Situation of Persons Deprived of Liberty in Honduras, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.147, doc. 6 ¶¶ 74, 104 (2013), *available at* <https://www.oas.org/en/iachr/pdl/docs/pdf/HONDURAS-PPL-2013ENG.pdf>.

¹⁸³ See, e.g., Ireland v. United Kingdom, App. No. 5310/71, ¶ 163 (1978), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57506> ("The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Article 3 makes no provision for exceptions and... there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.").

or moral resistance.”¹⁸⁴ Because basic dignity is fundamental to every human being, depriving someone of dignity is a form of inhuman treatment.¹⁸⁵

Texas’ positive obligation to guarantee inmates’ right to health is particularly important. Prisoners have no other way of accessing medical treatment, and as such are entirely reliant on the TDCJ to ensure their well-being. The IACHR has found violations of the right to health where prisoners had medical conditions that prison officials were aware of, and yet no measures were taken to address these health problems.¹⁸⁶ This exact same scenario has occurred—and is occurring—in TDCJ facilities. The TDCJ is aware that certain medical conditions and medications increase prisoners’ susceptibility to heat related illness, and yet there still exist no proper procedures for protecting these vulnerable inmates’ health.

Persons deprived of their liberty have been dying in the custody of the TDCJ from preventable causes. The fact that officials at the TDCJ were aware of risks to inmates that rose to the level of a substantial threat to their health, safety, and dignity shows that the state of Texas is not taking adequate measures to protect the physical well-being of those detained by the TDCJ. If nothing else, this in itself demonstrates that Texas is failing its obligation to guarantee the rights to life, health, and dignity of those persons deprived of liberty and under control of the state. As all inmates at TDCJ facilities are exposed to these extreme temperatures, even those who have not died have had their lives put at risk by the TDCJ as a result of the lack of preventative and remedial measures to address extreme heat, and their rights to health and to be treated with dignity have been violated.

VIII. Texas Fails Its Duty to Prevent Cruel, Inhuman, or Degrading Treatment

Texas violates all TDCJ inmates’ rights to not be subject to cruel, inhuman, and degrading treatment. The general standard regarding treatment of persons deprived of their liberty was first set out by the United Nations in the UDHR. Article 5 of the UDHR states that “no one shall be subject to torture or cruel, inhumane, or degrading treatment or punishment.”¹⁸⁷ This standard has since been reiterated in almost every major body of human rights law, including but not limited to the ICCPR,¹⁸⁸ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),¹⁸⁹ the American Convention on Human Rights (ACHR),¹⁹⁰ the ADRDM,¹⁹¹ and the European Convention on Human Rights (ECHR).¹⁹²

¹⁸⁴ Peers v. Greece, App. No. 28525/95 ¶¶ 21–22 (2001), *available at* <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-59413>.

¹⁸⁵ Mathew v. The Netherlands, App. No. 24919/03 ¶ 216 (2005), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70377>.

¹⁸⁶ Oscar Elías Biscet et al. v. Cuba, Case 12.476, Inter-Am. Comm’n H.R., Report No. 67/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 ¶ 157 (2007), *available at* <http://www1.umn.edu/humanrts/cases/67-06.html>.

¹⁸⁷ Universal Declaration of Human Rights, *supra* note 174, at 71.

¹⁸⁸ International Covenant on Civil and Political Rights, *supra* note 176, art. 7.

¹⁸⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res 39/46, U.N. Doc. A/39/51, art. 16 (Dec. 10, 1984).

¹⁹⁰ American Convention on Human Rights, *supra* note 176, art. 5.

¹⁹¹ American Declaration on the Rights and Duties of Man, *supra* note 176, art. XXVI.

The purpose of this standard is to ensure that all persons deprived of their liberty be treated with respect and the inherent dignity of a human being.

Although the phrase “torture or cruel, inhuman, or degrading treatment or punishment” is somewhat vague, various international human rights bodies have developed an in-depth body of case law regarding this standard. These standards and recommendations include, but are not limited to, the UN’s “Standard Minimum Rules for the Treatment of Prisoners,”¹⁹³ the IACHR’s “Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,”¹⁹⁴ and the Council of Europe’s “Recommendation of the Committee of Ministers to Member States on the European Prison Rules.”¹⁹⁵

The most substantial body of case law regarding what constitutes “torture or cruel, inhuman, or degrading treatment or punishment” has been established through litigation in the European Court of Human Rights and in the Inter-American system. For the purposes of this report, the case law regarding detention conditions will be analyzed collectively because their decisions are highly uniform, the international human rights bodies often cite one another, and because the Inter-American system has expressly adopted many of the Europeans Court of Human Right’s (ECtHR) standards regarding detention conditions.¹⁹⁶

Nonetheless, the decisions from the IACHR and IACtHR are more relevant than the ECHR and the ECtHR. As a member of the Organization of American States (OAS), the United States is a signatory of the ACHR.¹⁹⁷ The Convention establishes the IACtHR as the court competent to address matters arising from commitments made under the ACHR.¹⁹⁸

Because the term “torture” is generally isolated as a specific breach requiring intentional infliction of a very severe harm,¹⁹⁹ the international human rights bodies have generally focused on determining what conditions constitute “inhuman or degrading treatment or punishment” by considering the relevant standards in cases most analogous to extreme heat issues in Texas prisons.”²⁰⁰

¹⁹² European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221.

¹⁹³ Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663C, Annex 1, at 11, U.N. Doc. A/CONF/611 (July 31, 1957), amended by E.S.C. Res. 2076, at 35, U.N. Doc. E/5988 (May 13, 1977).

¹⁹⁴ *Principles and Best Practices*, *supra* note 176.

¹⁹⁵ Council of Europe: Committee of Ministers, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules*, Rec(2006)2 (Jan. 11, 2006), available at <https://wcd.coe.int/ViewDoc.jsp?id=955747>.

¹⁹⁶ See, e.g., *Luis Lizardo Cabrera v. Dominican Republic*, Case 10.832, Inter-Am. Comm'n H.R., Report No. 35/96, OEA/Ser.L/V/II.98, doc. 7 rev. 821 (1997), available at <http://www1.umn.edu/humanrts/cases/1997/domrep35-96.html> (referring to the definitions from the European Commission on Human Rights and the European Court of Human Rights to distinguish inhuman and degrading treatment from torture, and adopting its own criterion that included some, but not all of the criteria from the European bodies).

¹⁹⁷ Org. of Am. States, Am. Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

¹⁹⁸ *Id.* art. 33.

¹⁹⁹ See, e.g., Convention against Torture, *supra* note 189, art. 1.

²⁰⁰ The European Commission on Human Rights has distinguished between inhuman and degrading, defining inhuman as “severe suffering, mental or physical, which, in the particular situation is unjustifiable,” and degrading as “grossly humiliat[ing] him before others or driv[ing] him to act against his conscience.” See BRICE DICKSON, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE CONFLICT IN NORTHERN IRELAND* 140 (2010) (quoting

There is no definitive test or any explicit list of factors to determine whether detention conditions constitute “inhuman or degrading treatment or punishment.” Instead, international human rights bodies have favored an approach that requires analysis of conditions be done solely on a case-by-case basis.²⁰¹ In each case brought by a person deprived of liberty regarding detention conditions, the human rights body will analyze the circumstances specific to that complainant, requiring that the situation reach a “minimum level of severity” in order to constitute “inhuman or degrading treatment.”²⁰² The evaluation of this minimum level of severity is highly dependent on a broad analysis of all the relevant circumstances that affect conditions of detention.²⁰³ The international human rights bodies will generally consider many factors such as, but not exclusively, the duration of the treatment, and its physical and mental effects, as well as the sex, age, and health of the victim.²⁰⁴

It is important to note that the Texas’ obligation to avoid subjecting persons deprived of their liberty to “cruel, inhuman, or degrading treatment or punishment” consists of both negative and positive obligations. Texas not only has the obligation to refrain from causing a prisoner to be subjected to “cruel, inhuman, or degrading treatment or punishment,” Texas also, as guarantor of life and physical and psychological integrity of those under its control, has the additional positive obligation to prevent third parties from unduly interfering with the enjoyment of rights and personal liberty.²⁰⁵ This obligation imposes a duty on Texas to “ensure that... [a person deprived of their liberty’s] health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.”²⁰⁶ This duty is especially relevant to the most vulnerable detainees, including children, the elderly, and people with disabilities or medical conditions because in these cases Texas’ obligations increase considerably. For example, in *Brown v. Jamaica*, the complainant charged that he suffered an asthma attack while in extremely hot cells during pre-trial detention. The Human Rights Committee ruled that the harm suffered by the complainant while detained in these conditions and the denial of exercise, medical treatment, adequate nutrition, and clean drinking water was a violation of both articles 7

Denmark, Norway, Sweden and the Netherlands v. Greece, App. Nos. 3321/67, 3322/67, 3323/67 and 3344/67, 12 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm’n on H.R.) (1969)). However, more recently, the courts have defined inhuman and degrading together. See, e.g., *Iorgov (II) v. Bulgaria*, App. No. 44082/98 (2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100271>; *Mayzit v Russia*, App. No. 63378/00 (2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68067>.

²⁰¹ *Ireland v. United Kingdom*, App. No. 5310/71, ¶ 12 (1978), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57506> (“It is thus left to be determined in the light of the circumstances of each particular case whether what occurred amounted to, or constituted the specified treatment.”).

²⁰² *Id.* at ¶ 162 (1978).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Ximenes-Lopes v. Brazil*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 149 ¶ 86 (July 4, 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_149_ing.pdf.

²⁰⁶ *Kudla v. Poland*, App. No. 30210/96, 35 Eur. Ct. H.R. Rep. 198 (2000), available at <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=001-58920>.

and 10 of the ICCPR (relating to cruel or unusual punishment and preserving the dignity of incarcerated persons, respectively).²⁰⁷

International human rights bodies have consistently considered extreme temperature and lack of adequate heating or ventilation, similar to the conditions in Texas, as factors that contribute to detention conditions being considered “inhuman or degrading treatment or punishment.” For example, in *Peers v. Greece*, the complainant suffered from extreme heat in an overcrowded segregation unit with poor ventilation and a broken toilet with no privacy from the other inmates.²⁰⁸ In the winter, heating was only provided for two hours a day.²⁰⁹ The European Court considered the fact that the applicant was placed in the segregation unit when temperatures rise considerably, and referred to witness testimony that the complainant was affected by the heat and lack of ventilation in the cell.²¹⁰ Given these extreme heat conditions and the lack of action by Greek authorities to remedy the situation, the European Court found that the complainant had been subjected to inhuman and degrading treatment, and that the government had violated Article 3 of the European Convention—the prohibition against inhuman and degrading treatment.²¹¹ Additionally, in *Štrucl and others v. Slovenia*, overcrowding²¹² and temperatures averaging around 82.4 °F and occasionally exceeding 86 °F²¹³ contributed to conditions that exceeded a threshold of severity of suffering in detention that amounted to degrading treatment and a violation of Article 3.²¹⁴ Following the same reasoning, in *Lăutaru v. Romania*, the European Court of Human Rights found that living in an overcrowded facility with summer temperatures reaching over 104 °F in a cell, where a window grille prevented proper ventilation of hot air in the cell, constituted a violation of Article 3.²¹⁵

The ECtHR has even go so far as to proclaim that “[it is] unacceptable that anyone should be detained in conditions involving a lack of adequate protection against... extreme temperatures.”²¹⁶ Neither the ECtHR nor the IACtHR has ever expressly stated what temperatures constitute extreme heat, or affirmatively held that air conditioning is a requirement to prevent inhumane detention conditions. However, because the human rights bodies have repeatedly held that the State must do everything within its power to minimize the suppression of

²⁰⁷ *Brown v. Jamaica*, Case No. CCPR/C/65/D/775/1997, 6 IHRR 978 (1999), available at <http://www1.umn.edu/humanrts/undocs/session65/view775.htm>.

²⁰⁸ *Peers v. Greece*, App. No. 28525/95 ¶¶ 21–22 (2001), available at <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-59413>.

²⁰⁹ *Id.* at ¶ 26.

²¹⁰ *Id.* at ¶ 72.

²¹¹ *Id.* at ¶ 75.

²¹² *Štrucl and others v. Slovenia*, App. No.s 5903/10, 6003/10, 6544/10 ¶ 52 (2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107141>.

²¹³ *Id.* at ¶ 87.

²¹⁴ *Id.* at ¶ 89.

²¹⁵ *Lăutaru v. Romania*, App. No. 13099/04 ¶¶ 11–12 (2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107028>.

²¹⁶ *Mathew v. The Netherlands*, App. No. 24919/03, ¶ 216 (2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70377>.

individual rights and to ensure health and welfare of detainees,²¹⁷ the State has the duty to provide minimum material requirements,²¹⁸ and there are no mitigating circumstances for these obligations.²¹⁹ In fact, while the European Committee on the Prevention of Torture (CPT) has acknowledged that it has not specified an ideal maximum temperature for prison cells, it “has made it clear that... excessive heating, whether artificial or natural, is... to be avoided.”²²⁰ Therefore it is clear that under current human rights standards, Texas, as the guarantor of rights of those under its custody, has an unmitigated duty to provide adequate relief from extreme heat.

Reports published by the various human rights bodies have also repeatedly condemned facilities throughout the world for their inadequate detention conditions relating to extreme climatic conditions. For example, a modern prison built in Peru in 1997 had no provision for basic water, power, or communications services.²²¹ Inmates were exposed to temperatures in the winter that fell to -4 °F.²²² No heating mechanism was available in cells or corridors, and the cold was exacerbated by humidity from leaking water, which could not be removed due to lack of ventilation.²²³ The Inter-American Commission found that the Peruvian State had failed to comply with its obligations under the U.N. Standard Minimum Rules for the Treatment of Prisoners as well as the Peruvian Constitution to provide prisoners at Challapalca with adequate facilities.²²⁴ Likewise, a facility in Jamaica was found to be “in serious violation of the right to humane treatment” as a result of inmates being exposed to extreme heat with a lack of adequate ventilation.²²⁵ Similar conditions—lack of ventilation and “oppressive heat”²²⁶—created a “suffocating atmosphere” in prisons in Honduras and Suriname.²²⁷ The IACHR found that Cuban political dissidents were held in cramped cells without any means to endure temperature extremes.²²⁸ In another facility in Benin, heat indices reached 123.8 °F to 129.2 °F.²²⁹ The United Nations Subcommittee on the Prevention of Torture recommended these conditions be

²¹⁷ *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 86 (July 5, 2006).

²¹⁸ *Yvon Neptune v. Haiti*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 180, ¶ 138 (May 6, 2008).

²¹⁹ *See Ireland v. United Kingdom*, App. No. 5310/71, ¶ 163 (1978), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57506> (“Article 3... makes no provision for exceptions and... there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.”).

²²⁰ ROD MORGAN & MALCOLM D. EVANS, *THE ASSOCIATION FOR THE PREVENTION OF TORTURE, THE PREVENTION OF TORTURE IN EUROPE* (2001), *available at* http://www.apr.ch/content/files_res/APT%20CPT%206%20En.pdf.

²²¹ Special Report on the Human Rights Situation at the Challapalca Prison, Department of Tacna, Republic of Peru, Inter-Am. Comm’n H.R., OEO/Ser.L/V/II.118, doc. 3 ¶ 23 (2003).

²²² *Id.* at ¶ 26.

²²³ *Id.* at ¶ 38.

²²⁴ *Id.* at ¶¶ 104, 116.

²²⁵ Report on the Situation of Human Rights in Jamaica, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.144, doc. 12 ¶ 201 (Aug. 10, 2012), *available at* <https://www.oas.org/en/iachr/docs/pdf/Jamaica2012eng.pdf>.

²²⁶ Report on the Human Rights of Persons Deprived of Liberty in the Americas, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II., doc. 64 ¶ 402 (Dec. 31, 2011).

²²⁷ *Id.* at ¶ 288.

²²⁸ *Id.* at ¶ 401.

²²⁹ U.N. Subcommittee on Prevention of Torture, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Benin, CAT/OP/BEN/1, ¶ 180 (2011).

the subject of urgent review, that inmates be provided natural light and ventilation, and that measures be put in place to reduce the temperature extremes.²³⁰ In the country of Georgia, many facilities had unheated cells,²³¹ and temperatures in facilities were found to be as low as 59 °F.²³² These conditions led the European Committee Prevent Torture to recommend that cells be properly heated.²³³

The U.N.'s Standard Minimum Rules for the Treatment of Prisoners explicitly states a heightened concern for the condition of detention regarding climate. Paragraph 10 states, "All accommodations provided for the use of prisoners... shall meet all requirements of health, [with] *due regard being paid to climatic conditions*... [including] heating and ventilation" (emphasis added).²³⁴ A similar concern over climatic conditions is expressed by the IACHR in their "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas." Principle XI states that "Persons deprived of liberty shall have adequate floor space, daily exposure to natural light, appropriate ventilation and heating, *according to the climatic conditions of their place of deprivation of liberty*" (emphasis added).²³⁵

The conditions in Texas prisons violate these obligations. The very fact that prisoners are dying for preventable reasons demonstrates that the fundamental right to life has been violated in contravention of the Texas' duty to ensure this right. Furthermore, subjecting inmates to extended periods of extreme heat rises to the level of inhuman treatment and is a violation of their right to health and dignity. The extreme heat in the cells where the inmates died violate the standards established by every organization that has explicitly considered the issue of regulating exposure to extreme heat.

IX. Conclusion and Recommendations

Given the current situation in Texas prisons, the University of Texas School of Law Human Rights Clinic concludes that the extreme heat in certain Texas prisons violates international human rights standards that require Texas to guarantee the right to life and physical integrity of prisoners, prisoners' right to health and to be treated with dignity, and to prevent prisoners from being subjected to "inhumane or degrading treatment or punishment." These standards require the TDCJ to guarantee these rights for all prisoners, not just those that are particularly susceptible to heat-related injury. The extreme heat in Texas prisons risks the lives of all inmates that are subject to these conditions, and this violates their physical integrity as well. The continuing lack of standards and preventive measures to address these risks increases the seriousness of the violations. International human rights standards notwithstanding, the

²³⁰ *Id.* at ¶ 190.

²³¹ EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT), REPORT TO THE GEORGIAN GOVERNMENT ON THE VISIT TO GEORGIA ¶¶ 42, 108, 138 (2010).

²³² *Id.* at ¶ 92.

²³³ *Id.* at ¶ 95.

²³⁴ Standard Minimum Rules for the Treatment of Prisoners, *supra* note 193, ¶ 10.

²³⁵ *Principles and Best Practices*, *supra* note 176, at XI.

temperature extremes in Texas prisons also constitute a violation of the Eighth Amendment's prohibition of cruel and unusual punishment.

The Human Rights Clinic recommends the following actions to immediately eliminate the TDCJ's current practice of inhumane treatment of its prisoners in extreme heat conditions:

1. The Texas Department of Criminal Justice should immediately codify and implement preventative policy measures for the coming summer months to prevent exposing inmates to extreme heat conditions and, particularly, to avoid additional heat-related injuries and deaths. Permanent and adequate measures should, at the least, include installation of air conditioning units to keep temperatures in inmate housing areas below 85 °F. Until this is completed, TDCJ should take additional precautions to reduce the risk of injury and death, including:
 - a. Immediate screening of all new inmates for health conditions or medications that could make them more susceptible to heat-related illness;
 - b. Immediate movement of more susceptible new inmates to housing areas that do not have temperatures exceeding 85 °F;
 - c. If areas at a safe temperature are not yet available, continuous monitoring of susceptible new inmates which starts immediately after screening;
 - d. Frequent monitoring of any inmates housed in non-air-conditioned units when temperatures in inmate housing areas exceed 85 °F;
 - e. Provision of constant inmate access to cool liquids and ice; and
 - f. Uniform documentation of these practices, including number of inmates classified as susceptible to heat-related illness and quantity of cool liquids provided per inmate.
2. In the long term, either by promulgation of new TDCJ policy or by amendment of the Texas Administrative Code, a maximum temperature standard should be set for all TDCJ facilities. This standard should mirror the standards promulgated by the Texas Commission on Jail Standards and the standards TDCJ currently has in place for the prison workplace. Specifically, the standard should follow widespread precedent and adopt a maximum temperature standard of 85 °F throughout its facilities, including in prison cells and inmate housing areas.
3. The TDCJ Board and Texas Legislature should approve funding as necessary for installation of permanent air-conditioning at TDCJ prison facilities, as needed, to ensure temperatures do not exceed 85 °F.

It is likely at least some facilities will require the addition of either temporary or permanent air conditioning units in order to comply with this new standard. However, this is a cost that must be incurred. Continuing to disregard the plight of TDCJ inmates subject to extreme heat is not an option; the TDCJ would be in violation of international human rights

standards and the requirements of the Eighth Amendment if it were to do so. The TDCJ must take action to stop its continuing violation of several human rights of prisoners in Texas prisons.

