

# Prisons, Immigration Detention Centers, and Natural Disasters: An Eighth Amendment Right to Risk Reduction

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*Although the general public may heed the advice of local and federal officials to reduce risks to their health and safety in the face of extreme weather events, incarcerated individuals do not share this liberty. About 2.3 million incarcerated Americans rely on prison officials to ensure their access to food, water, reasonable safety, clothing, power, and medication before, during, and after a disaster. Climate change has elevated the degree of risk posed to this population by extreme weather events, which are occurring with increased frequency and severity. These changing patterns result in the imposition of undue risk of imminent harm to incarcerated people held in facilities without sufficient risk mitigation strategies. The law must evolve to address this enhanced threat and protect the constitutional rights of this vulnerable population. The Eighth Amendment’s Cruel and Unusual Punishments Clause imposes an affirmative duty on prison officials to eliminate prison conditions which pose a substantial risk of serious harm to a person’s health and safety. This Note proposes that federal courts should extend the current Eighth Amendment jurisprudence, which mandates that prison officials must take risk-reduction measures in certain contexts—like extreme cell temperatures, fire safety, food deprivation, and exposure to secondhand smoke—to protect an incarcerated person’s access to adequate food, water, power, and medication before, during, and after a natural disaster.*

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## Introduction

In the midst of Hurricane Michael's landfall in 2018, Melinda Aronson was not only worried about her own safety.<sup>1</sup> As the storm tore through Florida's Panhandle, she was on the phone with her son, hearing the shouts of men around him begging her to notify their loved ones that they were alive.<sup>2</sup> Her son was one of almost 100,000 incarcerated individuals forced to ride out the storm in Florida state prisons as water poured in through the windows, roofs were torn apart, and people lost access to power, food, and water.<sup>3</sup> This story is not unique. For decades, incarcerated individuals have been overlooked in setting standards for natural disaster preparedness and in blanket risk-reduction measures, resulting in tragedy year after year.<sup>4</sup>

Following Hurricane Harvey, incarcerated individuals in the Federal Correctional Institution (FCI) Beaumont, a low security federal prison housing over 1,800 people, spoke out about the lack of safe drinking water, food shortages, and lack of running water in the wake of the storm.<sup>5</sup> Leading up to Hurricane Katrina, over six thousand people—adults and children—were incarcerated in the Orleans Parish Prison in Louisiana.<sup>6</sup> In Templeman III of the Orleans Parish Prison, more than six hundred people were left

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1. Daniel A. Gross, *For the Families of People in Prison, Hurricanes Bring Extra Panic and Uncertainty*, NEW YORKER (Oct. 16, 2018), <https://www.newyorker.com/news/news-desk/for-the-families-of-people-in-prison-hurricanes-bring-panic-and-uncertainty> [https://perma.cc/2ZUE-VXMW].

2. *Id.* (“Over the phone, [Melinda Aronson] heard men yelling out the names and phone numbers of their loved ones, hoping that she could let them know that they were alive.”).

3. *Id.*

4. Incarcerated individuals were trapped in flooded cells without food or drinkable water for days in New Orleans, Louisiana following Hurricane Katrina in 2005. *See id.*; *see also* Michael Patrick Welch, *Hurricane Katrina Was a Nightmare for Inmates in New Orleans*, VICE (Aug. 29, 2015, 12:56 AM), <https://www.vice.com/en/article/5gidxn/hurricane-katrina-was-a-nightmare-for-inmates-in-new-orleans-829> [https://perma.cc/W4CR-QMZK]. Incarcerated people in Florida experienced similar devastation in September 2022 after Hurricane Ian hit the coast of Florida. N’dea Yancy-Bragg, *Hurricane Ian Brings Renewed Focus to ‘Life and Death’ Struggle for Prisoners During a Disaster*, USA TODAY (Oct. 17, 2022, 11:53 AM), <https://www.usatoday.com/story/news/nation/2022/10/14/hurricane-ian-jails-prisons-florida/8189762001/> [https://perma.cc/BXD8-JQFL].

5. Fernando Alfonso III, *Inmates Inside Beaumont’s Federal Prison Share Stories of Grim Conditions Following Harvey*, HOUS. CHRON. (Sept. 1, 2017), <https://www.chron.com/news/houston-weather/hurricaneharvey/article/Harvey-beaumont-prison-inmates-speak-out-texas-12167587.php> [https://perma.cc/48KZ-SBRT].

6. Although exact prison population numbers from the Orleans Parish Prison (OPP) are unknown, the OPP reported holding 6,375 people, whose ages range from ten to seventy-three, in its custody the day Hurricane Katrina hit. NAT’L PRISON PROJECT, AM. CIV. LIBERTIES UNION, *ABANDONED & ABUSED: ORLEANS PARISH PRISONERS IN THE WAKE OF HURRICANE KATRINA 29* (2006), <https://www.aclu.org/report/abandoned-abused-complete-report> [https://perma.cc/P6X5-GSE6] [hereinafter *ABANDONED & ABUSED*].

without food, lights, air circulation, and running water for at least three days<sup>7</sup> as the first floor of their facility filled with up to four feet of water.<sup>8</sup> At Metropolitan Detention Center in New York, hundreds of incarcerated people lost access to power, heat, and medical treatment as temperatures plummeted below freezing in early 2019.<sup>9</sup> During a 2017 heat wave in St. Louis, people inside the St. Louis jail were heard screaming for help as temperatures reached triple digits, since many incarcerated people had no access to air conditioning and were forced to rely only on vented windows for air circulation.<sup>10</sup> High temperatures in Texas Department of Criminal Justice facilities have resulted in at least twenty-three heat-related deaths since 1998.<sup>11</sup> In 2020, Hurricane Laura cut off power and running water at a Louisiana immigration detention center, leaving detained people in sweltering heat with no air conditioning and overflowing toilets.<sup>12</sup> In the case of the Orleans Parish Prison response to Hurricane Katrina, incarcerated people were explicitly excluded from the mandatory evacuation order issued by the Mayor of Orleans Parish.<sup>13</sup>

For the 2.3 million individuals incarcerated in the United States today,<sup>14</sup> there is no federally-mandated minimum level of protection in the face of natural disasters. As the stories above demonstrate, states and the federal

7. *New Orleans: Prisoners Abandoned to Floodwaters*, HUM. RTS. WATCH (Sept. 21, 2005, 8:00 PM), <https://www.hrw.org/news/2005/09/21/new-orleans-prisoners-abandoned-floodwaters> [https://perma.cc/7XWW-EYZT].

8. Incarcerated people in lower-level cells were not moved until after the flooding on the first floor reached four feet of water. ABANDONED & ABUSED, *supra* note 6, at 37.

9. Nick Pinto, “‘Vicious’ and ‘Brutal’” – *Life Inside a Freezing Federal Prison with No Heat*, INTERCEPT (Feb. 2, 2019, 9:26 PM), <https://theintercept.com/2019/02/02/federal-prison-no-heat-new-york-nadler-mdc/> [https://perma.cc/D3EL-UCXL].

10. Elliott Davis, *Without A/C, Inmates at St. Louis Jail Scream for Help During Heat Wave*, FOX2NOW (July 19, 2017, 11:34 AM), <https://fox2now.com/news/you-paid-for-it/without-ac-inmates-at-st-louis-jail-scream-for-help-during-heat-wave/> [https://perma.cc/U62W-ZXHA].

11. Emanuella Grinberg, *Texas Judge Orders Prison to Cool Down*, CNN (July 19, 2017, 10:26 PM), <https://www.cnn.com/2017/07/19/us/texas-prison-heat-lawsuit/index.html> [https://perma.cc/H5ZA-CLAT].

12. Nomaan Merchant, *Migrants Detained in Louisiana Plead for Help After Storm*, HOUS. PUB. MEDIA (Sept. 1, 2020, 12:06 PM), <https://www.houstonpublicmedia.org/articles/news/weather/hurricane-laura/2020/09/01/380958/migrants-detained-in-louisiana-plead-for-help-after-storm/> [https://perma.cc/W4AU-4BDL]; Katie Shepherd, *Hurricane Laura Devastated ICE Facilities, Leaving People Detained in Horrific Conditions*, IMMIGRATION IMPACT (Sept. 3, 2020), <https://immigrationimpact.com/2020/09/03/hurricane-laura-damage-ice/#.YZviamDMI2x> [https://perma.cc/8HC9-2LMQ].

13. See ABANDONED & ABUSED, *supra* note 6, at 19–20 (explaining that Mayor Nagin’s executive orders excluded incarcerated individuals and essential personnel from evacuation orders because the facilities allegedly had backup generators to accommodate power loss, while even pets in animal shelters were being evacuated).

14. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [https://perma.cc/LHP8-78KD].

government have long overlooked prison safety and explicitly disregarded these populations in preparing for and reacting to extreme weather events.<sup>15</sup> Incarcerated people and people detained in immigration detention centers remain incredibly vulnerable populations in the face of these storms, as they cannot make life-saving decisions about if and when to evacuate, how much food, water, and medicine to have on hand, or whether to secure and maintain access to an emergency generator. Instead, millions of individuals rely completely on federal and state officials and the administrators of their facilities to protect their safety and to adequately consider the risks associated with emergency situations in these vulnerable facilities.

This Note proposes a basis for federal minimum protections of an incarcerated person's access to adequate food, water, power, and medication before, during, and after a natural disaster. These protections are rooted in the Eighth Amendment's protection from "substantial risk of serious harm."<sup>16</sup> Climate change has elevated the risks posed to incarcerated individuals by extreme weather such that the law must address this enhanced threat by providing baseline constitutional protections. Courts should extend their current interpretations of the Eighth Amendment's Cruel and Unusual Punishments Clause as applied to substantial risk of harm from exposure to secondhand smoke,<sup>17</sup> extreme heat,<sup>18</sup> and inadequate fire safety measures<sup>19</sup> to the context of natural disasters to provide a minimum standard of protection. Judicial action is necessary to comprehensively solve the systematic failure to protect incarcerated individuals from undue risk imposed by facilities that are unprepared for extreme weather.

Section I of this Note will first review the statutory authority, industry best practices, and state laws to assess the risks posed by climate change and the current landscape of emergency preparedness in prisons. Section II will examine courts' interpretations of the Eighth Amendment as imposing a duty

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15. See ABANDONED & ABUSED, *supra* note 6, at 19; see also Taylor Dolven, *Thousands of Inmates Are Left in Miami's Irma Evacuation Zone*, VICE NEWS (Sept. 9, 2017, 5:34 AM), [https://www.vice.com/en/article/zmygb3/thousands-of-inmates-are-left-in-miamis-irma-evacuation-zone?utm\\_source=US&utm\\_campaign=Read%20More](https://www.vice.com/en/article/zmygb3/thousands-of-inmates-are-left-in-miamis-irma-evacuation-zone?utm_source=US&utm_campaign=Read%20More) [https://perma.cc/H99S-NFTJ]. The Florida Department of Corrections evacuated some of its prisons, while leaving other incarcerated individuals in vulnerable locations in their facilities. *Id.* State and local officials forced people on house arrest to relocate into custody, giving their attorneys only one day to keep them out of jail before courts closed. *Id.* Court closures also deprived detained individuals of their trials and arraignments within twenty-four hours of their arrest. *Id.*

16. U.S. CONST. amend. VIII; see also *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) ("The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial 'risk of serious damage to his health,' and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.").

17. See discussion *infra* Section II.B.1.

18. See discussion *infra* Section II.B.2.

19. See discussion *infra* Section II.B.5.

on prison officials to reduce undue risk of harm to incarcerated individuals through the contexts of secondhand smoke, extreme heat, access to food and medication, and fire safety. Section II will also review the application of this doctrine in the wake of Hurricane Katrina and extend this case law to the context of extreme weather events to create minimum federal protections from environmental risk. Section III will present the case for courts to revisit protections from extreme weather for incarcerated people since this issue was last considered in the Katrina cases nearly twenty years ago. Finally, Section IV will address the pathway to litigation for one of these suits and the benefits and challenges of pursuing this necessary change through litigation rather than through legislation.

#### I. Background: The Status of Climate Change and Disaster Preparedness in Prisons, Jails, and Immigration Detention Centers

There are over 2.3 million people incarcerated in the United States,<sup>20</sup> with the majority held in state prisons,<sup>21</sup> local jails,<sup>22</sup> and federal prisons and jails.<sup>23</sup> The U.S. Immigration and Customs Enforcement (ICE) detains over forty-two thousand people in federally- or privately-run immigration detention facilities and in local jails through rented-out spaces.<sup>24</sup> As the climate continues to warm—increasing the frequency and severity of extreme weather events—these individuals will be placed at a heightened risk of harm from unprepared facilities. This section describes the threat climate change poses to prisons—particularly in geographic areas of high risk—and discusses the current state of emergency preparedness in prisons, jails, and immigration detention centers.

##### A. *Growing Threats of a Changing Climate*

As the climate continues to warm, the frequency and severity of natural disasters will continue to increase.<sup>25</sup> Scientists have observed an increased incidence of severe hurricanes throughout the past forty years, a trend that is highly likely to continue as the global temperature increases.<sup>26</sup> A similar

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20. Sawyer & Wagner, *supra* note 14.

21. *Id.* (explaining that over 1.2 million people are held in state prisons).

22. *Id.* (explaining that over 630,000 people are held in local jails).

23. *See id.* (explaining that over 225,000 people are held in federal prisons and jails).

24. *Id.*

25. CTR. FOR RSCH. ON THE EPIDEMIOLOGY OF DISASTERS & U. N. OFF. FOR DISASTER RISK REDUCTION, HUMAN COST OF DISASTERS: AN OVERVIEW OF THE LAST 20 YEARS, 2000–2019, at 7 (2020), [https://www.preventionweb.net/files/74124\\_humancostofdisasters20002019reportu.pdf](https://www.preventionweb.net/files/74124_humancostofdisasters20002019reportu.pdf) [<https://perma.cc/WNC9-PJXE>] [hereinafter HUMAN COST OF DISASTERS] (explaining that increased heatwaves, droughts, flooding, winter storms, hurricanes, and wildfires have followed the increase in the average global temperature).

26. Greg Holland & Cindy L. Bruyère, *Recent Intense Hurricane Response to Global Climate Change*, 42 CLIMATE DYNAMICS 617, 625 (2014).

pattern follows for intense heat waves,<sup>27</sup> extreme cold weather,<sup>28</sup> wildfires,<sup>29</sup> intense and frequent rain events,<sup>30</sup> and other extreme weather, posing<sup>31</sup> a risk to the safety of incarcerated people and people detained by ICE. As these severe weather events continue to worsen and occur more frequently, incarcerated populations face increased risk of harm. This increased risk elevates the need for judicially-created minimum protections for these individuals who cannot make decisions regarding their own safety in the face of these events.

Take hurricanes, for example. There are thirteen federal prisons within seventy-five miles of the gulf coastlines of Texas, Louisiana, and Florida.<sup>32</sup> This area has suffered five of the eight most powerful hurricanes since 1950.<sup>33</sup> The 17,132 people currently housed in these institutions<sup>34</sup> face a

27. A. Park Williams et al., *Rapid Intensification of the Emerging Southwestern North American Megadrought in 2020–2021*, 12 NATURE CLIMATE CHANGE 232, 234 (2022) (finding that the forty-two percent decrease in the American West’s soil moisture, which is an important integrator of the twenty-two-year megadrought, is attributable to the results of climate change).

28. See *Research Links Extreme Cold Weather in the United States to Arctic Warming*, CLIMATE PROGRAM OFF., U.S. NAT’L OCEANIC & ATMOSPHERIC ADMIN. (Sept. 7, 2021), <https://cpo.noaa.gov/Divisions-Programs/Communication-Education-and-Engagement/CEE-News/ArtMID/8293/ArticleID/2369/Research-Links-Extreme-Cold-Weather-in-the-United-States-to-Arctic-Warming> [<https://perma.cc/E3W8-3BUG>] (finding that scientists have observed a link between accelerated Arctic warming and more severe winter weather in the United States, like the 2021 wave of cold weather in Texas); see generally Judah Cohen et al., *Linking Arctic Variability and Change with Extreme Winter Weather in the United States*, 373 SCIENCE 1116 (2021) (noting that scientists have observed that the Arctic warming likely contributes to the polar vortex stretching in the U.S. and Asia).

29. See *Wildfires and Climate Change*, CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/content/wildfires-and-climate-change/> [<https://perma.cc/4Z4Z-YY6J>] (noting that changes in climate are responsible for an increase in wildfire risk in the American West and contributed to the doubling of the number of large fires that occurred between 1984 and 2015).

30. *Climate Change Indicators: Heavy Precipitation*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/climate-indicators/climate-change-indicators-heavy-precipitation> [<https://perma.cc/E2D8-HTKP>].

31. Brian Clark Howard, *Human-Caused Climate Change Worsened Heat Waves in 2013*, *Study Says*, NAT’L GEOGRAPHIC (Sept. 29, 2014), <https://www.nationalgeographic.com/science/article/140929-climate-change-heat-waves-drought-severe-weather-science> [<https://perma.cc/V2WG-MDYN>] (detailing droughts and other reports of extreme weather).

32. These institutions include: FCI Three Rivers, FDC Houston, FCI Beaumont Low, FCI Beaumont Medium, USP Beaumont, FPC Pensacola, FCI Marianna, FCI Tallahassee, USP Coleman I, USP Coleman II, FCI Coleman Low, FCI Coleman Medium, and FCI Miami. To note, this number does not include state prisons and jails or immigration detention facilities. See *Our Locations*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/map.jsp> [<https://perma.cc/X98N-NHVE>].

33. Zachary Crockett, *A Map of the Most Powerful Hurricanes in the US Since 1950*, VOX (Oct. 7, 2016, 4:00 PM), <https://www.vox.com/science-and-health/2016/10/7/13201834/hurricane-matthew-category-3-hurricane-history> [<https://perma.cc/2ZQD-PA55>].

34. At the time of this Note, FCI Three Rivers housed 1,374 people. See *FCI Three Rivers*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/trv/> [<https://perma.cc/KD73-HLZ7>]. FDC Houston housed 796 people. See *FDC Houston*, FED. BUREAU OF PRISONS,

particularly heightened risk from the devastating effects of Atlantic hurricanes.<sup>35</sup> Climate change will also negatively affect those who are incarcerated further inland. Hurricanes weaken more slowly over land as the oceans warm, causing significant flooding and extreme rainfall, which impacts larger and larger geographic areas annually.<sup>36</sup> Further, the odds that a given tropical storm will develop into a Category 3, 4, or 5 hurricane have risen significantly since 1979.<sup>37</sup> These trends point to drastic increases in potential loss of life and economic cost associated with extreme weather events as more incarcerated individuals are placed in the paths of devastating and frequent disasters.

Further, the risks posed by severe weather are almost certain to grow in the short term, regardless of climate change mitigation strategies. “Committed” warming (i.e., the global temperature increase that will occur as a result of anthropogenic greenhouse gas emissions regardless of measures taken to reduce these emissions at present) is increasing the frequency of extreme weather events<sup>38</sup> and will continue to disrupt current patterns of

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<https://www.bop.gov/locations/institutions/hou/> [https://perma.cc/4868-YZJZ]. FCI Beaumont Low housed 2,177 people. *See FCI Beaumont Low*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/bml/> [https://perma.cc/C3Z3-6RHH]. FCI Beaumont Medium housed 1,691 people. *See FCI Beaumont Medium*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/bmm/> [https://perma.cc/6E5Y-DP3C]. USP Beaumont housed 1,477 people. *See USP Beaumont*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/bmp/> [https://perma.cc/5TCV-CQYE]. FPC Pensacola housed 350 people. *See FPC Pensacola*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/pen/> [https://perma.cc/VNY8-PJ3G]. FCI Marianna housed 1,217 people. *See FCI Marianna*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/mna/> [https://perma.cc/DJ8M-XD2E]. FCI Tallahassee housed 818 people. *See FCI Tallahassee*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/tal/> [https://perma.cc/ATX6-6PBN]. USP Coleman I housed 1,361 people. *See USP Coleman I*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/cop/> [https://perma.cc/YV2K-FSH7]. USP Coleman II housed 1,243 people. *See USP Coleman II*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/clp/> [https://perma.cc/E45Y-JDSE]. FCI Coleman Low housed 2,063 people. *See FCI Coleman Low*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/col/> [https://perma.cc/WA9Q-3224]. FCI Coleman Medium housed 1,587 people. *See FCI Coleman Medium*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/com/> [https://perma.cc/7TD8-XM7Z]. FCI Miami housed 978 people. *See FCI Miami*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/mia/> [https://perma.cc/C8L5-K3YY].

35. *See* Crockett, *supra* note 33.

36. Andrew Freedman & Chris Mooney, *Hurricanes Are Staying Stronger Even over Land as Oceans Warm from Climate Change, Study Finds*, WASH. POST (Nov. 11, 2020, 11:02 AM), <https://www.washingtonpost.com/weather/2020/11/11/hurricanes-weaken-slowly-landfall/> [https://perma.cc/6FC6-DX9G].

37. James P. Kossin et al., *Global Increase in Major Tropical Cyclone Exceedance Probability over the Past Four Decades*, 117 PROCEEDINGS NAT’L ACAD. SCI. 11975, 11976 (2020).

38. Robin Kundis Craig, “Stationary is Dead”—*Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENV’T L. REV. 9, 14 (2010).



natural disasters for at least a century.<sup>39</sup> The current risk faced by incarcerated individuals, which is already significant, will only increase as the impacts of climate change become more severe, mandating the implementation of adaptive measures.<sup>40</sup> As noted by the Intergovernmental Panel on Climate Change, “[a]daptation is necessary in the short and longer term to address impacts resulting from the warming that would occur even for the lowest stabilization scenarios assessed.”<sup>41</sup> Adaptation involves changing current systems in response to actual or expected climate change with an eye toward reducing the harm caused by those changes.<sup>42</sup> Increasing the resiliency and adaptive capacity—terms that refer to a system’s ability to function in and adjust to new conditions—of current systems and infrastructure is an important consideration for reducing the risk of future harm posed by the threats of a changing climate to incarcerated individuals.<sup>43</sup> In sum, climate change drastically exacerbates the effects of extreme weather, placing vulnerable populations, including incarcerated individuals, at greater risk of harm.

#### *B. Federal Statutory Authorities Provide No Protection for Incarcerated People*

Enacted in 1988, the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) provides the authority for federal involvement during natural disasters.<sup>44</sup> The Act does not mention incarcerated populations

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39. Maximilian Martin & Andreas Ernst, *Climate Change: Enlarging the Toolbox*, VIEWPOINTS 35, 39 (2008).

40. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION, AND VULNERABILITY 747 (2007), [https://www.ipcc.ch/site/assets/uploads/2018/03/ar4\\_wg2\\_full\\_report.pdf](https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg2_full_report.pdf) [<https://perma.cc/VF35-S5QE>] (explaining that a comprehensive response to climate change requires two approaches: mitigation to reduce greenhouse gas emissions or an increase in greenhouse gas sinks and adaptation to adjust current systems in response to the actual or anticipated effects of climate change to reduce harm).

41. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 19 (2008), [https://www.ipcc.ch/site/assets/uploads/2018/02/ar4\\_syr\\_full\\_report.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/ar4_syr_full_report.pdf) [<https://perma.cc/R5X3-W69Z>].

42. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 40, at 750 (comparing adaptation, which is defined as “natural or human systems in response to actual or expected climatic stimuli or their effects,” to mitigation, which is defined as “an anthropogenic intervention to reduce the sources or enhance the sinks of greenhouse gases”).

43. See Craig, *supra* note 38, at 39 (“[T]he more we acknowledge pervasive uncertainties regarding what climate change actually means at all levels—local, state, regional, or nation; social, political, and natural—the more we should restructure environmental and natural resources law to give as many species and systems as possible the best chance to survive and adopt to whatever changes come. As the USCCSP recently concluded, “[I]t is essential to increase the resilience of ecosystems . . . and to employ adaptive management strategies to deal with new conditions, new successional trajectories and new combinations of species.”).

44. Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 88 Stat. 143 (1974) (codified as amended at 42 U.S.C. §§ 5121–5208).

and leaves prisons out of the public and private non-profit facilities that receive federal assistance in responding to and recovering from natural disasters.<sup>45</sup> Public and private facilities only include: rehabilitation, emergency, medical, and custodial care facilities; zoos; museums; and other facilities providing “essential social services to the general public.”<sup>46</sup>

The Disaster Recovery and Reform Act was enacted in 2018 to amend the Stafford Act.<sup>47</sup> It was the first disaster relief legislation to explicitly mention incarcerated people and does so only once.<sup>48</sup> In this singular statutory note, the Act directs the Federal Emergency Management Agency (FEMA) Administrator to consider “special needs populations,” which includes incarcerated populations.<sup>49</sup> Although this note adds no substantive protections for incarcerated people, it demonstrates a “missed opportunity” for Congress to implement heightened protections for these people in the context of natural disasters.<sup>50</sup> However, this note indicates congressional acknowledgement of the particular vulnerability of those housed in correctional facilities, and has led to FEMA and the Department of Homeland Security (DHS) issuing limited guidance concerning correctional facilities to their local partners in planning for natural disaster evacuations.<sup>51</sup>

The Correctional Facility Disaster Preparedness Act, introduced in the Senate in 2020 and 2021, was proposed in hopes of providing more thorough protections for incarcerated people during natural disasters.<sup>52</sup> This

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45. See 42 U.S.C. § 5122.

46. *Id.* § 5122(11)–(12).

47. Disaster Recovery Reform Act of 2018, Pub. L. No. 115-254, 132 Stat. 3438 (2018).

48. See 6 U.S.C. § 721 note (Guidance on Evacuation Routes).

49. *Id.*; see also *Disaster Preparedness: DRRRA Implementation and FEMA Readiness: Hearing Before the Subcomm. on Econ. Dev., Pub. Bldgs., & Emergency Mgmt. of the H. Comm. on Transp. & Infrastructure*, 116th Cong. 47 (2019) (statement of James Gore, Supervisor, Sonoma Cnty., Cal.).

50. See Maya Habash, *Locked Up in the Eye of the Storm: A Case for Heightened Legal Protections for Incarcerated People During Hurricanes*, 21 U. MD. L.J. RACE, RELIGION, GEND. & CLASS 137, 154 (2021) (“A notable missed opportunity to include these considerations is in the definition of private non-profits that federal assistance reaches to.”).

51. See U.S. DEP’T OF HOMELAND SEC., PLANNING CONSIDERATIONS: EVACUATION AND SHELTER-IN-PLACE: GUIDANCE FOR STATE, LOCAL, TRIBAL, AND TERRITORIAL PARTNERS 11 (2019) (providing guidance which states that evacuation in correctional facilities requires a “coordinated effort between local and state law enforcement and correction officials . . . and Federal agencies, [sic] (e.g., Department of Justice Federal Bureau of Prisons, Department of Homeland Security [DHS], Bureau of Immigration and Customs Enforcement, U.S. Marshals Service)”).

52. See Press Release, Tammy Duckworth, Senator, U.S. Senate, *Duckworth, Booker Re-introduce Bill to Improve Disaster Response and Recovery Plans in Prisons* (Aug. 3, 2021), <https://www.duckworth.senate.gov/news/press-releases/duckworth-booker-re-introduce-bill-to-improve-disaster-response-and-recovery-plans-in-prisons#:~:text=%5BWASHINGTON%2C%20DC%5D%20%E2%80%93%20U.S.,disasters%20and%20public%20health%20emergencies> [<https://perma.cc/L8CG-VS2E>]; see also Correctional Facility Disaster Preparedness Act, S.4748, 116th Cong. (2020); Correctional Facility Disaster Preparedness Act, S.2592, 117th Cong. (2021).

legislation, which has not advanced in Congress, aims to ensure that adequate plans and procedures are in place to “protect the health, safety and civil rights of incarcerated individuals during natural disasters and public health emergencies.”<sup>53</sup> The failure of this legislation may reflect a disinterest towards any future legislative or court-mandated protections in this context. This also demonstrates that, even after the widely-publicized shortcomings of these facilities in responding to COVID-19,<sup>54</sup> Congress is still hesitant to provide substantive protections for these vulnerable populations.

### C. *The Status of Emergency Preparedness in Prisons*

#### 1. *The American Correctional Association’s Published Standards*

Founded in 1870, the American Correctional Association (ACA) is a nonprofit trade organization that serves as the accreditor for the corrections industry.<sup>55</sup> This organization publishes performance-based standards manuals reflecting the basis of their accreditation process.<sup>56</sup> These standards, outlined in twenty-two different manuals for different types of facilities, are divided into two categories: (1) mandatory standards (i.e., standards that facilities are required to meet all of for accreditation); and (2) non-mandatory standards (i.e., standards that facilities are required to meet ninety percent of in order to be accredited).<sup>57</sup> In the ACA’s standards for facilities housing adults, mentions of food, water, clothing, and medication are limited, and discussion of their supply in an emergency situation, like a natural disaster, is sparse.<sup>58</sup> Regarding temperatures in a non-mandatory provision, the ACA requires only that “temperatures in indoor living and work areas are appropriate to the summer and winter comfort zones” and “should be capable of being mechanically raised or lowered to an acceptable comfort level.”<sup>59</sup> In another non-mandatory provision, the ACA recommends that institutions have “the equipment necessary to maintain essential lights, power, and communications in an emergency . . . to provide essential lighting and life-

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53. Duckworth, *supra* note 52.

54. *See id.* (describing how senators remarked that the pandemic exposed how vulnerable and unprotected incarcerated populations were during natural disasters).

55. *The History of Standards & Accreditation*, AM. CORR. ASS’N, [https://www.aca.org/ACA\\_Member/Standards\\_\\_Accreditation/About\\_Us/ACA/ACA\\_Member/Standards\\_and\\_Accreditation/SAC\\_AboutUs.aspx?hkey=bdf577fe-be9e-4c22-aa60-dc30dfa3adcb](https://www.aca.org/ACA_Member/Standards__Accreditation/About_Us/ACA/ACA_Member/Standards_and_Accreditation/SAC_AboutUs.aspx?hkey=bdf577fe-be9e-4c22-aa60-dc30dfa3adcb) [https://perma.cc/9MLH-4XJ7].

56. *Id.*

57. *Standards*, AM. CORR. ASS’N, [https://www.aca.org/ACA\\_Member/Standards\\_\\_Accreditation/Standards/ACA/ACA\\_Member/Standards\\_and\\_Accreditation/StandardsInfo\\_Home.aspx?hkey=7c1b31e5-95cf-4bde-b400-8b5bb32a2bad](https://www.aca.org/ACA_Member/Standards__Accreditation/Standards/ACA/ACA_Member/Standards_and_Accreditation/StandardsInfo_Home.aspx?hkey=7c1b31e5-95cf-4bde-b400-8b5bb32a2bad) [https://perma.cc/KB7Y-2EA5].

58. *See generally* AM. CORR. ASS’N, PERFORMANCE-BASED STANDARDS AND EXPECTED PRACTICES FOR ADULT CORRECTIONAL INSTITUTIONS (5th ed. 2021).

59. *Id.* at 63.

sustaining functions within the institution.”<sup>60</sup> Mandatory evacuation drill planning refers only to fire drills or other on-site emergencies, rather than requiring planning for an evacuation that would take incarcerated people to a secondary location for longer-term evacuation.<sup>61</sup> There are no mentions of a required level of food, water, or medication supply that must—or should—be stocked at all times.

Although courts may use these standards to inform their determinations of “contemporary standards” relating to prison conditions,<sup>62</sup> these standards “do not establish the constitutional minima; rather, they establish goals recommended by the organization in question.”<sup>63</sup> In sum, this guidance reflects only an industry standard of inadequate protection for incarcerated people against a substantial risk of serious harm. Courts are not bound by this guidance when making determinations about the constitutionality of prison conditions.

## 2. *The National Institute of Corrections: 2005 Survey and Guidance*

The National Institute of Corrections (NIC) notes that “[e]mergency preparedness is a central, even critical issue throughout American corrections.”<sup>64</sup> Emergency plans differ by state and department;<sup>65</sup> while some utilize a generic plan applicable in all emergency situations, others use separate plans for different types of emergencies.<sup>66</sup> Of the thirty-four departments surveyed by the NIC in preparing to release its 2005 guidance, twenty-eight addressed severe weather in their emergency plans.<sup>67</sup> Only eighteen of thirty-three departments replied that they have specific policies or procedures for natural disasters.<sup>68</sup> The survey also showed that, of the average 213 hours spent in a recruit academy program, an average of only six hours were spent on emergency preparedness training.<sup>69</sup> For departments that identified specific emergency subjects and scenarios covered, no more

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60. *Id.* at 89.

61. *Id.* at 91–92.

62. *See e.g.*, *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (“conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional”); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (noting that the government’s failure to deny medical care is “inconsistent with contemporary standards of decency as manifested in modern legislation”); *Lareau v. Manson*, 651 F.2d 96, 106–07 (2d Cir. 1981) (acknowledging that some courts have looked to acceptable minimum standard to hold that overcrowding conditions violates the Eighth Amendment).

63. *Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979).

64. NAT’L INST. OF CORR., U.S. DEP’T OF JUST., A GUIDE TO PREPARING FOR AND RESPONDING TO PRISON EMERGENCIES 3 (2005), <https://s3.amazonaws.com/static.nicic.gov/Library/020293.pdf> [<https://perma.cc/CG3V-HTGC>].

65. *Id.* at 186.

66. *Id.*

67. *Id.* at 187 tbl. 3.

68. *Id.* at 195.

69. *Id.* at 190 tbl. 8.

than five departments identified discussing topics other than fire, riot, and hostage situations specifically, and each of these topics averaged two hours of coverage.<sup>70</sup> Fifteen of thirty-three departments stated that they have trained incarcerated people to provide some form of community assistance in the event of certain types of community disasters.<sup>71</sup>

### 3. *State Law as a Model for Designing Effective Systems*

Some state systems draw primarily from the guidance developed by Law Enforcement Training and Research Associates, Inc. (LETRA).<sup>72</sup> LETRA provides guidance for facilities planning for emergencies and natural disasters to ensure that they can adequately cope before, during, and after disasters.<sup>73</sup> This guidance includes a checklist of more targeted, inclusive, and protective measures than those included in ACA accreditation requirements and suggestions.<sup>74</sup> These provisions suggest preparatory measures including: storage of a forty-eight to seventy-two-hour supply of potable water, flashlights, batteries, a portable emergency generator, and portable lighting; preparation of a comprehensive medical plan for an emergency; routine training in natural disaster response; orientations with incarcerated people on tornado response and participation in tornado drills; analyses of all buildings to determine their ability to withstand hurricane-force wind; and other procedures that speak directly to natural disaster procedures.<sup>75</sup>

Nebraska, which bases its emergency preparedness system on this LETRA guidance,<sup>76</sup> represents an effective model for other states to follow. Nebraska's emergency preparedness system ensures that incarcerated people's needs will be met even if external access to power, water, and food supplies are cut off.<sup>77</sup> This system is split into two mandatory components: first, a single, generic plan capable of use and implementation in the event of

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70. NAT'L INST. OF CORR., U.S. DEP'T OF JUST., A GUIDE TO PREPARING FOR AND RESPONDING TO JAIL EMERGENCIES 190 tbl. 8 (2005), <https://s3.amazonaws.com/static.nicic.gov/Library/020293.pdf> [<https://perma.cc/CG3V-HTGC>].

71. *Id.* at 197.

72. See L. ENF'T TRAINING & RSCH. ASSOC., INC. & NAT'L INST. OF CORR., U.S. DEP'T OF JUST., A GUIDE TO PREPARING FOR AND RESPONDING TO JAIL EMERGENCIES (2009), <https://s3.amazonaws.com/static.nicic.gov/Library/023494.pdf> [<https://perma.cc/P5UF-8BKL>] [hereinafter LETRA GUIDANCE].

73. *Id.* at viii; see also Ira P. Robbins, *Lessons from Hurricane Katrina: Prison Emergency Preparedness as a Constitutional Imperative*, 42 U. MICH. J.L. REFORM 1, 13 (2008) (discussing LETRA and its resources used in multiple states).

74. See LETRA GUIDANCE, *supra* note 72, at 41–116 (detailing a variety of checklists for smaller and larger jails).

75. *Id.*, at 89–90, 110, 112, 114.

76. Robbins, *supra* note 73, at 13.

77. *Id.*, at 12–13. For example, warehouses must “stock thirty days worth of essential provisions” when facilities decide to not evacuate. *Id.*

any emergency; and second, a series of specific incident plans, consisting of checklists to be used in the event of a fire, flood, riot, or other emergency to supplement the generic plan.<sup>78</sup> If a facility chooses to evacuate before a disaster, “the Nebraska system has a comprehensive set of policies in place for both the evacuating and receiving institutions,” with the latter aimed at ensuring that there is sufficient capacity at the receiving institution for the overall population, as well as for those individuals with special needs.<sup>79</sup> Additionally, the system requires that prisons be prepared to “defend in place” and maintain a thirty-day stock of necessary items.<sup>80</sup> A designated Emergency Management Supervisor “manages the development of emergency response and emergency incident plans,” ensures revision of these plans, ensures staff is trained, and supervises emergency response teams.<sup>81</sup>

D. *The Status of Emergency Preparedness in Immigration Detention Centers*

ICE’s Enforcement and Removal Operations (ERO) division facilitates the United States civil immigration detention system and detains individuals before, during, and after removal proceedings.<sup>82</sup> There are two applicable standards of care in ICE facilities. First, facilities entirely dedicated to housing people detained by ICE are subject to the Performance-Based National Detention Standards (PBNDS).<sup>83</sup> Second, non-dedicated ICE facilities, including city and county jails that rent space to ICE, are governed by ICE’s National Detention Standards (NDS).<sup>84</sup> The NDS are less stringent than the PBNDS.<sup>85</sup>

The NDS address emergency response in a mere three sentences, only requiring that non-dedicated facilities “develop written plans and procedures for handling emergency situations reasonably likely to occur,” including

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78. *Id.*, at 12.

79. *Id.*

80. *Id.*, at 12–13.

81. *Id.*, at 13.

82. *Detention Management*, U.S. IMMIGR. & CUSTOMS ENF’T (Jan. 19, 2023), <https://www.ice.gov/detain/detention-management> [<https://perma.cc/E2D9-4AB5>].

83. U.S. IMMIGR. & CUSTOMS ENF’T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at i (2016), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf> [<https://perma.cc/K2SC-NKLW>] [hereinafter PBNDS].

84. U.S. IMMIGR. & CUSTOMS ENF’T, NATIONAL DETENTION STANDARDS FOR NON-DEDICATED FACILITIES, at i (2019), <https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf> [<https://perma.cc/T925-3EAQ>] [hereinafter NDS].

85. NAT’L IMMIGR. F., FACT SHEET: IMMIGRATION DETENTION IN THE UNITED STATES 1–2 (2021), [https://immigrationforum.org/wp-content/uploads/2021/01/Immigration-Detention-Factsheet\\_FINAL.pdf](https://immigrationforum.org/wp-content/uploads/2021/01/Immigration-Detention-Factsheet_FINAL.pdf) [<https://perma.cc/DZ4M-VQPT>].

procedures relating to disabled people.<sup>86</sup> These standards state that staff “will be trained” in these plans.<sup>87</sup> The PBNDS are much broader, highlighting six expected outcomes of the manual’s standards: (1) contingency plans to respond to emergency situations; (2) annual staff training in emergency preparedness and the facility’s emergency plans; (3) an evacuation plan; (4) accurate documentation of events during and after emergency situations; (5) procedures for assisting people with special needs during an emergency or evacuation; and (6) communication assistance provided to those with disabilities and people limited in their English proficiency.<sup>88</sup> The standard requires that facilities compile individual, contingency-specific plans as needed for certain events, including “environmental hazard[s].”<sup>89</sup> In addition, facilities must create contingency plans that include designated individuals responsible for developing and implementing such plans, procedures for rendering emergency assistance, accurate inventories of identified equipment, and the preparation of staff to implement the program when necessary.<sup>90</sup>

When compared to the current state of disaster preparedness in prisons, these regulations seem to provide more explicit protections in the face of natural disasters. In practice, however, ICE’s standards do not go far enough, given the environmental threats incarcerated individuals already face.<sup>91</sup> Incarcerated and detained individuals in these facilities face a substantial risk of serious harm as a result of insufficient regulatory, statutory, and judicial requirements, which necessitates judicial action.

## II. The Current Application of the Eighth Amendment Duty to Protect Against Imminent Risk of Substantial Harm

The Eighth Amendment states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>92</sup> The Cruel and Unusual Punishments Clause, as held by the Supreme Court, places the treatment of incarcerated people and the conditions in which they are confined under scrutiny.<sup>93</sup> The Clause protects against prison conditions

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86. NDS, *supra* note 84, at 3.

87. *Id.*

88. PBNDS, *supra* note 83, at 1.

89. *Id.*, at 8.

90. *Id.*, at 3.

91. See Alfonso III, *supra* note 5; Pinto, *supra* note 9; Davis, *supra* note 10; Grinberg, *supra* note 11; Merchant, *supra* note 12.

92. U.S. CONST. amend. VIII, § 2.

93. *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (“It is ‘cruel and unusual punishment to hold convicted criminals in unsafe conditions.’ It would be off to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.”).

that pose a “substantial risk of serious harm” to incarcerated individuals.<sup>94</sup> Courts use a two-part inquiry for determining whether prison conditions meet this standard and thus violate this Clause.<sup>95</sup> This section addresses the two-part standard, the current landscape of the doctrine’s application to risk of serious harm, and the application of this standard to the context of natural disasters in the wake of Hurricane Katrina.

A. *The Two-Part Test for Unconstitutional Conditions of Confinement*

1. *The Objective Requirement: Deprivation of the Minimal Civilized Measure of Life’s Necessities*

First, the Cruel and Unusual Punishments Clause imposes an affirmative duty on prison officials to provide the “minimal civilized measure of life’s necessities.”<sup>96</sup> These necessities include food, clothing, shelter, medical care, and reasonable safety,<sup>97</sup> and this definition must be extended in line with “the evolving standards of decency that mark the progress of a maturing society.”<sup>98</sup> This is the objective standard for determining liability, and it requires a court assessing prison conditions to make a finding that the alleged deprivation is “sufficiently serious,” or that there is a “substantial risk of serious harm.”<sup>99</sup> Prison conditions may even violate the Eighth Amendment in the aggregate, even though each condition alone would not (e.g., high cell temperatures combined with failure to provide ice water, cold showers, air conditioning, or appropriate ventilation may rise to the level of a violation, where each condition alone may not).<sup>100</sup>

In determining what constitutes a “sufficiently serious” harm, courts have found that lack of access to food and water, failure to provide timely and appropriate medical treatment to incarcerated people, and failure to provide sanitary and safe facilities all met that standard.<sup>101</sup> Although “food, clothing, shelter, medical care, and reasonable safety”<sup>102</sup> are explicit elements

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94. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

95. *See id.* at 833–34 (explaining that, to have a culpable state of mind, a prison official must cause an alleged deprivation that is sufficiently serious, and the official must have been deliberately indifferent).

96. *See Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

97. *Farmer*, 511 U.S. at 832.

98. *Id.* at 859 (Thomas, J., concurring) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

99. *Id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

100. *Wilson v. Seiter*, 501 U.S. 294, 304–05 (1991); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

101. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (finding that “deliberate indifference to serious medical needs of prisoners” may violate the Eighth Amendment); *Hodge v. Ruperto*, 739 F. Supp. 873, 878 (S.D.N.Y. 1990) (finding that plaintiff’s claim that officers deprived him of food and water may be sufficiently egregious to allow a reasonable inference of deliberate indifference).

102. *Farmer*, 511 U.S. at 832.



of the “minimal civilized measure of life’s necessities”—the deprivation of which violate the Eighth Amendment—the threshold of when a deprivation becomes unconstitutional (e.g., how many meals an individual may be deprived of<sup>103</sup> before that deprivation becomes unconstitutional) has not been identified by the Supreme Court,<sup>104</sup> leaving lower courts to make these determinations. In addition, the risk at issue must be “so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk,” meaning that the risk “is not one that today’s society chooses to tolerate.”<sup>105</sup>

Finally, it is well-settled that “a remedy for unsafe conditions need not await a tragic event.”<sup>106</sup> A plaintiff may bring a suit alleging a violation of their Eighth Amendment rights even if the harm has not yet occurred.<sup>107</sup> “[S]ubjecting individuals to a risk of future harm” is sufficient to stake a claim,<sup>108</sup> as long as the risk is “sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers.”<sup>109</sup> In sum, a condition which is “sure or very likely” to cause “needless suffering” in the near future, even if it may not cause “imminent harm,” is at odds with the purpose and current interpretation of the Eighth Amendment, so long as it meets the requirements under the subjective prong of this analysis.<sup>110</sup>

## 2. *The Subjective Requirement: Deliberate Indifference*

The requisite *mens rea* for an officer’s violation of the Eighth Amendment is “deliberate indifference,” defined by the court as the equivalent of “subjective recklessness” as used and defined in criminal law.<sup>111</sup> This standard goes beyond mere negligence, requiring that the officer “disregard[ed] a risk of harm of which he [was] aware.”<sup>112</sup> Although this knowledge requirement is strict and constructive notice cannot be substituted for actual notice, a plaintiff can rely on the “obviousness” of the risk to successfully hold an officer liable, as long as the officer does not prove that

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103. See e.g., *Williams v. Coughlin*, 875 F. Supp. 1004, 1011 (W.D.N.Y. 1995) (detailing that prison officials refused to feed an individual five consecutive meals over two days).

104. See *Rhodes*, 452 U.S. at 347 (discussing that not providing medical care—including dental care—is an Eighth Amendment violation, but not listing what other essential medical care must be given to incarcerated people).

105. *Helling v. McKinney*, 509 U.S. at 36.

106. *Id.* at 33.

107. *Id.* (“We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery.”).

108. *Baze v. Rees*, 553 U.S. 35, 49 (2008).

109. *Id.* at 50 (quoting *Helling*, 509 U.S. at 33, 34–35).

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

111. *Farmer v. Brennan*, 511 U.S. 825, 834–40 (1994).

112. *Id.* at 837.

they were unaware of the risk at issue.<sup>113</sup> This knowledge is a finding of fact to be made by weighing circumstantial evidence.<sup>114</sup> A plaintiff may sufficiently prove actual knowledge if the substantial risk was “longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and th[at] circumstances suggest that defendant-official being sued had been exposed to information concerning the risk.”<sup>115</sup> Even so, prison officials who have actual knowledge about a substantial risk will not be held liable if they “responded reasonably” to that risk, even if they were unsuccessful in preventing the harm from coming to fruition.<sup>116</sup>

Finally, courts in the Fifth Circuit have held that a request for administrative relief—as required by the Prison Litigation Reform Act<sup>117</sup>—is only circumstantial evidence that a prison official is aware of the risk of harm to incarcerated people. These requests must have “independent verification before they become probative.”<sup>118</sup> A request alone is insufficient to prove the deliberate indifference standard, but may support such a finding so long as there is sufficient factual corroboration that they were aware of a substantial risk of serious harm.<sup>119</sup>

#### *B. Current Application to Risk of Future Harm*

This subsection identifies several prison conditions that courts have found to pose an unconstitutional, substantial risk of serious harm under the Eighth Amendment’s protections.

##### *1. Secondhand Smoke*

The Supreme Court has applied the Eighth Amendment’s protection against risk of future harm in the context of secondhand smoke, finding that an incarcerated person may bring a successful claim after being involuntarily exposed to secondhand smoke, which creates an undue risk of serious harm.<sup>120</sup> The Court indicated that determining whether the risk at issue violates the Eighth Amendment includes not only a “scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused,” but also a determination of “whether

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113. *Id.* at 842–43, 843 n.8.

114. *Id.* at 842.

115. *Id.* at 842.

116. *Id.* at 844.

117. *See* Prison Litigation Reform Act, 42 U.S.C. § 1997e. The requirements under the Prison Litigation Reform Act will be discussed more fully below.

118. *Ball v. LeBlanc (Ball II)*, 792 F.3d 584, 595 (5th Cir. 2015) (holding that the district court did not err in finding that officers were deliberately indifferent based on the totality of the record, including incarcerated people’s administrative requests).

119. *Ball II*, 792 F.3d at 595.

120. *See Helling v. McKinney*, 509 U.S. 25, 35 (1993).

society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.”<sup>121</sup> The Court explicitly invites scientific and statistical analyses of the risks faced by incarcerated individuals into the analysis under this standard, providing an avenue to make risk-assessment arguments based on science and statistical fact.

## 2. *Extreme Heat*

In cases where plaintiffs are held in cells during periods of extreme heat without sufficient mitigating measures, courts have ruled in favor of incarcerated people, finding that they were exposed to an unreasonable risk for heat-related sickness and death.<sup>122</sup> Courts have found this argument to be particularly compelling for individuals with preexisting medical conditions, or who were on medications that made them more susceptible to these risks.<sup>123</sup> In these cases, looking to the totality of the circumstances, courts have considered whether individuals were given sufficient mitigating measures in the face of high temperatures, instead of just considering whether a facility’s temperatures have reached a designated maximum level.<sup>124</sup> Adequate remedies to mitigate risk may include the provision of ice water at all times, access to a cool shower, the availability of personal fans, or access to air conditioned areas.<sup>125</sup> Although exposure to extreme temperatures may

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121. *Id.* at 36.

122. *See, e.g.,* *Gates v. Cook*, 376 F.3d 323, 339–40 (5th Cir. 2004) (finding that people held on death row faced a substantial risk when temperatures rose above ninety degrees in a Mississippi facility); *Ball II*, 792 F.3d at 594 (holding that plaintiffs can suffer from heat-related ailments, such as heat stroke, in a facility with temperatures reaching over one hundred degrees); *Hinojosa v. Livingston*, 807 F.3d 657, 669 (5th Cir. 2015) (“[A] prison official acts unreasonably when he, either directly or through his policy, subject an inmate to extremely dangerous temperatures without adequate remedial measures in conscious disregard of the risk posed by those temperatures.”).

123. *See, e.g.,* *Gates*, 376 F.3d at 339 (discussing complaints from incarcerated people, including some who took psychotropic medications, who brought to prison officials’ attention that they were experiencing heat-related illnesses and conditions); *Ball II*, 792 F.3d at 593 (discussing how plaintiffs, who suffered from hypertension, diabetes, obesity, and hepatitis, were at an increased risk of heat stroke); *Hinojosa*, 807 F.3d at 666 (discussing how the plaintiff, who suffered from obesity, hypertension, diabetes, depression, and schizophrenia, was subjected to dangerous heat conditions in light of his medical condition).

124. *See* *Gates*, 376 F.3d at 339–40; *Hinojosa*, 807 F.3d at 662–663; *Walker v. Schult*, 717 F.3d 119, 126 (2d Cir. 2013) (“[E]xposing prisoners to extreme temperatures without adequate ventilation may violate the Eighth Amendment.”); *Graves v. Arpaio*, 623 F.3d 1043, 1049 (9th Cir. 2010) (“The district court did not err, therefore, in concluding that dangerously high temperatures that pose a significant risk to detainee health violate the Eighth Amendment.”); *Chandler v. Crosby*, 379 F.3d 1278, 1294 (11th Cir. 2004) (“[T]he Eighth Amendment applies to prisoner claims of inadequate cooling and ventilation.”).

125. *See* *Gates*, 376 F.3d at 339–40 (upholding district court’s injunction to provide incarcerated people with fans, in water, and daily showers when the heat index was over 90 degrees); *Ball II*, 792 F.3d at 595–96 (finding that fans split between two cells were not cooling down cells enough, and incarcerated people could not get enough relief from the heat when they

constitute an Eighth Amendment violation, the provision of these cooling factors may sufficiently lower the risk of serious harm enough to bring the conditions out of the unconstitutional zone.<sup>126</sup> This risk analysis must be done on a case-by-case basis, as the conditions of each facility may necessitate different mitigating measures to bring the level of risk below the threshold of unconstitutionality.<sup>127</sup> The Fifth Circuit has implemented a probability-based approach to determining the imminence and substantiality of the risk of harm in heat-related cases.<sup>128</sup> In this circuit, courts have considered the testimony of medical experts in determining the likelihood of heat-related illness or death in the conditions at issue, particularly given plaintiffs' underlying medical conditions.<sup>129</sup> The Fifth Circuit also found that "lower risk in other months does not offset their vulnerability [to extreme heat] during the summer."<sup>130</sup> Plaintiffs certainly do not need to prove that heat-related injury or death has already occurred; rather, they only need to show that there is a "substantial risk of serious harm" created by the conditions in which they are held.<sup>131</sup>

### 3. *Deprivation of Food*

In the context of access to adequate food, courts impose an affirmative duty on prison officials to "provide humane conditions of confinement; [they] *must ensure* that inmates receive adequate food."<sup>132</sup> The Supreme Court has provided little guidance on this topic,<sup>133</sup> leaving it to the circuit

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relied on guards to get ice); *Graves*, 623 F.3d at 1049–50 (noting the district court's order that prison officials must house people in temperatures under 85 degrees); *Chandler*, 379 F.3d at 1294 (noting that cooling and ventilation may be a sufficient remedy for an Eighth Amendment violation).

126. See *Ball v. LeBlanc (Ball I)*, 988 F. Supp. 2d 639, 662–63 (M.D.La. 2013), *aff'd in part, rev'd on other grounds, Ball II*, 792 F.3d 584 (5th Cir. 2015).

127. See *Gates*, 376 F.3d at 339–40; *Ball I*, 988 F. Supp. 2d at 662–63. The court found that this case was distinguishable from *Gates* because, although *Gates* approved fans for each cell, the prison fans in *Ball I* did not adequately cool or provide ventilation in cells. *Id.* Unlike *Gates*, water was not maintained at a cool temperature and people only had access to ice during one hour of the day. *Id.* Given these distinctions, although the prison complied with the measures mandated in *Gates*, incarcerated plaintiffs were not precluded from a viable Eighth Amendment violation. *Id.*

128. See *Ball I*, 988 F. Supp. 2d at 664 (utilizing the annual average maximum temperatures in an area during one month to estimate likely temperatures inside a prison).

129. See *Gates*, 376 F.3d at 339; *Ball I*, 988 F. Supp. 2d at 665–66.

130. *Ball II*, 792 F.3d at 594.

131. *Hinojosa v. Livingston*, 807 F.3d 657, 666 (5th Cir. 2015) (quoting *Ball II*, 792 F.3d at 593).

132. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (emphasis added).

133. *Williams v. Coughlin*, 875 F. Supp. 1004, 1011 (W.D.N.Y. 1995) ("I note, first of all, that there is little Supreme Court or Second Circuit case law providing guidance on the issue. The Supreme Court has indicated that prison inmates may be placed under conditions of confinement that include a *restricted* diet for limited periods of time. But no Supreme Court case has directly faced the questions of whether, under what circumstances, and for how long, prison officials may deliberately withhold *all* food from an inmate.").

courts to determine what level of food deprivation constitutes a sufficient Eighth Amendment claim. Deprivation of food and water for as short as two-and-one-half days is sufficient in some courts to support a finding of cruel and unusual punishment, regardless of whether that deprivation resulted in illness, death, or other injury.<sup>134</sup> In line with the extreme heat and secondhand smoking cases, some courts have extended this body of law to the potential risk of receiving a nutritionally inadequate diet.<sup>135</sup> Although courts vary in their interpretation of “substantial risk,” they have regularly held conditions unconstitutional where (1) established prison policy has resulted or *would* result in the denial of food; and (2) incarcerated people receive a nutritionally inadequate diet.<sup>136</sup> The institutional importance of access to adequate food is also recognized throughout the prison industry, as reflected in the ACA’s requirement that “at least three meals . . . [be] provided at regular meal times during each 24-hour period.”<sup>137</sup> Courts have held that food deprivation does not violate the Eighth Amendment where it does not jeopardize the nutritional sufficiency of the food provided to an incarcerated person and where the deprivation is caused by an officer’s response to an action taken by the incarcerated individual.<sup>138</sup> It follows from these cases that the substantial risk of losing access to food during or after a natural disaster—which would jeopardize individuals’ access to a nutritionally adequate diet—may violate the Eighth Amendment where this risk resulted from prison officials’ deliberate indifference.

#### 4. Access to Medication

The Supreme Court set the standard for inadequate provision of medical care in violation of the Eighth Amendment in *Estelle v. Gamble*.<sup>139</sup> A

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134. *Hodge v. Ruperto*, 739 F. Supp. 873, 878 (S.D.N.Y. 1990) (“Plaintiff’s claim that a number of officers deprived him of food and water for two-and-one-half days and confined him in an overcrowded and unsanitary cell charges conduct sufficiently egregious to allow a reasonable inference of . . . deliberate indifference to plaintiff’s constitutional rights.”).

135. *See Foster v. Runnels*, 554 F.3d 807, 810 (9th Cir. 2009) (“[I]t is clearly established under the Eighth Amendment that prison officials are obligated to provide inmates with nutritionally adequate meals on a regular basis.”).

136. *See id.* at 814–15.

137. AM. CORR. ASS’N, *supra* note 58, at 151.

138. *See, e.g., Williams v. Shah*, 927 F.3d 476, 481 (7th Cir. 2019) (discussing no risk of serious harm when evidence showed meals were nutritionally sufficient); *Foster*, 554 F.3d at 813 (discussing cases where incarcerated individuals refused to comply with “simple prerequisites”); *Rodriguez v. Briley*, 403 F.3d 952, 952–53 (7th Cir. 2005) (discussing no violation when an incarcerated person would not store personal belongings in a storage box before exiting a cell, which would cause prison guards to keep the person in his cell, unable to eat in the cafeteria); *Talib v. Gilley*, 138 F.3d 211, 215–16 (5th Cir. 1998) (discussing no violation when an incarcerated person was not served when he refused to kneel down before being served).

139. *See 429 U.S. 97, 99–101 (1976)* (in which an incarcerated person injured his back while performing a prison work assignment and prison officials placed the person in solitary confinement for refusing to work).

violation results when prison officials are deliberately indifferent to the medical needs of an individual, and the individual's medical needs are serious.<sup>140</sup> The Tenth Circuit clarified the *mens rea* requirement, holding that deliberate indifference may be shown “when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment.”<sup>141</sup> In the context of a class action, plaintiffs may satisfy the deliberate indifference standard by demonstrating a pattern of negligent conduct by prison officials or medical staff, or by establishing that “there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care.”<sup>142</sup>

##### 5. *Fire Safety Measures*

Lastly, a number of circuits hold that the Eighth Amendment protection against risk to health or safety requires prison officials to provide sufficient fire safety measures, although the extent to which that protection extends varies.<sup>143</sup> The First Circuit has ruled that “fire safety is a legitimate concern under the Eighth Amendment,”<sup>144</sup> and noted that incarcerated people are not required to prove that they “*inevitably* will suffer physical injury or death from fire before they have standing to challenge the hazardous fire conditions.”<sup>145</sup> The Ninth Circuit has held that “prisoners have the right not to be subjected to the unreasonable threat of injury or death by fire and need not wait until actual casualties occur in order to obtain relief from such conditions.”<sup>146</sup> The Seventh Circuit echoed this sentiment, stating that “[t]here is no question” that fire safety is a legitimate Eighth Amendment concern.<sup>147</sup> The Fifth Circuit has also held that the Eighth Amendment mandates adequate fire safety in prisons, but noted that a plaintiff must show that they were injured by a fire, or that their unit was particularly susceptible

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140. *Id.* at 104–05.

141. *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980).

142. *Id.* at 575.

143. *Compare* *Masonoff v. DuBois*, 899 F. Supp. 782, 798 (D. Mass. 1995) (quoting *Santana v. Collazo*, 714 F.2d 1172, 1183 (1st Cir. 1983)) (“There is no question that fire safety is a legitimate concern under the Eighth Amendment”), *with* *Shrader v. White*, 761 F.2d 975, 986 (4th Cir. 1985) (holding that deficiencies in fire safety did not violate the Eighth Amendment). *See also* *Hadix v. Johnson*, 367 F.3d 513, 528–29 (6th Cir. 2004) (reviewing cases dealing with prison fire safety, noting the “continuum” of various violations of fire safety).

144. *Santana v. Collazo*, 714 F.2d at 1183.

145. *Dimarzo v. Cahill*, 575 F.2d 15, 18 (1st Cir. 1978) (emphasis added); *see also* *Hoptowitz v. Spellman*, 753 F.2d 779, 783–84 (9th Cir. 1985) (affirming a district court finding that “substandard fire prevention at the penitentiary endangered the prisoners’ lives and therefore violated the Eighth Amendment”).

146. *Hoptowitz*, 753 F.2d at 784.

147. *French v. Owens*, 777 F.2d 1250, 1257 (7th Cir. 1985).

to fires.<sup>148</sup> The Supreme Court favorably cited a case finding that incarcerated people were entitled to relief where “exposed electrical wiring, deficient firefighting measures, and the mingling of inmates with serious contagious diseases with other prison inmates” were adequately proven, premised on a risk of harm analysis.<sup>149</sup> Many circuits have held that incarcerated people do not need to take all measures, or do everything they can to reduce this risk before bringing a lawsuit—rather, courts tend to require that these facilities do just enough to reduce risk below a certain threshold, at which point the risk incarcerated individuals face is no longer unconstitutional.<sup>150</sup> This holding mirrors extreme heat standards, where sufficient mitigation measures may reduce otherwise unconstitutional risk below the threshold, thus making it constitutional.

In sum, the Eighth Amendment protects incarcerated people against prison conditions that pose a “substantial risk of serious harm.”<sup>151</sup> The application of the two-prong standard in several contexts demonstrates the willingness of courts to step in and protect people against unconstitutional conditions of confinement, even where there has been only a *risk* of harm to health or safety.

### C. *Application of This Standard in the Wake of Hurricane Katrina*

In the wake of Hurricane Katrina, incarcerated people were left without food, water, medical attention, clean clothes, and bathroom facilities during the storm, only to be evacuated to a highway overpass where they sat for hours, again without access to food and water.<sup>152</sup> Louisiana courts found that plaintiffs did not meet the second prong of the Eighth Amendment test, the “deliberate indifference” standard.<sup>153</sup> The Eastern District of Louisiana in

148. *Johnson v. Tex. Bd. of Crim. Just.*, 281 F. App’x 319, 322 (5th Cir. 2008); *Pinkton v. Jenkins*, No. 3:17CV202-JMV, 2018 WL 3463276, at \*6 (N.D. Miss. July 18, 2018).

149. *Helling v. McKinney*, 509 U.S. 25, 34 (1993) (citing *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974)).

150. *See, e.g., Pinkton*, 2018 WL 3463276, at \*6 (“Though fire and electrical codes may assist in determining whether a lack of fire safety constitutes a violation of the Eighth Amendment, they are not determinative.”).

151. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

152. *See Carroll v. Gusman*, No. 06-9031, 2009 WL 2949997 at \*1 (E.D. La. Sept. 10, 2009) (alleging that plaintiff was left in his cell in the Orleans Parish Prison for four days and nights without food, water, toilet or shower facilities, change of clothes, or medicine after Hurricane Katrina); *Harris v. Gusman*, No. 06-3939, 2007 WL 1792512 at \*1 (E.D. La. June 19, 2007) (alleging that plaintiff housed in Templeman Jail was abandoned without food, drinking water, medication, ventilation, electricity, or any treatment for his amputated leg while water levels raised to his chest); *Conner v. Gusman*, No. 06-1650, 2007 WL 1428749 at \*1 (E.D. La. May 10, 2007) (alleging that plaintiff was left without food, security, medical attention, drinking water, or clean clothes when sewage water began flooding the sixth floor of the jail).

153. *Carroll*, 2009 WL 2949997 at \*6; *Harris*, 2007 WL 1792512 at \*7; *Conner*, 2007 WL 1428749 at \*3.

those cases stated that the Orleans Parish Prison’s warden was “under no constitutional burden to protect [the plaintiff] from the unknown and unexpected,” referring to the flooding caused by the breached levees.<sup>154</sup> Further, courts found that the actions of prison officials did not rise beyond mere negligence because, *inter alia*, the warden acted in accordance with the evacuation order given by the Mayor of New Orleans—an order that excluded incarcerated populations.<sup>155</sup> Those holdings did not discuss whether the deprivations at issue satisfied the first prong of the Eighth Amendment test.<sup>156</sup> Regarding the alleged insufficient provision of water to people during Hurricane Ike, the Eleventh Circuit similarly held that “any failure to anticipate the inmates’ water consumption was mere negligence, and did not establish a basis for liability.”<sup>157</sup>

### III. Solution: Courts Should Extend Eighth Amendment Jurisprudence to the Context of Natural Disasters

This section proposes a solution to protect incarcerated individuals in the face of natural disasters. Courts should extend their interpretation of the Eighth Amendment’s protection from substantial risk of serious harm to the context of extreme weather, creating a federal minimum level of protection for incarcerated populations. The law must adapt to reflect the heightened risk of harm posed by a changing climate. This section will discuss the importance of the judicial process—rather than the legislative process—in creating these protections, and will discuss the application of the Eighth Amendment test for unconstitutional prison conditions to the natural disaster context. Further, this section will explore the process of bringing one of these claims, including several potential barriers to successful litigation.

#### A. *Judicial Action as the Appropriate Avenue for Protecting Incarcerated Populations*

As climate change results in greater frequency and severity of extreme weather events,<sup>158</sup> the need for comprehensive emergency preparedness and planning is imperative to avoid undue risk of harm to the 2.3 million individuals detained in the United States.<sup>159</sup> A recent FEMA study found that more than forty percent of Americans lived in a county subjected to a climate-

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154. *Harris*, 2007 WL 1792512, at \*6.

155. *See Carroll*, 2009 WL 2949997, at \*6.

156. *See id.* at \*2–7; *Harris*, 2007 WL 1792512, at \*4–7; *Conner*, 2007 WL 1428749, at \*2–5.

157. *Collins v. Homestead Corr. Inst.*, 452 F. App’x, 848, 851 (11th Cir. 2011).

158. *See generally* HUMAN COST OF DISASTERS, *supra* note 25, at 13–18 (discussing increases in floods, dangerous storms, earthquakes, droughts, extreme temperatures, and wildfires).

159. Sawyer & Wagner, *supra* note 14.



related, extreme weather event in 2021.<sup>160</sup> Rising temperatures extended the wildfire season and raised the intensity of fires, while abnormally high temperatures impacted eighty percent of Americans in the same year.<sup>161</sup> Flash floods, extreme rainfall, and major hurricanes were particularly harmful in the Southeastern United States.<sup>162</sup> The risks posed by severe weather events will continue to devastate vulnerable communities in the United States for the foreseeable future, creating a greater need for judicial action to extend Eighth Amendment protections against substantial risk of serious harm from unprepared facilities. Taking affirmative steps to reduce risk in response to a changing climate is necessary as an adaptive measure to protect incarcerated individuals and reduce the risk of loss of life as a result of extreme weather events.<sup>163</sup> Incarcerated individuals cannot go to the store upon hearing a hurricane warning, they cannot maintain a stock of emergency supplies, and they cannot take other reasonable actions to protect themselves in an emergency. It is the duty of the state “to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.”<sup>164</sup> Climate change has increased the risk of harm resulting from these events such that courts must extend the interpretation of “substantial risk of serious harm” to risks related to inadequate prison preparedness for extreme weather events.

Even in the face of the considerable barriers discussed below, litigation is currently the most appropriate avenue for bringing these sweeping changes and providing incarcerated individuals with a constitutional ceiling. As demonstrated, Congress has failed to create a statutory scheme to protect people in this context,<sup>165</sup> increasing the need for federal courts to apply the Eighth Amendment to protect incarcerated individuals’ constitutional rights. Incarcerated individuals are facing extraordinary levels of risk, and the legislative process is not providing an adequate—or any—remedy, necessitating the involvement of courts to uphold these individuals’ constitutional rights. It is the duty of the judiciary to protect the constitutional rights of individuals, and courts must step in where, as here, conditions clearly violate the Eighth Amendment.<sup>166</sup>

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160. Sarah Kaplan & Andrew Ba Tran, *More Than 40 Percent of Americans Live in Counties Hit by Climate Disasters in 2021*, WASH. POST (Jan. 5, 2022, 9:11 PM), <https://www.washingtonpost.com/climate-environment/2022/01/05/climate-disasters-2021-fires/> [https://perma.cc/C794-VSYZ].

161. *Id.*

162. *Id.*

163. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 40, at 750.

164. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Spicer v. Williamson*, 132 S.E. 291, 293 (N.C. 1926)).

165. See discussion *supra* Section I.B.

166. See *Davis v. Passman*, 442 U.S. 228, 242 (1979) (discussing that the justice system has an established practice of issuing injunctions to restrain state officers as a means of protecting people’s constitutional rights); *Hudson v. Palmer*, 468 U.S. 517, 557 (1984) (O’Connor, J., concurring) (“The

*B. A Risk-Based Eighth Amendment Claim Satisfies the Existing Test*

*1. The Risk Posed by Unprepared Facilities Presents a Substantial Risk of Serious Harm*

First, the failure to adequately prepare a prison for natural disasters places incarcerated individuals at substantial risk of serious harm, satisfying the objective standard of the two-part test for unconstitutionality in prison conditions. Here, there is a clear parallel between involuntary exposure to secondhand smoke in a prison facility, which places an incarcerated individual at substantial risk of the adverse effects of secondhand smoke, and involuntary exposure to prison conditions, which threaten an incarcerated person's access to the "minimal civilized measure of life's necessities" prior to and during extreme weather events.<sup>167</sup> To satisfy this prong on a claim of risk of future harm, the plaintiff must show that a potential harm is serious, that such injury is likely to occur, and that the risk complained of is "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk."<sup>168</sup>

The Supreme Court in *Helling* opened the door for reasoning based on science and data to provide the foundation for the Court to step in to prevent risk of harm. In *Helling*, the Court held that scientific evidence of the risks of exposure to secondhand smoke was enough to state an Eighth Amendment claim.<sup>169</sup> A court can apply this risk-based analysis to natural disaster risk mitigation. Many extreme weather events are predictable with significant confidence.<sup>170</sup> Hurricanes, tornados, and extreme temperatures each have well-understood and established seasonal variability, presenting clearly heightened risk during expected periods of each year.<sup>171</sup> Looking specifically to hurricanes, scientists can predict the paths of these storms days, if not weeks, in advance.<sup>172</sup> Sufficient advanced forecasting allows for adequate preparation and evacuation of individuals in high-risk areas.<sup>173</sup> The Fifth Circuit has noted that in the context of extreme heat, lower risk of harm

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courts, of course, have a special obligation to protect the rights of prisoners. Prisoners are truly the outcasts of society.").

167. *Cf. Helling v. McKinney*, 509 U.S. 25, 33–36 (1993) (explaining that the Eighth Amendment provides protections against the future risk of injury for "basic human needs"); *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (discussing the Eighth Amendment test).

168. *Helling*, 509 U.S. at 37.

169. *Id.* at 33.

170. See NAT'L OCEANIC & ATMOSPHERIC ADMIN., HURRICANES: IMPROVED TRACK AND INTENSITY PREDICTIONS 12, <https://research.noaa.gov/sites/oar/Documents/NOAA%20Research%20Matters/ResearchHighlights-WeatherTsunamiForecasts.pdf> [<https://perma.cc/LDG6-HR7W>].

171. *See id.*

172. *Id.*

173. *Id.*

during some parts of the year does not offset vulnerability during periods of high risk.<sup>174</sup> It follows that the same applies for periods of particular vulnerability to extreme weather in the contexts of hurricanes, tornadoes, and other events with predictable seasonal variability.

The risk posed by inadequate preparation in this context is clearly serious. The Court in *Farmer* explicitly listed “adequate food, clothing, shelter, and medical care, and [reasonable safety]” as those conditions which officers have a duty to provide incarcerated people as part of their rights to “humane conditions of confinement.”<sup>175</sup> Here, when these facilities are inadequately prepared for disaster, they place incarcerated individuals at risk of losing access to each of these important conditions. As discussed above, courts have identified deprivation of food, exposure to extreme heat, lack of access to medical care, and inadequate fire safety measures as sufficiently “serious” to satisfy this prong.<sup>176</sup> It follows that the risks faced by incarcerated people as a result of inadequate preparation (i.e., loss of access to food, potable water, power, shelter, medical care, and safe conditions of confinement) are sufficiently serious to satisfy this element of the objective requirement.

Looking to contemporary standards of decency, adequate risk reduction measures fall within these standards. It is unimaginable that someone would be *forced* to face a natural disaster without adequate protective measures. Residents of areas facing high risk of extreme weather are counseled by local, state, and federal officials before each natural disaster or hurricane/tornado season to stock up on essentials and take precautions.<sup>177</sup> Before storms, grocery store shelves are regularly cleared out, indicating the standard practice of reducing one’s risk of harm prior to disaster.<sup>178</sup> Incarcerated

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174. *Ball II*, 792 F.3d 584, 594 (5th Cir. 2015).

175. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

176. See discussion *supra* Section II.B.

177. See, e.g., Adam Nossiter & Shalia Dewan, *Mayor Orders the Evacuation of New Orleans*, N.Y. TIMES (Aug. 30, 2008), <https://www.nytimes.com/2008/08/31/us/31orleans.html> [<https://perma.cc/Q6LG-ZY4W>]; Teddy Grant, *Timeline: When Did Officials Tell People to Evacuate from Hurricane Ian?*, ABC NEWS (Oct. 4, 2022, 11:44 AM), <https://abcnews.go.com/US/officials-people-evacuate-hurricane-ian/story?id=90931063> [<https://perma.cc/G58M-N3AC>].

178. Kayla Webley, *Qualm Before the Storm: East Coasters Clean out Store Shelves in Last-Minute Preparations*, TIME (Aug. 27, 2011), <http://content.time.com/time/nation/article/0,8599,2090696,00.html> [<https://perma.cc/7QY5-TCGF>]; Peter Kotecki, *Eerie Photos Show Empty Supermarket Shelves and Desolate Streets Before Hurricane Florence Hits*, BUS. INSIDER INDIA (Sept. 14, 2018, 12:19 AM), <https://www.businessinsider.in/eerie-photos-show-empty-supermarket-shelves-and-desolate-streets-before-hurricane-florence-hits/articleshow/65801829.cms> [<https://perma.cc/BK8S-763H>]; Marco Torres & Treva Wygle, *Houstonians Clearing Grocery Shelves Before Hurricane Harvey Hits*, HOUS. PRESS (Aug. 25, 2017, 2:45 PM), <https://www.houstonpress.com/slideshow/houstonians-clearing-grocery-shelves-before-hurricane-harvey-hits-9735282> [<https://perma.cc/8Y8N-SB2Z>].

populations rely solely on prison officials to take these protective measures for them and expect that, in the event of extreme weather, their facilities will have prepared sufficiently for disaster such that they will not lose access to food, water, and medication—those life-sustaining necessities that are certainly included in contemporary standards of decency. When facility officials do not even attempt to take sufficient risk-reduction measures, they must be held accountable for placing individuals who rely on them to make decisions regarding their health and safety at a substantial risk of serious harm.

Finally, it is well-settled that plaintiffs do not necessarily have to wait until these risks manifest themselves in injury or death to challenge the conditions of their confinement.<sup>179</sup> Risk of a harm that has been shown time and again—in this context, deprivation of basic needs as a result of unprepared prisons and jails—fits squarely into this description. The Court in *Helling* explicitly rejected the idea that “only deliberate indifference to *current* serious health problems of inmates is actionable under the Eighth Amendment.”<sup>180</sup> It follows from these cases that plaintiffs’ claims in the extreme weather context would clearly satisfy the objective prong of this standard.

## 2. *Reconsidering the Subjective Requirement Decades After Hurricane Katrina*

Second, the requisite *mens rea* for a violation of the Eighth Amendment is “deliberate indifference.”<sup>181</sup> A plaintiff may rely on “obviousness” of the risk to successfully hold an officer liable, as long as the officer does not prove that they were unaware of the risk at issue.<sup>182</sup> This second prong poses the greatest barrier to relief for incarcerated people in conditions of insufficient disaster preparedness, as shown in the line of Katrina cases above.<sup>183</sup> Courts evaluating these claims today should take note of the impact of natural disasters on prisons in the near twenty years since these cases were decided. Decades of highly publicized, disastrous, extreme weather events have effectively placed prison officials on notice of the risks associated with natural disasters in prisons, particularly in areas that tend to be hit the hardest

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179. See *Dimarzo v. Cahill*, 575 F.2d 15, 18 (1st Cir. 1978); *Hoptowit v. Spellman*, 753 F.2d 779, 783–84 (9th Cir. 1985); *Johnson v. Tex. Bd. of Crim. Just.*, 281 F. App’x 319, 322 (5th Cir. 2008).

180. *Helling v. McKinney*, 509 U.S. 25, 34 (1993) (emphasis added).

181. *Farmer v. Brennan*, 511 U.S. 825, 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 302–03 (1991)).

182. *Id.* at 840–41.

183. See *Robbins*, *supra* note 73, at 34–35 (discussing reasons for planning inadequacies during Hurricane Katrina).

by these events annually. Dozens of case studies<sup>184</sup> have shown the significant risk to incarcerated people before, during, and after natural disasters. These case studies sufficiently demonstrate what can—and often does—happen when a prison is not adequately prepared for disaster when courts evaluate an officer’s deliberate indifference to these risks. This effectively distinguishes cases brought today from the line of Katrina cases brought after 2005 and provides the opportunity for reevaluation under this second prong.

Obviousness can serve as evidence establishing knowledge of these risks.<sup>185</sup> Here, there is widespread, obvious knowledge that, in the face of storms, it is in an individual’s best interest to prepare by obtaining nonperishable food, a supply of potable water, other necessities like household essentials and medication, and a backup generator: FEMA and many state agencies have promulgated guidance for individuals living in areas impacted by hurricanes, particularly leading up to the start of hurricane season and before each individual storm.<sup>186</sup> This guidance often includes checklists denoting suggested emergency supplies one should have on hand, as well as guidance for planning and preparing for potential evacuation.<sup>187</sup> The DHS operates a site exclusively dedicated to disaster preparedness, providing information to individuals regarding safety measures to be taken before, during, and after earthquakes, extreme heat, floods, hurricanes, tornadoes, severe weather, and wildfires, among many other extreme weather events.<sup>188</sup> Although the obviousness of the risks associated with a facility not creating or maintaining an evacuation plan, failing to keep a stock of food, water, and medication, or failing to maintain a backup power supply is clear, guidance exists only for those individuals capable of protecting themselves. No explicit requirements exist for prison officials tasked with protecting the health and safety of hundreds or thousands of incarcerated individuals in the face of extreme weather.

Some of the deadliest, most devastating, and most broadly-publicized extreme weather events have occurred in the two decades following the

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184. See discussion *supra* Introduction.

185. *Farmer*, 511 U.S. at 842.

186. See *generally Proper Emergency Kit Essential to Hurricane Preparedness*, FED. EMERGENCY MGMT. AGENCY (Aug. 16, 2018), <https://www.fema.gov/press-release/20210318/proper-emergency-kit-essential-hurricane-preparedness> [<https://perma.cc/P24L-6YAN>] [hereinafter *Emergency Kit*]; FED. EMERGENCY MGMT. AGENCY, HOW TO PREPARE FOR A HURRICANE (2020), [https://www.ready.gov/sites/default/files/2020-03/fema\\_how-to-prepare-for-hurricane.pdf](https://www.ready.gov/sites/default/files/2020-03/fema_how-to-prepare-for-hurricane.pdf) [<https://perma.cc/2ZCQ-D9SP>] [hereinafter HOW TO PREPARE]; *Texas Hurricane Center*, OFF. OF THE TEX. GOVERNOR, <https://gov.texas.gov/hurricane> [<https://perma.cc/3SPH-6TJV>].

187. See *Emergency Kit*, *supra* note 186, at 11; HOW TO PREPARE, *supra* note 186; *Texas Hurricane Center*, *supra* note 186.

188. READY.GOV, U.S. DEP’T OF HOMELAND SEC., <https://www.ready.gov> [<https://perma.cc/3YEK-J3PS>].

historic 2005 hurricane season. Even though the courts in the Katrina cases found that officers' conduct was negligent, but not deliberately indifferent since prison officials had no way of foreseeing the specific risks at the hurricane and flooding, officers today should recognize that the individuals in their facilities face extreme risks to their health and safety. Some of the most destructive hurricanes on record (e.g., Katrina, Rita, Harvey, Sandy, Ike, Wilma, and Maria, among many others) have occurred since 2005.<sup>189</sup> Notably, the 2005 hurricane season, which brought the particularly damaging storms of Katrina, Rita, and Wilma, broke multiple long-standing records: the most named tropical storms in a single season since 1933, the most hurricanes formed in a single season since 1969, and the most major hurricanes making landfall in the United States in a single season.<sup>190</sup> The records set in the 2005 hurricane season for most named storms and most storms making landfall were both broken again in 2020.<sup>191</sup> Not only are severe storms happening more frequently and causing more destruction, but the reporting surrounding these storms has also increased, resulting in widespread perceptions that extreme weather events are occurring more frequently and with more severity than in the past.<sup>192</sup> These factors support the inference that prison officials are more aware of the risks posed to the health and safety of incarcerated individuals under their care today than they were before Hurricane Katrina. This is especially true for high-level prison management, who may be in charge of overseeing the preparation and maintenance of emergency planning, and for officers at facilities in areas repeatedly burdened by extreme weather, as emergency preparedness customs are general knowledge for residents in these areas.

The obviousness of the risks associated with extreme weather to officers has likely increased dramatically in the last 20 years. This represents a

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189. NAT'L CTRS. FOR ENV'T INFO. & NAT'L OCEANIC & ATMOSPHERIC ADMIN., COSTLIEST U.S. TROPICAL CYCLONES 1 (2022), <https://www.ncei.noaa.gov/access/monitoring/billions/demi.pdf?sort=cost-asc> [<https://perma.cc/U6Y3-CVMS>].

190. Jeff Halverson & Mike Bettwy, *2005: A Hurricane Season 'On Edge'*, NAT'L AERONAUTICS & SPACE ADMIN. (Feb. 10, 2006), [https://www.nasa.gov/vision/earth/lookingatearth/2005hurricane\\_recap.html#:~:text=Typically%20the%20waters%20of%20the,many%20storms%20to%20rapidly%20intensify](https://www.nasa.gov/vision/earth/lookingatearth/2005hurricane_recap.html#:~:text=Typically%20the%20waters%20of%20the,many%20storms%20to%20rapidly%20intensify) [<https://perma.cc/9JVC-AC3W>].

191. *Record-breaking Atlantic Hurricane Season Draws to An End*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., (June 10, 2021), <https://www.noaa.gov/media-release/record-breaking-atlantic-hurricane-season-draws-to-end> [<https://perma.cc/XA5T-KXDK>]; *2020 Atlantic Hurricane Season Takes Infamous Top Spot for Busiest on Record*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Nov. 10, 2020), <https://www.noaa.gov/news/2020-atlantic-hurricane-season-takes-infamous-top-spot-for-busiest-on-record> [<https://perma.cc/N95D-KFTD>].

192. Jason Bittel, *Are Hurricanes Happening More Often or Does It Just Seem That Way?*, WASH. POST (Sept. 20, 2021, 9:44 AM), [https://www.washingtonpost.com/lifestyle/kidspot/are-hurricanes-happening-more-often-or-does-it-just-seem-that-way/2021/09/17/9bc40450-1449-11ec-9589-31ac3173c2e5\\_story.html](https://www.washingtonpost.com/lifestyle/kidspot/are-hurricanes-happening-more-often-or-does-it-just-seem-that-way/2021/09/17/9bc40450-1449-11ec-9589-31ac3173c2e5_story.html) [<https://perma.cc/L8HN-KW2V>].

sufficient change in conditions for courts to find that officers who do not adequately prepare their facilities for extreme weather are deliberately indifferent to the risks posed to their facility populations. While courts may have found that prison officials were not on notice of the risks posed to prison facilities prior to the 2005 hurricane season, the obviousness of the risk has increased. Therefore, plaintiffs bringing these claims today may be able to satisfy the deliberate indifference standard via the obviousness of the risks. Given the broadly publicized nature of these risks and the extensive guidance provided to individuals before disasters, the risks facing detention facilities are also abundantly clear.

In sum, given the changed circumstances since courts last took up this issue directly in the Katrina cases, courts should extend current Eighth Amendment jurisprudence to mandate that sufficient risk-reduction measures must be taken by correctional facilities in response to the substantial risk of serious harm posed by natural disasters, particularly in light of the obviousness of the risk supporting a finding of deliberate indifference. The need for this application is especially pressing today, as climate change continues to exacerbate these risks and place more individuals at risk of harm every year.

*C. Courts Should Extend and Apply the “Mitigating Measures” Standard in Crafting a Remedy*

As in the extreme heat and fire safety cases, courts should adopt the mitigating measures approach, where courts establish a ceiling of risk of potential harm beyond which levels of risk cannot rise without violating the federal Constitution. Each facility has different needs and faces different levels and types of risk, making a blanket level of protection unsuitable for adequate protection for all facilities. In the context of extreme heat, courts look to the risk-reduction measures in place—for incarcerated people to be constitutionally subjected to extreme heat, they must also be given access to ice water, cold showers, personal fans, or other forms of ventilation.<sup>193</sup> Courts have found that these mitigation measures, when effectively employed, reduce the risk of harm below unconstitutional levels. So too here, where natural disasters pose a substantial risk of serious harm sufficient to satisfy the Eighth Amendment test, the risk of harm may be mitigated down to constitutional levels by measures discussed above, particularly those recommended by LETRA<sup>194</sup> and implemented by states like Nebraska.<sup>195</sup> In

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193. See *Gates v. Cook*, 376 F.3d 323, 339–40 (5th Cir. 2004); *Ball I*, 988 F. Supp. 2d 639, 662–63 (M.D. La. 2013); *Walker v. Schult*, 717 F.3d 119, 126 (2d Cir. 2013); *Graves v. Arpaio*, 623 F.3d 1043, 1049 (9th Cir. 2010); *Chandler v. Crosby*, 379 F.3d 1278, 1294 (11th Cir. 2004).

194. See LETRA GUIDANCE, *supra* note 72.

195. Robbins, *supra* note 73, at 13.

the context of food, for example, courts may hold that maintaining a thirty-day emergency stock of food appropriately reduces the risk of serious harm faced to incarcerated individuals, particularly before a hurricane or tornado season or before specific extreme weather events which are sufficiently predictable. In providing a remedy in these cases, courts should hold that facilities cannot have so many factors operating together that the level of risk rises to the level of unconstitutionality. Courts should examine each risk separately (e.g., the risk of deprivation of food is clearly distinct from the risk of exposure to extreme heat). This examination will look different for each facility in each region and will provide the necessary flexibility for prison officials to make decisions in the best interests of the health and safety of incarcerated populations, while providing a judicially-enforceable ceiling to hold those officials accountable when they do not take sufficient measures.<sup>196</sup>

#### D. *Barriers to Litigation*

Although litigation presents the clearest, fastest, and most effective avenue to achieving a solution, several barriers stand in the way of litigating these claims. The duty to exhaust all administrative remedies imposed by the Prison Litigation Reform Act (PLRA) is a significant deterrent in bringing these claims. Several other potential barriers further heighten the difficulty of bringing these claims.

##### 1. *The Prison Litigation Reform Act's Duty to Exhaust Administrative Remedies*

The PLRA was enacted in 1996 with the goal, *inter alia*, of “reduc[ing] the quantity and improv[ing] the quality of prisoner suits,”<sup>197</sup> in response to the public perception that people were bringing large numbers of frivolous lawsuits.<sup>198</sup> The centerpiece of the PLRA was a heightened exhaustion requirement, mandating that “[n]o action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”<sup>199</sup> This provision applies to “all inmate suits about prison life.”<sup>200</sup> Two main justifications for exhaustion have been advanced: first, the practice provides an agency with an opportunity to remedy its mistakes before it is haled into court; second, exhaustion promotes the efficient resolution of claims and provides the opportunity for the production of a useful record for

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196. *Gates*, 376 F.3d at 339–40; *Ball I*, 988 F. Supp. 2d at 662–63.

197. *Porter v. Nussle*, 534 U.S. 516, 524–25 (2002).

198. William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651, 669 (2004).

199. 42 U.S.C. § 1997e(a).

200. *Porter*, 534 U.S. at 532.



judicial consideration.<sup>201</sup> The Supreme Court has interpreted “exhaustion” under this statute to have the same meaning as in administrative law, and requires incarcerated individuals to “[do] all of steps that the agency holds out, and do[] so *properly*.”<sup>202</sup>

The Federal Bureau of Prisons (BOP), which is responsible for the custody and care of people held in federal custody,<sup>203</sup> has promulgated regulations outlining the Administrative Remedy Program for federal facilities, commonly referred to as the grievance procedure.<sup>204</sup> The District of Columbia Corrections Information Council characterizes this procedure as a four-step process, where the incarcerated individual: (1) fills out an informal complaint and provides it to staff; (2) begins the formal complaint process by filing a Request for Administrative Remedy and providing it to the Warden; (3) may file an appeal to the Regional Director within twenty calendar days of the Warden’s response; and (4) may appeal to the General Counsel in Central Office within thirty days of the Regional Director’s response.<sup>205</sup> This procedure includes only one exception for an emergency: a reduction in the response time by a warden or officer if the request “is determined to be of an emergency nature which threatens the inmate’s immediate health or welfare.”<sup>206</sup> In contrast, Nebraska’s Department of Correctional Services provides for a separate emergency grievance form for those “matters that must be resolved quickly because if the standard grievance time limits were used the inmate would be subjected to substantial risk of personal injury or other serious or irreparable harm,”<sup>207</sup> incorporating the language from the Supreme Court’s Eighth Amendment jurisprudence outlined above.

The exhaustion of this grievance procedure is the first step in bringing a claim contesting an incarcerated individual’s conditions of confinement. Here, the BOP has the opportunity to correct the inadequacies in its system without the need to go to court. This process, however, is not always clear, and many incarcerated individuals face significant burdens in attempting to go through the process for a number of reasons, including the complicated

201. *Woodford v. Ngo*, 548 U.S. 81, 89 (2006).

202. *Id.* at 90 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)).

203. *About Our Agency*, FED. BUREAU OF PRISONS, <https://www.bop.gov/about/agency/> [<https://perma.cc/6Q26-24GS>].

204. FED. BUREAU OF PRISONS, PROGRAM STATEMENT 1330.18, ADMINISTRATIVE REMEDY PROGRAM (2014), [https://www.bop.gov/policy/progstat/1330\\_018.pdf](https://www.bop.gov/policy/progstat/1330_018.pdf) [<https://perma.cc/2S3K-88GE>]; see also D.C. CORR. INFO. COUNCIL, FBOP – ADMINISTRATIVE REMEDY PROGRAM (2017), [https://cic.dc.gov/sites/default/files/dc/sites/cic/page\\_content/attachments/BOP%20Administrative%20Remedies%2011.15.17%20REVISED.pdf](https://cic.dc.gov/sites/default/files/dc/sites/cic/page_content/attachments/BOP%20Administrative%20Remedies%2011.15.17%20REVISED.pdf) [<https://perma.cc/3SKJ-LFH4>].

205. D.C. CORR. INFO. COUNCIL, *supra* note 204.

206. FED. BUREAU OF PRISONS, *supra* note 204, at 9.

207. 68 NEB. ADMIN. CODE § 2-009 (2022).

nature of the system, the time it takes to reach a final result, and fear of retaliation.<sup>208</sup> Engaging in this process is, although difficult, a necessary prerequisite to litigating these issues. Success at this stage of the process, however, may not provide an adequate remedy.

Another barrier to achieving a favorable result by an administrative remedy lies in the cost to facilities in undertaking these measures. Preparation measures are likely to be costly, and when combined with rising costs associated with more frequent and severe extreme weather events, these measures likely will require a significant financial investment. Many states and facilities may not be prepared or willing to spend money on risks that seemingly may not come to fruition. However, courts have held that financial constraints do not place limits on constitutional protections. “[I]f a state can excuse a failure to feed prisoners by claiming that it lacks the money to purchase food,” the Eighth Amendment’s protection against unconstitutional conditions of confinement becomes meaningless.<sup>209</sup>

Further, a favorable result achieved at this stage would not result in the sweeping, binding changes that a favorable result in litigation might. While a court’s interpretation of the Eighth Amendment as mandating sufficient risk reduction measures before a natural disaster would impose a constitutional ceiling on the risk incarcerated populations may face, an administrative remedy only protects individuals’ Eighth Amendment rights to the extent the agency determines that it should. Further, the agency may choose not to promulgate a broader policy providing protections to all individuals incarcerated in their facilities, but rather only in the facility at which the grievance was made or only for the individual writing the grievance. This results in a piecemeal constitutional scheme of protection. Some individuals’

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208. Shannon Heffernan, *The Way Prisoners Flag Guard Abuse, Inadequate Health Care and Unsanitary Conditions is Broken*, PROPUBLICA (Dec. 2, 2020, 6:00 AM), <https://www.propublica.org/article/the-way-prisoners-flag-guard-abuse-inadequate-health-care-and-unsanitary-conditions-is-broken> [<https://perma.cc/S2BU-UHC7>]; see also PRISON JUST. LEAGUE, A “RIGGED SYSTEM”: HOW THE TEXAS GRIEVANCE SYSTEM FAILS PRISONERS AND THE PUBLIC 15–21 (2017), [https://www.prisonpolicy.org/scans/prison\\_justice\\_league/a\\_rigged\\_system.pdf](https://www.prisonpolicy.org/scans/prison_justice_league/a_rigged_system.pdf) [<https://perma.cc/9KQV-VU8L>] (noting that other problems include lack of trust in the grievance process, lack of independent oversight, lack of adequate staffing, and no consequences for staff not adhering to the grievance process).

209. Alexandra E. Faia, *Prisons, Politics, and Pointing Fingers: The Issues Plaguing Orleans Parish Prison’s Consent Decrees*, 16 LOY. J. PUB. INT. L. 129, 156 (2014); see also *Smith v. Sullivan*, 611 F.2d 1039, 1043–44 (5th Cir. 1980) (“It is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement.”); *Campbell v. McGruder*, 580 F.2d 521, 540 (D.C. Cir. 1978) (“[W]e join our sister Circuits in holding that while [financial] considerations may be relevant, they can by no means be determinative.”); *Battle v. Anderson*, 564 F.2d 388, 396 (10th Cir. 1977) (“If the State . . . wishes to hold the inmates in institutions, it must provide the funds to maintain the inmates in a constitutionally permissible manner.”).

rights may not be upheld, perhaps only because they faced significant barriers in getting through the administrative procedure process.

One additional difficulty lies in identifying facilities that do not have sufficient risk-mitigating procedures in place *before* disaster, rather than waiting for the harm to come to fruition. Incarcerated people likely may not know what the plans and procedures for a natural disaster are or may not have access to food and water storage, preventing them from knowing what measures have been taken to protect them. One potential solution may be mandating emergency response training for all incarcerated people to ensure that individuals have access to information regarding the level of risk that they face while in custody.

Despite the discussed barriers, these solutions could help provide a cohesive, comprehensive, and effective means of protecting incarcerated people from the risk of harm during extreme weather, particularly when there are no procedures in place to inform them of the dangers of extreme weather during periods of incarceration.

#### IV. Application of These Principles to Immigration Detention Centers

When compared to current practices in most U.S. detention facilities as discussed above,<sup>210</sup> ICE's immigration detention center policies seem to protect people who are detained against the risks of natural disasters more fully. However, the plans implemented by ICE also have several key deficiencies, as they do not require a set quantity of food, water, clothing, and medication which must be held on-site in the event of a natural disaster.<sup>211</sup> As discussed above, detained people are unable to mitigate the risk of harm from an emergency weather event due to their incarceration, and therefore the state must step in to take reasonable precautions.<sup>212</sup> Extending the Eighth Amendment protections to people held in ICE facilities would ensure the health and safety of people held in ICE's custody, especially those held in areas with a high risk of extreme weather.

#### Conclusion

While individuals may be able to heed the advice of local and federal public health and safety officials in reducing the risk of harm to their own health or safety in the face of an extreme weather event, incarcerated people do not share this liberty. Instead, 2.3 million incarcerated Americans rely on prison officials to ensure that they have adequate access to food, water,

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210. See discussion *supra* Section I.D.

211. See NDS, *supra* note 84; PBNDS, *supra* note 83.

212. *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976) (holding that prison officials cannot be deliberately indifferent to a person's serious medical needs because incarcerated people must rely on prison officials to satisfy their needs).

medication, and reasonable safety before, during, and after a severe weather event. Natural disasters and extreme weather events, which are occurring with increased frequency and severity as a result of climate change, pose an undue risk of imminent harm to people held in prisons without sufficient risk-mitigation strategies. The Eighth Amendment imposes a duty to reduce imminent risk to an incarcerated person's health and safety on prison officials, providing a pre-disaster right to recovery if those risks are found to be substantial.