No. _____

In the Supreme Court of the United States

DANIEL BARBOSA, *ET AL.*, PETITIONERS

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY AND FEDERAL EMERGENCY MANAGEMENT AGENCY, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(1), "require[s]" agencies to publish certain rules, a mandate that affords no discretion in furthering Congress's goal to prevent the use of "secret (agency) law." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975). Congress protected FOIA and the rest of the Administrative Procedure Act ("APA") from inadvertent amendment by directing that subsequent statutes "may not be held to supersede or modify" the APA unless they do so "expressly." 5 U.S.C. § 559. This petition concerns one such subsequent statute, the Stafford Act, which contains no express reference to the APA, and instead bars judicial review *only* of claims concerning "a discretionary function or duty" authorized by the Stafford Act itself. 42 U.S.C. § 5148.

Even though section 5148 lacks the express statement required by section 559, and without holding that FOIA affords agencies any discretion to avoid publication, the D.C. Circuit held that the Stafford Act bars review of whether the Federal Emergency Management Agency ("FEMA") has published the materials required by FOIA.

The question presented is whether section 5148 bars review of claims that FEMA uses secret law in violation of FOIA's mandatory requirements.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners are Daniel Barbosa, Luis Barbosa, Ramon Bueno, Filiberto Chapa, Juanita Chavez, Maria de la Fuente, Irma Duarte, Rosemary Duron, Gamaliel Espinoza, Oscar Gallegos, Armando Garcia, Alicia Gonzales, Ruby Granados, Ricardo Hernandez, Jr., Leticia Martinez, Candidado B. Mireles, Gilberto Mireles, Maria Moreno, Norberto Muñoz, Guadalupe V. Perez, Jesica Reyes, Reynaldo Rosas, Armando Serna, Sylvia Silguero, Enedina Vela, Ramiro Villegas, Jr., and *La Unión Del Pueblo Entero*. Petitioners were the appellants in the court of appeals. Petitioner *La Unión Del Pueblo Entero* and counsel Texas RioGrande Legal Aid have no parent companies or stock.

Respondents are the United States Department of Homeland Security and the Federal Emergency Management Agency (collectively, "FEMA"). Respondents were the appellees in the court of appeals.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Barbosa v. *U.S. Dep't of Homeland Sec.*, No. 1:16-cv-01843-APM (Oct. 6, 2017)

United States Court of Appeals (D.C. Cir.):

Barbosa v. *U.S. Dep't of Homeland Sec.*, No. 17-5206 (June 21, 2019)

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INTRODUCTION

The Freedom of Information Act ("FOIA") provides that "[e]ach agency shall separately state and currently publish" all substantive rules of general applicability, interpretations of general applicability, and the nature and requirements of all formal and informal procedures available. 5 U.S.C. § 552(a)(1). These are "matter[s] required to be published in the Federal Register." *Id.* Individuals cannot "in any manner . . . be adversely affected" by rules that are not published as required. *Id.* Congress intends these provisions and the rest of FOIA to prevent agencies from using secret law. *Sears*, 421 U.S. at 153; *Morton* v. *Ruiz*, 415 U.S. 199, 232-33 & n.27 (1974).

To ensure that the entire Administrative Procedure Act ("APA"), including FOIA, is protected from inadvertent amendment, Congress mandated that a "[s]ubsequent statute may not be held to supersede or modify" FOIA or any other part of the APA, "except to the extent that it does so expressly." 5 U.S.C. § 559.

The facts are few and straightforward. Petitioners claim that they witnessed disasters causing severe damage to their homes. After FEMA denied them disaster assistance funds due to "insufficient damage," Petitioners attempted to appeal but were unable to effectively do so because FEMA does not disclose the rules, policies, and procedures that it uses to determine which damages qualify for assistance. FEMA marks these standards "secret," "not for public release," and "for agency internal use only." Compl. ¶ 31.

Petitioners asserted FOIA claims challenging FEMA's use of secret law, and the D.C. Circuit agreed that "[i]t is certainly difficult to muster an effective appeal if one is ignorant of the grounds upon which a claim is denied." App., *infra*, 9a-10a.[1] Even so, the D.C. Circuit held that courts lack jurisdiction to decide whether FEMA uses secret law in violation of FOIA due to the Stafford Act's "discretionary function exception" in section 5148. *Id.* at 12a.

To reach this result, with no explanation, the D.C. Circuit held that the APA's express-statement requirement in section 559 does not apply to "jurisdictional" statutes like the Stafford Act. App., *infra*, 12a. This ignores that no such limitation appears in the text of section 559. Instead, section 559 explicitly protects jurisdictional statutes from amendment, *see* 5 U.S.C. § 552(a)(4)(B); *id.* § 704, which means that it must limit the application of subsequent jurisdictional statutes. This holding places the D.C. Circuit among a minority of courts of appeals that refuse to enforce statutory express-statement requirements. And because the D.C. Circuit stated no basis for disregarding the unambiguous text of section 559—no reason rooted in structure, history, or purpose—its refusal to apply express-statement requirements is limitless. Similarly limitless is the danger that inheres when courts interpret a statute

[1] *Accord Gray Panthers* v. *Schweiker*, 652 F.2d 146, 168-69 (D.C. Cir. 1980) ("Without notice of the specific reasons for denial, a claimant is reduced to guessing what evidence can or should be submitted in response and driven to responding to every possible argument against denial at the risk of missing the critical one altogether.").

without reference to statutory text, structure, history, or purpose.

The D.C. Circuit's ruling is flawed for a second reason that is independent of section 559. The D.C. Circuit held that the Stafford Act's "discretionary function exception" in section 5148 bars judicial review of FOIA claims "regardless of whether § 552(a)(1), itself, is discretionary." App., *infra*, 12a. This manifestly disregards the text of section 5148 and FOIA's purpose and history, as repeatedly decreed by this Court and all other courts of appeals.

Petitioners do not claim that FOIA requires FEMA to promulgate any new rules, or to change the substance of any rules. Instead, Petitioners only seek FEMA's publication of whatever rules FEMA chooses to use. *See Bennett* v. *Spear*, 520 U.S. 154, 172 (1997) ("It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking."). Consistent with the purposes of FOIA and the APA, this ensures that the public knows the rules that will be used to decide their claims and appeals.

The Court should grant certiorari to rectify the D.C. Circuit's error in holding that the Stafford Act modified FOIA without an express statement—an important issue and one on which the courts of appeals are divided. Independently, this Court should grant certiorari to hold that the Stafford Act's discretionary function exception does not bar review of whether an agency has complied with FOIA's mandatory publica-

tion requirements. This is a question of extreme importance to millions of people. Courts of appeals across the nation have recognized the adverse impact that FEMA's vague published standards have on some of the most vulnerable in society—those who must unexpectedly rely on disaster relief programs administered under the Stafford Act.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-13a, is reported at 916 F.3d 1068. The opinion of the district court, *id.* at 14a-47a, and the denial of the motion for reconsideration, *id.* at 48a-58a, are reported at 263 F. Supp. 3d 207 and 278 F. Supp. 3d 325, respectively.

JURISDICTION

The court of appeals entered judgment on March 1, 2019. A petition for rehearing was denied on June 21, 2019. The Chief Justice extended this petition's filing date to October 18, 2019, No. 19A186. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The complete pertinent statutes are reproduced in an appendix to this petition. App., *infra*, 59a-61a.

STATEMENT

A. Statutory Framework

1. The Stafford Act's Individuals and Households Program

Since 1974, the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act") has

governed the federal response to each major disaster declared by a President. 42 U.S.C. §§ 5121, *et seq.* The Stafford Act is comprised of dozens of programs that are implemented before (planning), during (emergency), and after (recovery) disasters. *Id.*

By Executive Order, FEMA carries out most of the President's responsibilities under the Stafford Act. 6 U.S.C. § 314(a)(8); Exec. Order No. 12,673, § 1, 54 Fed. Reg. 12,571 (Mar. 23, 1989). Relevant here, when "carrying out the provisions" of the Stafford Act, the federal government is not "liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government." 42 U.S.C. § 5148.[2]

In 2000, Congress combined two prior major disaster assistance programs into the Individuals and Households Program ("IHP"), which is designed to help families recover from disasters. Pub. L. No. 106-390, § 206(a), 114 Stat. 1552, 1566 (2000) (codified at 42 U.S.C. § 5174). IHP has been implemented in hundreds of declared major disasters since its inception and has delivered $22.8 billion total in disaster assistance to millions of people between 2005 and 2014.[3]

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[2] The text of section 5148 is largely identical to text in the Federal Tort Claims Act, 28 U.S.C. § 2680(a), commonly called the "discretionary function exception." *See Berkovitz by Berkovitz* v. *United States*, 486 U.S. 531, 533 (1988).

[3] U.S. Gov't Accountability Office, *Federal Disaster Assistance: Federal Departments and Agencies Obligated at Least $277.6 Billion During Fiscal Years 2005 Through 2014*, at 28 (2016), https://www.gao.gov/assets/680/679977.pdf; *see also Registration Intake and Individuals and Households (RI-IHP) Program Data*,

IHP includes several forms of assistance, including home repair. 42 U.S.C. § 5174(c)(2) (repair); *id.* § 5174(c)-(e) (all forms).

On September 30, 2002, FEMA published "interim final" IHP rules applying to all disasters declared after October 14, 2002. 67 Fed. Reg. 61,446 (Sept. 30, 2002).[4] These rules, codified at 44 C.F.R. §§ 206.110-.120, are FEMA's only published IHP eligibility standards that have the force of law, and have remained in force since 2002, with but one minor substantive amendment. *See* 78 Fed. Reg. 66,852 (Nov. 7, 2013).[5]

2. FEMA's Unpublished Rules

FEMA uses unpublished rules, policies, and procedures to fill the many gaps left by its published rules. *See* Compl. ¶ 93. FEMA's unpublished policies appear in an array of memoranda, manuals, guidelines, standard operating procedures, numbered policy catalogues, and agency directives that are subject to change from

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FEMA (Sept. 25, 2019) (listing 6,256,377 valid IHP registrations since 2014), https://www.fema.gov/media-library/assets/documents/34752.

[4] In this action, Petitioners do not challenge the procedures that FEMA used to produce its IHP rules. Rather, Petitioners challenge FEMA's use of unpublished rules, procedures, and policies to adversely affect them in violation of 5 U.S.C. § 552(a)(1).

[5] FEMA has also published a 134-page document entitled "Individuals and Households Program Unified Guidance." 81 Fed. Reg. 68,442 (Oct. 4, 2016) (referencing *IHP Unified Guidance*, FEMA (Sept. 30, 2016), https://www.fema.gov/ihp-unified-guidance). This document does not "have the force or effect of law." *Id.* Even if it had the force of law, this document would not cure the FOIA violations identified by Petitioners, because the document does not state all of the rules that FEMA uses to determine IHP eligibility.

disaster to disaster and have not been published or referenced in the Federal Register.[6] Compl. ¶¶ 30, 93. Some of these policies are "marked secret," "for agency internal use only," and "not for public release." Compl. ¶ 31.

FEMA's unpublished policies include binding, generally applicable substantive rules that narrow eligibility for assistance, including without limitation: (a) caps and floors for each type of repair, which FEMA calls "line items"; (b) exclusions of certain repairs regardless of disaster damage; (c) restrictive definitions of what repairs are allowed to make a home "habitable"; (d) restrictive standards of proof for disaster causation; and (e) presumptions as to pre-existing damage. *See* Compl. ¶¶ 39-40; *see also La Unión Del Pueblo Entero* v. *FEMA*, 141 F. Supp. 3d 681, 698 (S.D. Tex. 2015) (describing record evidence of unpublished rules). At oral argument before the D.C. Circuit, FEMA's counsel appeared to agree that FEMA maintains an array of unpublished materials and identified no reason that such materials should not be published. *See, e.g.*, Oral Argument at 46:30-49:51 ("[W]e have no objection to publishing anything."), *Barbosa* v. *Dep't of Homeland Sec.*, 916 F.3d 1068 (D.C. Cir. 2019) (No. 17-5206),

[6] Agencies routinely comply with section 552(a)(1) by including a brief statement in the Federal Register referencing voluminous materials that are published outside the Federal Register, including materials published on agency websites. *See Am. Soc'y for Testing & Materials (ASTM)* v. *Public.Resource.Org, Inc.*, 896 F.3d 437, 458 (D.C. Cir. 2018). The materials at issue here, however, have never been published anywhere, including on websites.

https://www.cadc.uscourts.gov/recordings/recordings.nsf.

3. The Administrative Procedure Act and the Freedom of Information Act

The APA, 5 U.S.C. §§ 551, *et seq.*, requires agencies to disclose certain information through APA amendments known as FOIA. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552). Congress intended FOIA to implement "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't. of Air Force* v. *Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 89-813, at 3 (1965)).

Relevant here, FOIA requires publication of "statements of the general course and method by which [an agency's] functions are channeled and determined, including the nature and requirements of all formal and informal procedures available" and "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1). It further states that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." *Id.*

Moreover, the APA specifically states that a "[s]ubsequent statute may not be held to supersede or modify [the APA] . . . except to the extent that it does so expressly." 5 U.S.C. § 559. So to the extent a later-in-time statute, such as the Stafford Act, seeks to modify

FEMA's duties under the APA or FOIA, it must state that it is doing so in no uncertain terms.

B. Factual History

In late 2015 and early 2016, a series of storms devastated a broad section of Texas, causing extensive property damage and dozens of casualties. Compl. ¶¶ 69-70. Petitioners include 26 South Texas homeowners who were inside their homes and watched the storms tear their roofing and walls apart and flood their homes. Compl. ¶¶ 9-10. President Obama declared these storms "major disasters" and made IHP assistance available. Compl. ¶ 71. Each individual Petitioner applied to FEMA for assistance. FEMA dispatched an independent contractor to inspect each Petitioner's home and record the information sought by FEMA. Compl. ¶¶ 42, 75.

Based exclusively on these inspections, FEMA sent one of two form letters. The first, an "Eligible for Home Repair" letter, informed applicants that they were eligible for home repair assistance and the amount of assistance that FEMA would provide. However, that letter did not provide any information about how FEMA had calculated the amount of assistance granted, or what criteria or standards FEMA relied upon to make its determinations. Compl. ¶¶ 60-61.

The second letter, sent to applicants who were found ineligible, contained the statement: "Based on your FEMA inspection, we have determined that the disaster has not caused your home to be unsafe to live in. This determination was based solely on the damage

to your home that is related to this disaster." The letter further stated that applicants had the right to appeal and provided the following instruction: "Please send us documents . . . to show that the damage to your home was caused by the disaster and has caused unsafe or unlivable conditions." The letter said nothing else about what facts or standards FEMA relied upon to deny assistance or would use to decide any appeal of its determination. Compl. ¶ 62.

All 26 individual Petitioners appealed FEMA's determinations. FEMA denied 21 of their appeals in whole and five in part, all without further explanation. C.A. J.A. 36-95. FEMA did not disclose what criteria or standards it applied to conclude that Petitioners were ineligible for the assistance that they asserted they needed to make their homes safe. Without knowing the factual or legal reasons why they were denied assistance, Petitioners could not know what information was necessary to prove their eligibility in the first instance or on appeal.

C. Procedural History

1. The District Court's Decision

Petitioners filed this action on September 15, 2016, claiming that FEMA's failure to publish the rules that it uses to decide IHP eligibility violates:

(a) the Stafford Act, 42 U.S.C. §§ 5151(a), 5174(j), and 5189a(c), requirements directing FEMA to publish rules and regulations that ensure fair distribution of assistance, the carrying out of IHP, and fair appeal procedures; and

(b) FOIA, 5 U.S.C. § 552(a)(1), requiring agencies to publish their substantive and procedural rules that adversely affect applicants.

Compl. ¶¶ 81-95. Only the second violation is at issue in this petition.

On July 11, 2017, the district court dismissed all of Petitioners' claims under Rules 12(b)(1) and 12(b)(6). App., *infra*, 17a. The district court held that "[e]ven if the court were to have jurisdiction over Plaintiffs' [Stafford Act] claims, FEMA's IHP regulations nonetheless constitute reasonable interpretations of the Stafford Act and therefore Plaintiffs have failed to state a claim." *Id.* at 41a. In a footnote, the district court also dismissed Petitioners' FOIA claim, stating that it "depend[ed] upon" Petitioners' dismissed Stafford Act claims. *Id.* at 47a n.7.

Petitioners sought reconsideration, noting that their FOIA claim was independent of the separate Stafford Act counts of the complaint. Doc. 18. In an October 6, 2017, order, the district court agreed that Petitioners' FOIA claim was "a different type of claim." App., *infra*, 50a. Yet the district court denied reconsideration, concluding that because FOIA is a "procedural" statute, it lacked subject matter jurisdiction to review Petitioners' FOIA claim pursuant to the Stafford Act's discretionary function exception, 42 U.S.C. § 5148. App., *infra*, 51a.

2. The D.C. Circuit's Decision

The court of appeals affirmed, only briefly discussing FOIA. App., *infra*, 2a, 11-13a. While the court was "not . . . unmoved by the contentions that 'secret law'

was being used," *id.* at 13a, the court held that the Stafford Act's discretionary function exception, 42 U.S.C. § 5148, deprived it of jurisdiction to decide these contentions. App., *infra*, 12a. First, the court held that section 5148 departed from FOIA and thus applied—even though section 5148 lacks the express statement required by section 559—because section 559 does not apply to jurisdictional statutes like section 5148. The opinion, however, ventured no reason *why* section 559 does not apply to jurisdictional statutes. *Id.* The court then held that the Stafford Act's discretionary function exception applied "regardless of whether § 552(a)(1), itself, is discretionary." *Id.*

The D.C. Circuit ordered FEMA to respond to a timely petition for rehearing *en banc*, but then denied rehearing. C.A. Denial of Pet. for Reh'g En Banc.

REASONS FOR GRANTING THE PETITION

The purpose of the Freedom of Information Act "is to ensure informed citizens, [which is] vital to the functioning of a democratic society." FOIA, https://www.FOIA.gov (last visited October 15, 2019). Congress intends FOIA to "promote honesty and reduce waste . . . by exposing official conduct to public scrutiny," *U.S. Dep't. of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 n.20 (1989), and "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language," S. Rep. No. 89-813, at 3 (1965). The clear and mandatory directives in FOIA's text, 5 U.S.C. § 552(a)(1), and the express prohibition on implied amendments, 5 U.S.C. § 559, confirm this reading.

Ignoring the text of section 559, the D.C. Circuit held that FOIA was amended *sub silentio* by the later-enacted Stafford Act's discretionary function exception. The court further held that this discretionary function exception strips courts of jurisdiction to hear claims that FEMA violated FOIA's mandatory requirements. The plain language of FOIA and the Stafford Act required the opposite result.

These two errant holdings will have widespread impact and thus warrant certiorari. The D.C. Circuit's decision threatens the express-statement requirements upon which the APA and other statutes depend for stability. This threat is magnified by the division among the courts of appeals—which the D.C. Circuit's decision deepens—as to whether courts must follow Congress's plain mandates in express-statement requirements. The practical consequence of the D.C. Circuit's decision is that millions of disaster survivors must appeal without knowing the facts or legal standards that produced the challenged result. This Court's guidance is needed.

I. The D.C. Circuit erred in holding that the Stafford Act deprives courts of jurisdiction to hear FOIA claims.

The text of 5 U.S.C. §§ 552(a)(1) and 559 unequivocally create mandatory publication requirements that can be overcome only by express congressional direction. The D.C. Circuit's contrary ruling is not based upon any statutory text, structure, history, or purpose. *See* App., *infra*, 11a-13a.

A. FOIA's statutory mandate can be overcome only by an express statutory statement, which the Stafford Act does not contain.

FOIA requires each federal agency to publish its "substantive rules of general applicability" and its "formal and informal procedures," among others. 5 U.S.C. § 552(a)(1). This provision goes on to say that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." *Id.*

Congress protected section 552(a)(1) and other APA provisions from unintentional modification by decreeing that a "[s]ubsequent statute may not be held to supersede or modify [the APA] . . . except to the extent that it does so expressly." 5 U.S.C. § 559. Because of this command that any modification must be express, this Court has cautioned that "[e]xemptions from the terms of the Administrative Procedure Act are not lightly to be presumed." *Marcello* v. *Bonds*, 349 U.S. 302, 310 (1955) (citing virtually identical precursor to section 559); *see also Dickinson* v. *Zurko*, 527 U.S. 150, 155 (1999) (Section 559 expresses a "statutory intent that legislative departure from the norm must be clear."); *Webster* v. *Doe*, 486 U.S. 592, 607 n.* (1988) (Scalia, J., dissenting) (A subsequent statute "becomes subject to . . . the APA unless *specifically* excluded.").

This Court's understanding of section 559's express-statement requirement aligns with this Court's presumption against implied repeals. *See, e.g.*, *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (noting that "'repeals by implication are

not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest'" (quoting *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981))).

Likewise, section 559 and other express-statement requirements are consistent with the canon of construction that courts should interpret statutes in light of their predecessors, given the "commonplace of statutory interpretation that 'Congress legislates against the backdrop of existing law.'" *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1890 (2019) (quoting *McQuiggin* v. *Perkins*, 569 U.S. 383, 398 n.3 (2013)); *see also, e.g.*, *Dorsey* v. *United States*, 567 U.S. 260, 274 (2012) (treating an earlier statute "as setting forth an important background principle of interpretation"); *Lockhart* v. *United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) ("[E]xpress-statement requirements may function as background canons of interpretation of which Congress is presumptively aware."). This is consistent with the "duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1619 (2018).[7]

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[7] Because express-statement requirements operate as canons of construction, they present no constitutional issue. *See* Part II, *infra* (collecting cases that enforce express-statement requirements without noting any constitutional issues); *see also Lockhart*, 546 U.S. at 147-48 (Scalia, J., concurring) (noting that while "[o]ne legislature . . . cannot abridge the powers of a succeeding legislature," express-statement requirements "function as background canons of interpretation" (quoting *Fletcher* v. *Peck*, 6 Cranch 87, 135 (1810))). Ultimately, express-statement requirements are "unobjectionable," given that "the door would remain open to exercise the full panoply of legislative power" by simply using the express statement required.

Here, the Stafford Act's discretionary function exception was not enacted until 1974, rendering it "subsequent" to section 552(a)(1), which was enacted in 1966.[8] Therefore, the discretionary function exception only supplants FOIA if it contains an express statement to that effect—which it does not. *See* 42 U.S.C. § 5148. Not only does section 5148 fail to mention the APA or any sort of publication requirement under section 552(a)(1), but its terms expressly limit its application to "carrying out the provisions" of Title 42, Chapter 68—the U.S. Code chapter on disaster relief—and therefore could not "expressly" "supersede or modify" 5 U.S.C. § 552(a)(1).

Yet after recognizing that "modifications of the APA's applicability . . . must be specifically stated," and despite identifying no such specific statement, the D.C. Circuit held that the Stafford Act's discretionary function exception "remains a barrier" to consideration of Petitioners' FOIA claim. App., *infra*, 12a. Without citation to any authority or reason, the D.C. Circuit

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Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2118 (2002).

[8] The APA became law in 1946, including a virtually identical precursor to the express-statement requirement of section 559. Pub. L. No. 79-404, § 12, 60 Stat. 237, 244 (1946) ("No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."). FOIA amended the APA in 1966 and added the relevant "adversely affected" language of section 552(a)(1). Pub. L. No. 89-487, 80 Stat. 250 (1966). Also in 1966, Congress moved the express-statement requirement to section 559. Pub. L. No. 89-554, 80 Stat. 378, 388 (1966).

Section 5148, on the other hand, was not enacted until 1974 in the Disaster Relief Act of 1974, a precursor to the Stafford Act. Pub. L. No. 93-288, 88 Stat. 143, 149 (1974).

simply declared that section 5148 is a "jurisdictional limitation on judicial power," and that section 559 does not govern such jurisdictional limitations. *Id.*

This decision was error. The text of section 559 applies the express-statement requirement to every "[s]ubsequent statute" without any hint of exception—not even for a jurisdictional statute. *See* 5 U.S.C. § 559. Because the plain language of section 559 is unambiguous, the "inquiry begins with the statutory text, and ends there as well." *See Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (quoting *BedRoc Ltd.* v. *United States*, 541 U.S. 176, 183 (2004) (plurality opinion)). "[T]he Supreme Court has held that . . . precedent doesn't authorize courts of appeals to create out of whole cloth exceptions to duly enacted statutes or rules." *Prost* v. *Anderson*, 636 F.3d 578, 592 n.11 (10th Cir. 2011) (citing *Johnson* v. *United States*, 520 U.S. 461 (1997)). There is nothing unique about a jurisdictional *statute* that exempts it from the APA's express-statement requirement for a "[s]ubsequent *statute*." *See* 5 U.S.C. § 559. Indeed, this Court treats jurisdictional statutes on par with substantive statutes. *See Patchak* v. *Zinke*, 138 S. Ct. 897, 906 (2018) ("Statutes that strip jurisdiction 'chang[e] the law' . . . as much as other exercises of Congress' legislative authority.").

The structure of section 559 underscores this conclusion. Section 559 forbids subsequent statutes from superseding or modifying "this subchapter [or] chapter 7," which include two statutes that are themselves jurisdictional: 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 704. Any subsequent statute that purports to modify these

jurisdictional provisions must itself necessarily be jurisdictional—*while still being subject to the express-statement requirement of section 559*. This clearly demonstrates that section 559 applies to jurisdictional and non-jurisdictional statutes alike. The D.C. Circuit's patent disregard of this statutory structure cannot be correct.

Had the D.C. Circuit followed this correct analysis, it would have concluded that, because the Stafford Act did not amend the APA, the court had jurisdiction to decide Petitioners' FOIA claims. Instead, the D.C. Circuit's misapplication of the express-statement requirement of section 559 effectively created an exception that allows FEMA to disregard section 552(a)(1) in implementing disaster recovery programs. This outcome is directly at odds with Congress's intent in requiring limited and express exemptions from FOIA. Moreover, as discussed below, this decision raises an important issue that has divided the courts of appeals.

B. The Stafford Act's *discretionary* function exception does not divest courts of jurisdiction to enforce FOIA's *mandatory* publication requirement.

Even if section 5148 could be read to modify the APA, its discretionary function exception still would not apply in the present case. By its own terms, the text of section 5148 only divests courts of jurisdiction over claims involving a "discretionary function or duty on the part of a Federal agency . . . in carrying out the provisions of this chapter." The term "this chapter" is Title 42, Chapter 68, the U.S. Code chapter on disaster relief, which does not include FOIA, 5 U.S.C. § 552. *See*

42 U.S.C. § 5148. The D.C. Circuit itself even noted that Congress "specifically limited [its] jurisdiction to review discretionary decisions under the Stafford Act." App., *infra*, 12a. Yet the D.C. Circuit failed to identify one discretionary action by FEMA under the Stafford Act that implicated section 5148 and divested the court of its jurisdiction, even admitting that it had made no determination of whether the obligations imposed by section 552(a)(1) are in any way discretionary. *See id.* This is an unsupportable reading of section 5148. Without a discretionary act, section 5148 does not deprive courts of jurisdiction.

Moreover, there is no such discretionary act here; section 552(a)(1) is mandatory. "Congress use[s] 'shall' to impose discretionless obligations." *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001). Section 552(a)(1) states that an "agency *shall*" publish in the Federal Register "all formal and informal procedures," which FEMA has not done, as can be seen most clearly with regards to the appeals process. 5 U.S.C. § 552(a)(1)(B) (emphasis added). The statute further states an "agency *shall*" publish in the Federal Register "substantive rules of general applicability," which FEMA has not done, as can be seen most clearly with regards to what types of damage are and are not eligible for financial assistance. *Id.* § 552(a)(1)(D) (emphasis added). Finally, section 552(a)(1) states that these "matter[s] [are] *required* to be published in the Federal Register" and that a person may not be "adversely affected" by a "matter . . . not so published." *Id.* § 552(a)(1) (emphasis added).

Courts acknowledge that section 552(a)(1) affords agencies no discretion: "The statute clearly provides

that no administrative action taken pursuant to unpublished procedures can be allowed to stand against a person adversely affected thereby." *N. Cal. Power Agency* v. *Morton*, 396 F. Supp. 1187, 1191 (D.D.C. 1975), *aff'd sub nom. N. Cal. Power Agency* v. *Kleppe*, 539 F.2d 243 (D.C. Cir. 1976); *see also Animal Legal Def. Fund* v. *USDA*, 935 F.3d 858, 871 (9th Cir. 2019) (Section 552(a)(1) imposes a "dut[y]" on agencies and section 552(a)(4)(B) "creates the machinery to address violations, such as authorizing judicial review"); *id.* at 876 (FOIA's affirmative publication requirements "aren't optional." (quoting *Ctr. for Biological Diversity* v. *Kempthorne*, 466 F.3d 1098, 1103 (9th Cir. 2006) (alterations omitted))). And agencies have "no interpretive authority" over FOIA, so they have no discretion to decide whether their rules are covered by section 552(a)(1). *See Sorenson Commc'ns Inc.* v. *FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014); *accord Chiquita Brands Int'l, Inc.* v. *SEC*, 805 F.3d 289, 293 (D.C. Cir. 2015) (Courts "review de novo [agency] interpretation of FOIA.").

Beyond this clear error of textual statutory interpretation, the panel's jurisdiction-stripping decision conflicts with FOIA's purpose and history.

FOIA "represents a strong congressional aversion to 'secret (agency) law.'" *Sears*, 421 U.S. at 153. Congress designed FOIA to "promote honesty and reduce waste . . . by exposing official conduct to public scrutiny," and that FOIA's "primary objective is the elimination of 'secret law.'" *Reporters Comm. for Freedom of the Press*, 489 U.S. at 772 n.20 (quotation omitted). This Court has also observed that FOIA is particularly

concerned with records that "shed[] light on an agency's performance of its statutory duties." *Id.* at 773. At bottom, "FOIA is often explained as a means for citizens to know what their Government is up to. This phrase should not be dismissed as a convenient formalism." *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 171-72 (2004) (internal quotation marks omitted).

Likewise, Congress has made clear that the purpose of FOIA is "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 89-813, at 3 (1965). When considering later regulatory reform, Congress deliberately highlighted the "high standard to which Congress intends to hold agencies" via section 552(a)(1) and the APA, specifically citing section 552(a)(1) as evidence that "fair notice of a regulation's actual requirements is a procedural *right* bestowed upon the regulated public." H.R. Rep. No. 104-859, at 5-6 (1996) (emphasis added).

Indeed, Congress intentionally deleted a prior FOIA provision permitting non-disclosure for "secrecy in the public interest" and replaced it with text "stating repeatedly that official information shall be made available . . . 'for public inspection'" and that "[a]ggrieved citizens are given a speedy remedy in district courts." *EPA* v. *Mink*, 410 U.S. 73, 79 (1973); *see also Dep't of Air Force*, 425 U.S. at 360-61 (noting that the original APA included certain public disclosure requirements which proved ineffective, so Congress replaced them with FOIA's stronger requirements).

Until now, the courts of appeals have uniformly rejected agency use of secret law. *See, e.g.*, *Providence Journal Co.* v. *U.S. Dep't of Army*, 981 F.2d 552, 556 (1st Cir. 1992) ("The FOIA was designed to expose the operations of federal agencies to public scrutiny without endangering efficient administration, as a means of deterring the development and application of a body of 'secret law.'" (quoting *Sears*, 421 U.S. at 138)); *ACLU* v. *NSA*, 925 F.3d 576, 593-94 (2d Cir. 2019) (noting that FOIA prohibits agencies' use of binding "working law" that is undisclosed); *Coastal States Gas Corp.* v. *Dep't of Energy*, 644 F.2d 969, 983 n.69 (3d Cir. 1981) (explaining "[c]ongressional concern with the plight of those forced to litigate with agencies on the basis of secret laws" was a reason for the passage of FOIA); *Skelton* v. *U.S. Postal Serv.*, 678 F.2d 35, 41 (5th Cir. 1982) (noting that FOIA's prohibition on "secret law" extends beyond "final opinions"); *Animal Legal Def. Fund* v. *USDA*, 935 F.3d 858, 868 (9th Cir. 2019) ("Congress crafted the affirmative portion of FOIA to prevent the proliferation of 'secret law.'"); *Schlefer* v. *United States*, 702 F.2d 233, 244 (D.C. Cir. 1983) ("A strong theme . . . has been that an agency will not be permitted [by FOIA] to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden [from publication]." (quoting *Coastal States Gas Corp.* v. *Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980))).

In sum, the text of FOIA, the APA, and the Stafford Act are more than sufficient to demonstrate error, and FOIA's purpose and history underscore this clear result. Indeed, by making judicial review of FEMA's failure to publish its rules effectively impossible, the court

of appeals trampled the "strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). The D.C. Circuit was wrong to allow FEMA to decide individuals' eligibility for relief by a set of rules to which the public has no access.

II. The D.C. Circuit's decision deepens a divide among the courts of appeals over an important issue, the enforceability of express-statement requirements.

The courts of appeals are divided over whether courts must follow express-statement requirements, or whether courts can ignore these congressional mandates. The Second, Seventh, Eighth, Ninth, and Tenth Circuits enforce express-statement requirements as written. *See City of New York* v. *Permanent Mission of India to United Nations*, 618 F.3d 172, 203 (2d Cir. 2010) ("Subsequent organic statutes may supersede or modify APA requirements, but they must do so expressly."); *Five Points Road Joint Venture* v. *Johanns*, 542 F.3d 1121, 1126-27 (7th Cir. 2008) ("Section 559 therefore prevents a statute from amending the APA by implication."); *Robinette* v. *Comm'r*, 439 F.3d 455, 460 (8th Cir. 2006) ("Nothing in the text or history of the [subsequent statute] clearly indicates an intent by Congress" to "endorse[] such a departure" from the APA.);[9] *California* v. *Azar*, 911 F.3d 558, 579 (9th Cir.

[9] The D.C. Circuit's holding that section 559 does not apply to subsequent "jurisdictional" statutes, App., *infra*, 12a, particularly conflicts with *Robinette*, where the Eighth Circuit held that a subsequent statute regulating "judicial review" did not modify the APA because

2018) (Where subsequent statutory provisions "neither contain express language exempting agencies from the APA nor provide alternative procedures," those provisions "stand in contrast to other provisions . . . found to be express abdications of the APA."); *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Burwell*, 794 F.3d 1151, 1159 n.4 (10th Cir. 2015) ("The [Affordable Care Act], enacted in 2010, did not contain a specific exemption and is subject to" the express-statement requirement in the Religious Freedom Restoration Act (RFRA).), *vacated on other grounds* 136 S. Ct. 1557 (2016).

Here, the D.C. Circuit has joined the Third and Sixth Circuits in refusing to enforce express-statement requirements.[10] *See United States* v. *Dixon*, 648 F.3d 195, 199-200 (3d Cir. 2011) (joining the First and Eleventh Circuits, and explicitly disagreeing with the Sev-

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the subsequent statute lacked the express statement required by section 559. *Robinette*, 439 F.3d at 459-60. Specifically, *Robinette* found that a tax law which expanded the scope of judicial review of IRS levies but lacked an express statement modifying the APA did not displace the APA's requirement that judicial review be conducted solely on the administrative record. Like the tax law in *Robinette*, here, the Stafford Act modified the scope of judicial review of FEMA's actions without expressly purporting to curtail the APA, yet the D.C. Circuit reached the opposite result, finding that the Stafford Act *did* modify the APA. App., *infra*, 12a.

[10] The D.C. Circuit's decision in this case clarifies its earlier unclear position that the APA can "presumably be repealed by implication," even though section 559 "increases the burden that must be sustained before an intent to depart from the Administrative Procedure Act can be found." *Church of Scientology of Calif.* v. *IRS*, 792 F.2d 146, 149 n.2 (D.C. Cir. 1986).

enth Circuit, in holding that a subsequent statute reducing penalties for certain drug offenses be applied retroactively "[n]otwithstanding the absence of [an express] statement" required by 1 U.S.C. § 109); *Mich. Catholic Conference & Catholic Family Servs.* v. *Burwell*, 755 F.3d 372, 383 n.8 (6th Cir. 2014) ("Congress may reject the application of RFRA to a later-enacted statute without explicitly stating that RFRA does not apply."), *vacated on other grounds* 135 S. Ct. 1914 (2015).

This division among the courts of appeals is exacerbated by conflicting guidance from this Court. On one hand, this Court has held that "Congress remains free to express [its] intention either expressly or by implication as it chooses" regardless of a statutory express-statement requirement. *Dorsey*, 567 U.S. at 274; *accord Lockhart*, 546 U.S. at 148 (Scalia, J., concurring) (reading this Court's decision in *Marcello*, 349 U.S. at 302, to permit implied modification of the APA despite the APA's express-statement requirement). Yet in *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), this Court recently held that RFRA's indistinguishable express-statement requirement is enforceable. *Id.* at 719 & n.30. And in *Dickinson* v. *Zurko*, this Court explained that the APA's express-statement requirement means that "legislative departure from the [APA] must be clear." 527 U.S. at 155.

In light of this authority, the *en banc* Ninth Circuit's observation from a decade ago remains true today: the enforceability of statutory express-statement requirements is an "open question." *United States* v. *Novak*, 476 F.3d 1041, 1054 n.12 (9th Cir. 2007) (en

banc); *see also Grizzle* v. *Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1098 n.7 (4th Cir. 1993) (observing split). This Court's resolution of this open question is urgently necessary for three reasons.

First, express-statement requirements tend to appear in statutes of obvious importance that form the foundation of how our government is supposed to function. *See, e.g.*, 1 U.S.C. § 109 (effect of existing liabilities when a statute is repealed); 5 U.S.C. § 3347(a)(1) (appointment to federal office, including the Executive Office of the President); 12 U.S.C. § 5491(a) (financial services regulation); 15 U.S.C. § 1012 (federal insurance regulation); 26 U.S.C. § 3112 (tax exemptions); 28 U.S.C. § 2283 (Anti-Injunction Act); 42 U.S.C. § 2000dd(c) (treatment of detainees); 42 U.S.C. § 2000bb-3(b) (Religious Freedom Restoration Act); 50 U.S.C. § 1547(a)(1) (War Powers Resolution); 50 U.S.C. § 1812(b) (foreign intelligence surveillance); *see also Lockhart*, 546 U.S. at 149 (Scalia, J., concurring) (It is "not uncommon for Congress" to enact express-statement requirements.).[11]

The APA, including its express-statement requirement at issue here, is a prime example. The APA describes "the full extent of judicial authority to review executive agency action for procedural correctness." *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207

[11] State Legislatures also commonly mandate how all statutes are to be construed by courts. *See, e.g.*, Tex. Gov't Code Ann. §§ 311.001-.035 (Texas Code Construction Act). These statutes commonly contain express-statement requirements. *See, e.g.*, *id.* § 311.022 ("A statute is presumed to be prospective in its operation unless expressly made retrospective.").

(2015); *see also* U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 5 (1947) (The APA is "notable in the history of the governmental process" because the "Act sets a pattern designed to achieve relative uniformity in the administrative machinery of the Federal Government."), https://archive.org/details/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947. FOIA, contained within the APA, is foundational to democracy itself. *See Favish*, 541 U.S. at 172; *Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies,* 74 Fed. Reg. 4683 (Jan. 26, 2009). The D.C. Circuit's lax application of section 559 subjects the APA to inadvertent amendment, thus threatening this foundational statute in spite of Congress's expressed intent. *See Prof'l Reactor Operator Soc'y* v. *U.S. Nuclear Reg. Comm'n*, 939 F.2d 1047, 1052 (D.C. Cir. 1991) (Congress "meant [the APA] to be operative 'across the board' in accordance with its terms" and apply "equally to agencies and persons." (quoting H.R. Rep. No. 79-1980, at 16 (1946))). Without this Court's review, all statutes bearing express-statement requirements are equally subject to unintended amendment.

Second, express-statement requirements promote "a compromise between stability and flexibility" in foundational statutes like the APA. Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1672 (2002). Such requirements promote stability by establishing default rules upon which the government and public can rely. *See id.*; *see also, e.g.*, *Lane* v. *USDA*, 120 F.3d 106, 109 (8th

Cir. 1997) (describing section 559 as a "logical approach given the variety of issues and forums covered by the APA and the possibility that Congress would inadvertently adopt a provision that conflicted with the APA"). And express-statement requirements retain flexibility by permitting subsequent legislatures to either expressly repeal an express-statement requirement altogether if it becomes unworkable, or to create case-by-case exceptions by using the required express statement. This Court's review is necessary to ensure that the proper balance is struck between the APA's stability and flexibility.

Third, because the D.C. Circuit has joined the circuit split and sided with the courts of appeals willing to disregard express-statement requirements, its incorrect decision will have a widespread impact. In part due to its vast administrative law caseload,[12] the D.C. Circuit is recognized "as a court with special responsibility to review legal challenges to the conduct of the national government," as "there is a far more extensive body of administrative law developed there than in other circuits." John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 389 (2006). Absent review by this Court, and

[12] "[A]dministrative and civil suits involving the federal government comprise nearly 50% of the D.C. Circuit's docket, compared to the nationwide average of 20%." Eric M. Fraser, et al., *The Jurisdiction of the D.C. Circuit*, 23 Cornell J.L. & Pub. Pol'y 131, 138 (2013); *accord* Patricia M. Wald, *Life on the District of Columbia Circuit: Literally and Figuratively Halfway Between the Capitol and the White House*, 72 Minn. L. Rev. 1, 2-3 (1987) (noting that the D.C. Circuit "get[s] the lion's share of the 'political' cases").

given the D.C. Circuit's reputation as expert in administrative law, the decision in this case will lead to similar incorrect outcomes across the country.[13] The end result is that every time Congress legislates in a way that inadvertently conflicts with the APA, a court, relying on the D.C. Circuit's decision in the present case, could find that the statute exempted yet another agency from the strictures of the APA. "[T]he Congress that enacted the APA might justifiably have been concerned that future Congresses"—or, in this case, the federal judiciary—"would turn the procedural framework for the administrative state into swiss cheese." Posner & Vermeule, *supra*, at 1698. This Court's review is warranted.

[13] Courts look to the D.C. Circuit for its administrative law expertise. One has described its influence as "quasi-primacy in administrative law" and noted that "the D.C. Circuit carries clout in the field of administrative law that goes well beyond that which a non-parent Circuit usually wields." *See Jarita Mesa Livestock Grazing Ass'n* v. *U.S. Forest Serv.*, 61 F. Supp. 3d 1013, 1071 & n.20 (D.N.M. 2014). Commentators likewise recognize the D.C. Circuit's influence in administrative law. *See, e.g.*, Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 Yale L.J. 2, 19 (2009) (describing the D.C. Circuit as "by far the most important court in the country when it comes to federal administrative law"); Sanne H. Knudsen & Amy J. Wildermuth, *Lessons from the Lost History of* Seminole Rock, 22 Geo. Mason L. Rev. 647, 655 (2015) ("[T]he D.C. Circuit is viewed as the expert and trendsetter in administrative law.").

III. Whether judicial review is available to secure FEMA's compliance with FOIA is a recurring question of exceptional importance to millions of people.

In addition to the issue of whether courts must interpret statutes in light of earlier express-statement requirements, there is another reason why this Court should grant review. The panel held that claims seeking to enforce the publication requirements of FOIA are jurisdictionally barred by a discretionary function exception. That is a holding with serious and systemic ramifications.

FEMA is often criticized for failing to follow the requirements of the Stafford Act and FOIA, even by its own inspector general:

> "[T]he [OIG] report found that FEMA designated Miami-Dade County eligible for IHP assistance without a proper preliminary damage assessment, that claims were not properly verified, that guidelines for making awards were generally lacking, that oversight of inspections was deficient, and that funds disbursed were not based on actual losses," *News-Press* v. *U.S. Dept. of Homeland Sec.*, 489 F.3d 1173, 1182 (11th Cir. 2007);

> "Even FEMA seems to implicitly recognize that [its IHP regulations] are rather poor . . . . One hopes that the new regulations FEMA is considering will give affected parties more guidance about

> whether the damage to their homes will count as 'disaster-related,'" *LUPE* v. *FEMA*, 608 F.3d 217, 224 n.3 (5th Cir. 2010);[14]
>
> "Examination of the notice letters and other correspondence found in the record convinces us that FEMA could measurably improve the navigability of its processes by providing applicants with more understandable explanations of its ineligibility determinations." *Ridgely* v. *FEMA*, 512 F.3d 727, 741 (5th Cir. 2008).

See also Ass'n of Cmty. Orgs. for Reform Now v. *FEMA*, 463 F. Supp. 2d 26, 35 (D.D.C. 2006) (Leon, J.) (describing FEMA's eligibility explanations as "Kafkaesque").

The concerns animating these suits would be resolved if FEMA were simply to publish the rules that it has already written and already uses, as required by FOIA. Yet the strained reading of section 5148 employed by the D.C. Circuit yields the opposite result, insulating FEMA from complying with FOIA's publication requirement, and not just for the Individuals and Households Program, but for all disaster relief programs authorized by the Stafford Act. Notably, the

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[14] On their face, FEMA's current IHP regulations remain thoroughly precatory (some 76 times, they say what FEMA "may" do, not what it will do, to decide applications) and incomplete (at most they state some eligibility criteria without ever stating what criteria render a person eligible for assistance, or how FEMA calculates the amount of assistance). *See* 44 C.F.R. §§ 206.110-.120.

Stafford Act "constitutes the statutory authority for most Federal disaster response activities especially as they pertain to FEMA and FEMA programs," including disaster unemployment assistance, crisis counseling, hazard mitigation, and emergency preparedness programs, among many others. *Robert T. Stafford Disaster Relief and Emergency Assistance Act*, FEMA (June 12, 2019, 9:25 AM), https://www.fema.gov/robert-t-stafford-disaster-relief-and-emergency-assistance-act-public-law-93-288-amended.

A decision that FEMA and its Stafford Act programs are exempt from section 552(a)(1) of FOIA effectively exempts an agency with over $40 billion in budget authority from oversight by the American people—oversight promised by Congress through FOIA. *See* FEMA, *Disaster Relief Fund: Monthly Report as of September 30, 2019*, at 4 (2019), https://www.fema.gov/media-library/assets/documents/31789. This is particularly egregious given the millions of people who rely on IHP, let alone FEMA's other disaster relief programs. *See Registration Intake and Individuals and Households (RI-IHP) Program Data*, FEMA (Sept. 25, 2019) (listing 6,256,377 valid IHP registrations since 2014), https://www.fema.gov/media-library/assets/documents/34752. The "basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). People are at their most vulnerable as they recover from a natural disaster or other emergency, and

are least likely to be able to navigate an opaque bureaucracy governed by unpublished rules. Despite this, the D.C. Circuit's decision holds that there is no mechanism that would allow the American people to ensure an informed citizenry. It bars the only mechanism to force a government agency tasked with administering disaster programs to publish in the Federal Register how those programs will be administered.

The D.C. Circuit explicitly recognized the practical consequence of its ruling: disaster survivors must appeal without knowing the facts or legal standards used to render the decision from which they appeal. App., *infra*, 9a-10a & n.7, 13a. This is so foreign to settled administrative practice—and indeed to appellate practice throughout the United States—as to merit this Court's scrutiny.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 18, 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Case No. 17-5206

DANIEL BARBOSA, ET AL.,
APPELLANTS

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY AND FEDERAL EMERGENCY MANAGEMENT AGENCY, APPELLEES

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Argued: Nov. 19, 2018
Decided: Mar. 1, 2019

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Before: KATSAS, *Circuit Judge*, and SILBERMAN and WILLIAMS, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* SILBERMAN.

SILBERMAN, *Senior Circuit Judge*: A number of applicants sought Stafford Act economic relief from FEMA because of storm damage. They, accompanied by La Union del Pueblo Entero, appeal the district court's dismissal. We, however, agree with the district court. We lack jurisdiction over their claims because of a statutory preclusion of judicial review.

I.

The Stafford Act authorizes the President to provide relief in response to "major disasters." The President has delegated authority under the Stafford Act to the Federal Emergency Management Agency ("FEMA"), a subdivision of the Department of Homeland Security. In 2000, Congress established the Federal Assistance to Individuals and Households Program. Unlike the traditional approach of Stafford Act programs, which disburse federal funds to the states, which in turn disburse those funds to individuals, under this program, the federal government may provide forms of direct relief to individuals and households after a major disaster has been declared by the President.[1]

The statute creating the program contains three specific statutory provisions designed to guide its implementation. They call for the issuance of regulations as follows:

(1) "The President shall issue, and may alter and amend, such regulations as may be necessary for the

[1] *See* 42 U.S.C. §§ 5121 *et seq.*

guidance of personnel *carrying out* Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an *equitable* and *impartial* manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status." 42 U.S.C. § 5151(a) (emphasis added);

(2) "The President shall prescribe rules and regulations to carry out this section, *including criteria*, *standards*, and *procedures for determining eligibility* for assistance." 42 U.S.C. § 5174(j) (emphasis added);

(3) "The President shall issue rules which provide for the *fair* and *impartial consideration* of *appeals* under this section." 42 U.S.C. § 5189a(c) (emphasis added).

But there is a fourth statutory provision of the Stafford Act applying to this case, a preclusion of judicial review, which governs our jurisdiction:

"The Federal Government shall not be liable for any claim upon the exercise or performance of or *the failure to exercise or perform a discretionary function* or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter." 42 U.S.C. § 5148 (emphasis added).

* * *

The government has promulgated regulations pursuant to the statutory mandates.[2]

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[2] We note that the regulations at times track the statutory language. Presumably, the statutory command to regulate anticipates

Starting with 42 U.S.C. § 5151(a), the nondiscrimination mandate, FEMA issued a regulation that provides for nondiscrimination in disaster assistance.[3] Although, in part, it echoes the statutory language, it does more. It also states "government bodies and other organizations [participating in Stafford Act programs] shall provide a written assurance of their intent to comply with regulations relating to nondiscrimination," and provides that the agency "shall make available" to "interested parties . . . information regarding" its nondiscrimination regulation. Perhaps most significant, as the district court noted, the regulation states "Federal financial assistance to the States or their political subdivisions is conditioned on full compliance with" regulations entitled "Nondiscrimination in Federally-Assisted Programs."[4] That provision states explicitly: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this regulation applies." *Inter alia*, the nondiscrimination regulations identify specific discriminatory actions prohibited, require that assurances of nondiscrimination accompany applications, and contain extensive provisions regarding conducting compliance investigations.

FEMA has also promulgated regulations, purportedly, "to carry out" the program, "including criteria,

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more than merely restating the statutory language. However, incorporating the statutory language into a broader regulatory framework is understandable, especially when the statute arguably sets out only the minimum standards of regulation.

[3] 44 C.F.R. § 206.11.

[4] 44 C.F.R. §§ 7.1 *et seq.*

standards, and procedures for determining eligibility for assistance," as mandated by 42 U.S.C. § 5174(j).[5] The regulations include provisions calling for the payment of "necessary expenses" or "serious needs" for those "unable to meet such expenses" caused by disasters "through other means." This provision states the maximum amount of assistance ($25,000, adjusted "annually to reflect changes in the Consumer Price Index"), the multiple types of assistance, the date of eligibility, the duration of assistance (not longer than 18 months unless exceptional circumstances exist), and details about how assistance will be characterized and treated (not counted as income, exemption from garnishment, and duplication of benefits). A regulation also defines certain terms used in the regulations, including "[h]ousing costs," "[s]afe," and "[u]ninhabitable." The regulations state the registration period (60 days after declaration of major disaster or emergency) and provide for extensions and late registrations.

Another provision, of obvious significance, describes when funds for repairs will be granted ("[if:] [t]he component [of a structure] was functional immediately before the declared event; [t]he component [of a structure] was damaged, and the damage was caused by the disaster; [t]he damage to the component [of a structure] is not covered by insurance; and [r]epair of the component [of a structure] is necessary to ensure the safety or health of the occupant or to make the residence functional"). It further lists the components that are eligible for repair through housing assistance (including "[s]tructural components of the residence,"

[5] 44 C.F.R. §§ 206.110 *et seq.*

"[w]indows and doors," and "[t]he Heating, Ventilation and Air Conditioning system").

Even more detail is provided by a provision that establishes nine "[c]onditions of eligibility" and ten "[c]onditions of ineligibility." "FEMA may only provide assistance" when the eligibility conditions have been met. Assistance may be provided "[w]hen the individual or household has incurred a disaster-related necessary expense or serious need in the state in which the disaster has been declared, without regard to their residency in that state." These conditions also provide for assistance even in some situations where individuals have insurance. Other conditions also describe the necessary state of the renter's or owner's residence in order to qualify for housing assistance: "primary residence has been destroyed, is uninhabitable, or is inaccessible." The ten conditions of ineligibility speak to circumstances in which the individuals or households still have access to their homes or to accommodations, have adequate insurance, or meet other criteria.

Of particular concern to Appellants, FEMA's provisions governing appeals as mandated by 42 U.S.C. § 5189a(c) list the determinations applicants may appeal, state that "[a]ppeals must be in writing and explain the reason(s) for the appeal," provide for requesting files related to the applicant, and describe the period of appeal and to whom appeals must be directed. These provisions explain that an appellant will receive "a written notice of the disposition of the appeal within 90 days of the receiving of the appeal," and that "the decision of the appellate authority is final." The regulations also state that an appeal of a determination regarding repair assistance "must provide proof. . . that

the component was functional before the declared event and proof that the declared event caused the component to stop functioning" and, if disputing the amount of assistance granted, "must also provide justification for the amount sought."

* * *

Appellants are twenty-six individuals who resided in Texas and whose homes suffered damage during one of three storms in 2015 and 2016 declared major disasters, accompanied by La Union del Pueblo Entero, a non-profit organization. The individual Appellants all sought relief through the program. After having applied, some of them received a letter granting benefits, others a form letter denying benefits. All appealed. Some were granted an increase in benefits, others were denied any additional relief.

Appellants' suit was dismissed by the district judge on jurisdictional grounds, although the judge alternatively concluded the regulations satisfied the statute.

II.

It should be noted at the outset that Appellants make no claim that they are entitled statutorily to any specific amount of payments in response to their Stafford Act claims. Nor is it asserted that constitutional due process is governing because it is not claimed that Appellants have a property interest. Their primary contention is rather that FEMA inadequately complied with its statutory obligation to publish regulations that would, *inter alia*, describe the criteria the agency has used to determine whether and for how much their claims were paid. Without such criteria, according to Appellants, it is difficult to present a claim or for that

matter appeal from a denial. Indeed, Appellants argue that the actual process by which claims are evaluated—we are told by contractors—is governed by "secret law."

The government insists the regulations satisfy the statutory mandates, denies that there is any "secret law" governing claims, and, in any event, contends that the preclusion of judicial review ousts us of jurisdiction to entertain Appellants' claims.[6] (Interestingly, the government does not rely on *Chevron* deference.)

Although we would normally turn our attention first to our jurisdiction, as the district court noted, *Barbosa v. U.S. Dep't of Homeland Sec. (Barbosa I)*, 263 F. Supp. 3d 207, 215-16 (D.D.C. 2017), to decide whether the preclusion of judicial review applies, it is necessary to determine whether the agency's actions are discretionary—which obliges us to compare those actions with the statute. Indeed, the Fifth Circuit faced with a similar case, *La Union del Pueblo Entero v. Fed. Emergency Mgmt. Agency (LUPE)*, 608 F.3d 217 (5th Cir. 2010), held that FEMA's regulations satisfied one of the statutory provisions, 42 U.S.C. § 5174(j), without even considering the judicial review preclusion. The

[6] The preclusion language could be thought to sound more like a limitation on a cause of action, but because it implicates sovereign immunity, the district court and we see it as jurisdictional. *See Dalehite v. United States*, 346 U.S. 15, 24, 31-32 (1953); *see also Morris v. Washington Metro. Area Transit Auth.*, 781 F.2d 218, 221 (D.C. Cir. 1986). To be sure, the Supreme Court has recently tightened the concept of jurisdiction, *see, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-63 (2010), but even if the preclusion provision were regarded as a limitation on a cause of action, our analysis would be the same.

court concluded that the regulations "significantly narrow[] the universe of potentially eligible disaster victims." *LUPE*, 608 F.3d at 223.

Appellants direct their argument that the regulations are inadequate primarily to FEMA's alleged failure to sufficiently specify the criteria for eligibility and for amounts of reimbursement. They rely on two of our cases, *American Airlines, Inc. v. Transportation Security Administration*, 665 F.3d 170 (D.C. Cir. 2011) and *Oceana, Inc. v. Locke*, 670 F.3d 1238 (D.C. Cir. 2011). We think those cases are instructive but not persuasive precedent because the statutory mandates were more specific. In *American Airlines*, Congress had directed *in hoc verba* that the Transportation Security Administration develop a priority list for reimbursement of airport security projects. The TSA, however, added an escape clause allowing it to deviate on "a case-by-case" basis that essentially modified—almost nullified—the congressional command. *Am. Airlines*, 665 F.3d at 177. And similarly in *Oceana*, the Department of Commerce frustrated a statutory command that it adopt a standardized reporting methodology by adding "an exception so vague as to make the rule meaningless." *Oceana*, 670 F.3d at 1241.

As for Appellants' argument in this case, that FEMA's regulations lack adequate criteria, we agree with the Fifth Circuit that the extensive list of eligible and ineligible claims certainly narrows the type of claims that the agency will grant. We admit that we are more troubled by the regulations' treatment of appeals—which, it will be recalled, are required to be "fair." It is certainly difficult to muster an effective appeal if one is ignorant of the grounds upon which a

claim is denied.[7] Indeed, we have said if a constitutionally protected property interest is involved—which is not this case—a statement of reasons explaining a denial may well be required if an appeal right is effective. *Lightfoot v. District of Columbia*, 448 F.3d 392, 398 (D.C. Cir. 2006) (per curiam).

It is unnecessary, however, for us to decide whether the appeals regulations are "fair" because we conclude the preclusion of review limits our authority to challenge FEMA's regulations. The parties do not dispute that the appropriate test, as the district court recognized, is the test the Supreme Court used to interpret similar language in the Federal Tort Claims Act. *See Barbosa I*, 263 F. Supp. 3d at 216. If the challenged agency act involves "an element of judgment or choice" and the agency's "judgment is of the kind that the discretionary function was designed to shield," our review is precluded. *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991) (citations omitted). We have little doubt that the statutory requirements for regulations rely on the discretionary judgment of FEMA; the range of choice that FEMA can employ is quite wide.

The Supreme Court has concluded the discretionary function exception to judicial review is inapplicable under the first prong of the test only if "a federal statute . . . specifically prescribes a course of action" to be followed, *Berkovitz v. United States*, 486 U.S. 531, 536 (1988), and that is not this case. We need not decide

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[7] Moreover, since the appeals regulations impose no time limit on FEMA to turn over information in an individual's "file" following a request, *see* 44 C.F.R. § 206.115(d), there is no guarantee that this information (whose contents are nowhere specified) will be received within the 60-day window to lodge an appeal, *id.* § 206.115(a).

whether if FEMA failed to issue regulations at all would the preclusion of review still apply; the agency has issued a great deal in the form of regulations supplemented by interpretive guidance—some were issued after the Fifth Circuit case, *LUPE*.[8]

III.

Appellants, perhaps recognizing that their direct attack on the regulations would run into a jurisdictional barrier, presented a creative alternative argument. They turn away from the Stafford Act to the Freedom of Information Act ("FOIA") to expose the "secret law" that they suspect is used to deny claims and appeals. They rely on 5 U.S.C. § 552(a)(1), which obliges agencies to publish, *inter alia*, "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D).

We have held, however, that that section cannot be enforced by a judicial mandate to publish materials in the Federal Register, *see Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1202-03 (D.C. Cir. 1996); it is only if a person dealing with an agency is "adversely affected" by a matter that should have been published can he or she get relief. 5 U.S.C.

[8] We have held a failure to promulgate regulations at all in light of a statutory mandate to be illegal. *See, e.g.*, *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1146 (D.C. Cir. 2002) (citations omitted) (EPA ignored statutory mandate to "by regulation establish methods and procedures" by creating "a framework for automobile manufacturers to develop their own tests."). But Appellants are misguided in relying on those cases here.

§ 552(a)(1). Appellants claim that the "secret law" employed by FEMA with regard to claims and appeals adversely affects them so therefore they are entitled to have their Stafford Act cases reopened.

It is probable that the sanction in that section is designed for a case like *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987), where an application for a license was improperly rejected because it was filed at the wrong location, despite the fact that the FCC had never published the right location. But even assuming one could stretch "adverse affect" to refer to denied Stafford Act claims, we think § 552(a)(1) cannot be used to allow us to review Stafford Act regulations, still less to reopen FEMA decisions. The preclusion of judicial review remains a barrier.

To be sure, modifications of the APA's applicability, as Appellants point out, must be specifically stated, 5 U.S.C. § 559, but the preclusion of judicial review is a jurisdictional limitation on judicial power. A FOIA claim cannot be used to create judicial authority to review Stafford Act claims, regardless of whether § 552(a)(1), itself, is discretionary.[9]

After all, Congress specifically limited our jurisdiction to review discretionary decisions under the Stafford Act. As such, it would be an improbable stretch to use another unrelated statute to frustrate congressional intent.

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[9] The district court, assuming § 552(a)(1) applied to Stafford Act challenges, reasoned that the preclusion of judicial review would still govern because it would be discretionary as to what was published. *Barbosa v. U.S. Dep't of Homeland Sec. (Barbosa II)*, 278 F. Supp. 3d 325, 328 (D.D.C. 2017).

That is not to say that we were unmoved by the contentions that "secret law" was being used. So we were encouraged to hear government counsel assure us that additional policies for dealing with claims and appeals were easily available to Appellants on the internet. Moreover, a normal FOIA request would reach any governing policies. At oral argument, counsel for FEMA stated repeatedly that the agency would have no objection to complying with *specific* requests for documents so that the allegedly "secret law" can be brought to light. So, to the extent Appellants wish to seek additional materials beyond those already now available to them, they may do so by making FOIA requests under 5 U.S.C. § 552(a)(3). And, of course, if such requests are denied, they may seek further judicial review through FOIA under 5 U.S.C. § 552(a)(4)(B), a provision that they did not invoke in this case.

We do not mean to suggest that the Stafford Act cases can be reopened regardless of the result of any subsequent FOIA litigation; the preclusion of judicial review still governs. But if it should turn out that there is something troubling in the files, there is always the possibility of further legislation.

IV.

For the foregoing reasons, we affirm the district court's dismissal.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

———————

Case No. 1:16-cv-01843 (APM)

DANIEL BARBOSA, ET AL.,
PLAINTIFFS,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL., DEFENDANTS.

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[Filed: July 11, 2017]

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MEMORANDUM OPINION

I. INTRODUCTION

In late 2015 and early 2016, a series of massive storms devastated the State of Texas, causing millions

of dollars in property damage and, tragically, dozens of casualties. In response, the Federal Emergency Management Agency ("FEMA")—the agency charged with administering federal disaster relief—mobilized efforts to provide assistance to the affected individuals. This case arises out of those efforts.

The President and, correspondingly, FEMA, derives the statutory authority to provide disaster relief from the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 ("Stafford Act"). In 2000, Congress amended the Stafford Act to enable FEMA to, among other things, provide direct assistance to individuals under the Individuals and Households Program ("IHP"), including financial assistance for home repairs. Under the IHP, FEMA may directly provide federal grants to qualified applicants, rather than require those individuals to seek those grants through federally subsidized, state-run disaster relief funds. The IHP amendments tasked FEMA with designing and implementing the federal grant program, in part, by issuing rules and regulations governing the program. FEMA subsequently issued a set of rules and regulations purporting to do just that.

Plaintiffs include 26 individuals whose homes were severely damaged during the 2015–2016 storms, and applied to FEMA for home repair assistance under the IHP, but had their applications denied, in whole or in part. Plaintiffs claim that FEMA violated federal law when it chose to disclose neither the legal standards it used to evaluate their applications nor the reasons for denying them full relief. So, Plaintiffs filed this suit to compel FEMA to articulate those standards, to shed

light on the IHP process, and to reconsider their applications. Specifically, Plaintiffs charge FEMA with (1) failing to comply with its congressional mandate under the Stafford Act to promulgate regulations that "carry out" the IHP, 42 U.S.C. § 5174(j), and (2) relying on "secret rules" in non-public documents to deny their IHP applications in violation of 5 U.S.C. § 552(a)(1). For relief, Plaintiffs ask the court to order FEMA to promulgate regulations that (1) define the eligibility criteria for home repair assistance relief under the IHP, (2) detail the process for appealing application denials, and (3) insure the equitable and impartial administration of the IHP. Additionally, Plaintiffs ask the court to order FEMA to reconsider their applications under these new regulations.

Before the court is Defendants' Motion to Dismiss and Plaintiffs' Motion for Summary Judgment. Defendants move to dismiss the Complaint on the ground that the court lacks subject matter jurisdiction, because the United States has not waived its sovereign immunity from suit. Defendants point to the Stafford Act's "discretionary function exception," which bars federal courts from reviewing FEMA's discretionary decisions. Defendants contend that the agency's decisions concerning the content and specificity of its regulations are discretionary and, therefore, cannot be the subject of judicial review. *See* 42 U.S.C. § 5148. Further, Defendants argue that, even if the court has jurisdiction, Plaintiffs have failed to state a claim for relief because its IHP rules and regulations, as currently constituted, do exactly what Congress commanded. Expectedly, Plaintiffs view FEMA's actions, or inaction, differently. They contend that the court has jurisdiction because FEMA's regulations are not covered

by the Act's discretionary function exception. They also assert that FEMA has not, as Congress directed, promulgated the necessary regulations to implement the IHP. On that basis, Plaintiffs move for summary judgment on Counts I–III of their Complaint, seeking a judgment in their favor that FEMA violated federal law by issuing deficient regulations.

Having given careful consideration to the parties' arguments, the court agrees with Defendants that the Stafford Act's discretionary function exception bars Plaintiffs' challenge to FEMA's IHP rulemaking. Accordingly, the court grants Defendants' Motion to Dismiss and denies Plaintiffs' Motion for Summary Judgment.

II. BACKGROUND

A. Statutory and Regulatory Background

Congress passed the Stafford Act ("the Act"), originally known as the Disaster Relief Act of 1974, to provide federal assistance when disaster strikes. *See* 42 U.S.C. § 5121 et seq. The Act authorizes the President to declare a major disaster and, where appropriate, direct "[f]ederal agencies . . . [to] provide assistance essential to meeting immediate threats to life and property resulting from [the] major disaster." *Id.* § 5170b(a). The President is authorized to delegate his authority under the Act to a federal agency, *see id.* § 5164, which President George H.W. Bush did in 1989, delegating most of that authority to the Federal Emergency Management Agency ("FEMA"), which is now part of the Department of Homeland Security (collectively, "Defendants"). Exec. Order No. 12,673: Delegation of Disaster Relief and Emergency Assistance Functions, 54 Fed. Reg. 12,571, § 1 (Mar. 23, 1989).

FEMA, in turn, is responsible for promulgating the regulations necessary to implement the Act's provisions, including those regulations that Plaintiffs challenge in their Complaint.

Plaintiffs' lawsuit concerns FEMA's "Individuals and Households Program" ("IHP"). The IHP authorizes the President, through FEMA, to provide direct federal assistance to disaster-affected individuals, as opposed to indirect assistance through federally subsidized state disaster relief funds. 42 U.S.C. § 5174. The Act includes three general eligibility requirements to receive IHP aid: (1) the affected home must be owner-occupied, (2) the damages must be disaster-related, and (3) the repairs must be necessary to return the affected home to sanitary and safe living conditions. Congress said no more about eligibility criteria. Instead, it directed FEMA to "prescribe rules and regulations to carry out [the IHP], including criteria, standards, and procedures for determining eligibility." *Id.*[1]

The Stafford Act and its amendments direct FEMA to fill in specifics concerning two other statutory provisions that implicate the IHP. First, the Act requires FEMA to "issue . . . . such regulations as may be necessary . . . for insuring that the" IHP is "accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status." *Id.* § 5151(a). Second, it directs FEMA to "issue rules which provide for the fair and impartial

[1] The statute actually directs the "President" to act, but, of course, with respect to disaster relief, the President acts through FEMA. Therefore, for ease of reference, throughout this opinion, the court will refer to Congress as having directed FEMA to act.

consideration of appeals" from any denial of disaster relief, including under the IHP. *Id.* § 5189a(c).

1. Regulations Promulgated to "Carry Out" the IHP

FEMA has issued rules and regulations intended to "carry out" the IHP, which are contained in sections 206.110 through 206.120 of Chapter 44 of the Code of Federal Regulations. *See* 44 C.F.R. §§ 206.110–120. The court here focuses on those sections relevant to the provision of housing assistance. Section 206.110, among other things, sets the maximum amount of assistance a qualified individual may receive, identifies the types of assistance available, fixes the date of eligibility, defines the period of assistance, and places certain limitations and conditions on assistance recipients. *Id.* § 206.110. Section 206.111 provides definitions of terms used in the relevant regulations. *Id.* § 206.111. Section 206.112 sets application deadlines following a disaster declaration, including provisions governing extensions of time and late applications. *Id.* § 206.112.

Section 206.113, entitled "Eligibility Factors," lists both qualifying and disqualifying factors for disaster assistance under the IHP. Subsection (a) lists nine "conditions of eligibility," five of which address when assistance is available to an applicant who has insurance. *Id.* § 206.113(a)(2)–(6). Two other factors specifically address that housing assistance is available (1) when "the primary residence has been destroyed, is uninhabitable, or is inaccessible," or (2) when "a renter's primary residence is no longer available as a result of the disaster." *Id.* § 206.113(a)(8)–(9). Subsection (b) lists ten "conditions of ineligibility," the first five of which address housing assistance. For instance,

individuals do not qualify if they are displaced from properties other than their pre-disaster primary residence (e.g., a vacation home). *Id.* § 206.113(b)(1). Additionally, those individuals who have "adequate rent-free housing accommodations," a "secondary or vacation residence within reasonable commuting distance to the disaster area," or a "rental property that meets their temporary housing needs," likewise are ineligible to receive housing assistance. *See id.* §§ 206.113(b)(2), (b)(3). Lastly, individuals who have adequate insurance coverage, and receive timely compensation for their damage from their insurer, do not qualify for housing assistance. *Id.* § 206.113(b)(6).

Section 206.117 addresses the types of housing assistance available under the IHP. Qualified applicants may receive financial assistance for temporary housing, direct assistance in the form of purchased or leased temporary housing, and financial assistance for the repair or replacement of real property. *Id.* § 206.117(b)(1)–(3). As to each of those types of assistance, Section 206.117 outlines additional requirements or eligibility factors, *see, e.g.*, *id.* §§ 206.117(b)(1)(i), (b)(2)(i), (b)(3)(i), and identifies the component parts of applicants' homes that, if damaged, qualify for repair assistance. *See id.* § 206.117(b)(2)(ii).

2. Regulations Concerning Appeals from Adverse Decisions

Pursuant to congressional directive, *see* 42 U.S.C. § 5189a, FEMA also has "issue[d] rules which provide for the fair and impartial consideration of appeals[.]" Section 206.115 sets forth instructions and procedures for appealing assistance decisions made under the IHP. The section provides that an appeal must be filed

within 60 days and enumerates the types of decisions that can be appealed. 44 C.F.R. § 206.115(a). It further instructs what an appeal petition must include, identifies to whom an appeal should be directed, and sets a 90-day deadline for FEMA or the State to provide a written disposition of an appeal. *Id.* at §§ 206.115(b), (c), (f). The regulation also permits an applicant to "ask for a copy of information in his or her file by writing to FEMA or the State as appropriate." *Id.* at § 206.115(d). Lastly, the regulation declares that the "decision of the appellate authority is final." *Id.* at § 206.115(f).

3. Regulations Concerning Nondiscrimination in Disaster Assistance

Finally, Section 206.11 addresses Congress' direction to "issue . . . such regulations as may be necessary" to provide disaster assistance in a nondiscriminatory manner. *See* 42 U.S.C. § 5151. That regulation requires that "[a]ll personnel carrying out Federal major disaster or emergency assistance functions . . . shall perform their work in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status." 44 C.F.R. § 206.11(b). It also requires "government bodies and other organizations [to] provide a written assurance of their intent to comply with regulations relating to nondiscrimination." *Id.* § 206.11(c).

B. Factual and Procedural Background

Plaintiffs include 26 Texas residents whose homes were damaged in a series of severe storms in 2015 and 2016 ("Individual Plaintiffs") and whose IHP applications FEMA denied either in whole or in part. Compl., ECF No. 1 [hereinafter Compl.], ¶¶ 9, 75. Also bringing suit against FEMA is La Union del Pueblo Entero, a

non-profit organization dedicated to assisting low-income families apply for government assistance. *See id.* ¶ 10.

Plaintiffs filed this matter on September 15, 2016, seeking judicial review of FEMA's IHP rulemaking under the Administrative Procedure Act ("APA"). *Id.* ¶ 79. Plaintiffs' first three claims allege that FEMA has violated congressional directives by (1) "failing to adopt regulations needed to carry out [the IHP], including criteria, standards, and procedures for determining eligibility for assistance," as required under 42 U.S.C. § 5174(j) (Count I), *id.* ¶¶ 81–85; (2) "failing to adopt regulations that insure equitable and impartial IHP administration," as required under § 5151(a) (Count II), *id.* ¶¶ 86–88; and (3) "failing to adopt regulations that provide for fair and impartial consideration of appeals," as required under § 5189a(c) (Count III), *id.* ¶¶ 89–90. Plaintiffs also assert that FEMA uses "unpublished rules that adversely affect applicants" in violation of 5 U.S.C. § 552(a)(1) (Count IV). *Id.* ¶¶ 91–95. Plaintiffs seek an order compelling Defendants to (1) promulgate more detailed regulations concerning how FEMA makes IHP eligibility and award decisions, (2) cease from using unpublished rules in making such decisions, and (3) reconsider Plaintiffs' disaster relief applications without the use of rules that were unpublished at the time FEMA denied their applications. *Id.* ¶ 96.

Defendants move to dismiss the Complaint. They contend that (1) the court lacks subject matter jurisdiction to hear Plaintiffs' claims under Rule 12(b)(1) of the Federal Rules of Civil Procedure and (2) Plaintiffs failed to state a claim for relief under Rule 12(b)(6). See

Defs.' Mot. to Dismiss, ECF No. 4, Mem. in Supp., ECF No. 4-1 [hereinafter Defs.' Mot]. Defendants assert that the court lacks subject matter jurisdiction because the United States has not waived its sovereign immunity in this context. To support that position, Defendants point to the Stafford Act's "discretionary function exception," which provides that the federal government "shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter." *Id.* at 7–13; 42 U.S.C. § 5148. Additionally, Defendants argue that Plaintiffs have failed to state a claim under the APA because the challenged regulations are permissible interpretations of the Stafford Act's directives. Defs.' Mot. at 16–21.[2]

Plaintiffs both oppose Defendants' Motion, *see* Pls.' Opp'n to Defs.' Mot., ECF No. 5 [hereinafter Pls.' Opp'n], and move for partial summary judgment, *see* Pls.' Mot. for Partial Summ. J., ECF No. 8 [hereinafter Pls.' Mot.]. Taking both motions together, Plaintiffs argue that the "regulations" FEMA has promulgated do not satisfy the congressional directive to issue or prescribe rules or regulations to implement the IHP.

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[2] Defendants originally argued that Count III of Plaintiffs' Complaint was rendered moot when FEMA published its IHP guidelines in September 2016. *See* Defs.' Mot at 14. However, in light of the D.C. Circuit's recent decision in *Cierco v. Mnuchin*, 857 F.3d 407 (D.C. Cir. 2017), Defendants withdrew that contention at the hearing on the parties' Motions. *See* Transcript of May 25, 2017, Hearing, ECF No. 13, at 41–42. Accordingly, the court will not address Defendants' mootness argument.

Compl. ¶¶ 82, 87, 90. Moreover, because Congress commanded FEMA to act, its failure to do so cannot be discretionary and therefore falls outside the Stafford Act's discretionary function exception. The court now turns to those arguments.

III. LEGAL STANDARD

As noted, Defendants move to dismiss Plaintiffs' Complaint both for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, as well as for failure to state a claim upon which relief can be granted under Rule 12(b)(6). A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction requires the court to assess its own power to entertain the action. In order to withstand a Rule 12(b)(1) motion, "the plaintiff bears the burden of establishing [the court's] jurisdiction by a preponderance of the evidence." *Moran v. U.S. Capitol Police Bd.*, 820 F. Supp. 2d 48, 53 (D.D.C. 2011) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). In contrast, a Rule 12(b)(6) motion tests the legal sufficiency of a complaint. *See Howard Univ. v. Watkins*, 857 F. Supp. 2d 67, 71 (D.D.C. 2012). Courts reviewing a motion to dismiss under Rule 12(b)(6) must accept as true all factual allegations in the complaint and "grant [the] plaintiff the benefit of all inferences that can be derived from the facts alleged." *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) (internal quotation marks and citation omitted).

Plaintiffs, for their part, move for summary judgment on Counts I–III. Typically, such motions are reviewed under the standard set forth in Rule 56. In cases such as this one, however, that involve the review

of an agency action under the APA, the Rule 56 standard does not apply. *See Stuttering Found. of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007). Instead, "the district judge sits as an appellate tribunal" and "[t]he 'entire case' on review is a question of law." *Am. Biosci. Inc. v. Thompson*, 269 F.3d 1077, 1083–84 (D.C. Cir. 2001) (citing cases).

IV. DISCUSSION

Ordinarily, a federal court must address a challenge to its jurisdiction before considering the merits of the parties' claims. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–94 (1998). The court does so here, but with a slight twist. To answer the jurisdictional question of whether Defendants are immune from suit under the Stafford Act's discretionary function exception, the court must determine whether Congress vested discretion in FEMA to issue regulations and, if so, to what degree. The answer to that inquiry necessarily lies in the text of the statutes themselves. The exact same exercise applies to evaluating Plaintiffs' APA claims under Chevron step one. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) (holding that the first step in evaluating claims brought under the APA involves determining "whether Congress has directly spoken to the precise question at issue"); *see also Am. Trucking Ass'n v. U.S. Dep't of Transp.*, 166 F.3d 374, 378 (D.C. Cir. 1999) ("The Chevron test applies to issues of how specifically an agency must frame its regulations."). Accordingly, the court's jurisdictional and merits inquiries necessarily overlap. *See Columbus Reg'l Hosp. v. Fed. Emergency Mgmt. Agency*, 708 F.3d 893, 898 (7th Cir. 2013) (finding that the question of whether certain

FEMA activities were discretionary under the Stafford Act, and thus barred from judicial review, necessitated "tak[ing] up the [plaintiff's] claims on the merits"); *cf. Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778–79 (2000) (asking first whether the statute itself creates the cause of action to be asserted against the states before the jurisdictional question of Eleventh Amendment immunity). The court therefore begins with a discussion of the discretionary function exception and then turns to the statutes themselves.

A. Whether the Stafford Act's Discretionary Function Exception Precludes Review of Plaintiffs' Claims

As a general rule, the United States is immune from suit unless it consents to be sued. *See, e.g.*, *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Under the Stafford Act, the United States only has partially granted such consent. The Act's discretionary function exception prevents the federal government from being held liable for "any claim based upon the exercise or performance of or the failure to exercise or perform a *discretionary function* or duty on the part of the federal agency or an employee of the federal government in carrying out the provisions of" Chapter 42 of the United States Code. 42 U.S.C. § 5148 (emphasis added). In *United States v. Gaubert*, the Supreme Court established a two-part inquiry to determine the circumstances in which the discretionary function exception will shield the United States from suit. 499 U.S. 322–23 (1991). In broad strokes, the *Gaubert* test first determines whether a challenged act is discretionary and, if so, then questions whether the act is of the kind

that Congress intended to immunize from suit. *Id.* Although *Gaubert* concerned the discretionary function exception under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a), courts also apply *Gaubert* to the Stafford Act's exception because its text mirrors that of the FTCA and because the Stafford Act's legislative history shows that Congress intended to incorporate the FTCA standard. *See, e.g., St. Tammany Par., ex rel. Davis v. Fed. Emergency Mgmt. Agency*, 556 F.3d 307, 323 (5th Cir. 2009) (citing cases and legislative history); *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 195–96 (2d Cir. 2008); *Dureiko v. United States*, 209 F.3d 1345, 1351 (Fed. Cir. 2000). This court will do the same.

Under the first prong of the *Gaubert* test, a court asks whether an agency's challenged acts "are discretionary in nature, acts that 'involv[e] an element of judgment or choice." *Gaubert*, 499 U.S. at 322 (citation and internal quotation marks omitted). The degree of agency "choice" depends on the source of legal authority for the agency's action. "If a statute, regulation, or policy leaves it to a federal agency to determine when and how to take action, the agency is not bound to act in a particular manner and the exercise of its authority is discretionary." *St. Tammany Par.*, 556 F.3d at 323. On the other hand, "[t]he requirement of judgment or choice is not satisfied," and the discretionary function exception is inapplicable, "if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because the employee has no rightful option but to adhere to the directive." *Gaubert*, 499 U.S. at 322 (citation and internal quotation marks

omitted). In evaluating whether an agency's action involved discretion, what matters is the nature of the conduct, rather than the status of the actor. *See id.*

The second *Gaubert* prong winnows the field of discretionary acts that enjoy immunity from suit. Under that prong, courts are to ask whether the judgment exercised by the agency "is of the kind that the discretionary function exception was designed to shield." *Id.* at 322–23 (internal quotation marks omitted). "Decisions that require choice are exempt from suit . . . only if they are 'susceptible to policy judgment' and involve an exercise of 'political, social, [or] economic judgment.'" *Cope v. Scott*, 45 F.3d 445, 448 (D.C. Cir. 1995) (quoting *Gaubert*, 499 U.S. at 325).

With the *Gaubert* test in hand, the court turns to whether FEMA's promulgation of regulations constitutes an exercise of its discretionary function.

1. Whether FEMA's Promulgation of Regulations is a Discretionary Act

In deciding whether the agency action challenged here—the promulgation of regulations—is a discretionary act, the court begins with the text of the three statutes that form the basis for Plaintiffs' claims.

- 42 U.S.C. § 5174(j) requires FEMA to "prescribe rules and regulations to carry out [the IHP], including criteria, standards, and procedures for determining eligibility for assistance."
- 42 U.S.C. § 5151(a) instructs FEMA to "issue . . . such regulations as may be necessary for the guidance of personnel carrying out [the IHP and any] . . . [s]uch regulations shall include provisions for insuring that the [IHP is carried out]

in an equitable and impartial manner, without discrimination."

- 42 U.S.C. § 5189a(c) directs FEMA to "issue rules which provide for the fair and impartial consideration of appeals" from any "decision regarding eligibility for, from, or amount of [disaster] assistance."

Thus, whether the discretionary function exception applies here depends on whether FEMA was exercising its discretion when "prescrib[ing]" and "issu[ing]" "rules" or "regulations," as required by Congress.

Plaintiffs' argument against applying the exception proceeds as follows. Plaintiffs assert that FEMA's "regulations," as codified in the Code of Federal Regulations ("CFR"), do not satisfy the mandatory directives contained in each of the above statutes. Compl. ¶¶ 82, 87, 90. For instance, Plaintiffs allege that the regulations listed at 44 C.F.R. § 206.110–206.119 fall short because the regulations (1) "do not state eligibility standards in sufficient detail to permit FEMA to 'carry out' [the] IHP"; (2) do not "insure" equitable and impartial administration of the IHP because the regulations "are so vague"; and, (3) with respect to appeals, are so devoid of substance that FEMA may rely on secret rules to reject appeals without disclosing the reasons for its determination to the applicant. *Id.* ¶¶ 82, 87, 90. Plaintiffs assert that these shortcomings constitute a "deliberate choice" by FEMA not to promulgate the regulations that Congress demanded and that such rulemaking choices are not the kinds of discretionary acts that are immune from suit. Pls.' Opp'n at 2–7. Put succinctly, Plaintiffs argue that "FEMA has no discretion to violate federal law." *Id*. at 2.

Plaintiffs' argument fails for two reasons, one based on the text of the three statutes and the other based on binding D.C. Circuit precedent. The court addresses each reason in turn.

a. Plaintiffs' Argument Contradicts the Text of the Stafford Act

Plaintiffs' argument is premised on a mischaracterization of the text of the Stafford Act. *See* Compl. ¶¶ 2, 27; Pls.' Mot. at 7, 38, 42. Under the Act, Congress granted FEMA the authority to issue both rules *and* regulations, not regulations alone. 42 U.S.C. §§ 5121–5206. In fact, only one of the three cited statutes, 42 U.S.C. § 5151(a), directs FEMA to administer the IHP exclusively through "regulations" adopted in the CFR. Section 5174(j), on the other hand, permits FEMA to "prescribe *rules and regulations* to carry out" the IHP, *id.* § 5174(j) (emphasis added), and Section 5189a(c) only requires FEMA to "issue *rules*" with respect to the appeals process, *id.* § 5189a(c) (emphasis added). Furthermore, even section 5151(a), which uses only the word "regulation," merely directs FEMA to publish such regulations "*as may be necessary* to [carry out the IHP]." 42 U.S.C. § 5151(a) (emphasis added). Accordingly, a plain reading of the statutes does not support Plaintiffs' assertion that the Stafford Act requires FEMA to implement the IHP only through published "regulations" in the CFR. Compl. ¶¶ 82, 87, 90.

The court cannot, as Plaintiffs suggest, brush aside Congress' decision to use the word "rules," in addition to the word "regulations," or ascribe the same meaning to both terms. *See* Transcript of May 25, 2017, Hearing, ECF No. 13 [hereinafter Hr'g Tr.], at 8–9; *cf. Deal v.*

United States, 508 U.S. 129, 134 (1993) (acknowledging that "Congress sometimes uses slightly different language to convey the same message") (internal quotation marks omitted). Ordinarily, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States*, 556 U.S. 568, 573 (2009) (citation and internal quotation marks omitted). That rule takes on greater force where, as here, the statutes were adopted at separate times. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988) ("Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning"); *see also United States v. Wilson*, 290 F.3d 347, 360 (D.C. Cir. 2002). Congress enacted (1) Section 5151(a) in 1974, *see* Pub. L. No. 93-288, § 308, 88 Stat. 143, 150 (1974) (formerly § 311); (2) Section 5189a(c) in 1988, *see* Pub. L. No. 100-707, tit. 1, sec. 106, § 423, 102 Stat. 4689, 4705 (1988); and (3) Section 5174(j) in 2000, *see* Pub. L. No. 106-390, tit. 2, sec. 206(a), § 408, 114 Stat. 1552, 1566 (2000). That the statute with the narrowest directive, Section 5151(a), is also the first-in-time statute suggests that Congress, in its amendments, intended to grant FEMA broader authority to select its methods for designing the IHP, and not to limit the agency to formal rulemaking alone. And affording FEMA increased flexibility in implementing the IHP makes perfect sense. The awarding of disaster relief depends on a host of variables, including the availability of funds, the nature of the disaster, and the

number of persons affected by the disaster. Thus, ascribing different meanings to the words "regulations" and "rules," and thereby granting FEMA wide berth in how it carries out its statutory obligations, is consistent with the Stafford Act's purpose of "assur[ing] a prompt and comprehensive federal response to a national disaster," *In re World Trade Center Disaster Site Litig.*, 521 F.3d at 194. *See Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve.").

The legislative history of Section 5174(j), which broadly directs FEMA to "carry out" the IHP, lends further support for the court's interpretation of the statutes at issue. Section 5174(j) first appeared in the Disaster Relief Act of 1974. In that Act, Congress directed the President to "promulgate regulations" to "carry out" the IHP. § 408(i), 114 Stat. 1570. Twenty-five years later, Congress amended that provision, as part of the Disaster Mitigation Act of 2000, to read that the President "shall prescribe rules and regulations to carry out" the IHP. § 408(i), 114 Stat. 1570. Why would Congress change decades-old statutory text from "promulgate regulations" to "prescribe rules and regulations" unless it intended to alter the statute's meaning? The natural reading of that textual change is that Congress intended to grant FEMA greater flexibility in "carry[ing] out" the IHP. Such expanded implementing authority is fatal to Plaintiffs' argument: FEMA simply does not need to set forth all eligibility criteria through published regulations in the CFR. Rather, Congress afforded FEMA the discretion to rely

on informally adopted "rules," in addition to formal rulemaking, to administer the program.

Plaintiffs also argue that the three statutes' textual differences are irrelevant because their claims actually concern FEMA's alleged failure to publish the *policies* governing the IHP, regardless of whether a policy is characterized as a "rule" or "regulation." *See* Hr'g Tr. at 10–11, 46–48. That argument, however, runs aground on the shores of Plaintiffs' Complaint. Counts I through III each rest squarely on the theory that the "regulations" FEMA published in the CFR, standing alone, do not satisfy the directives of Congress. *See* Compl. ¶ 82 ("FEMA's IHP *regulations* . . . do not satisfy the requirement stated in [Section 5174(j) of the Stafford Act]"); ¶ 83 (alleging that "the text of 44 C.F.R. § alone proves that FEMA must use unpublished *rules* to decide eligibility for disaster assistance") (emphasis added); ¶ 87 ("On their face, FEMA's IHP *regulations* . . . do[] not 'insure' equitable and impartial administration as required by [Section 5151(a) of the Stafford Act]") (emphasis added); ¶ 90 ("On their face and as applied, FEMA's IHP *regulations* . . . do not provide for the fair and impartial consideration of appeals") (emphasis added). Indeed, Plaintiffs even go so far as to offer a one-page draft "regulation" entitled "The meaning of 'disaster-related damage'" for adoption and publication in the CFR at "44 C.F.R. § 206.111.5," to demonstrate the alleged ease with which FEMA could "rectify most of the deficiencies in its current regulations." Pls.' Reply Supporting Pls.' Partial Mot. for Summ. J., ECF No. 12, at 11, and Ex. A, ECF No. 12-1. Nowhere do Plaintiffs contend, however, that FEMA's "rules" *and* "regulations" in combination fail to execute the direction of

Congress. The court will not permit Plaintiffs, now confronted with statutory text that does not support their claims as drawn, to recast their suit as one seeking mere publication of policies rather than affirmative adoption of regulations.

Plaintiffs also rely on an alternative textual analysis, asserting that the plain text of the Stafford Act circumscribes the subject matter of FEMA's rulemaking to such an extent that the agency cannot claim its rulemaking is discretionary. With respect to Section 5174(j), Plaintiffs contend that the words "carry out" and "including criteria, standards, and procedures" mean Congress required FEMA to "state in regulation *all* eligibility standards and procedures that FEMA uses to carry out IHP." Pls.' Opp'n at 14; *see also* Pls.' Mot. at 11–16 (arguing that "at minimum, § 5174(j) requires FEMA to publish regulations that rectify the five deficiencies described above").[3] Plaintiffs place heavy emphasis on the words "carry out," which they contend means the "accomplishment of a completed act," and thus mandates FEMA to include all criteria and standards that it uses to "decide[] who will get what IHP assistance." *Id.* at 9–13 (citing cases).

The court disagrees that, in the context of this statute, "carry out" means seeing an act through to completion. Congress could not have meant for FEMA to "complete" or "conclude" the IHP when it elected to use that phrase. Rather, the more natural interpretation of "carry out" in this context is that Congress meant for FEMA to "put into execution" the IHP by

[3] As discussed earlier, this argument independently fails because the statute does not require FEMA to "carry out" the IHP only through regulations, but through "rules and regulations."

way of rules and regulations. *See Carry Out*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/carry%20out (last visited June 26, 2017). Read this way, by instructing FEMA to put the IHP into execution, Congress did not intend to require the agency to publish in the CFR *every* standard or piece of criteria that it might use to evaluate disaster relief eligibility. Such a reading would make little sense, particularly in the context of providing disaster assistance, which, as noted, can depend on a number of factors.

Plaintiffs' reading of Section 5151(a) likewise does not foreclose the agency's exercise of discretion. Plaintiffs seize on the word "insure"—as in "insuring" nondiscrimination in disaster assistance—and assert that it is a "muscular word" that means "to make certain especially by taking necessary measures and precautions." Pls.' Mot. at 17 (citing Merriam-Webster Dictionary). Plaintiffs focus on "insure," however, ignores another key phrase in Section 5151(a)—"as may be necessary"—which affords the agency substantial discretion. *Cf. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 968–69 (2005) (affording *Chevron* deference to rulemaking under statute that authorized agency "to prescribe such rules and regulations as may be necessary"). Plaintiffs' selective reading of the statute cannot convert a discretionary act into a mandatory one.[4] Thus, the court rejects Plaintiffs' narrow interpretation of the Stafford Act's mandate and concludes that the statutory text confers upon

[4] Plaintiffs do not make a serious argument that the text of Section 5189a(c) removes discretion from FEMA; rather, its argument is that the regulations do not reasonably reflect what Congress mandated. *See* Pls.' Mot. at 20–21.

FEMA substantial discretion in how to implement the IHP, thereby satisfying the first prong of *Gaubert*.

b. Plaintiffs' Argument Fails Under D.C. Circuit Precedent

Plaintiffs' argument that FEMA lacks discretion concerning how to implement the IHP also runs contrary to precedent in this Circuit. When faced with broad statutory mandates similar to those at issue here, the D.C. Circuit has held that "the agency [is] entitled to broad deference in picking the suitable level" of specificity for its regulations. *Ethyl Corp. v. E.P.A.*, 306 F.3d 1144, 1149 (D.C. Cir. 2002). Here, each of the three statutes command FEMA to institute rules, regulations, or both, on a general topic related to administering the IHP. Section 5174(j) concerns "criteria, standards, and procedures for determining eligibility for assistance" under the IHP. 42 U.S.C. § 5174(j). Section 5151(a) relates to "the processing of applications . . . in an equitable and impartial manner." *Id.* § 5151(a). And section 5189a(c) addresses the "fair and impartial consideration of appeals." *Id.* § 5189a(c). Such broad mandates do not significantly handcuff FEMA's discretion when rulemaking, as none of the statutes supply any further direction as to required content or level of specificity. The generality of these provisions means that Congress left it to FEMA to decide how best to satisfy the statutory mandates. *Cf. Am. Trucking Ass'n*, 166 F.3d at 379 (observing that "[i]n a series of cases we have explicitly accorded agencies very broad deference in selecting the level of generality at which they will articulate rules"). Such a broad grant of discretion easily satisfies the first prong of the *Gaubert*

test—that the agency acted with the authority to make a choice or judgment.[5]

Plaintiffs, for their part, point to a series of D.C. Circuit cases to support their view that FEMA lacks discretion to determine the specificity of its regulations under the Stafford Act.[6] *See* Pls.' Mot. at 21–29. They rely heavily on *Ethyl Corp. v. E.P.A.* in particular, asserting that "[t]he case at bar is indistinguishable from *Ethyl.*" *Id.* at 25. Not so. In *Ethyl,* the court considered whether the Environmental Protection Agency ("EPA") had complied with its obligations under the Clean Air Act ("CAA"), which instructed the agency to, "*by regulation*[,] establish methods and procedures for making tests" designed to measure motor vehicle emissions. *See Ethyl*, 306 F.3d at 1148–49 (emphasis added). The EPA asserted that it had satisfied its mandate, even though it had not promulgated test methods of its own, because the agency had instead "establishe[d] a framework for automobile manufacturers to develop their own tests." *Id.* at 1146. The court disagreed, finding that the statute required the agency to actually issue regulations specifically governing emissions test procedures—i.e., the agency did not have discretion to outsource that responsibility to third-parties. *Id.* at

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[5] Plaintiffs cite several cases where they claim courts have rejected the argument that FEMA maintains rulemaking discretion under the Stafford Act. *See* Pls' Opp'n at 5 (citing cases). However, those cases stand for the proposition that FEMA cannot violate the Constitution under the guise of its discretionary function. Plaintiffs do not advance constitutional claims in this case. Accordingly, Plaintiffs' reliance on those cases proves unhelpful.

[6] For ease of discussion, the court will address Plaintiffs' reliance on *MST Express v. Dep't of Transp.*, 108 F.3d 401 (D.C. Cir. 1997), when discussing the substance of Plaintiffs' APA claims.

1148–50. Here, in sharp contrast, FEMA has not outsourced its administration of the IHP to any third party. To the contrary, there is no dispute that FEMA in fact issued rules and regulations designed to "carry out" the IHP and its appeals process in a nondiscriminatory manner. Plaintiffs' challenge therefore falls "on the 'too general' rather than the 'no regulation at all' side of the line," *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 222 (D.C. Cir. 2007), and directly implicates FEMA's discretion how to administer the IHP. *Public Citizen v. Nuclear Regulatory Commission* is inapposite for the same reason. The statute at issue in that case, the Nuclear Waste Policy Act of 1982, required the agency to "establish" certain instructional requirements for personnel training programs for civilian nuclear power plant licensees. 901 F.2d 147, 149 (D.C. Cir. 1990). The court found that agency had failed to do so, instead permitting "case-by-case impositions of requirements on particular licensees." *Id.* at 158. No similar abdication of implementation authority is present in this case.

Plaintiffs' reliance on *American Airlines, Inc. v. Transportation Security Administration*, 665 F.3d 170 (D.C. Cir. 2011), and *Oceana, Inc. v. Locke*, 670 F.3d 1238 (D.C. Cir. 2011), is unconvincing for similar reasons. Both cases concerned circumstances in which an agency reserved the option to deviate from regulations promulgated pursuant to a statutory mandate. In *Oceana*, the D.C. Circuit held that the National Marine Fisheries Service ("NMFS") had violated its obligations under the Magnuson-Stevens Act—which required NMFS to "establish a standardized reporting methodology to assess the amount and type" of fish

caught but ultimately discarded (i.e., bycatch)—because the NMFS's proposed reporting methodology contained an exception that NMFS could trigger "in any year in which external operational constraints would prevent NMFS from fully implementing" the reporting regulations. *Id.* at 1239–41 (internal quotation marks omitted). The court considered *Ethyl* and its progeny in finding that, because the agency could not identify any "meaningful limitation" on its ability to "trigger" that exception at will, it had failed to carry out its obligation to establish binding regulations to effectively monitor the amount of annual bycatch. *Id.* at 1241. In other words, the exception was "so vague as to make the rule meaningless." *Id.* at 1241–42. Similarly, *American Airlines* relied on *Oceana* to hold the same concerning a Transportation Security Agency ("TSA") decision to include a unilateral "case-by-case" exception to an airport security funding prioritization list that it had created pursuant to requirements set out in the Aviation and Transportation Security Act. 665 F.3d at 176–77. The court again found that the agency's exception swallowed the rule—TSA could not have fulfilled Congress' mandate to promulgate binding regulations while simultaneously maintaining the unilateral authority to deviate from those regulations whenever it desired. *Id.* Here, in contrast, FEMA has not unilaterally excepted itself from administering the IHP under any circumstances: FEMA has explicitly adopted the regulations that it uses to administer the IHP and Plaintiffs have failed to identify an opt-out provision in those regulations similar to those that ran afoul of the congressional directives in *Oceana* and *American Airlines*.

Thus, the cases on which Plaintiffs rely are distinguishable. At bottom, Plaintiffs' cited cases stand for the general propositions that an agency cannot: (1) ignore Congress' explicit direction to regulate in favor of some other preferred means of administering a program (*Ethyl* and *Public Citizen*), or (2) satisfy an explicit direction to regulate by issuing regulations that the agency can nonetheless cast aside at will by relying on an overly broad exception (*Oceana* and *American Airlines*). In this case, by contrast, FEMA did exactly what Congress required by creating rules and regulations to administer the IHP. Those rules and regulations do not contain any exception "so vague as to make the rule meaningless." *Oceana*, 670 F.3d at 1241–42. In summary, the court finds that the authority granted to FEMA under the Stafford Act satisfies the first prong of the *Gaubert* test because Congress only prescribed that FEMA create rules and regulations to administer the IHP, leaving to FEMA the "choice" to determine the scope and content of those rules and regulations.

2. Whether FEMA is Immune from Suit for Its Discretionary Acts

Having decided that the Stafford Act vests discretion in FEMA to promulgate rules and regulations, the second *Gaubert* inquiry—whether the challenged judgment is of the kind that the discretionary function exception was designed to shield—is easily resolved. *Gaubert* itself provides the answer. There, the Supreme Court provided the following example of a discretionary agency action that is immune from suit:

> Where Congress has delegated the authority to an independent agency or to the Executive Branch to implement the general provisions

> of a regulatory statute and to issue regulations to that end, there is no doubt that planning-level decisions establishing programs are protected by the discretionary function exception, *as is the promulgation of regulations by which the agencies are to carry out the programs*.

Gaubert, 499 U.S. at 323 (emphasis added). Thus, *Gaubert* leaves no doubt that FEMA's promulgation of the challenged regulations is the type of discretionary agency action that Congress intended to shield from review. *Cf. St. Tammany Par.*, 556 F.3d at 320–322 (holding that the decision whether to engage in notice and comment rulemaking, or to use a less formal method, to adopt policy is a discretionary act that cannot be challenged under the APA); *Rosas v. Brock*, 826 F.2d 1004, 1008 (11th Cir. 1987) (same).

Accordingly, the court finds that it lacks subject matter jurisdiction to review Plaintiffs' claims under the discretionary function exception of the Stafford Act. Plaintiffs' Complaint is therefore dismissed.

B. Whether FEMA's IHP Regulations Are Reasonable Interpretations of the Stafford Act

Even if the court were to have jurisdiction over Plaintiffs' claims, FEMA's IHP regulations nonetheless constitute reasonable interpretations of the Stafford Act and therefore Plaintiffs have failed to state a claim. As previously noted, Plaintiffs' claims implicate the two-step formula set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842–44. Under *Chevron*'s first step, courts must determine whether Congress has "directly spoken to the

precise question at issue." *Id.* at 842. As discussed above, Congress has *not* provided direct instruction to FEMA concerning the content and specificity of its IHP regulations, and so the court proceeds to *Chevron*'s second step: whether those regulations are "based on a permissible construction of the [Stafford Act]." *Id.* at 843. "[U]nder *Chevron* [step two] . . . the fundamental question is not whether we think the [agency]'s interpretation is correct, but whether the [agency]'s interpretation of the Act is at least reasonable in light of any ambiguities in the statute." *District of Columbia v. Dep't of Labor*, 819 F.3d 444, 449 (D.C. Cir. 2016). "If the agency's construction is reasonable, [courts] defer." *Council for Urological Interests v. Burwell*, 790 F.3d 212, 219 (D.C. Cir. 2015) (citing *Chevron*, 467 U.S. at 842–43). "[J]udicial deference is at its highest in reviewing an agency's choice among competing policy considerations, including the choice . . . of the level of generality at which it will promulgate norms implementing a legislative mandate." *Metro. Washington Airports Auth. Prof'l Firefighters Ass'n v. United States*, 959 F.2d 297, 300 (D.C. Cir. 1992) (internal citation omitted); *see also Cement Kiln,* 493 F.3d at 221 (holding that courts must defer to agency interpretations of statutes when rulemaking "so long as [the agency] establishes an identifiable standard governing" the subject matter Congress required).

For the reasons that follow, the court finds FEMA reasonably interpreted the Stafford Act in promulgating each contested provision of the IHP regulations.

1. Count I - 42 U.S.C. § 5174(j)

The court finds FEMA's interpretation of 42 U.S.C. § 5174(j) reasonable under *Chevron*. Plaintiffs contend

that FEMA failed to satisfy the requirements of that section because it failed to "[s]tate [a]ll of [i]ts [e]ligibility [r]equirements" in the IHP regulations. Pls.' Opp'n at 14. However, as discussed, the Act does not require such specificity. Moreover, Plaintiffs' arguments run counter to the persuasive reasoning of the Fifth Circuit's recent decision in *La Union Del Pueblo Entero (LUPE) v. Federal Emergency Management Agency*, 608 F.3d 217, 221 (5th Cir. 2010), which held that that FEMA's IHP regulations comport with the requirements of 42 U.S.C. § 5174(j) because they sufficiently "establish—though sometimes imprecisely—criteria, standards, and procedures for determining eligibility for FEMA aid." *Id.* at 221. In so holding, the court explained that "although the C.F.R. materials do not lay out the 'criteria, standards, and procedures for determining eligibility for assistance' with as much specificity as might be desired, we cannot conclude that the regulations contravene Congress's directive to issue eligibility regulations. The additional content provided by [44 C.F.R.] §§ 206.110–206.120 significantly narrows the universe of potentially eligible disaster victims." *Id.* at 223. This court agrees with the Fifth Circuit. Accordingly, FEMA's interpretation of its obligations under § 5174(j) is reasonable under *Chevron*, and, as a result, Plaintiffs fail to state a claim as to Count I. *See Cement Kiln*, 493 F.3d at 221.

The Fifth Circuit's reasoning in *LUPE* also undermines Plaintiffs' reliance on *MST Express v. Department of Transportation*, 108 F.3d 401 (D.C. Cir. 1997). Plaintiffs assert FEMA's "regulations at issue here feature . . . all [the] flaws that the D.C. Circuit held to be dispositive in *MST*." Pls.' Mot at 24. The court does not agree. At its core, the D.C. Circuit's decision in

MST Express turned on the substance of the plaintiffs' APA claims that regulations promulgated by the Federal Highway Administration—which provided that vehicle safety controls were "adequate" if they are "appropriate for the size and type of operation of the particular motor carrier"—did not satisfy the Motor Carrier Safety Act's directive that the agency promulgate "a means of deciding whether the owners, operators, and persons meet the safety fitness requirements." *MST Express*, 108 F.3d at 402–406. The Circuit found that such an open-ended regulation did not constitute a reasonable interpretation of the agency's mandate to publish "a means of deciding" safety fitness ratings in the CFR. *Id.* at 406. Understood this way, *MST Express* is readily distinguishable because the regulations in that case did not serve to "significantly narrow" the statutory criteria and, thus, wholly failed to carry out Congress' mandate. *LUPE,* 608 F.3d at 223. Here, on the other hand, FEMA has in fact provided sufficiently specific IHP regulations to satisfy the Stafford Act's directive—as discussed in *LUPE*—and, accordingly, the court does not agree with Plaintiffs that FEMA's regulations suffer from similar flaws to those identified in *MST Express*.

2. Count II - 42 U.S.C. § 5151(a)

The court reaches the same conclusion regarding FEMA's interpretation of 42 U.S.C. § 5151(a). Again, that section requires FEMA to "issue . . . such regulations as may be necessary for the guidance of personnel carrying out [the IHP and any] . . . [s]uch regulations shall include provisions for insuring that the [IHP is carried out] in an equitable and impartial manner, without discrimination." 42 U.S.C. § 5151(a) (emphasis

added). Relying on *Gonzales v. Oregon*, 546 U.S. 243 (2006), Plaintiffs assert that FEMA's interpretation is unreasonable because 44 C.F.R. § 206.11(b), "only repeats what is required by statute" and, thus, is nothing more than a "parroting regulation" not entitled to deference. *See* Pls.' Opp'n at 13–14. *Gonzales*, however, concerned whether an agency should be afforded deference in *interpreting its own regulations* under *Auer v. Robbins*, 519 U.S. 452 (1997), where such regulations merely "parroted" the governing statute. *Gonzales*, 546 U.S. at 257. That question is not implicated in this case. Plaintiffs are not challenging FEMA's authority *to interpret* its IHP regulations, but rather, the content of those IHP regulations. *Gonzales* is thus irrelevant to this case.

Further, Plaintiffs' argument that FEMA has merely parroted the text of the Act collapses upon further inspection. True, consistent with the text of § 5151(a), section 206.11(b) requires all FEMA personnel to "perform their work in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status." 44 C.F.R. § 206.11(b). But that is not all that section 206.11 commands. It also demands that "government bodies and other organizations shall provide a written assurance of their intent to comply with regulations relating to nondiscrimination." *Id.* § 206.11(c). It further requires the agency to make available to a broad spectrum of interested persons—"employees, applicants, participants, beneficiaries, and other interested parties"—information as to how FEMA goes about implementing its programs and activities in an "equitable and impartial" manner. *Id.* § 206.11(d). And, perhaps most critically, section 206.11 cross-references

another part of FEMA's regulations, titled "Nondiscrimination in FEMA-Assisted Programs," 44 C.F.R. §§ 7.1–7.16. The stated purpose of those regulations is to give effect to Title VI of the Civil Rights Act of 1964, "to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from" FEMA. *Id.* The anti-discrimination regulations apply broadly to "any program for which Federal financial assistance is authorized under law administered by" FEMA, which would include the IHP. *Id.* § 7.4. The regulations enumerate specific forms of prohibited discrimination, *id.* § 7.5; require that applications contain assurances of non-discriminatory treatment, *id.* § 7.7; and authorize FEMA to conduct investigations to ensure compliance and to ferret out and sanction non-compliance, *id.* §§ 7.11–7.14. Thus, FEMA has done far more than regurgitate the statute in insuring the administration of the IHP in an equitable and impartial manner, and the court "must defer to [FEMA's] reasonable interpretation . . . as to the degree of detail required." *See Cement Kiln*, 493 F.3d at 218. Accordingly, the court finds that Plaintiffs also fail to state a claim as to Count II.

3. Count III - 42 U.S.C. § 5189a(c)

Finally, FEMA has published regulations that govern appeals of disaster relief decisions. Though hardly fulsome, 44 C.F.R. § 206.115 sets forth instructions and procedures for appealing the denial of assistance determinations under the IHP. The fact that Plaintiffs

desire a more fully fleshed-out set of published regulations does not make the level of specificity chosen by FEMA unreasonable. *See Cement Kiln*, 493 F.3d at 221–222; *Ethyl*, 306 F.3d at 1149. Accordingly, the court finds that Plaintiffs also fail to state a claim as to Count III.[7]

V. CONCLUSION

For the foregoing reasons, the court grants Defendants' Motion to Dismiss and denies Plaintiffs' Motion for Partial Summary Judgment.

A separate Order accompanies this Memorandum Opinion.

Dated: July 11, 2017

/s/ Amit Mehta

Amit P. Mehta

United States District Judge

[7] Given that Count IV depends on Plaintiffs stating a claim in Counts I, II or III, Count IV necessarily fails to state a claim, as well.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

———————

Case No. 1:16-cv-01843 (APM)

DANIEL BARBOSA, ET AL.,
PLAINTIFFS,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL., DEFENDANTS.

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[Filed: Oct. 6, 2017]

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MEMORANDUM OPINION

Plaintiffs seek reconsideration of the court's dismissal of Count IV of their Complaint, which alleged that the Federal Emergency Management Agency ("FEMA") violated the Administrative Procedure Act,

specifically 5 U.S.C. § 552(a)(1), by using unpublished rules to evaluate Plaintiffs' applications for disaster relief. *See* Pls.' Mot. for Recons., ECF No. 18 [hereinafter Pl.'s Mot.]; Compl., ECF No. 1 [hereinafter Compl.], ¶¶ 91–95.[1] In its Memorandum Opinion dismissing the Complaint, the court tersely explained its dismissal of Count IV as follows: "Given that Count IV depends on Plaintiffs stating a claim in Counts I, II, or III, Count IV necessarily fails to state a claim, as well." *Barbosa v. U.S. Dep't of Homeland Sec.*, No. 16-1843, 2017 WL 2958606, at *12 n.7 (D.D.C. July 11, 2017). Plaintiffs now assert that the court was wrong to dismiss Count IV on that basis, arguing that "Count IV is fact-based and conceptually distinct from the legal issues decided by the Court in [its Memorandum Opinion], and cannot be dismissed for the same reasons that this Court relied upon to dismiss Plaintiffs' other claims." Pls.' Mot. at 1. The court should have provided the parties a more fulsome explanation for why it dismissed Count IV and now takes the opportunity to do so.

I.

In Counts I, II, and III, Plaintiffs claimed that FEMA violated three separate statutory mandates by failing to adopt sufficiently detailed regulations concerning the agency's operation of an emergency disaster relief program known as the Individuals and Households Program. *See Barbosa*, 2017 WL 2958606, at *2–3. The court's primary reason for dismissing all three counts was that Defendants were immune from suit under the "discretionary function exception" of the

[1] Plaintiffs do not ask the court to reconsider its dismissal of Counts I through III.

Robert T. Stafford Disaster Relief and Emergency Assistance Act (the "Stafford Act"), 42 U.S.C. §§ 5121–5206, the statute that governs the provision of emergency disaster relief, including through the Individuals and Households Program. *Id.* at *5–10. The Stafford Act provides that the federal government "shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter." 42 U.S.C. § 5148. The court applied the two-part discretionary function test the Supreme Court created in *United States v. Gaubert* and found that (1) FEMA's determination of which rules to adopt through formal notice-and-comment rulemaking is a discretionary act, and (2) such decision-making is of the type that Congress intended to shield from review under the Stafford Act's discretionary function exception. *See Barbosa*, 2017 WL 2958606, at *5–10 (citing 499 U.S. 315, 322–23 (1991)). The court thus dismissed Counts I, II, and III, for lack of subject matter jurisdiction. *Id.* at *10.

Count IV advanced a different type of claim than that stated in Count I, II, or III. Whereas the first three counts alleged that FEMA had not promulgated regulations as required by Congress, Count IV challenged FEMA's use of unpublished rules and policies to decide Plaintiffs' applications for disaster relief. *Compare* Compl. ¶¶ 81–90 (Counts I–III), *with id.* ¶ 93 (Count IV). That practice, Plaintiffs alleged, ran afoul of the Administrative Procedure Act's ("APA") requirement that "[f]ederal agencies must publish in the federal register all of their substantive and procedural rules and policy statements." *Id.* ¶ 91 (citing 5 U.S.C.

§§ 552(a)(1)(B)–(E)). As relief for that violation, Plaintiffs asked the court to enjoin FEMA from using any unpublished rules and to reevaluate Plaintiffs' relief applications based only on the published rules that existed at the time. *Id.* ¶ 96.

II

The court concludes that it properly dismissed Count IV of the Complaint because the Stafford Act's discretionary function exception shields the agency actions that are the subject of that count from judicial review. Count IV of the Complaint requires the court to determine whether FEMA complied with the APA's requirement that certain types of rules and policies must be published in the Federal Register. Two circuit courts have held, however, that the Stafford Act's discretionary function exception bars judicial review of FEMA's decision-making concerning the applicability of the APA's procedural requirements to FEMA's rules and policies. *See Rosas v. Brock*, 826 F.2d 1004, 1006 (11th Cir. 1987); *St. Tammany Parish ex rel. Davis v. FEMA*, 556 F.3d 307, 313, 326 n.13 (5th Cir. 2009). And, while the D.C. Circuit has not addressed the Stafford Act's discretionary function exception's application to APA challenges, it has held in an analogous context that the discretionary function exception contained in the Federal Tort Claims Act precludes tort claims alleging violations of the APA's procedural requirements. *Jayvee Brand, Inc. v. United States*, 721 F.2d 385, 387 (D.C. Cir. 1983). Applying those decisions here, the court lacks subject matter jurisdiction as to Count IV.

Both the Eleventh Circuit and the Fifth Circuit have held that the Stafford Act's discretionary function

exception precludes judicial review of FEMA's compliance with the APA's notice-and-comment rulemaking provisions. In *Rosas v. Brock*, the plaintiff, who was denied disaster unemployment benefits, brought a class-action suit challenging the definition of "unemployed worker" that the agency[2] had used to evaluate his disaster relief claims. *See Rosas*, 826 F.2d at 1006–07. The plaintiff alleged, among other things, that the agency had wrongfully denied his claim because it had adopted and applied its definition of "unemployed worker" without subjecting the definition to notice-and-comment rulemaking. *See id.* at 1009. The agency responded that its decision to adopt a particular definition of "unemployed worker" was exempt from the APA's notice-and-comment requirement because it was an interpretive, as opposed to substantive, rule. *See id.* The Eleventh Circuit, like the district court, declined to reach the merits of the parties' dispute—whether the agency failed to adhere to the APA's formal rulemaking requirements—because "the government's determination of whether its definition of 'unemployed worker' is a substantive or interpretive rule involves the same sort of discretion and implicates the same policy considerations that exempt the decision [of selecting the term's definition] from judicial review." *Id.* The court explained that "if a discretionary decision," i.e., the adoption of a definition, "is made without following mandated procedures, it is an abuse of discretion and, as such, protected from judicial review." *See id.* at 1009–10. In other words, the court held that the Stafford Act's discretionary function exception

[2] At the time of *Rosas*, the agency responsible for overseeing disaster relief was the Department of Labor, not FEMA. *See Rosas*, 826 F.2d at 1006.

precluded review of the agency's *discretionary* decision not to follow formal rulemaking procedures when defining "unemployed worker." The Eleventh Circuit, therefore, affirmed dismissal of the claimant's APA challenge for lack of subject matter jurisdiction. The Fifth Circuit reached a similar decision in *St. Tammany Parish ex rel. Davis v. FEMA*. There, the plaintiff challenged FEMA's refusal to approve funding for debris removal in the aftermath of Hurricane Katrina and, as pertinent here, argued that "FEMA's refusal to approve funding constituted a substantive rule change about which FEMA never provided the public with notice and an opportunity to comment." 556 F.3d at 313. Citing *Rosas*, the Fifth Circuit affirmed the district court and held that the discretionary function exception barred review of the plaintiff's claim that FEMA had violated the APA's notice-and-comment requirement. *Id.* at 326 n.13 ("Because § 5148 applies, it bars any claim—whether alleged under the [Federal Tort Claims Act] or APA."). Taken together, *Rosas* and *St. Tammany Parish* stand for the proposition that the Stafford Act's discretionary function exception forecloses claims challenging FEMA actions that implicate both procedural and substantive considerations under the APA.[3]

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[3] The court discerns no material difference between the challenge asserted in this case, brought under Section 552(a)(1), and the challenges in *Rosas* and *St. Tammy Parish*, brought under Section 553. Both types of challenges involve an alleged procedural violation of the APA and contest FEMA's decision not to subject a rule or policy to public scrutiny. After all, just as FEMA exercises discretion when making a judgment under Section 553 as to whether a matter is a legislative rule that requires notice and comment or another type of action that is exempt from the notice-and-comment requirements, an agency exercises similar discretion in deciding under Section 552

Although the D.C. Circuit has not addressed the Stafford Act's discretionary function exception in the context of an APA challenge, it has addressed the scope of the exception in an analogous context. In *Jayvee Brand, Inc. v. United States*, the plaintiffs brought claims under the Federal Tort Claims Act ("FTCA"), contesting a Consumer Product Safety Commission decision to ban the use of a certain chemical used to treat fabric. 721 F.2d at 387. The plaintiffs maintained that the Commission's ban was unlawful because the agency did not follow procedures set forth in the federal Food, Drug, and Cosmetic Act, which required the Commission to provide notice of the proposed ban in the Federal Register and an opportunity for public comment. *See id*. The Circuit held that the plaintiffs' FTCA claims—which it described as an "attack . . . on the procedures by which the . . . ban was formulated and adopted"—were barred by the FTCA's discretionary function exception because, even if the Commission failed to follow the procedures laid out in the statute, that failure was "an abuse in the exercise of policy making, and hence an abuse of discretion shielded from liability" under the FTCA. *Id.* at 389.[4] As this court noted in its Memorandum Opinion, Congress used the FTCA's discretionary function exception in crafting

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whether a matter is a "statement[] of the general course and method by which [FEMA's] functions are channeled and determined"; a "rule[] of procedure"; a "substantive rule[] of general applicability adopted as authorized by law"; or a "statement[] of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(B)–(D).

[4] The court further supported that conclusion by reasoning that Congress did not intend for the FTCA to be used as an additional means of "policing the internal procedures of governmental agencies." *Jayvee Brand*, 721 F.2d at 391.

the Stafford Act's exception and, consequently, courts routinely refer to FTCA jurisprudence when evaluating the Stafford Act's discretionary function exception. *See Barbosa*, 2017 WL 2958606, at *5 (collecting cases). In fact, the Eleventh Circuit in *Rosas* relied on *Jayvee Brand* in finding that the Stafford Act's discretionary function exception barred the plaintiffs' APA claims in that case. *See Rosas*, 826 F.2d at 1010. The Circuit's holding in *Jayvee Brand* therefore provides a strong signal as to how the Circuit would apply the Stafford Act's discretionary function exception to an alleged violation of the APA's publication requirements.

Applying *Rosas*, *St. Tammy Parish*, and *Jayvee Brand* here, the court concludes that it lacks subject matter jurisdiction to review Count IV of Plaintiffs' Complaint. Once again, the count alleges FEMA violated the APA by failing to publish rules and policies before using those unpublished rules and policies to deny Plaintiffs relief. Resolving that claim, however, would require the court to evaluate the type of discretionary agency action—i.e., the decision not to publish certain rules and policies in the Federal Register—that *Rosas*, *St. Tammy Parish*, and *Jayvee Brand* make clear is barred from judicial review. An illustration makes the point. Take, for instance, Plaintiffs' allegation that FEMA unlawfully applied unpublished caps and floors on the amount of assistance provided regardless of disaster damages. Compl. ¶ 40(a). To evaluate the lawfulness of that action, the court first would have to address the predicate question of whether the APA required FEMA to publish such aid restrictions in the first place. That inquiry, in turn, would immerse the court in the difficult task of resolving whether caps and floors are: (1) "statements of the general course

and method by which [FEMA's] functions are channeled and determined"; (2) "rules of procedure"; (3) "substantive rules of general applicability adopted as authorized by law"; or (4) "statements of general policy or interpretations of general applicability formulated and adopted by the agency"—each of which must be published in the Federal Register. 5 U.S.C. § 552(a)(1)(B)–(D). Pursuing that course, however, would run the court headlong into the shield erected by the Stafford Act's discretionary function exception. Even if FEMA erred by not publishing its caps and floors in the Federal Register before applying them to Plaintiffs' claims, such an error is "an abuse in the exercise of policy making, and hence an abuse of discretion shielded from liability" under the Stafford Act. *See Jayvee Brand*, 721 F.2d at 389; *see also Rosas*, 826 F.2d at 1010. The court lacks subject matter jurisdiction to evaluate such allegations. Accordingly, the court properly dismissed Count IV of the Complaint.

III

Plaintiffs dispute the court's dismissal of Count IV, in large part, based on *La Union Del Pueblo Entero (LUPE) v. FEMA*, in which the United States District Court for the Southern District of Texas held that FEMA's decision to use an unpublished policy—known as the "deferred maintenance" rule—to deny disaster relief claims violated the APA. *See* Pls.' Mot. at 1–2 (citing 141 F. Supp. 3d 681 (S.D. Tex. 2015)). While Plaintiffs are correct that the *LUPE* court found that the Stafford Act's discretionary function exception did not present a barrier to a failure-to-publish claim under Section 552(a)(1) of the APA, the court cannot follow that decision here. First, this court is bound to follow

the D.C. Circuit's decision in *Jayvee Brand*, which, although concerning the FTCA, provides a strong indication that the Circuit would treat the challenge Plaintiffs presented in Count IV as implicating FEMA's discretionary function. Second, it does not appear that the *LUPE* court considered whether the Stafford Act's discretionary function exception barred the plaintiffs' Section 552(a)(1) claims. The trial judge in *LUPE* did address whether the Stafford Act's discretionary function exception barred the plaintiffs' claims—similar to those alleged in Counts I through III of Plaintiffs' Complaint—that FEMA's failure to promulgate certain types of regulations violated the Stafford Act, and ruled that such claims were barred. *See La Union Del Pueblo Entero v. FEMA*, 2009 WL 1346030, at *2–8 (S.D. Tex. May 13, 2009). But it does not appear to have conducted the same jurisdictional analysis with respect to the plaintiffs' claims under Section 552(a)(1) during those proceedings.[5] And Plaintiffs here, for their part, have not demonstrated that the *LUPE* trial court engaged in such an analysis. Therefore, neither the *LUPE* decision upon which Plaintiffs' argument relies, nor any related decisions in that case, persuade this

[5] The court also has thoroughly reviewed the published decisions leading to the *LUPE* decision upon which Plaintiffs' rely, and has similarly been unable to locate any analysis concerning whether the Stafford Act's discretionary function exception applied to the plaintiffs' claim that FEMA's use of the unpublished deferred maintenance rule violated the APA. *See* 2009 WL 1346030; 2009 WL 10674516 (S.D. Tex. Sep. 22, 2009); 2011 WL 1230099 (S.D. Tex. Mar 30, 2011); 2011 WL 13135967 (S.D. Tex. Oct 6, 2011). Moreover, the Fifth Circuit did not address that issue, either, electing instead to allow the trial court to adjudicate the Section 552(a)(1) claim in the first instance. *See La Union Del Pueblo Entero v. FEMA*, 608 F.3d 217, 225 (5th Cir. 2010).

court that FEMA's decision *not* to publish a rule or policy pursuant to Section 552(a)(1) is subject to judicial review.

* * *

Accordingly, for the foregoing reasons, the court finds that it properly dismissed Count IV of Plaintiffs' Complaint and denies Plaintiffs' Motion for Reconsideration.

Dated: October 6, 2017

/s/ Amit Mehta

Amit P. Mehta

United States District Judge

APPENDIX D

1. 5 U.S.C. § 552 provides:

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of

general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

2. 5 U.S.C. § 559 provides:

Effect on other laws; effect of subsequent statute

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5372, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

3. 42 U.S.C. § 5148 provides:

Nonliability of Federal Government

The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter.