No. 19-517

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Petitioners reference the Rule 29.6 Statement in the petition for a writ of certiorari.

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The D.C. Circuit held that (i) the Stafford Act's "discretionary function exception" in 42 U.S.C. § 5148 bars judicial review of whether FEMA complied with FOIA's mandatory publication requirements in 5 U.S.C. § 552(a)(1), and (ii) the rule in 5 U.S.C. § 559 that subsequent statutes may only modify the APA if they do so "expressly" does not apply to subsequent "jurisdictional" statutes like section 5148. App. 12a. The Court of Appeals acknowledged the result of its holding: disaster survivors are forced to appeal FEMA's adverse aid decisions without knowing what standards produced those decisions, App. 9a-10a & n.7, and courts are powerless to prevent FEMA from using "secret law" against disaster survivors, App. 13a.

The petition for certiorari identified two reasons why this decision ignores the plain text of the Stafford Act, the APA, and FOIA. First, section 552(a)(1) imposes mandatory publication requirements on FEMA that are unaffected by the Stafford Act's discretionary function exception; and second, the express-statement requirement in section 559 applies to subsequent jurisdictional statutes, including section 5148.

In response, FEMA misreads the D.C. Circuit's opinion and the petition, asserting that both address only the question of whether federal courts have jurisdiction to order FEMA to *reconsider* aid applications if FEMA uses secret law in violation of section 552(a)(1). Opp. 8-9. In defending this invented ruling against an imagined attack, FEMA's own brief makes clear that the actual decision was error and should be reviewed by this Court: jurisdiction does exist to enforce section 552(a)(1)'s publication requirement against FEMA, and the D.C. Circuit deepened a circuit

split over the exceptionally important issue of enforcing express-statement requirements.

I. The D.C. Circuit's publication ruling is wrong.

FEMA's brief consists of four arguments in response to Petitioners' demand for publication of FEMA's unpublished law. Opp. 8-14. When unpacked, none stand to reason.

A. Publication is at issue, not reconsideration.

FEMA argues that the D.C. Circuit only decided whether section 5148 barred Petitioners' request for *reconsideration* of their disaster assistance applications, not whether section 5148 bars Petitioners' argument that FEMA must *publish* rules as required by section 552(a)(1) to prevent any use of secret law. Opp. 8-11. FEMA further argues that the publication demand "contrast[s]" with Petitioners' "arguments below," Opp. 11, which included seeking both publication of the unpublished rules and reconsideration of their FEMA aid eligibility.

Neither contention has merit. The D.C. Circuit's decision could not have been limited to a reconsideration theory, as the opinion itself agreed that Petitioners' "primary contention" is that FEMA has a "statutory obligation to publish regulations." App. 7a. Likewise, Petitioners' Complaint seeks "an injunction that prevents FEMA from using any unpublished rules to decide disaster assistance applications." C.A. App. 33; Compl. ¶ 96(c).

Here, Petitioners seek certiorari only on the publication question, not for the issue of whether their applications must be reconsidered, which follows stand-

ard practice to present only the most important questions to this Court. *See* Stephen M. Shapiro et al., Supreme Court Practice § 6.25(e) (11th ed. 2019). FEMA may not avoid the question presented by changing it. *See Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) ("[B]y and large it is the petitioner himself who controls the scope of the question presented.").

Thus, FEMA's entire discussion of the breadth of its discretion as to reconsideration, Opp. 8-11, 13, only tilts at windmills.[1]

B. FEMA has failed to comply with section 552(a)(1).

Next, FEMA asserts that it has published all rules required by section 552(a)(1). Opp. 13-14. And FEMA argues that section 552(a)(1) does not apply to the materials sought by Petitioners, as those materials are purportedly at most "administrative staff manuals and instructions to staff" or "field instruction manuals." Opp. 1, 5. But the D.C. Circuit's jurisdictional ruling obviously precluded any litigation, let alone finding, of the "facts" that FEMA now claims to be true. App. 11a-13a. Regardless, FEMA is incorrect, as Petitioners seek publication of "formal and informal procedures" expressly subject to section 552(a)(1), which includes, for example, the procedures for appealing

[1] The discretion that FEMA has in deciding assistance amounts is broad but not plenary. It is limited by Congress's directives, not only in 42 U.S.C. §§ 5151(a), 5174(j), and 5189a(c), but also in FOIA. *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.").

FEMA's aid determinations. Pet. 7, 19; Compl. ¶ 28-40.

Relatedly, FEMA claims that Petitioners "did not allege in a non-conclusory way that they were adversely affected by a failure to publish" documents covered by section 552(a)(1). Opp. 14. This is something no court has ever addressed, but, nonetheless, it is belied by 59 pages of declarations submitted with the Complaint—which describe adverse effect in detail. C.A. App. 36-95. Indeed, even the D.C. Circuit acknowledged 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. 9a-10a.

C. Section 552(a)(1) affords FEMA no discretion.

FEMA asserts that the decision "whether and how to publish any particular document—which requires the agency to, *inter alia*, discern the imprecise line between substantive and procedural or interpretive rules—requires an element of judgment, and thus falls under the discretionary function exception." Opp. 11 (internal quotation marks omitted). This sentence is FEMA's only effort to argue that FOIA affords it discretion; FEMA mentions the issue nowhere else.

Yet the text of section 552(a)(1) forecloses FEMA's argument. The text explicitly states that FEMA "shall" publish "substantive rules of general applicability," "interpretations of general applicability," and "rules of procedure." 5 U.S.C. § 552(a)(1). Consequently, even if FEMA had discretion to classify its rules as substantive, interpretive, or procedural, section 552(a)(1) still imposes a mandatory publication requirement for all of them. Moreover, FEMA has no

discretion to decide the scope of FOIA's publication requirement. *See Sorenson Commc'ns Inc.* v. *FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) ("[A]n agency has no interpretive authority over the APA."). FEMA simply has no basis to argue that it can refuse to publish rules used to adversely affect individuals, as that is directly contrary to the text of section 552(a)(1). Pet. 19-20.[2]

Because neither the D.C. Circuit nor FEMA can explain how the text of section 552(a)(1) affords FEMA discretion in deciding which rules to publish, the Stafford Act's discretionary function exception does not apply. *See Berkovitz by Berkovitz* v. *United States*, 486 U.S. 531, 544 (1988) ("When a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply.").

D. FEMA essentially concedes Petitioners' position.

After arguing that section 552(a)(1) affords agencies discretion, FEMA concedes that to some extent, section 552(a)(1) imposes a mandatory publication requirement that is not subject to the Stafford Act's discretionary function exception. Opp. 12 (arguing that the D.C. Circuit "did not hold that [section 5148] displaces the APA or Section 552(a)(1) *entirely*.") (emphasis added). According to FEMA, "while the Stafford Act's discretionary function exception would not itself

[2] To the extent FEMA is arguing that it has discretion to decide whether certain rules should be published through formal notice-and-comment rulemaking or in some other manner, *see Rosas* v. *Brock*, 826 F.2d 1004, 1009 (11th Cir. 1987), that question is not at issue in this case. Pet. C.A. Br. 31. FEMA also argues that its "decision to grant disaster relief is unquestionably discretionary." Opp. 9-10. At no point have Petitioners claimed otherwise.

bar an attempt to bring a freestanding claim that FEMA failed to publish certain documents as required by Section 552(a)(1) . . . it does bar petitioners' attempt to use Section 552(a)(1)'s 'sanction' provision to obtain reopening and reconsideration of FEMA's discretionary disaster-relief decisions under the Stafford Act." Opp. 12 (emphasis omitted).

Thus, FEMA acknowledges that the Stafford Act's section 5148 does not bar judicial review of FEMA's compliance with section 552(a)(1) as long as the relief sought is limited to publication, and does not include reconsideration. Opp. 12.[3] Given that FEMA accepts Petitioners' own position that section 552(a)(1) is mandatory, this Court's review is necessary to rectify the D.C. Circuit's error.

II. The D.C. Circuit's ruling on express-statement requirements is wrong.

FEMA's brief is remarkable for its failure to even attempt any defense of the D.C. Circuit's application of the APA's express-statement requirement, 5 U.S.C. § 559. Without any basis at all in the APA's text, structure, history, and purpose, the D.C. Circuit held that section 559—which 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—does not apply to subsequent "jurisdictional" statutes like the Stafford Act's section 5148. App. 12a.

[3] No authority or reason supports FEMA's argument that courts may lack jurisdiction to enforce section 552(a)(1) for requests for reconsideration but not publication. FEMA only cites 5 U.S.C. § 702 to support its argument, Opp. 12, but section 702 is irrelevant because Petitioners now rely only on their APA claims and thus do not rely on any "consent to suit" under "any other statute."

This cannot be correct because section 559 contains no exceptions and protects jurisdictional provisions of the APA, which could *only* be modified by subsequent jurisdictional statutes. Pet. 17-18. The D.C. Circuit improperly created an APA exemption from whole cloth. *See Marcello* v. *Bonds*, 349 U.S. 302, 310 (1955) ("Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed."); *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51 (1955) (Section 559's "purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes.").

FEMA argues that Petitioners "did not cite [section 559] in their opening brief before the court of appeals, and their reply brief devoted only a few sentences to it." Opp. 17-18. The extent to which an argument is raised is irrelevant, so long as it was not waived, which FEMA does not and cannot argue here. *See United States* v. *Williams*, 504 U.S. 36, 41 (1992) (The Court's "traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed *or* passed upon below.'") (emphasis added).

FEMA also argues that this case would not be an appropriate vehicle to address express-statement requirements because the "court of appeals likewise addressed [section 559] only briefly." Opp. 18. But the brevity of the D.C. Circuit's analysis followed directly from its view that it lacked jurisdiction to apply section 559—and thus lacked authority to opine at all. *See Ex parte McCardle*, 74 U.S. 506, 514 (1868) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."). The rule established by the Court of Appeals—that express-

statement requirements such as section 559 need not be enforced—is perfectly clear and capable of review.

This Court can and should hold that express-statement requirements must be enforced as written, which the D.C. Circuit failed to do here.

III. The Courts of Appeals are divided over the enforceability of express-statement requirements generally, and section 559 specifically.

With respect to the conflict that Petitioners raise—five circuits that enforce express-statement requirements and three, now including the D.C. Circuit, that do not—FEMA argues that the "court of appeals did not directly address that general question." Opp. 16.[4] But the D.C. Circuit did just that when it refused to enforce an express-statement requirement. App. 12a. The Court reviews decisions reached by this sort of necessary implication. *See, e.g.*, *Arizona* v. *Hicks*, 480 U.S. 321, 324 (1987) (deciding "whether th[e] 'plain view' doctrine" applies when the Court of Appeals—only "by necessary implication"—"rejected the State's contention that [the officer's] actions were justified under the 'plain view' doctrine").

FEMA attempts to dismiss the conflict by arguing that "many of the cases on which the petitioners rely do not involve either the Stafford Act or the APA." Opp. 16 (citation and emphases omitted). But the division raised by Petitioners is over the general enforceability of express-statement requirements, whether in

[4] FEMA also asserts the D.C. Circuit's decision is "consistent" with "decisions of other courts of appeals," Opp. 14-15, but those other decisions do not address the enforceability of express-statement requirements, and thus are irrelevant to the circuit split that Petitioners raise here.

the APA, RFRA, or elsewhere, not for any single statute. Pet. 23-26. The Court regularly grants certiorari when the Courts of Appeals have split over how to apply distinct, yet analytically similar, statutes. *See, e.g.*, *Descamps* v. *United States*, 570 U.S. 254, 260 & n.1 (2013) (noting the "Circuit split" regarding "statutes like § 459" and other "similar" statutes). The Court's resolution of the split as to express-statement requirements is particularly warranted when, "[a]dmittedly, our cases have not spoken with the utmost clarity on this point." *Dorsey* v. *United States*, 567 U.S. 260, 289 (2012) (Scalia, J., dissenting).

Moreover, while this case implicates the broader split over the enforceability of express-statement requirements, it also presents divided rulings on a more specific issue: the enforceability of section 559. At least two circuits enforce section 559 as written. *See City of New York* v. *Permanent Mission of India to U.N.*, 618 F.3d 172, 203 (2d Cir. 2010); *Five Points Rd. Joint Venture* v. *Johanns*, 542 F.3d 1121, 1127 (7th Cir. 2008).

Yet now at least two circuits, including the D.C. Circuit, permit an implied repeal of the APA without any sort of express statement and thus fail to enforce section 559 as written. *See Giambanco* v. *INS*, 531 F.2d 141, 144-45 & n.6 (3d Cir. 1976) (holding that the Board of Immigration Appeals was "exempt from APA requirements," because "supersession [of the APA] could be implied"); App. 12a (holding that the APA does not apply when the subsequent statute is a "preclusion of judicial review [that] is a jurisdictional limitation on judicial power").

The APA, and similarly significant or structural statutes,[5] which rely on express-statement requirements for uniformity and predictability,[6] are threatened by the D.C. Circuit's decision, especially given the division among the Courts of Appeals and the lack of clarity from the Court. The Court's intervention is necessary to ensure that courts enforce Congress's "eminently sensible technique" to avoid a United States Code littered with a "grab-bag of implied partial repeals." Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1698 (2002).

IV. The importance of the question presented is undisputed.

FEMA never disputes the critical role played by express-statement requirements generally or in section 559 of the APA, all of which are threatened by the D.C. Circuit's decision, and which alone justifies granting certiorari.

Nor does FEMA contest that the use of secret law in violation of section 552(a)(1) presents a question of exceptional importance. Pet. 30-33. Although FEMA points out that members of the public can seek publication of agency rules under section 552(a)(3), Opp. 8, 12-14, 18, such publication will not happen in time to be

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[5] *See, e.g.*, 28 U.S.C. § 2283 (Anti-Injunction Act); 42 U.S.C. § 2000bb-3(b) (RFRA); 50 U.S.C. § 1547(a)(1) (War Powers Resolution); *see also* Pet. 26 (collecting statutes).

[6] Indeed, section 559 reflects "the importance of maintaining a uniform approach to judicial review of administrative action," as the "APA was meant to bring uniformity to a field full of variation and diversity." *Dickinson* v. *Zurko*, 527 U.S. 150, 154-55 (1999); *see also* Pet. 27-28.

of any use to disaster survivors, as even the D.C. Circuit recognized, App. 9a-10a & n.7. In any event, publication under section 552(a)(1) is a "procedural *right* bestowed upon the regulated public." H.R. Rep. No. 104-859, at 5-6 (1996) (emphasis added). This right must be available regardless of whether an alternative remedy exists, as section 552(a)(1) "requires agencies to release some records *even absent a request*." *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 563 U.S. 401, 414 (2011) (emphasis added).

Presidents declare dozens of major disasters every year. Recovery from each is a major public works project—as prone to waste, fraud, and abuse as any other. Transparency limits these evils while increasing public faith in fair administration of taxpayer resources. In light of the D.C. Circuit's mistreatment of the plain text of FOIA itself, transparency from FEMA will only be available if this Court grants review.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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