



Equitable Disaster Relief

An Analysis of FEMA's Legal Authority to Integrate Equity under the Stafford Act

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Executive Summary

Disasters make inequities worse, especially [economic inequality](#). However, recent research suggests that assistance from the Federal Emergency Management Agency (FEMA) further [exacerbates wealth inequality](#), especially along lines of [race, homeownership, and education](#), even after accounting for the impacts of the disaster itself. This means the more aid an area receives from FEMA, the more inequality grows.

The federal government's response to disasters is dictated by the 1988 Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) and subsequent amendments. The Stafford Act delegates authority to FEMA and other disaster agencies to coordinate and execute disaster preparedness and response programs in partnership with states, tribes, territories, and local governments. Last year, the [National Advisory Council \(NAC\)](#) urged FEMA to assess its existing programs and policies and integrate equity considerations. Specifically, the NAC stated:

“While it is not the role of FEMA to dismantle a series of systems that cause inequity, it is within the role of FEMA to recognize these inequities (and the disparities caused by them) and ensure that existing or new FEMA programs, policies, and practices do not exacerbate them. Further, as state and local emergency management agencies are also seeking guidance on how best to incorporate equity-centered principles in their outreach and work, FEMA has an opportunity to serve as a standard bearer.”

In its 2020 report, the NAC defined equity as “provid[ing] the greatest support to those with the greatest need to achieve a certain minimum outcome.” Equity is distinct from “equality,” which the NAC defined as “providing the same resources to everyone regardless of need.” Programs that treat all applicants equally often result in inequitable outcomes because they do not account for the particular needs and circumstances of marginalized populations. FEMA [recently announced](#) its own agency-wide equity definition, adapted from President Biden's [executive order on racial equity](#): “the consistent and systematic fair, just and impartial treatment of all individuals.” The agency also declared its commitment to “address[] gaps, barriers and challenges experienced by vulnerable populations” to ensure all disaster survivors have equal access to federal assistance, regardless of their identity or circumstance.

More broadly, the Biden administration has prioritized integrating equity [across the whole of government](#). Through a series of executive orders, President Biden mandated all federal agencies to assess their existing programs and policies to determine whether those programs perpetuate systemic barriers for underserved groups, or adequately address the disproportionately high impacts of climate change on those groups. In response, on April 22, 2021, FEMA launched an agency-wide review of its



programs and issued a request for information (RFI) [seeking public comments](#) on how to reform FEMA programs and regulations “in a manner that furthers the goal of advancing equity for all, including those in underserved communities, bolstering resilience from the impacts of climate change, particularly for those disproportionately impacted by climate change, and environmental justice.”

Over 300 states, tribes, community groups, and organizations responded to the RFI recommending ways FEMA could make its programs more equitable. However, few assessed whether FEMA has the legal authority to implement these reforms, and if so, what the scope of that authority is. In this report, we argue that **the Stafford Act’s nondiscrimination provision requires FEMA to design and execute its programs in an equitable manner.** Furthermore, **the act’s discretionary function exception gives FEMA extraordinary flexibility in deciding how to fulfill that mandate** by shielding most FEMA rules, policies, and other decisions from judicial review.

Many federal and state agencies play a role in disaster mitigation, preparedness, relief, and recovery. For example, the Department of Housing and Urban Development’s (HUD) Community Development Block Grant programs for mitigation (CDBG-MIT) and disaster recovery (CDBG-DR) are increasingly responsible for allocating millions, if not billions, of federal dollars every year. However, FEMA serves as the coordinating agency for almost all federal disaster preparedness, relief, and recovery operations. For this reason, we focus on FEMA’s legal authority pursuant to the Stafford Act.

In Part I, we assess the scope of FEMA’s equity mandate by exploring the legislative history behind the Stafford Act’s nondiscrimination provision—one of the strongest and most comprehensive antidiscrimination mandates in federal law. We find that Congress intended for this provision to exceed the scope of Title VI of the Civil Rights Act, and to prohibit federal disaster agencies from not only intentionally discriminating, but also executing disaster relief programs in a manner that exacerbates preexisting inequities. While private citizens cannot sue to enforce this mandate with regards to disparate impacts, it still provides strong statutory support for the Biden administration to prioritize equity in agency policies and programs.

In Part II, we evaluate federal precedent interpreting the Stafford Act’s discretionary function exception. The exception shields FEMA’s “discretionary” acts from judicial review. We find that this exception, as interpreted by federal courts, gives FEMA extraordinary latitude to design and execute federal disaster programs as it sees fit, either via internal guidance or notice-and-comment rulemaking. Courts have held that the discretionary function exception shields nearly all FEMA decisions regarding the allocation of federal disaster assistance from judicial review, provided those decisions do not implicate constitutionally protected rights. Because most of the solutions proposed in response to FEMA’s April 22 RFI rely on FEMA’s discretionary authority, such reforms, if implemented, would not be struck down by a reviewing court unless they were found to violate a constitutional right or other mandate.



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Background: Inequities in Federal Disaster Assistance and Proposed Solutions

Recent studies have shown that how the federal government allocates disaster assistance often exacerbates inequities. In 2018, two university researchers found as part of a nationwide study that, at any given level of local damage, the more aid an area receives from FEMA, the more wealth inequality increases in that area, especially along lines of race, education, and homeownership.¹ This effect persisted even after accounting for the impacts of the disaster itself. In 2019, investigators at National Public Radio (NPR) found that FEMA's benefit-cost calculations tend to intensify wealth inequality, especially in urban areas affected by flooding.² NPR investigators also found that nationwide, white communities disproportionately receive more federal buyouts after a disaster than communities of color.³

FEMA's own analyses support these findings. According to documents obtained by NPR through a public records request, FEMA assessed 4.8 million aid registrations submitted by disaster survivors between 2014 and 2018.⁴ The agency found significant disparities in access to federal assistance depending on an applicant's income level. The poorest renters were 23 percent less likely than higher-income renters to receive housing assistance, and the poorest homeowners received about half as much to rebuild as compared with higher-income homeowners. These disparities could not be explained by the relative repair costs of the damaged properties alone. While FEMA did not assess racial disparities, Junia Howell—co-author of the 2018 study and sociologist at Boston University's Center for Antiracist Research—notes that implicit bias can affect how assessors value homes, and thus how they value the amount of damage to that home. For example, FEMA's analysis showed that the agency was about twice as likely to deny housing assistance to lower-income people because the damage to their home was "insufficient." Yet homes in primarily Black neighborhoods are consistently valued at tens of thousands of dollars less than comparable homes in primarily white neighborhoods.⁵ These disparities in turn can inform how assessors value the cause and cost of disaster damage.

¹ Junia Howell & James R. Elliott, *Damages Done: The Longitudinal Impacts of Natural Hazards on Wealth Inequality in the United States*, 66 SOCIAL PROBLEMS 3 448, 450 (2018).

² Rebecca Hersher & Robert Benincasa, *How Federal Disaster Money Favors the Rich*, NPR (March 5, 2019), <https://www.npr.org/2019/03/05/688786177/how-federal-disaster-money-favors-the-rich>.

³ *Id.*

⁴ Rebecca Hersher, *Why FEMA Aid is Unavailable to Many Who Need It The Most*, NPR (June 29, 2021), <https://www.npr.org/2021/06/29/1004347023/why-fema-aid-is-unavailable-to-many-who-need-it-the-most>.

⁵ Dana Anderson, *The Price of Racial Bias: Homes in Black Neighborhoods are Valued at an Average of \$46,000 Less Than Similar Homes in White Neighborhoods*, REDFIN NEWS (April 20, 2021), <https://www.redfin.com/news/undervaluation-homes-black-versus-white-neighborhoods/>.

On June 1, 2021, President Biden announced a new "first-of-its-kind interagency effort to address inequity in home appraisals" led by HUD Secretary Marcia Fudge and to issue rules to "aggressively combat housing discrimination." *Fact Sheet: Biden-Harris Administration Announces New Actions to Build Black Wealth and Narrow the Racial Wealth Gap*, WHITEHOUSE.GOV (June 1, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/01/fact-sheet-biden-harris-administration-announces-new-actions-to-build-black-wealth-and-narrow-the-racial-wealth-gap/>.



In its November 2020 report, the NAC⁶ recognized this problem, noting that “by perpetually assisting larger communities that already have considerable resources, the smaller, less resource-rich, less-affluent communities cannot access funding,” meaning that “through the entire disaster cycle, communities that have been underserved stay underserved, and thereby suffer needlessly and unjustly.”⁷ In response, FEMA leadership have publicly committed to make the agency’s programs more equitable by prioritizing the needs of “underserved, marginalized and vulnerable populations.”⁸ To achieve this goal, FEMA must address the more difficult question of how it defines and accounts for those characteristics when allocating federal disaster resources consistent with its authority under the Stafford Act.

The structure of the Stafford Act constrains FEMA’s flexibility in important ways. Under the act, the majority of federal resources are allocated after disasters strike, not before.⁹ While federal investments in pre-disaster mitigation and resilience have increased in the past three years, the statute’s reactionary posture restricts public participation and consultation while increasing community exposure to more frequent and severe disasters. Amendments made to the Stafford Act in 2018 (called the Disaster Recovery Reform Act or DRRA¹⁰) addressed some of these concerns by increasing federal funds for pre-disaster mitigation, but additional legislative reforms are necessary to close these protection gaps.¹¹ Nevertheless, we argue in this paper that FEMA has ample discretion in how it interprets the statute, and thus the power to reform existing programs to address equity concerns.

On April 22, 2021, FEMA issued an RFI seeking public comment on how to best address systemic barriers and inequities in the federal disaster system.¹² Many of the comments received focused on the procedures FEMA uses to determine who is eligible for assistance. For example, groups argued that FEMA’s benefit-cost analysis requirement, in which project proponents must show that a project’s benefits outweigh its costs, puts too much weight on economic benefits and undervalues non-economic benefits, such as the preservation of cultural, sacred, and historic sites for indigenous communities.¹³

⁶ The NAC was established in 2006 as part of the Post-Katrina Emergency Management Reform Act. It includes up to 35 members appointed by the FEMA Administrator to advise on issues related to natural disasters, acts of terrorism, and other man-made disasters. 6 U.S.C. § 318.

⁷ *National Advisory Council November 2020 Report to the FEMA Administrator*, FEMA (Nov. 30, 2020), https://www.fema.gov/sites/default/files/documents/fema_nac-report_11-2020.pdf.

⁸ Thomas Frank, *FEMA Says It Will Make Disaster Response More Equitable*, E&E NEWS (March 15, 2021), <https://www.scientificamerican.com/article/fema-says-it-will-make-disaster-response-more-equitable/>.

⁹ See e.g., Carlos Martín & Alexander Williams, *A Federal Policy and Climate Migration Briefing for Federal Executive and Legislative Officials*, URBAN INST. (March 2021), https://www.urban.org/sites/default/files/publication/103796/a-federal-policy-and-climate-migration-briefing-for-federal-executive-and-legislative-officials_1.pdf. See also Hannah Perls, *Student Note: U.S. Disaster Displacement in the Era of Climate Change: Discrimination and Consultation Under the Stafford Act*, 44 HARV. ENV’T L. REV. 511, 530 (2020).

¹⁰ Pub. L. No. 115-254, 132 Stat. 3186.

¹¹ Ari Sillman, *A New Approach to Disaster Relief Funding? The Disaster Recovery Reform Act’s Promise for Pre-Disaster Mitigation*, HARV. ENV’T & ENERGY L. PROGRAM (Jan. 28, 2021), <https://eelp.law.harvard.edu/2021/01/a-new-approach-to-disaster-relief-funding-the-disaster-recovery-reform-acts-promise-for-pre-disaster-mitigation/>.

¹² Request for Information on FEMA Programs, Regulations, and Policies, 86 Fed. Reg. 21,325 (April 22, 2021).

¹³ See, e.g., Alaska Institute for Justice, Comment Letter on Request for Information on FEMA Programs, Regulations, and Policies, 86 Fed. Reg. 21,325 (July 21, 2021), <https://www.regulations.gov/comment/FEMA-2021->



Similarly, commenters argued that FEMA’s cost share requirement, in which states and localities must cover 25 percent of certain projects’ costs,¹⁴ disadvantages small and low-income communities that cannot afford the cost share.¹⁵ While the Stafford Act allows FEMA to cover up to 90 percent of eligible pre-disaster hazard mitigation project costs (including BRIC¹⁶) for “small, impoverished communities,” several commenters noted that the definition of “small, impoverished communities”¹⁷ is too narrow.¹⁸ FEMA also does not allow states or counties to apply on behalf of communities that lack the necessary administrative and technical resources to apply on their own.¹⁹

Commenters also argued that FEMA’s grant application system is too complex and onerous for smaller communities that lack the necessary technical capacities to apply, while larger, wealthier communities are better equipped to successfully apply for competitive grant programs. These critiques were borne out two months later when FEMA awarded the first round of Building Resilient Infrastructure and Communities (BRIC) grant funding. Five of the country’s richest states received 70 percent of the \$500 million made available for disaster resilience projects. The largest single grant of \$50 million went to Menlo Park in California where the median household income is \$160,784.²⁰

For individual and household assistance programs, commenters critiqued FEMA’s policy dictating which documents survivors could use to prove residency or homeownership before receiving aid. Commenters

[0011-0246](#) (click “Download” under “Attachments”) (urging FEMA to amend its benefit-cost analysis to include non-economic costs and benefits, including the impact of losing properties that provide cultural value to Alaska Native tribes).

¹⁴ The default 25 percent cost share requirement applies to several programs under the Stafford Act, including Predisaster Hazard Mitigation, Hazard Mitigation, and Debris Removal. 42 U.S.C. §§ 5133, 5172, 5173. In some programs, the Stafford Act sets a federal floor where the federal contribution “shall be not less than” 75 percent of total eligible project costs, *see, e.g.*, 42 U.S.C. § 5170b(b) (setting terms for distributing Essential Assistance). For other programs, the act sets a maximum share at 75 percent. For example, Pre-disaster Hazard Mitigation funds including the BRIC program can cover “up to 75 percent of the total cost of [approved] mitigation activities,” and “up to 90 percent” in a “small impoverished community.” 42 U.S.C. § 5133(h).

¹⁵ *See, e.g.*, Center for Biological Diversity, Comment Letter on Request for Information on FEMA Programs, Regulations, and Policies, 86 Fed. Reg. 21,325 (July 22, 2021), <https://www.regulations.gov/comment/FEMA-2021-0011-0265> (click “Download” under “Attachments”).

¹⁶ FEMA launched the Building Resilient Infrastructure and Communities (BRIC) Program to distribute new pre-disaster mitigation funds created under the DRRRA.

¹⁷ The Stafford Act defines a “small impoverished community” as a community of 3,000 or fewer “that is economically disadvantaged, as determined by the States in which the community is located and based on criteria established by the President.” 42 U.S.C. § 5133(a).

¹⁸ *See, e.g.*, Environmental Defense Fund, Comment Letter on Request for Information on FEMA Programs, Regulations, and Policies, 86 Fed. Reg. 21,325 (July 22, 2021), <https://www.regulations.gov/comment/FEMA-2021-0011-0284> (click “Download” under “Attachments”) (urging FEMA to broaden the definition of “small impoverished communities” to include any census block group in a special flood hazard zone that meets certain household income criteria).

¹⁹ Thomas Frank, *States Urge FEMA to Overhaul New Climate Program*, E&E News (July 26, 2021), <https://subscriber.politicopro.com/article/eenews/2021/07/26/states-urge-overhaul-to-fema-climate-program-275613>.

²⁰ Thomas Frank, *Climate Grants Meant for Poor Places Went to Rich States*, E&ENews (July 2, 2021), https://www.eenews.net/climatewire/2021/07/02/stories/1063736387?utm_campaign=edition&utm_medium=email&utm_source=eenews%3Aclimatewire.



specifically pointed to survivors that lack formal rental agreements or owners of heirs' property where property is communally held by multiple family members without clear title.²¹ This policy is not mandated under the Stafford Act.²² FEMA recently issued a new policy in response to these comments expanding acceptable forms of proof of occupancy or ownership, including a self-declarative statement from survivors with heirship properties.²³

Other commenters recommended changes to account for low-income households' heightened needs post-disaster. For example, some experts urged FEMA to assess the value of financial or physical loss relative to a household's income or total assets in order to account for the fact that one dollar of damage has a greater effect on quality of life for low-income households than wealthier ones.²⁴ Others recommended more aggressive targeting of low-income applicants by applying a means-test for individual assistance funds. Craig Fugate, former FEMA Administrator under President Obama, recently spoke in support of this idea, where federal disaster funds are subject to an income or wealth cap, similar to the Supplemental Nutrition Assistance Program (SNAP) or Medicaid benefits, in order to ensure that those most in need receive assistance.²⁵

All of these critiques turn on the ways FEMA defines "need," and the mechanisms (e.g. benefit-cost analysis, competitive grant application processes, damage assessments) the agency uses to assess and target funds to meet that need. If FEMA seeks to implement commenters' suggestions, it must ensure that such changes fall within the scope of its regulatory authority. In the following sections, we assess the scope of FEMA's authority under the Stafford Act to integrate equity considerations into existing programs.

²¹ See, e.g., North Carolina Inclusive Disaster Recovery Network, Comment Letter on Request for Information on FEMA Programs, Regulations, and Policies, 86 Fed. Reg. 21,325 (July 22, 2021), <https://www.regulations.gov/comment/FEMA-2021-0011-0275> (click "Download" under "Attachments"). Heirs' property is a vestige of the Jim Crow era when Black people were excluded from the legal system. As a result, many families could not obtain a lawyer to properly document property ownership and inheritance. Instead, families informally divided their assets among members. Without formal deeds, owners of heirs' property often cannot receive federal loans or grants because they are unable to prove sole ownership. Hannah Dreier, *'The Real Damage': Why FEMA is Denying Disaster Aid to Black Families that Have Lived for Generations in the Deep South*, WASHINGTON POST (July 11, 2021), https://www.washingtonpost.com/nation/2021/07/11/fema-black-owned-property/?utm_campaign=Hot%20News&utm_medium=email&hsmi=139793061&hsenc=p2ANqtz-NaimJ7eQD5cbD_0DYquuzVbKdG0oSxVB47FBFhYYKGah6Q554vasl05gXoJZDs7_bUGrfaQ3ZVD4oJ9jNdlrg1FQ8g&utm_content=139793061&utm_source=hs_email.

²² See 42 U.S.C. § 5174 (describing the Individuals and Households program).

²³ *Update to FEMA's Individual Assistance Program and Policy Guide, Version 1.1*, FEMA (August 2021), https://www.fema.gov/sites/default/files/documents/fema_updated-iappg-version-1.1.pdf (creating "additional flexibilities that ensure access to assistance is equitably provided to all survivors.").

²⁴ Miyuki Hino, *Five Ways to Ensure Flood-Risk Research Helps the Most Vulnerable*, NATURE (June 29, 2021), <https://www.nature.com/articles/d41586-021-01750-0>.

²⁵ Hersher, *supra* note 4.



Part I: FEMA’s Equity Mandate - the Stafford Act’s Nondiscrimination Provision

The Stafford Act’s nondiscrimination mandate is one of the most inclusive and comprehensive in federal law. It requires that FEMA execute its disaster relief programs in an “equitable and impartial manner” and not discriminate against certain protected classes. These include not only race, color, nationality, religion, and English proficiency, but also sex, age, disability, and economic status:

Nondiscrimination in disaster assistance

- (a) Regulations for equitable and impartial relief operations.** The president shall issue, and may alter and amend, such regulations as may be necessary for the 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.
- (b) Compliance with regulations as a prerequisite to participation by other bodies in relief operations.** As a condition of participation in the distribution of assistance or supplies under this chapter or of receiving assistance under this chapter, governmental bodies and other organizations shall be required to comply with regulations relating to nondiscrimination promulgated by the President, and such other regulations applicable to activities within an area affected by a major disaster or emergency as he deems necessary for the effective coordination of relief efforts.²⁶

The nondiscrimination provision first appeared in 1970 with the passage of the Disaster Relief Act, requiring federal disaster programs to “be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.”²⁷ Congress added “disability” and “English proficiency” as protected classes in 2006.²⁸

Congress did not define any of the terms in the nondiscrimination provision, and there is no federal precedent defining or clarifying the meaning of “discrimination” or “impartial and equitable” under the Stafford Act. In this paper, we look to legislative history—the documents produced by Congress in the introduction, debate, or passage of a bill—to better understand Congress’s intent as to what these otherwise ambiguous terms mean. Legislative history can help answer questions like whether the inclusion of the word “equitable” requires FEMA to act in an equitable manner as we define the term today? In prohibiting “discrimination,” did Congress intend to prohibit acts that disparately impact protected groups, even if there is no evidence of intent? By including “economic status” as a protected class, did Congress intend to prevent federal agencies from relying on economic means testing to distribute funding? We assess each of these questions below.

²⁶ 42 U.S.C. § 5151.

²⁷ Pub. L. 93-288 Title III § 311(a) (1974).

²⁸ Pub. L. 109-295 Title IV § 689(a) (2006).



Hurricane Camille and the 1970 Disaster Relief Act

Congress passed the nondiscrimination provision as part of the 1970 Disaster Relief Act to address rampant discrimination in federal, state, and private assistance programs after Hurricane Camille.²⁹ Camille made landfall along the Mississippi Gulf Coast on August 17, 1969 and was the second most intense hurricane to ever strike the continental US. The storm devastated counties across southwest Mississippi and southwest Alabama and displaced thousands from their homes.³⁰ Camille also struck during Mississippi's "last stand" against federally imposed school desegregation, and civil rights groups were primed to document and denounce racial and other discriminatory treatment in federal, state, and private disaster relief efforts.³¹ This outcry, combined with a string of disasters preceding Camille, provided a crucial moment for political compromise. Congressional liberals sought to shift power from southern states to the federal government, and segregationists wanted more predictable federal disaster assistance for exposed states on the Gulf Coast.³²

In January 1970, the Senate Subcommittee on Disaster Relief hosted a series of widely publicized hearings in Biloxi, Mississippi to assess proposed disaster relief legislation in light of Hurricane Camille. The Subcommittee devoted two days to allegations of discriminatory treatment, much of which was documented in a lengthy report submitted by the American Friends Service Committee (AFSC) and the Southern Regional Council. These allegations included humiliating interpersonal interactions and explicit discrimination against Black disaster survivors by Red Cross relief workers, as well as more systematic complaints about federal and Red Cross policies. For example, the Red Cross capped financial assistance to renters at one month's rent, but imposed no limit on rebuilding assistance to homeowners.³³ While the policy made no explicit race-based distinctions, discrimination by landlords, relators, banks, and zoning boards was both rampant and legal prior to the passage of the Fair Housing Act in 1968, preventing Black families from purchasing homes or renting in higher-income neighborhoods. The policy thus resulted in Black families receiving far less federal disaster assistance as compared to white families.³⁴

The Subcommittee paid special attention to the unintended disparate impacts of Red Cross policies, especially as they affected racial minorities, the elderly, and the poor. For example, Senator Muskie, an outspoken desegregationist and future cosponsor of the 1970 Disaster Relief Act, "was impressed, not

²⁹ In introducing the 1970 Disaster Relief Act for passage, Senator Bayh, lead sponsor of the bill and chairman of the Special Subcommittee on Disaster Relief, stated that the "consolidation and [] proposed broadening and enlargement of existing statutory provisions are designed to take into account the experience . . . from the devastating catastrophe caused in August 1969 by Hurricane Camille, the largest known destructive force of wind and water ever to strike the United States." 91 Cong. Record 31045-46 (1970).

³⁰ *Hurricane Camille – August 17, 1969*, WEATHER.GOV (last updated Aug. 2019), <https://www.weather.gov/mob/camille>.

³¹ Andrew Morris, *Hurricane Camille and the New Politics of Federal Disaster Relief, 1965—1970*, 26 J. of Policy Hist. 406, 408 (2014).

³² *Id.*

³³ *Id.* at 416.

³⁴ See Michelle Singletary, *Black Homeownership Is as Low as It Was When Housing Discrimination was Legal*, Washington Post (Apr. 5, 2018), <https://www.washingtonpost.com/news/get-there/wp/2018/04/05/black-homeownership-is-as-low-as-it-was-when-housing-discrimination-was-legal/>.



by policies of deliberate discrimination, but perhaps of unintended discrimination because of the impact upon people in different circumstances.”³⁵ Similarly, Senator Dole, the ranking minority member on the Subcommittee, argued that “much of the discrimination that takes place is in the area of policy. Perhaps that caused the discrimination rather than overt acts.”³⁶

These concerns directly informed the phrasing of the nondiscrimination provision. For example, during the hearings, subcommittee members expressed grave concern over Red Cross policies requiring assistance to be allocated based on a family’s pre-disaster economic status, meaning poor families received fewer furnishings of lesser quality than wealthier families.³⁷ The Red Cross also offered two categories of food stipends – one for low-income families that included cheaper food (potatoes, dried beans) and one for families with “moderate cost” budgets, including “fruit, eggs, higher-priced cuts of meat, and some frozen and convenience food.”³⁸ The nondiscrimination provision as worded in the 1970 Disaster Relief Act thus prohibited discrimination on the basis of “economic status prior to a major disaster.”³⁹ The provision also included a second section requiring private “relief organizations,” including the Red Cross, to comply as a condition of participation in federal disaster relief activities.⁴⁰

The Senate Committee on Public Works unanimously recommended this comprehensive version of the nondiscrimination provision as part of S. 3619,⁴¹ which was passed as the 1970 Disaster Relief Act. In its report to Congress recommending the bill, the committee stated that the nondiscrimination provision was designed to address “charges of inequitable and discriminatory treatment, by both public and private agencies” in the response to Hurricane Camille.⁴² Notably, in its report the committee did not confine the nondiscrimination provision to only prohibit instances of intentional or overt discrimination. Rather they explicitly stated that the nondiscrimination provision served to assure “that aid will be provided to all, irrespective of their personal background or status.”⁴³

Congress’ intent to broadly prohibit both intentional and unintentional discrimination is further evidenced by its rejection of President Nixon’s version of the nondiscrimination provision. In April 1970, Nixon submitted his own proposed legislation to Congress, including a nondiscrimination provision that parroted agencies’ obligations under Title VI of the Civil Rights Act to not discriminate on the basis of

³⁵ *Federal Response to Hurricane Camille (Part 2): Hearings before the Special Subcomm. on Disaster Relief of the Committee on Public Works*, 95th Cong. 485, 652 (1970).

³⁶ *Id.* at 648.

³⁷ The policy stated that “needs will vary according to the amount and quality of furnishings lost, and the economic level, size and composition of the family. For example, the family that lost poor quality furnishings can be expected to resume its normal way of living with used or unpainted items.” *Id.* at 652.

³⁸ Morris, *supra* note 31 at 416.

³⁹ Pub. L. No. 91-606, § 209 (1970).

⁴⁰ *Id.*

⁴¹ 91 Cong. Rec. 31045 (1970) (Statement of Senator Bayh) (“Mr. President, the Committee on Public Works has unanimously approved S. 3619, a bill to revise and expand Federal programs for relief from the effects of major disasters.”).

⁴² S. REP. NO. 91-1157, at 4 (1970).

⁴³ *Id.*



race, color, or national origin.⁴⁴ Notably, the provision did not require the promulgation of antidiscrimination regulations, made no reference to “equitable and impartial” action, and did not prohibit discrimination based on sex, religion, age, or economic status.⁴⁵ Nixon’s provision also did not extend to non-federal disaster relief actors, and thus would not have covered activities by the American Red Cross or other private entities. The Senate Committee soundly rejected this weaker provision, unanimously recommending the far more comprehensive nondiscrimination mandate offered in S. 3619.

The Provision Endures

The nondiscrimination provision is notable not just for its extraordinary breadth, but also its durability. In 1973, the Senate Subcommittee on Disaster Relief held hearings to review the adequacy of the 1970 Disaster Relief Act. The act had been recently tested by a series of major disasters in 1972, including flash flooding in Rapid City, South Dakota, and Hurricane Agnes in Pennsylvania. During the hearings, senators heard continued allegations of civil rights abuses and other instances of discrimination against minorities, women, and the elderly, particularly regarding disparate allocations of Small Business Administration (SBA) loans and patterns of segregation in temporary housing placements by HUD and local authorities.⁴⁶ Nevertheless, Subcommittee members including Subcommittee Chairman Burdick of South Dakota, Senator Domenici of New Mexico, and then-Senator Biden of Delaware insisted that the nondiscrimination provision already comprehensively prohibited such “patterns” of discriminatory behavior.

In one telling exchange, subcommittee members defended the wording and scope of the Disaster Act’s nondiscrimination provision as comprehensively prohibiting such disparate impacts. In hearings reviewing the federal government’s response to Hurricane Agnes, Thomas Arnoldi, then the director of Pennsylvania’s Flood Recovery Program, presented statistics showing relatively lower SBA loan awards to minorities, female heads of households, and the elderly; a persistent lack of Black employees staffing disaster offices in majority Black communities; and “confirmed instances of segregated patterns of placement” in temporary housing.⁴⁷ Arnoldi argued that the federal disaster law should provide a “viable civil rights compliance program” to correct such “patterns of segregation” and the “dearth of affirmative action” on civil rights complaints.⁴⁸ Notably, Arnoldi made no reference to overt or intentional acts of discrimination, but rather statistical patterns of disparate impacts affecting protected groups.

⁴⁴ In his message to Congress on April 22, 1970, President Nixon “ask[ed] the Congress to enact the Disaster Assistance Act of 1970,” i.e. S. 3745. 91 Cong. Rec. 12657, 12658 (1970) (Disaster Assistance Program—Message from the President Received During Adjournment).

⁴⁵ Nixon’s version of the nondiscrimination mandate stated: “The provision or the support by Federal agencies or funds of disaster relief under this or any other authority shall not operate to discriminate against any person on the ground of race, color, or national origin; and the President is authorized to take such action as he deems necessary to assure compliance herewith.” *Federal Response to Hurricane Camille (Part 4): Hearings before the Special Subcomm. on Disaster Relief of the Comm. on Public Works*, 91st Cong. 1475 (1970) (text of S. 3745).

⁴⁶ See generally *Federal Response to Hurricane Camille (Part 2): Hearings before the Special Subcomm. on Disaster Relief of the Committee on Public Works*, 95th Cong. 485 (1970).

⁴⁷ *To Investigate the Adequacy and Effectiveness of Federal Disaster Relief Legislation (Part 3): Hearings before the Subcomm. on Disaster Relief of the Committee on Public Works*, 93rd Cong. 861, 1152–59 (1973).

⁴⁸ *Id.* at 1159.



In response, Senators Domenici and Burdick pointed to section 209, the nondiscrimination provision. According to Chairman Burdick, “[Section 209] is completely antidiscrimination in every sense. Perhaps nobody tried to enforce it, but Congress can’t enforce the law. What else can be included that is not there now?” Arnoldi backpedaled. “I am not prepared to debate on the full scope of equal opportunity provisions of all the disaster relief acts we might have.” Burdick responded, “this is it right here. The disaster act as amended is the only comprehensive act we have. [Section 209] is the only provision.” Senator Biden echoed Senators Domenici and Burdick. “We have it encompassed in the law. [Section 209] states it . . . I can’t think of anything more specific we can do. Whether it is a Republican or Democratic administration, [enforcement] is an administrative problem.”⁴⁹

The 1973 hearings would go on to inform one of the most significant amendments to the 1970 Disaster Relief Act, passed as the 1974 Disaster Relief Act. The bill, S. 3062, was sponsored by Senator Burdick and cosponsored by Senators Biden and Domenici, among others. Despite testimony like Arnoldi’s regarding ongoing civil rights concerns in the provision of federal disaster assistance, the nondiscrimination provision remained largely unchanged.⁵⁰ The provision’s persistence can likely be attributed to sentiments like those expressed by Subcommittee Chairman Burdick and members Domenici and Biden that the provision already comprehensively prohibits instances of discrimination, whether overt or unintended. Complaints that the provision is not being effectively enforced must be addressed by the executive and judicial branches of government, not Congress.

Internal Consistency and Economic Means Testing

The persistence of “economic status” as a protected class also informs whether the nondiscrimination provision would be consistent with FEMA using economic means testing as a criterion in distributing disaster assistance. In the 1980s, five different bills seeking to amend the Disaster Relief Act included a provision quietly deleting “economic status” from the nondiscrimination provision.⁵¹ There is no documentation in the bills themselves or in the Congressional Record explaining the proponents’ rationale, and the edit received minimal attention in the hearings leading up to the passage of the 1988 Stafford Act. The deletion was discussed only once, in 1983, when the Senate Subcommittee on Regional and Community Development held hearings on proposed amendments to the 1974 Disaster Relief Act.⁵² David McLoughlin, FEMA’s deputy associate director for state and local programs and support, argued that eliminating “economic status” from the nondiscrimination provision was necessary in order to address “an internal inconstancy” in the statute between the provision and subsequent sections offering legal services to low-income households and allowing agencies to consider financial circumstances in offering extensions of rental assistance.⁵³ No senators responded to the suggestion. Three of these five

⁴⁹ *Id.* at 1161.

⁵⁰ The 1974 Disaster Relief Act’s nondiscrimination provision substituted “President” for “Director,” and deleted “prior to a major disaster” after “economic status.”

⁵¹ Bills proposing to strike “economic status” from the nondiscrimination provision were presented in 1982 (S. 2250), 1983 (S. 1525), 1984 (S. 2517), 1986 (S. 2125), and 1988 (S. 2380).

⁵² *Disaster Relief Act Amendments of 1983: Hearings before the Subcomm. on Regional and Community Development of the Comm. on Environment and Public Works on S. 1525, A Bill to Amend the Disaster Relief Act of 1974*, 98th Cong. 473 (1983).

⁵³ *Id.*



bills ultimately passed the Senate, but none made it out of committee after being transferred to the House.⁵⁴

Despite McLoughlin’s advocacy, both the nondiscrimination provision and the legal services provision persisted and remain a part of the Stafford Act today. Furthermore, the number of Stafford Act provisions allowing federal agencies to provide different levels of assistance based on an applicant’s membership in a protected class has increased significantly.⁵⁵ For example, the statute permits the Secretary of Agriculture to issue emergency grants to assist low-income migrant and seasonal farmworkers⁵⁶; federal agencies can fund or otherwise help provide low-income households with access to legal services⁵⁷; and people with disabilities are allowed higher maximum grant caps to help cover accessibility-related property improvements.⁵⁸ The statute even includes a requirement, passed as part of the 1974 Disaster Relief Act, that federal agencies give “priority and immediate consideration” to applicants seeking public housing assistance.⁵⁹ A cardinal presumption in statutory interpretation is that the statute must be internally consistent. The persistence of both the nondiscrimination provision and these other provisions over the past five decades suggests that programs or policies in which federal agencies allow for differential treatment on the basis of an applicant’s membership in a protected class would not *de facto* violate the nondiscrimination provision. Furthermore, there is no federal precedent suggesting that any of these provisions are inconsistent with or otherwise violate the Stafford Act’s nondiscrimination provision. FEMA can therefore rely on economic means-testing and other characteristics listed under the provision, provided doing so does not violate other federal laws or the constitution.⁶⁰

The nondiscrimination provision thus provides a clear mandate for FEMA to execute its programs in an equitable manner that does not discriminate against or disproportionately impact protected groups. In the next section, we explore the scope of FEMA’s authority to fulfill that mandate by evaluating the scope of discretion that FEMA enjoys under the statute, and how federal courts have defined the limits of that discretion over time.

⁵⁴ Both S. 2250 and S. 2517 passed the Senate and were referred to the House Subcommittee on Water Resources; S. 2125 passed the Senate and was referred to the House Committee on Public Works and Transportation with no subsequent action.

⁵⁵ See Yxta Maya Murray, *What FEMA Should Do After Puerto Rico: Toward Critical Administrative Constitutionalism*, 72 ARK. L. REV. 165, 191 (2019) (listing examples under the Stafford Act where assistance can be distributed on the basis of “intersectional factors”).

⁵⁶ 42 U.S.C. § 5177a (2012).

⁵⁷ 42 U.S.C. § 5182.

⁵⁸ 42 U.S.C. § 5174.

⁵⁹ 42 U.S.C. § 5153.

⁶⁰ See *infra* Part II.



Part II: FEMA's Broad Discretion under the Stafford Act

Congress grants FEMA significant discretion under the Stafford Act to implement the statute's provisions. This discretion is consistent with legislators' desire to give federal agencies flexibility when responding to urgent, and often unpredictable, emergency situations.⁶¹ What makes the Stafford Act unique is that Congress added another layer of protection to shield FEMA's discretionary decisions from judicial review: the discretionary function exception.⁶² This exception prevents courts from reviewing, and thus second guessing, the discretionary choices that FEMA and its officials make when implementing the Stafford Act.⁶³

In general, discretionary function exceptions block judicial review by preserving sovereign immunity for a federal government when it acts in a discretionary capacity. The notion of sovereign immunity derives from British common law and the notion that that the King can do no wrong.⁶⁴ In the US, sovereign immunity implies that sovereign bodies (i.e., federal, state, or tribal governments) cannot be sued without their consent. Many statutes explicitly waive sovereign immunity to allow citizens to sue the federal government over certain issues. For example, the Federal Tort Claims Act (FTCA) includes a broad waiver of sovereign immunity allowing citizens to sue the federal government for torts committed by federal employees.⁶⁵ However, the FTCA also contains a discretionary function exception retaining sovereign immunity for the federal government's discretionary acts.⁶⁶

Whether or not a court can second-guess FEMA decisions, including decisions about how to best integrate equity into its programs, thus depends on whether a court thinks the action at issue is "discretionary." To determine which actions are "discretionary" under the Stafford Act, federal courts rely on case law interpreting the FTCA's discretionary function exception.⁶⁷ That analysis asks: (1) whether the challenged act is discretionary in nature, that is, whether it involves "an element of

⁶¹ See *supra* Part I.

⁶² "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 exception first appeared in the 1950 Disaster Relief Act, Pub. L. 81-875.

⁶³ *In re World Trade Ctr. Disaster Site, Litig.*, 521 F.3d 169, 192 (2d Cir. 2008) (finding that "the right of federal agencies to make discretionary decisions when engaged in disaster relief efforts without fear of judicial second-guessing" justifies interlocutory review of the district court's denial of derivative immunity under § 5148).

⁶⁴ See, e.g., *Clinton v. Jones*, 520 U.S. 681, 697 n. 24 (1997) (referencing "the English ancestry that informs our common-law jurisprudence . . . Although we have adopted the related doctrine of sovereign immunity, the common-law fiction that '[t]he king ... is not only incapable of doing wrong, but even of thinking wrong,' was rejected at the birth of the Republic.") (citing 1 W. Blackstone, *Commentaries* *246).

⁶⁵ 28 U.S.C. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances").

⁶⁶ 28 U.S.C. § 2680(a) (exempting claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty").

⁶⁷ See, e.g., *St. Tammany Par. v. FEMA*, 556 F.3d 307, 322 (5th Cir. 2009); *Barbosa v. U.S. Dep't of Homeland Sec.*, 916 F.3d 1068, 1073 (D.C. Cir. 2019) ("the appropriate test" for jurisdiction under § 5148 "is the test the Supreme Court used to interpret similar language in the Federal Tort Claims Act.")



judgment or choice” and (2) whether the agency’s “judgment is the kind that the discretionary function was designed to shield” from suit.⁶⁸

An agency action is generally assumed to involve judgment or choice as long as it is not specifically prescribed (or proscribed) by federal statute, regulation, or policy.⁶⁹ Furthermore, the Supreme Court has held that when Congress has delegated regulatory authority to an agency, “there is no doubt” that the FTCA’s discretionary function exception protects agencies’ planning-level decisions establishing programs, the promulgation of regulations to carry out those programs, and actions of Government agents “grounded in the social, economic, or political goals of the statute and regulations.”⁷⁰ These same standards apply when courts decide whether FEMA acts are discretionary, and thus shielded from review.

In this section, we assess which FEMA actions federal courts have found to be “discretionary,” and thus shielded from review. In doing so, we seek to provide FEMA with a guide as to which recommendations collected via the RFI can be easily implemented without subjecting the agency to heightened litigation risk. We first assess the scope of this discretion when FEMA creates policy or rules interpreting the Stafford Act, including the procedural choice to do so as internal guidance or via notice-and-comment rulemaking. We then assess FEMA’s implementation of its rules, and summarize the three situations in which courts will review FEMA actions: when those actions conflict with a mandate or prohibition under the act, a regulation, or a contract; when those actions allegedly violate the Constitution; and when FEMA’s discretion is contingent on a finding of fact.

FEMA Actions Shielded from Judicial Review

Federal courts have interpreted the Stafford Act’s discretionary function exception to shield a broad range of agency action from judicial review. For example, the Fifth Circuit has held that eligibility determinations, the distribution of limited funds, and other decisions regarding the funding of eligible projects are “inherently discretionary” and “the exact types of decision which the discretionary function exception is intended to shield.”⁷¹ Several district courts have also held that the discretionary function exception bars judicial review of FEMA decisions related to eligibility determinations,⁷² and even the reallocation of previously designated funds,⁷³ provided that the statute, FEMA rules, or FEMA directives

⁶⁸ *Id.* at 1073 (D.C. Cir. 2019) (citing *U.S. v. Gaubert*, 499 U.S. 315, 322–23 (1991)).

⁶⁹ *See Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (holding that the FTCA’s discretionary function exception does not apply “when a federal statute, regulation, or policy specifically prescribes a course of action” to be followed).

⁷⁰ *U.S. v. Gaubert*, 499 U.S. 315, 323 (1991).

⁷¹ *St Tammany Parish v. FEMA*, 556 F.3d 307, 325 (5th Cir. 2009); *see also City of San Bruno v. FEMA*, 181 F. Supp. 2d 1010, 1014 (N.D. Cal. 2001) (“[t]he heart of FEMA’s mission is to distribute limited funds in response to national disasters. Distributing limited funds is inherently a discretionary responsibility.”).

⁷² *Maleche v. Solis*, 692 F. Supp. 2d 679, 688 (S.D. Tex. 2010); *United Power Ass’n v. FEMA*, No. A2-99-180, 2000 WL 33339635, at *3–4 (D.N.D. Sept. 13, 2000) (finding § 5148 of the Stafford Act shields FEMA’s funding eligibility determinations from judicial review).

⁷³ *Dubow v. FEMA*, No. 2:16-cv-3717 (DRH)(AKT), 2018 U.S. Dist. LEXIS 8163, at *16 n.3 (E.D.N.Y. Jan. 18, 2018) (finding plaintiff Long Beach residents failed to establish an injury in fact because FEMA’s distribution of disaster-relief funds after Hurricane Sandy was discretionary, and even if such distribution was not discretionary, FEMA



don't mandate a particular course of action. In 2013, FEMA went so far as to argue before the Seventh Circuit that "everything it does is 'a discretionary function'" shielded from review.⁷⁴ While the court disagreed with this extreme take,⁷⁵ federal courts remain reluctant to review FEMA's choices on the merits unless there is "a statutory or regulatory mandate to compel FEMA" to take a particular action.⁷⁶

With regard to rulemaking, while the Stafford Act may require FEMA to issue rules under certain provisions, courts often leave the design, content, and implementation of those rules up to the agency. For example, the Stafford Act's nondiscrimination provision (discussed in Part I) states that "the President shall issue . . . such regulations as may be necessary" that "shall include provisions for insuring" the equitable and impartial distribution of federal disaster assistance.⁷⁷ In a 2017 case, plaintiffs argued before the District Court for the District of Columbia that this language not only requires FEMA to issue nondiscrimination rules, but also that the word "insure" requires FEMA to include sufficient guidance for the equitable and impartial administration of disaster programs.⁷⁸ Plaintiffs argued that FEMA violated this mandate because the rule issued "is nothing more than a 'parroting regulation'" repeating the statutory text.⁷⁹ The court, however, refused to assess the rule's sufficiency, citing the phrase "as may be necessary" as "afford[ing] the agency substantial discretion," consistent with the Congress's intent to "grant[] FEMA wide berth in how it carries out its statutory obligations."⁸⁰ The court thus held that the Stafford Act's discretionary function exception shielded the rule from review, and dismissed plaintiffs' claim for lack of jurisdiction.⁸¹

Federal courts have also interpreted the discretionary function exception to block plaintiffs from using other statutes, namely the Administrative Procedure Act (APA) and the Freedom of Information Act (FOIA), to challenge the content of FEMA rules where such challenges would otherwise be blocked by the discretionary function exception. In a 2019 decision, the D.C. Circuit explained the rationale for such deference, noting that Congress "specifically limited [federal courts'] 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."⁸²

complied with the plain language of the statute by finding the expenditure was in the public's "best interest" and served the "general area").

⁷⁴ *Columbus Reg'l Hosp. v. FEMA*, 708 F.3d 893, 898 (7th Cir. 2013).

⁷⁵ *Id.* at 897–98.

⁷⁶ *Id.* at 900.

⁷⁷ 42 U.S.C. § 5151(a).

⁷⁸ *Barbosa v. United States Dep't of Homeland Sec.*, 263 F. Supp. 3d at 214 (D.D.C. 2017), *aff'd*, 916 F.3d 1068 (D.C. Cir. 2019).

⁷⁹ *Id.* at 217–219, 225.

⁸⁰ *Id.* at 218–19.

⁸¹ *Id.*

⁸² *Barbosa v. United States Dep't of Homeland Sec.*, 916 F.3d 1068, 1074 (D.C. Cir. 2019).



To date, the Eleventh,⁸³ Fifth,⁸⁴ and D.C. Circuits⁸⁵ have all declined to review whether FEMA complied with notice-and-comment rulemaking requirements under the APA, so long as the underlying policy decision involved a discretionary act. For example, in *St. Tammany Parish ex rel. Davis v. FEMA*, plaintiffs argued that FEMA’s decision to deny funding for debris removal after Hurricane Katrina constituted a “substantive rule change” and that failure to provide the public with notice and an opportunity to comment violated the APA. The Fifth Circuit, however, didn’t reach the question, instead finding that, “where [the Stafford Act’s discretionary function exception] is applicable, the government retains sovereign immunity for claims that are based on discretionary functions or duties, whether alleged under the FTCA [or] the APA.”⁸⁶ Because the court found that FEMA’s underlying decision to deny funding was discretionary and thus covered by the discretionary function exception, plaintiffs’ APA claim must also be barred.

The District Court for the District of Columbia adopted this interpretation in 2019. In *Barbosa*, plaintiff homeowners alleged that FEMA violated section 552(a)(1) of the APA by using unpublished rules to evaluate disaster assistance applications. The court held, however, that even if FEMA had erred in not publishing certain rules and policies in the *Federal Register*, the decision to do so was a discretionary agency action, the review of which is barred by the Stafford Act’s discretionary function exception.⁸⁷ The D.C. Circuit affirmed, further holding that plaintiffs could not use FOIA to “create judicial authority” to review Stafford Act claims when that claim was otherwise barred by the discretionary function exception.⁸⁸

The Supreme Court declined to review the D.C. Circuit’s decision in *Barbosa* in 2020,⁸⁹ and has not ruled on the scope of the Stafford Act’s discretionary function exception. This denial, combined with the consensus among the three circuit courts, suggests that FEMA enjoys extremely broad discretion to not only interpret the Stafford Act, but also select the procedure by which those interpretations are issued, either as internal guidance or notice-and-comment rulemaking. This discretion cuts two ways. If the Biden administration is committed to integrating equity into its existing programs, it may quickly do so by issuing substantive policy as guidance, provided the underlying decision is discretionary. However, that policy may also be quickly retracted by a subsequent administration, which will likewise enjoy broad immunity. The Biden administration should therefore consider issuing new regulations to cement

⁸³ *Rosas v. Brock*, 826 F.2d 1004, 1009–10 (11th Cir. 1987) (“if a discretionary decision is made without following mandated procedures, it is an abuse of discretion and, as such, protected from judicial review by section 5148”).

⁸⁴ *St. Tammany Parish v. FEMA*, 556 F.3d 307 (5th Cir. 2009).

⁸⁵ *Barbosa v. United States Dep’t of Homeland Sec.*, 916 F.3d 1068, 1074 (D.C. Cir. 2019) (“We think § 552(a)(1) [of the APA] cannot be used to allow us to review Stafford Act regulations, still less to reopen FEMA decisions. The preclusion of judicial review [under § 5148] remains a barrier.”)

⁸⁶ 556 F.3d at 321–22. The court’s holding relied on § 701(a) of the APA, which states that the statute’s “waiver [of sovereign immunity] does not apply ‘to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.’” *Id.* (citing 5 U.S.C. § 701(a)).

⁸⁷ *Barbosa v. United States Dep’t of Homeland Sec.*, 278 F. Supp. 3d 325, 329 (D.D.C. 2017) (“Even if FEMA erred by not publishing its caps and floors [on the amount of assistance provided] 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.”) (quoting *Jayvee Brand, Inc. v. U.S.*, 721 F.2d 385, 389 (D.C. Cir. 1983)).

⁸⁸ *Barbosa v. United States Dep’t of Homeland Sec.*, 916 F.3d 1068, 1074 (D.C. Cir. 2019).

⁸⁹ *Barbosa v. Dep’t of Homeland Security*, 140 S. Ct. 955 (2020).



its equity priorities.⁹⁰ FEMA may also consider mandating certain actions as part of those rules. While FEMA's compliance, or failure to comply, with those mandates would be subject to judicial review, such mandates could help ensure the rules are implemented in a consistent manner.

FEMA Actions Subject to Judicial Review

Statutory, Regulatory, or Contractual Mandates

FEMA actions will be subject to judicial review when they fail to comply with an explicit mandate under the Stafford Act, FEMA regulation, or other applicable directive. While there are few mandates under the Stafford Act, the statute's language does limit the agency in several important ways with respect to recommendations made in response to FEMA's RFI. For example, under the Pre-Disaster Hazard Mitigation Program (which includes the BRIC grant program) the act states that "financial assistance provided under this section may contribute *up to 75 percent*" of total eligible project costs.⁹¹ Several commenters argued that the 75 percent federal cost share requirement excludes low-wealth communities that can't access funding to cover the remaining 25 percent of project costs. But this cost share cap is set explicitly under the Stafford Act, not by FEMA. Thus, FEMA could not issue a regulation or notice of funding opportunity that allows for program funds to exceed 75 percent of project costs unless a statutory exception applies. However, FEMA could explore allowing other sources of federal funding to be used towards the applicant's 25 percent cost share, given the statute only restricts "financial assistance provided under this section."⁹² Furthermore, that policy choice would likely be shielded from judicial review as a discretionary interpretation of the statute.

Similarly, commenters critiqued FEMA's narrow definition of a "small impoverished community," but this definition is set in part by the Stafford Act, not the agency. Under the act, these communities have to cover only 10 percent of project costs under the Pre-Disaster Hazard Mitigation Program, while "the President may contribute up to 90 percent of the total cost of a mitigation activity carried out by a small impoverished community."⁹³ The Stafford Act defines these communities as "a community of 3,000 or

⁹⁰ One federal district court has suggested that in issuing regulations under the nondiscrimination provision, FEMA must do more than just "instruct its individual personnel to, in effect, 'be fair.'" However, the court provided no additional guidance as to what a proper interpretation of the provision should look like. The court also stated that "the non-discrimination provision of the Stafford Act ensures *equal* treatment and division of resources." Though dicta, the statement reflects the possibility that courts may conflate "equity" with "equality," absent further guidance from FEMA. *McWaters v. Fed. Emergency Mgmt. Agency*, 436 F. Supp. 2d 802, 816–17 (E.D. La. 2006).

⁹¹ 42 U.S.C. § 5133(h)(1) (emphasis added).

⁹² *Id.* FEMA's cost-share regulations state that "except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant." 44 C.F.R. § 13.24. FEMA could argue that the Stafford Act explicitly allows other federal, but non-predisaster mitigation, funds to be used for the cost share, and therefore the regulation does not apply. FEMA could also explore amending its cost-share regulations to give the agency more flexibility on a program-by-program basis. Similar arguments would apply to relevant Office of Management and Budget (OMB) regulations where universities, hospitals and other nonprofit applicants are blocked from using funds "paid by the Federal Government under another award, except where authorized by Federal statute" to satisfy their cost share. 2 C.F.R. § 215.23(a)(5).

⁹³ 42 U.S.C. § 5133(h)(2).



fewer individuals that is economically disadvantaged.”⁹⁴ Commenters argued that this definition is “too narrow . . . to defray systemic inequities,” excluding larger rural communities and isolated urban populations that don’t have sufficient funding to meet the default 25 percent cost share requirement.⁹⁵ However, the plain text of the statute bars FEMA from expanding this definition to populations greater than 3,000.

Nevertheless, FEMA can take other actions to make the 10 percent cost share more accessible to these communities. Commenters argued that these communities generally lack the administrative capacity to navigate FEMA’s complex application process, yet FEMA policy prevents larger counties or states from applying on their behalf.⁹⁶ This policy is not mandated under the Stafford Act; the plain language of the statute makes no reference to applications, but rather requires that the funded activities be “carried out in” these communities.⁹⁷ Thus, FEMA could explore amending its current policy to allow states and counties to apply on behalf of these smaller communities provided that the project itself is executed solely within the community. This policy choice would likely also be shielded from judicial review as a discretionary interpretation of the statute.

Finally, breach of contract claims may also be reviewable if the contract eliminates the “element of judgment or choice” in FEMA’s actions.⁹⁸ In such cases, even if the Stafford Act or FEMA regulations do not mandate a particular course of action, FEMA can constrain its own discretion by entering into a binding contract. The Federal Circuit has held that for purposes of the Stafford Act’s discretionary function exception, a contract requiring FEMA to adhere to certain standards “is indistinguishable from a federal statute, regulation, or policy that specifically prescribes a course of action.”⁹⁹ While the initial decision to enter into the contract may be discretionary, and thus not reviewable, FEMA’s subsequent compliance (or non-compliance) with the terms of the contract is not, and thus would not be shielded from review.¹⁰⁰ FEMA could use contracts with its non-federal partners to quickly and easily enshrine its equity priorities, including funding or subcontracting mandates consistent with the Biden administration’s Justice40 Initiative.¹⁰¹ Doing so could help ensure accountability by creating a justiciable mandate for both FEMA and its contracting partners.

⁹⁴ 42 U.S.C. § 5133(a). FEMA can also waive the cost share requirement for “insular areas” where the total non-federal cost share is less than \$200,000. *See* FEMA, *supra* note 92. This authority comes from another section of the Stafford Act which grants FEMA broad authority to “provide technical assistance to the insular area which [FEMA] deems necessary for the recovery effort.” 42 U.S.C. § 5204(a). “Insular areas” are defined under the statute as “American Samoa, the Federated States of Micronesia, Guam, the Marshall Islands, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and the Virgin Islands.” 42 U.S.C. § 5204(1).

⁹⁵ Frank, *supra* note 19.

⁹⁶ *Id.* *See also* Thomas Frank, *FEMA Climate Grants Pose Challenge for Poor Communities*, E&E News (June 1, 2021), <https://subscriber.politicopro.com/article/eenews/1063733777>.

⁹⁷ 42 U.S.C. 5133(h)(2).

⁹⁸ *Dureiko v. U.S.*, 209 F.3d 1345, 1351 (Fed. Cir. 2000).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1353.

¹⁰¹ The Justice40 Initiative directs federal agencies to ensure that 40 percent of federal “benefits” go to “disadvantaged communities.” Exec. Order 14,008, 86 Fed. Reg. 7,619, 7,632 (Jan. 27, 2021). For more on Justice40 and other whole-of-government environmental justice initiatives, visit EELP’s Federal Environmental Justice Tracker. *See Federal Environmental Justice Tracker*, HARV. ENV’T & ENERGY L. PROGRAM, <https://eelp.law.harvard.edu/ejtracker/> (last visited Oct. 12, 2021).



Constitutional Violations: Property Rights and Race-Based Classifications

Compliance with the constitution is mandatory, not discretionary. Therefore, the Stafford Act's discretionary function exception does not shield FEMA from liability when it allegedly violates the constitution.¹⁰² The two potential violations most likely to arise in the disaster equity context are violations of fundamental property rights and equal protection clause violations, discussed below.

If FEMA acts in a way that allegedly deprives people of a fundamental property right, that action would be subject to judicial review.¹⁰³ However, access to federal disaster assistance is not a constitutionally-protected property right. The Fifth Circuit determined that if FEMA has the discretion to grant or deny a benefit, it is not a protected entitlement.¹⁰⁴ This decision overturned an earlier ruling by the Eastern District of Louisiana, which was the only federal court to hold that the Stafford Act conveys a constitutionally-protected property right to those who qualify for federal disaster assistance.¹⁰⁵ Since the Fifth Circuit's ruling, no court has held that individuals or communities have affirmative rights to federal disaster assistance under the Stafford Act.¹⁰⁶ Thus, any changes to FEMA policy determining who is eligible for federal assistance and how much, including reforms to FEMA's benefit-cost assessments, would not directly infringe on any constitutionally protected property right. This is especially true where FEMA allocates funds to states or localities, which then in turn distribute those funds to individuals.¹⁰⁷

¹⁰² *Rosas v. Brock*, 826 F.2d 1004, 1008 (11th Cir. 1987) (“The law now, as when section 5148 was enacted, is that adherence to constitutional guidelines is not discretionary; it is mandatory.”).

¹⁰³ *Id.* at 1008.

¹⁰⁴ *Ridgely*, 512 F.3d at 735 (“[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion.”) (quoting *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005)).

¹⁰⁵ In 2006, the Eastern District of Louisiana interpreted a Stafford Act provision to provide eligible individuals with a “legitimate claim of entitlement” and thus a constitutionally protected property right to temporary housing assistance. *McWaters v. FEMA*, 436 F. Supp. 2d 802, 818 (E.D. La. 2006). However, the Fifth Circuit overturned that decision two years later in *Ridgely v. FEMA*, 512 F.3d 727 (5th Cir. 2008), holding that the Stafford Act contains no mandatory language compelling FEMA to provide continuing temporary housing assistance payments, and thus eligible persons had no constitutionally protected right to that assistance. *Id.* at 736; see also *Santos v. FEMA*, 327 F. Supp. 3d 328, 343 n.12 (D. Mass. 2018) (“[I]t has been widely recognized that the holding in *McWaters* has been abrogated by the Fifth Circuit’s ruling in *Ridgely*.”).

¹⁰⁶ At least one federal court has found plaintiffs may, under certain circumstances, allege a protected property interest in funds allocated under HUD’s Community Development Block Grant for Disaster Recovery (CDBG-DR) Program. CDBG-DR funds are not distributed pursuant to existing statutory authority; after a disaster, Congress may allocate supplemental funds to the CDBG-DR program, and HUD issues a *Federal Register* notice for each allocation outlining how those funds will be spent. See *Perls*, *supra* note 9 at 536. In 2019, the District Court for the Middle District of Pennsylvania held that plaintiffs may assert a constitutionally-protected property right to CDBG-DR funds where the funds were distributed through the County’s adoption of a federal Disaster Recovery Buyout Operations Plan, which included mandatory language sufficiently constraining decision-makers’ discretion and conferring subject matter jurisdiction on the court to review plaintiffs’ procedural due process claim. *Hazzouri v. W. Pittston Borough*, 416 F.Supp.3d 405, 414–416 (M.D. Pa. 2019).

¹⁰⁷ See *Bishop v. City of Galveston*, 595 F. App’x 372, 375–76 (5th Cir. 2014) (holding that plaintiffs were not entitled to HMGP funds under the Stafford Act because Texas received and administered the funds through its own Division of Emergency Management, and even if individuals had received the funds, the awarding of those funds was a discretionary act).



It is important to note that FEMA actions that diminish or extinguish existing property rights could be reviewable if plaintiffs allege that the government's acts effected a physical or regulatory taking in violation of the Fifth Amendment. These arguments often arise in the context of managing flood impacts and risk, though such decisions are often made by the Army Corps of Engineers, not FEMA.¹⁰⁸

The discretionary function exception also won't shield claims alleging violations of the Fourteenth Amendment's Equal Protection Clause, i.e., claims that the federal government unlawfully discriminated against plaintiffs based on their membership in a protected class. However, to bring a successful equal protection claim, plaintiffs must show that FEMA's allegedly discriminatory actions were intentional or motivated by animus, as opposed to an unintended result of facially neutral policies.¹⁰⁹ This standard imposes an extremely high bar, especially in the disaster context where it can be difficult to disentangle the impacts of the disaster itself from the impacts and intent of federal assistance or policy.¹¹⁰

Nevertheless, FEMA should avoid issuing policies or regulations that allocate assistance solely based on race or ethnicity, even if that allocation seeks to address the agency's own history of race-based discrimination or disparate impact. In light of an increasingly conservative federal judiciary,¹¹¹ judges are likely to be more skeptical of programs that seek to affirmatively address prior discrimination through race-based policies. In one recent and emblematic case, Florida District Judge Marcia Morales Howard issued a preliminary injunction in favor of white farmers who alleged USDA's program issuing loan relief to "socially disadvantaged" farmers or ranchers discriminated against white applicants.¹¹² The USDA loan program was created as part of President Biden's American Rescue Plan Act, a stimulus law enacted in March, 2021.¹¹³ Under the law, USDA can grant debt relief to "socially disadvantaged farmers and ranchers," defined as members of a group that was "subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities."¹¹⁴ The law sought to remedy the USDA's well-documented history of explicit racial discrimination against minority farmers,

¹⁰⁸ See, e.g., *In re Downstream Addicks*, 147 Fed. Cl. 566 (2020) (holding downstream property owners flooded by waters intentionally released by the Army Corps did not have a constitutionally-protected property interest to "perfect flood control" following an Act of God, i.e. Hurricane Harvey); *In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs*, 146 Fed. Cl. 219, 264 (2019) (holding that upstream flooding resulted from the Army Corps' dam design and decision to keep flood gates closed in order to protect downstream property owners, and thus constituted a Fifth Amendment taking).

¹⁰⁹ *Washington v. Davis*, 426 U.S. 229, 240–41 (1976) (holding that while disproportionate impact is not "irrelevant" to evaluating claims of racial discrimination under the Equal Protection Clause, the "invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").

¹¹⁰ See Perls, *supra* note 9 at 540–41.

¹¹¹ John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RESEARCH CENTER (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/>.

¹¹² *Wynn v. Vilsack*, No. 3:21-CV-514-MMH-JRK, 2021 WL 2580678, at *1 (M.D. Fla. June 23, 2021).

¹¹³ American Rescue Plan Act of 2021, Pub. L. No. 117-2 (2021).

¹¹⁴ 7 U.S.C. § 2279(a)(5)–(6). The USDA also issued a public FAQ stating it would determine if other groups could qualify as "socially disadvantaged" on a case-by-case basis. *American Rescue Plan Debt Payments FAQ*, USDA (last updated May 21, 2021), <https://www.farmers.gov/americanrescueplan/arp-faq>.



particularly Black farmers, in the provision of USDA loans and other federal assistance.¹¹⁵ Judge Morales Howard, however, held that the statute was not sufficiently “narrowly tailored” and thus violated the Equal Protection Clause.¹¹⁶ To avoid similar pitfalls, FEMA can still issue policies and rules allocating assistance accounting for membership in a socially disadvantaged or vulnerable group. However, group membership should not be defined solely by race or ethnicity, and the provision should include the option to grant exceptions or waivers to non-group members.

Factual Preconditions

FEMA actions may be reviewable if the statute or regulation only allows FEMA to exercise discretion after factual preconditions are established. For example, a now-revoked regulation governing disbursements under the Individual and Family Grant Program allowed FEMA to withdraw funds from a state grantee if the grantee “failed to comply with grant award conditions.”¹¹⁷ Under this rule, FEMA’s decision to withdraw funds was discretionary, but the prior question—whether the grantee failed to comply with award conditions—was one of fact, to be determined by the court before application of the discretionary function exception.¹¹⁸ Courts will review FEMA’s determination of whether necessary conditions have been met under an arbitrary and capricious standard.¹¹⁹ Thus, though FEMA’s capacity to implement equitable programs under the discretionary function exception is quite broad, it does not automatically extend to actions based on conditional grants of power. FEMA can broaden the protection it enjoys under the Stafford Act’s discretionary function exception by acting pursuant to non-conditional authority whenever possible or by promulgating rules which do not contain conditional language. However, by relying on such discretion, FEMA also risks having those regulations implemented in an inconsistent manner.

¹¹⁵ *Civil Rights at the United States Department of Agriculture*, USDA CIVIL RIGHTS ACTION TEAM (Feb. 1997), <https://static.ewg.org/reports/2021/BlackFarmerDiscriminationTimeline/1997-crat-report.pdf>.

¹¹⁶ 2021 WL 2580678, at *7–12 (finding the loan program to be “untethered to an attempt to remedy any specific instance of past discrimination” and “absolutely rigid” without options to grant waivers or exceptions to applicants who are not members of socially disadvantaged groups). Judge Morales Howard also questioned whether the government had a compelling interest in correcting past discrimination, despite substantial evidence presented regarding USDA’s history of discriminatory practices. *Id.* at *6. However, she did not rule on the issue given her finding that the statute was not sufficiently narrowly tailored.

¹¹⁷ 44 C.F.R. § 13.21(g)(1)(i) (stating that agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless “the grantee or subgrantee has failed to comply with grant award conditions.”) (removed and reserved Dec. 19, 2014).

¹¹⁸ *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1006 (9th Cir. 1998) (holding that “defendants had discretion to withdraw funds only if the [grantee] actually violated the award conditions, and that whether or not the [grantee] did so is a question of fact to be determined in the normal course of litigation.”).

¹¹⁹ *Id.* at 1007.



Part III: Additional Limitations on Who Can Sue and Be Sued

Federal Courts Limit Plaintiffs' Private Rights of Action

Despite the nondiscrimination provision's broad scope, federal courts have held that the provision does not allow plaintiffs to sue the federal government for acts that disparately impact protected groups. Federal precedent interpreting the Stafford Act's nondiscrimination provision is limited to defining the scope of private rights of action—the ability of private citizens to sue. While courts have found the provision to contain an implied private right of action,¹²⁰ they have held that that right only extends to actions challenging instances of intentional discrimination where plaintiffs must prove that the federal government's action was motivated by animus based on plaintiffs' membership in a protected class.¹²¹ Recently, the District Court for the District of Columbia also held that the nondiscrimination provision does not impose a justiciable mandate on FEMA to “insure” nondiscrimination in disaster assistance.¹²² This holding does not mean that the mandate does not exist; just that private citizens cannot sue FEMA in court for failing to comply with that mandate.

Derivative Immunity for Non-Federal Defendants

Derivative immunity is a legal doctrine by which sovereign immunity, including immunity from suit as preserved by a discretionary function exception, is extended to non-federal entities acting on behalf of the federal government. In the disaster relief context, non-federal entities implementing FEMA regulations and policies can enjoy derivative immunity for those actions if they satisfy a three-part test defined by the Second Circuit.¹²³ This test narrowly applies to situations in which federal policy and state law conflict and the federal government exercises sufficient control over the entity's actions, among other conditions.

The assertion that non-federal actors enjoy derivative immunity under the Stafford Act's discretionary function exception is relatively new. Federal courts first addressed this defense in 2007 as part of

¹²⁰ See, e.g., *Graham v. FEMA*, 149 F.3d 997, 1004–05 (9th Cir. 1998); *Grose v. Napolitano*, No. 1:11CV227-LG-RHW, 2012 WL 2912742 (S.D. Miss. July 16, 2012); *LaDay v. Ramada Plaza Hotel LaGuardia*, No. 07-CV-0450 (BMC), 2007 WL 526613, at *2 (E.D.N.Y. Feb. 13, 2007) (finding § 5151(a) “provides an aggrieved individual with a right of action against FEMA”). See also *Perls*, *supra* note 9 at 540.

¹²¹ See, e.g., *Maleche v. Solis*, 692 F. Supp. 2d 679, 693 (S.D. Tex. 2010) (granting defendant's motion for summary judgment after finding that the plaintiff failed to show under § 5151(a) that the Department of Labor's denial of his benefits claim was “was motivated by discriminatory animus based on his economic status.”).

¹²² *Barbosa v. United States Dep't of Homeland Sec.*, 263 F. Supp. 3d 207, 220 (D.D.C. 2017), *aff'd*, 916 F.3d 1068 (D.C. Cir. 2019). In its ruling, the district court relied on the discretionary function exception to determine that the court lacked jurisdiction to evaluate FEMA's interpretation of section 5151(a). *Id.* (holding that because section 5151(a) requires FEMA to issue regulations “as may be necessary,” it “affords the agency substantial discretion,” and that the inclusion of the word “insure” “cannot convert a discretionary act into a mandatory one” subject to judicial review.)

¹²³ *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 197 (2d Cir. 2008).



litigation before the New York Southern District Court.¹²⁴ Plaintiffs—300 disaster workers tasked with clearing debris from the World Trade Center site following the September 11, 2001 terrorist attacks—sued the City of New York and the Port Authority after suffering severe respiratory and other health impacts. The City and the Port Authority raised the novel claim that they were entitled to derivative federal immunity under the Stafford Act and thus immune from suit.¹²⁵ The district court rejected this claim, holding that the plain language of the discretionary function exception applies to federal government agencies only.¹²⁶ Defendants appealed to the Second Circuit, seeking interlocutory review of the denial of immunity.

The Second Circuit accepted the appeal and reversed, crafting a new test under which non-federal actors could qualify for derivative immunity under the Stafford Act. The Second Circuit adapted the Supreme Court’s decision in *Boyle* defining the contractor defense to immunity under the FTCA. In *Boyle*, the Court held that this defense “only arises in ‘an area of uniquely federal interest,’ where ‘a significant conflict exists between an identifiable federal policy or interest and the operation of state law,’ or the application of state law would ‘frustrate specific objectives’ of federal legislation.”¹²⁷ The Second Circuit reasoned that, as in *Boyle*, where non-federal entities act “under the specific direction and close supervision of federal agencies,” federal common law should displace state liability law in order to “assure a prompt and comprehensive federal response to a national disaster.”¹²⁸ The court then fashioned a new test, holding that a non-federal entity contracting with the federal government could enjoy derivative immunity conferred by the Stafford Act’s discretionary function exception where:

1. the federal agency, in its discretion, approved **reasonably precise specifications** for the non-federal entity to follow;
2. the agency **supervised and controlled** the entity charged with implementing those specifications; and
3. the entity **warned the agency** about any dangers known to it but not to the agency.¹²⁹

The Second Circuit noted that derivative immunity would not apply where the government merely rubber stamps the entity’s decision without sufficient review or oversight, or if the entity violated a state statute and could have avoided doing so while still implementing the federal government’s specifications.¹³⁰ Since the Second Circuit’s decision, no federal court has issued a ruling on the merits

¹²⁴ In re World Trade Ctr. Disaster Site Litig., 469 F. Supp. 2d 134, 144 (S.D.N.Y. 2007) (“Defendants in this case appear to be the first to claim *derivative* immunity under the Stafford Act since it was enacted in 1974”) (emphasis in original).

¹²⁵ *Id.* at 144.

¹²⁶ *Id.* at 137–38. However, the district court also stated that derivative federal immunity would apply “to the extent that reliance, and adoption of federal standards and protocols is shown, and the Defendants’ conduct is tantamount to actions by the federal authority.” *Id.* at 566. The Second Circuit sought to address this “somewhat confusing[]” ambiguity in its discussion of derivative immunity under the Stafford Act. In re World Trade Ctr. Disaster Site Litig., 521 F.3d 169, 193–94 (2d Cir. 2008).

¹²⁷ *Boyle v. United Techs. Corp.*, 487 U.S. 500, 505 n. 1, 507 (1988).

¹²⁸ 521 F.3d at 194.

¹²⁹ In re World Trade Ctr. Disaster Site Litig., 521 F.3d 169, 197 (2d Cir. 2008). The court also stated that “as a threshold manner,” the derivative immunity defense would only apply in “an area of uniquely federal interest,” where there is a “significant conflict” between federal legislation, policy, or interests and state law. *Id.* at 195.

¹³⁰ *Id.*



applying this three-part test.¹³¹ However, at least one district court has expressed skepticism that a non-federal actor could enjoy derivative immunity under the discretionary function exception, particularly private actors.¹³² Thus, if FEMA seeks to shield states' or localities' actions from judicial review when they implement the agency's equity priorities, it should strictly adhere to the Second Circuit's three criteria.

Conclusion and Recommendations

The Biden administration has committed to addressing environmental and racial injustice across the whole of government, including in federal disaster mitigation and response programs. This commitment is long overdue. Low-income communities and communities of color are often the most exposed to disasters, and the least able to recover after disasters strike. As climate change makes these disasters more frequent and severe, FEMA has an urgent opportunity to ensure its programming does not exacerbate these inequities and that federal disaster assistance is distributed in an effective and equitable way.

The Stafford Act's nondiscrimination provision provides the statutory authority for FEMA to redesign its programs in an "equitable and impartial manner," including reforming programs that currently disproportionately exclude low-income communities and communities of color. The provision is one of the most comprehensive nondiscrimination mandates in federal law, prohibiting discrimination on the basis of race, color, nationality, religion, English proficiency, sex, age, disability, and economic status. Legislative history shows that Congress intended the provision to prohibit both intentional discrimination as well as facially neutral policies that result in unequal access to federal assistance for protected groups. Federal courts have held citizens may sue to enforce the provision, but only for alleged intentional discrimination. Nevertheless, the provision provides strong statutory authority for FEMA to take a more proactive approach to ensuring its programs do not unintentionally prevent or limit marginalized groups' access to federal assistance.

Accounting for applicants' preexisting vulnerabilities is essential to crafting more equitable programs. Importantly, the nondiscrimination provision does not block FEMA from taking applicants' class status into account when distributing assistance as long as doing so does not violate the Constitution. The Stafford Act includes several sections allowing FEMA to distribute aid based on an applicant's socioeconomic status, race, preferred language, or disability, and thus doing so must be consistent with the nondiscrimination provision. FEMA can therefore distribute assistance based on membership in a protected class, e.g. by using economic means-testing, to execute its equity mandate. However, the agency should avoid allocating assistance based solely on race or ethnicity to avoid allegations of equal protection clause violations.

¹³¹ Cf. *In re Sept. 11, Litig.*, 621 F.Supp.2d 131, 149 (S.D.N.Y. 2009) (applying the Second Circuit's three-part test to evaluate defendants' evidentiary requests in support of their claimed derivative immunity defense).

¹³² *Walker v. AMID/Metro P'ship. LLC*, 2008 WL 5382372, at *12 (E.D. La. Dec. 19, 2008) (calling private company's claim that they are entitled to derivative immunity under the Stafford Act "clearly questionable" even in light of the Second Circuit's three-part test).



FEMA has extraordinary flexibility to reinterpret its programs consistent with this equity mandate thanks to another Stafford Act provision: the discretionary function exception. Federal courts have interpreted this exception to shield nearly all FEMA decisions from judicial review, as long as those decisions are based on a valid exercise of discretion. Most FEMA decisions fall under this umbrella, including eligibility determinations, the distribution of limited funds, and even the reallocation of previously distributed funds. Furthermore, FEMA's decisions about whether to issue policies as internal guidance or via notice-and-comment rulemaking will also likely be shielded from judicial review, so long as the underlying decision is discretionary. Federal courts have also held that plaintiffs cannot use other statutes, namely the FTCA, FOIA and the APA, to get around the discretionary function exception.

There are three exceptions to this broad shield: statutory, regulatory, or contractual mandates; constitutional violations; and factual preconditions. However, these exceptions are relatively narrow. For example, applicants do not have a constitutionally-protected property right to services or funds distributed under the Stafford Act, thus the agency may freely revise how and to whom it allocates assistance without fear of violating the Fifth Amendment. The Stafford Act also limits FEMA by capping or constraining the scope of federal assistance under certain provisions, but the agency still retains significant flexibility within that scope. For example, many of the comments submitted in response to the RFI asked FEMA to adjust its federal cost-share caps, but that cap is set under the statute. However, FEMA could explore amending its predisaster mitigation program policy to accept other sources of federal funding as part of the applicant's 25 percent cost share, or allowing states and localities to apply on behalf of smaller communities to make funding more accessible.

FEMA's broad discretion, and thus immunity from judicial review, cuts two ways. If the Biden administration is committed to integrating equity into existing programs, it may quickly do so by issuing substantive policy as guidance provided the underlying decision is discretionary. However, a subsequent administration could quickly retract that policy, and that retraction would likely be unreviewable as a discretionary act. FEMA should therefore consider issuing new regulations or using contractual mandates to cement its equity priorities, including Justice40 spending and contracting commitments.

Under President Biden, FEMA has shown new initiative to identify and address inequities in its disaster programs. The Stafford Act gives the agency both the statutory mandate and the broad flexibility to do so. The agency therefore possesses all the necessary legal tools to fulfill the Biden administration's equity agenda and help our most vulnerable communities withstand the current and future impacts of climate change.



Acronym Glossary

AFSC	American Friends Service Committee
APA	Administrative Procedure Act
BRIC	Building Resilient Infrastructure and Communities
CDBG-DR	Community Development Block Grant for Disaster Recovery
CDBG-MIT	Community Development Block Grant for Mitigation
DRRA	Disaster Recovery Reform Act
FEMA	Federal Emergency Management Agency
FOIA	Freedom of Information Act
FTCA	Federal Tort Claims Act
HUD	Department of Housing and Urban Development
NAC	National Advisory Council
NPR	National Public Radio
OMB	Office of Management and Budget
RFI	Request for Information
SBA	Small Business Administration
SNAP	Supplemental Nutrition Assistance Program