

# Killer Heat: The Disaster FEMA Refuses to Own

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## ABSTRACT

*Extreme heat, also known as a “heatwave,” is by far the leading weather-related cause of death in the United States.<sup>1</sup> In 2023, extreme heat took 2,300 lives—more than all the deaths attributed to hurricanes, earthquakes, tornadoes, droughts, wildfires, winter storms, and floods combined. Harms from extreme heat, which are especially severe in disadvantaged communities, will only increase as the climate continues to break down. Despite these facts, in more than 70 years of comprehensive disaster response, no president has ever declared a “major disaster” based on extreme heat, nor has the Federal Emergency Management Agency (FEMA) ever recommended he do so.*

*This Article examines the need and justification for a more robust approach to extreme heat by FEMA under the Stafford Act. I conclude that—given the severity of extreme heat events, their disproportionate effects on vulnerable populations, and the broad protection promised under the Stafford Act—immediate action is needed. It would be best for Congress to revise the Stafford Act and create a whole-of-government approach to fighting extreme heat. But in the absence of Congressional action, FEMA must own the problem. The agency should take action to increase the chances that states and Tribal governments threatened by extreme heat can receive their fair share of disaster funds, including individual assistance, public assistance, or hazard mitigation funds. Lives would be saved and suffering relieved.*

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<sup>1</sup> NOTE ON SOURCES: During the editing stage of this article, I discovered that some government web pages and datasets related to extreme heat, energy assistance, and public health had been recently altered, downsized, or removed, apparently on the direction of leadership within the second Trump administration. See, e.g., Sarah Fielding, *Extreme Heat Is Coming, but CDC’s Heat and Health Tracker Website Says It’s No Longer Being Maintained*, FAST COMPANY (June 20, 2025), <https://www.fastcompany.com/91355598/extreme-heat-wave-warning-cdc-tracker-website-not-maintained> [perma.cc/G5VZ-2PQQ]; Zahra Hirji, *Six Environmental Mapping Tools the White House Doesn’t Want You to See*, BLOOMBERG NEWS (May 7, 2025), <https://www.bloomberg.com/news/articles/2025-05-07/six-environmental-mapping-tools-the-white-house-doesn-t-want-you-to-see?embedded-checkout=true> [perma.cc/U3CZ-TZY9]; Will Stone and Pien Huang, *Some Federal Health Websites Restored, Others Still Down, After Data Purge*, NPR (Feb. 6, 2025), <https://www.npr.org/sections/shots-health-news/2025/02/06/nx-s1-5288113/cdc-website-health-data-trump> [perma.cc/TF7T-JJJ3]. Where possible, I have provided alternate sources.

*The Article makes both an ethical case (building on the author's earlier "disaster justice" writings and incorporating Martha Albertson Fineman's "vulnerability theory") and a legal one (drawing from the purpose, history, and implementation of the Stafford Act). Congress has granted FEMA and the President considerable discretion in addressing extreme heat, and they should act to safeguard our communities from extreme heat.*

## I. INTRODUCTION

At the tail end of summer in 2022, howling winds and a pulsing heat turned the Golden State into an air fryer.<sup>2</sup> During a ten-day period, from August 31 to September 9, temperature records in 1,500 California localities were shattered.<sup>3</sup> Sacramento saw ten days of triple-degree heat.<sup>4</sup> Modesto saw nine days.<sup>5</sup> Meanwhile, amid gusts exceeding sixty miles per hour, six wildfires raced across six counties, producing around twenty-seven thousand short tons of soot and poisonous gas which became trapped in urban atmospheric bubbles called "heat domes."<sup>6</sup> The state that earlier that year had committed more than \$404 million dollars to prepare for extreme heat was bracing for the loss of hundreds of lives and the crippling of its electrical grid.<sup>7</sup>

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<sup>2</sup> See generally MILET ET AL., EXCESS MORTALITY DURING THE SEPTEMBER 2022 HEAT WAVE IN CALIFORNIA 3–4 (2023), <https://www.cdph.ca.gov/Programs/OHE/CDPH%20Document%20Library/Climate-Health-Equity/CDPH-2022-Heat-Wave-Excess-Mortality-Report.pdf> [perma.cc/3TUB-FXH7]; Nouran Salahieh & Dakin Andone, *The Heat Wave Scorching California May Be the Worst in Its History and Now an Offshore Hurricane Threatens to Fan Already Raging Wildfires*, CNN, <https://www.cnn.com/2022/09/08/us/western-us-heat-wave-thursday/index.html> [perma.cc/4A62-MBB9] (last updated Sept. 8, 2022); CNTY. OF SAN DIEGO HEALTH & HUM. SERVS. AGENCY PUB. HEALTH SERVS., 2022 ANNUAL EXCESSIVE HEAT REPORT (2023), <https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/ExtremeHeat/2022%20Annual%20Excessive%20Heat%20Report%20-%206.29.23%20FINAL.pdf> [perma.cc/7572-BXZ5]; Letter from Gavin Newsom, Governor of Cal., to Joseph R. Biden, President of the U.S. (Oct. 26, 2022), <https://www.gov.ca.gov/wp-content/uploads/2022/10/Heat-Dome-Fires-Request.pdf> [perma.cc/NM9P-9BHZ] [hereinafter Letter from Gavin Newsom]; and 2022 Incident Archive, CAL FIRE, <https://www.fire.ca.gov/incidents/2022> [perma.cc/57QD-6GK9] (last visited Aug. 16, 2025).

<sup>3</sup> MILET ET AL., *supra* note 2, at 3–4.

<sup>4</sup> Jose Fabian, *Sacramento Broke the Record for Most 100-Degree Days in a Year*, FOX40 (Sept. 9, 2022), <https://fox40.com/news/local-news/sacramento/sacramento-broke-the-record-for-most-100-degree-days-in-a-year/> [perma.cc/9UAW-EVMV].

<sup>5</sup> Modesto Weather in 2022, EXTREME WEATHER WATCH, <https://www.extremeweatherwatch.com/cities/modesto/year-2022> [perma.cc/5WCK-BNF5].

<sup>6</sup> See *Wildfire Emission Estimates for 2022*, CAL. AIR RES. BD. 2, Table 1, <https://ww2.arb.ca.gov/sites/default/files/classic/cc/inventory/Wildfire%20Emission%20Estimates%20for%202022%20%28ADA%29.pdf> [perma.cc/54DG-8P3K] (last visited Aug. 16, 2025).

<sup>7</sup> MILET ET AL., *supra* note 2, at 3, 7 (reporting on \$404-million investment and on loss of life); Emily Hoeven, *Blackouts Loom as Record Heat Wave Blankets California*, CAL MATTERS (Sept. 7, 2022), <https://calmatters.org/newsletters/whatmatters/2022/09/california-heat-wave-blackouts/> [perma.cc/AJ9T-HBCJ] (reporting stress on electrical grid).

In October 2022, as the state was assessing the damage and recovering from this unprecedented event, Governor Gavin Newsom sent a letter to former President Joe Biden requesting a “major disaster” declaration under federal law, an action that would open significant avenues of federal aid in the form of information, services, grants, and loans.<sup>8</sup> Connecting the two climate-based threats that Californians of all walks of life have come to dread, the governor made the case for unlocking the Treasury’s vault: “I respectfully request you declare a major disaster,” he wrote, “as a result of the Heat Dome event that . . . significantly exacerbated the . . . spread of wildfires across California.”<sup>9</sup> The President’s response, issued through the Federal Emergency Response Agency (FEMA), arrived soon after: no.<sup>10</sup>

More specifically, the agency said it believed that the described damage “was not of such severity and magnitude” to warrant a major disaster declaration.<sup>11</sup> FEMA would later tell the Congressional Research Service (CRS) that it had not considered Newsom’s request to really involve extreme heat, saying that the damage described in the letter was actually attributable to the wildfires.<sup>12</sup> At any rate, the agency concluded, “FEMA precedent is to evaluate discrete events and impacts, not seasonal or general atmospheric conditions.”<sup>13</sup>

California’s official assessment of the heatwave would later conclude that in a period of only ten days, 395 people had died from extreme heat.<sup>14</sup> The state estimated \$3.168 million in economic loss.<sup>15</sup>

Whatever one thinks about FEMA’s call on “severity and magnitude,” the agency’s read on precedent was solid. In more than seventy years of comprehensive disaster response, no president has ever declared a “major disaster” based on extreme heat.<sup>16</sup> Not in 1980,

<sup>8</sup> Letter from Gavin Newsom, *supra* note 2.

<sup>9</sup> *Id.*

<sup>10</sup> CONOR F. BOYLE ET AL., CONG. RSCH. SERV., R46873, EMERGENCY RESPONSE TO EXTREME HEAT: FEDERAL FINANCIAL ASSISTANCE AND CONSIDERATIONS FOR CONGRESS 10 (2024), <https://crsreports.congress.gov/product/pdf/R/R46873> [perma.cc/2S4H-QFPB].

<sup>11</sup> *Id.* (quoting FEMA’s response to Governor Newsom); *see also* FEMA, PRELIMINARY DAMAGE ASSESSMENT REPORT: CALIFORNIA HEAT DOME AND RESULTING WILDFIRES DENIAL OF APPEAL (2023), [https://www.fema.gov/sites/default/files/documents/PDAResponse\\_AppealDenial-CA.pdf](https://www.fema.gov/sites/default/files/documents/PDAResponse_AppealDenial-CA.pdf) [perma.cc/Z3UK-CS3V].

<sup>12</sup> BOYLE ET AL., *supra* note 10, at 10.

<sup>13</sup> *Id.* (quoting E-mail from FEMA Congressional Affairs Division, to CRS (April 9, 2024)).

<sup>14</sup> MILET ET AL., *supra* note 2, at 6.

<sup>15</sup> RICARDO LARA, CAL. DEPT. INS., IMPACTS OF EXTREME HEAT TO CALIFORNIA’S PEOPLE, INFRASTRUCTURE, AND ECONOMY 4 (2024), <https://www.insurance.ca.gov/01-consumers/180-climate-change/upload/Impacts-of-Extreme-Heat-to-California-s-People-Infrastructure-and-Economy-Key-Findings-and-Recommendations.pdf> [perma.cc/76HC-SAQK].

<sup>16</sup> *See* BOYLE ET AL., *supra* note 10, at 10. In a 1948 appropriations law, Congress first delegated to the President the authority to recognize catastrophic events and direct general relief funds to help states and local governments respond. *See* Second Deficiency Appropriation Act of

when Governor Joseph Teasdale of Missouri twice requested a major disaster declaration related to a heatwave that killed 400 people in eighteen days.<sup>17</sup> Not in 1995, when Governor Jim Edgar of Illinois requested a major disaster declaration for a Chicago heatwave that killed more than 700 people in five days.<sup>18</sup> And not in 2022, when 70% of the Golden State was knocked to its knees by a dome of malevolent heat.<sup>19</sup>

In its *National Preparedness Goal*, the Department of Homeland Security describes an “all-hazards” approach to disaster planning, noting the “significant and varied risks” of “natural hazards including hurricanes, earthquakes, tornadoes, droughts, wildfires, winter storms, and floods.”<sup>20</sup> Absent from the list are heat events, which in 2023 took 2,300 American lives—more than all the deaths attributed to those listed hazards *combined*.<sup>21</sup> In a country where extreme heat threatens millions of people each year, federal emergency-response policy steers billions of dollars away from our hottest, most disadvantaged places.<sup>22</sup>

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1948, ch. 658, 62 Stat. 1186 (1948). Two years later, with the passage of the Disaster Relief Act of 1950, such events were referred to as “major disasters,” a term now enshrined in today’s Stafford Act. WILLIAM L. PAINTER, CONG. RSCH. SERV., R45484, THE DISASTER RELIEF FUND: OVERVIEW AND ISSUES 10 (2024), <https://crsreports.congress.gov/product/pdf/R/R45484> [perma.cc/NY22-F664]. In the Disaster Relief Act of 1974, Congress added a second, broader category of incident called an “emergency.” *See* Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143, 148 (codified as amended at 42 U.S.C. § 5122(1)). Under that category, federal assistance is generally capped at \$5 million per emergency unless the President determines more funds are needed and reports to Congress. *How a Disaster Gets Declared*, FEMA, <https://www.fema.gov/disaster/how-declared> [perma.cc/BUQ9-Q8ZE] (last updated July 22, 2024). Because such relief would often be insufficient to address extreme heat, this Article does not address emergency declarations.

<sup>17</sup> *See* BOYLE ET AL., *supra* note 10, at 10; Hunter Bassler & Kay Quinn, *One of Missouri’s Deadliest Heat Waves Left Echoes Still Felt More than 40 Years Later*, KSDK (June 25, 2024), <https://www.ksdk.com/article/weather/severe-weather/missouri-deadliest-heat-wave-40-years-later-1980-heat-wave-st-louis/63-500462a1-0c45-42d8-be75-37c49905d1a6> [perma.cc/K2FS-GAH C].

<sup>18</sup> BOYLE ET AL., *supra* note 10, at 10 (citing Letter from Jim Edgar, Ill. Governor, to William J. Clinton, U.S. President (July 24, 1995)).

<sup>19</sup> Ian Livingston, *Maps Show Where California’s Intensifying Heat Wave Could Be ‘Dangerous and Lethal’*, WASH. POST (July 3, 2024), <https://www.washingtonpost.com/weather/2024/07/03/california-heat-wave-maps-forecast-analysis/> [perma.cc/K2WV-ZWPR].

<sup>20</sup> DEPT’ OF HOMELAND SEC., NATIONAL PREPAREDNESS GOAL 4 (2d ed. 2015), [https://www.fema.gov/sites/default/files/documents/fema\\_gpd\\_national-preparedness-goal-2nd-edition\\_051525.pdf](https://www.fema.gov/sites/default/files/documents/fema_gpd_national-preparedness-goal-2nd-edition_051525.pdf) [perma.cc/BR2X-4JV9].

<sup>21</sup> Seth Borenstein, Mary Katherine Wildeman & Anita Snow, *2023 Set a Record for U.S. Heat Deaths*, PBS NEWS, (May 31, 2024), <https://www.pbs.org/newshour/nation/2023-set-a-record-for-u-s-heat-deaths-why-2024-could-be-even-deadlier> [perma.cc/DHJ5-VM98]; Press Release, FEMA, Dep’t Homeland Sec. Offers Cnty Leaders New Res. to Prepare Extreme Temperature Events as 17 States Experience Rec.-Breaking Heat (Aug. 24, 2023) (I don’t believe the Department means this list to be exclusive, *see infra* Part IV.B.1, but to ignore the largest killer in a brief on disaster preparedness is, to say the least, a big oversight).

<sup>22</sup> *See* Erick Burgueño Salas, *Share of People Exposed to Heat Waves in U.S. 2016–2021*, STATISTA (Aug. 7, 2025), <https://www.statista.com/statistics/1264726/exposure-to-heat-waves-us/> [perma.cc/4VHC-AKNV] (showing that 30–64% of U.S. residents experienced heat waves from

The pattern persists even as climate breakdown catapults U.S. temperatures to new heights, causing multi-day extreme-heat events to balloon in frequency, intensity, and duration.<sup>23</sup> While public health experts write frequently, and with alarm, about the threat of heat-related disaster, legal scholarship on extreme heat and its relationship to the Stafford Act is scarce. As the CRS mourned in a 2024 report, “[n]o federal agency claims responsibility for managing emergency preparedness and response to extreme heat.”<sup>24</sup>

Someone needs to take charge. In fact, last year, near the end of the Biden administration, a coalition of environmental nonprofits, labor unions, health professionals, and environmental justice groups petitioned FEMA to seize the reins on killer heat.<sup>25</sup> Spearheaded by the Center for Biological Diversity (CBD), the coalition urged FEMA to add extreme heat and wildfire smoke to the Stafford Act’s regulatory definition of “major disaster.” “It’s past time for [FEMA] to address the climate emergency head-on,” Jean Su, a senior attorney at CBD, told the media.<sup>26</sup> “That means unlocking crucial funding for local governments to build robust and resilient solutions like community solar and storage, cooling centers and air filtration.”<sup>27</sup> Of top concern, according to the petition, is the welfare of “disadvantaged communities,” which bear the brunt of these burdens.<sup>28</sup>

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2016 to 2021).

<sup>23</sup> See Julia Simon, ‘We’re Screaming into the Void.’ Across the U.S., Heat Keeps Breaking Records, NPR (July 11, 2024), <https://www.npr.org/2024/07/11/hx-s1-5034292/temperature-records-heatwave-climate-change> [perma.cc/8ZKC-YQE9] (showing heat records broken); *Climate Change Indicators: Heat Waves*, EPA, <https://www.epa.gov/climate-indicators/climate-change-indicators-heat-waves> [perma.cc/33SG-MGMF] (last updated June 2024) (showing frequency, intensity, duration).

<sup>24</sup> BOYLE ET AL., *supra* note 10, at 20. There is at least one exception. Dan Farber reminds me that in response to recent heatwaves in the Midwest, the U.S. Department of Agriculture increased payments to cattle ranchers under its Livestock Indemnity Program, which compensates ranchers and farmers for “weather-related livestock deaths.” Nathan Owens, *USDA Increases Payments for Cattle Killed by Midwest Heat Waves*, AGRIC. DIVE (Aug. 29, 2023), <https://www.agriculturedive.com/news/usda-increases-indemnity-payments-for-cattle-killed-by-midwest-heat-waves/692153/> [perma.cc/6RH6-RBQF]. This example illustrates the “property over people” I discuss in Part IV.B.3.

<sup>25</sup> Erum Salam, *Fema Petitioned to Make Extreme Heat and Wildfire Smoke Major Disasters*, GUARDIAN (June 18, 2024), <https://www.theguardian.com/environment/article/2024/jun/18/fema-extreme-heat-smoke-disasters> [perma.cc/Y8KL-LL56]; *see also* Ctr. for Biological Diversity et al., Petition for Rulemaking, Pursuant to the Administrative Procedure Act, to Include Extreme Heat and Wildfire Smoke as Major Disasters Under The Stafford Act, (June 17, 2024), [https://www.biologicaldiversity.org/programs/energy-justice/pdfs/EMBARGOED\\_FEMA-Petition-on-Heat-and-Wildfire-Smoke.pdf](https://www.biologicaldiversity.org/programs/energy-justice/pdfs/EMBARGOED_FEMA-Petition-on-Heat-and-Wildfire-Smoke.pdf) [perma.cc/8G3P-QCH8].

<sup>26</sup> Salam, *supra* note 25.

<sup>27</sup> *Id.*

<sup>28</sup> Ctr. for Biological Diversity et. al., *supra* note 25, at 21–23.

### A. Preview

This Article examines the need and justification for a more robust approach to extreme heat by FEMA under the Stafford Act. I focus only on “major disaster declarations” under the Stafford Act, as opposed to “national emergency declarations,” which are limited by statute to \$5 million (with some exceptions) and not suitable for incidents as severe and widespread as extreme heat. Also, in contrast to the CBD’s petition, I do not address wildfire smoke, which presents issues beyond the scope of this Article.<sup>29</sup> I conclude that—given the severity of extreme heat events, their disproportionate effects on vulnerable populations, and the broad protection promised under the Stafford Act—immediate action is needed. It would be best for Congress to amend the Stafford Act to explicitly include extreme heat and its special characteristics into the Act’s disaster definition and its aid programs. This should be the first step in developing a whole-of-government strategy to help communities cope with extreme heat. That strategy would include plans to re-landscape neighborhoods, provide affordable home-cooling options, strengthen the power grid, expand health and safety services. Congress is paralyzed now, but we can work to undo that and must hold lawmakers accountable for that dream.<sup>30</sup>

In the absence of Congressional action, FEMA should take action to increase the chances that states and Tribal governments threatened by extreme heat can receive their fair share of disaster funds, from individual assistance, public assistance, to hazard mitigation funds. That would include FEMA immediately developing regulations and

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<sup>29</sup> Like heat, wildfire smoke causes major health and economic suffering across the United States. *See id.* at 23–26. Wildfire smoke also disproportionately affects marginalized groups. *See id.* at 26–27. But some characteristics of that problem are different and deserve a kind of individualized attention beyond the scope of this Article. For instance, wildfire, as a category, is explicitly included in the Stafford Act’s definition of “major disaster.” Under some readings (emphasizing text), that might make it an easier case than extreme heat. Under other readings (emphasizing drafters’ intent), that might make a harder case. The Stafford Act also authorizes the President to make available fire management assistance, which is available upon a Fire Management Assistance Grant declaration by the FEMA Administrator. This is a separate declaration process, which needs to be considered in developing a policy for smoke under a major disaster declaration.

In addition, the U.S. Forest Service’s expertise and broad authority over wildfire control should be considered in prescribing the most effective approach to addressing the problem of wildfire smoke. For more on the challenges of wildfire, wildfire smoke, and its relationship to climate and environmental justice. *See ROB VERCHICK, THE OCTOPUS IN THE PARKING GARAGE: A CALL FOR CLIMATE RESILIENCE*, 130–49 (2023).

<sup>30</sup> Alas, the “undoing that” part is beyond the scope of this Article, but there is enlightening work in the field. *See, e.g., An Effective Congress*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/bolster-checks-balances/effective-congress> [perma.cc/W8EJ-8J3G] (last visited Aug. 18, 2025) (collection of briefs and policy reports on ways to improve the functioning of the U.S. Senate); LEE DRUTMAN, *BREAKING THE TWO-PARTY DOOM LOOP: THE CASE FOR MULTIPARTY DEMOCRACY IN AMERICA* (2020); JOSH CHAFETZ, *CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* (2017).

guidelines that make clear extreme heat can qualify for disaster aid under certain conditions and to provide a template for affected governments to use in requesting such aid. In addition to that (or even in the absence of that), FEMA and the President should use their discretionary powers to declare disasters for extreme heat when the welfare of affected communities warrant it. With a declaration, heat-struck regions would have access to expanded evacuation services, emergency medical care, and unemployment benefits for outdoor workers. They could multiply their cooling centers, install solar generators in times of power outages, and retrofit homes with efficient air conditioning. Buckled roads could be repaired and warped roofing replaced. Lives would be saved and suffering relieved.

These prescriptions can be justified practically and legally with reference to the Act, FEMA's regulations, and FEMA's past practices. But importantly, these prescriptions also follow from robust and enduring moral commitments that a functioning democracy guarantees to its people. The upshot is that while courts have limited authority to control FEMA's or the President's ultimate decisions in this area, the moral mandate is clear: the federal government must address extreme heat to insure well-functioning governance at all levels and to protect its people.

My argument unfolds as follows. Part II describes the problem of extreme heat, paying special attention to burdens borne by vulnerable groups. It then reviews the basics of the Stafford Act, as a means of showing how extreme heat fits comfortably within the statutory purview. This part also examines and addresses objections that readers (including some FEMA employees) might have about expanding the agency's mission this way. This sets up the legal case for addressing heat under the Stafford Act.

Part III takes up the moral case, building upon my earlier work on "disaster justice" (drawing from the theoretical work of Amartya Sen) and strengthening the case by leaning on Martha Albertson Fineman's "vulnerability theory," which I think is particularly suited to federal disaster policy.

Part IV delves into policy prescriptions and examines the legal challenges they might face. Of particular note, this part addresses the concern that major disaster declarations require heavy property damage. I'll show that is not always the case, referring to declarations involving snowstorms or pandemics. This part concludes finding that, as a legal matter, FEMA and the President have considerable discretion in this area to promulgate rules for extreme heat and direct disaster relief funds to imperiled communities. As moral and ethical actors, they have an obligation to protect the country from extreme heat.

## B. Caveats

Before moving forward, let us acknowledge two elephants pacing the room. One is President Donald Trump. In his first term, the President's handling of emergency relief was idiosyncratic, coercive, and sometimes extralegal.<sup>31</sup> President Trump, as the *New York Times* noted in its coverage of the Los Angeles fires of January 2025, "rarely passes up an opportunity to blame natural disasters on his political enemies."<sup>32</sup> If the President wants to withhold federal support to score political points or punish an adversary, traditional policy arguments like mine are not going to make much difference.

In addition, White House officials appear to be following a programmatic agenda—called “Project 2025”—that is focused on trammeling bureaucracy and consolidating executive power.<sup>33</sup> On the subject of disaster response, the document proposes to shrink FEMA’s capacity, end disaster-preparation grants, cut aid for smaller disasters, upend federal-state cost-sharing formulas, and guillotine the National Weather Service.<sup>34</sup>

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<sup>31</sup> See, e.g., Press Release, FEMA, President Donald J. Trump Directs FEMA Support Under Emergency Declaration for COVID-19 (Mar. 13, 2020), <https://www.fema.gov/press-release/20250121/president-donald-j-trump-directs-fema-support-under-emergency-declaration> [perma.cc/E2U5-BCQ3]; Andy Sullivan, *Trump Administration Taps Disaster, Cyber Funds to Cover Immigration*, REUTERS (Aug. 27, 2019), <https://www.reuters.com/article/world/trump-administration-taps-disaster-cyber-funds-to-cover-immigration-idUSKCN1VH2F8> [perma.cc/6Z4L-HZBW]; Holmes Lybrand, *Fact Check: Does Trump’s Reallocation of FEMA Funds Take Money from Puerto Rico?*, CNN POLITICS (Aug. 29, 2019), <https://www.cnn.com/2019/08/29/politics/fema-puerto-rico-disaster-funding-hurricane-donald-trump-fact-check/index.html> [perma.cc/45GQ-9B2P].

<sup>32</sup> Michael D. Shear, *Trump Blames California’s Governor, and His Water Policy, for Wildfires*, N.Y. TIMES (Jan. 8, 2025), <https://www.nytimes.com/2025/01/08/us/trump-newsom-california-fires.html> [perma.cc/8BAA-RLSH].

<sup>33</sup> See, e.g., Rachel Leingang, *Trump’s Appointments Signal Which Project 2025 Goals He Might Advance First*, GUARDIAN (Jan. 8, 2025), <https://www.theguardian.com/us-news/2025/jan/08/trump-project-2025> [perma.cc/LVF7-UND5]; Kiara Alfonseca & Katherine Faulders, *How Trump Has Infused Parts of Project 2025 into His Administration*, ABC NEWS (Dec. 9, 2024), <https://abcnews.go.com/Politics/trump-project-2025-administration/story?id=116019369> [perma.cc/KS33-4QNQ]; Elena Shao & Ashley Wu, *The Many Links Between Project 2025 and Trump’s World*, N.Y. TIMES (Oct. 22, 2024), <https://www.nytimes.com/interactive/2024/10/22/us/politics/project-2025-trump-heritage-foundation.html> [perma.cc/WE3F-AMCY].

<sup>34</sup> Ken Cuccinelli, *Department of Homeland Security, in MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE* 153, 153–54 (Paul Dans & Steven Groves eds., 2023), <https://www.documentcloud.org/documents/24088042-project-2025s-mandate-for-leadership-the-conservative-promise/> [perma.cc/9LQK-ER2R]; James Goodwin, *The Administrative State in a Project 2025 World*, THE REGUL. REV. (Dec. 2, 2024), <https://www.theregreview.org/2024/12/02/goodwin-the-administrative-state-in-a-project-2025-world/> [perma.cc/7SFE-UGJZ]; Dharna Noor & Oliver Milman, *Project 2025 Would ‘Unequivocally’ Lead to More Hurricane Deaths, Experts Warn*, GUARDIAN (Oct. 8, 2024), <https://www.theguardian.com/us-news/2024/oct/08/trump-project-2025-hurricanes> [perma.cc/VS5Y-3N7Q]; Thomas Frank & Chelsea Harvey, *How Project 2025 Would Treat Helene Survivors*, E&E NEWS (Oct. 1, 2024), <https://www.eenews.net/articles/how-project-2025-would-treat-helene-survivors/> [perma.cc/8KDJ-J7LK].

“I love Oklahoma,” the President told Fox interviewer Sean Hannity two days after his second inauguration, “But you know what? If they get hit with a tornado or something, let Oklahoma fix it. . . . And then the federal government can help them out with the money. F[EMA] is getting in the way of everything.”<sup>35</sup> As this article goes to press, FEMA’s future is unclear. The administration has already fired hundreds of agency employees, and, during a televised cabinet meeting, Secretary Kristi Noem of the Department of Homeland Security said she planned to “eliminate FEMA.”<sup>36</sup> How much demolition is actually attempted—and how much will survive legal challenge—remains to be seen.<sup>37</sup> Today’s disaster-response situation is fluid, to say the least.

The second elephant in the room is the U.S. Supreme Court, whose recent rulings have rewritten some aspects of regulatory law, stripping agencies of power and dismissing precedents once seen as surefire.<sup>38</sup> These legal developments could limit some of the “Project 2025” prescriptions listed above. But they could also limit my call to address extreme heat through the Stafford Act.<sup>39</sup>

Still, you should keep reading. Law and politics are not mountains but streams. They change course and speed when you are not looking. What direction they take depends on the groove open to receive them, including the one I am starting to chisel here. It is even possible that states like Nevada and Arizona (which in 2024 both landed on red) may be favored in this administration when seeking shelter from the sun. (There are MAGA-rich districts in California too.) The legal and moral case for that aid can be found in these pages.

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<sup>35</sup> Oliver Milman & Dahrna Noor, ‘*Setting Us Up for Catastrophe*’: Alarm at Trump Attack on Federal Agency, GUARDIAN (Jan. 23, 2025), <https://theguardian.com/us-news/2015/jan/23/trump-fema-natural-disasters> [perma.cc/X42Y-SKCN].

<sup>36</sup> Arcelia Martin, *Nearly Half of the Country’s Attorneys General Make Legal Effort to Restore FEMA Funds*, INSIDE CLIMATE NEWS (Mar. 26, 2025), <https://insideclimatenews.org/news/260320-25/attorney-generals-legal-efforts-to-restore-fema-funds-trump/> [perma.cc/56A5-XZMK].

<sup>37</sup> For instance, neither President Trump nor Secretary Noem would appear to have the legal authority to abolish FEMA without the consent of Congress. Hannah Perls, *Proposed Changes to FEMA and the Future of Federal Disaster Response*, ENV’T AND ENERGY L. PROGRAM HARV. L. SCH. (Feb. 27, 2025), <https://eelp.law.harvard.edu/proposed-changes-to-fema-and-the-future-of-federal-disaster-response/> [perma.cc/JG5C-WVEQ]. In addition, as Hannah Perls points out, “federal law . . . explicitly prohibits the Secretary of Homeland Security from ‘substantially or significantly reduc[ing] . . . the authorities, responsibilities, or functions of [FEMA] or the capability of the Agency to perform those missions, authorities, responsibilities.’” *Id.* (quoting 6 U.S.C. § 316).

<sup>38</sup> See, e.g., *West Virginia v. EPA*, 597 U.S. 697, 735 (2022) (holding that Congress could not have given authority to the EPA to cap carbon dioxide emissions); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (overruling *Chevron v. NRDC*, 467 U.S. 837 (1984), which required courts to defer to agencies’ interpretation of statutes and substituting with courts exercising their own independent judgment).

<sup>39</sup> I consider this possibility in Section IV.B.3.

## II. EXTREME HEAT AND THE STAFFORD ACT

### A. Extreme Heat

In recent years, the planet has endured record episodes of intense, pounding, pitiless heat. In fact, last year—2024—was the hottest year ever recorded.<sup>40</sup> Extreme heat in Mexico, Mali, and Saudi Arabia killed thousands.<sup>41</sup> In the United States, the trend is clear. In 2021, a withering heat dome struck Washington state and took 400 lives.<sup>42</sup> In September 2022, soaring temperatures broke nearly 1,000 heat records across the country.<sup>43</sup> That year, governors declared state emergencies in Arizona, California, Louisiana, and beyond.<sup>44</sup>

There is no single definition for what constitutes excessive heat. The World Meteorological Organization defines “heatwave” as “a period where local excess heat accumulates over a sequence of unusually hot days and nights.”<sup>45</sup> FEMA uses the term “extreme heat,” defining it as “a long period (2 to 3 days) of high heat and humidity with temperatures above 90 degrees [Fahrenheit].”<sup>46</sup> (For ease, I’ll use the terms “extreme heat” and “heatwave” interchangeably.) The Centers for Disease Control (CDC) describe extreme heat as an “summertime temperatures

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<sup>40</sup> Kate Abnett & Alison Withers, *2024 Is the Hottest Year on Record, EU Scientists Say*, REUTERS (Dec. 9, 2024), <https://www.reuters.com/business/environment/2024-will-be-hottest-year-record-eu-scientists-say-2024-12-09/> [perma.cc/56RB-V8JP].

<sup>41</sup> *Id.*

<sup>42</sup> Jason Vogel et al., *In the Hot Seat: Saving Lives from Extreme Heat in Washington State*, UNIV. WASH. (2023), <https://cig.uw.edu/projects/in-the-hot-seat-saving-lives-from-extreme-heat-in-washington-state/> [perma.cc/XXC2-JRQX].

<sup>43</sup> *U.S. Selected Significant Climate Anomalies and Events for 2022*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://www.ncei.noaa.gov/access/monitoring/monthly-report/national/202213> [perma.cc/GTR2-HVML] (last visited Dec. 16, 2024).

<sup>44</sup> Katie Hobbs, Ariz. Governor, *Declaration of Emergency: 2023 Record Excessive Heat Risk* (Aug. 11, 2023), [https://azgovernor.gov/sites/default/files/2023.08.11\\_doe\\_record\\_excessive\\_heat\\_risk.pdf](https://azgovernor.gov/sites/default/files/2023.08.11_doe_record_excessive_heat_risk.pdf) [perma.cc/WU7A-W958]; Gavin Newsom, Cal. Governor, *Proclamation of a State of Emergency*, EXEC. DEP'T STATE OF CAL. (June 17, 2021), <https://www.gov.ca.gov/wp-content/uploads/2021/06/6.17.21-Extreme-Heat-proclamation.pdf> [perma.cc/TM7D-KFYU]; La. Proclamation No. 141 JBE 2023 (Aug. 11, 2023), <https://gov.louisiana.gov/assets/141JBE2023.pdf> [perma.cc/GND2-JCSE] (The governors of Oregon and Washington also declared heat-related disasters that year.); Or. Exec. Order No. 22-13 (July 25, 2022), [https://www.oregon.gov/gov/eo/eo\\_22-13.pdf](https://www.oregon.gov/gov/eo/eo_22-13.pdf) [perma.cc/TX3J-VQRU]; Wash. Proclamation No. 21-12 (July 16, 2021), <https://governor.wa.gov/sites/default/files/proclamations/21-12%20-%20WSDOT%20Heat%20Damage%20%28tmp%29.pdf> [perma.cc/8X2J-G6WC].

<sup>45</sup> *Heatwave*, WORLD METEOROLOGICAL ORG., <https://wmo.int/topics/heatwave> [perma.cc/EP9P-B59H].

<sup>46</sup> FEMA, *Be Prepared for Extreme Heat*, at 1 (June 2018), <https://fema-community-files.s3.amazonaws.com/hazard-information-sheets/Extreme+Heat-English.pdf> [perma.cc/4VVW-M8MX] (applying definition for “most of the United States”).

that are much hotter and/or humid than average.”<sup>47</sup> Other agencies use different formulations.<sup>48</sup>

However defined, heat is already the leading weather-related cause of death in the United States, causing or contributing to an average of 702 deaths each year.<sup>49</sup> Predictably, the Sunbelt has it worse. For instance, while Arizona, California, and Texas make up about a quarter of the U.S. population, these states account for more than a third of heat-related deaths.<sup>50</sup>

As with other weather-related events, climate change is loading the dice. The most recent National Climate Assessment expects the number of heat-related deaths in the United States to keep climbing until carbon pollution is collared and more protective health measures are adopted.<sup>51</sup>

Extreme heat damages human health in many ways even when it is not fatal. Experts estimate that each year it sends about 235,000 people to the emergency department and 56,000 people into hospital beds, at an annual cost of about \$1 billion.<sup>52</sup> Related illnesses include heat stroke (the body’s inability to control its temperature), heat exhaustion (the loss of too much water and salt), heat cramps, heat rash, muscle damage, and burns.<sup>53</sup>

For physiologic and health-related reasons, heat hits some populations harder. Pregnant women and people with medical conditions or disabilities, for instance, are especially vulnerable to heat spikes. A recent study appearing in the American Heart Association’s journal, *Circulation*, estimates that among African Americans and older people the number of deaths from extreme heat will triple by mid-century, on account of pre-existing disparities in respiratory health.<sup>54</sup>

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<sup>47</sup> See BOYLE ET AL., *supra* note 10, at 4.

<sup>48</sup> *Id.* at 3–4.

<sup>49</sup> Ambarish Vaidyanathan et al., *Heat-Related Deaths—United States, 2004-2018*, 69 CDC MORBIDITY & MORTALITY WKLY REP. 729, 729 (2020) [https://www.cdc.gov/mmwr/volumes/69/wr/m6924a1.htm?s\\_cid=mm6924a1\\_w](https://www.cdc.gov/mmwr/volumes/69/wr/m6924a1.htm?s_cid=mm6924a1_w) [perma.cc/N5E7-RLE2]. Because of inconsistencies in reporting across states, experts believe many figures on heat-related deaths are probably undercounts. See, e.g., Marcus C. Sarofim et al., U.S. Glob. Change Rsch. Program, *Temperature-Related Death and Illness, in THE IMPACTS OF CLIMATE CHANGE ON HUMAN HEALTH IN THE UNITED STATES: A SCIENTIFIC ASSESSMENT* 43–68 (2016), <https://ntrs.nasa.gov/api/citations/20160011261/downloads/20160011261.pdf> [perma.cc/74LB-MT4R].

<sup>50</sup> Vaidyanathan et al., *supra* note 49, at 730.

<sup>51</sup> Paul J. Schramm et al., *Chapter 15. Human Health, in FIFTH NATIONAL CLIMATE ASSESSMENT* (A.R. Crimmins et al. eds., 2023), <https://repository.library.noaa.gov/view/noaa/61592> [perma.cc/5XB9-YFSC].

<sup>52</sup> Steven Woolf et al., *The Health Care Costs of Extreme Heat*, CAP (June 27, 2023), <https://www.americanprogress.org/article/the-health-care-costs-of-extreme-heat/> [perma.cc/5L4R-PTV4].

<sup>53</sup> See JOINT ECON. COMM. DEMOCRATS, THE MOUNTING COSTS OF EXTREME HEAT 2 (2023), <https://ghhin.org/wp-content/uploads/jec-heat-wave-report-final.pdf> [perma.cc/S2N5-5CVJ].

<sup>54</sup> Sameed Ahmed M. Khatana et al., *Projected Change in the Burden of Excess Cardiovascular*

Doctors have long known that older people, in general, are more susceptible to extreme heat because of changes in the body's ability to adapt to temperature fluctuations.<sup>55</sup> But new research suggests it may be *younger* people—those under thirty-five—who will suffer the brunt of heat-related deaths as temperatures ramp up. Based on the study of heat and mortality rates in Mexico, a study led by Andrew Wilson of Columbia University predicts a 32% increase in deaths of people under thirty-five-years-old this century from heat if carbon pollution isn't significantly cut.<sup>56</sup> “Most discussion of vulnerability to heat focuses on the elderly,” Wilson told a reporter for *The Guardian*,<sup>57</sup> “but we found a surprising source of inequality in that most heat mortality is in younger people. . . . We didn’t think we’d find this.” The researchers attribute the disparity to a number of factors that include physiological differences and occupational risks.<sup>58</sup>

The mention of occupational risk reminds us that vulnerability to heat is about more than physiology; it is tied up with how people work and live. In recent years, extreme heat events have affected millions of workers, from farm workers cutting lettuce in triple-degree heat to roofers pouring tar under a molten sun. Residents in poor communities and communities of color are more likely to live in urban “heat islands”—treeless neighborhoods dominated by asphalt and concrete where the air can be ten degrees hotter than other parts of the city.<sup>59</sup> A 2021 study published in *Nature* found that “[t]he average person of color lives in a census tract with higher summer daytime [Surface Urban Heat Island] intensity than non-Hispanic whites in all but 6 of the 175 largest urbanized areas in the continental United States.”<sup>60</sup> Among other factors, the pattern is linked to racist practices in home-lending known as “redlining.”<sup>61</sup>

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*Deaths Associated with Extreme Heat by Midcentury (2036–2065) in the Contiguous United States*, 148 CIRCULATION 1559, 1559–1560 (Oct. 30, 2023), <https://www.ahajournals.org/doi/epub/10.1161/CIRCULATIONAHA.123.066017> [perma.cc/N7C3-ES85].

<sup>55</sup> *Heat and Older Adults (Aged 65+)*, CDC (June 25, 2024), <https://www.cdc.gov/heat-health/risk-factors/heat-and-older-adults-aged-65.html> [perma.cc/X93B-FE59].

<sup>56</sup> Andrew J. Wilson et al., *Heat Disproportionately Kills Young People*, 10 SCI. ADVANCES, no. 49, 2024, at 1, <https://www.science.org/doi/10.1126/sciadv.adq3367> [perma.cc/4G2X-5SJ7].

<sup>57</sup> Oliver Milman, *Younger People at Greater Risk of Heat-Related Deaths this Century - Study*, GUARDIAN (Dec. 6, 2024), <https://www.theguardian.com/us-news/2024/dec/06/young-adults-heat-related-deaths-climate-crisis> [perma.cc/452S-CEQU].

<sup>58</sup> *Id.*

<sup>59</sup> Melba Newsome, *Discrimination Has Trapped People of Color in Unhealthy Urban ‘Heat Islands’*, 621 NATURE S48, S48–49 (2023), <https://www.nature.com/articles/d41586-023-02618-1> [perma.cc/Z89C-GC2U].

<sup>60</sup> Angel Hsu et al., *Disproportionate Exposure to Urban Heat Island Intensity Across Major US Cities*, 12 NATURE COMM’NS, no. 2721, 2021, at 2, <https://pubmed.ncbi.nlm.nih.gov/34035248/> [perma.cc/ZGL3-4WVA]; *see also* Newsome, *supra* note 59.

<sup>61</sup> *Id.*

A recent study by the global consulting company ICF estimates that at least 25 million people in “Justice40 communities” (a Biden-era term describing communities with serious economic, health, and environmental challenges) will be exposed to health-threatening extreme heat annually by 2050 with Arizona, New Mexico, Louisiana, and Texas experiencing extreme heat days for a staggering one-third of the year.<sup>62</sup>

In describing these impacts, my intention is to build a case for stronger FEMA involvement under the Stafford Act. But, of course, FEMA is not the only federal actor in this policy pot boiler. Many other agencies do or could offer serious help in preventing harm from extreme heat. For instance, the Department of Transportation spends millions to reduce heat damage on roads and railways.<sup>63</sup> During the Biden administration, the Occupational Safety and Health Administration (OSHA) proposed a set of long-awaited standards to protect workers from extreme heat, although in the Trump administration its fortunes may fizz. <sup>64</sup>

The Department of Health and Human Services (HHS) maintains the Low Income Home Energy Assistance Program (LIHEAP),<sup>65</sup> a critical piece of the social safety net that provides heating and cooling assistance to nearly seven million households. But its balance tilts toward snowy climes. Consider these numbers: In 2017, according to the Pew Research Center, the largest recipients of LIHEAP allocations, per capita, were concentrated in New England and the Upper Midwest, with the highest allocation—\$34 per capita—going to North Dakota.<sup>66</sup> The states receiving the lowest allocations were mostly in the Southwest, with the lowest allocation—\$3 per capita—going to

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<sup>62</sup> JUDSEN BRUZGUL ET AL., INT'L CLIMATE FUND CLIMATE CTR., EXTREME HEAT IN DISADVANTAGED COMMUNITIES (2024), <https://www.icf.com/-/media/files/icf/reports/2024/climate-flagship-report-extreme-heat-in-disadvantaged-communities-icf.pdf?rev=6644d086ce8d483893144d94133fa196> [perma.cc/3BVR-8P5R].

<sup>63</sup> Julie Strupp, *DOT Releases \$830M for Resilience Projects*, CONSTRUCTION DRIVE (Apr. 12, 2024), <https://www.constructiondive.com/news/transportation-infrastructure-resilience-830-million/713114/> [perma.cc/UUW6-WTXB].

<sup>64</sup> Matt Sledge, *Biden Made “Record Time” On Worker Protections for Heat. Trump Could Quickly Stamp Them Out.*, INTERCEPT (Nov. 25, 2024), <https://theintercept.com/2024/11/25/heat-rule-osha-worker-rights-trump/> [perma.cc/BPV8-QS4S]; Emma Dumain & Ariel Wittenberg, *Republicans Scoff at ‘Idiotic’ Biden Heat Plan for Workers*, E&E NEWS (July 23, 2024), <https://www.eenews.net/articles/republicans-scoff-at-idiotic-biden-heat-plan-for-workers-ee/> [perma.cc/8Q56-HWC9].

<sup>65</sup> See U.S. Dep’t of Health & Hum. Services, *Low Income Home Energy Assistance Program (LIHEAP)*, OFFICE OF COMMUNITY SERVICES (May 7, 2025), <https://www.acf.hhs.gov/ocs/programs/liheap> [perma.cc/ZK5N-6S4L].

<sup>66</sup> Phillip Oliff, Rebecca Thiess, & Brakeyshia Samms, *Federal Funding for Low-Income Energy Assistance Highest in New England, Upper Midwest*, PEW (Feb. 21, 2018), <https://www.pew.org/en/research-and-analysis/articles/2018/02/21/federal-funding-for-low-income-energy-assistance-highest-in-new-england-upper-midwest> [perma.cc/PG37-QFEL].

Arizona.<sup>67</sup> The pattern holds to this day. My earlier review of the LIHEAP web-based dashboard—whose data offerings are now more limited in the second Trump administration—showed that from 2018 through July 2024, the largest recipients of annual LIHEAP allocations, per capita, were Vermont, North Dakota, and Maine, while the smallest recipients were Hawai‘i, Arizona, and California.<sup>68</sup> Still, the sun takes its toll. In 2017, an estimated 264 people died from “heat related” causes in the Grand Canyon State.<sup>69</sup> From 2018 to 2024, 2,682 Arizonans died of heat-related causes, which amounts to nearly 37 heat-related deaths per 100,000 residents—the highest in the nation.<sup>70</sup>

Lawmakers from warm-weather states have tried for almost fifty years to revise the allocation of LIHEAP funds to help more people pay for air-conditioning, but lawmakers from cold-weather states have blocked all attempts.<sup>71</sup> (The allocation is based on an outdated formula based largely on how often and how far temperatures drop below sixty-five degrees Fahrenheit).<sup>72</sup> The upshot is that every time energy assistance, worker safety standards, or some other relevant program falls short, FEMA may at some point be asked to pick up the slack. That is where the Stafford Act comes in.

## B. The Stafford Act

The Stafford Act lays out the federal government’s current framework for responding to state, Tribal, and local requests for disaster assistance.

### 1. Historical foundation

Until the 1950s, federal disaster assistance was improvisational. A state or city would be hit with disaster and appeal to Congress for aid. If so inclined, Congress would authorize specific expenditures to support response efforts. Some readers might be surprised to learn that the federal government has been in the business of providing disaster aid since the earliest days of the republic, dispensing funds to victims

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<sup>67</sup> *Id.*

<sup>68</sup> See author’s notes, dated November 6, 2024, on file with the editors.

<sup>69</sup> ARIZ. DEPT OF HEALTH SERVS., *Heat-Caused and Heat-Related Deaths in Arizona by Year (2011–2021)*, <https://www.azdhs.gov/documents/preparedness/epidemiology-disease-control/extreme-weather/pubs/heat-related-mortality-year.pdf> [perma.cc/LNB8-CZ5Y].

<sup>70</sup> Thomas Frank, *They Died with the AC Off. Why the Government Pays for Heating but Not Cooling*, E&E NEWS (Sept. 3, 2024), <https://www.eenews.net/articles/why-the-government-lets-extreme-heat-get-away-with-murder/> [perma.cc/JEN4-92MR] (from embedded interactive map drawing from Centers for Disease Control and Prevention Records).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

of fires, hurricanes, epidemics, and even boll weevil infestations.<sup>73</sup> Congress's authority was often said to be grounded in the Constitution's "general welfare" clause, suggesting a national commitment to helping fellow citizens in times of unavoidable hardship and vulnerability.<sup>74</sup>

But this tradition—so often dependent on the whims of lawmakers and vagaries of the legislative process—was inconsistent and factious. After World War II, as the nation became more affluent and citizens embraced a more shared national identity (for many, not all), the federal effort toward disaster response grew.<sup>75</sup> In 1947, for instance, Congress initiated the Disaster Surplus Property Program, which authorized the federal government to provide federal surplus property to state and local governments recovering from disaster.<sup>76</sup> The next year, Congress delegated to the President the authority to declare a "disaster" and direct assistance from a federal general relief fund.<sup>77</sup> Mundanely titled the "Second Deficiency Appropriation Act of 1948,"<sup>78</sup> the law gave the President broad latitude in dispensing these funds and introduced certain hallmarks that distinguish the federal disaster relief system to this day. Namely, it (1) delegated to the President the authority to identify "any flood, fire, hurricane, earthquake, or other catastrophe" of sufficient severity and to direct federal assistance to the affected area from a general relief fund, (2) authorized the President to direct federal agencies to participate in that assistance, and (3) required states to certify their damages and to match a proportion of committed federal resources with their own state resources.<sup>79</sup>

Congress formalized this structure in the Disaster Relief Act of 1950 and announced for the first time its intent "to provide orderly and continuing means of assistance" for the purpose of alleviating "suffering and damage resulting from major disasters."<sup>80</sup> Over the next two decades—a period that saw a major earthquake in Alaska, floods in the western states, and Hurricanes Betsy and Camille—Congress

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<sup>73</sup> Michele Landis Dauber exquisitely documents this tradition, framing it as the inspiration for New Deal liberalism in MICHELE LANDIS DAUBER, *THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE* (2012).

<sup>74</sup> U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . ."); WILLIAM L. PAINTER, CONG. RSCH. SERV., R45484, *THE DISASTER RELIEF FUND: OVERVIEW AND ISSUES* 7 (2024), <https://crsreports.congress.gov/product/pdf/R/R45484> [perma.cc/NY22-F664].

<sup>75</sup> PAINTER, *supra* note 74, at 7–9.

<sup>76</sup> *Id.* at 9.

<sup>77</sup> *Id.* at 9–10.

<sup>78</sup> Second Deficiency Appropriation Act of 1948, ch. 658, 62 Stat. 1186 (1948).

<sup>79</sup> See PAINTER, *supra* note 74, at 10.

<sup>80</sup> Federal Disaster Relief Act of 1950, chs. 1124, 1125, 64 Stat. 1109 (1950).

continued to strengthen and expand its commitment. By 1970, the federal disaster relief framework included programs for debris removal, permanent repair and replacement of public facilities, assistance in developing local preparedness plans, temporary housing, food assistance, and unemployment benefits.<sup>81</sup> The 1974 version of the Disaster Relief Act introduced the concept of a “national emergency declaration” to respond to situations that did not meet the “major disaster” threshold, but that merited some federal attention.<sup>82</sup>

## 2. The Stafford Act’s mission and FEMA’s role

To handle all these new responsibilities, President Jimmy Carter established FEMA in 1979. FEMA’s activities, and the decades of Congressional action behind it, eventually materialized as the Stafford Act in 1988.<sup>83</sup> Since then, Congress has amended the Act several times to improve local preparedness and risk reduction, accelerate response services, and otherwise improve effectiveness.<sup>84</sup> In 2002, as part of a reorganization following the 9/11 terrorist attacks, Congress moved FEMA into the newly created Department of Homeland Security, where it resides today.<sup>85</sup>

The Stafford Act retains Congress’s original goal, expressed in 1950, to provide orderly assistance to alleviate “suffering and damage” resulting from “disasters” (the word “major” is dropped, probably to accommodate the new category of “national emergencies”).<sup>86</sup> For the most part, relief efforts under the Stafford Act are triggered when the President declares either a “major disaster declaration[]” or an “emergency declaration[].”<sup>87</sup> Available relief for the former is limited only by the availability of appropriated disaster relief funds. Available relief for the latter is limited by statute (with some exceptions) to \$5 million.<sup>88</sup> In general, requests for declarations are made by the governor of the affected “State,”<sup>89</sup> a term that also includes the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. As of 2013, with the Sandy Recovery

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<sup>81</sup> See PAINTER, *supra* note 74, at 11–12.

<sup>82</sup> *Id.*

<sup>83</sup> DANIEL A. FARBER ET AL., DISASTER LAW AND POLICY 109 (3d ed. 2015).

<sup>84</sup> See generally *We Are FEMA: Helping People Before, During, and After Disasters*, FEMA, [https://www.fema.gov/sites/default/files/2020-03/publication-one\\_english\\_2019.pdf](https://www.fema.gov/sites/default/files/2020-03/publication-one_english_2019.pdf) [perma.cc/E3P3-XZM2] (last visited Dec. 30, 2024).

<sup>85</sup> *Id.* at 22.

<sup>86</sup> 42 U.S.C. § 5121(b).

<sup>87</sup> FARBER ET AL., *supra* note 83, at 109–10.

<sup>88</sup> 42 U.S.C. § 5193(b).

<sup>89</sup> 42 U.S.C. § 5170.

Improvement Act,<sup>90</sup> federally recognized Tribal Nations may also issue direct requests to the President.<sup>91</sup> Before seeking a declaration, a state or Tribal government will contact its FEMA Regional Office and request a preliminary damage assessment, which is performed jointly among federal, state, Tribal, and local officials (as the case may be).<sup>92</sup> The state or Tribal government then requests a declaration, noting the type of assistance it is seeking. FEMA will then review the assessment (according to regulatory standards and guidelines) and make a recommendation to the President, who makes the final call to approve or deny the declaration request in his or her sole discretion.<sup>93</sup>

### 3. Defining a “Major Disaster”

What is a “major disaster”? The Act defines it as “any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion” that the President finds “causes damage of sufficient severity and magnitude” to require assistance.<sup>94</sup>

Exactly what sorts of disasters belong in FEMA’s jurisdiction is a perennial question. No major disaster has ever been declared under the Act solely for extreme heat, although Presidents have declared major disasters for events such as wildfires and power outages in which heat played a role.<sup>95</sup> Agency officials and academics have debated for years whether pandemics—either naturally occurring or genetically engineered—should qualify as disasters under the Act.<sup>96</sup> And we will leave for another day the matter of electromagnetic solar flares, cyber attacks, and thawing permafrost.<sup>97</sup>

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<sup>90</sup> Disaster Relief Appropriations Act of 2013, Pub. L. No. 113-2, 127 Stat. 4 (2013).

<sup>91</sup> FEMA, TRIBAL DECLARATIONS PILOT GUIDANCE 3 (2017), <https://www.fema.gov/sites/default/files/2020-04/tribal-declaration-pilot-guidance.pdf> [perma.cc/3XNU-AM88]. Before the Sandy Recovery Improvement Act, Tribal nations could not directly request disaster or emergency declarations under the Stafford Act. Instead, they were required to make their requests indirectly, through the governor of the state in which they were located.

<sup>92</sup> *How a Disaster Gets Declared*, *supra* note 16; DIANE HORN ET AL., CONG. RSCH. SERV., IN11696, CLIMATE CHANGE, SLOW-ONSET DISASTERS, AND THE FEDERAL EMERGENCY MANAGEMENT AGENCY 4 (2024), <https://crsreports.congress.gov/product/pdf/IN/IN11696> [perma.cc/Y2ZH-6ZMV].

<sup>93</sup> HORN ET AL., *supra* note 92, at 2.

<sup>94</sup> 42 U.S.C. § 5122(2).

<sup>95</sup> BOYLE ET AL., *supra* note 10, at 10–11.

<sup>96</sup> See FARBER ET AL., *supra* note 83, at 111–12.

<sup>97</sup> See, e.g., DEPT OF HOMELAND SEC., FEDERAL OPERATING CONCEPT FOR IMPENDING SPACE WEATHER EVENTS 3 (2019), [https://www.fema.gov/sites/default/files/2020-07/fema\\_incident-annex\\_space-weather.pdf](https://www.fema.gov/sites/default/files/2020-07/fema_incident-annex_space-weather.pdf) [perma.cc/QLD9-CBWM] (solar flares). See also, Matt Lyttle & Yvonne Manzo, *When Cyber-Attacks Lead to Disasters, Does the Stafford Act Apply?*, INFO SECURITY (Sept. 3, 2021), <https://www.infosecurity-magazine.com/opinions/cyber-attacks-disasters-stafford/>

Testifying before Congress in September 2023, FEMA Administrator Deanne Criswell maintained that her agency was open to requests based directly on extreme heat, but suggested, without specific elaboration, that past entreaties had not been compelling enough.<sup>98</sup>

#### 4. Types of disaster assistance

Upon declaration of a disaster, the Stafford Act authorizes three types of federal assistance: individual assistance, public assistance, and hazard mitigation assistance. Individual assistance is directed to affected individuals and businesses. This might include food, temporary housing, financial assistance and repairs. Public assistance is funding and expertise allocated to state, Tribal, and local governments. Examples include debris removal, setting up evacuation shelters, or repairing damaged roads and bridges. Hazard mitigation assistance provides funding for eligible long-term solutions that reduce the community impact of disasters in the future.<sup>99</sup>

Hazard mitigation—which aims to reduce harm by proactively identifying risk, implementing protective strategies, and minimizing the impacts of future threats—is crucial when building resilient communities and “breaking the cycle of disaster damage and reconstruction.”<sup>100</sup> FEMA deserves credit for leaning hard into these mitigation programs, saving lives and reducing costs at the same time. The problem, as many have pointed out, is that, by design, a large portion of the funding only becomes available *after* a disaster has already been declared.<sup>101</sup> But, as climate change imposes *new* future risks, like more extreme heat, and as developers build into *new* areas previously uninhabited, like deserts in the Sunbelt, we will increasingly need that aid on the front end—what FEMA refers to as “pre-disaster” mitigation aid. In the current administration, such aid, which includes

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[perma.cc/NT2H-LTW8] (cyber-attacks); Rachel Waldholz, *Obama Denies Newtok’s Request for Disaster Declaration*, ALASKA PUB. MEDIA (Jan. 18, 2017), <https://alaskapublic.org/news/2017-01-19/obama-denies-newtoks-request-for-disaster-declaration> [perma.cc/PKZ4-8C9P] (thawing permafrost).

<sup>98</sup> *FEMA: The Current State of Disaster Readiness, Response, and Recovery: Hearing Before the Subcomm. on Econ. Dev., Pub. Bldgs. & Emergency Mgmt.*, 118th Cong. 42 (2023) (statement of Deanne Criswell, Adm’r of Fed. Emergency Mgmt. Agency and U.S. Dep’t of Homeland Sec.) [hereinafter *FEMA: The Current State of Disaster Readiness, Response, and Recovery*].

<sup>99</sup> *Hazard Mitigation Planning*, FEMA (Nov. 28, 2023), <https://www.fema.gov/emergency-managers/risk-management/hazard-mitigation-planning> [perma.cc/9GX5-M97K].

<sup>100</sup> *Id.*

<sup>101</sup> FEMA does offer other mechanisms for applying for mitigation aid, but these are not as robust. See generally FEMA, FP-206-21-0001, HAZARD MITIGATION ASSISTANCE PROGRAM AND POLICY GUIDE (2023), [https://www.fema.gov/sites/default/files/documents/fema\\_hma\\_guide\\_062024.pdf](https://www.fema.gov/sites/default/files/documents/fema_hma_guide_062024.pdf) [perma.cc/959K-XKJH].

funds from the so-called BRIC (Building Resilient Infrastructure and Communities) initiative, has been especially vulnerable to attack.<sup>102</sup>

Another snag where heat is concerned is that, even in situations where mitigation funds are available, FEMA guidelines specifically *exclude* many heat-mitigation projects.<sup>103</sup> So while FEMA sends billions of dollars to residents to protect their homes from tornadoes, floods, earthquakes, and fire, it offers much less to shield people from debilitating heat and humidity.

Disaster response programs follow a cost-sharing framework. FEMA generally covers up to 75% of costs for disaster preparation or recovery while state and local governments cover the rest.<sup>104</sup> (The President may increase the federal share under some programs.)<sup>105</sup> Each year, Congress appropriates money to the Disaster Relief Fund (DRF), which supports much of FEMA's disaster work. From 2020 to 2024 (a period that included the COVID-19 pandemic), appropriations to the fund ranged from \$20 billion to \$70 billion.<sup>106</sup>

### 5. The nondiscrimination mandate

The Stafford Act also contains a nondiscrimination mandate, which applies to all regulations pertaining to "personnel carrying out Federal assistance functions at the site of a major disaster or emergency."<sup>107</sup> These regulations must:

insur[e] 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*.<sup>108</sup>

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<sup>102</sup> See Jack Brook & Michael Casey, *Trump Administration Cannot Reallocate Billions Meant for Disaster Mitigation, Federal Judge Rules*, PBS NEWS (Aug. 5, 2025), <https://www.pbs.org/newshour/politics/trump-administration-cannot-reallocate-billions-meant-for-disaster-mitigation-federal-judge-rules> [perma.cc/6626-VZ2J].

<sup>103</sup> See HAZARD MITIGATION ASSISTANCE PROGRAM AND POLICY GUIDE, *supra* note 101. For example, when the New York Housing Authority requested \$10 million to improve air conditioning, FEMA rejected the application as "ineligible." See Frank, *supra* note 71.

<sup>104</sup> ERICA A. LEE, CONG. RSCH. SERV., R47646, STAFFORD ACT COST SHARES: HISTORY, TRENDS, ANALYSIS 2–3 (2023), <https://crsreports.congress.gov/product/pdf/R/R47646> [perma.cc/E3MU-LQ7A].

<sup>105</sup> BRUCE R. LINDSAY, CONG. RSCH. SERV., R42702, STAFFORD ACT DECLARATIONS 1953–2016: TRENDS, ANALYSES, AND IMPLICATIONS FOR CONGRESS 30 (2017), <https://crsreports.congress.gov/product/pdf/R/R42702> [perma.cc/97VY-Z63K].

<sup>106</sup> WILLIAM L. PAINTER, CONG. RSCH. SERV., R4767, DISASTER RELIEF FUND STATE OF PLAY: IN BRIEF 6–7 (2025), <https://www.congress.gov/crs-product/R47676> [perma.cc/RC5D-ZPR2].

<sup>107</sup> 42 U.S.C. § 5151(a).

<sup>108</sup> *Id.* (emphasis added).

In addition, the provision requires other “government bodies” and nongovernmental organizations involved in the federal response to follow this same standard.<sup>109</sup> The broad list of protected classes and the mandate’s application to actors outside FEMA has led legal analysts Hannah Perls and Dane Underwood to call this provision “one of the most inclusive and comprehensive” nondiscrimination statements in all of “federal law.”<sup>110</sup> The language unquestionably suggests a broad concern for all victims of catastrophic harm, whatever their station. But, by its terms, the mandate seems limited to activities occurring *after* a disaster or emergency has already been declared. How this language might inform a decision of *whether* to allow or invite disaster declarations based on heat remains to be seen.

## 6. Heat allergy

It is impossible to know why FEMA is “allergic” to extreme heat. Agency officials’ past justifications for ignoring heat—that they are just “atmospheric conditions,” or less compelling than other events—seem unconvincing.<sup>111</sup> And the ultimate decision-making process—between the President and his or her top advisors—is a black box.<sup>112</sup> Many outside observers think the real issue is money. “There’s a fear of opening that door and realizing how much need there is going to be,” Grace Wickerson, a policy manager for the Federation of American Scientists, told Politico, “We don’t have the capacity to add on other disasters.”<sup>113</sup> That is a legitimate concern. But the answer to increased disaster threats cannot be for the responsible agency to bolt the door and hope someone else responds. If, as I argue, extreme heat is an obvious part of FEMA’s delegated authority, it should answer the call.

That said, there *are* differences that might distinguish extreme heat from other disasters listed under the Act. First, in some regions extreme heat may soon become more common and predictable than other catastrophic events. I am not referring to seasonality. FEMA was

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<sup>109</sup> 42 U.S.C. § 5151(b).

<sup>110</sup> DANE UNDERWOOD & HANNAH PERLS, EQUITABLE DISASTER RELIEF: AN ANALYSIS OF FEMA’S LEGAL AUTHORITY TO INTEGRATE EQUITY UNDER THE STAFFORD ACT 8 (2021), <https://eelp.law.harvard.edu/equitable-disaster-relief-an-analysis-of-femas-legal-authority-to-integrate-equity-under-the-stafford-act/> [perma.cc/SRA8-9FPV].

<sup>111</sup> See *supra* Part I and *infra* Part IV.B.3.

<sup>112</sup> Matt Sedlar, a climate analyst at the Center for Economic and Policy Research put it this way: “The problem is that this whole process, once you get above FEMA to the Department of Homeland Security and between the president, those conversations are executive privilege, so we can’t analyze what’s going on there. It could just be a political decision.” See Dana Cronin, *Can Trump Really Withhold Fire Relief from California? He’s Tried It Before*, KQED (Nov. 14, 2024), <https://www.kqed.org/news/12014403/can-trump-really-withhold-fire-relief-from-california-hes-tried-it-before> [perma.cc/BZ4W-FB6A].

<sup>113</sup> Frank, *supra* note 71.

wrong to suggest that “seasonal or general atmospheric conditions” was enough to disqualify the 2022 Heat Dome as a major disaster.<sup>114</sup> Hurricanes are seasonal, after all, and closely dependent on general atmospheric conditions like temperature and humidity. But hurricanes are still comparatively rare. Recall that the ICF estimates that in twenty-five years parts of the southern United States will feel extreme heat one third of the year. When does hardship graduate from “disaster” to “business as usual”?

Second, heatwaves are sneaky. You might not know you are in one until a day or two has passed. Often the cause of death or illness is less obvious at the time and requires statistical analysis (comparing death rates, say, in “normal” years to death rates in heat-challenged years) rather than direct observation. Sneakiness is not always a disqualifier. Drought, a type of disaster specifically listed in the Stafford Act, materializes even more slowly. The U.S. Drought Mitigation Center, for instance, must assess an array of separate indicators over weeks and months to identify and classify a drought.<sup>115</sup> And some particularly damaging storms, such as Hurricane Maria, required statistical analysis to calculate a death toll of 2,975.<sup>116</sup> But it seems true that, on account of its anticipated commonness and its less visible effects, extreme heat will challenge the cultural meaning of disaster as the climate continues to break down.

A third and related point is that extreme heat is often accompanied by other extreme events like wildfire or drought, making it hard to link cause with effect. Presidents generally (but not always) declare a major disaster for a discrete event.<sup>117</sup> As the CRS explained in a recent report on slow-onset disasters, “the President has discretion to make such a declaration, and as damages caused by slow-onset, compound, or cascading incidents may not be easily attributable to a single event, incidents involving one or multiple, related hazards may receive inconsistent treatment.”<sup>118</sup> Governor Newsom’s 2022 disaster request,

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<sup>114</sup> BOYLE ET AL., *supra* note 10, at 10.

<sup>115</sup> See NAT'L DROUGHT MITIGATION CTR. ET AL., *Drought Classification*, U.S. DROUGHT MONITOR, <https://droughtmonitor.unl.edu/About/AbouttheData/DroughtClassification.aspx> [perm a.cc/N4EN-495T] (last visited Jan. 23, 2025); see generally *Drought Monitoring Tools*, NAT'L DROUGHT MITIGATION CTR., <https://drought.unl.edu/Monitoring/DroughtMonitoringTools.aspx> [p erma.cc/86J3-UG2U] (last visited Jan. 23, 2025).

<sup>116</sup> CARLOS SANTOS-BURGOA ET AL., MILKEN INSTITUTE SCHOOL OF PUBLIC HEALTH, ASCERTAINMENT OF THE ESTIMATED EXCESS MORTALITY FROM HURRICANE MARÍA IN PUERTO RICO 9 (2018), [https://hsrcc.himmelfarb.gwu.edu/cgi/viewcontent.cgi?article=1287&context=sphhs\\_global\\_fapubs](https://hsrcc.himmelfarb.gwu.edu/cgi/viewcontent.cgi?article=1287&context=sphhs_global_fapubs) [perma.cc/TK6-8H2D] (independent report commissioned by the Government of Puerto Rico).

<sup>117</sup> The CRS points out: “there are examples of multiple, related hazards being included in a single declaration (e.g., a single declaration for noncontiguous wildfires and flooding and mudslides).” DIANE HORN ET AL., *supra* note 92, at 2.

<sup>118</sup> *Id.*

which described damage from extreme heat as well as six wildfires across six counties, illustrates the point.<sup>119</sup>

Finally, extreme heat—for all its risks to life and human health—does not always damage *property* to the same extent. FEMA’s choice of nonintervention, explained by an investigator for National Public Radio in a recent report, “stems from a longstanding convention: FEMA responds to natural disasters like hurricanes or earthquakes—disasters with major and obvious damage to physical infrastructure.”<sup>120</sup> This emphasis on “property over people” is a recurring theme in news analysis on this subject.

Heat’s supposed lack of material effects is not entirely true. Heatwaves can seriously damage homes, commercial buildings, and public infrastructure. “Your home’s roof really takes a beating in excessive heat,” says Corbin Clay, a custom home builder and founder of the homeowner advising platform Wayhome.<sup>121</sup> “Direct sunlight and increased temperatures can cause blistering, warping, and cracking on any roof material, especially asphalt shingles. Additionally, any rubber boots around vents or rubberized sealants (like caulk or tar) can become dry and brittle, potentially leading to leaks.”<sup>122</sup> Extreme heat also taxes air conditioning systems, erodes wood siding and decking materials, and, when accompanied by high humidity, supercharges the spread of mold and mildew.<sup>123</sup>

In scorching temperatures, public roadways, runways, and railways can buckle and slump.<sup>124</sup> High-voltage transmission lines lose efficiency and sag into tree canopies, threatening “flashovers,” explosions, and fire.<sup>125</sup> That effect, combined with spikes in energy demand from ramped-up air conditioning, can easily lead to prolonged power outages and a whole new wave of property damage and public health emergencies.<sup>126</sup>

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<sup>119</sup> See Letter from Gavin Newsom, *supra* note 2.

<sup>120</sup> Alejandra Borunda, *Why Isn’t Extreme Heat Considered a Disaster in the U.S.?*, NPR (June 18, 2024), <https://www.npr.org/2024/06/18/61503785/extreme-heat-disaster-fema-climate> [perma.cc/D8RN-GNAH].

<sup>121</sup> Jamie Gold, *Protecting Your Home from Extreme Heat Damage*, FORBES (Aug. 22, 2023) <https://www.forbes.com/sites/jamiegold/2023/08/22/protecting-your-home-from-extreme-heat-damage/> [perma.cc/96VU-6XX3] (interviewing “Corbin Clay, a Raleigh, North Carolina, area custom home builder and founder of homeowner advice platform Wayhome”).

<sup>122</sup> *Id.*

<sup>123</sup> Nicole Lozano, *Protecting Your Home from Extreme Heat*, CHUBB, <https://www.chubb.com/us-en/individuals-families/resources/protecting-your-home-from-extreme-heat.html> [perma.cc/3DN2-ZUDM] (last visited Aug. 22, 2025).

<sup>124</sup> U.N. Econ. Comm’n for Europe [ECE], *Climate Change Impacts and Adaptation for International Transport Networks*, at 77–85 (2020).

<sup>125</sup> VERCHICK, *supra* note 29, at 110–11.

<sup>126</sup> See JOINT ECON. COMM. DEMOCRATS, *supra* note 53, at 6.

As I will explain later, this formulation of “property over people” seems more about convention than law.<sup>127</sup> Still, property damage can be difficult to assess in the early days of a heat event, and attribution can be challenging on account of overlapping factors that could include drought, fire or power outages. These differences should not justify excluding extreme heat from Stafford’s family of “natural disasters,” even if they might make preliminary assessments more difficult. I will expand more on the preliminary assessment process in Part IV.B.2. In particular, I will highlight FEMA’s assessment of snowstorms—a commonly accepted category of “major disaster” that is *not* associated with high levels of property loss or damage. In addition, as I show in the next part, considerations of fairness and justice weigh heavily on the side of inclusion.

### III. DISASTER JUSTICE

We cannot successfully respond to a disaster without knowing *who* is most affected and *why*.<sup>128</sup> We have known for decades that natural disasters heap disproportionate harm on disadvantaged groups. As I wrote back in 2012, in an article called “Disaster Justice,” “Studies consistently show that in a disaster, poor people and people of color are more likely to suffer property damage, injury, and death.”<sup>129</sup> Such groups are also more likely to be unprepared for a disaster, less likely to receive life-saving information, and less likely to fully recover.<sup>130</sup> Many disaster disparities reach beyond income and race to age, sex, disability, education, LGBT status, and more.<sup>131</sup> Much of the problem is, of course, related to more general structural inequities in economic and political life.<sup>132</sup>

Much of what we know comes from a rich vein of social science that is concerned with “social vulnerability,” which the CDC defines as “the demographic and socioeconomic factors . . . that adversely affect communities that encounter hazards and other community-level

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<sup>127</sup> See *infra* Section IV.B.3.

<sup>128</sup> I borrow this formulation from Clifford Villa. See Clifford Villa, *Remaking Environmental Justice*, 66 LOYOLA L. REV. 469, 512 (2020) (citing Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 ENV’T L. 371, 379–80 (2008)).

<sup>129</sup> Robert R.M. Verchick, *Disaster Justice: The Geography of Human Capability*, 23 DUKE ENV’T L. & POL’Y F. 23, 42–43 (2012) [hereinafter Verchick, *Disaster Justice*] (citing studies in the United States from 1957 to 2006); see also ROBERT R.M. VERCHICK, *FACING CATASTROPHE: ENVIRONMENTAL ACTION FOR A POST-KATRINA WORLD*, 105–11, 130–42 (2010) (discussing historical inequities in disaster burdens as well as those associated with Hurricane Katrina).

<sup>130</sup> Verchick, *Disaster Justice*, *supra* note 129, at 42.

<sup>131</sup> VERCHICK, *supra* note 29, at 48–49.

<sup>132</sup> *Id.* at 48–52.

stressors [including] natural or human-caused disasters.”<sup>133</sup> Interest in the *social* side of disaster impacts can be traced to Jean-Jacques Rousseau’s analysis of the 1755 Lisbon earthquake,<sup>134</sup> but the idea was not formally taken up by researchers in the United States until after World War II.<sup>135</sup> The main insight is that a community’s risk of damage from an external hazard, like a disaster, is a combination of both *physical* vulnerability (geophysical characteristics and characteristics of the built environment) and *social* vulnerability (race, sex, age, wealth, health, and so on).<sup>136</sup> If your goal is to reduce as much community risk as you can, you need to know about both the vulnerabilities of the *place* and the vulnerabilities of the *people*.

We already know that the combination of physical heat in poorly protected areas and especially susceptible populations result in extreme human suffering causes more death and illness than the events that FEMA already addresses. That alone merits a change in policy. But there is more. While more investigation is needed, I think there are reasons to believe that extreme heat—in ways beyond that of other catastrophes—hammers disadvantaged groups harder. Consider, first, geography. Unlike hurricanes or floods, which are geographically constrained, extreme heat affects nearly all regions and, given climate change, will mercilessly expand. Heat also disproportionately targets urban areas (on account of the “heat island effect”), making the disparities more widespread and harder to address with relocation alone. That 25 million people in Justice40 communities sit in the heat-stress crosshairs makes the point.

Next, consider housing conditions. The lack of air conditioning or the inability to afford its use is a unique factor with heat that is extremely widespread. In California, nearly 30% of homes lack air conditioning of any kind; in Washington state, nearly half go without.<sup>137</sup> As we learned earlier, poor communities and communities of color are particularly exposed because they are more likely to live in hotter, more

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<sup>133</sup> *Social Vulnerability Index*, Agency for Toxic Substances and Disease Registry [ATSDR], <https://www.atsdr.cdc.gov/place-health/php/svi/index.html> [perma.cc/6E4B-8NSN] (last visited Jan. 23, 2025).

<sup>134</sup> At a time when philosophers and poets were attributing the horrors of the 1755 Lisbon earthquake to either divine will or the vagaries of nature, Rousseau proposed a third option: the failure of sound city planning. Rousseau’s observation that “[m]ost of our physical ills are still our own work” anticipates today’s social scientific view of disasters by centuries. See Verchick, *Disaster Justice*, *supra* note 129, at 29–33 (quoting letter from J.J. Rousseau to M. de Voltaire, August 18, 1756).

<sup>135</sup> *Id.* at 41.

<sup>136</sup> *Id.* at 38.

<sup>137</sup> U.S. Energy Info. Admin., *Highlights for Air Conditioning in U.S. Homes by State, 2020* (Mar. 2023), <https://www.eia.gov/consumption/residential/data/2020/state/pdf/State%20Air%20Conditioning.pdf> [perma.cc/76EV-G9ZP].

barren “heat islands.”<sup>138</sup> Consider what we learned about the federal energy assistance program’s preference for cold-weather states over hot-weather states.<sup>139</sup> Recall that the top per-capita recipients from 2018 to 2024 were Vermont, North Dakota, and Maine—three states whose non-Hispanic white populations vary from 83–92%.<sup>140</sup> In contrast, the bottom per-capita recipients—Hawai‘i, Arizona, and California—all have *non-white (and/or Hispanic)* populations ranging from 47 to 78%.<sup>141</sup>

As with housing vulnerabilities, health-based risks to heat are also particularly broad, given its connection to so many pre-existing conditions and occupational settings. (Remember, many outdoor workers remain *on the job* during heatwaves, in contrast to storms or floods when many people are sent home.)

Finally, heat lacks the spectacle of other disasters. Unlike hurricanes or wildfires, extreme-heat events (is there a clunkier phrase?) do not even have proper names. There is no Katrina Dome, Horatio Heat, or Florence Fever.<sup>142</sup> There are no breaking-news events showing garbage haulers on I.V.s in the emergency rooms or TikTok influencers, shriveling in the sun, massaging ice on their necks. This makes mobilizing resources and public attention for heat emergencies more challenging, a deficit that hurts disadvantaged groups in particular. In addition, cooling centers and heat advisory services are even more underfunded than, say, levee systems or wildfire mitigation programs.

A decade earlier, I wrote that disaster response “is more than a politician’s kind turn, more than charity; it is the obligation of a free society. To fail to provide it is an injustice.”<sup>143</sup> That sentiment is reflected in Congress’s effort to institutionalize federal disaster response and recovery services after World War II, making them more consistent and accessible.

The connection between disaster response and justice is also bound in liberal commitments to freedom and democracy. You can see this in

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<sup>138</sup> See Newsome, *supra* note 59.

<sup>139</sup> See *supra* Section II.A.

<sup>140</sup> According to data from the 2020 U.S. Census, the percentage of the population that identifies as “[w]hite alone, not Hispanic, or Latino” are as follows: Vermont, 91.5%; Maine, 91.8%, and North Dakota, 82.6%. See *Quick Facts*, U.S. CENSUS BUREAU <https://www.census.gov/quickfacts/> [perma.cc/V5YB-LTV5] (last visited Jan. 23, 2025).

<sup>141</sup> According to data from the 2020 U.S. Census, the percentage of the population that identifies as “[w]hite alone, not Hispanic, or Latino” are as follows: Hawai‘i, 21.5%; Arizona, 53.4%, and California, 34.3%. *Id.*

<sup>142</sup> The Times Editorial Board, *Editorial: Should We Name Heat Waves? It’s Worth a Try to Save Lives*, L.A. TIMES (July 28, 2023), <https://www.latimes.com/opinion/story/2023-07-28/la-naming-heat-waves> [perma.cc/W343-SPMC].

<sup>143</sup> Verchick, *Disaster Justice*, *supra* note 129, at 67.

the works of political philosophers like Amartya Sen who stress the role of “basic capability” in assessing freedom.<sup>144</sup> For Sen, freedom demands that all persons have the real-life capabilities to “lead the kind of lives they have reason to value.”<sup>145</sup> That includes the capability to escape “morbidity and premature mortality,”<sup>146</sup> an entitlement Sen has linked to government protection from catastrophic environmental and climate-related harm.<sup>147</sup> A working democracy is important because the best responses and protective plans will come when those affected are meaningfully included in the decision making. Democracy also helps ensure accountability when the government fails to meet its obligations.<sup>148</sup>

More recently, the legal philosopher Martha Albertson Fineman has developed an alternate framing she calls “vulnerability theory,” which I think offers additional insight into FEMA’s treatment of extreme heat.<sup>149</sup> Fineman posits that because vulnerability is inherent in the human condition, the government has an ethical responsibility to respond affirmatively to that vulnerability, ensuring that people have equal access to societal institutions (public and private) that allocate important resources like security, employment, and healthcare.<sup>150</sup> As “embodied beings,” Fineman notes that we are all “vulnerable to physical, environmental, social, and material changes that affect our well-being.” We are therefore inherently dependent on an array of “interconnected social institutions,” from family, to markets, to government.<sup>151</sup> This much, I believe, Sen would agree with.

What separates Fineman’s approach from Sen’s is the conclusion she reaches. Her acknowledgment of universal vulnerability leads her

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<sup>144</sup> See VERCHICK, *supra* note 29, at 58; Verchick, *Disaster Justice*, *supra* note 129, at 56. Part of my discussion of liberty and equity in disaster policy draws from these earlier works.

<sup>145</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM 10 (Alfred Knoff Inc. 1999).

<sup>146</sup> *Id.* at 36.

<sup>147</sup> See *id.* at 70, 177–78.

<sup>148</sup> *Id.* at 180–86.

<sup>149</sup> See, e.g., Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VAL. U. L. REV. 341, 342 (2019).

<sup>150</sup> My discussion of Fineman’s approach draws from Martha Albertson Fineman, *Understanding the Duty to Care: A Vulnerability Perspective*, BLOG APA (May 16, 2024), <https://blog.apaonline.org/2024/05/16/understanding-the-duty-to-care-a-vulnerability-perspective/> [perma.cc/88RX-6NZ4] [hereinafter Fineman, *Understanding the Duty to Care*]; Martha Albertson Fineman, *Universality, Vulnerability, and Collective Responsibility*, 16 LES ATELIERS DE L’ÉTHIQUE/ETHICS F. 103 (2021) [hereinafter, Fineman, *Universality, Vulnerability, and Collective Responsibility*]; Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VAL. U. L. REV. 341 (2019); Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO L. REV. 133 (2017) [hereinafter Fineman, *Vulnerability and Inevitable Inequality*]; Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L. REV. 251 (2010); and Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1 (2008) [hereinafter Fineman, *The Vulnerable Subject*].

<sup>151</sup> Fineman, *Understanding the Duty to Care*, *supra* note 150.

to discredit liberalism's emphasis on the "unrealistic valorization of . . . individual autonomy, independence, liberty, and equality."<sup>152</sup> Instead, Fineman demands a governmental "duty to care," committed to building societal "resilience."<sup>153</sup> This would include efforts to help people "recover from harm, setbacks and the misfortunes that affect our lives."<sup>154</sup> But crucially: "The question of care would not be primarily framed as a 'right' belonging to the individual but as a 'responsibility' placed upon the state in its creation and design of legal institutions and relationships."<sup>155</sup> The idea is that rather than zapping social inequities one-by-one, the government should work more broadly to support social resilience across all populations.

I am not ready to give up on liberalism. I think rights discourse still provides a bulwark against some of our worst inequalities. But I do think Fineman's approach can serve as a supplement to rights discourse, and that it is particularly suited to disaster policy.<sup>156</sup> The reason is that, while disasters do hurt some groups in tragically disproportionate ways, their negative effects are nonetheless widespread across populations. Fire and flood smite elite households too.

In the disaster context, Fineman's approach helps in two ways. First, by detaching vulnerability from specific vulnerable groups, we emphasize the fact that we are *all* vulnerable and will experience dependency in continual and in countless ways. This emphasis, Fineman believes, would reduce the stigma of vulnerability, which is too often seen as a weakness or failing.<sup>157</sup> As someone who interacts frequently with local communities in Louisiana on climate resilience efforts, I can tell you there is no faster way to earn rebuke than to refer to a locality as "socially vulnerable." And, no, it does not matter that that is the "accepted" academic term.

The point is that, while group-based vulnerability is real, reformers lose ground by too often focusing on that. We can acknowledge, as Fineman does, that discrimination and disadvantage exist and that these will sometimes require specific judicial action.<sup>158</sup> But a perspective of universal vulnerability to disaster can encourage a more comprehensive approach to building community resilience.

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Fineman, *Vulnerability and Inevitable Inequality*, *supra* note 150, at 146.

<sup>155</sup> Fineman, *Understanding the Duty to Care*, *supra* note 150.

<sup>156</sup> While Fineman rejects the liberal, rights-based model, she has in her later writings allowed that her theory could serve as a valuable supplement to that model without necessarily replacing it. *See id.*

<sup>157</sup> Fineman, *Universality, Vulnerability, and Collective Responsibility*, *supra* note 150, at 4.

<sup>158</sup> *Id.* at 5.

Systemic reform is not the only win. Applying policies across populations may be less politically divisive. In one recent study, communications researchers found that messages formulated as intending to help “vulnerable” groups “often activate a mind-set known as otherism, which can make people less likely to support interventions that cost money.”<sup>159</sup> In contrast, “framing the same issue in terms of social progress and future prosperity triggers a sense of collectivism, which can increase support for the same interventions.”<sup>160</sup> This seems particularly true of disaster resilience, where the point is not just to revitalize a household, but to resurrect an entire neighborhood, city, or region. It does no good to invest in the shop owner if the customers are broke, retrofit the school if the students are gone, or harden the refinery if the workers have taken other jobs. Anyone whose community has survived a tornado or flood can tell you that. Communities rebound most effectively when everyone plays a role.

The second way that Fineman’s approach helps is by training a spotlight on “institutions”—not just individual actions. That “redirect[s] our attention” to the institutional role of “providing assets in ways that may unfairly privilege certain persons or groups, even if unintentionally.”<sup>161</sup> For heat-protection advocates, this point is on the nose. The Stafford Act, with all its heroic promise, grants wide berth to the executive branch. As I will show in Part IV, FEMA and the President have considerable discretion in whether or how to address extreme heat and the prospect of court intervention seems low. Showing that extreme heat imposes disproportionate impacts on protected groups beyond that of many other catastrophic events would not change the calculus: by its terms, the nondiscrimination mandate applies only to allocations of resources deployed *after* a disaster has been declared. This means that action on heat must be directed toward the executive and legislative branches, not the courts.

In our era of government dysfunction, this all can be tough to hear. But in visualizing our hopes for a new era, we must acknowledge that courts alone cannot build the resilient nation we need. In fact, as Robin West, another legal philosopher, has argued, too much reliance on the judiciary makes our other institutions weak and flabby.<sup>162</sup> Sometimes we must shift our “hermeneutic skills,” as she puts it, “away from the forum in which such arguments will likely never prevail—the courts—

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<sup>159</sup> Jenna Interlandi, *We Tire Very Quickly of Being Told That Everything Is on Fire*, N.Y. TIMES (Nov. 21, 2024), [https://www.nytimes.com/2024/11/21/opinion/public-health-crisis-america.html?utm\\_id=nytcore-ios-share&referringSource=articleShare](https://www.nytimes.com/2024/11/21/opinion/public-health-crisis-america.html?utm_id=nytcore-ios-share&referringSource=articleShare) [perma.cc/X4JX-4ZPG].

<sup>160</sup> *Id.*

<sup>161</sup> Fineman, *The Vulnerable Subject*, *supra* note 150, at 18.

<sup>162</sup> See generally Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127 (2006).

and to those fora in which they may well make a difference: legislatures that may indeed have moral and Constitutional duties to legislate on behalf of the well-being of all.”<sup>163</sup> To that, I would add federal agencies and their rulemaking powers.

#### IV. EXTREME HEAT AS A MAJOR DISASTER

##### A. A Proposal

In the case of extreme heat, we have already seen certain biases in federal policy that keep us from addressing community hazard. As we saw in the previous part, one of the strongest and most destructive biases (conscious or not) is the failure to show proper concern for marginalized or more susceptible groups. But we have seen other biases too. There is a bias to respond to cold temperatures over hot, a historical vestige now perpetuated in legislative inertia. There is a bias toward hazards with property damage, which is easier to assess (this may also be related to a bias toward wealth). And there is a bias towards non-overlapping, discrete events, which again are often easier to assess.

Given the severity of extreme heat events, their disproportionate effects on vulnerable populations, and the broad protection promised under the Stafford Act, immediate action is needed. It would be best for Congress to amend the Stafford Act to explicitly include extreme heat and its special characteristics into the Act’s disaster definition and its aid programs. This should be the first step in developing a whole-of-government approach to fighting extreme heat. Such an approach would coordinate agencies (FEMA, HHS, OSHA, the Department of Housing and Urban Development, and the National Oceanic and Atmospheric Administration, to name a few) and affiliated programs to work together to address extreme heat. This would improve housing, re-landscape neighborhoods, provide affordable home-cooling options, strengthen the power grid, expand health and safety services, and more. But even as we advocate for this, legislative paralysis on Capitol Hill means this dream is unlikely in the short term.

In absence of a legislative approach, FEMA should take action to increase the chances that states and Tribal governments threatened by extreme heat can receive their fair share of disaster funds, from individual assistance, public assistance, or hazard mitigation funds. That would require FEMA to immediately begin developing regulations and guidelines that make clear extreme heat can qualify for disaster aid under certain conditions and to provide a template for affected governments to use in requesting such aid.

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<sup>163</sup> *Id.* at 1129.

Specifically, FEMA should amend its regulatory definition of “major disaster,” set forth in 44 C.F.R. § 206.2(a)(17), to include the words “extreme heat.” It would thus read: “Major disaster: any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, *extreme heat*, or drought).”<sup>164</sup> The agency should then work with public health officials to prescribe an appropriate index for an actionable extreme heat event, perhaps based on the temperature’s deviation from historical records and the capability of the government to effectively respond. As we will see, this approach resembles FEMA’s current index for snowstorms.<sup>165</sup> FEMA should then fold that index into guidance materials, other instructive materials, and templates to explain to state, Tribal, and local officials precisely how to effectively request aid for extreme heat. Finally, FEMA should use its authority to approve disaster mitigation plans to commit state, Tribal, and local governments to adopt strong heat standards for businesses and public buildings.

In the absence of such regulatory reform, FEMA should at the very least make good on then-Administrator Deanne Criswell’s statement about the availability of disaster aid for extreme heat and pursue, along with the President, a course toward declaring disasters for extreme heat when the welfare of affected communities warrants it.<sup>166</sup>

## B. Objections

We can imagine a number of objections to this plan. “It would cost too much money!” might be your first reaction. While the “fear of opening that door” to greater need is real,<sup>167</sup> I am going to leave this argument aside. The government’s disaster funding during the COVID-19 pandemic shows the money can be found when the political will exists. Even assuming that appropriations to the DRF return to something closer to pre-COVID levels, it is no argument to say Nevadans must collapse at the bus stop so Louisianans can unplug the storm drains.<sup>168</sup> Americans with similar needs and who bear similar risks should be treated the same.<sup>169</sup>

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<sup>164</sup> See Ctr. for Biological Diversity et. al., *supra* note 25, at 37 (making a similar recommendation).

<sup>165</sup> See *infra* Section IV.B.2.

<sup>166</sup> See *FEMA: The Current State of Disaster Readiness, Response, and Recovery*, *supra* note 98.

<sup>167</sup> See *supra* Section II.B.6.

<sup>168</sup> As a Nevada native who lives in Louisiana, I am comfortable making this call.

<sup>169</sup> In addition, investments in hazard mitigation provide surprising economic benefits compared to their cost. See generally K. PORTER, NATIONAL INSTITUTE OF BUILDING SCIENCES, NATURAL HAZARD MITIGATION SAVES: 2019 REPORT (2019), [https://nibs.org/wp-content/uploads/2025/04/NIBS\\_MMC\\_MitigationSaves\\_2019.pdf](https://nibs.org/wp-content/uploads/2025/04/NIBS_MMC_MitigationSaves_2019.pdf) [perma.cc/846Z-W4VH] (showing overall benefit-

But there are other arguments, based on law and/or fairness, that we should consider, namely:

1. The Act's text does not include extreme heat;
2. Heat damages people more than property, and the Act cares more about property; and
3. FEMA and the President lack authority to do more under current administrative law doctrines. This is a job for Congress.

I'll address each briefly.

1. Objection One: The Act's text does not include extreme heat.

While extreme heat does not appear in the text of the Act's definition of "major disaster" (or indeed anywhere else), that should not matter. There is ample support in the text, purpose, and implementation of the Act to allow FEMA to add heat to its regulations and guidelines and for the President to rely on it in making a decision. In full, the Act's definition reads:

"Major disaster" means any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.<sup>170</sup>

The provision is a little circular, and the limits are vague. Rather than construe the text in any helpful way, FEMA regulations simply adopt this language verbatim.<sup>171</sup> But that does not mean the agency could not add extreme heat or create a free-standing regulation on that phenomenon if it wanted to. Let us start with the term "natural catastrophe."<sup>172</sup> Searching for the plain meaning of these words, we

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cost ratios ranging from 4:1 to 11:1 for mitigation focused on riverine flood, hurricane surge, wind, earthquake, and wildfire, but *not* extreme heat). From the perspective of maximizing benefit, it would appear government should spend as much as it reasonably can on mitigating risk.

<sup>170</sup> 42 U.S.C. § 5122(2).

<sup>171</sup> 44 C.F.R. § 206.2(a)(17).

<sup>172</sup> My interpretative approach starts with the widely shared theory of "legislative supremacy,"

might consult a dictionary from the decade in which the Stafford Act was passed. The 1987 edition of *The Random House Dictionary* defines *catastrophe* as “[a] sudden and widespread disaster.”<sup>173</sup> *Disaster*, in turn, is defined as “[a] calamitous event, especially one occurring suddenly and causing great loss of life, damage, or hardship.”<sup>174</sup> The loss of hundreds of lives in only a matter of days surely meets that test. California: 395 deaths in ten days; Chicago: 400 deaths in five days; Missouri: 400 deaths in eighteen days. Box checked.

“Natural,” according to the same dictionary, means “[e]xisting in or formed by nature.”<sup>175</sup> Extreme heat is natural in this sense, so long as we leave out anthropogenic climate change as a possible contributor (which, if we do not, would erase almost everything on the statutory list). In addition, many emergency response organizations also treat extreme heat as a catastrophic event. For instance, the International Federation of Red Cross and Red Crescent Societies, with whom the federal government is closely associated, explicitly classifies extreme heat as a “disaster” hazard.<sup>176</sup> Second box checked.

Next, we should consider the term “any” and the line of parenthetical train cars (“hurricane, tornado, storm . . .”) following the term “including.” Is that the complete list? Under accepted canons of statutory interpretation, no. Without some contradictory evidence, the term “any” is to be read as open-ended, and the term “including” is to be read as nonexclusive, making room for the coupling of more cars.<sup>177</sup> If Congress meant otherwise, it would have swapped “including,” for “consisting of.”<sup>178</sup>

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which seeks “to give effect to the intent of Congress” in some objective way. See *United States v. Am. Trucking Ass’ns, Inc.*, 310 U.S. 534, 542 (1940). For more on “legislative supremacy,” see John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2413, 2425 (2017). The contemporary interpretive methods of textualism and purposivism both follow from this idea. VALERIE C. FRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 10 (2024), <https://crsreports.congress.gov/product/pdf/R/R45153> [https://perma.cc/J5E5-H75K]. Readers will see that while I hew closely to text, I am a purposivist at heart.

<sup>173</sup> THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 326 (2d ed., 1987).

<sup>174</sup> *Id.* at 561.

<sup>175</sup> *Id.* at 1280.

<sup>176</sup> *What is a disaster?*, IFRC, <https://www.ifrc.org/our-work/disasters-climate-and-crises/what-disaster> [perma.cc/L768-WMKK].

<sup>177</sup> “For example, the Eighth Circuit construed a statute that allowed the government to seize “any property, including money,” to mean both real and personal property.” The Writing Center at Georgetown University Law Center, *A Guide To Reading, Interpreting And Applying Statutes*, (2017), <https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf> [perma.cc/2CJY-7GPD] (citing *United States v. South Half of Lot 7 & Lot 8, Block 14*, 910 F.2d 488, 490–91 (8th Cir. 1990)); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 101, 132–33 (2012) (explaining general-terms canon and the presumption of nonexclusive “include.”).

<sup>178</sup> See *South Half*, 910 F.2d at 490–91.

The Act's stated purpose supports a broad reading too. The Congressional findings, announced in the opening text emphasize the need to address the "loss of life, human suffering, loss of income, and property loss and damage" caused by disaster.<sup>179</sup> Part of Congress's intent is to assist states and local governments by "revising and broadening the scope of existing disaster relief programs."<sup>180</sup> An additional goal, added in 2022, was to improve "climate and natural hazard resilience of vulnerable communities."<sup>181</sup> If the goal is to reduce climate-related death and suffering among vulnerable communities, it is hard to imagine a hazard that merits more attention than extreme heat.

Finally, we might gain insight from how FEMA and the President have interpreted the Stafford Act in the recent past. Recall my statement earlier that policy makers once debated whether a pandemic—which is mentioned nowhere in the Stafford Act and which damages no property—might qualify as a "major disaster."<sup>182</sup> COVID-19 answered that question. During that period, President Trump approved fifty-seven major disasters based on the COVID-19 pandemic in all fifty states; five territories; Washington, D.C.; and for the Seminole Tribe of Florida.<sup>183</sup> It was the first time Stafford's disaster declaration had been used this way. In all, FEMA has dispersed more than \$109 billion for vaccine testing and distribution, shelters, personal protective equipment, funeral services, and more.<sup>184</sup> (For comparison, the nearest competitor is funding in response to Hurricane Maria, which hit the northeastern Caribbean in 2017 and, as of late 2021, represented \$34 billion in FEMA obligations).<sup>185</sup> To my knowledge, no COVID-19 declaration has ever been legally challenged—something we can all be thankful for.

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<sup>179</sup> 42 U.S.C. § 5121(a)(1).

<sup>180</sup> 42 U.S.C. § 5121(b)(1) (emphasis added).

<sup>181</sup> 42 U.S.C. § 5121(b)(7) (emphasis added). *See* Community Disaster Resilience Zones Act of 2022, Pub. L. No. 117-255, 136 Stat. 2363 (2022) (adding language about climate and natural hazard resilience in vulnerable communities).

<sup>182</sup> *See supra* Section II.B.3.

<sup>183</sup> *COVID-19 by the Numbers*, FEMA, <https://www.fema.gov/disaster/historic/coronavirus/new-s-multimedia/covid-19-numbers> [perma.cc/K6PG-DU4T]; Press Release, FEMA, President Donald J. Trump Approves Major Disaster Declaration for Seminole Tribe of Florida (May 8, 2020), <https://www.fema.gov/news-release/20200514/president-donald-j-trump-approves-major-disaster-declaration-seminole-tribe> [perma.cc/GCT9-6XVZ] (last updated May 15, 2023).

<sup>184</sup> Hugh Cameron, *FEMA Spending on COVID-19 Dwarfs Hurricane Helene Response*, NEWSWEEK (Oct. 8, 2024), <https://www.newsweek.com/fema-funds-covid-more-hurricane-helene-1965563> [perma.cc/UM3L-DTTS].

<sup>185</sup> *DR-4339 Hurricane Maria by The Numbers*, FEMA (Nov. 2, 2021), <https://www.fema.gov/act-sheet/hurricane-maria-numbers> [perma.cc/5SA4-3MRB].

2. Objection Two: Heat damages people more than property, and the Act cares more about property.

I have already shown that extreme heat *does*, in fact, harm private and public property—from warped roofs to splintered decks to buckled highways to crippled power grids.<sup>186</sup> Property damage may not be as severe as what a hurricane or wildfire produces, but it is there. It is also true that assessment and attribution can be harder to confirm. For instance, the estimates of property damage submitted by Governor Newsom in his disaster request for the 2022 Heat Dome were dramatically higher than the estimate FEMA eventually settled on in its rejection of that request.<sup>187</sup> That is an argument for comprehensive assessments, not excluding extreme heat.

The bigger issue is that *neither* the Act *nor* the regulations emphasize property damage as much as outside observers (and maybe some agency staff) seem to think it does. There is no indication at all in these documents that property is to be valued *over* human lives in identifying a major disaster, or that some minimum property loss or damage (as opposed to a minimum need for assistance) is required *at all*.

Consider the legislative history. Congress’s declared purpose in the legislation was to address the “loss of life, human suffering, loss of income, and property loss and damage” caused by disaster.<sup>188</sup> Property “loss and damage” are on the list. But they are not listed first. Recall, too, Congress’s intent to “broad[en] the scope” of current disaster relief and to improve the “climate and natural hazard resilience of vulnerable communities.”<sup>189</sup> Vulnerable communities, by definition, will have quantified property loss and damage less than other communities. Monetized loss or replacement value is surely not the lodestar.

The Act’s definition of major disaster does speak of “damage of sufficient severity and magnitude” to warrant aid to states and others to alleviate “the damage, loss, hardship, or suffering caused thereby.”<sup>190</sup> But in this broad context, the term “damage” would appear to include not just material destruction, but also the kind of social and commercial disruption and economic loss that occurs when public health and safety is gravely impaired.

As it happens, FEMA’s regulations and past practices support this reading. Consider the eligibility standards for FEMA’s Public

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<sup>186</sup> See *supra* Section II.B.6.

<sup>187</sup> See Letter from Gavin Newsom, *supra* note 2; BOYLE ET AL., *supra* note 10, at 10.

<sup>188</sup> 42 U.S.C. § 5121(a)(1).

<sup>189</sup> 42 U.S.C. § 5121(a)(1), (7).

<sup>190</sup> 42 U.S.C. § 5122(2).

Assistance program, the mechanism that provides states and other governments with supplemental services and infrastructure to meet public needs. To determine if the severity of need warrants federal aid, FEMA looks to the “estimated cost of . . . assistance” (using a figure of \$1 per capita, adjusted for inflation, as a threshold indicator), “insurance coverage in force” (which cuts in favor of aid), and the amount of “hazard mitigation” in place (which again favors aid), among other factors.<sup>191</sup> The severity of damage—part of what the regulations would call “localized impacts”—is *only* considered if the per capita threshold is not met.<sup>192</sup>

In addition, FEMA considers whether the estimated cost of eligible public assistance would exceed a threshold of \$1 million dollars across a state or territory, or \$100,000 across a tribal jurisdiction.<sup>193</sup> As with the per capita threshold, that number is often met by factoring in the costs of repairing or replacing damaged property. But there is no rule that this must be the case. The test is always *cost of service*. During and after a tropical storm, those services might include opening evacuation facilities and collecting debris. During the COVID-19 disasters, assistance came in the form of testing centers, the distribution of protective masks, vaccine management, and more. For extreme heat, such assistance could include providing emergency water, cooling centers, evacuation services, and solar generators in times of power outages. For a heatwave affecting several cities or counties over many days, it seems entirely possible these thresholds could be met.

Eligibility for FEMA’s Individual Assistance program differs in that property damage plays a more significant role. Uninsured home and personal property losses is one of two “principal factor[s]” to be considered, the other being the requesting government’s “fiscal capacity” to help residents on its own.<sup>194</sup> But the remaining factors rely on property loss less directly or not at all. The list includes the need for “life sustaining services,” the need for “essential community services” (eldercare, childcare, schooling), disruption of transportation and utilities, the extent of the affected population’s social or economic challenges (as measured by income, unemployment, age, disability, and English-speaking ability), and the number of dead and injured.<sup>195</sup> The

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<sup>191</sup> 44 C.F.R. § 206.48(a). The considerations for Tribal governments are slightly different and can be found at FEMA, TRIBAL DECLARATIONS INTERIM GUIDANCE (2024), [https://www.fema.gov/sites/default/files/documents/fema\\_tribal\\_declarations\\_interim\\_guidance\\_april\\_2025.pdf](https://www.fema.gov/sites/default/files/documents/fema_tribal_declarations_interim_guidance_april_2025.pdf) [perma.c c/3GL3-2ETW].

<sup>192</sup> 44 C.F.R. § 206.48(a).

<sup>193</sup> ERICA A. LEE, CONG. RSCH. SERV., IF11529, A BRIEF OVERVIEW OF FEMA’S PUBLIC ASSISTANCE PROGRAM (2024), <https://www.congress.gov/crs-product/IF11529> [perma.cc/29PE-T4MU].

<sup>194</sup> 44 C.F.R. § 206.48(b)(1)–(2).

<sup>195</sup> 44 C.F.R. § 206.48(b)(4)–(5).

last two factors would appear to lean heavily in a state's favor in many extreme-heat situations. For extreme heat, individual assistance might include air conditioning, solar generators, home weatherization, roof repair, and energy-efficient appliances.

In sum, there is nothing in these regulations that rules out the eligibility of disaster aid for reasons of comparatively low property loss and damage. The 57 disaster declarations during COVID-19, which were not based on significant harm to property, prove that point. The harm was to people and not property.

A more prosaic example is snowstorms. As the CRS explains, FEMA policy acknowledges two types of "winter incidents": snowstorms and severe winter storms. Severe winter storms are defined by conditions of "snow, ice, high winds, . . . and other wintry *conditions that cause substantial physical damage or property loss.*"<sup>196</sup> Snowstorms, in contrast, are not associated with substantial damage and loss. The standard, instead, is based on whether the snowfall is *unusually heavy* (that is, whether it is at or near record measurements) and whether it "*overwhelms the capability*" of the requesting government.<sup>197</sup> FEMA's snowstorms assistance falls under the Public Assistance program and takes the form of services intended to prevent harm to people and property, such as plowing snow, sanding roads, rescuing drivers, and sheltering those without heat; replacing or repairing physical property is not even part of the remit.<sup>198</sup> If a record snowstorm can qualify as a major disaster, it is hard to see why a record heatwave should not.<sup>199</sup>

### 3. Objection Three: FEMA and the President lack authority to do more under current administrative law doctrines. This is a job for Congress.

How free are FEMA and the President to address extreme heat under the Stafford Act? What effect, if any, do recent Supreme Court decisions have on this question, namely, those decisions involving standing, judicial deference to agencies, and the Major Questions Doctrine? To answer these questions, we might imagine the scenarios in which a legal challenge involving killer heat could arise. Consider these four:

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<sup>196</sup> BRUCE R. LINDSAY, CONG. RSCH. SERV., R43802, MAJOR DISASTER DECLARATIONS FOR SNOW ASSISTANCE AND SEVERE WINTER STORMS: AN OVERVIEW 2 (2017), <https://sgp.fas.org/crs/homesec/R43802.pdf> [perma.cc/N97P-HRFR] (emphasis added).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 6.

<sup>199</sup> While it is true that the word "snowstorm" appears in the text of the statutory definition and that "extreme heat" does not, this distinction should not matter. *See supra* Section IV.B.1.

- a. FEMA promulgates a rule amending its regulatory definition of “major disaster” to include extreme heat; FEMA’s rulemaking is then challenged in court.
- b. A party petitions FEMA to promulgate a rule amending its regulatory definition of “major disaster” to include extreme heat, and FEMA denies the petition; the petitioner then challenges the denial in court.
- c. Informed by FEMA’s current definition of “major disaster,” the President (acting on the recommendation of FEMA)<sup>200</sup> declares an episode of extreme heat to be a “major disaster;” the declaration is then challenged in court.
- d. Informed by FEMA’s current definition of “major disaster,” the President (acting on the recommendation of FEMA) denies a request to declare an episode of extreme heat to be a “major disaster;” the denial is then challenged in court.

My short answer is that in each of these scenarios, FEMA and the President enjoy broad discretion and would likely succeed in defending their actions. That is partly because of general principles of administrative law and partly because of the Stafford Act itself.

The longer answer goes like this:

- a. *FEMA amends its definition to include extreme heat; FEMA’s rulemaking is then challenged in court.*

Before getting to the substantive issue, a challenging state would first have to show standing, an imposing barrier. To establish standing, a plaintiff must argue that expanding the list of disaster types causes or threatens actual redressable injury.<sup>201</sup> Suppose, for instance, that Vermont—a state prone to snowstorms—worries that an expansion of listed disasters to include extreme heat would reduce the federal disaster funds available to snowy states by encouraging more sunny states to apply.<sup>202</sup> The harm to Vermont is that during the next

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<sup>200</sup> A presidential declaration does not require the support of a FEMA recommendation, but I assume FEMA support in scenarios c and d to make the analysis more straightforward. *See* 42 U.S.C. § 5170; *see also* ERICA A. LEE & BRUCE R. LINDSAY, CONG. RSCH. SERV., IN12384, STAFFORD ACT DECLARATIONS FOR EXTREME HEAT 1–2 (2024), <https://crsreports.congress.gov/product/pdf/IN/IN12384> [perma.cc/NU28-KYPN] (stating that FEMA’s regulations for making a recommendation to the President do “not restrict the President’s authority to issue a Stafford Act declaration,” for disasters).

<sup>201</sup> *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

<sup>202</sup> I make the state the plaintiff in order to build the strongest case. Having a stake in protecting their “quasi-sovereign interests,” states are entitled to “special solicitude” in federal standing analysis. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

catastrophic blizzard, FEMA—aware that it has now expanded the pool of presumed aid recipients—will be less likely to recommend a disaster declaration and the President, therefore, less likely to declare one. Or even if the President declares a snowstorm disaster, Vermont might say FEMA can be expected to be less generous in its discretionary allocation of aid because it has either already spent large sums on heat response or is preparing to.

There is a lot of speculation here, some of it about the future conduct of third parties like Congress and the governors of other states. First, the scenario imagines that Congress will keep the coffers of the DRF at the same levels. But we know that Congress regularly adjusts spending on disaster aid depending on the threats involved. (During the pandemic, annual appropriations to the DRF jumped from \$13.76 billion to \$19.32 billion, while supplemental appropriations zipped from zero to \$48.67 billion).<sup>203</sup>

Second, the argument suggests that states will request disaster declarations for extreme heat with a frequency and at a scale that would prevent FEMA from aiding other states crushed by disaster. Maybe. But that would depend on the severity of the year's extreme-heat season, the factors involved in determining the "severity" and "magnitude" of a qualifying disaster (a state's per capita cost of aid, the concentration of impact, the demographics of the affected population, and so on), and the individual decision of each state's governor. Third, the argument assumes that the decisions of FEMA officials and the President are driven by what's available in the DRF. I know of no evidence supporting that idea. To the contrary, that fact that Congress has often supplemented the DRF during busy disaster years suggests an understanding that financial commitments are able to expand with heightened needs.<sup>204</sup>

A look at the case law supports this analysis. Complaints of reduced benefits caused by an increase in the number of program beneficiaries get little traction in the federal courts. *Day v. Sebelius*<sup>205</sup> shows why. In that case, a group of university students in Kansas challenged a state statute allowing undocumented immigrants living in the state to attend Kansas universities and pay in-state tuition.<sup>206</sup> The plaintiffs argued that "[t]he more [that undocumented immigrants took] advantage of the state subsidy . . . the more likely it is that such subsidies will increase

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<sup>203</sup> *FEMA's Disaster Relief Fund: Budgetary History and Projections*, CONG. BUDGET OFF. (Nov. 2022), <https://www.cbo.gov/publication/58840> [perma.cc/9WKW-2PB5] (providing numbers in "Data Underlying Figures").

<sup>204</sup> PAINTER, *supra* note 106, at 10–11 (describing instances since 2017 in which Congress replenished funds when the DRF was running low).

<sup>205</sup> 376 F.Supp. 2d 1022 (D. Kan. 2005).

<sup>206</sup> *Id.* at 1025.

the financial burdens on Kansas universities and necessitate greater tuition hikes.”<sup>207</sup> That is, they claimed the value of *their* benefit (subsidized tuition) would decline as eligibility was expanded. But the logic of their claim, said the court, was not enough—they needed at least some sliver of evidence. In fact, in-state tuition had not increased and there was no indication the idea was being considered. With only “a generalized grievance about the expansion of benefits to others,” plaintiffs saw their case dismissed for lack of standing.<sup>208</sup>

What is important here is that funding available for tuition subsidies in Kansas, even with expanded access, was not depleted and was not structured as a zero-sum game. (The legislature, a third-party, was free to increase university budgets in the next budget). In the case of a contributor-supported fund where expanded access has already cost contributors more money (as happened in 2017 with a federal fund intended to aid communications companies after disaster), standing would be easier to show.<sup>209</sup>

Assuming a party could establish standing to challenge a FEMA rule hitching heat onto the locomotive of listed disasters, the principles of agency review suggest FEMA’s defense would be strong. After *Loper Bright Enterprises v. Raimondo*,<sup>210</sup> a court’s review of agency interpretation might be seen (with apologies to *Chevron* fans) as a two-step process. First, a court considers whether agency discretion over the matter has been delegated to it by Congress.<sup>211</sup> This is usually a perfunctory step, but if a “major question” is involved, the agency may need to produce a statement of “clear congressional authorization” to back its actions.<sup>212</sup> Second, if agency discretion is established, the court considers whether the agency’s rule follows a permissible interpretation of the statutory directive. After *Loper Bright*, courts must use their “independent judgment”<sup>213</sup> in interpreting a statute, with the understanding that “contemporary and consistent views of a coordinate branch of government can provide evidence of the law’s meaning.”<sup>214</sup>

The case for FEMA’s authority to call extreme heat a type of “natural catastrophe” is about as straightforward as one could

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<sup>207</sup> *Id.* at 1033.

<sup>208</sup> *Id.* at 1040.

<sup>209</sup> See, e.g., *Tri-County Telephone Ass’n, Inc. v. Federal Communications Commission*, 999 F.3d 714 (D.C. Cir. 2021) (finding standing where orders increased required contributions to a universal service fund).

<sup>210</sup> 603 U.S. 369 (2024).

<sup>211</sup> *Id.* at 404 (citing *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001)).

<sup>212</sup> *West Virginia v. EPA*, 597 U.S. 697, 723 (2022).

<sup>213</sup> *Bondi v. VanDerStok*, 145 S. Ct. 857, 874 (2025) (quoting *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024)) (internal quotation marks omitted).

<sup>214</sup> *Id.*

imagine.<sup>215</sup> The issue does not appear to involve a “major question,” as defined in *West Virginia*. Such questions, as alluded to by the Court, are likely to arise where (1) there is a stark departure from agency practice or norms, (2) the agency claims unusually broad authority, (3) the agency lacks relevant expertise, and where (4) there is evidence that Congress would oppose the exercise of such authority.<sup>216</sup> Listing extreme heat as a category of major disaster would not depart starkly from agency practice or norms: FEMA has already allowed that heat could rise to the level of a major disaster in the proper context and has never directly said otherwise.<sup>217</sup> FEMA’s core mission is to assess and respond to disasters, most of them related to weather, so the expertise is there. Further, Congress has never acted in a way to suggest that extreme heat should be excluded from the Stafford Act. In fact, it has only double-downed on the need to build the climate and natural hazard resilience of vulnerable communities.<sup>218</sup>

The remaining consideration concerning claims of unusually broad authority would similarly support FEMA’s action but deserves a little more attention. Properly seen, recognizing a disaster based on extreme heat is no different in any categorical way from recognizing a hurricane, snowstorm, or drought. But one might imagine a critic, borrowing language from FEMA’s denial of Governor Newsom’s “heat dome” request, to raise an objection, namely that extreme heat is not a “discrete event,” but rather a “seasonal or general atmospheric condition” for which there is no agency “precedent” to support a response.<sup>219</sup> If, one imagines our critic arguing, Congress meant to give FEMA the sweeping authority to redefine summer, it would surely have done so in plainer terms.

But this objection mistakes sizzle for steak. First, extreme heat and resulting heat domes *are* discrete events. As discussed earlier, meteorologists use precise (if varying) standards for assessing heat events and assigning them to distinct categories.<sup>220</sup> Subjects of deep and individualized study, heat events have long been distinguished from

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<sup>215</sup> Although, given the doctrine’s hazy outlines, perhaps nothing should be counted on. See, e.g., Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 29 (2023) (arguing the MQD criteria most recently suggested in *West Virginia* is “too subjective and manipulable to yield anything like a manageable judicial standard”).

<sup>216</sup> See *id.* at 21–27.

<sup>217</sup> See *supra* Section II.

<sup>218</sup> See *supra* Section IV.B.2.

<sup>219</sup> See BOYLE ET AL., *supra* note 10, at 10 (citing email correspondence between FEMA Congressional Affairs Division and CRS from Apr. 9, 2024).

<sup>220</sup> Sonia I. Seneviratne et al., *Weather and Climate Extreme Events in a Changing Climate*, in CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 1513, 1547 (2021) (“Extreme temperature events are associated with large-scale meteorological patterns.” (citation omitted)).

“general atmospheric conditions.”<sup>221</sup> Second, the seasonal nature of extreme heat does not make it more ordinary or uneventful. Hurricanes, blizzards, wildfire, and drought are also seasonal, but that fact does not curtail the sweep of FEMA’s authority. That extreme heat so closely resembles these explicitly listed events in terms of discreteness and seasonality suggests FEMA’s jurisdiction here is not of a different scale or kind.<sup>222</sup>

Even if one believes that the Major Questions Doctrine would in this case demand “clear congressional authority,” FEMA could persuasively argue the Act plainly confers such authority on the basis of the interpretive argument I made earlier—namely that “any natural catastrophe” means *any* natural catastrophe.<sup>223</sup>

- b. A party petitions FEMA to promulgate a rule amending its regulatory definition of “major disaster” to include extreme heat, and FEMA denies the petition; the petitioner then challenges the denial in court.*

As before, judicial standing is the first filter. The complaining party—let us say, the state of California—would be required to show that the refusal to expand the regulatory definition caused or threatened to cause a redressable injury. The problem for California is that the absence of an expanded rule is not so easily traceable to the ultimate (or threatened) injury, that is, the President’s refusal to declare a major disaster for extreme heat. Remember, FEMA’s position is that the regulatory definition *as written* permits it to recommend a disaster declaration for extreme heat. And, of course, the President is free to make such a declaration with or without the agency’s recommendation.

What work is an expanded definition expected to do? The answer, as I argued previously, is that an expanded definition would (1) encourage more requests for extreme-heat assistance, and (2) make it more likely that FEMA would develop protocols for such assistance and be more likely to recommend that the President authorize such assistance. But that chain may be too attenuated for current standing doctrine.<sup>224</sup>

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<sup>221</sup> Ctr. for Biol. Diversity et al., *supra* note 25, at 12.

<sup>222</sup> Actually, droughts are the furthest removed from extreme heat and the other events discussed. Because they are such slow-onset events, their beginnings and ends have much less discrete markers. As with an economic recession, you can be weeks or months into a drought before knowing you are actually in one. For discussion, see HORN ET AL., *supra* note 92.

<sup>223</sup> See *supra* Section IV.B.1.

<sup>224</sup> See, e.g., *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 (2013) (noting Court’s “usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors”).

Perhaps California could be more creative. It might argue the federal government's narrow view of disaster has forced state officials to prepare for future heat domes on their own, thus diverting vital funds from other state programs, causing injury to those programs and their beneficiaries. This theory, assuming the facts to back it up, seems more promising, but again, not a sure winner, given its speculative nature.

As for FEMA's interpretive license, its discretion seems clear. FEMA's regulatory definition is lifted virtually word-for-word from the Act. Congress imposed no *mandatory* duty to embellish that work. There is no need for pre-*Loper* deference to confirm that. The Major Questions Doctrine has no effect either, since the authority to keep the definition as Congress wrote it seems obvious.

- c. *Informed by FEMA's current definition of "major disaster," the President (acting on the recommendation of FEMA) declares an episode of extreme heat to be a "major disaster"; the declaration is then challenged in court.*

As in our first scenario, we here have a hypothetical party complaining about the aid *another* party received. The same challenge to judicial standing that we examined there applies also here. But for the federal government, there may be an even easier answer: sovereign immunity. The Stafford Act makes no provision for citizen suits and contains no waiver of sovereign immunity. It also explicitly denies any liability for "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."<sup>225</sup> A President's decision whether or not to declare a major disaster is certainly discretionary.<sup>226</sup> While the issue has never been addressed, it seems likely the President is an "employee of the Federal government" for Stafford Act purposes.<sup>227</sup> While parties have in the past challenged FEMA decisions under the Administrative Procedure Act (APA),<sup>228</sup> the standard for challenging a discretionary act is high and—crucially—the acts of a President are not reviewable under the APA at all.<sup>229</sup> Put bluntly, the President here holds nearly all the cards. All of which helps to explain why there seems to have been few, if any, legal challenges to the President's decisions under the Act.

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<sup>225</sup> 42 U.S.C. § 5148.

<sup>226</sup> 42 U.S.C. § 5170 ("the President *may* declare . . . that a major disaster or emergency exists.") (emphasis added).

<sup>227</sup> See *Carroll v. Trump*, 49 F.4th 759, 772 (2d Cir. 2022) (President is "employee of the government" for purposes of Federal Employees Liability Reform and Tort Compensation Act of 1988).

<sup>228</sup> See, e.g., *City of San Bruno v. FEMA*, 181 F. Supp. 2d 1010 (N.D. Cal. 2001).

<sup>229</sup> *Dalton v. Spector*, 511 U.S. 462, 476 (1994).

- d. *Informed by FEMA's current definition of "major disaster," the President (acting on the recommendation of FEMA) denies a request to declare an episode of extreme heat to be a "major disaster"; the denial is then challenged in court.*

In this case, standing would be easier to show since the economic loss from the failure to receive aid is clear. But the Act's broadened delegation of power, and its refusal to waive sovereign immunity, pose big barriers. Under the Stafford Act, remember, the President holds nearly all the cards. But not *all* the cards. There is still the Constitution. Imagine it could be shown that the President had refused to make a major disaster declaration—thus depriving residents of public and individual assistance—for an unlawfully discriminatory, truly capricious, or blatantly corrupt reason. In such a case, affected residents could claim a violation of equal protection or due process. Proving the case might be a long shot, but it is still helpful to know where the guardrails are planted.

## V. CONCLUSION

There are lots of biases in our response to disasters.<sup>230</sup> We might overestimate the frequency of shark attacks during hurricanes or underestimate the number of heart attacks during blizzards.<sup>231</sup> We might worry about looting during a power outage—which is statistically very low—but ignore the much worse danger of carbon monoxide from portable generators.<sup>232</sup> It is the job of the government, informed by scientific expertise and the specialized knowledge of local people, to filter out those biases and keep our communities as safe as practicality and good judgment allow.

That is the theory. But government officials also have biases. Sometimes they are rooted in reasonable ideas—about one's take on the agency's mission, about the availability of resources, about what that lawyer said three years ago when the issue last came up. Biases like these are not always easy to identify, but I sense one within FEMA: a full-blown “heat allergy.”

Add to that the nation's more invidious and historical bias in disaster policy against the needs of disadvantaged groups. Congress sought to prevent discriminatory treatment and disparate impact in the

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<sup>230</sup> See, e.g., Lisa Grow Sun, *Disaster Mythology and the Law*, 96 CORNELL L. REV. 1131 (2011).

<sup>231</sup> Abigail Abrams, *No, Sharks Will Not Attack You During a Hurricane*, TIME (Sept. 7, 2017), <https://time.com/4932377/sharks-hurricane-irma-florida/> [perma.cc/77SV-59CS].

<sup>232</sup> See Janelle Ross & Lesley Lowery, *Looting Rumors and Fear of Crime often Exaggerated after Natural Disasters*, WASH. POST (Sept. 1, 2017), [https://www.washingtonpost.com/national/looting-rumors-and-fear-of-crime-often-exaggerated-after-natural-disasters/2017/09/01/14fc6546-8f57-11e7-a2b0-e68cbf0b1f19\\_story.html](https://www.washingtonpost.com/national/looting-rumors-and-fear-of-crime-often-exaggerated-after-natural-disasters/2017/09/01/14fc6546-8f57-11e7-a2b0-e68cbf0b1f19_story.html) [perma.cc/BYB7-JVZE].

Stafford Act's broad mandate against discrimination. But more is needed to realize disaster justice: we must target and address the types of disaster most threatening to especially susceptible and historically marginalized groups. That means responding to extreme heat.

I have stopped short of arguing for litigation as a means of solving this problem because I am skeptical of its chance of success. Congress has granted FEMA and the President considerable discretion in providing disaster aid, allowing it to be generous or not. Still, it has made clear that the overarching purpose of disaster relief is to protect our communities, keep governments at levels running, and to prevent loss of life, human suffering, and loss of and damage to property. What is more, as Martha Albertson Fineman and others make clear, the executive branch (just as much as the judicial branch) is a moral actor with moral responsibilities. For a just nation, that includes responding to catastrophic incidents. We should do all we can to petition agencies like FEMA and to hold the President accountable in ensuring that justice is pursued.

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Back in 2015, I remember seeing a cartoon in the July issue of the *New Yorker*, which happened to be the same issue featuring Kathryn Schulz's prize-winning article on the monstrous tsunami risk now haunting the Pacific Northwest.<sup>233</sup> The cartoon, penned by Drew Dernavich, shows two businessmen, their shirts drooping and untucked, wilting beneath a broiling sun.

"This heat is killing me," one says to the other. "Let's get a drink in Little Antarctica."<sup>234</sup>

I admit I chuckled. Having imagined Seattle under many fathoms of seawater, I needed a pick-me-up. But even then, I knew better. When the killer heat comes, there will be more to worry about than finance bros schlepping toward a penguin-themed bar. We will be worrying about harvesters and construction workers rushed off by ambulance, kids with the third-degree burns from the playground slide, someone's granny dying at the bus stop. When the killer heat comes—whatever they call it—it is going to be a disaster.

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<sup>233</sup> Kathryn Schulz, *The Really Big One*, NEW YORKER (July 13, 2015), <https://www.newyorker.com/magazine/2015/07/20/the-really-big-one> [perma.cc/2AL6-58CE]. Schulz won the Pulitzer Prize for this piece in 2016. *Prize Winners by Year: 2016*, THE PULITZER PRIZES, <https://www.pulitzer.org/prize-winners-by-year/2016> [perma.cc/WZH2-LGJF] (last visited Aug. 22, 2025).

<sup>234</sup> Schulz, *supra* note 233.