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## Mitigating the Discretion Disaster: How Changes in the Law Can Help FEMA Effectuate Its Critical Mission

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## MITIGATING THE DISCRETION DISASTER: HOW CHANGES IN THE LAW CAN HELP FEMA EFFECTUATE ITS CRITICAL MISSION

*Paul G. Rando\**

Well the rails are washed out north of town,  
We gotta head for higher ground,  
We can't come back till the water goes down,  
Five feet high and risin.'

-Johnny Cash, *Five Feet High and Rising*

### I. INTRODUCTION

On August 29, 2021, Hurricane Ida made landfall in Louisiana as a Category Four hurricane with wind speeds of 150 mph.<sup>1</sup> Ida knocked out the power to the entire city of New Orleans, including hospitals and sewer systems.<sup>2</sup> From New Orleans, the storm raged northeast, ultimately causing major flooding, death, and billions of dollars in property damage in east coast states including New Jersey and New York.<sup>3</sup>

Survivors whose homes get damaged or destroyed in disasters such as Ida seek help from the federal government through the Federal Emergency Management Agency ("FEMA").<sup>4</sup> FEMA, empowered by the Stafford Act,<sup>5</sup> helps survivors pay rent and provides other post-disaster

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1. Tim Craig et al., *Hurricane Ida Barrels into Louisiana, Causing Catastrophic Damage with Wind, Rain and Storm Surge*, WASH. POST (Aug. 29, 2021), [https://www.washingtonpost.com/national/hurricane-ida-brings-widespread-damage-to-southeast-louisiana/2021/08/29/72fa792c-08dd-11ec-a6dd-296ba7fb2dce\\_story.html](https://www.washingtonpost.com/national/hurricane-ida-brings-widespread-damage-to-southeast-louisiana/2021/08/29/72fa792c-08dd-11ec-a6dd-296ba7fb2dce_story.html) [https://perma.cc/BX9Z-GWC5].

2. *Id.*

3. Thomas Frank, *Deaths from Hurricane Ida Expose Flaws in FEMA Flood Maps*, SCI. AM. (Oct. 6, 2021), <https://www.scientificamerican.com/article/deaths-from-hurricane-ida-expose-flaws-in-fema-flood-maps/> [https://perma.cc/AVA9-FPCT]. See also Rebecca Baird-Remba, *Hurricane Ida Caused \$16B to \$24B in Damage in the Northeast, Report Finds*, COM. OBSERVER (Sept. 10, 2021) (estimating that Hurricane Ida caused between sixteen and twenty-four billion dollars worth of property damage in the northeast United States), <https://commercialobserver.com/2021/09/hurricane-ida-caused-16b-to-24b-in-damage-in-the-northeast-report-finds/> [https://perma.cc/9EBC-Z9RE].

4. See e.g., John K. Pierre & Gail S. Stephenson, *After Katrina: A Critical Look at FEMA's Failure to Provide Housing for Victims of Natural Disasters*, 68 LA. L. REV. 443, 444 (2008).

5. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5208 (2021).

housing assistance.<sup>6</sup> However, in its four-decade history, FEMA has erroneously denied thousands of eligible applicants post-disaster housing assistance.<sup>7</sup> Advancing the right to housing is difficult enough in non-disaster circumstances; doing so in the aftermath of a catastrophe is much harder.<sup>8</sup> The post-disaster needs of entire communities, all being urgently addressed in tandem by the immense machinery of both government agencies and non-governmental organizations, dwarf the rights of individuals, such that the needs of survivors get overlooked or left behind in error.<sup>9</sup>

This Comment examines the Stafford Act's housing provisions to show that FEMA repeatedly and erroneously denies survivors their housing benefits primarily due to a critical defect in the Act: the section on housing assistance is written in discretionary rather than mandatory terms. Due to this shortcoming, legislatures and judges are unable to protect survivors from FEMA's mistaken denials of assistance. When the destructive impact of natural disasters is exacerbated by failures of manmade systems such as FEMA, those systems should be recalibrated.

This Comment demonstrates the need for more robust federal natural disaster relief systems. Section II of this Comment will explain the science of natural disasters, the Stafford Act's specific housing provisions, and how federal courts have addressed FEMA denials in the past. Section III argues that the phenomenon of erroneous denials can be put to rest either by Congressional amendment of the Stafford Act, or by the common law establishment of a due process right to receipt of FEMA assistance. While either remedy would suffice, the ideal solution is to implement both.

## II. BACKGROUND

Before the Discussion section provides a proposal to reform the laws governing FEMA, this Section will explain the background necessary to understand why the U.S. law of disaster recovery needs reforming. Part A of this Section will illustrate the increasing frequency and intensity of major natural disasters in the twenty-first century. Then, Part B will explain the basics of the American disaster management system with a focus on FEMA, the Stafford Act, and the types of individual post-disaster

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6. Pierre & Stephenson, *supra* note 4, at 444.

7. Damian Williams, *Sheltering Deprivations: FEMA, Section 408 Housing, and Procedural Redesign*, 116 YALE L.J. 1883 (2007).

8. Charles W. Gould, *The Right to Housing Recovery After Natural Disasters*, 22 HARV. HUM. RTS. J. 169, 181 (2009) (detailing the "daunting" task of housing the world's poor prior to a disaster, and arguing that a nation's response to additional housing burdens post-disaster is a measure of that nation's commitment to housing rights).

9. *Id.*

assistance FEMA is authorized to provide. Finally, Parts C and D will explore constitutional due process and how courts have applied it to cases on FEMA assistance, respectively.

*A. Five Feet High and Rising: Natural Disasters in the  
Twenty-First Century*

The desolation in Hurricane Ida's wake is certainly familiar to those for whom Katrina, Sandy, Harvey, Irma, and Maria remain vivid memories. Even in this decade, Ida was not an isolated event. In the United States there were 22 disasters in 2020 alone that each caused one billion dollars of damage or more, including wildfires in California, Oregon, and Washington, and tornadoes in Tennessee.<sup>10</sup> 2021 was no calmer. According to the National Hurricane Center, "[t]he 20 named storms through the end of September is well above the 30-year (1991-2020) average of 9 to 10 named storms. . ."<sup>11</sup> By October, major disaster activity in the Atlantic basin was already almost fifty percent above the long-term average.<sup>12</sup>

Any major disaster is liable to cause major damage. Between 1980 and July 2019, 250 disasters caused more than one billion dollars of damage each.<sup>13</sup> Over 120 disasters between 2010-2020 surpassed the one billion dollar threshold,<sup>14</sup> nearly double the previous decade.<sup>15</sup> The magnitude of

10. U.S. 2020 Billion-Dollar Weather and Climate Disasters (graphic), NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://coast.noaa.gov/data/nationalfacts/img/fast-fact-weather-climate-disasters.jpg> [<https://perma.cc/67TG-CQHT>] (last accessed Mar. 29, 2022).

11. NAT'L HURRICANE CTR., NAT'L OCEANIC & ATMOSPHERIC ADMIN., MONTHLY ATLANTIC TROPICAL WEATHER SUMMARY (Oct. 1, 2021), <https://www.nhc.noaa.gov/text/MIATWSAT.shtml> [<https://perma.cc/25LJ-BGZU>] (accessed Dec. 2, 2021).

12. *Id.*

13. Danshera Wetherington Cords, *An Inflection Point for Disaster Relief: Superstorm Sandy*, 35 TOURO L. REV. 925 (2019).

14. *See e.g., Id.* at 926 (2012's Hurricane Sandy cost \$70.2 billion, 2017's Hurricane Maria cost \$90 billion); NAT'L HURRICANE CTR., NAT'L OCEANIC & ATMOSPHERIC ADMIN., TROPICAL CYCLONE REPORT: HURRICANE HARVEY (May 9, 2018) (2017's Hurricane Harvey cost \$125 billion), [https://www.nhc.noaa.gov/data/tcr/AL092017\\_Harvey.pdf](https://www.nhc.noaa.gov/data/tcr/AL092017_Harvey.pdf) [<https://perma.cc/XDM3-8BRZ>]; NAT'L HURRICANE CTR., NAT'L OCEANIC & ATMOSPHERIC ADMIN., TROPICAL CYCLONE REPORT: HURRICANE IRMA (Sept. 24, 2021) (2017's Hurricane Irma cost \$50 billion), [https://www.nhc.noaa.gov/data/tcr/AL112017\\_Irma.pdf](https://www.nhc.noaa.gov/data/tcr/AL112017_Irma.pdf) [<https://perma.cc/YSU2-ND64>]; NAT'L HURRICANE CTR., NAT'L OCEANIC & ATMOSPHERIC ADMIN., TROPICAL CYCLONE REPORT: HURRICANE FLORENCE (May 30, 2019) (2018's Hurricane Florence cost \$24 billion), [https://www.nhc.noaa.gov/data/tcr/AL062018\\_Florence.pdf](https://www.nhc.noaa.gov/data/tcr/AL062018_Florence.pdf) [<https://perma.cc/5ZR8-TGH6>]; NAT'L HURRICANE CTR., NAT'L OCEANIC & ATMOSPHERIC ADMIN., TROPICAL CYCLONE REPORT: HURRICANE DORIAN (Apr. 20, 2020) (2019's Hurricane Dorian cost \$1.6 billion), [https://www.nhc.noaa.gov/data/tcr/AL052019\\_Dorian.pdf](https://www.nhc.noaa.gov/data/tcr/AL052019_Dorian.pdf) [<https://perma.cc/N9P3-46C8>].

15. *Billion-Dollar Weather and Climate Disasters: Summary Stats*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L CTRS. FOR ENV'T'L. INFO (showing that the United States experienced 123 billion-dollar weather events from 2010-2019, compared to 63 billion-dollar weather events from 2000-2009), <https://www.ncdc.noaa.gov/billions/summary-stats> [<https://perma.cc/FQE4-UP2S>].

damage derives from the ferocity the disasters of our time inflict. Hurricane Harvey in 2017 “carried more rain to the Houston, Texas, area than ever before seen in one storm”<sup>16</sup> while “Hurricane Irma the same year maintained extreme winds for longer than ever recorded.”<sup>17</sup>

These storms damage more than just property. Thousands of people died in Puerto Rico as a result of Hurricane Maria.<sup>18</sup> People drowned in their New York City apartments when Ida’s floodwaters poured down streets that were outside of official flood zones.<sup>19</sup> The arbitrary lines of a flood map are of little help when your kitchen is underwater.<sup>20</sup>

The problem is not on track to improve. Hurricanes form as part of an interaction between high ocean temperature and low air pressure, normally near the equator,<sup>21</sup> meaning that as global temperatures continue to rise,<sup>22</sup> hurricanes will make landfall with greater ferocity.<sup>23</sup> In addition to contributing to increased hurricane activity, high temperatures also create ideal conditions for severe wildfires, leading to a noticeable uptick in their frequency and potential to inflict damage.<sup>24</sup> Flooding also increases as rivers swell with melted snow and ice and eat up more land

16. LUCY JONES, *THE BIG ONES: HOW NATURAL DISASTERS HAVE SHAPED US (AND WHAT WE CAN DO ABOUT THEM)* 152 (2018).

17. *Id.*

18. Yxta Maya Murray, *What FEMA Should Do After Puerto Rico: Toward Critical Administrative Constitutionalism*, 72 *ARK. L. REV.* 165, 170 (2019); *see also* Sheri Fink, *Nearly a Year After Puerto Rico Revises Death Toll to 2975*, *N.Y. TIMES* (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/us/puerto-rico-hurricane-maria-deaths.html> [<https://perma.cc/Z29G-TA98>].

19. Frank, *supra* note 3.

20. The author worked with disaster survivors in Texas and Louisiana in 2016 who were deemed ineligible for both flood insurance and FEMA assistance because their homes sat outside of arbitrarily-drawn flood maps. The narrow scope of this article is limited, however, to survivors who *do* fit FEMA’s eligibility criteria.

21. JONES, *supra* note 16, at 151-52.

22. Sarah Kaplan and Brady Dennis, *The World is Running Out of Options to Hit Climate Goals*, *WASH. PO.* (Apr. 4, 2022) (“The world is already more than a degree warmer than it was before people started burning fossil fuels. Yet since the [U.N. Intergovernmental Panel on Climate Change]’s first warning, greenhouse gas emissions have moved almost exclusively in one direction: up.”), <https://www.washingtonpost.com/climate-environment/2022/04/04/climate-change-report-united-nations-ipcc/> [<https://perma.cc/M8BT-TPCX>].

23. Tom Knutson, *Global Warming and Hurricanes*, *GEOPHYSICAL FLUID DYNAMICS LABORATORY, NAT’L OCEANIC & ATMOSPHERIC ADMIN.* (Aug. 9, 2021) (projecting that tropical cyclone intensity will rise by one to ten percent, and rainfall will increase by one to fifteen percent, based on a two degree Celsius temperature rise), <https://www.gfdl.noaa.gov/global-warming-and-hurricanes/> [<https://perma.cc/489W-6AUK>].

24. Alejandra Borunda, *The Science Connecting Wildfires to Climate Change*, *NAT’L GEOGRAPHIC* (Sept. 17, 2020) (“[C]limate-related changes have vastly increased the likelihood that fires will start more often and burn more intensely and widely than they have in the past.”), <https://www.nationalgeographic.com/science/article/climate-change-increases-risk-fires-western-us> [<https://perma.cc/U6ER-AFKQ>].

to accommodate the flow.<sup>25</sup>

As temperatures rise, so too does the number of disasters. As United States District Judge for the Central District of California Josephine Staton, sitting by designation on the Ninth Circuit Court of Appeals, prophesied regarding the deteriorating condition of the environment, the inevitable result of rising temperatures is nothing less than “an inhospitable future . . . marked by rising seas, coastal city functionality loss, mass migrations, resource wars, food shortages, heat waves, *mega-storms*. . .”<sup>26</sup> If the American people are to survive such a future, swift action may be necessary.

### *B. FEMA: Process & Problems*

FEMA has existed since 1979. In its forty-two year history, the agency has provided temporary housing and other aid to survivors of numerous major disasters.<sup>27</sup> Below, Subpart 1 will provide historical context for disaster response at the federal level, leading up to passage of the Stafford Act. Then, Subpart 2 will illustrate some of FEMA’s prominent blunders. Subpart 3 describes the process for acquiring FEMA aid with a focus on individual housing. Finally, Subpart 4 will briefly address relevant portions of the Administrative Procedure Act and some suggested improvements to FEMA’s model.

#### 1. FEMA & The Stafford Act

In the summer of 1926, heavy rainfall across the Mississippi River Basin in the Midwest began a series of record-breaking floods.<sup>28</sup> Through the normally dry autumn and into early 1927, floods killed dozens and left thousands homeless in Chattanooga, Nashville, Cincinnati, and Pittsburgh.<sup>29</sup> In the spring, the river carried so much water so quickly that it caused levees that “were so vast as to seem impregnable” to fail.<sup>30</sup>

That April, one million acres were submerged under ten feet of water flowing at twice the speed of Niagara Falls, displacing nearly half of Mounds Landing, Mississippi’s 180,000 residents.<sup>31</sup> Nevertheless, then-President Coolidge refused to authorize direct relief payments to citizens

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25. JONES, *supra* note 16, at 98.

26. *Juliana v. United States*, 947 F.3d 1159, 1176 (9th Cir. 2020) (emphasis added).

27. Pierre & Stephenson, *supra* note 4, at 444.

28. JONES, *supra* note 16, at 102.

29. *Id.*

30. *Id.* at 103.

31. *Id.* at 106.

who had been affected by the Great Mississippi Flood.<sup>32</sup> Coolidge (like many others) believed that disaster recovery was a local issue and that it was inappropriate for the federal government to spend the public's money to help individuals, and he worried that so-called federal aid would find its way into the pockets of already wealthy plantation owners instead of those who had truly suffered.<sup>33</sup> Still, public backlash after Mounds Landing inspired Coolidge to put Herbert Hoover in charge of federal rescue efforts.<sup>34</sup> The result was the 1928 Flood Control Act, through which the government funded a massive flood control engineering program to build new reservoirs.<sup>35</sup> However, the Act failed to offer any support to individual survivors.<sup>36</sup>

Disasters over the following decades led to other measures, such as the New Deal-era creation of agencies meant to help farmers recover from the Dust Bowl and the Federal Disaster Relief Act ("FDRA") in 1950.<sup>37</sup> Though the FDRA authorized the government to spend federal funds on disaster recovery, implementation was still an uncoordinated and confusing process undertaken by multiple agencies.<sup>38</sup>

In 1979, President Carter signed Executive Order 12127, creating and activating FEMA with a stroke of the pen.<sup>39</sup> Almost a decade later, President Reagan signed the Stafford Act into law, establishing the statutory framework under which FEMA still operates today.<sup>40</sup> FEMA's mission, as laid out in the Stafford Act, is to expedite "the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas."<sup>41</sup> In 2003, FEMA joined several other agencies under the umbrella of the newly-formed Department of Homeland Security.<sup>42</sup> In the decades since FEMA was created and the Stafford Act was passed, FEMA has become one of the most essential pillars of the nation's emergency management system.<sup>43</sup>

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32. *Id.* at 152.

33. *Id.* at 108, 112.

34. *Id.* at 107.

35. *Id.* at 112, 152.

36. *Id.*

37. *Id.* at 152-53.

38. *Id.* at 153-54 ("In the 1970s, disaster relief was provided in some instances by more than one hundred different governmental agencies").

39. 3 C.F.R. 376 (1979), <https://irp.fas.org/offdocs/eo/eo-12127.htm> [<https://perma.cc/N9PB-HA82>].

40. *Stafford Act*, FEMA (July 6, 2021), <https://www.fema.gov/disaster/stafford-act> [<https://perma.cc/BV7M-5KWA>]; see also *History of FEMA*, FEMA (Jan. 4, 2021), <https://www.fema.gov/about/history> [<https://perma.cc/6ENN-L6VL>].

41. 42 U.S.C. § 5121(a).

42. *History of FEMA*, *supra* note 40.

43. Williams, *supra* note 7, at 1883.

## 2. The FEMA Process & Individual Aid

The American emergency management system operates on the tenet that disasters occur locally.<sup>44</sup> Local officials have complete autonomy and authority to handle crises, and when a disaster overwhelms their capabilities, they may call upon the state for help.<sup>45</sup> After that, if the state is also overwhelmed (or anticipates being overwhelmed due to high demand for local relief), the Governor asks the President to declare a “major disaster.”<sup>46</sup> A major disaster is:

[A]ny 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 . . . which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance . . .<sup>47</sup>

A presidential declaration triggers FEMA to act via the Stafford Act.<sup>48</sup> FEMA’s role is primarily (though not exclusively) a dispenser of financial aid.<sup>49</sup> Thus, the presidential declaration must designate the types of aid FEMA is authorized to make available for that disaster.<sup>50</sup> Among other things, the designation might include individual assistance grants for housing and home repairs, personal property losses, and medical and funeral expenses, or grants to state and local governments for repair or reconstruction of public facilities and infrastructure.<sup>51</sup>

The Stafford Act enables FEMA to give individuals temporary housing assistance in Section 408. Under Section 408, “The President *may* provide financial or other assistance . . . to respond to the disaster-related housing needs of individuals and households who are displaced from their pre-disaster primary residences or whose pre-disaster primary residences are rendered uninhabitable as a result of damage caused by a major disaster.”<sup>52</sup> Assistance available under Section 408 may include money for repairs to or replacement of homes damaged or destroyed by the disaster, disaster-related needs such as replacement of personal property, or temporary housing assistance to hold survivors over until their pre-

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44. JONES, *supra* note 16, at 161.

45. *Id.*

46. 42 U.S.C. § 5170.

47. 42 U.S.C. § 5122(2).

48. Santos v. FEMA, 327 F. Supp. 3d 328, 332-33 (D. Mass. 2018).

49. JONES, *supra* note 16, at 161.

50. Santos, 427 F. Supp. 3d at 334.

51. *Understanding FEMA Individual Assistance and Public Assistance*, FEMA (Nov. 29, 2020), <https://www.fema.gov/fact-sheet/understanding-fema-individual-assistance-and-public-assistance> [<https://perma.cc/N34K-V985>].

52. 42 U.S.C. § 5174(b)(1) (emphasis added).



disaster residences can be repaired.<sup>53</sup> Temporary housing assistance may come in two forms: (1) financial assistance intended to pay for renting alternate housing; and (2) temporary housing units.<sup>54</sup> FEMA's provision of Section 408 assistance may not exceed eighteen months from the date of the President's disaster declaration—though this time limit may be extended under extraordinary circumstances.<sup>55</sup>

An individual or household is eligible for Section 408 assistance if they have been displaced from their home, or the home has been rendered uninhabitable as a result of a major disaster.<sup>56</sup> In addition to this requirement, FEMA's implementing regulations outline additional criteria. For instance, FEMA may only provide Section 408 assistance:

[W]hen the individual or household has incurred a disaster-related necessary expense or serious need in the state in which the disaster has been declared . . . [and] when the applicant agrees to refund FEMA or the State any portion of the assistance that the applicant receives or is eligible to receive as assistance from another source.<sup>57</sup>

Additionally, FEMA will only pay for damage that is uninsured or underinsured<sup>58</sup> in order to ensure that it does not aid individuals who can get assistance through other means.<sup>59</sup>

The language of these rules is discretionary (i.e., the President *may*, rather than *shall*; FEMA *may*).<sup>60</sup> Yet according to FEMA's internal policies, once an applicant is deemed eligible for assistance, some sort of assistance *will* be provided.<sup>61</sup> FEMA asserts that it only uses its statutory discretion to determine which *type* of assistance they will provide the applicant.<sup>62</sup> But this is not the case in practice. Survivors have criticized FEMA for erroneously denying hundreds of thousands of meritorious Section 408 claims.<sup>63</sup> One report shows that “FEMA's section 408

53. *Santos*, 327 F. Supp. 3d at 334.

54. *Id.* at 333.

55. 44 C.F.R. § 206.110(e) (2016). What constitutes extraordinary circumstances is more or less left to FEMA's discretion; *see e.g.*, Williams, *supra* note 7 at 1883 (“Indeed, FEMA recently bowed to public pressure and extended the duration of housing benefits for Katrina survivors.”).

56. *Ridgely v. FEMA*, 513 F.3d 727, 729 (5th Cir. 2008) (citing 42 U.S.C. § 5174(b)(1)).

57. *Id.* at 732-33 (citing 44 C.F.R. § 206.113).

58. Williams, *supra* note 7, at 1885 (citing 44 C.F.R. § 206.110); *see also supra* note 20 (acknowledging survivors whose homes fall outside of FEMA's flood maps).

59. *Ridgely*, 513 F.3d at 732.

60. 42 U.S.C. § 5174(b)(1).

61. *McWaters v. FEMA*, 436 F. Supp. 2d 802, 818 (E.D. La. 2006) (“Here FEMA admits that all persons meeting the impartial eligibility criteria above are entitled to assistance, and all of them will receive it.”).

62. *Id.* at 818 n.25.

63. Williams, *supra* note 7, at 1883; *see also* Pierre & Stephenson, *supra* note 4, at 447 (“Over 200,000 people were displaced and evacuated to distant places . . . FEMA's failure and in some cases refusal to provide housing assistance to Katrina victims resulted in problems that still linger”).

stewardship documented a 50% error rate in a sample of approximately 12,000 housing denials.”<sup>64</sup> Other survivors have noted “FEMA’s curious, but seemingly widespread, pattern of denying housing damage in areas that the agency’s own geospatial mapping showed to be entirely uninhabitable.”<sup>65</sup> Another criticism is that FEMA’s appeal process is so convoluted that survivors fail to take advantage of it even if they were denied benefits.<sup>66</sup> The practical effect is unmistakable: thousands of eligible people have been denied assistance of Section 408 benefits, despite FEMA asserting that it *will* provide assistance to all those who are eligible.

It is also worth noting that the doctrine of sovereign immunity, which the government can use to avoid legal liability in some situations, applies to a subset of FEMA actions. According to the Stafford Act, the federal government “shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a *discretionary* function or duty . . . in carrying out the provisions of this chapter.”<sup>67</sup> Because providing temporary housing assistance is discretionary, the Stafford Act’s sovereign immunity clause “precludes judicial review of disaster relief claims” based upon FEMA’s errors implementing Section 408.<sup>68</sup>

### 3. FEMA’s Failures: When the Cavalry Doesn’t Show

FEMA is not only one of the most essential pillars of American emergency management; it is also one of the most distrusted.<sup>69</sup> A complete account of FEMA’s failures could occupy an entire volume of scholarship. While recent debacles are well documented and well known—the savage conditions in the New Orleans Superdome following Hurricane Katrina come to mind<sup>70</sup>—it is worth dragging a few of the

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64. Williams, *supra* note 7, at 1886 (citing Jonathan P. Hooks & Trisha B. Miller, *The Continuing Storm: How Disaster Recovery Excludes Those Most in Need*, 43 CAL. W. L. REV. 21, 36-37 (2006)).

65. *Id.*

66. *Id.* at 1884 (“[A] significant number of families in need simply dropped out of the [appeals] program, due to factors such as FEMA’s administrative incompetence, the difficulty in dealing with FEMA...”).

67. 42 U.S.C. § 5148 (emphasis added).

68. *Graham v. FEMA*, 149 F.3d 997, 1005 (9th Cir. 1998) (quoting *Rosas v. Brock*, 826 F.2d 1004, 1008 (11th Cir. 1987)).

69. Williams, *supra* note 7, at 1883 (claiming that despite the agency’s responsibility for over a million survivors, FEMA’s “constellation of well-documented failures” has eroded public confidence in its capabilities).

70. Nate Scott, *Refuge of Last Resort: Five Days Inside the Superdome for Hurricane Katrina*, USA TODAY (Aug. 24, 2015) (detailing violence, sexual assault, death, food rot, and sewage failures while thousands of survivors awaited evacuation by FEMA), <https://ftw.usatoday.com/2015/08/refuge-of-last-resort-five-days-inside-the-superdome-for-hurricane-katrina> [<https://perma.cc/V2DG-9X7M>]; *see also*

agency's other skeletons out of the closet to illustrate how grave the risk of erroneous denials of FEMA benefits can be.

In October 1989, an earthquake struck northern California along the San Andreas Fault during the World Series, killing sixty-three and destroying over 18,000 homes.<sup>71</sup> Because FEMA was waiting to determine the availability of local housing options (there were none), local officials had to intervene a month after the disaster to convince FEMA to send temporary housing units, in response to which FEMA sent a scanty 122 mobile homes.<sup>72</sup> With winter approaching, thousands of low-income residents had nowhere to go.<sup>73</sup> Then, as recovery efforts got underway over the course of the following year, FEMA solicited reports of earthquake damage from inspectors who were careless, inadequately trained, and racially biased.<sup>74</sup> In short, FEMA failed to adequately address the immediate, life-threatening loss of housing in the region.<sup>75</sup>

In 1992, Hurricane Andrew struck Florida at 160 mph and destroyed 130,000 homes, making 350,000 new homeless overnight.<sup>76</sup> Miami-Dade County was immediately declared a disaster zone, but three days after the hurricane, FEMA still had not shown up.<sup>77</sup> The local Director of Emergency Management rightfully asked, "Where the hell is the cavalry on this one? We need water. We need people. For God's sake, where are they?"<sup>78</sup> When FEMA did arrive, it failed to notify survivors of the availability of mortgage and rental assistance, dismantled tent cities that had housed thousands of survivors, forced survivors to jump through extra bureaucratic hoops to apply for assistance, and ignored its own regulations by denying assistance to many eligible victims.<sup>79</sup>

In the fifteen years since Hurricane Katrina, FEMA has continued to draw ire and criticism. The agency's failures touch nearly every aspect of its mission to coordinate federal disaster response—from violating survivors' Fourteenth Amendment right to equal protection by using a

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JONES, *supra* note 16, at 160 ("They deemed it uninhabitable. Maybe so, but almost twenty thousand people were inhabiting it.")

71. Pierre & Stephenson, *supra* note 4, at 457-58.

72. *Id.* at 460.

73. *Id.*; see also Jay Mathews, *Earthquake Swells Ranks of Homeless*, WASH. POST (Oct. 27, 1989), <https://www.washingtonpost.com/archive/politics/1989/10/27/earthquake-swells-ranks-of-homeless/8752ca48-cfa7-4561-b13c-c267e62fb890/>.

74. *Id.* at 465-66 (explaining how the biases and incompetence of FEMA inspectors resulted in "more denials and low grants for people of color and low-income people than for white and wealthy people." (quoting Petition to FEMA, et al.: The Continuing Disaster, Disaster Relief Agencies Fail Low Income Earthquake Victims, 6 (1991)).

75. *Id.* at 461.

76. *Id.* at 472.

77. *Id.* at 473.

78. *Id.* (quoting Tom Mathews et al., *What Went Wrong*, NEWSWEEK Sept. 7, 1992, at 23).

79. *Id.* at 474-75.

biased distribution process,<sup>80</sup> to poor management,<sup>81</sup> and everything in between.<sup>82</sup> Reports even urge “communities in harm’s way not to count on FEMA in a future crisis.”<sup>83</sup>

#### 4. Other Considerations

Under the Administrative Procedure Act of 1946 (“APA”), an agency may not take action that is arbitrary, capricious, or an abuse of its discretion.<sup>84</sup> However, the APA does not provide for review of agency action to the extent that “statutes preclude judicial review” or “agency action is committed to agency discretion by law.”<sup>85</sup> As discussed above, the Stafford Act leaves FEMA’s Section 408 stewardship to the agency’s discretion, and the sovereign immunity clause shields FEMA’s misconduct from judicial review.

Furthermore, when an agency’s enabling statute is unambiguous and clear, courts and agencies should both follow the statute.<sup>86</sup> If the statute is silent or ambiguous, *Chevron, U.S.A., Inc. v. Natural Resource Defense Council* requires courts to follow an agency’s reasonable interpretation of the statute.<sup>87</sup> The Stafford Act is not ambiguous on its face. Nevertheless, Section II(D) will show that some courts have deferred to FEMA’s interpretation of Section 408.

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80. Murray, *supra* note 18, at 169 (“[T]he Stafford Act’s execution in Puerto Rico created a race, class, and disability-rights catastrophe that is at odds with the Constitution’s promise of equal protection”).

81. Cords, *supra* note 13, at 952.

82. Including violations of privacy, dangerously slow release of aid funds, lack of appropriate disaster planning, and appropriation of resources to locations where they were not needed, ensuring that they were not available in places that they *were* needed. *See, e.g.*, OFFICE OF INSPECTOR GEN., DEP’T OF HOMELAND SECURITY, MANAGEMENT ALERT – FEMA DID NOT SAFEGUARD DISASTER SURVIVORS’ SENSITIVE PERSONALLY IDENTIFIABLE INFORMATION (2019) (FEMA violated the Privacy Act of 1974 by releasing personal information of millions of 2017’s disaster survivors), <https://www.oig.dhs.gov/sites/default/files/assets/2019-03/OIG-19-32-Mar19.pdf> [<https://perma.cc/65TG-HVAJ>]; Cords, *supra* note 13, at 947 (Slow release of disaster-related benefits, as when by “August 2014, less than one-quarter of the \$48 billion available funds appropriated for [Hurricane Sandy] assistance had been paid out.”); Murray, *supra* note 18, at 204-05, citing FEMA, 2017 HURRICANE SEASON FEMA AFTER-ACTION REPORT iii (July 12, 2018) (FEMA lacked appropriate emergency plans for overseas U.S. territories and blamed local governments for its own logistical failures); Thomas Frank, *Why the U.S. Disaster Agency is Not Ready for Catastrophes*, SCI. AM. (Aug. 20, 2019) (FEMA’s distraction by small disasters which local agencies were fully capable of handling, such as when on the “day Harvey made landfall near Houston, 4,948 emergency workers were deployed to other disasters or were unavailable, meaning that almost half of the agency’s emergency workforce was tied up”), <https://www.scientificamerican.com/article/why-the-u-s-disaster-agency-is-not-ready-for-catastrophes/> [<https://perma.cc/YMA5-FTTM>].

83. Murray, *supra* note 18, at 205.

84. 5 U.S.C. § 706(2)(A).

85. *McWaters v. FEMA*, 436 F. Supp. 2d 802, 809 (E.D. La. 2006).

86. *Chevron, U.S.A., Inc. v. Nat’l Resource Defense Council*, 467 U.S. 837 (1984).

87. *Id.*

### C. Due Process

The Fifth and Fourteenth Amendments guarantee that the government shall deprive no person of life, liberty, or property, without due process of law.<sup>88</sup> To prevail on a due process claim, a plaintiff must show that they have a legally cognizable interest.<sup>89</sup> When it comes to governmental benefits like those provided by FEMA, the Supreme Court has long held that such benefits may be considered a property interest protected by due process.<sup>90</sup> However, not *all* benefits claims are protected.<sup>91</sup> The existence of a federal agency that provides a benefit does not create a property interest in that benefit, “absent some legitimate claim of *entitlement*—arising from statute, regulation, contract, or the like—to the benefit.”<sup>92</sup>

The Supreme Court in *Obergefell v. Hodges* explained that judges may “exercise reasoned judgment” in identifying interests protected under due process.<sup>93</sup> Furthermore, there are some rights which “serve as the necessary predicate for others; their fundamentality therefore derives, at least in part, from the necessity to preserve other fundamental constitutional protections.”<sup>94</sup> Suffrage, for example, is a necessary predicate to all other rights because voting in democratic society is a means to preserve or create other rights.<sup>95</sup>

The Supreme Court has used due process analysis many times to find a constitutionally protected right to receive certain government benefits. For example, in *Goldberg v. Kelly* the Court established a property interest in the receipt of welfare benefits.<sup>96</sup> In *Goss v. Lopez*, the Court held that education at a public school was a protected benefit.<sup>97</sup> In *Memphis Light, Gas & Water Division v. Craft*, the Court established that a potential recipient’s expectation of receiving benefits strengthens a due process claim.<sup>98</sup> In *Craft*, the Court held that a public utility company

88. U.S. CONST. amends. V, XIV.

89. *Ridgely v. FEMA*, 513 F.3d 727, 734 (5th Cir. 2008) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)).

90. *Id.* at 735, citing *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

91. *Id.*

92. *Id.*, citing *Blackburn*, 42 F.3d at 941.

93. Bradford C. Mank, *Does the Evolving Concept of Due Process in Obergefell Justify Judicial Regulation of Greenhouse Gases and Climate Change?: Juliana v. United States*, 52 U.C. DAVIS L. REV. 855, 876 (Dec. 2018) (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015)).

94. *Juliana*, 947 F.3d at 1177.

95. *Id.*; see also Brandon Bryer, *One Vote, Two Votes, Three Votes, Four: How Ranked Choice Voting Burdens Voting Rights and More*, 90 U. CIN. L. REV. 711 (2021) (“Without the sound and secure ability to vote, all other rights and liberties are defenseless.”) (citing *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

96. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

97. *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

98. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978).

could not terminate customers' service without providing legal process because the law gave the customers an expectation of receiving that benefit.<sup>99</sup> In cases like these, the government may only revoke the individual's benefit if it provides a minimum level of legal process so the individual at least has notice of the grounds for benefit revocation<sup>100</sup> and some opportunity to contest the termination.<sup>101</sup>

Do due process rights truly exist when granting the benefit in question is left to the agency's discretion? In *Goldberg*, the Court held that because persons meeting state eligibility criteria for welfare benefits *automatically* qualified for them, those individuals had a protected property interest in receiving the benefits.<sup>102</sup> However, where final determination of *which* individuals among the many eligible would receive benefits "was left to the 'unfettered discretion' of administrators, no constitutionally protected property interest existed."<sup>103</sup>

When a court recognizes a due process property interest, it may evaluate the agency's actions that allegedly caused deprivation of that interest. Courts apply the *Mathews v. Eldridge* test to determine whether the "process" applied was truly "due," or adequate.<sup>104</sup> The test balances three factors: (1) the individual's property interest; (2) the risk of an erroneous deprivation of this interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the burdens that additional or substitute procedural requirements would impose.<sup>105</sup>

In the disaster recovery context, a court would first have to find that a constitutionally protected due process interest exists in Section 408 assistance and then apply the *Mathews* three-factor test to determine whether the process used to deny Section 408 benefits was adequate. Only if the plaintiff meets this high bar (showing that the denial process was not adequate) will courts vindicate his or her due process rights and provide a remedy for the agency's malfeasance.

#### *D. FEMA on Trial: Is There a Due Process Right to Section 408 Assistance?*

Taking judicial action against FEMA to secure housing assistance is

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99. *Id.*

100. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1280 (1975) (citing *Goldberg*, 397 U.S. at 267-68).

101. *Id.*

102. *McWaters v. FEMA*, 436 F. Supp. 2d 802, 816 (E.D. La. 2006) (citing *Goldberg*, 397 U.S. at 262).

103. *Id.* (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 567 (1972)).

104. *See e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 675 (1977).

105. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

“difficult, at best,” especially for low-income survivors.<sup>106</sup> The previous two Sections explored the bounds of FEMA’s authority to grant financial assistance to individual survivors and the general constitutional principle of due process. This Section will analyze how federal courts have dealt with the question of whether due process protects an individual’s right to receive Section 408 benefits and the impact of the Stafford Act’s sovereign immunity clause. This survey draws on two cases from the Fifth Circuit, one from the District Court of Massachusetts, and one from the District Court for the District of Columbia, splitting the cases by outcome.

### 1. Arguments in Favor of a Due Process Right to Section 408 Benefits

The question of whether Section 408 benefits deserve constitutional protection arose in the Fifth Circuit case *McWaters v. FEMA*.<sup>107</sup> The plaintiffs in *McWaters* were a class of individuals whose homes were destroyed during Hurricane Katrina.<sup>108</sup> Despite the destruction, FEMA failed to grant the survivors disaster-related housing assistance.<sup>109</sup> Among other claims, the plaintiffs argued that FEMA’s denial of benefits constituted a violation of due process because, as persons whose pre-disaster primary residences were rendered uninhabitable by a major disaster, they were eligible to receive the benefits which the Stafford Act authorized FEMA to confer.<sup>110</sup>

In arguments, FEMA avowed that its own internal policy was that all persons meeting Section 408’s impartial eligibility criteria are entitled to assistance, that all of them will receive it,<sup>111</sup> and that “if they are eligible, we will pay.”<sup>112</sup> The agency stated that FEMA interprets its governing regulations to allow discretion as to the *type* of assistance it provides, such as cash payments versus mobile homes, but denying assistance altogether is not an option.<sup>113</sup>

The *McWaters* court pointed out that “if FEMA has discretion to choose whom to assist from among otherwise eligible persons, then no constitutionally protected interest in disaster assistance exists.”<sup>114</sup> This tracks with the prior discussion of sovereign immunity for discretionary acts. FEMA’s ability to claim sovereign immunity for its discretionary

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106. Pierre & Stephenson, *supra* note 4, at 478.

107. *McWaters*, 436 F. Supp. 2d at 814.

108. *Id.* at 805.

109. *Id.*

110. *Id.*

111. *Id.* at 818.

112. *Id.* at 817.

113. *Id.* at 818 fn. 25.

114. *Id.* at 814.

acts withholding benefits from the survivor class members engenders the lack of due process protection for the survivors. Coupled with the plain discretionary language in the Stafford Act, this suggests that the plaintiffs had no constitutionally protected interest.

However, without specifically applying *Chevron* deference to Section 408, the *McWaters* court adopted FEMA's interpretation of the Stafford Act, holding that policies "which require FEMA to automatically provide assistance to *all* applicants deemed *eligible* creates a reasonable expectation of the benefit of federal disaster assistance . . . [which] rises to the level of a property interest protectable under the Due Process Clause."<sup>115</sup> Through this reasoning, the court agreed with the plaintiffs that they did have a due process right to Section 408 benefits.<sup>116</sup>

The court also determined that while FEMA *is* immune from judicial review of those acts which are discretionary in nature, the agency remained liable for constitutional violations—such as if FEMA denied the plaintiffs a properly-established property right.<sup>117</sup> To expand on that, the court stated that "authority to review FEMA's actions clearly exists as to any actions that are mandated by statute, and more importantly, any actions that may rise to the level of a constitutional violation by the agency."<sup>118</sup>

However, the court in *McWaters* ultimately held that plaintiffs failed to prove a denial of their due process rights. FEMA's lack of preparedness for the volume of cases that arose after Hurricane Katrina, the court explained, did not necessarily mean that anybody's rights had been violated.<sup>119</sup>

The United States District Court for the District of Columbia addressed Section 408 benefits in *ACORN v. FEMA*, another post-Katrina case, in which the plaintiffs had received transitional housing benefits from FEMA under Section 403.<sup>120</sup> After several extensions of its deadline to terminate the Section 403 program, the City of Houston requested a further extension in August 2006, which was granted to only 113 of the thousands of people who needed it because they had been deemed ineligible for Section 408 assistance.<sup>121</sup> Plaintiffs sought injunctive relief, alleging that FEMA failed to provide sufficiently detailed written explanations for its decision denying benefits to enable them to file

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115. *Id.* at 818.

116. *Id.*

117. *Id.* at 813-14.

118. *Id.*

119. *Id.* at 819.

120. *Ass'n of Cmty. Orgs. for Reform Now v. FEMA*, 463 F. Supp. 2d 26, 29 (2006).

121. *Id.* at 30.



meaningful appeals.<sup>122</sup> The court agreed, because the letters contained cryptic codes that were meaningless without the explanation provided in a separate application guide, whose language was vague and non-individualized.<sup>123</sup> The letters and guide did not provide adequate explanation for FEMA's decisions and therefore did not constitute proper notice under the Fifth Amendment to terminate plaintiffs' protected property rights to receive emergency housing assistance.<sup>124</sup>

The court also stated, and FEMA conceded, that the discontinuation of benefits would "deprive an eligible recipient of the very means by which to live while he waits" for reconsideration of his case.<sup>125</sup> Subsequently, the court noted that a more detailed statement of FEMA's reasons for denying Section 408 benefits to the plaintiffs was necessary to "(1) diminish the risk of erroneous deprivation; (2) restore the appellate review process to the valuable safeguard it was intended to be; and (3) free these evacuees from the 'Kafkaesque' application process they have had to endure."<sup>126</sup> A property interest, such as the plaintiff's interest in Section 408 housing assistance, "could not be more fundamental and overarching than it is here."<sup>127</sup>

## 2. Arguments Against a Due Process Right to Section 408 Benefits

*McWaters* did not reach the Fifth Circuit Court of Appeals, but similar questions arose in that court in another class action case, *Ridgely v. FEMA*.<sup>128</sup> *Ridgely* was filed by survivors of Hurricanes Katrina and Rita, who had received some Section 408 rental assistance but had then been denied recertification of those benefits.<sup>129</sup> The class alleged that FEMA's denials did not contain understandable explanations, precluded any effective challenge of FEMA's decision before the assistance was discontinued, and that FEMA failed to publish standards for continued Section 408 eligibility.<sup>130</sup> Therefore, the class argued that FEMA acted in an arbitrary and capricious manner in violation of the APA and due process.<sup>131</sup> The trial court found for the plaintiffs, rejecting FEMA's argument that the plaintiff class lacked the property interest necessary to

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122. *Id.* at 28.

123. *Id.* at 35.

124. *Id.* at 34.

125. *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 340-41 (1976)).

126. *Id.* at 35.

127. *Id.* at 34.

128. *Ridgely v. FEMA*, 513 F.3d 727 (5th Cir. 2008)

129. *Id.* at 730.

130. *Id.*

131. *Id.*

support a due process claim.<sup>132</sup> Instead, the court found that the plaintiffs did have a property right akin to the one the Supreme Court established in *Goldberg* and other due process cases.<sup>133</sup>

The Fifth Circuit disagreed, holding that “the statute and regulations governing the rental assistance program are not sufficient to create a property interest.”<sup>134</sup> The analysis in *Ridgely* centered on the discretionary/mandatory distinction.<sup>135</sup> The Court stated that absent real, substantive limitations on FEMA’s discretion, Section 408 and the regulations did not create a constitutional property interest because “a benefit is not a protected entitlement if government officials may grant or deny it at their discretion.”<sup>136</sup> The Court compared this case to *Mathews v. Eldridge*, in which “[t]he mandatory language [in the social security disability statute] makes it clear that an individual who satisfies the eligibility criteria has a legitimate expectation” of receiving the benefit.<sup>137</sup> No specific directives in the Stafford Act or FEMA’s implementing regulations compelled FEMA to provide assistance to anybody who meets the eligibility criteria (let alone *everybody*).<sup>138</sup> The court worried that compelling assistance would open FEMA to the possibility of fraud.<sup>139</sup> The *Ridgely* court was also less concerned with FEMA’s own claim that “if they are eligible, we will pay” than the *McWaters* court—that claim doesn’t figure into the court’s analysis at all. In fact, FEMA’s argument in this case was based on the opposing idea, that the agency retained absolute discretion as to who receives Section 408 benefits.<sup>140</sup> Thus, the provisions could not give rise to a property interest.<sup>141</sup>

Though it comes from an entirely separate federal circuit, *Santos v. FEMA* follows the *Ridgely* court very closely in its approach to Section 408 property interests. The plaintiffs in *Santos* all evacuated Puerto Rico in the aftermath of Hurricane Maria.<sup>142</sup> FEMA had been providing Section 403 transitional assistance (temporary shelters, a typical precursor to Section 408 housing benefits) to thousands of Puerto Ricans displaced by Maria but announced that in June 2018,<sup>143</sup> it would discontinue that

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132. *Id.* at 731.

133. *Id.* at 732 (“[We see] no relevant difference between the plaintiff’s property rights to Section 408 benefits and those rights belonging to the plaintiffs in ... *Goldberg*”).

134. *Id.* at 735.

135. *Id.* at 738-39.

136. *Id.* at 735 (quoting *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 756 (2005)).

137. *Id.* at 738.

138. *Id.* at 736.

139. *Id.* at 732.

140. *Id.* at 731.

141. *Id.* at 736.

142. *Santos v. FEMA*, 327 F. Supp. 3d 328, 331 (D. Mass. 2018).

143. Almost a full year after Hurricane Maria, significantly longer than the typical 5 to 14 days

assistance.<sup>144</sup> Among other claims, the plaintiffs alleged violation of their due process rights and sought an injunction to prevent the termination of benefits under Section 403 for themselves and others similarly situated until such time as they either received temporary housing (a Section 408 benefit) or found permanent housing.<sup>145</sup> The court ultimately denied the plaintiffs' request.<sup>146</sup>

In denying the injunction, the court agreed with the *Ridgely* court that, "given that Section 408 and the regulations do not provide entitlement to financial assistance, that plaintiffs were previously found eligible for [403] assistance is of no matter."<sup>147</sup> Plaintiffs' arguments, according to the court, were undermined because Sections 403 and 408 both speak in discretionary terms, not absolutes,<sup>148</sup> and it agreed with *Ridgely* that FEMA shall not be liable for any claim based upon a discretionary function or duty.<sup>149</sup> Though the court refused to find a constitutional property interest and ultimately denied plaintiffs' motion at bar, it did so knowing that there was another restraining order already in place preventing FEMA from terminating plaintiffs' benefits until such time as the plaintiffs' need was gone. The court concluded by "strongly urg[ing] the parties to work together to find temporary housing."<sup>150</sup>

### III. DISCUSSION

Ensuring that individuals and households recover as quickly and effectively as possible is a cardinal goal of disaster recovery.<sup>151</sup> To ensure that courts are prepared to play an effective and meaningful role in the American emergency response system, Congress should amend the Stafford Act so that the language of Section 408 is mandatory rather than discretionary. Alternatively, courts should follow *McWaters* in adopting

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authorized for Section 403 transitional assistance, and indeed even longer than the six months post-disaster declaration maximum for Section 403 assistance. *Id.* at 334.

144. *Id.* at 331.

145. *Id.* at 331-32.

146. *Id.*

147. *Id.* at 339 (citing *Ridgely v. FEMA*, 513 F.3d 727, 736 (5th Cir. 2008)).

148. *Id.* at 338 (citing *Ridgely*, 512 F.3d at 735-36) (also citing *Pride v. FEMA*, Civ. No. 1:1CV22-HSO-JMR, 2013 WL 6048153 (Section 408 benefits are discretionary and therefore, there is no constitutionally protected property interest in receiving such benefits); *Konashenko v. FEMA*, No. 12-CV-3034 (SJR)(WDW), 2014 WL 1761436 (E.D.N.Y. Apr. 29, 2014) (FEMA had discretion whether to award plaintiff repair funds, therefore she had no reasonable expectation that she would receive funds and no protected property interest in receiving the funds)).

149. *Id.* at 333 (citing 42 U.S.C. § 5148).

150. *Id.* at 345.

151. Anne Sikes Hornsby, *Roadblock to Recovery: How FEMA's Liability Insurance Mandate Denies Low-Income Disaster Survivors Essential Transportation Benefits*, 96 MARQ. L. REV. 735, 787 (focusing on the clear need for effective transportation in the immediate post-disaster period, for delivering supplies and recovery personnel to disaster zones).

FEMA's own interpretation of the Stafford Act in order to establish a due process right to Section 408 benefits. While either remedy on its own may be sufficient, the ideal solution is to do both. Such a change will empower federal courts to defend a uniform due process property interest in the receipt of post-disaster FEMA benefits, supported by statutory authority.

Part A of this Section outlines the reasons why establishing a due process right is an essential next step in preparing for the inevitable increase in both the frequency and strength of natural disasters in the very near future. Then, Part B will detail two potential avenues that can establish the due process right. Finally, Part C will discuss various complicating factors.

### A. *Why Due Process?*

Without an established constitutional due process right, it is likely that more courts will treat Section 408 benefits the way the Fifth Circuit did in *Ridgely* (followed by the District Court of Massachusetts in *Santos*).<sup>152</sup> Without the right, FEMA and the courts will be free to continue denying benefits even to those who have established their eligibility. But in the face of increasing damage from natural disasters, how can the desired result be that a person who is eligible under the statute has no interest that a court can protect? Like disabilities in *Mathews*, a natural disaster is no fault of the victim. It is one of the most chaotic, stressful, and devastating times in a person's life.

Section II of this Comment established that absent some action, “the destabilizing climate will . . . spawn life-threatening natural disasters.”<sup>153</sup> The number and ferocity of natural disasters will escalate in tandem with death tolls and recovery bills. Measures to reduce climate change<sup>154</sup> will hopefully have the added effect of reducing the number and strength of disasters. But in the meantime, the nation (and the world) will continue to experience catastrophes. Just as old, fragile building materials need to be replaced with disaster-resilient components, so too must poor frameworks of emergency management be amended to ensure they remain effective. A comprehensive and effective system for relief and recovery must be established to replace the current system, which is cumbersome and faulty.

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152. *Ridgely v. FEMA*, 513 F.3d 727, 736 (5th Cir. 2008).

153. *Juliana v. United States*, 947 F.3d 1159, 1166 (9th Cir. 2020).

154. Such as those introduced in President Biden's Build Back Better Framework (The White House, *The Build Back Better Framework*, <https://www.whitehouse.gov/build-back-better/> [<https://perma.cc/3VK6-6WKZ>] (last visited Oct. 29, 2021)) or discussed in the U.N. COP26 climate conference in Glasgow (see Brady Dennis, *What You Need to Know About the U.N. COP26 Climate Summit—And Why It Matters*, WASH. POST (Oct. 26, 2021), <https://www.washingtonpost.com/climate-environment/2021/10/06/cop26-glasgow-un-climate-talks/> [<https://perma.cc/JM5T-PZRN>]).

For some, an easy suggestion might be to relocate the residents of disaster zones to places less susceptible—away from places like New Orleans, which has been hit by multiple billion-dollar hurricanes this millennium, or from cities along the San Andreas fault on the West Coast. In fact, climate migration, the global phenomenon of people choosing to leave home due to dangerous changes in the environment, may already be taking shape across the United States.<sup>155</sup>

While voluntary climate migration may prove a net positive in terms of lives lost and property damaged in disasters, *compelling* people to relocate is an impracticable long-term solution to the problem of natural disasters. In the United States, a person's right to stay or go where they choose is traditionally respected.<sup>156</sup> There are deep-rooted emotional and socioeconomic factors that prevent people in the most common disaster zones from moving to safer locales. For example, some people don't want to move away from their family home (not just a family *house*, but their family had been in that neighborhood for many generations),<sup>157</sup> or they can't afford to move.<sup>158</sup> Anecdotally, the author of this Comment also discussed this issue first-hand with disaster survivors in Texas, Louisiana, North Carolina, and Puerto Rico from 2016-2019. Their reactions to the idea of evacuating illustrated that many people are inclined to remain in their homes despite the associated risks from frequent, ferocious natural disasters.

Furthermore, any plan to completely abandon disaster prone-regions, involving mass migration inland and development of fire- and earthquake-resilient communities, would be sure to carry an astronomical price tag, involve great emotional turmoil, and require collaboration amongst a politically divided government.<sup>159</sup>

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155. Jake Bittle, *Climate Change is Already Rejiggering Where Americans Live*, THE ATLANTIC (Sept. 3, 2021) ("about half of Americans who planned to move in the next year said natural disasters were a factor in their decision."), <https://www.theatlantic.com/science/archive/2021/09/hurricane-ida-louisiana-climate-migration/619971/> [<https://perma.cc/5898-3LHA>]; see also Kenzie Poole, *Climate Migrants: Who They Are and What Legal Protections Do They Have*, IMMIGR. & HUMAN RIGHTS L. REV. (Oct. 28, 2021) (stating that some twenty-two million refugees have been displaced from their homes by "by profound environmental changes and disasters globally."), <http://lawblogs.uc.edu/ihrlr/2021/10/28/climate-migrants-who-are-they-and-what-legal-protections-do-they-have/> [<https://perma.cc/X2E9-MDDK>].

156. See generally, *Saenz v. Roe*, 526 U.S. 489 (1999); *Kent v. Dulles*, 357 U.S. 116 (1958); *Paul v. Virginia*, 75 U.S. 168 (1868).

157. Adrian Florido, *Why Stay During A Hurricane? Because It's Not As Simple As 'Get Out'*, NPR (Oct. 18, 2018) ("Of course it's, 'Get out.' But when it's your life and your home, it's often a lot more challenging than that."), <https://www.npr.org/2018/10/18/658258370/why-stay-during-a-hurricane-because-its-not-as-simple-as-get-out> [<https://perma.cc/N3WQ-94GE>].

158. *Id.*; see also Bittle, *supra* note 155 (telling the story of Hurricane Ida survivor Milton Thibodeaux, who would likely have to pay triple his current housing costs to move to a less disaster-prone area than the Louisiana bayou).

159. Cords, *supra* note 13, at 952 (arguing that alleviating massive human suffering should not be

Nor is short-term evacuation always a good solution. Though it can certainly save lives, people don't always have enough forewarning.<sup>160</sup> In the case of Hurricane Katrina, when there was only nineteen hours to make evacuation plans, “[h]ow were those without cars, one-quarter of the city’s population, supposed to escape? . . . no other option had been provided to them. The city didn’t use its fleet of school buses to transport them out.”<sup>161</sup> There are also concerns around those for whom it may be difficult to move, such as the elderly, the disabled, and the family pets.<sup>162</sup> Even for young, healthy families without pets, evacuating can be expensive. Wait too long, and the only available hotel rooms are far away and costly.<sup>163</sup> Therefore, income inequality and similar socioeconomic disparities are factors in who has the option to evacuate at all. There are additional logistical factors when it comes to the United States’ island states and territories, including Hawaii, Puerto Rico, the U.S. Virgin Islands, American Samoa, and Guam. Unlike the contiguous states and Alaska, persons in the islands and territories cannot drive from their homes to stay with friends or family in another state while they wait out a storm. When an evacuation order comes down, there may be no choice but to hunker down and wait for the stormwall to hit. In any event, evacuation and migration are life-saving, not property-saving, techniques. Even if they saved every life threatened by a disaster (which they don’t), the survivors’ property would still be at the mercy of the storm.

Other suggestions for FEMA’s improvement include amending the Stafford Act to afford Section 408 claimants the right to an in-person hearing to contest their eligibility denial and to strengthen the appeals process.<sup>164</sup> Another idea is to embrace an “intersectional consciousness” to reconcile FEMA’s actions with the spirit of the Equal Protection Clause,<sup>165</sup> eliminating unnecessary delays in the aid application

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a matter of politics).

160. JONES, *supra* note 16, at 159, 165. Note also that development of quicker, more accurate, and widespread early warning systems has been a major focus of many international agreements relating to effective disaster mitigation and recovery. See e.g., World Conference of Natural Disaster Reduction, Yokohama, Japan, May 23-27, 1994, *Yokohama Strategy for a Safer World*, U.N. Doc. A/CONF.172/9 (Sept. 27, 1994); World Conference on Disaster Reduction, Hyogo, Japan, Jan. 18-22, 2005, *Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters*, U.N. Doc. A/CONF.206/6 (Jan. 22, 2005); Third U.N. World Conference on Disaster Risk Reduction, Sendai, Japan, March 14-18, 2015, *Sendai Framework for Disaster Risk Reduction 2015-2030*, U.N. Doc. UNISDR/GE/2015 (Mar. 18, 2015), [https://preventionweb.net/files/43291\\_sendaiframeworkfordrren.pdf](https://preventionweb.net/files/43291_sendaiframeworkfordrren.pdf) [<https://perma.cc/HTF5-N6FA>].

161. *Id.*

162. Brian Resnick, *Why Some People Never Evacuate During a Hurricane, According to a Psychologist*, VOX (Sept. 14, 2018), <https://www.vox.com/science-and-health/2017/8/25/16202296/hurricane-florence-2018-evacuation-psychology>.

163. Florido, *supra* note 157.

164. Williams, *supra* note 7, at 1887.

165. Murray, *supra* note 18, at 196 (encouraging FEMA to “embrace its role as a possessor of a

process,<sup>166</sup> and working with the Department of Housing and Urban Development to create a plan to ensure that adequate amounts of affordable housing are available for disaster victims.<sup>167</sup>

Others suggest leaving untouched the issue of Section 408 denials, because the risk of fraud to FEMA by people posing as survivors eligible for Section 408 benefits appears high. Indeed, it may be true that FEMA has paid out millions of dollars in fraudulent claims.<sup>168</sup> The risk of further fraud to FEMA could inspire more courts to follow *Ridgely*, denying disaster victim plaintiffs the Section 408 benefits for which they are eligible.<sup>169</sup>

But there are more appropriate responses to the possibility of fraud than refusing aid.<sup>170</sup> Compare the millions of dollars in fraudulent claims to the many thousands of people improperly denied aid—those who should have received Section 408 benefits but did not. The policies supporting the very existence of FEMA suggest that the needs of disaster victims should hold preference over efforts to protect the agency from fraud. In other words, the nebulous possibility of fraud should not incentivize the government to create roadblocks to recovery during the traumatic aftermath of disaster. Compared to individuals or even households, FEMA is better able to absorb the cost of its erroneous decisions.<sup>171</sup> In fact, one could argue that absorbing costs associated with disaster recovery is part of FEMA's *raison d'être*. Therefore, it would work better to grant benefits to all of those who are eligible to receive them and then put the onus on FEMA to correct itself if it errs rather than risk denying those truly in need.

Establishing a due process right to post-disaster housing assistance would not expose FEMA to the kinds of fraud *Ridgely* anticipated. This constitutional development would not be a blank check for anybody who wanted FEMA money. It is not as though every person who sets foot in a

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constitutional duty” under the Equal Protection Clause, to consider the realities and unique narratives of the communities in which the agency operates).

166. Pierre & Stephenson, *supra* note 4, at 493.

167. *Id.*

168. Williams, *supra* note 7 at 1883; see also James Finn, *Scammers are Posing as Hurricane Ida Victims, Trying to Get FEMA Money. Here's What You Can Do*, THE ADVOCATE (Oct. 7, 2021) (“Scammers are trying to exploit [FEMA]’s efforts to help people whose homes were damaged and lives were disrupted”), [https://www.theadvocate.com/baton\\_rouge/news/article\\_fe7075a6-26ec-11ec-8b94-6fffc3cf3dc1.html#:~:text=You%20can%20report%20scams%2C%20fraud,be%20found%20at%20this%20link](https://www.theadvocate.com/baton_rouge/news/article_fe7075a6-26ec-11ec-8b94-6fffc3cf3dc1.html#:~:text=You%20can%20report%20scams%2C%20fraud,be%20found%20at%20this%20link).

169. *Ridgely v. FEMA*, 513 F.3d 727, 732 (5th Cir. 2008).

170. For example, rather than withholding aid at the outset and risk denying benefits to those who truly need them, allow FEMA to challenge a grant of benefits if the agency later has reason to suspect the claim was fraudulent. Because post-disaster needs are great and immediate, this method would allow FEMA to protect itself from fraud in the aftermath without denying benefits when the immediate need arises.

171. Williams, *supra* note 7, at 1891.

disaster zone is entitled to FEMA's assistance. Applicants would still need to establish eligibility under the Section 408 criteria. The main effect of a due process right would be to ensure that those who *are* eligible—like the plaintiffs in *Ridgely*, *McWaters*, *Santos*, and *ACORN*—are not denied their benefits. Instead, any plaintiff improperly denied Section 408 benefits would have a cause of action against FEMA. Establishing this right would ensure that courts faced with FEMA denials would analyze those denials for adequacy of process under a *Mathews v. Eldridge* framework. A due process right would go a long way toward augmenting victims' likelihood of actually receiving the benefit to which they are entitled.

### *B. Methods to Establish a Right to Section 408 Benefits*

Establishing new constitutional rights may seem like a monumental task worthy of much strain and commotion, but more is not necessarily better when a few carefully-crafted changes will do the trick.<sup>172</sup> Striking down the Stafford Act or repealing the entire thing would leave FEMA powerless to provide aid that *is* available in the event of a major disaster.<sup>173</sup> Even if striking the Act were a good idea, doing so would likely prove difficult (at best) due to Congressional gridlock. Luckily, it is not necessary to strike the Stafford Act and replace it with a whole new statute. There are two possible avenues for properly establishing the right to receipt of post-disaster FEMA benefits: (1) a legislative remedy consisting of a few carefully-crafted amendments to the Stafford Act; or (2) a judicial remedy following *McWaters*. Either of these remedies will serve to further the policy permeating Section 408, that of providing “temporary housing assistance to families and individuals who have lost their homes because of a natural disaster.”<sup>174</sup> Section III(B)(1) will address the legislative remedy while Section III(B)(2) will address the judicial remedy.

#### 1. A Few Carefully-Crafted Changes: The Legislative Remedy

A benefit is not protected if the government has discretion to grant or deny it.<sup>175</sup> Thus, the first necessary change is to amend Section 408's discretionary language so that it becomes mandatory. As the case law

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172. *Id.* at 1887.

173. Murray, *supra* note 18, at 171 (“... if 2017 taught us anything, it was that natural disasters can create cataclysms that imperil life and property to such a degree that it would be madness to strike down a law that allows the federal government to respond to these catastrophes with its resources.”).

174. Pierre & Stephenson, *supra* note 4, at 492.

175. *Ridgely v. FEMA*, 513 F.3d 727, 756 (5th Cir. 2008).



demonstrates, as long as FEMA retains discretion to deny assistance to those who meet the statutory eligibility criteria, most courts are likely to defer to the agency's decisions. Nor will such decisions be reviewed in court because the sovereign immunity clause bars judicial review over discretionary actions. If the statutory language remains discretionary, there is no security or guarantee for post-disaster benefits. Where the disputed action relates to a mandatory function, neither the case law nor the Stafford Act's sovereign immunity clause can protect FEMA from judicial review.<sup>176</sup>

The *McWaters* court adopted FEMA's own interpretations as to the type of discretion afforded to it by the Stafford Act. Meanwhile in *Ridgely*, FEMA stated a different reading altogether, and in any case, the court's analysis ignored FEMA's interpretation. Modifying Section 408 so that its housing provisions are mandatory will not only ensure that FEMA provides housing assistance to all survivors who meet the eligibility criteria, and that any refusals to do so will be reviewable in court, but will also alleviate the confusion caused by differing interpretations of the Stafford Act by generating a clear, uniform interpretation. With this modification, finding that disaster plaintiffs have a right to Section 408 benefits will not be a stroke of luck based on FEMA's representations about its own policies, as it was in *McWaters*. Amending the Stafford Act will ensure that FEMA's duty to deliver assistance to the eligible is *actually* mandatory.

In *Ridgely*, the Ninth Circuit helpfully provided a model of what the Stafford Act could look like in order for the court to hold FEMA liable for denying benefits to eligible applicants.<sup>177</sup> The social security disability statute which served as the model reads, “[e]very individual who . . . is under a disability . . . shall be entitled to a disability insurance benefit . . . for each month beginning with the first month . . . in which he becomes so entitled to such insurance benefits.”<sup>178</sup> If Section 408 read “the President shall provide financial or other assistance . . . to respond to the disaster-related housing needs of individuals and households” instead of “the President may provide,” courts would have significantly less wiggle room to hold that “the statute and regulations governing the rental assistance program are not sufficient to create a property interest.”<sup>179</sup> Instead, this amendment would be a real, substantive limitation on FEMA's ability to deny assistance and give courts the authority to support disaster victims' claims of entitlement to Section 408 benefits.

The other suggested improvements to FEMA, such as allowing for in-

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176. Hornsby, *supra* note 151, at 789

177. *Ridgely*, 513 F.3d at 738.

178. *Id.* (quoting 42 U.S.C. § 423(a)) (emphasis added).

179. *Id.* at 735.

person hearings to contest eligibility denials and strengthening the appeals process, are undoubtedly vital and important. But as long as FEMA retains discretion to refuse assistance to anybody who *is* eligible, those improvements remain paper tigers. What good is an in-person hearing to contest an eligibility denial if FEMA is under no mandate to provide assistance once somebody has proven their eligibility? Nor does amending the appeals process take priority to amending Section 408. Even if FEMA's appeal process was straightforward, disaster victims are not often in a position to wait for an appeal. In an emergency, disaster survivors need immediate help and cannot always afford to wait, let alone pay, for an appeal. Making Section 408 mandatory may cut down on the number of appeals that assistance applicants file.

Furthermore, this amendment will eliminate ambiguity from the Stafford Act's individual housing provisions. If Section 408 is clear and unambiguous, it will no longer be subject to *Chevron* deference—meaning that any interpretation FEMA may concoct to avoid issuing benefits to every person deemed eligible will hold no weight upon review in court.

## 2. Interpreting the Statute: The Judicial Remedy

Among historically protected rights there is the right “to be free from, and obtain judicial relief for, unjustified intrusions on personal security.”<sup>180</sup> What is the intrusion on personal security in disaster recovery cases? Certainly, FEMA itself is not a Category Five hurricane flooding the town, nor an earthquake shaking foundations at magnitude seven on the Richter scale, nor a raging wildfire. The agency itself may not be a cataclysm intruding on the victims' personal security. However, in some ways, the term ‘natural disaster’ is a misnomer, because these events are not inherently destructive to the natural world; they are destructive to human systems.<sup>181</sup> They are destructive in part *because* of the fragility of human systems. Decades of engineering and urban planning decisions left Mounds Landing surrounded by inadequate levees, and there were no spillways, outflows, or reservoirs that may have mitigated the damage of the Great Mississippi Flood.<sup>182</sup> Natural disasters are really the human, governmental failure to prepare and respond.<sup>183</sup> It is imperative to maximize the potential of the courts to mitigate the

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180. *Ingraham v. Wright*, 430 U.S. 651, 673 (1977).

181. *JONES*, *supra* note 16, at 114.

182. *Id.* at 100-01.

183. Paul Rando, *There Are No Natural Disasters*, INT'L L. SOC'Y NEWSLETTER, May 7, 2021 (“[W]hat is a ‘natural disaster,’ other than the failure to reduce risk and make resilient communities?”), <https://sway.office.com/9N9JSe1z0U6nGaYq?red=Link> [https://perma.cc/4U43-RCKU].

disastrous human consequences of natural events. “The best investment in a resilient community is to identify such weaknesses and repair them—before the event.”<sup>184</sup> Thus, courts should be armed with the means to correct FEMA’s mistakes.

A property interest could not be more fundamental and overarching than the right to receive Section 408 post-disaster benefits.<sup>185</sup> The question of whether post-disaster assistance is a constitutionally protected property interest is almost certain to reach more Circuit Courts (and eventually the Supreme Court) in the foreseeable future. When it does, courts should follow *McWaters*, giving anybody who is eligible for Section 408 benefits a constitutionally protected property interest in receipt of their FEMA assistance. This is true even in the absence of a statutory amendment of the Stafford Act.

It is well-established that “Congress cannot preclude judicial review of allegedly unconstitutional agency action.”<sup>186</sup> Even an agency’s discretionary acts that are otherwise precluded from judicial review by sovereign immunity may be reviewed in court if the claim alleges constitutional violations.<sup>187</sup> This is because “adherence to constitutional guidelines is not discretionary, it is mandatory.”<sup>188</sup> Therefore, if Section 408 benefits were a constitutionally protected interest, FEMA’s decisions to deny assistance to eligible individuals would become reviewable in court for allegedly violating the Constitution.

Additionally, depriving the property interest in government benefits of somebody who is eligible to receive them verges upon unconstitutionality. If FEMA deprives an individual of equal treatment under the law—if one eligible person is denied the same benefits another eligible person received—it is unconstitutional.<sup>189</sup> When the only basis for a deprivation is agency discretion, the deprivation hews too close to the termination of public welfare benefits held unconstitutional in *Goldberg v. Kelly*.<sup>190</sup> Doing so deprives a property interest without due process of law because it is completely arbitrary.

Courts should follow the *McWaters* court in establishing that disaster plaintiffs have a constitutionally protected property interest in Section 408 benefits on the basis of FEMA’s purported *interpretation* that the decision whether to grant the benefit is mandatory: that all who are

184. JONES, *supra* note 17, at 115.

185. Ass’n of Cmty. Orgs. for Reform Now v. FEMA, 463 F. Supp. 2d 26, 34 (2006).

186. Rosas v. Brock, 826 F.2d 1004, 1008 (11th Cir. 1987) (citing Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986)); Campbell v. Office of Pers. Mgmt., 694 F.2d 305, 307 (3d Cir. 1982).

187. Pierre & Stephenson, *supra* note 4, at 479.

188. *Id.* (citing Rosas 826 F.2d at 1008).

189. U.S. Const. amend. XIV, § 1.

190. Goldberg v. Kelly, 397 U.S. 254, 261 (1970).

eligible will receive some assistance. By following this reasoning to establish a due process right, courts can truly review FEMA's actions for constitutional adequacy under *Mathews*. It involves a bit of circular reasoning, but once the constitutional right is established, the agency's discretionary acts (as actually written in the statute) become reviewable because the denial of Section 408 benefits would trigger constitutional claims.

Establishing a property interest would be a major boon to disaster-victim plaintiffs like those in *Ridgely* and *Santos*. Courts would be in a position to apply the *Mathews* analysis every time FEMA's denial of Section 408 benefits appeared in court. The survivor's interest in the benefits necessary to establish a safe home or shelter, and the risk of erroneous deprivation of that interest, would weigh heavily against FEMA's concerns of fraud.

The courts can establish a due process right even if Congress fails to amend the Stafford Act. Doing so will only require courts to be cognizant, as was the court in *McWaters*,<sup>191</sup> that FEMA's policy sufficiently narrowed its discretion to deny a legitimate claim of entitlement to 408 assistance.<sup>192</sup> Absent mandatory language in a statute, a property interest may still arise from "administrative understandings."<sup>193</sup> If the Circuit Courts or the Supreme Court follow *McWaters*, they could find that FEMA's purported internal policies effectively make Section 408 a mandatory statute. Such a holding would ensure that people who meet the eligibility requirements would have a private right of action if FEMA denied them their benefits.

### 3. Ideally Both

The most effective strategy would be to implement both remedies—they should complement each other. *Ridgely* proves that courts would be much more comfortable finding and upholding a constitutionally protected property interest in Section 408 benefits if the statutory language was already mandatory instead of discretionary. However, while the statutory remedy would make courts more likely to implement the judicial remedy, congressional gridlock in the twenty-first century makes achieving substantive statutory changes difficult.<sup>194</sup> Likewise, while

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191. *McWaters v. FEMA*, 436 F. Supp. 2d 802, 818 (E.D. La. 2006).

192. *Ridgely v. FEMA*, 513 F.3d 727, 739 (5th Cir. 2008) ("It may be the case that FEMA's policies in administering the rental assistance program require it to make awards . . . to all eligible applicants").

193. *Id.* at 740 (citing *Mahone v. Addicks Util. Dist. Of Harris County*, 836 F.2d 921, 931 (5th Cir. 1988)).

194. Lee Drutman, *How Much Longer Can This Era of Political Gridlock Last?*, FIVETHIRTYEIGHT (Mar. 4, 2021), <https://fivethirtyeight.com/features/how-much-longer-can-this-era-of-political-gridlock-last/>.

endorsement from the judiciary would lend credence to a statutory amendment, *stare decisis* and the principal of judicial restraint sometimes make courts hesitant to establish new constitutional rights.<sup>195</sup> Furthermore, courts may argue that this issue is for the political branches to solve. Each of the remedies would certainly support the case for establishing the other. Thus, because either option would clearly be sufficient to protect eligible disaster survivors from FEMA's erroneous decision to deny them Section 408 assistance, in the absence of both, either will suffice.

### C. Complicating Factors

The two-factor method to enshrine a due process right to Section 408 benefits laid out above is not without its pitfalls. Though none of these complicating factors, in and of themselves, are convincing reasons to refrain from acting, any legislature or court seeking to implement the changes proposed above should consider them.

Significantly, the primary method of providing disaster relief for major disasters continues to be via "supplemental appropriations."<sup>196</sup> Congress authorizes a certain budget for FEMA each year, but FEMA usually needs to request supplemental funds to prepare for major disasters.<sup>197</sup> Thus, barring adjustment of the appropriation scheme, Congress may be hesitant to amend the Stafford Act in a way that could require FEMA to pay out even more money.

Making it mandatory for FEMA to provide Section 408 benefits to all eligible persons also runs the risk that Congress (in the Stafford Act) or FEMA (in its implementing regulations) will make the eligibility standards themselves significantly more stringent. By doing so, they could ensure that the number of payouts FEMA actually makes does not increase. On the other hand, this could be a positive outcome—stricter FEMA eligibility standards could inspire a certain amount of benevolent restraint on the agency's part. FEMA could stop focusing on small disasters where local and state agencies are already capable of covering costs.<sup>198</sup> Instead, FEMA could start diverting its existing resources to where they are needed most.

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195. See e.g., Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 283 (1990) (citing *South Carolina v. Gathers*, 490 U.S. 805 (1989) (Scalia, J., dissenting) (acknowledging concern about overturning decisions that are "so embedded in our system of government that return is no longer possible"))).

196. Cords, *supra* note 13, at 954.

197. *Id.* at 933.

198. Frank, *supra* note 82 (stating that FEMA's "distraction" by small pre-Harvey disasters led to a delayed and ineffective response when the hurricane struck).

## IV. CONCLUSION

Have four decades, hundreds of disasters, and thousands of erroneous denials of housing assistance taught FEMA anything about effective disaster mitigation? Survivors across the United States would answer with “a resounding chorus of ‘No.’”<sup>199</sup> As global temperatures increase, and catastrophes become more common and more violent, so too do the risk and potential consequences of erroneously depriving survivors their post-disaster benefits.

In the hurricane’s torrential downpour, in the thunderous flood, water nurtures the soil and carries mineral resources vital to natural evolution.<sup>200</sup> Fire cleanses the forest, sparking new and diverse life.<sup>201</sup> What humanity calls “natural disaster” is really *tabula rasa* (a clean slate) for the natural world. While the inevitabilities of the natural world will not change, the human systems that have been created to deal with the effects of those inevitabilities can—and must—be reformed. It is not necessary to wait until FEMA recognizes the need to do better; the disaster has already struck. Time after time, FEMA has denied benefits for those who are eligible. Ensuring that survivors who are eligible for Section 408 benefits receive those benefits is not the only improvement that FEMA requires, but it’s a significant one. The solution awaits in Congress, the courts, or both.

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199. Pierre & Stephenson, *supra* note 4 at 445.

200. *Why We Need to Restore Floodplains*, AMERICAN RIVERS, <https://www.americanrivers.org/threats-solutions/restoring-damaged-rivers/benefits-of-restoring-floodplains/> [https://perma.cc/HXY8-YVTQ] (last visited Nov. 4, 2021).

201. *The Ecological Benefits of Fire*, NAT’L GEOGRAPHIC SOC’Y (Jan. 15, 2020), <https://www.nationalgeographic.org/article/ecological-benefits-fire/> [https://perma.cc/C8ND-83A8].