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GIMME SHELTER: AMENDING FEMA'S ENABLING LEGISLATION TO PERMIT CITIZEN SUITS FOR FAILURES IN DISASTER RECOVERY EFFORTS

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INTRODUCTION

On August 29, 2005, Hurricane Katrina, a Category 3 hurricane, made landfall at the mouth of the Pearl River (situated near the Louisiana /Mississippi border).[1] From there, the storm brought maximum sustained wind speeds of 110 knots throughout Louisiana, Mississippi, and Alabama.[2] There was no precise way to measure how much flooding Katrina brought to these areas throughout its lifespan, as there were not enough buildings left behind to provide the high-water marks used at that time to calculate the level of flooding.[3] Hurricane Katrina dissipated rather quickly, gradually being absorbed into a weather front over the Eastern Great Lakes only two days after making landfall.[4] It had only taken two days for Katrina to become one of the costliest and deadliest hurricanes to ever strike the United States.[5]

One contributing factor to Katrina's staggering financial impact was the hundreds and thousands of households (substantially comprised of lower-income and Black families) left homeless in the hurricane's wake.[6] Congress quickly approved $62.3 billion in funding to be primarily

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[1] RICHARD D. KNABB ET AL., NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE KATRINA 23–30 AUGUST 2005, 1, 3 (2011), https://www.nhc.noaa.gov/data/tcr/AL122005_Katrina.pdf [https://perma.cc/8PLE-N566].

[2] *Id.* at 1, 3.

[3] *Id.* at 8–9.

[4] *Id.* at 4.

[5] *Id.* at 1.

[6] John K. Pierre & Gail S. Stephenson, *After Katrina: A Critical Look at FEMA's Failure to Provide Housing for Victims of Natural Disaster*, 68 LA. L.R. 443, 443 n.3 (2008).

administered by the Federal Emergency Management Agency ("FEMA") for the purposes of providing disaster relief, much of which was marked for housing relief assistance to be provided as expressed by the Stafford Act.[7] However, after three months had passed, thousands of the displaced families remained in limbo without receiving any housing assistance at all.[8] Some had their claims for assistance outright denied by FEMA on the basis of "'mechanical or arbitrary presumption[s] of fraud' that arguably had no factual basis."[9]

Worse still, FEMA's failure to provide necessary guidance on housing assistance provided by external agencies (such as the Treasury Department) meant that some displaced families received a check with no instructions, spent it on other necessities, and were later informed that they were now debtors to the federal government for spending housing assistance elsewhere.[10] A particularly high degree of dysfunction in FEMA's response to Hurricane Katrina is evidenced by this attempt to deliver financial assistance to disaster victims—over 1,000,000 of whom lived in poverty before Hurricane Katrina destroyed their homes—which instead left them further in debt.[11]

FEMA's Kafkaesque housing assistance response to Hurricane Katrina has been thoroughly dissected by stakeholders to provide learning points for the Agency to better prepare for future catastrophes.[12] A Government Accountability Office report issued in 2007 found that "FEMA had initiated various catastrophic planning efforts, but they were incomplete at the time of Hurricane[] Katrina . . . ."[13] The sluggish grind of FEMA's bureaucracy created challenges not only through hindering the swift delivery of housing relief assistance, but also by fostering an atmosphere of distrust among the public, leading those displaced households lucky

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[7] *Id.* at 444.
[8] *Id.* at 445.
[9] *Id.* at 446.
[10] *Id.*
[11] Pierre & Stephenson, *supra* note 6, at 455.
[12] Hari Sreenivasan, *How Has FEMA Changed in the Ten Years Since Hurricane Katrina?*, PBS NEWSHOUR (Aug. 29, 2015, 4:40 PM), https://www.pbs.org/newshour/show/fema-changed-ten-years-since-hurricane-katrina#:~:text=In%20the%20aftermath%20of%20Hurricane,agency%20has%20undergone%20many%20reforms [https://perma.cc/5B24-JV7F] ("In the aftermath of Hurricane Katrina, the Federal Emergency Management Agency—FEMA—was widely blamed for a lack of preparedness and an inadequate response.").
[13] Pierre & Stephenson, *supra* note 6, at 446 (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-88, DISASTER ASSISTANCE: BETTER PLANNING NEEDED FOR HOUSING VICTIMS OF CATASTROPHIC DISASTERS 6 (2007), http://www.gao.gov/new.items/d0788.pdf [https://perma.cc/36W9-GDV5]).

enough to receive housing assistance to struggle with "FEMA-shy landlords who refused to take the vouchers because of FEMA's 'broken promises, unreasonable deadlines[,] and mind-numbing bureaucracy.'"[14] Denise Bottcher, press secretary to then–Louisiana Governor Kathleen Blanco, summed FEMA's response up best when she said, "[w]e wanted helicopters, food[,] and water. [FEMA] wanted to negotiate an organizational chart."[15]

Following the botched relief efforts and widespread public scrutiny, FEMA has undergone a series of reforms in an effort to improve future disaster relief efforts.[16] These reforms, while well-intended and appreciated, have yet to prove sufficient to improve FEMA's capacity to respond to large-scale natural disasters. After Hurricane Maria devastated Puerto Rico in 2017, 332,000 Puerto Ricans had their claims for housing relief assistance denied due to "agency regulations and policies that require recipients of assistance to prove they own and occupy the damaged dwellings."[17] A 2018 Government Accountability Office report analyzing FEMA's response to the 2017 hurricane and wildfire seasons stated that "state officials . . . noted challenges in coordinating with FEMA that led to delays in providing assistance to survivors."[18] According to FEMA's own Hurricane Maria post-response analysis, the agency "lost track of much of the aid it delivered and who needed it," causing a humanitarian crisis that the Mayor of San Juan described as "something close to a genocide."[19] Public distrust in FEMA stemming from their bureaucratic processes has not abated, either; in August 2020, members of the California congressional delegation were compelled to request that the Department of Homeland Security Inspector General investigate reports that disaster relief aid had been improperly denied to California wildfire victims on the basis of the state's ideological leanings.[20]

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[14] *Id.* at 448.

[15] *FEMA Faces Intense Scrutiny*, PBS NEWSHOUR (Sept. 9, 2005, 12:02 PM) [hereinafter *FEMA Faces Scrutiny*], https://www.pbs.org/newshour/politics/government_programs-july-dec05-fema_09-09 [https://perma.cc/79KF-YAHH].

[16] Sreenivasan, *supra* note 12.

[17] Andres Viglucci, *They Lost Homes in Hurricane Maria, But Didn't Have Deeds. FEMA Rejected Their Claims*, MIAMI HERALD (Sept. 20, 2018, 7:00 AM), https://www.miamiherald.com/news/nation-world/national/article217935625.html [https://perma.cc/7EUK-D6WU].

[18] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-472, 2017 HURRICANES AND WILDFIRES: INITIAL OBSERVATIONS ON THE FEDERAL RESPONSE AND KEY RECOVERY CHALLENGES (2018), https://www.gao.gov/products/gao-18-472 [https://perma.cc/E6UT-4W6P].

[19] Frances Robles, *FEMA Was Sorely Unprepared for Hurricane Maria, Report Says*, N.Y. TIMES (July 20, 2018), https://www.nytimes.com/2018/07/12/us/fema-puerto-rico-maria.html [https://perma.cc/EKT2-M7FH].

[20] Letter from Members of Cal. Delegation to the U.S. House of Representatives, to Hon. Joseph Chaffin, Inspector Gen., U.S. Dep't of Homeland Sec. (Aug. 21, 2020), https://lieu

In a microcosm, FEMA's failures to timely deliver housing relief assistance leaves hundreds of thousands of disaster victims hungry, homeless, stressed, and anxious.[21] On a broader level, FEMA's failures leave deep socioeconomic scars that become another chapter in a long story of socioeconomic inequality in America. Federal data shows that individual white Americans often receive more money in FEMA disaster aid than their Black counterparts, even when the financial amount of damage is the same.[22] In predominantly Black neighborhoods, eleven percent of disaster victims requesting housing relief assistance had their applications denied by FEMA with no reason given, compared to just four percent of white disaster victims receiving such denials to their applications.[23] For white Americans living in counties struck by natural disaster, their personal wealth actually grew by an average of five times more than the personal wealth of white Americans in non-disaster-struck counties.[24] In contrast, Black residents in counties struck by natural disaster had their personal wealth decrease.[25] These data points are only a handful in a long trend line that led FEMA's own National Advisory Council to conclude that FEMA is not in compliance with its requirement under the Stafford Act to "[process applications and distribute financial relief and assistance] in an equitable and impartial manner, without discrimination on the grounds of race [or economic status, *inter alia*] . . . ."[26]

Beyond the immediate urgency of meeting a disaster victim's needs for life, there is a moral imperative, then, to treat reforming FEMA's disaster relief procedures as a social justice issue. This Note argues that democratizing the disaster relief process through enabling citizen suits against FEMA to timely deliver housing relief assistance is one potential solution to the immense problem at hand. This Note provides an overview of FEMA's obligations to survivors of natural disasters under both federal law and evolving interpretations of binding international law. This Note asserts that FEMA's repeated failure to deliver necessary disaster

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.house.gov/sites/lieu.house.gov/files/2020-08-21%20Letter%20to%20DHS%20OIG%20re%20California%20wildfire%20assistance%20investigation.pdf [https://perma.cc/B3UT-BRME].

[21] Pierre & Stephenson, *supra* note 6, at 447.

[22] Christopher Flavelle, *Why Does Disaster Aid Often Favor White People?*, N.Y. TIMES (Oct. 27, 2021), https://www.nytimes.com/2021/06/07/climate/FEMA-race-climate.html [https://perma.cc/LZX6-KWFG].

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] NAT'L ADVISORY COUNCIL, FED. EMERGENCY MGMT. AGENCY, NOV. 2020 REPORT TO THE FEMA ADM'R 12 (2020).

relief aid to these survivors constitutes violations of these obligations. This Note will then assert that the issue underlying these failures (i.e., flawed administrative and bureaucratic processes) is analogous to similar failures by environmental agencies. This Note will then propose that a citizen suit provision, similar to those under federal environmental law that have compelled agency action in the past, should be adopted to FEMA's enabling legislation to remedy failures to meet their obligations. Finally, this Note will examine the application of citizen suits since their introduction to understand how such a provision may operate under FEMA's enabling legislation, and to identify structural challenges faced by citizen suits that can be learned from to best ensure successful implementation moving forward.

I. OVERVIEW OF FEMA'S OBLIGATIONS

A. Obligations Under the Stafford Act and Other Federal Law

Federal law tasks the FEMA Administrator with "providing the Federal Government's response to terrorist attacks and major disasters . . . [and] aiding the recovery from terrorist attacks and major disasters."[27] The Robert T. Stafford Disaster Relief & Emergency Assistance Act ("the Stafford Act") that created FEMA states that in order for FEMA-led major disaster assistance programs—such as housing assistance—to receive federal authorization, Governors of states affected by the disaster must first initiate an "appropriate" state level response.[28] After doing so, the Governor may then request a Presidential declaration that the severity and magnitude of the disaster exceeds the state government's capacity to respond, at which point the President may direct the FEMA Administrator to implement the major disaster assistance programs under Title IV of the Act.[29]

Title IV continues to prescribe which major disaster assistance programs the President may direct the Administrator to implement, including the individual and household assistance relief provisions of Section 408.[30] Section 408 specifically authorizes the provision of "financial or

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[27] 6 U.S.C. § 314 (2011).
[28] 42 U.S.C. § 5170 (2021).
[29] *Id.*
[30] Other sections of the Stafford Act outline various other forms of disaster relief that the President may implement. For example, Section 403 authorizes the provision of "Essential Assistance," such as "Medicine, Food, and Other Consumables." *See* 42 U.S.C. § 5170(b).

other assistance" to individual families and households, such as housing assistance.[31] To be eligible for housing assistance under Section 408, a household must have either been displaced by the disaster from their primary residence or had it rendered uninhabitable.[32]

The first form of authorized housing assistance under Section 408 is direct financial assistance for rental of temporary housing units, as determined by the fair market rent for the accommodation provided plus ancillary costs.[33] FEMA typically provides such assistance through the issuance of an initial check covering three months' worth of rent, with further assistance provided upon proof of need by eligible applicants.[34] Direct assistance through the provision of actual temporary housing units is also authorized under this section.[35] This assistance enables displaced disaster victims in areas without available rental units to reside in mobile homes or trailers.[36] This Section also authorizes financial assistance to address other expenses for survivors, including medical, dental, child care, and funeral expenses.[37]

For the purposes of this Note, it is key to note that this section of the Stafford Act does not in and of itself create a binding obligation upon the FEMA Administrator. Rather, it creates the structures through which the President, through the Administrator, provides the forms of aid described therein.[38] It is the failure to adequately comply with these specific instructions which gives rise to the problems with which this Note is concerned.

B. Obligations Under International Law

The role of international law in creating obligations upon states who ratify a particular treaty is uneven relative to the obligations under ratifying states' own laws. Because there is no international judiciary that can compel a state to comply with a judicial interpretation of a treaty, these obligations are normative, whereas domestic laws come with their own mechanisms to facilitate their enforcement. With that being said, for

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However, this Note will focus on the Section 408 disaster relief benefits targeted towards federal assistance for individuals and households.

[31] 42 U.S.C. § 5174(b)(1).

[32] *Id.* § 5174(a)(1).

[33] *Id.* § 5174(c).

[34] Pierre & Stephenson, *supra* note 6, at 451.

[35] *Id.*

[36] *Id.*

[37] *Id. See also* 42 U.S.C. § 5174(e).

[38] Additional forms of financial assistance include relocation, legal, and mental health counseling assistance under sections 414 through 416. *See* 42 U.S.C. §§ 5181–83.

the purposes of this Note, an analysis of international human rights law is illustrative to identify ways in which FEMA's disaster relief responses deviate from internationally recognized principles, and to provide guidance for how to bring these shortcomings in line with international obligations.

Throughout the twenty-first century, United Nations member states have reached a general consensus regarding the implications of climate change on human rights.[39] This consensus includes the mutual understanding of the role climate change plays in exacerbating the severity of natural disasters.[40] There is a less developed understanding of how to translate the existing body of international human rights law into a recognizable set of obligations, but generally accepted principles have emerged as a point of reference for member states.[41]

The two relevant treaties which the United States has signed and ratified into force are the Universal Declaration of Human Rights[42] and the International Covenant on Civil and Political Rights ("ICCPR").[43] The ICCPR contains positive obligations to protect the "rights to life, health, and an adequate standard of living . . . ."[44] This has been interpreted by a number of international courts and United Nations special rapporteurs to create "a general duty to 'adopt legal and institutional frameworks that protect against, and respond to, environmental harm that may or does interfere with the enjoyment of human rights."[45] The European Court of Human Rights has incorporated the scientific consensus regarding the effects of climate change on natural disasters to hold that "states must also take reasonable measures to protect citizens against the reasonably foreseeable effects of natural disasters."[46] While such a ruling does not create an obligation upon the United States, it speaks to evolving interpretations among the international community regarding human rights and natural disasters.

United Nations Special Rapporteurs have elaborated upon what measures member states should take to protect human rights in the wake of natural disaster. Notably, these measures include efforts to protect

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[39] U.N. ENVIRONMENT PROGRAMME, CLIMATE CHANGE AND HUMAN RIGHTS 1 (2015).
[40] *Id.* at 19 ("The adverse impacts of climate change [including natural disasters] clearly qualify as 'environmental harms.'").
[41] *Id.* at 13.
[42] UNITED NATIONS HUMAN RIGHTS OFF. OF THE HIGH COMM'R, https://indicators.ohchr.org/ [https://perma.cc/MB9Z-LQU3] (last visited Mar. 11, 2022).
[43] *Id.*
[44] U.N. ENVIRONMENT PROGRAMME, *supra* note 39, at 19.
[45] *Id.*
[46] *Id.*

those displaced by natural disasters.[47] These measures include efforts to "[ensure] adequate resettlement opportunities for those who are temporarily displaced by climate change–related disasters, and ensuring that 'temporary relocation must last only as long as absolutely necessary and all displaced persons should have the right to return to their homes without discrimination.'"[48] Rapporteurs have further urged member states to "[adhere] to the Guiding Principles on Internal Displacement, which describe how human rights considerations should be incorporated into government actions to prevent and manage internal displacement."[49]

To reiterate, it is difficult to definitively say how the framework of international human rights obligations bears directly on FEMA's failures to deliver necessary relief to disaster survivors. Further, the United States is not a ratifying party to the International Covenant on Economic, Social and Cultural Rights,[50] which more explicitly speaks to the human rights of families displaced by natural disaster. It is fair to say that there is a growing international recognition that natural disasters directly implicate human rights issues, and that United Nations member states that have agreed to the international human rights framework have a positive obligation to address such issues. Given the nature of international law, this in and of itself does not create a mandate for FEMA. However, it supports the assertion that there is a strong normative obligation for states that are concerned with human rights to satisfy the needs of disaster survivors. This normative obligation, in conjunction with the binding mandates of American federal law, create the need to ensure that FEMA competently and conscientiously addresses the needs of disaster survivors.

II. EXAMINING CITIZEN SUITS

A. History & Relevance of the Citizen Suit Provision

The first Congressional recognition of the need for a mechanism to compel action (or remedy inaction) by federal agencies failing to fulfill

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[47] *Id.* at 22.
[48] *Id.* (citing Raquel Rolnik (Special Rapporteur on Adequate Housing), *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, at 55, U.N. Doc. A/62/25 (Aug. 6, 2009)).
[49] *Id.* (citing Chaloka Beyani (Special Rapporteur on the Human Rights of Internally Displaced Persons), *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons*, ¶ 65, U.N. Doc. A/HRC/16/43 (Dec. 20, 2010)).
[50] UNITED NATIONS HUMAN RIGHTS OFF. OF THE HIGH COMM'R, *supra* note 42.

their mandate arose with the Clean Air Act of 1970, which enabled citizens to act as "'private attorneys general.'"[51] The Congressional legislative history of the Clean Air Act reflects Congressional intent to "enlist citizens as 'useful instrument[s] for detecting violations and bringing them to the attention of the enforcement agencies and courts alike.'"[52] The citizen suit provision of the Clean Air Act reads:

> a. [A]ny person may commence a civil action on his own behalf . . .
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator . . .[53]

This basic model of a citizen suit provision has since been replicated throughout the majority of federal environmental laws, including the Clean Water Act, Endangered Species Act, Safe Drinking Water Act, and the Comprehensive Environmental Response, Compensation and Liability Act, *inter alia*.[54]

One notable early success of the citizen suit provision in the context of environmental law came when the Natural Resources Defense Council successfully compelled the Environmental Protection Agency ("EPA") Administrator Russell Train to list lead as a "criteria air pollutant" under Section 108 of the Clean Air Act, which reads:

> (a)(1) For the purposes of establishing national primary and secondary air quality standards, the Administrator shall within 30 days [of enactment of the Clean Air Amendments of 1970] . . . publish, and shall from time to time thereafter revise, a list which includes each air pollutant—
> (A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

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[51] Katherine Rouse, Note, *Holding the EPA Accountable: Judicial Construction of Environmental Citizen Suit Provisions*, 93 N.Y.U. L. REV. 1271, 1276 (2018).
[52] *Id.*
[53] 42 U.S.C. § 7604(a)(2).
[54] Rouse, *supra* note 51, at 1277.

> (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
> (C) for which air quality criteria had not been issued before [the date of enactment of the Clean Air Amendments of 1970] . . . but for which he plans to issue air quality criteria under this section.[55]

The argument advanced by the plaintiffs was that the plain text of Section 108(a)(1)'s usage of "shall" indicated that the duty to list criteria air pollutants satisfying the statutory requirements is nondiscretionary.[56] While the EPA conceded that lead satisfied the requirements of Section 108(a)(1)(A) and (B), they argued that the statutory language of (C) indicated that the Administrator retains discretion over the decision to list a pollutant.[57] The Second Circuit held that the plain text of the statute and its legislative history clearly supported the plaintiff's arguments and reaffirmed the district court's holding of the same.[58]

While this Note does not deal with air pollution, *Train* is important to understand the development of the citizen suit's role in enforcing nondiscretionary duties in the face of federal inaction. The relevant principle demonstrated in *Train*—that citizen suits are an appropriate tool for rectifying federal inaction—is not necessarily a principle that demonstrates whether judicial enforcement is sufficient to remedy the problem that necessitates federal action in the first place. While solving the public health crisis caused by lead pollution in the 1970s was not a problem that lay within the ambit of the judiciary, the decision in *Train* showed that citizen suits are at least one arrow in Congress's quiver to solving large-scale issues. Following the EPA's listing of lead as a criteria air pollutant and the subsequent promulgation of National Ambient Air Quality Standards ("NAAQS") for lead, lead emissions, atmospheric lead concentration, and "'average blood levels of lead in Americans'" decreased, with "'the ambient air quality standard for lead that emanated from the

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[55] 42 U.S.C. § 7408(a)(1)(A)–(C).
[56] Natural Resources Defense Council, Inc. v. Train, 545 F.2d 320, 324–25 (2d Cir. 1976).
[57] *Id.*
[58] *Id.* at 328. It should be further noted that later Supreme Court decisions have held that the difference between "may" and "shall" in a statute's text is superficial if a nondiscretionary duty is still imposed. Lopez v. Davis, 531 U.S. 230, 241 (2001) ("If [the statute] functions not as a grant of discretion . . . but both as an authorization and a command . . . then Congress' use of the word 'may,' rather than 'shall,' has no significance.").

[*NRDC v. Train*] litigation [undoubtedly playing] a role in those reductions . . . .'"[59]

B. Judicial Limitations on Citizen Suit Litigation

As environmental litigation brought by private attorneys general proliferated, so too did a limiting principle. The emergence of a "date-certain deadline rule" began developing among several circuits and district courts that have generally held that courts will not compel EPA performance of a nondiscretionary duty "unless Congress both (1) specifies the duty, and (2) provides a date-certain or readily ascertainable deadline."[60]

The date-certain rule derives from the D.C. Circuit's decision of *Sierra Club v. Thomas* in 1987.[61] The plaintiff in this case brought a citizen suit against the EPA to compel their completion of a proposed rule that would include strip mines as a pollutant source regulated by the Clean Air Act's Prevention of Significant Deterioration ("PSD") program.[62] The plaintiff argued that under the overarching PSD program, the EPA had a nondiscretionary duty of timeliness that it had failed to meet.[63] However, the D.C. Circuit rejected this, holding that the absence of a specific deadline left this duty discretionary.[64] In doing so, the court emphasized that, "[a]lthough a date-certain deadline . . . may or may not be discretionary, it is highly improbable that a deadline will ever be nondiscretionary . . . if it exists only by reason of an inference drawn from the overall statutory framework."[65]

While some courts fully embraced the date-certain deadline test,[66] others still—including the D.C. Circuit[67]—have hesitated to rely on it or outright rejected it. In one such case in 1996, the Eastern District of

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[59] Rouse, *supra* note 51, at 1280–81 n.50.
[60] James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 28 (2003).
[61] Rouse, *supra* note 51, at 1286.
[62] *Id.*
[63] *Id.* at 1287.
[64] *Id.*
[65] *Id.*
[66] *See* Maine v. Thomas, 874 F.2d 883, 888 (1st Cir. 1989); Zen-Noh Grain Corp. v. Jackson, 943 F. Supp. 2d 657, 662 (E.D. La. 2013); Defs. of Wildlife v. Browner, 888 F. Supp. 1005, 1008–09 (D. Ariz. 1995) (all strictly applying the date-certain deadline to find no discretionary duty under various EPA statutes).
[67] Rouse, *supra* note 51, at 1288 (citing Nat'l Wildlife Fed'n v. Browner, 127 F.3d 1126 (D.C. Cir. 1997)).

Pennsylvania declined to apply the rule to a Clean Water Act citizen suit brought against the EPA for failing to promulgate a water quality standard for the state, pursuant to its obligations to do so when a state issues water quality standards noncompliant with the Clean Water Act.[68] While the EPA argued that the relevant statutory text (reading "The Administrator shall promptly prepare and publish proposed regulations") lacked a date-certain deadline, the court held that "shall" is sufficient to impose a nondiscretionary duty in the absence of a date-certain deadline.[69] In doing so, the court explicitly recognized that some jurisdictions applied the date-certain deadline, but rejected it in the case at hand on the grounds that: (1) the rule was originally created to interpret a "bifurcated jurisdictional scheme" present in the Clean Air Act, but not the Clean Water Act; (2) application of the date-certain deadline directly contravenes the intent and purpose of the Clean Water Act; and (3) the Third Circuit (in which the Eastern District of Pennsylvania sits) had not yet adopted the date-certain deadline.[70]

For the purposes of extrapolating conclusions from judicial limitations on citizen suit provisions, trends regarding application of the date-certain deadline provide little more than the understanding that it is a potential pitfall facing proliferation of citizen suit provisions outside of the environmental law context. This is particularly true when considering that the Supreme Court is silent on the issue of the date-certain deadline. As of 2020, there is a dearth of empirical studies to examine any correlation between the adoption by some courts of the date-certain deadline and a decline in citizen suits seeking to compel performance of a nondiscretionary duty.[71] One study (although more than a decade old) found that between 1995 and 2002, such citizen suits declined in number significantly.[72] While that falls after the decision in *Thomas*, there is little to support an inference of causation between these facts. For now, this Note will treat the date-certain deadline as an existing, if murky, roadblock that should be addressed in any addition of a citizen suit provision to the Stafford Act.

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[68] Rouse, *supra* note 51, at 1294 (citing Raymond Proffitt Found. v. EPA, 930 F. Supp. 1088, 1090 (E.D. Pa. 1996)).
[69] *Id.* at 1296.
[70] *Id.* at 1297–98.
[71] David E. Adelman & Robert L. Glicksman, *Reevaluating Environmental Citizen Suits in Theory & Practice*, 91 UNIV. COLO. L. REV. 386, 393 (2020).
[72] May, *supra* note 60, at 21 ("[C]itizens sent 25% fewer notices to regulated parties in 2002 than they did in 1995.").

C. Practical Limitations Upon the Citizen Suit Provision

Generally speaking, the effectiveness of any citizen suit provision will vary depending on the statutory framework to which it belongs. Each legislative scheme will prescribe differing numbers of nondiscretionary duties upon the agency responsible for administering it. Because citizen suit provisions afford plaintiffs the ability to sue either an agency administrator for failure to perform a nondiscretionary duty or any person who violates the provisions of the statutory framework to which it belongs,[73] the ability to obtain meaningful remedy may depend upon whether, for instance, a large corporate entity or a municipal public water system is the defendant.[74]

It is fair to state that there is a broad array of practical barriers to success in a citizen suit that a private citizen with limited funds and expertise faces when suing a governmental or corporate entity who has decidedly less of such limitations. A useful case study to understanding this dynamic is that of the Safe Drinking Water Act's ("SDWA") citizen suit provision.

The SDWA seeks to ensure that water quality across the nation is sufficient to safeguard public health, doing so through two avenues of regulation: (1) imposing maximum levels for regulated contaminants on public water systems; and (2) preventing contamination of sources of drinking water.[75] Regulated contaminants are listed by the EPA Administrator, who considers the potential for adverse health effects towards the average citizen, higher-risk subgroups (e.g., infants, pregnant women, etc.), and balances this with a cost-benefit analysis.[76] Similar to the Clean Air Act's NAAQS criteria air pollutant listing requirements, the Administrator has a nondiscretionary duty to regulate a contaminant if they determine that:

> (i) the contaminant may have an adverse effect on the health of persons; (ii) the contaminant is known to occur or there is a substantial likelihood that the contaminant

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[73] Christine L. Rideout, Note, *Where Are All the Citizen Suits?: The Failure of Safe Drinking Water Enforcement in the United States*, 21 HEALTH MATRIX: J. L.-MED. 655, 656 (2011).

[74] *Id.* at 692 ("Congress [likely did not authorize civil penalties on defendants in SDWA citizen suits because they] did not want to bankrupt [Public Water Systems]—which frequently are small municipal governments . . .").

[75] *Id.* at 663.

[76] *Id.*

> will occur in public water systems with a frequency and at levels [sufficient to endanger] public health; and (iii) in the sole judgment of the Administrator, regulation of such contaminant [can meaningfully achieve] health risk reduction . . . .[77]

Despite being armed with what appears to be—on paper at least—sufficient statutory weight to fulfill the goals of the SDWA, the United States faces recurrent public health issues with access to safe drinking water. Since 2015, the City of Newark, New Jersey, has dealt with unsafe levels of lead (a pollutant regulated by the SDWA) in their drinking water supply.[78] While the City of Flint, Michigan, no longer has unsafe levels of lead present in their drinking water,[79] the City's well-publicized water crisis was linked to an outbreak of Legionnaire's Disease that led to twelve deaths, for which five state and local officials faced involuntary manslaughter charges.[80]

There are a myriad number of factors to look to for an explanation of the failure of the SDWA to protect the public health of these cities. In some instances, neither state officials nor the EPA actually enforce the provisions of the SDWA.[81] This has been attributed to "political pressure,

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[77] 42 U.S.C. § 300g.

[78] Rebecca Nathanson, *Newark's Lead Crisis Isn't Over. "People Are Still Drinking Water That They Shouldn't,"* THE INTERCEPT (Mar. 15, 2020, 8:00 AM), https://theintercept.com/2020/03/15/newark-new-jersey-lead-water-crisis/ [https://perma.cc/J6RQ-9W2L].

[79] Emma Winowiecki, *Does Flint Have Clean Water? Yes, But It's Complicated*, MICH. RADIO (Aug. 21, 2019, 11:50 AM), https://www.michiganradio.org/post/does-flint-have-clean-water-yes-it-s-complicated [https://perma.cc/ESY3-SVVM].

[80] Emma Winowiecki, *How Flint's Legionnaires' Disease Outbreak Led to 5 Charges of Involuntary Manslaughter*, MICH. RADIO (June 14, 2017, 11:35 AM), https://www.michiganradio.org/post/how-flints-legionnaires-disease-outbreak-led-5-charges-involuntary-manslaughter [https://perma.cc/QU8M-8RNA].

[81] While this Note's treatment of the SDWA centers on regulation of lead, this principle is also illustrated by the EPA's failure to regulate perchlorate under the SDWA despite scientific evidence existing to show that it meets the criteria for regulation. *See* Jennifer Sass, *NRDC Joins Medical Experts: Drinking Perchlorate Is Bad!*, NAT. RES. DEF. COUNCIL (Aug. 26, 2019), https://www.nrdc.org/experts/jennifer-sass/nrdc-joins-medical-experts-drinking-perchlorate-bad [https://perma.cc/T9AG-L6FH]; Consent Decree at 1–3, Nat. Res. Def. Council v. McCarthy, No. 2:16-cv-01251-ER, 2016 (S.D.N.Y., Oct. 18, 2016), https://www.freshlawblog.com/wp-content/uploads/sites/15/2016/12/Doc-38-Consent-Decree.pdf [https://perma.cc/F7T2-PT84]; Petition for Review at 1, Nat. Res. Def. Council v. Wheeler (D.C. Cir. 2020) (pending citizen suit litigation challenging Trump administration's attempt to withdraw EPA's scientific findings regarding perchlorate by that invoking nondiscretionary duty).

scientific uncertainty[,] and bureaucratic inertia."[82] A 2011 Government Accountability Office ("GAO") report highlighted "troubling issues with a lack of transparency and credibility in the determination of contaminants," among other programmatic failures, as contributing to the SDWA's shortcomings in regulation of various contaminants.[83]

While there is considerably less room for external influence in the disaster declaration process than there is in the SDWA's rule-making process (which turns on discrete, complex information), a key challenge to a potential Stafford Act citizen suit provision is that the level of assistance to be distributed is determined by Congress.[84] Congress is responsible for funding the Disaster Relief Fund from which FEMA provides disaster relief, and "has been generally willing to provide resources for major disasters on an as-needed basis."[85] However, the Congressional Research Services notes that "discussions of deficit and debt continue in Congress, and may increase in frequency and volume as the Budget Control Act nears expiration in [2021]."[86] At the time of this writing, the COVID-19 pandemic provides a real-time example of austerity politics shaping the amount of discretionary spending directed towards disaster relief.[87] There is, unfortunately, no judicial provision which can cure federal inaction predicated upon Congress declining to extend the power of the purse towards disaster relief.

The last key practical limitation a potential Stafford Act citizen suit provision should address comes from within the Act itself. Section 305 of the Act, Nonliability of the Federal Government, provides that "[FEMA] shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on

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[82] Annie Snider, *What Broke the Safe Drinking Water Act?*, POLITICO (May 11, 2017, 5:02 PM), https://www.politico.com/agenda/story/2017/05/10/safe-drinking-water-perchlorate-000434/ [https://perma.cc/QQ25-8SH8].

[83] NORA SMITHHISLER, THE SAFE DRINKING WATER ACT AND FLINT, MICHIGAN: HOW WE CAN UPDATE OUR STANDARDS FOR SAFE DRINKING WATER 5 (2018), http://www.cornellpolicyreview.com/sdwa-flint-michigan/ [https://perma.cc/5U54-FWHW].

[84] CONG. RSCH. SERV., THE DISASTER RELIEF FUND: OVERVIEW AND ISSUES, at Overview (2020), https://fas.org/sgp/crs/homesec/R45484.pdf [https://perma.cc/ZP43-A2G5] ("The Disaster Relief Fund (DRF) is one of the most-tracked single accounts funded by Congress each year . . . . [I]t is the primary source of funding for [FEMA's] general disaster relief programs.").

[85] *Id.* at 33.

[86] *Id.*

[87] Zoë Hu, *A New Age of Destructive Austerity After the Coronavirus*, THE NEW REPUBLIC (Apr. 23, 2020), https://newrepublic.com/article/157417/new-age-destructive-austerity-coronavirus [https://perma.cc/HS8E-KN5L].

the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter."[88] This is particularly problematic, because under the current Stafford Act, FEMA's procedure and final determination of a disaster relief applicant's eligibility are both considered discretionary functions,[89] precluding judicial review via citizen suit for failure to timely deliver disaster relief as a result of the process and its outcome.

With that being said, the proposed citizen suit amendment to the Stafford Act can and should legislate away most of the above limitations. By: (a) adding a citizen suit provision modeled on the Clean Air Act's provision; (b) minimizing FEMA's discretion through amending all nonmandatory language to mandatory language; and (c) minimizing FEMA's discretion in establishing verification procedures for housing assistance eligibility, Congress could create a meaningful judicial remedy for disaster victims and empower them to compel FEMA's delivery of housing assistance to which they are entitled.

D. The Proposed Amendment to the Stafford Act

1. Amending the Stafford Act to Include a Citizen Suit Provision

The first component to the proposed amendment should be a straightforward addition of a citizen suit provision that models the language of the Clean Air Act's citizen suit provision.[90] In the context of the Stafford Act, the language would authorize civil actions against the FEMA administrator for failure to perform any nondiscretionary duty under the Stafford Act. In conjunction with the rest of the proposed amendments, this would render timely delivery of housing assistance a nondiscretionary function to be compelled under judicial review.

It is key to note that modeling the proposed Stafford Act citizen suit provision upon the Clean Air Act would require incorporation of a date-certain deadline, as the permitting programs of the Clean Air Act do.[91] While this Note does not propose a specific time limit, a good starting point would be to require a thirty-day deadline by which FEMA must deliver

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[88] 42 U.S.C. § 5148.
[89] 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, 773 (2013).
[90] *See generally* 42 U.S.C. § 7604.
[91] *See* 42 U.S.C. § 7409.

Section 408 disaster relief benefits upon receipt of an eligible disaster victim's application for such benefits. By providing a date-certain deadline (e.g., thirty days upon receipt of application) in conjunction with nonmandatory language, any court that does apply strict date-certain deadline requirements in finding nondiscretionary functions would have no grounds upon which to find the amended Section 408 duties to be discretionary.[92]

Finally, it is worth noting that the creation of a citizen suit provision would fulfill international normative obligations to create judicial remedies for human rights violations caused by environmental harms.[93] By empowering courts to compel FEMA's provision of individual and household assistance to eligible applicants, the proposed amendment would be the exact type of "legal and institutional framework that protects against . . . environmental harm . . . [to] human rights" that the international community calls for.[94]

2. Amending the Stafford Act to Make Discretionary Functions Under Section 408 Nondiscretionary Duties

While adding a citizen suit provision to the Stafford Act is a straightforward enough first step, it alone would be insufficient to provide a remedy for the problem at hand. The failure to deliver disaster relief benefits in a timely fashion can generally be said to stem from two organizational dysfunctions within FEMA: (1) bureaucratic and organizational delay;[95] and (2) arbitrary assumptions of fraud in disaster relief assistance applications.[96]

Under the current legal framework, jurisprudence in administrative law offers no remedy for failure to deliver disaster relief due to bureaucratic delay. In the words of Supreme Court Justice John Paul Stevens, "as [the Supreme Court has] repeated time and time again, an agency has broad discretion to choose how best to martial its limited resources and personnel to carry out its delegated responsibilities."[97] In cases involving arbitrary assumptions of fraud, the current legal framework is downright unforgiving towards judicial review. As Anne Sikes Hornsby writes:

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[92] Rouse, *supra* note 51, at 1287.
[93] U.N. ENVIRONMENT PROGRAMME, *supra* note 39, at 18.
[94] *Id.* at 19.
[95] Pierre & Stephenson, *supra* note 6, at 448; *FEMA Faces Scrutiny*, *supra* note 15.
[96] Pierre & Stephenson, *supra* note 6, at 446.
[97] Massachusetts v. EPA, 549 U.S. 497, 527 (2007).

> Case law makes clear that there is no question that decisions to grant or deny disaster aid pursuant to FEMA policy are discretionary. FEMA's statutes give it the authority to establish eligibility standards and to make determinations of who meets its established criteria. The Stafford Act provisions pertaining to individual and household aid are replete with the language of discretion. The lacing of aid provisions with permissive language has led courts to frequently characterize awards of disaster financial assistance from FEMA as "gratuitous." . . . The provision or withholding of virtually every FEMA benefit has been deemed a discretionary act, and immune from suit.[98]

So, it suffices to say that absent limitations on agency discretion, simply adding a citizen suit provision to the Stafford Act will not be enough to permit judicial review of FEMA's distribution of disaster relief.

3. Amending the Stafford Act to Reduce Discretion in FEMA's Verification of Applicant Eligibility for Section 408 Benefits

Virtually every provision under Section 408 of the Stafford Act is currently framed in language granting discretionary authority to the President, through their authorized agent (i.e., the FEMA Administrator), to provide disaster relief if they so choose, and to do so in any fashion that they see fit.[99] Because "decisions involving the allocation and deployment of limited governmental resources are the type of administrative judgment that the discretionary function was designed to immunize from suit,"[100] the most viable solution to the Stafford Act's expansive discretionary language is Congressional action to render certain provisions nondiscretionary.

International law provides a clear framework of normative obligations to guide revision of the statutory text. Congress can start by looking to which forms of disaster relief most directly parallel the ICCPR's positive obligations to protect the "rights to life, health, and an adequate standard of living."[101] Applying that obligation towards Section 408 would support the simple step of amending the language therein to replace every

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[98] Hornsby, *supra* note 89, at 773.
[99] *See generally* 42 U.S.C. § 5174.
[100] Hornsby, *supra* note 89, at 773.
[101] U.N. ENVIRONMENT PROGRAMME, *supra* note 39, at 19.

usage of "may" with "shall." Pursuant to the Second Circuit's decision in *Train*,[102] this would be the first necessary step towards creating non-discretionary functions under Section 408.

While amending Section 408 to include mandatory language would likely be sufficient to render delivery of disaster relief benefits nondiscretionary, further amendments are required to bring FEMA's disaster relief response in line with normative obligations to ensure "adequate resettlement opportunities for those who are temporarily displaced by climate change–related disasters, . . . that 'temporary relocation must last only as long as absolutely necessary[,] and all displaced persons should have the right to return to their homes without discrimination.'"[103]

FEMA's current process for determining eligibility for Section 408 assistance is predicated on a certain amount of bureaucratic delay and places undue burden on disaster victims. As an example, uninsured homeowners applying for Section 408 assistance are required to prove losses caused by the disaster.[104] This is done by scheduling an appointment with a FEMA inspector at the damaged property, who is responsible for "determin[ing whether] the damage was caused by the disaster and affects the functionality of the home."[105] Part of the inspection includes verifying a significant amount of documentation to which the applicant is unlikely to have access.[106] Within roughly ten days, FEMA provides the applicant with a determination of their eligibility for aid, and if granted, how much aid they will receive.[107] If the applicant is determined to be ineligible, they receive a letter stating this determination and have sixty days to respond via written letter.[108] Even if an applicant does everything correctly, there is little guarantee that they will receive assistance in a timely fashion. As noted by Shannon Collins Schroeder:

> [I]n the midst of a catastrophe, when the system is already overworked, it can take weeks before an applicant knows if her application has been approved. As of December 2017,

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[102] Nat. Res. Def. Council v. Train, 545 F.2d 320, 328 (2d Cir. 1976).
[103] U.N. ENVIRONMENT PROGRAMME, *supra* note 39, at 22.
[104] FED. EMERGENCY MGMT. AGENCY, INDIVIDUAL ASSISTANCE PROGRAM AND POLICY GUIDE 71–73 (Jan. 2019), https://www.fema.gov/sites/default/files/2020-09/fema_individual-assistance-program-policy-guide_11-29-2018.pdf [https://perma.cc/G6D2-C65J].
[105] *Id.* at 71.
[106] Shannon Collins Schroeder, *Does America's New Disaster Relief Law Provide the Relief America Needs?*, 56 HOUS. L. REV. 1177, 1195 (2019).
[107] *Id.*
[108] *Id.*

> over three months after Hurricane Harvey made landfall, "about half of those who applied for disaster assistance from FEMA . . . say their application is still pending or has been denied, and many of those who were denied say they were not told the reason for the denial and were not given information on how to resubmit their application." . . . Additionally, even after aid has been granted and disbursed, some recipients have been asked to repay that aid due to mistakes made by FEMA agents.[109]

As the *Massachusetts* court noted, agencies are acting within their discretion when determining how to best marshal their limited resources, even when that determination does not reflect efficiency.[110]

The proposed amendment to the Stafford Act that would allow for judicial review of these processes while balancing FEMA's discretion with improvement of Section 408 assistance distribution would shift the burden of proving eligibility away from the applicant and create a presumption of eligibility that can be retroactively verified.[111]

Creating a presumption of eligibility would require amending Section 408(I), which grants FEMA the authority to develop a system to, *inter alia*, verify that only eligible applicants receive financial assistance and to minimize the risk of duplicative or fraudulent payments.[112] While there is a legitimate governmental interest in preventing fraud, the COVID-19 pandemic has provided a real-time example of how to weigh the risk of disaster-induced poverty against fraud. The CARES Act of 2020 expanded federal funding for state unemployment benefit programs in response to the unfolding pandemic.[113] Instead of beginning with a lengthy, federal verification process to serve as a prophylactic against fraud, the CARES Act included language creating civil and criminal penalties for individuals found to have fraudulently obtained benefits through the program.[114] The steady stream of ongoing Department of Justice actions to successfully prosecute unemployment fraud and recover lost

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[109] *Id.* at 1196 (citing LIZ HAMEL ET AL., KAISER FAMILY FOUND. & EPISCOPAL HEALTH FOUND., AN EARLY ASSESSMENT OF HURRICANE HARVEY'S IMPACT ON VULNERABLE TEXANS IN THE GULF COAST REGION (2017)).

[110] Massachusetts v. EPA, 549 U.S. 497, 527 (2007).

[111] The creation of a date-certain deadline under the citizen suit provision would likely do much to provide a remedy for unacceptably lengthy distribution processes.

[112] 42 U.S.C. § 5174(I).

[113] H.R. 748, 116th Cong. § 2104 (2020).

[114] *Id.* § 2104(f).

taxpayer dollars suggests that the federal government is capable of guarding against fraud while delivering aid to those who need it most.[115]

While efforts to verify eligibility for aid under Section 408 should certainly not be abandoned, creating a presumption of eligibility that could be retroactively verified would also serve the dual purpose of reducing the denial of disaster relief assistance on the basis of arbitrary assumptions of fraud by reducing FEMA's discretion to reject applicants. This could all be done while maintaining standards of proof for eligibility: applicants could be given housing assistance benefits up front while having a period of time to provide documentation to FEMA once they have had a legitimate chance to replace lost records.[116]

To reiterate, FEMA can and should have the flexibility to prevent waste and abuse of taxpayer dollars. The principle justifying a presumption of eligibility is that discretion should not come at the deprivation of a disaster victim's human rights. FEMA has a dedicated Fraud and Internal Investigations Division which has been providing an array of auditing and fraud prevention training within the Agency since the mid-2000s.[117] With the ability to marshal the resources of the federal government of the United States to prevent fraud, a presumption of eligibility for housing assistance applicants is a challenge that FEMA would be more than able to meet.

CONCLUSION

To understand what sort of impact this proposed amendment might make in the disaster recovery process, it is illustrative to examine

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[115] *See generally* Ripley Rand, *CARES Act Prosecutions Have Already Rooted Out Over $360 Million in Fraud with Much More Likely to Come in 2021*, 12 NAT'L L. REV. 36 (Jan. 14, 2021), https://www.natlawreview.com/article/cares-act-prosecutions-have-already-rooted-out-over-360-million-fraud-much-more [https://perma.cc/6VDB-GLRM]; U.S. ATT'Y OFF., DEP'T OF JUST., 1:21-CR-054-DAD, COVID-19 UNEMPLOYMENT BENEFIT FRAUD SCHEME CHARGED (Mar. 3, 2021), https://www.justice.gov/usao-edca/pr/covid-19-unemployment-benefit-fraud-scheme-charged [https://perma.cc/98HX-CGMG].

[116] *See* CAL. COMM'N ON ACCESS TO JUST., DISASTERS IN RURAL CALIFORNIA: THE IMPACT ON ACCESS TO JUSTICE 12 (July 2019), http://www.calbar.ca.gov/Portals/0/documents/accessJustice/Rural-Disaster-Policy-Brief.pdf [https://perma.cc/7PH3-PCEK] ("When disaster strikes, survivors often do not have time to gather such vital records and documents," and "pro bono counsel can . . . help disaster survivors replace vital records and documents [to access FEMA benefits].").

[117] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-472, 2017 HURRICANES AND WILDFIRES: INITIAL OBSERVATIONS ON THE FEDERAL RESPONSE AND KEY RECOVERY CHALLENGES 104 (Sept. 2018).

FEMA's long history of inadequate responses to natural disasters. In *Lockett v. FEMA* and *Armstead v. Nagin*, lawsuits filed by disaster victims against FEMA in the wakes of Hurricanes Andrew and Katrina, respectively, plaintiffs alleged statutory and constitutional violations of their right to housing assistance under Section 408 of the Stafford Act.[118] In *Lockett*, the Southern District of Florida ruled that the Stafford Act's nonliability clause precluding judicial review of discretionary acts did not bar judicial review of FEMA's failed housing assistance response on the grounds that it violated the Due Process Clause of the Fifth Amendment.[119] In *Armstead*, the Eastern District of Louisiana reached the opposite holding in finding that the same acts fell within FEMA's discretion, and were barred by the Stafford Act's nonliability clause.[120]

The amendment proposed by this Note would have provided for uniform outcomes in these two cases by rendering the issue of agency discretion moot to begin with. While it is not insignificant that in at least one case, plaintiffs were able to obtain judicial review on constitutional grounds, it is more significant that unequal outcomes result from this argument for standing. Natural disasters are inherently geographically widespread, meaning that citizen litigation against FEMA for failed disaster relief responses will likely result in a circuit split that produces uneven jurisprudence regarding the reviewability of FEMA's disaster response. Hurricane Katrina itself left thousands homeless in Louisiana, Mississippi, and Alabama.[121] This dynamic will further be complicated as climate change intensifies and brings more intense natural disasters[122] to regions that do not frequently suffer from them.[123]

The significance of this uniform availability of judicial review should not be underestimated. Hurricane Katrina provides an excellent case study to demonstrate that "[g]enerally, 'disasters affect low-income

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[118] Pierre & Stephenson, *supra* note 6, at 479, 486.
[119] *Id.* at 479–80.
[120] *Id.* at 486.
[121] *Id.* at 445.
[122] SHANNON HEYCK-WILLIAMS, NAT'L WILDLIFE FED'N, CLIMATE CHANGE, NATURAL DISASTERS, AND WILDLIFE 1 (Nov. 2019), https://www.nwf.org/-/media/Documents/PDFs/Environmental-Threats/Climate-Change-Natural-Disasters-fact-sheet [https://perma.cc/M3EG-GSXS].
[123] *See, e.g.*, Paul Huttner, *Can the Midwest Expect More Derechos as the Climate Changes?*, MINN. PUB. RADIO NEWS (Aug. 20, 2020), https://www.mprnews.org/episode/2020/08/20/can-the-midwest-expect-more-derechos-as-the-climate-changes [https://perma.cc/U7G9-7EUG] ("The research available now . . . does suggest such storms could hit farther north as [the climate changes and] the mid-latitude jet stream shifts north.").

victims more negatively than middle- or upper-class victims . . . .'"[124] More than 90,000 individuals living in the areas affected by Hurricane Katrina made less than $10,000 a year.[125] Roughly one-third of individuals living in the areas most impacted by Katrina were Black.[126] The statistics in New Orleans were even more disheartening: twenty-eight percent of New Orleans' residents lived in poverty before Hurricane Katrina,[127] and forty percent of households led by single mothers lived in poverty.[128] These residents were more likely than their wealthy counterparts to need judicial remedy to access Section 408 benefits, yet, their wealthy counterparts were far more likely to have the resources necessary to litigate their cases.[129] FEMA's National Advisory Council acknowledged this reality in their November 2020 Report to the Administrator, writing, "[t]he Individual Assistance Program is more accessible to those with time, income, and access."[130]

Citizen suits are rightly credited for their impact in democratizing the enforcement of environmental laws.[131] Citizen suits can similarly serve to democratize equitable disaster relief response. The amendments proposed by this Note not only minimize the risk of prolonged delays in disaster relief response—which have been seen year in and year out[132]—but would provide a judicial remedy by which "people most in need of assistance" could hold FEMA accountable for "compound[ing their] hardship, confusion, and trauma."[133]

While this Note raised the issue of practical limitations upon amending the Stafford Act to enable citizen suits against FEMA for failure to deliver Section 408 benefits, these issues are not as easily resolved without political action. Courts cannot review "political pressure, scientific uncertainty[,] and bureaucratic inertia."[134] They certainly cannot review

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[124] Pierre & Stephenson, *supra* note 6, at 455.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649, 652 (2010) (summarizing the positive statistical relationship between litigant wealth and favorable judicial outcomes).
[130] NAT'L ADVISORY COUNCIL, *supra* note 26, at 12.
[131] May, *supra* note 60, at 6–7.
[132] Pierre & Stephenson, *supra* note 6, at 445; Schroeder, *supra* note 106, at 1177; Viglucci, *supra* note 17.
[133] Pierre & Stephenson, *supra* note 6, at 448.
[134] Snider, *supra* note 82.

a strengthening[135] Congressional proclivity towards austerity politics.[136] Citizen suits will not fix racially discriminatory real estate market values that prioritize white neighborhoods over nonwhite neighborhoods.[137]

Yet, there is strong normative obligation to enact the proposed amendments to ensure that the most vulnerable disaster victims have equal access to equitable disaster relief through judicial review. This Note does not assert that this is a sufficient step to ensure that all disaster victims are given the support they need to rebuild after losing everything. This Note does assert that the proposal herein has created change in the context of environmental regulation, and that change is badly needed in the context of disaster relief.

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[135] Hu, *supra* note 87.
[136] CONG. RSCH. SERV., *supra* note 84, at 33.
[137] Flavelle, *supra* note 22.