No. 19-517

In the Supreme Court of the United States

DANIEL BARBOSA, ET AL., PETITIONERS

v.

DEPARTMENT OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioners are 26 individuals (joined by an organization) who alleged that their homes were damaged during one of three Texas storms in 2015 and 2016. They took issue with the denial of disaster relief or the amount of relief they were awarded by the Federal Emergency Management Agency (FEMA) under The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), Pub. L. No. 100-707, 102 Stat. 4689. As relevant here, petitioners alleged that FEMA inspectors relied on field instruction manuals and other materials that allegedly should have been published in the Federal Register, and they claimed that, as a sanction, FEMA should be ordered to reconsider their disaster-relief applications without use of such materials. Petitioners relied on Section 552(a)(1) of the Freedom of Information Act (FOIA), which provides that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. 552(a)(1). The question presented is:

Whether the court of appeals erred in holding that petitioners' request for reconsideration of their disaster-relief applications is barred by the Stafford Act's immunity provision, 42 U.S.C. 5148, which bars challenges to discretionary actions taken in the implementation of a disaster-relief program.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.D.C.):

Barbosa v. *United States Dep't of Homeland Sec.*, No. 16-cv-1843 (July 11, 2017)

Barbosa v. *United States Dep't of Homeland Sec.*, No. 16-cv-1843 (Oct. 6, 2017)

United States Court of Appeals (D.C. Cir.):

Barbosa v. *United States Dep't of Homeland Sec.*, No. 17-5206 (Mar. 1, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 916 F.3d 1068. The district court's opinions granting respondents' motion to dismiss and denying petitioners' motion for reconsideration (Pet. App. 14a-47a, 48a-58a) are reported at 263 F. Supp. 3d 207 and 278 F. Supp. 3d 325, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2019. A petition for rehearing was denied on June 21, 2019. On August 19, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 18, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Disaster Relief Act of 1974, Congress formalized the process by which the President may declare a major disaster and expanded the types of disaster assistance the President may offer. Pub. L. No. 93-288, 88 Stat. 143 (42 U.S.C. 5121 *et seq.*). In 1988, Congress amended and renamed the statute The Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (Stafford Act or Act).

In 2000, Congress combined two preexisting Stafford Act programs and established the program at issue here, which is found in Section 408 and known as the Federal Assistance to Individuals and Households Program (IHP). See Disaster Mitigation Act of 2000, Pub. L. No. 106-390, sec. 206, § 408, 114 Stat. 1566-1571 (42 U.S.C. 5121 *et seq.*). Section 408 authorizes the President, after declaring the existence of a major disaster in a State, to provide certain relief to affected persons. See 42 U.S.C. 5174(a)(1). Such relief includes, among other things, financial assistance for temporary housing or home repair. See 42 U.S.C. 5174(b) and (c); 42 U.S.C. 5174(h) (limiting financial assistance to $25,000 per household, as adjusted to reflect inflation).

The President is authorized to delegate his authority under the Stafford Act, and he has delegated much of it to the Federal Emergency Management Agency (FEMA). Pet. App. 2a; see 42 U.S.C. 5164; Exec. Order No. 12,673, 3 C.F.R. 214 (1989 comp.). FEMA, in turn, has promulgated regulations implementing the Act. See 44 C.F.R. 206.101-206.120.

The decision to grant relief under the Stafford Act is discretionary. The Act "does not require that payments of * * * assistance be offered after a disaster or that

payments be made in any specific amounts when assistance is offered." *Ridgely* v. *FEMA*, 512 F.3d 727, 736 (5th Cir. 2008) (considering rental assistance payments). "Instead, it contains only a permissive grant of authority to FEMA (through the President) to provide" the various forms of assistance authorized by the Act. *Ibid.* FEMA's implementing regulations are similarly "written in entirely permissive terms," and "nowhere provide that an individual has a right to receive assistance if he meets the eligibility criteria." *Ibid.*

The Stafford Act immunizes discretionary decisions made in the administration of a disaster-relief program. Specifically, 42 U.S.C. 5148 provides that "[t]he Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions" of the Stafford Act. See, *e.g.*, *St. Tammany Parish ex rel. Davis* v. *FEMA*, 556 F.3d 307, 318-319 (5th Cir. 2009); *Rosas* v. *Brock*, 826 F.2d 1004, 1007-1010 (11th Cir. 1987).

2. Petitioners are 26 individuals whose homes were allegedly damaged as a result of one of three Texas storms that the President declared "major disasters" in late 2015 and early 2016, as well as a non-profit organization. Pet. App. 7a. Petitioners sought home-repair assistance under the Stafford Act. *Ibid.* FEMA granted some of their requests and denied others in whole or in part. *Ibid.*

Dissatisfied with FEMA's disaster-relief decisions, petitioners filed appeals with the agency. Pet. App. 7a. FEMA denied some of these claims in part, and denied others altogether, in many instances after sending a second inspector to evaluate the claim. *Ibid.*; see, *e.g.*,

C.A. App. 60 (indicating that FEMA provided additional $929.52 to petitioner Oscar Gallegos after sending second inspector on appeal); *id.* at 75 (second inspector sent to home of petitioner Gilberto Mireles); *id.* at 84 (similar for petitioner Jessica Reyes); *id.* at 87 (similar for petitioner Reynaldo Rosas); *id.* at 91 (similar for petitioner Sylvia Silguero); *id.* at 93 (similar for Enedina Vela); *id.* at 95 (similar for petitioner Ramiro Villegas Jr.).

Petitioners then brought this action in district court. The first three counts of petitioners' complaint alleged that FEMA had violated the Stafford Act, 42 U.S.C. 5151(a), 5174(j), and 5189a(c), by failing to adopt certain regulations. C.A. App. 29-32. With respect to those counts, petitioners sought, *inter alia*, an injunction requiring the agency to promulgate such regulations. *Id.* at 33, ¶ 96(b). Those counts are not directly at issue here. See Pet. 10-11.

Petitioners also alleged, in Count IV of their complaint, that FEMA had violated the Freedom of Information Act (FOIA), 5 U.S.C. 552(a)(1). See C.A. App. 32. That provision requires agencies to "separately state and currently publish in the Federal Register for the guidance of the public" various documents, including "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. 552(a)(1)(D). Section 552(a)(1) further states that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. 552(a)(1). Petitioners alleged that FEMA had violated Section 552(a)(1) by using what they described as unpublished

guidance found in field instruction manuals and memoranda to determine whether and to what extent relief should be granted under the Stafford Act. See C.A. App. 32, ¶¶ 91-95; accord *id.* at 19, ¶ 30; *id.* at 21-22, ¶ 39 (referencing "Inspection Guidelines," "Field Inspector Manuals," and "Pre-Shift Instructions").

As relief for their FOIA publication claim, petitioners sought, *inter alia*, an order "remanding all applications for home repair assistance following [the three Texas storms] to FEMA for its reconsideration without use of any rules that were not published when FEMA originally decided the applications." C.A. App. 33, ¶ 96(d). Petitioners argued that they were entitled to such relief as "the 'sanction' that Congress imposed in § 552(a)(1) to produce an 'incentive for agencies to publish the necessary details about their official activities in the Federal Register.'" Pet. C.A. Br. 23 (quoting *Morton* v. *Ruiz*, 415 U.S. 199, 233 & n.27 (1974)).

The district court granted respondents' motion to dismiss and denied petitioners' motion for summary judgment. Pet. App. 14a-47a. In its initial decision, the court focused (*id.* at 26a-47a) on whether the Stafford Act's discretionary function exception, 42 U.S.C. 5148, applied to FEMA's promulgation of regulations and barred petitioners' first three claims for relief. The court found that it does. Pet. App. 28a-47a. The court then determined that petitioner's claim that FEMA had violated 5 U.S.C. 552(a)(1) by using unpublished rules to adversely affect their applications "depends on [their] stating a claim" with respect to FEMA's failure to promulgate regulations. Pet. App. 47a n.7. As a result, the court held that the Section 552(a)(1) claim "necessarily fails to state a claim, as well." *Ibid.*

3. Petitioners sought reconsideration of the district court's dismissal of their claim that FEMA violated Section 552(a)(1) "by using unpublished rules to evaluate [their] applications for disaster relief." Pet. App. 48a-49a. The court denied reconsideration, *id.* at 48a-58a, but took "the opportunity" to provide "a more fulsome explanation for why it dismissed" that claim, *id.* at 49a. The court explained that the Fifth and Eleventh Circuits had held that the Stafford Act's immunity provision bars APA claims with no "material difference" from those presented here, and that the D.C. Circuit had held "in an analogous context that the discretionary function exception contained in the Federal Tort Claims Act precludes tort claims alleging violations of the APA's procedural requirements." *Id.* at 51a, 53a n.3 (citing *St. Tammany Parish*, 556 F.3d at 313, 326 n.13; *Rosas*, 826 F.2d at 1007-1008; *Jayvee Brand, Inc.* v. *United States*, 721 F.2d 385, 387 (D.C. Cir. 1983)); see *id.* at 52a-56a. The court found petitioners' FOIA claim likewise barred, because petitioners alleged, at most, "an abuse in the exercise of policy making, and hence an abuse of discretion shielded from liability" under the Stafford Act. *Id.* at 56a (quoting *Jayvee Brand*, 721 F.2d at 389).

4. The court of appeals affirmed. Like the district court, the court of appeals observed that the Stafford Act precludes judicial review of discretionary decisions made by an agency in the administration of a disaster-relief program. See Pet. App. 3a (citing 42 U.S.C. 5148). The court of appeals explained that to overcome that bar, a plaintiff must identify a federal statute that "specifically prescribes a course of action" and does not involve an "element of judgment or choice." *Id.* at 10a

(citing cases applying the similar language of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, and noting that petitioners did not dispute that this was the appropriate test) (citation omitted).

The court of appeals rejected petitioners' contention that they were entitled to reopening of their disaster-relief applications as a FOIA "sanction" for FEMA's alleged failure to publish certain materials in the Federal Register. See Pet. App. 11a-12a (characterizing this argument as a "creative alternative" to petitioners' "direct attack on the regulations," which was jurisdictionally barred). The court noted that "[i]t is probable that the sanction in [Section 552(a)(1)] is designed for a case like *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987), where an application for a license was improperly rejected because it was filed at the wrong location, despite the fact that the FCC had never published the right location." *Id.* at 12a. "But even assuming one could stretch 'adverse affect' to refer to denied Stafford Act claims," the court determined that Section 552(a)(1) "cannot be used to allow us to review Stafford Act regulations, still less to reopen FEMA decisions," because the Stafford Act's discretionary function exception "remains a barrier." *Ibid.*

The court of appeals acknowledged the general provision in the Administrative Procedure Act (APA), 5 U.S.C. 559, stating that "modifications" of the APA's applicability "must be specifically stated." Pet. App. 12a. The court explained, however, that the Stafford Act's "preclusion of judicial review is a jurisdictional limitation on judicial power." *Ibid.* The court concluded that the FOIA provision "cannot be used to create judicial authority to review Stafford Act claims, regardless of whether" the publication directive in Section 552(a)(1)

"itself, is discretionary," as the district court had found. *Ibid.*; see *id.* at 12a n.9. In the court's view, because "Congress specifically limited our jurisdiction to review discretionary decisions under the Stafford Act, * * * it would be an improbable stretch to use another unrelated statute"—FOIA Section 552(a)(1)—"to frustrate congressional intent." *Id.* at 12a.

The court of appeals further noted that to the extent petitioners claimed that "'secret law' was being used," petitioners (and the public at large) had other recourse. Pet. App. 13a. Government counsel had explained at oral argument that "additional policies for dealing with claims and appeals were easily available to [petitioners] on the internet." *Ibid.* "Moreover, a normal FOIA request would reach any governing policies," and government counsel had represented that the agency "would have no objection to complying with specific requests for documents." *Ibid.* (emphasis omitted). "And, of course, if such requests are denied, [petitioners] may seek further judicial review through FOIA under 5 U.S.C. § 552(a)(4)(B), a provision that they did not invoke in this case." *Ibid.* The court made clear, however, that it was not "suggest[ing] that the Stafford Act cases" themselves could be "reopened" notwithstanding the discretionary function exception. *Ibid.*

The court of appeals denied petitioners' request for rehearing en banc, with no member of the court having requested a vote. See 6/21/19 Order.

ARGUMENT

The court of appeals correctly rejected petitioners' contention that despite the Stafford Act's immunity provision, 42 U.S.C. 5148, petitioners could rely on the FOIA, 5 U.S.C. 552(a)(1), to require the federal government to reconsider their applications for Stafford Act

disaster relief. That decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. a. Petitioners brought this suit because they were dissatisfied with FEMA's decision not to award them disaster relief, or the amount of such relief, in the aftermath of 2015 and 2016 Texas storms. See Pet. App. 2a, 7a. In relevant part, their complaint sought an order "remanding all applications for home repair assistance following [the Texas storms] to FEMA for its reconsideration without use of any rules that were not published when FEMA originally decided the applications." C.A. App. 33, ¶ 96(d). Petitioners relied on FOIA Section 552(a)(1), which requires agencies to "separately state and currently publish in the Federal Register for the guidance of the public" various documents, including "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. 552(a)(1); Pet. App. 11a (citation omitted). That provision further states that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. 552(a)(1).

The court of appeals correctly rejected petitioners' claim. As the court explained (Pet. App. 3a), the Stafford Act provides that the government "shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out" the decision whether and to what extent to award disaster relief. 42 U.S.C. 5148. Because the text of the

Stafford Act's immunity provision is based on text in the FTCA, courts applying the Stafford Act use the same test that this Court established to determine whether an action is protected under the discretionary function exception in the FTCA. Under that framework, the discretionary function exception applies to agency action that "involv[es] an element of judgment or choice," so long as that judgment is of the kind that the exception was designed to shield. *St. Tammany Parish ex rel. Davis* v. *FEMA*, 556 F.3d 307, 323 (5th Cir. 2009) (quoting *United States* v. *Gaubert*, 499 U.S. 315, 322 (1991) (citing *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988))); see *Rosas* v. *Brock*, 826 F.2d 1004, 1009 (11th Cir. 1987). As the court of appeals explained (Pet. App. 10a), petitioners did not dispute that framework was applicable here. FEMA's decision to grant disaster relief is unquestionably discretionary. See *Ridgely* v. *FEMA*, 512 F.3d 727, 736 (5th Cir. 2008). Thus, petitioners could not directly attack FEMA's discretionary disaster-relief awards (or lack thereof) under the Stafford Act.

The court of appeals correctly determined that petitioners' "creative" attempt to achieve the same result indirectly likewise failed, because Section 552(a)(1) "cannot be used to create judicial authority to review Stafford Act claims." Pet. App. 11a-12a. As the court explained, a contrary holding "would be an improbable stretch" that would "use another unrelated statute"—FOIA—"to frustrate congressional intent" to preclude review of FEMA's discretionary disaster-relief awards. *Id.* at 12a. Indeed, the Stafford Act's immunity provision has long been held to bar APA claims that challenge discretionary actions taken in implementing disaster-relief programs, see, *e.g.*, *Rosas*, 826 F.2d at

1007-1008, and Congress created the specific disaster-relief program at issue here against the background of that precedent, see Disaster Mitigation Act of 2000, Pub. L. No. 106-390, 114 Stat. 1552 (creating the IHP).

Petitioners now contend that they "*only* seek FEMA's publication of whatever rules FEMA chooses to use," Pet. 3 (emphasis added), and that such publication is mandatory—not discretionary—under the FOIA. See Pet. 18-23. But the court of appeals did not ground its decision in a determination that publication is discretionary; indeed, it did not decide that issue at all. See Pet. App. 12a. Moreover, as the government explained in the court of appeals, "[d]eciding whether and how to publish any particular document"—which requires the agency to, *inter alia*, discern the "imprecise" "line between substantive and procedural or interpretive rules"—"requires an element of judgment," and thus falls under the discretionary function exception, as the district court correctly held. Gov't C.A. Br. 34-35; see Pet. App. 12a n.9, 55a-56a.

In any event, petitioners' argument that they simply seek publication of FEMA documents stands in sharp contrast to their arguments below. Before the district court and in the court of appeals, petitioners relied on Section 552(a)(1) to argue that FEMA should be ordered to *reopen* their disaster-relief applications and to "*reconsider* [them], without the use of rules that were not published at the time of FEMA's adverse decision." Pet. C.A. Br. 23 (emphasis added). Petitioners' FOIA claims are therefore rooted in their dissatisfaction with FEMA's determinations concerning their eligibility for disaster relief and the amount of that relief—determinations that are purely discretionary. The court of appeals properly rejected petitioners' attempt to invoke FOIA

to circumvent the Stafford Act's immunity provision. See *St. Tammany Parish*, 556 F.3d at 313-314.

Petitioners now contend (Pet. 14-18) that the decision below is inconsistent with Section 559 of the APA, which provides that a "[s]ubsequent statute may not be held to supersede or modify" the APA's provisions "except to the extent that it does so expressly." Pet. 14 (quoting 5 U.S.C. 559) (brackets in original). Notably, however, petitioners did not cite Section 559 in their opening brief in the court of appeals, and they relied on that provision only briefly in reply. See Pet. C.A. Br. 1-56; Pet. C.A. Reply Br. 19-20. The court of appeals therefore discussed it only briefly. See Pet. App. 12a. And the court did not hold that the Stafford Act's prohibition on review of discretionary acts displaces the APA or Section 552(a)(1) entirely. Rather, it held that "[a] FOIA claim cannot be used to create judicial authority to review Stafford Act claims." *Ibid.* In other words, while the Stafford Act's discretionary function exception would not itself bar an attempt to bring a freestanding claim that FEMA failed to publish certain documents as required by Section 552(a)(1)—or that it improperly denied a request for documents under Section 552(a)(3), see *id.* at 13a—it *does* bar petitioners' attempt to use Section 552(a)(1)'s "sanction" provision to obtain reopening and reconsideration of FEMA's discretionary disaster-relief decisions under the Stafford Act. That holding is fully consistent with the APA, because 5 U.S.C. 702 provides that nothing in the APA "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought," as the Stafford Act does here.[*]

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[*] In a case not involving the Stafford Act, the D.C. Circuit held that FOIA "does not authorize district courts to order publication of

b. Petitioners' claim fails for at least two additional, independent reasons.

First, by its terms, the FOIA "sanction" that petitioners invoke does not apply to "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register" or to "administrative staff manuals and instructions to staff that affect a member of the public." 5 U.S.C. 552(a)(2). Those are precisely the sorts of documents on which petitioners premised their claims. See C.A. App. 21-22, ¶ 39 (listing policies such as "Inspection Guidelines," "Field Inspector Manuals," and "Pre-Shift Instructions"); Gov't C.A. Br. 32-34, 45-46 (making this argument).

Second, the FOIA provision on which petitioners rely does not apply unless a claimant was "adversely affected" by a failure to publish a matter in the Federal Register. 5 U.S.C. 552(a)(1). As the court of appeals observed (Pet. App. 13a), FEMA has for many years posted disaster-relief guidance on its website. Indeed, the government's brief in the court of appeals provided

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* * * documents" that fall within Section 552(a)(1), and that relief for a violation of Section 552(a)(1) is limited to an order that the agency provide documents to the requesting party. *Kennecott Utah Copper Corp.* v. *United States Dep't of the Interior*, 88 F.3d 1191, 1202 (1996); see *CREW* v. *DOJ*, 846 F.3d 1235, 1243-1244 (D.C. Cir. 2017) (adopting the same rule in the context of FOIA's "reading-room" provision, 5 U.S.C. 552(a)(2)). But see *Animal Legal Defense Fund* v. *USDA*, 935 F.3d 858, 874-876 (9th Cir. 2019) (holding that federal courts may order publication under 5 U.S.C. 552(a)(2)). This case does not implicate the extent of relief available for a freestanding claim based on a failure to publish documents in the Federal Register under Section 552(a)(1). The point here is simply that the court of appeals did not hold that the Stafford Act's immunity provision bars all suits to enforce Section 552(a)(1).

links to the guidance that was available on FEMA's website at the time of the 2015 and 2016 Texas storms. See Gov't C.A. Br. 9 & nn.1-3. Although petitioners now assert (Pet. 7 n.6) that the materials at issue were never posted on FEMA's website, they made no such argument below. Instead, they simply stated in a footnote that they "ha[d] not yet had an opportunity to prove adverse effect, and their allegations must be taken as true." Pet. C.A. Reply Br. 20 n.11.

Accordingly, this case bears no resemblance to the sole FOIA-sanction case on which petitioners rely. See Pet. 1. In *Morton* v. *Ruiz*, 415 U.S. 199 (1974), this Court held that an agency could not "extinguish the entitlement of" Native American farmers to statutorily guaranteed benefits without following procedural requirements. *Id.* at 235-236. Disaster-relief awards are not entitlements, *Ridgely*, 512 F.3d at 736, and in any event, petitioners did not allege in a non-conclusory way that they were adversely affected by a failure to publish any specifically identified document in the Federal Register. Furthermore, as the court of appeals explained, "a normal FOIA request would reach any governing policies," and the government "stated repeatedly that the agency would have no objection to complying with specific requests for documents so that the allegedly 'secret law' can be brought to light." Pet. App. 13a (emphasis omitted). Petitioners, however, never made such a request. See *ibid.*

2. a. The decision below is consistent with the decisions of other courts of appeals concerning the Stafford Act. In *St. Tammany Parish*, the Fifth Circuit held that the Stafford Act's immunity provision "exists * * * to protect the government from liability for claims based on its discretionary conduct brought pursuant to

the FTCA, APA, or other statutes of general applicability." 556 F.3d at 318. The court therefore held that the Stafford Act barred claims regarding FEMA's discretionary decision not to approve particular disaster-relief funding, including claims that the denial "constituted a substantive rule change about which FEMA never provided the public with notice and an opportunity to comment," as required by the APA. *Id.* at 313; see *id.* at 323-326. The court explained that "[b]ecause § 5148 applies, it bars any claim—whether alleged under the FTCA or APA." *Id.* at 326 n.13.

Similarly, in *Rosas*, the Eleventh Circuit held that the immunity provision in the Disaster Relief Act of 1974, 42 U.S.C. 5148 (1976), barred a plaintiff's APA claim that a sub-regulatory definition applied to deny relief in his case was an improper interpretation of the relevant federal regulations. 826 F.2d at 1008-1009. The plaintiff in *Rosas* attempted to avoid the Stafford Act's immunity provision by arguing that it did not preclude claims for injunctive and declaratory relief. The Eleventh Circuit disagreed, explaining that "[t]he use of the phrase 'liable for any claim' indicates not only Congress's concern that the government not have to pay damages, but also that it not be answerable in any way to claims arising out of discretionary actions." *Id.* at 1009; see *Graham* v. *FEMA*, 149 F.3d 997, 1005 (9th Cir. 1998) (following *Rosas*); *Ornellas* v. *United States*, 2 Cl. Ct. 378 (1983) (holding that the immunity provision in the Disaster Relief Act of 1974 precluded APA review of the denial of disaster relief).

b. Petitioners do not address *St. Tammany Parish*, *Rosas*, or the other decisions specifically considering the interaction between the Stafford Act's immunity provision (or its predecessor) and the APA. Instead,

petitioners assert that the decision below deepens a more general conflict among the courts of appeals over the "enforceability of express-statement requirements." Pet. 23 (emphasis omitted). But the court of appeals did not directly address that general question. See pp. 17-18, *infra*.

In any event, many of the cases on which petitioners rely (Pet. 23-25) do not involve *either* the Stafford Act *or* the APA. See *Little Sisters of the Poor Home for the Aged* v. *Burwell*, 794 F.3d 1151, 1159 n.4 (10th Cir. 2015) (noting that the Patient Protection and Affordable Care Act, 42 U.S.C. 18001 *et seq.*, "did not contain a specific exemption and is subject to [the Religious Freedom Restoration Act of 1993 (RFRA)], 42 U.S.C. 2000bb *et seq.*"), vacated on other grounds and remanded, 136 S. Ct. 1557 (2016); *Michigan Catholic Conference & Catholic Family Servs.* v. *Burwell*, 755 F.3d 372, 383 n.8 (6th Cir. 2014) ("Congress may reject the application of RFRA to a later-enacted statute without explicitly stating that RFRA does not apply."), vacated on other grounds, 135 S. Ct. 1914 (2015); *United States* v. *Dixon*, 648 F.3d 195, 199-200 (3d Cir. 2011) (holding that the more favorable mandatory minimum prison sentences imposed by the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, applied retroactively notwithstanding the absence of an express statement repealing the mandatory minimum sentences of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207).

While petitioners cite a few cases concerning the APA, they likewise bear no resemblance to this suit. None of those decisions addressed the interaction between the Stafford Act and the "sanction" provision in 5 U.S.C. 552(a)(1). See, *e.g.*, *California* v. *Azar*, 911 F.3d

558, 578-579 (9th Cir. 2018) (holding on review of a nationwide preliminary injunction that certain agencies "likely" did not have statutory authority for bypassing notice and comment in the absence of an express statement), cert. denied, 139 S. Ct. 2716 (2019); *City of New York* v. *Permanent Mission of India to the United Nations*, 618 F.3d 172, 203 (2d Cir. 2010) (declining to rely on "ambiguous legislative history" of Foreign Missions Act when interpreting the APA's "'foreign affairs function'" exception), cert. denied, 564 U.S. 1046 (2011); *Five Points Rd. Joint Venture* v. *Johanns*, 542 F.3d 1121, 11125-1127 (7th Cir. 2008) (holding that administrative proceedings before the National Appeals Division (NAD) in the Department of Agriculture constituted "adjudication[s] under [5 U.S.C.] 554," 5 U.S.C. 504(b)(1)(C)(i), because the NAD's review of agency determinations met the formal adjudication requirements of the APA and no express statement in the NAD statutes exempted the Division from the APA's procedures); *Robinette* v. *Commissioner*, 439 F.3d 455, 461 (8th Cir. 2006) (holding that the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, which did not address the scope of a Tax Court's review of decisions of IRS appeals officers, was not exempt from the APA's judicial review provisions or from "general principles of administrative law"). Petitioners thus have not identified any tension or conflict in the circuits warranting this Court's review.

3. In any event, this case would not be an appropriate vehicle to address the enforceability or proper scope of express-statement requirements more generally. See Pet. 25-29. Although the petition for a writ of certiorari relies heavily on the express-statement provision in 5 U.S.C. 559, petitioners did not cite that provision in

their opening brief before the court of appeals, and their reply brief devoted only a few sentences to it. See p. 12, *supra*. The court of appeals likewise addressed the provision only briefly. Pet. App. 12a. Although the court determined that Section 559 did not permit petitioners to use Section 552(a)(1) to circumvent the Stafford Act's immunity provision, it did not opine more generally on "the enforceability of statutory express-statement requirements." Pet. 25.

Petitioners also overstate the significance of the court of appeals' decision. See Pet. 22, 30-33. Although they assert that the decision "mak[es] judicial review of FEMA's failure to publish its rules effectively impossible," Pet. 22, the court emphasized that petitioners are free to make FOIA requests under 5 U.S.C. 552(a)(3) for documents that the agency fails to publish and to seek judicial review of any denials of such requests under 5 U.S.C. 552(a)(4)(B)—a route petitioners chose not to pursue. And as discussed above, see p. 12 & n.*, *supra*, the court did not interpret the Stafford Act's immunity provision to bar *all* claims regarding publication under Section 552(a)(1)—just those that rely on it to circumvent the Stafford Act's preclusion of claims based on discretionary disaster-relief decisions. The court of appeals' narrow decision thus raises no issue of general importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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