ORAL ARGUMENT NOT YET SCHEDULED

NO. 17-5206

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DANIEL BARBOSA, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,
Defendants-Appellees.

On Appeal from a Final Order of the
U.S. District Court for the District of Columbia
No. 1:16-cv-1843 (APM)

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

Julie A. Murray
Scott L. Nelson
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
jmurray@citizen.org

Attorneys for Amicus Curiae
Public Citizen, Inc.

March 15, 2018

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, RELATED CASES, CORPORATE DISCLOSURE STATEMENT, AND SEPARATE BRIEFING

(1) Parties and Amici. All parties appearing in this Court and in the district court are listed in the Brief for Appellants. In addition to Public Citizen, Inc., the National Low Income Housing Coalition, Mississippi Center for Justice, Texas Low Income Housing Information Service, and The St. Bernard Project, Inc. have filed a notice of intent to participate as amici in this Court. There are no intervenors in this case.

(2) Rulings Under Review. The rulings under review appear in the Brief for Appellants, with the exception of official citations. The district court's July 11 and October 6, 2017, opinions are published. *See Barbosa v. United States Dep't of Homeland Security*, 263 F. Supp. 3d 207 (D.D.C. 2017); *Barbosa v. United States Dep't of Homeland Security*, 278 F. Supp. 3d 325 (D.D.C. 2017).

(3) Related Cases. This case has not previously come before this Court or any other court. Counsel is aware of no related cases pending before this Court or any other court within the meaning of D.C. Circuit Rule 28(a)(1)(C).

(4) Corporate Disclosure Statement. Amicus curiae Public Citizen, Inc. is a nonprofit organization that has not issued shares or debt securities to the public and that has no parents, subsidiaries, or affiliates that have issued shares or debt securities

to the public. The general purpose of the organization is to advocate for the public interest on a range of issues, including access to justice and open government.

(5) Separate Briefing. Pursuant to Circuit Rule 29(d), counsel for Public Citizen certifies that a separate brief is necessary to provide a perspective informed by amicus curiae's long history of advocating for government transparency under the Freedom of Information Act and for access to the courts. Public Citizen has conferred with counsel for proposed amici the National Low Income Housing Coalition, *et al.*, and has determined that consolidation of its brief with the housing advocacy organizations' brief is not practicable given the distinct nature of the amici's interests and the different focus of each brief.

/s/ Julie A. Murray
Julie A. Murray

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

* *Authorities upon which we chiefly rely are marked with asterisks.*

STATUTES, REGULATIONS, AND RULES

ADDITIONAL AUTHORITIES

GLOSSARY

APA	Administrative Procedure Act
FEMA	Federal Emergency Management Agency
FOIA	Freedom of Information Act
FTCA	Federal Tort Claims Act
Stafford Act	Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121 et seq.

STATUTES AND REGULATIONS

The Stafford Act's discretionary-function provision, 42 U.S.C. § 5148, entitled "Nonliability of Federal Government," provides:

> The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter.

The Federal Tort Claims Act's discretionary-function provision, 28 U.S.C. § 2680(a), provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

All other pertinent statutes and regulations are reproduced in the addendum to the Brief of Appellants.

INTEREST OF AMICUS CURIAE[1]

Public Citizen, a nonprofit organization with members and supporters nationwide, is devoted to research, advocacy, and education on a wide range of

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than Public Citizen, Inc. or its counsel made a monetary contribution to the preparation or submission of this brief.

issues, including open government and access to justice. Since its founding in 1971, Public Citizen has relied on the Freedom of Information Act (FOIA) as an important tool for obtaining information for its work. Public Citizen has significant expertise in how FOIA works in practice, and it has appeared as an amicus in many FOIA cases, including recently in *Citizens for Responsibility and Ethics in Washington v. Department of Justice*, 846 F.3d 1235 (D.C. Cir. 2017). In addition, Public Citizen has appeared as amicus curiae in numerous cases raising issues concerning access to courts and the scope of courts' jurisdiction. *See*, *e.g.*, *Salt River Project Agricultural Improvement and Power District v. Tesla Energy Operations, Inc.*, No. 17-368 (U.S. 2018); *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142 (2007).

Public Citizen submits this brief, which makes arguments distinct from those advanced by plaintiffs-appellants, because it believes that the district court applied an improper sovereign-immunity analysis by failing to consider the Administrative Procedure Act's waiver of sovereign immunity and misapplying the Stafford Act's discretionary-function provision. Public Citizen is deeply concerned that the district court's analysis, if accepted by this Court, would countenance an agency's application of secret rules to adversely affect the public, an outcome antithetical to FOIA.

All parties have consented to the filing of this brief.

STATEMENT OF THE CASE

The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121 *et seq.* (Stafford Act), enacted in 1988, authorizes federal relief to families and businesses affected by major disasters. In 2000, Congress amended the Stafford Act to permit the primary agency charged with the law's administration—the Federal Emergency Management Agency (FEMA)—to provide direct grant assistance to individuals whose homes are damaged in such a disaster. FEMA provides this assistance through the Individuals and Households Program, codified at 42 U.S.C. § 5174, which authorizes, among other things, aid for "the repair of owner-occupied private residences" that are "damaged by a major disaster" in order to return those residences "to a safe and sanitary living or functioning condition." *Id.* § 5174(c)(2)(A)(i).

This case was brought by 26 individuals (hereinafter, the Homeowners) who reside in Texas and own homes that were damaged in FEMA-declared major disasters. JA 14, Compl. ¶ 9.[2] The Homeowners submitted applications to FEMA for housing repair assistance, and FEMA responded by denying the applications either in full or in part. *Id.* FEMA's responses to the applications did not explain the

[2] La Unión del Pueblo Entero, a non-profit membership organization that educates the public about disaster assistance and advocates for disaster recovery resources, also joined as a plaintiff in this action. JA 14-15, Compl. ¶ 10.

standards that the agency used to find the Homeowners ineligible for full relief. JA 28-29, Compl. ¶ 75(f).

The Homeowners filed suit against FEMA, challenging the agency's denials of or limitations on their housing repair assistance. JA 29, Compl. ¶ 76. They alleged that FEMA used "secret rules to decide who gets disaster assistance, and how much each person gets," JA 13, Compl. ¶ 1, and asserted four Administrative Procedure Act (APA) claims, JA 29-32, Compl. ¶¶ 78-95, hinging on that general theory.

Each of the first three counts in the complaint asserted that FEMA had violated separate provisions of the Stafford Act requiring the agency to adopt rules and regulations for the administration of the Individuals and Households Program. *See* JA 29-32, Compl. ¶¶ 81-90. The Homeowners' fourth count asserted that FEMA's determinations on their assistance applications violated 5 U.S.C. § 552(a)(1), a provision of the Freedom of Information Act (FOIA) that prohibits the federal government from relying on a rule that must be published in the Federal Register if the rule was not in fact published, unless the person affected had actual and timely notice of the rule. JA 32, Compl. ¶¶ 91-95.

Among other relief, the Homeowners sought an order (1) enjoining FEMA from using "unpublished rules to decide disaster assistance applications," (2) directing FEMA to reconsider applications for assistance "without use of any rules that were not published when FEMA originally decided the applications," and (3)

requiring FEMA to "promulgate regulations that state all standards that FEMA uses to decide eligibility for disaster assistance as required by 42 U.S.C. §§ 5151(a), 5174(j), and 5189a(c)." JA 32-33, Compl. ¶ 96. The Homeowners did not seek money damages.

The district court dismissed the Homeowners' claims for lack of subject matter jurisdiction, concluding—based on the Stafford Act's "discretionary-function" provision found at 42 U.S.C. § 5148—that the government had not waived its sovereign immunity from suit for the APA claims. The court did not discuss the APA's waiver of sovereign immunity for claims seeking relief other than money damages. *See* 5 U.S.C. § 702.

Relying on case law regarding the discretionary-function exception in the Federal Tort Claims Act (FTCA), the district court concluded that the Homeowners' APA claims based on violations of the Stafford Act were barred because, in the court's view, they challenged only the failure to publish *official regulations* (that is, regulations promulgated by notice-and-comment rulemaking for codification in the Code of Federal Regulations), not the failure to publish "*policies* governing the [Individuals and Households Program], regardless of whether a policy is characterized as a 'rule' or 'regulation.'" JA 345-46. Based on that construction of the claims, the Court held that FEMA had substantial discretion under 42 U.S.C. §§ 5151(a), 5174(j), and 5189a(c) in determining how it goes about rulemaking, and

that its determinations in that regard fell within the discretionary-function exception of 42 U.S.C. § 5148. JA 352. The district court held in the alternative that, even if it had jurisdiction over these claims, it would dismiss them for failure to state a claim because those regulations FEMA *has* promulgated "constitute reasonable interpretations of the Stafford Act." *Id.*

The district court also dismissed the Homeowners' APA claim based on the violation of FOIA's publication requirement. In its initial opinion, the court dismissed this cause of action in a footnote for "fail[ure] to state a claim" on the ground that it "depend[ed] on Plaintiffs stating a claim" with respect to their other three APA causes of action. JA 357 n.7. On a motion for reconsideration, the Court no longer took the position that this claim hinged on the other APA causes of action, *see* JA 360-61, but concluded that this count, too, was barred by sovereign immunity under the discretionary-function exception, JA 361, 365. The Court concluded that the "exception bars judicial review of FEMA's decision-making concerning the applicability of the APA's procedural requirements to FEMA's rules and policies." JA 361. It explained that to resolve the APA claim based on a violation of FOIA would require it "to evaluate [a] discretionary agency action—i.e., the decision not to publish certain rules and policies in the Federal Register." JA 364. It expressed concern that such evaluation would "immerse the court in the difficult task" of determining whether certain rules and policies were, for example, "rules of

procedure" or "substantive rules," as those terms are used in 5 U.S.C. § 552(a)(1), an outcome the court found unacceptable in light of the Stafford Act's discretionary-function provision. JA 365.

SUMMARY OF ARGUMENT

The district court erred by dismissing for lack of subject-matter jurisdiction the Homeowners' APA claim alleging a violation of FOIA, 5 U.S.C. § 552(a)(1). The court's sovereign-immunity analysis failed to recognize that the APA contains a waiver of sovereign immunity for APA claims seeking any form of relief other than money damages, 5 U.S.C. § 702, and thus presumptively permits the Homeowners' claim. The Stafford Act's discretionary-function provision does not cut back on the APA's waiver of sovereign immunity. The discretionary-function provision was intended, at most, to preclude claims seeking money damages, as evidenced by Congress's modeling of the provision on similar language in the FTCA and by case law regarding the interaction of FTCA and APA claims.

The Homeowners' claim based on FOIA would not be barred by the discretionary-function provision, even if that provision limited the § 702 waiver of sovereign immunity or extended beyond money damages. The act complained of in the Homeowners' claim based on FOIA—the denial of their assistance applications based on the application of secret rules required to be published under 5 U.S.C. § 552(a)(1)—is not discretionary in nature. The relevant FOIA provision uses

mandatory terms: agencies "shall" comply with FOIA's publication requirement, and when they do not, members of the public "may not in any manner" be adversely affected. *Id.* FEMA may have some discretion in determining whether to adopt particular rules and regulations and in selecting their degree of specificity, but it may not refuse to comply with FOIA's affirmative publication provision for those rules to which the provision applies. The agency "has no rightful option but to adhere to the directive." *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

ARGUMENT

I. The APA Waives Sovereign Immunity for The Homeowners' APA Claim Based on FOIA.

"The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). The district court asked only whether the Stafford Act waives sovereign immunity for the Homeowners' APA claim based on a FOIA violation. That question misses the mark because the APA itself contains a waiver of sovereign immunity for APA claims (and other claims not seeking money damages). Although that express waiver does not apply where another statute contains a consent to suit and impliedly or expressly precludes the exercise of subject-matter jurisdiction over APA claims, the Stafford Act is not such a statute.

Specifically, 5 U.S.C. § 702 of the APA provides in relevant part:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States….

This provision, added to the APA in 1976, *see* Pub. L. No. 94-574, 90 Stat. 2721 (1976), acts as a waiver of sovereign immunity applicable to all federal actions, under the APA or other statutes, seeking relief other than money damages from the United States. *See, e.g.*, *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996). In this case, the Homeowners seek only injunctive and declaratory relief from the United States with respect to their APA claim based on a violation of FOIA. Section 702 thus presumptively waives the government's sovereign immunity for this claim.

To be sure, "the APA's waiver of immunity comes with an important carve-out: The waiver does not apply 'if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought' by the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012) (quoting 5 U.S.C. § 702). Whether another statute has such an effect will depend on whether a claim under that statute is "addressed to the type of grievance which the plaintiff seeks to assert" under the APA. *Id*. at 216. If not, it "cannot prevent an APA suit." *Id.*

So, for example, this Court has held that the Tucker Act, 28 U.S.C. § 1491(a)(1), which waives sovereign immunity for some contract-based claims brought in the Court of Federal Claims, impliedly forbids contract claims against the government brought pursuant to the APA in a federal district court. *Albrecht v. Comm. on Employee Benefits of Fed. Reserve Employee Benefits Sys.*, 357 F.3d 62, 68 (D.C. Cir. 2004); *accord Sharp v. Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986); *Maryland Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1448 (D.C. Cir. 1985). In contrast, the Supreme Court has held that the Quiet Title Act, which authorizes a plaintiff to bring suit to establish his right to disputed property but does not waive sovereign immunity for claims involving certain Indian lands, does not limit the APA's waiver of sovereign immunity with respect to APA claims that contest the government's title to Indian land but in which the plaintiff *does not* assert a competing interest. *Match-E-Be-Nash-She-Wish*, 567 U.S. at 218; *compare Block*, 461 U.S. at 286 n.22.

The Stafford Act does not fall into the carve-out from the APA's waiver of sovereign immunity. As an initial matter, it is unclear whether the Stafford Act is a "statute that grants consent to suit," as that term is used in 5 U.S.C. § 702. It does not contain language expressly waiving sovereign immunity for any claims, much less for claims involving "the type of grievance" that the Homeowners "seek[] to assert" under the APA. *Match-E-Be-Nash-She-Wish*, 567 U.S. at 216. The

discretionary-function provision, on which the district court relied, speaks only in terms of a negative limitation on liability, not a positive authorization of suit against the government:

> The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter.

42 U.S.C. § 5148. In addition, although provisions establishing a private right of action may be interpreted to waive sovereign immunity, *see, e.g.*, *Match-E-Be-Nash-She-Wish*, 567 U.S. at 215; *Rochon v. Gonzales*, 438 F.3d 1211, 1216 (D.C. Cir. 2006), the only such provision in the Stafford Act was added in 2006—long after the discretionary-function exception was incorporated into the Stafford Act's predecessor in 1950. And that provision creates only a narrow cause of action for claims related to firearm policies, such as claims based on the unlawful seizure of a firearm by the United States during a major disaster or emergency response, far afield from the APA claim based on FOIA in this case. *See* 42 U.S.C. § 5207.

Whether the Stafford Act provides an *implied* private right of action for the enforcement of other terms remains an open question in this Circuit and many others. *See, e.g.*, *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 813 n.1 (8th Cir. 2006) (stating only that 42 U.S.C. § 5170c of the Stafford Act "does not expressly provide for private rights of action"); *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 201 (2d Cir. 2008) (stating in passing that the "Stafford Act clearly

contemplates that the United States may be liable for certain acts" and pointing to 42 U.S.C. § 5173, which permits federal agencies "to clear debris and wreckage resulting from a major disaster from publicly and privately owned lands and waters," but only if the affected State or local government "first agree[s] to indemnify the Federal Government against any claim arising from such removal"). *But see Graham v. FEMA*, 149 F.3d 997, 1006 (9th Cir. 1998) (rejecting contention that 42 U.S.C. § 5189a(b) of the Stafford Act provides a private right of action), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010).

This Court need not decide, however, whether the Stafford Act is a statute that "grants consent to suit" because 42 U.S.C. § 5148 does not "expressly or impliedly forbid[] the relief," 5 U.S.C. § 702, sought by the Homeowners. This Court must begin with "the strong presumption that Congress intends judicial review of administrative action" under the APA. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *see also Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) ("Congress rarely intends to prevent courts from enforcing its directives to federal agencies."). In light of that presumption and the language and purpose of 42 U.S.C. § 5148, the provision should be interpreted, at most, to preclude claims for money damages.

As the district court recognized, 42 U.S.C. § 5148 was added to import a standard similar to that used in the FTCA, which was adopted just four years before

the provision that became the Stafford Act's discretionary-function provision. The FTCA authorizes private tort actions for damages against the United States under circumstances where the United States, if it were a private person, would be "liable" in accordance with the state law where the act or omission occurred. 28 U.S.C. § 1346(b)(1); *United States v. Olson*, 546 U.S. 43, 44 (2005). The FTCA's waiver of sovereign immunity for damages is cabined by a discretionary-function exception, which bars suit for "[a]ny claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Through the FTCA's discretionary-function provision, Congress sought to prevent the "propriety of a discretionary administrative act" from being "tested *through the medium of a damage suit* for tort." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 809-10 (1984) (emphasis added) (internal quotation marks omitted). It did not bar claims under other statutes that authorize non-monetary relief.

Jayvee Brand, Inc. v. United States, 721 F.2d 385 (D.C. Cir. 1983), a decision that the district court mistakenly viewed as supporting its holding, makes this distinction clear. In that case, manufacturers sought monetary damages for losses caused by an agency's "failure to follow statutorily prescribed procedures"—there, providing notice in the Federal Register and taking public comment—and they

brought suit under the FTCA. *Id.* at 387. In reliance on the FTCA's discretionary-function exception, 28 U.S.C. § 2680(a), this Court held that the FTCA did not waive sovereign immunity for *damages* for such a claim because "making a discretionary decision without following mandated procedures should be characterized, *for the purposes of the FTCA*, as an abuse of discretion" covered by the FTCA's discretionary function exception. 721 F.2d at 390 (emphasis added).

In so holding, however, *Jayvee Brand* emphasized that an APA claim against the agency for its failure to follow required procedures remained viable: "Congress has explicitly created the remedy for cases where an agency violates mandatory procedures in framing a rule—the rule is to be declared a nullity." *Id.* at 394; *see id.* at 391 ("Nowhere, so far as we are aware, has Congress stated that, *in addition*, the affected parties could collect damages from the government." (emphasis added)); *see also Drake v. FAA*, 291 F.3d 59, 72-73 (D.C. Cir. 2002) (holding that a litigant's FTCA claim based on an agency's dismissal of his complaint without a hearing was barred by the discretionary-function exception but rejecting the litigant's APA claim on other grounds); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1140 & n.21 (10th Cir. 1999) (describing the APA and FTCA as having "diametrically opposed yet complementary purposes" and holding that although the FTCA's discretionary-function exception would preclude FTCA claims based on an agency's "bad faith and subjective decisionmaking," APA claims on the same basis could be

cognizable). *Cf. Golden Pac. Bancorp v. Clarke*, 837 F.2d 509, 512 (D.C. Cir. 1988) (holding that a plaintiff's FTCA claim was barred by the discretionary-function exception and rejecting APA claim because the plaintiff sought only money damages).

The Stafford Act's use of nearly identical language to limit the government's liability, together with the legislative record, makes clear that it was this limitation from the FTCA—a provision that barred liability for damages—that Congress sought to import into what became the Stafford Act. The House Report on the Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109, the precursor to the Stafford Act and the original source of the discretionary-function provision, describes the addition of that provision to the bill and contains a letter from the Department of the Army urging Congress to preclude liability for claims "based upon the exercise of or the failure to exercise a discretionary duty *as provided in*" the FTCA, 28 U.S.C. § 2680(a). H.R. Rep. 81-2727, at 1, 7 (1950) (Letter from Secretary Pace to Rep. Whittington) (emphasis added).[3]

[3] The original version of the discretionary-function exception in the 1950 legislation covered discretionary actions "carrying out the provisions of this section," referring to a section of the Disaster Relief Act that authorized federal agencies to undertake a variety of efforts in disaster response, such as distributing food, lending supplies to state and local governments, and clearing debris and wreckage. *See* Pub. L. No. 81-875, § 3, 64 Stat. 1110 (1950). Along with other disaster-relief provisions, it was incorporated into the Stafford Act when that law was adopted in 1988. In light of the Stafford Act's expanded scope, the provision

The Chairman of the Committee on Public Works later explained the purpose of the provision as follows:

> We have further provided that if the agencies of the Government make a mistake in the administration of the Disaster Relief Act that the Government may not be sued. Strange as it may seem, there are many suits pending in the Court of Claims today against the Government because of alleged mistakes made in the administration of other relief acts, suits aggregating millions of dollars because citizens have averred that the agencies and employees of Government made mistakes. We have put a stipulation in here that there shall be no liability on the part of the Government.

96 Cong. Rec. 11912 (1950) (statement of Mr. Whittington). Because "cases seeking relief other than money damages from the Court of [Federal] Claims have never been within its jurisdiction," *United States v. King*, 395 U.S. 1, 4 (1969) (internal quotation marks omitted), it is apparent that Congress was focused on damages claims, not claims for specific relief like those available under the APA. Accordingly, the case law from the FTCA context and the congressional record underlying the Stafford Act's discretionary-function provision confirm that the provision does not "expressly or impliedly forbid[] the relief" that the Homeowners seek under the APA, 5 U.S.C. § 702, and thus does not affect the APA's broad waiver of sovereign immunity for relief other than money damages.

---

now refers to discretionary actions "carrying out the provisions of this chapter." Aside from this and other minor, non-substantive changes, the language of the discretionary-function provision remains unchanged.

Although not discussed by the district court, it bears emphasis that two other provisions of the APA limiting the scope of relief for APA claims, at least one of which has been invoked by a court with respect to the Stafford Act's discretionary-function exception, *see St. Tammany Parish, ex rel. Davis v. FEMA*, 556 F.3d 307, 318 (5th Cir. 2009), also would not affect the APA's sovereign-immunity waiver. Section 701(a)(1) of the APA bars relief where another statute "precludes judicial review," and § 702(1) does so where some other "limitation[] on judicial review or the power or duty of the court to dismiss any action or deny relief" exists. Neither of these provisions affects a court's subject-matter jurisdiction. *See Darby v. Cisneros*, 509 U.S. 137, 153 (1993) (explaining that § 702(1) was added to the APA "to make clear that 'all other than the law of sovereign immunity remain unchanged,'" or, put differently, that the "elimination of the defense of sovereign immunity did not affect any other limitation on judicial review" (quoting S. Rep. No. 94-996, at 11 (1976)); *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (holding that § 701(a)(2), which precludes APA claims where agency action is committed to an agency's discretion by law, does not affect subject-matter jurisdiction because the APA does not "afford an implied grant of subject-matter jurisdiction" in the first instance (internal quotation marks omitted)). Accordingly, they could not be relied on to affirm the district court's dismissal of the Homeowners' claim alleging a violation of FOIA under Federal Rule of Civil Procedure 12(b)(1).

II. The Discretionary-Function Provision Does Not Bar The Homeowners' APA Claim Alleging A Violation of FOIA.

Regardless of whether the Stafford Act's discretionary-function exception is properly viewed as going to the scope of the government's waiver of sovereign immunity or only as a limit on the scope of relief otherwise available in an action against the government, the provision has no application to the claimed violation of FOIA's publication requirement. As the district court recognized, courts applying the Stafford Act's discretionary-function provision look to FTCA case law. And in that context, the Supreme Court applies a two-part test that asks, first, whether an act is "discretionary in nature"—that is, one that "involve[s] an element of judgment or choice." *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (internal alteration and quotation marks omitted). The "discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" because in those circumstances, "the employee has no rightful option but to adhere to the directive." *Berkovitz*, 486 U.S. at 536; *see also, e.g.*, *Loumiet v. United States*, 828 F.3d 935, 944 (D.C. Cir. 2016). If the agency action involves an element of judgment or choice, the test then asks whether the judgment involved in the challenged act "is of the kind that the discretionary function exception was designed to shield," that is, an act "based on considerations of public policy" that is "grounded in social, economic, and political" considerations. *Berkovitz*, 486 U.S. at 536-37 (internal quotation marks omitted).

The Homeowners allege that FEMA applied unpublished rules to deny the adjudication of their assistance applications in violation of 5 U.S.C. § 552(a)(1) of FOIA. That section of FOIA provides that "[e]ach agency shall separately state and currently publish in the Federal Register for the guidance of the public" certain enumerated types of rules, including rules of procedure, substantive rules of general applicability, and statements of general policy or interpretations of general applicability. 5 U.S.C. § 552(a)(1). "The purpose" of this "availability requirement is obviously to give the public notice of what the law is so that each individual can act accordingly." *Smith v. Nat'l Transp. Safety Bd.*, 981 F.2d 1326, 1328 (D.C. Cir. 1993) (so stating in a case involving 5 U.S.C. § 552(a)(2)). As a result, FOIA provides an unyielding consequence when agencies do not comply with this publication requirement: "Except to the extent that a person has actual and timely notice of the terms thereof, 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).

Courts rely on this FOIA provision to invalidate, under the APA, agency actions that improperly rely on unpublished rules. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (concluding that secret eligibility criteria were "ineffective so far as extinguishing rights of those otherwise within [a] class of beneficiaries contemplated by Congress" because they were not published in the Federal Register as required

by § 552(a)(1)); *see also Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1203 (D.C. Cir. 1996) (providing that § 552(a)(1) provides a "powerful incentive" for agencies "to publish any rules they expect to enforce" by "protect[ing] a person from being 'adversely affected by'" an unpublished rule).

Section 552(a)(1) speaks in mandatory terms—agencies "shall" comply with the publication requirement, and when they do not, members of the public "may not in any manner" be penalized. Nonetheless, the district court held that FEMA's duty under this provision involved some element of choice or discretion. The court reasoned that FEMA has discretion whether to adopt rules that are, for example, rules of procedure or substantive rules of general applicability, and that therefore fall within § 552(a)(1)'s affirmative disclosure mandate. The court then made the further leap that discretion as to whether to promulgate a rule subject to § 552(a)(1) also makes compliance with FOIA's publication requirement discretionary.

The district court's analysis is wrong for two reasons. First, FEMA has statutory obligations to adopt types of rules that are per se subject to § 552(a)(1)'s publication requirement given their subject matter and impact. FEMA is required, for example, to prescribe "criteria, standards, and procedures for determining eligibility for assistance," 42 U.S.C. § 5174(j), and the Homeowners allege such rules have been kept secret yet applied to assistance applications, *see* JA 14, Compl. ¶¶ 1, 7; JA 32, Compl. ¶ 93. Such rules necessarily fall into at least one of the

categories that § 552(a)(1) requires to be published affirmatively, such as substantive rules, statements of general policy, or interpretations, even if FEMA has some discretion as to their specificity or scope.

Moreover, even if FEMA had absolute discretion to decide whether to adopt *any* rules regarding eligibility criteria and standards, or to proceed instead on an ad hoc basis by adjudication, it had no discretion, after deciding to adopt rules covered by § 552(a)(1), to apply them to members of the public without first publishing them. In this regard, this case resembles the situation in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). There, the Supreme Court considered a suit brought by a plaintiff alleging that the government had not maintained a lighthouse in good working order. The Court acknowledged that "the initial decision to undertake and maintain the lighthouse service was a discretionary judgment," but once the government made that judgment, "the failure to maintain the lighthouse in good condition subjected the Government to suit under the FTCA," because the "latter course of conduct did not involve any permissible exercise of policy judgment." *Berkovitz*, 486 U.S. at 538 n.3. Likewise, FEMA's lack of discretion at this latter stage is determinative here.

The cases on which the district court relied are not to the contrary. As described above, *Jayvee Brand* was an FTCA case that made clear that APA claims based on an agency's "failure to follow statutorily prescribed procedures"—there,

providing notice in the Federal Register and taking public comment—would remain viable even though damages actions based on that failure could not be brought under the FTCA in light of its discretionary-function exception. 721 F.2d at 387. Although this Court stated that an attack on the procedures used to adopt an agency's discretionary decision "may be characterized as an abuse in the exercise of policy making, and hence an abuse of discretion shielded" by the discretionary-function exception, its holding "turn[ed] on other factors." *Id.* at 389. It described those factors as clear indications that Congress never intended the "utterly anomalous" result that "methods by which [an agency] arrives at a rule are judged and punished according to District [of Columbia] tort law." *Id.* at 393. It was in this context of discerning congressional intent with respect to tort liability that the Court relied heavily on Congress's creation of a remedy under the APA for an agency's failure to follow required procedures before taking action. *Id.* at 391-94.

In *St. Tammany*, 556 F.3d 307, also cited by the court below, a locality brought FTCA and APA claims against FEMA, arguing that the Stafford Act and various policies promulgated pursuant to it "created a nondiscretionary duty on FEMA to fund [the locality's] requested debris and sediment removal in the Coin du Lestin canals to a depth of eight feet." *Id.* at 324. The Fifth Circuit read 42 U.S.C. § 5148 broadly to preclude claims under any statute if they are based on a discretionary function by FEMA in carrying out the Stafford Act. *Id.* at 321-22. It held that § 5148

cuts back on the APA's waiver of sovereign immunity in 5 U.S.C. § 702 because it acts as a statute that "preclude[s] judicial review" under 5 U.S.C. § 701(a)(1). 556 F.3d at 318 n.6. The Court dismissed the locality's claims for lack of subject-matter jurisdiction because it held that neither the Stafford Act nor its implementing policies and regulations "create[d] a nondiscretionary duty mandating that FEMA fund the Parish's requested" removal activities. *Id.* at 324.

Even if *St. Tammany* were rightly decided, *but see Sierra Club v. Jackson*, 648 F.3d at 854 (holding that § 701(a)(2) does not affect subject-matter jurisdiction because the APA does not provide an implied grant of subject-matter jurisdiction), the Homeowners, unlike the *St. Tammany* plaintiffs, are not asserting that FEMA was obligated to grant their relief applications, a determination *St. Tammany* held to be discretionary. Rather, the Homeowners allege that FEMA had a nondiscretionary obligation not to deny those applications on the basis of secret rules, an obligation that flows directly from FOIA's mandate in 5 U.S.C. § 552(a)(1), as to which the agency has no discretion.

Finally, this Court should reject the application of *Rosas v. Brock*, 826 F.2d 1004 (11th Cir. 1987), which is both inapposite and wrongly decided. In that case, a claimant who was denied disaster relief brought a class action challenging a regulation that defined the term "unemployed worker" for purposes of assistance eligibility. He argued that the regulation—which was applied to his request for relief

and served as the basis for denial—violated the Stafford Act, among other laws. The Court rejected this argument, explaining that the Stafford Act did not "contain any guidelines for determining which workers are eligible for . . . benefits and which are not" and that, "[i]n the absence of such guidelines," the "promulgation of the challenged rule is exactly the sort of exercise of discretion that Congress intended to insulate from judicial review." *Id.* at 1009. The Homeowners, of course, are not challenging the *substance* of the secret rules applied to their applications for assistance. To this extent, then, *Rosas* simply has no application here.

Rosas also barred an APA claim that the challenged rule defining "unemployed worker" was promulgated in violation of the APA's notice-and-comment requirement under 5 U.S.C. § 553, which requires notice-and-comment for substantive but not interpretive rules. The Court determined that "the government's determination of whether its definition of 'unemployed worker' is a substantive or interpretive rule involves the same sort of discretion and implicates the same policy considerations that exempt the decision from judicial review." 826 F.2d at 1009.

That an agency may have some discretion with respect to whether to engage in notice-and-comment rulemaking is an issue distinct from the question here: whether an agency has discretion to apply a secret rule in violation of FOIA's mandatory provision forbidding such application. In any event, *Rosas*' rationale reflects the same mistake made by the district court here in conflating an agency's

initial discretion to determine the scope and substance of its rules, with discretion to violate mandatory procedural requirements for the development of those rules. As described above (see pp. 20-21), this rationale cannot be squared with the Supreme Court's and this Court's case law interpreting the discretionary-function exception under the FTCA. And it makes no sense. When determining whether an agency improperly failed to provide notice-and-comment procedures under 5 U.S.C. § 553, courts do not ask whether the agency abused its discretion or give deference to an agency's views on the matter. "[A]n agency has no interpretive authority over the APA," and this Court "cannot find that an exception applies simply because the agency says [it] should." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014). Moreover, the decision in *Rosas* is inconsistent with this Court's recognition that whether a rule is substantive or interpretive for purposes of the APA is a "purely legal question[]." *Mendoza v. Perez*, 754 F.3d 1002, 1020 (D.C. Cir. 2014).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court.

Dated: March 15, 2018

Respectfully submitted,

/s/ Julie A. Murray
Julie A. Murray
Scott L. Nelson
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
jmurray@citizen.org

Attorneys for Amicus Curiae Public Citizen, Inc.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 29(a)(5) as follows: The type face is fourteen-point Times New Roman font, and the word count is 6,220.

/s/ Julie A. Murray
Julie A. Murray

CERTIFICATE OF SERVICE

I certify that on March 15, 2018, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Julie A. Murray
Julie A. Murray