

# U.S. DISASTER DISPLACEMENT IN THE ERA OF CLIMATE CHANGE: DISCRIMINATION & CONSULTATION UNDER THE STAFFORD ACT

Hannah Perls\*

## ABSTRACT

*Environmental disasters displace over one million people in the United States per year. Displaced persons are disproportionately from marginalized communities, including low-income communities and communities of color. Once displaced, members of these groups also tend to be displaced for longer periods of time, exposing them to human rights violations.*

*Federal disaster programs are not equipped to prevent or address disaster displacement in the era of climate change. Most federal disaster programs derive their authority from the 1988 Stafford Act, which was designed to react to rare and random events through discretionary, short-term assistance. Long-term recovery funds increasingly come from unpredictable congressional appropriations that lack permanent statutory authority, leading to excessive delays and administrative burdens. This framework results in ad hoc responses that exclude vulnerable communities from critical planning processes and prolong displacement.*

*This Note argues that federal disaster reforms must address the rights of internally displaced persons (“IDPs”) as enumerated under the international Guiding Principles on Internal Displacement. Part I proposes a definitional framework for climate change–related migration in the United States, and reviews key drivers of disaster displacement. Parts II and III provide an overview of the Guiding Principles and the federal disaster system, respectively. Parts V and VI then address two key rights under the Guiding Principles. Part V reviews IDPs’ right to freedom from discrimination, concluding that the Stafford Act’s broad discretionary function exception, combined with courts’ narrow interpretation of the Act’s nondiscrimination provision, effectively blocks access to legal redress for disaster programs that disparately impact protected groups. Part VI evaluates IDPs’ right to access protection and assistance that accounts for their specific needs, finding that federal funding structures under both the Stafford Act and the Housing and Community Development Act severely inhibit meaningful consultation with groups vulnerable to disaster displacement. Both Parts V and VI conclude with suggested reforms to facilitate the recognition and affirmation of these rights.*

## TABLE OF CONTENTS

<i>Introduction</i> .....	512
<i>I. U.S. Disaster Displacement</i> .....	520
<i>A. Defining Disaster Displacement</i> .....	521
<i>B. Drivers of Disaster Displacement in the United States</i> .....	523
<i>II. IDPs’ Rights and Federal Obligations Under the Guiding Principles</i> .....	526

---

\* J.D. Candidate, Harvard Law School, Class of 2020; B.A., Columbia University. The author would like to thank Kevin Chen, Peter Daniels, Tyler Giannini, Elias Rodriguez, A.R. Siders, and Hana Vizcarra for their thoughtful feedback. Special thanks to Shaun Goho for his supervision, and the editorial staff of the *Harvard Environmental Law Review* for their edits and dedication in light of the COVID-19 pandemic.

A.	<i>Freedom from Discrimination</i> .....	528
B.	<i>Protection and Assistance Tailored to IDPs' Special Needs</i> .....	529
III.	<i>Overview of the Federal Disaster System</i> .....	529
A.	<i>Pre-Disaster: Incentivizing Preparedness</i> .....	531
B.	<i>During and Immediately Post-Disaster: Providing Relief and Assistance</i> .....	534
C.	<i>Post-Disaster: Funding Long-Term Recovery</i> .....	535
IV.	<i>Freedom from Discrimination</i> .....	538
A.	<i>Litigating the Stafford Act's Nondiscrimination Provision</i> .....	540
B.	<i>Conclusion and Recommendations</i> .....	543
V.	<i>Protection and Assistance Tailored to IDPs' Special Needs</i> .....	545
A.	<i>Pre-Disaster Consultation</i> .....	546
B.	<i>During and Immediately Post-Disaster Consultation</i> .....	547
C.	<i>Post-Disaster Consultation and Long-Term Recovery</i> .....	548
D.	<i>Conclusion and Recommendations</i> .....	550
	<i>Conclusion</i> .....	552

## INTRODUCTION

Disaster<sup>1</sup> displacement in the United States poses urgent humanitarian and human rights concerns. Individuals are considered displaced if they are “forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of . . . natural or human-made disasters.”<sup>2</sup> If those individuals do not cross a national border, they are referred to as IDPs.<sup>3</sup> In 2017, environmental disasters displaced at least 1.7 million people in the United States; the sixth-highest rate of new internal displacements in the world, even as compared to countries affected by armed

- 
1. This Note defines “disaster” as a “serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources.” NANSEN INITIATIVE, 1 AGENDA FOR THE PROTECTION OF CROSS-BORDER DISPLACED PERSONS IN THE CONTEXT OF DISASTERS AND CLIMATE CHANGE 16 (2015), <https://perma.cc/DWE8-Q7QE> [hereinafter PROTECTION AGENDA]. This definition includes natural hazards exacerbated by human action, such as urban development or greenhouse gas emissions. See United Nations High Comm’r for Refugees (“UNHCR”), *Guidance on Protecting People from Disasters and Environmental Change through Planned Relocation*, at 5 (2015), <https://perma.cc/M7ST-6UE9> [hereinafter *Guidance on Planned Relocation*]. See generally NAT’L ACAD. OF SCIS., ENG’G, & MED., *ATTRIBUTION OF EXTREME WEATHER EVENTS IN THE CONTEXT OF CLIMATE CHANGE* (2016) (reviewing the science of attribution of specific extreme weather events to human-caused climate change and natural variability).
  2. United Nations (“U.N.”) Office for the Coordination of Humanitarian Affairs, *Guiding Principles on Internal Displacement*, Introduction ¶ 2 (1998), <https://perma.cc/J89T-XHH6> [hereinafter *Guiding Principles*].
  3. *Id.*

conflict.<sup>4</sup> The majority of these displacements were caused by three events—Hurricanes Harvey, Irma, and Maria.<sup>5</sup> Harvey alone displaced over 30,000 people and damaged or destroyed 200,000 homes and businesses.<sup>6</sup>

Unfortunately, 2017 was not an anomaly but rather a sign of the new normal. In 2018, disasters displaced nearly 1.25 million people.<sup>7</sup> Hurricanes Florence and Michael caused nearly \$50 billion in damage and displaced at least 839,000 people, while the Camp Fire destroyed more than 18,500 buildings in northern California.<sup>8</sup> Sea-level rise led to record high-tide flooding days nationwide between May 2018 and April 2019, destroying billions of dollars' worth of agricultural assets and forcing Midwestern farmers to choose between abandoning their lands or investing in a long, uncertain recovery process.<sup>9</sup> Despite these trends, the United States remains woefully unprepared to withstand future disasters and the displacement that often results.<sup>10</sup>

- 
4. The top ten countries for new internal displacements were China, Philippines, Syria, Democratic Republic of the Congo, Cuba, the United States, India, Iraq, Somalia, and Ethiopia. INTERNAL DISPLACEMENT MONITORING CTR. ("IDMC"), GLOBAL REPORT ON INTERNAL DISPLACEMENT 5, 38 (2018), <https://perma.cc/EYZ5-LKS6> [hereinafter IDMC 2018 GRID].
  5. *Id.* at 43. The 2017 hurricanes and wildfires collectively affected 47 million people region-wide, and hurricanes Harvey, Maria, and Irma each ranked among the top five costliest hurricanes on record. FED. EMERGENCY MGMT. AGENCY ("FEMA"), 2017 HURRICANE SEASON: FEMA AFTER-ACTION REPORT 1 (2018).
  6. See U.S. Billion-Dollar Weather and Climate Disasters, NAT'L OCEANIC & ATMOSPHERIC ADMIN. NAT'L CTRS. FOR ENVTL. INFO. ("NOAA"), <https://perma.cc/HZ76-J9BH> [hereinafter NOAA].
  7. IDMC, 2019 GLOBAL REPORT ON INTERNAL DISPLACEMENT 39, [hereinafter IDMC 2019 GRID], <https://perma.cc/S4FV-LW8J>. While the IDMC reports that most U.S. displacement results from preemptive evacuations and people under evacuation orders, these data do not capture information about when, how, and for how long people are displaced, and whether they are ultimately able to return home or resettle elsewhere. See Vincent Fung, *Displacement and Housing Affordability in the United States*, IDMC (July 2019), <https://perma.cc/L234-UU2R>. Because the IDMC receives its U.S. displacement data from FEMA, these numbers also do not reflect displacement that results from disasters that do not trigger a federal response, such as slow-onset and smaller sudden-onset disasters where the President declines to issue a disaster declaration under the Stafford Act. See *infra* Part IV.
  8. See NOAA, *supra* note 6; Fung, *supra* note 7.
  9. See NOAA, 2018 STATE OF U.S. HIGH TIDE FLOODING WITH A 2019 OUTLOOK 3–5 (2019), <https://perma.cc/UA8P-C2YE>; April Simpson, *Midwest Farmers Suffer After Floods: 'I Got My Life in This Ground'*, PEW CHARITABLE TR. (Apr. 16, 2019), <https://perma.cc/NT3M-WH99>.
  10. A recent study found that the United States is more vulnerable to economic damage from disasters than any other nation. See Guoqiang Shen & Seong Nam Hwang, *Spatial-Temporal Snapshots of Global Natural Disasters Revealed from EM-DAT for 1900–2015*, 10 GEOMATICS, NAT. HAZARDS & RISK 912, 921–22 (2019) (citing as reasons for high vulnerability to economic damage in the United States the frequency of disasters, population size, and concentration of economic resources, such as properties, crops, and livestock, in affected areas).

As climate change increases the frequency, scale, severity, and duration of disasters, the rate and number of persons displaced by disasters will likely increase. Displacement can result from both sudden-onset events, including wildfires, flooding, and mudslides, and slow-onset events, including drought, rising sea levels, erosion, and saltwater intrusion.<sup>11</sup> Climate change also increases the frequency of “compound disasters,” where slow- and sudden-onset events occur simultaneously, exacerbating the effects of each.<sup>12</sup> For example, during Hurricane Harvey, unprecedented rainfall combined with sea-level rise exacerbated both storm surge and river flooding, resulting in extreme levels of “compound flooding” and far more destruction than anticipated.<sup>13</sup> These events can temporarily or permanently displace individuals, families, or even whole communities depending on their vulnerability to disasters and the severity of the disaster itself.<sup>14</sup>

Displacement is a “totalizing phenomenon, affecting virtually every aspect of a person’s life.”<sup>15</sup> The Fourth National Climate Assessment recognized that displacement from one’s home can result in trauma and psychological distress, and pose an especially heavy burden on the mental health of children.<sup>16</sup> IDPs can also experience significant human rights challenges, including land loss, unemployment, homelessness, marginalization, food insecurity, increased morbidity and mortality, and social disintegration.<sup>17</sup> At the community level, displaced groups may experience a loss of cultural identity and social norms, especially in Native American and Alaska Native communities due to the

- 
11. IDMC 2018 GRID, *supra* note 4, at 7.
  12. Minquan Liu & Michael C. Huang, U.N. Office for Disaster Risk Reduction, *Compound Disasters and Compounding Processes: Implications for Disaster Risk Management*, at 3–4 (2014), <https://perma.cc/VN24-EH6C>.
  13. Chelsea Harvey, *Ever Heard of ‘Compound’ Disasters? It’s New to Experts, Too*, E&E NEWS (July 3, 2019), <https://perma.cc/TJR8-C5XQ>.
  14. *See infra* Section II.B.
  15. Elizabeth Ferris, Div. on Int’l Prot., UNHCR, *Protection and Planned Relocations in the Context of Climate Change*, U.N. Doc. PPLA/2012/04, at 17–18 (2012), <https://perma.cc/QCS2-CP63> (quoting Anthony Oliver-Smith, *Development-Forced Displacement and Resettlement: A Global Human Rights Crisis*, in DEVELOPMENT & DISPOSSESSION, THE CRISIS OF FORCED DISPLACEMENT AND RESETTLEMENT 3, 3 (Anthony Oliver-Smith ed., 2009)).
  16. U.S. GLOB. CHANGE RESEARCH PROGRAM (“USGCRP”), FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES 546 (2019), <https://perma.cc/RZJ6-GYM8> [hereinafter FOURTH NATIONAL CLIMATE ASSESSMENT].
  17. Micheal M. Cernea, *Risks, Safeguards and Reconstruction: A Model for Population Displacement and Resettlement*, in RISKS AND RECONSTRUCTION: EXPERIENCES OF RESETTLERS AND REFUGEES 11, 19–20 (Michael M. Cernea & Christopher McDowell eds., World Bank 2000) (identifying the most common and fundamental risks involved in displacement and resettlement processes).

“place-centered nature of their cultural and religious identities.”<sup>18</sup> For example, Alaska Native villages on coastal islands and archipelagos are rapidly losing their land to sea-level rise and erosion. As these communities contemplate relocating further inland, they must also reckon with losing access to subsistence activities that provide basic food security and form the basis for community cohesion, livelihoods, and cultural events.<sup>19</sup>

Despite the already high rates and cost of disaster displacement to both individuals and governments, federal disaster agencies lack a comprehensive plan to address the rights and needs of disaster IDPs. The Federal Emergency Management Agency (“FEMA”) rarely refers to displaced persons and never invokes the formal term of IDPs.<sup>20</sup> Instead, federal disaster agencies often refer to displaced persons as disaster victims, survivors,<sup>21</sup> or evacuees.<sup>22</sup> Failure to recognize disaster displacement in turn leads to a failure to address the significant justice concerns that displacement poses, including the specialized protection and assistance needs of IDPs.<sup>23</sup>

Furthermore, the federal disaster statutory framework is ill-suited to address disaster displacement in an era of climate change. The 1988 Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”)<sup>24</sup> was passed to address the impacts of “rare and random” events<sup>25</sup> through reactive, not proactive, measures. The Stafford Act grants the President authority to declare a major disaster after receiving a petition from a state, territorial, or

- 
18. MAXINE BURKETT, ROBERT VERCHICK & DAVID FLORES, CTR. FOR PROGRESSIVE REFORM, *REACHING HIGHER GROUND: TOOLS FOR COMMUNITIES DISPLACED BY CLIMATE CHANGE* 8 (2017), <https://perma.cc/Z85K-DMKW>.
  19. Robin Bronen, *Climate-Induced Displacement of Alaska Native Communities*, 35 N.Y.U. REV. L. & SOC. CHANGE 357, 364–65 (2011).
  20. See Roberta Cohen, Brookings-Bern Project on Internal Displacement, Statement at the Harvard Kennedy School of Government: Human Rights at Home (Nov. 1, 2006), <https://perma.cc/4ZUG-LCRT> (stating that IDP “is the term the United States government uses at the United Nations” to apply to displaced persons in other countries, but never internally).
  21. Under former Director Craig Fugate’s leadership, FEMA intentionally shifted its nomenclature to refer to disaster “survivors” instead of “victims.” See David A. Graham, *We Are All First Responders*, ATLANTIC (Sept. 3, 2015), <https://perma.cc/G4ZU-3GEX> (interviewing Craig Fugate).
  22. In many disaster scenarios, even the term “evacuees” is inappropriate as many people displaced by storms are never formally evacuated. See Chris Kromm, *Remembering Hurricane Katrina as a Human Rights Disaster*, FACING SOUTH (Aug. 27, 2015), <https://perma.cc/D93G-84UA>. The term is also informal, and thus implies no rights or responsibilities under national or international law.
  23. See *infra* Part II.
  24. Pub. L. No. 100-707, 102 Stat. 4689 (1988) (amending Pub. L. No. 93-288, 88 Stat. 143 (1974)) (codified as amended at 42 U.S.C. §§ 5121–5202).
  25. Juliette Kayyem, *Smarter Disaster Management*, DEMOCRACY (Winter 2016), <https://perma.cc/ZG7C-483W>.

tribal government.<sup>26</sup> As defined under the Stafford Act, “major disasters” only include sudden-onset hazards and droughts.<sup>27</sup> Only after the President declares a major disaster may federal agencies provide assistance to the affected region, subject to the types of assistance specified in the request and the needs identified in a preliminary damage assessment.<sup>28</sup> The majority of this discretionary assistance is planned for, allocated, and spent in the immediate aftermath of a disaster.<sup>29</sup> While immediate assistance may facilitate displaced persons accessing short-term relief and humanitarian aid, the Stafford Act does little to prevent future displacement or facilitate long-term recovery planning that will decrease individual and community vulnerability to displacement by future disasters.

In the United States, poor communities and communities of color are more likely to be displaced by disasters, and for longer periods of time. Hurricane Katrina provides one example: in Orleans Parish, 73% of the black population—272,000 people—was displaced, 34% of whom were poor. By comparison, 63% of the non-black population—101,000 people—was displaced, 14.6% of whom were poor.<sup>30</sup> Three years after the storm, a government survey found that only 54% of black evacuees returned to their pre-Katrina counties, as compared with 82% of white evacuees.<sup>31</sup> Five years after the storm,

- 
26. 42 U.S.C. § 5170 (2018). This Note will only address major disaster declarations, though the Stafford Act also allows the President to issue an Emergency Declaration for any occasion or instance when the President determines federal assistance is required. *Id.* § 5191(b).
27. *Id.* § 5122(2) (defining “major disasters” to include “hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought” and “regardless of cause, any fire, flood, or explosion”). Efforts under the Obama Administration by Alaska Native villagers to expand that definition to include the effects of erosion and sea-level rise were unsuccessful. In 2004, the Army Corps of Engineers found that “[b]ased upon the erosion rates and the location of major utilities and infrastructure, [the village of Newtok] will be a complete loss in 10 to 15 years.” *Alaska Baseline Erosion Assessment*, U.S. ARMY CORPS OF ENG’RS (2004), <https://perma.cc/9GZS-2KD5>. Despite these findings, in 2017, President Obama declined the western Alaskan village of Newtok’s disaster declaration request seeking funding to support the village’s relocation. A spokesperson for FEMA at the time stated that “a major disaster declaration under the Stafford Act is not appropriate to address the situation.” Rachel Waldholz, *Obama Denies Newtok’s Request for Disaster Declaration*, ALASKA PUB. MEDIA (Jan. 18, 2017), <https://perma.cc/9K3F-JQVV>.
28. The state or tribal government typically conducts the assessment in cooperation with the relevant FEMA Regional Office to determine the extent of the disaster, its impact on individuals and public facilities, and the types of federal assistance that may be needed. *The Disaster Declaration Process*, FEMA (Feb. 3, 2020), <https://perma.cc/BKX3-BN6G>.
29. See *infra* Part IV.
30. THOMAS GABE ET AL., CONG. RESEARCH SERV., RL33414, HURRICANE KATRINA: SOCIAL-DEMOGRAPHIC CHARACTERISTICS OF IMPACTED AREAS 16 (2005).
31. Jeffrey A. Groen & Anne E. Polivka, *Hurricane Katrina Evacuees: Who They Are, Where They Are, and How They Are Faring*, BUREAU OF LAB. STAT. MONTHLY LAB. REV. (Mar. 2008) at 32, 41.

researchers concluded that “race and socioeconomic status were strongly related to the duration of displacement, with substantially slower rates of return for those with lower levels of education and, especially, for blacks.”<sup>32</sup> These disparate rates and duration of displacement often reflect preexisting inequities, which can determine which communities live in high-risk areas; own or rent homes; have lower incomes or education levels; and have health, home, personal property, or flood insurance.<sup>33</sup> Failure to account for these factors in disaster response can therefore entrench existing inequities and ensure those least able to withstand disasters’ impacts will bear the greatest costs.

Once displaced, certain vulnerable groups often have specific assistance and protection needs, including the elderly, incarcerated, women and girls, and persons with disabilities. Failure to anticipate those needs and vulnerabilities when responding to disasters can put those groups at risk of additional human rights violations post-displacement. For example, during Hurricane Katrina, in Orleans Parish Prison, “thousands of men, women and children as young as 10 . . . were effectively abandoned,” and thirty-five nursing home residents drowned.<sup>34</sup> In Puerto Rico after Hurricane Maria, the lack of federal or territorial protocols for managing sexual harassment, sexual assault, or domestic violence in disaster shelters contributed to the abuse of women, girls, and even toddlers.<sup>35</sup> Finally, the National Council on Disability has found that “for well over a decade” people with disabilities have been consistently institutionalized before and after disasters, segregating them from the rest of their community despite federal laws requiring them to be integrated.<sup>36</sup>

International human rights bodies have repeatedly urged the United States to apply the Guiding Principles on Internal Displacement—the leading international guidance on the rights of IDPs and the corresponding duties of na-

- 
32. See Connor Maxwell, *America's Sordid Legacy on Race and Disaster Recovery*, CTR. FOR AM. PROGRESS (Apr. 5, 2018), <https://perma.cc/XP5M-5VJM> (“Unless the federal government prioritizes equity in preparedness and recovery policy, environmental hazards will continue to bring ruin, displacement, and death to communities of color.”).
  33. See generally *id.*; Elizabeth Fussell, Narayan Sastry & Mark VanLandigham, *Race, Socioeconomic Status, and Return Migration to New Orleans After Hurricane Katrina*, 31 *POPULATION & ENV'T* 20, 23 (2010).
  34. Kromm, *supra* note 22.
  35. FRANCISCA VIGAUD-WALSH, *REFUGEES INT'L, HURRICANE MARÍA'S SURVIVORS: "WOMEN'S SAFETY WAS NOT PRIORITIZED"* 2–4 (2018), <https://perma.cc/RN8B-B3ZS>. After the storm, Puerto Rico's leading anti-violence coalition, Coordinadora Paz Para La Mujer, declared that gender-based violence had become a “crisis” as a direct result of the disaster. INSTITUTO CARIBEÑO DE DERECHOS HUMANOS, JUSTICIA AMBIENTAL, DESIGUALDAD, Y POBREZA EN PUERTO RICO, [ENVIRONMENTAL JUSTICE, INEQUALITY, AND POVERTY IN PUERTO RICO] 173 (2017), <https://perma.cc/7V3V-U45L>.
  36. NAT'L COUNCIL ON DISABILITY, *PRESERVING OUR FREEDOM: ENDING INSTITUTIONALIZATION OF PEOPLE WITH DISABILITIES DURING AND AFTER DISASTERS* 9 (2019), <https://perma.cc/2QJK-ENDE>; see also Rehabilitation Act, 29 U.S.C. §§ 701–718 (2018); Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2018).

tional governments<sup>37</sup>—to guide reforms to the federal disaster framework and address the protection needs of displaced persons. The Guiding Principles include thirty provisions outlining the rights of IDPs and the corresponding duties of national governments pre-, during, and post-displacement.<sup>38</sup> These Principles broadly define IDPs as persons

forced or obliged to flee or to leave their homes or places of habitual residence . . . as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters who have not crossed an internationally recognized state border.<sup>39</sup>

In 2005, 192 national governments, including the United States, recognized the Guiding Principles as an “important international framework for the protection of internally displaced persons.”<sup>40</sup> The United States has encouraged application of the Guiding Principles in U.S. Agency for International Development’s (“USAID”) international work, but has never accepted the Guiding Principles as binding international or domestic law.<sup>41</sup> After Hurricane Katrina, the U.N. Human Rights Committee called for the United States to “ensure the full implementation” of the Guiding Principles “in matters related to disaster prevention and preparedness, emergency assistance and relief measures.”<sup>42</sup> This call was based on the Commission’s finding that “the poor, and in particular African-Americans, were disadvantaged by the rescue and evacuation plans . . . and continue to be disadvantaged under the reconstruction plans.”<sup>43</sup> More recently, in January 2018, the Commission called on the United States again to adopt measures to respond effectively to displaced persons in Puerto Rico, “taking into account the Guiding Principles.”<sup>44</sup> Despite these admonitions, as of this writing, the federal government has failed to engage in an objective analysis of how disaster preparedness, relief, and recovery programs can integrate these Principles.

---

37. See G.A. Res. 62/153, preambular ¶¶ 1–7, 10 (Dec. 18, 2007) (reinforcing the application of the Guiding Principles to people uprooted by disasters).

38. See *infra* Part III.

39. *Guiding Principles*, *supra* note 2, at ¶ 2.

40. G.A. Res. 60/1, ¶ 132 (Sept. 16, 2005).

41. See, e.g., USAID, PD-ACA-558, ASSISTANCE TO INTERNALLY DISPLACED PERSONS POLICY 6 (2004) (“encourag[ing] wider international recognition and support” for the Guiding Principles “as a useful framework for dealing with IDPs”).

42. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, ¶ 26, UN Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

43. *Id.*

44. VIGAUD-WALSH, *supra* note 35, at 6.



This Note analyzes the current U.S. disaster framework through a human rights-based approach<sup>45</sup> in order to understand if and how that framework recognizes and fulfills two key rights of individuals and communities internally displaced by disasters.<sup>46</sup> This approach diverges from a purely environmental lens, which analyzes disaster preparation and recovery with a focus on ecological conservation and greenhouse gas emissions reductions. Instead, this Note seeks to bridge “the disciplinary gap between environmentalists and natural scientists on the one hand, and migration and refugee specialists . . . on the other,”<sup>47</sup> exploring whether and how the U.S. federal disaster framework can operationalize the Guiding Principles’ guarantees of (1) freedom from discrimination and (2) protection and assistance that takes into account IDPs’ special needs.

This Note’s scope is confined to those disasters recognized under the Stafford Act, and thus will not address displacement associated with slow-onset events that do not qualify as “major disasters.”<sup>48</sup> The Note also will not address

- 
45. A “rights-based” approach divides stakeholder into two groups: rights holders and duty bearers (government and other institutions obligated to respect, protect, and fulfill the holders’ rights). A rights-based approach seeks to simultaneously strengthen the capacity of duty bearers to fulfill their obligations, while empowering rights holders to vindicate those rights such that they may be fulfilled. “Rights” are not limited to the rights expressly protected under U.S. law; they include all rights protected under the Universal Declaration of Human Rights of 1948. See U.N. Sustainable Dev. Working Grp., *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies*, att.1 at 1 (2003), <https://perma.cc/3BFM-XNRU> (“All programmes . . . should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.”).
46. See THE BROOKINGS-BERN PROJECT ON INTERNAL DISPLACEMENT, IASC OPERATIONAL GUIDELINES ON THE PROTECTION OF PERSONS IN SITUATIONS OF NATURAL DISASTERS 3 (2011) [hereinafter IASC OPERATIONAL GUIDELINES] (“If humanitarian assistance is not based on a human rights framework, it risks having too narrow a focus, and not all the basic needs of the victims will be integrated into a holistic planning and delivery process.”). There are other international rights-based mechanisms relevant to assisting disaster IDPs, and federal disaster programs generally. See, e.g., Int’l Labour Org., *Convention C169 - Indigenous and Tribal Peoples Convention*, (June 27, 1989); G.A. Res. 61/611, *Convention on the Rights of Persons with Disabilities* (Dec. 6, 2006); *Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”)*, Sept. 3, 1981, 1249 U.N.T.S. 13; G.A. Res. 2106, *Convention on the Elimination of All Forms of Racial Discrimination* (Dec. 21, 1965). A holistic rights-based approach to federal disaster reform should consider all instruments relevant to the particular individuals or communities and their circumstances.
47. See VIKRAM ODEDRA KOLMANSKOG, NORWEGIAN REFUGEE COUNCIL, *FUTURE FLOODS OF REFUGEES: A COMMENT ON CLIMATE CHANGE, CONFLICT AND FORCED MIGRATION* (2008), <https://perma.cc/WU5Q-Z7ZM>.
48. For scholarship on adapting the federal disaster framework to address slow-onset hazards, see, e.g., Bronen, *supra* note 19 (reviewing protection gaps under the Stafford Act for the relocation of coastal Alaska Native Village communities); *Develop Policies Targeting Environmentally Induced Displacement in the United States*, GRAND CHALLENGES FOR SOC.

treatment of disaster IDPs who enter the United States from abroad—i.e., “climate refugees,” nor the substantial role that states and local governments play in addressing minor disasters that do not qualify for federal assistance under the Stafford Act. Part II proposes a definitional framework for U.S. disaster displacement and reviews key factors driving that displacement. Part III reviews the rights of IDPs and the obligations of national governments under the Guiding Principles. Part IV provides an overview of the federal disaster framework organized into three phases: pre-, during, and post-disaster. The final two Parts introduce and discuss whether key rights of IDPs—freedom from discrimination in Part V, and access to protection and assistance tailored to IDPs’ special needs in Part VI—are currently recognized under existing federal law, and if not, what incremental reforms could facilitate recognition and fulfillment of those rights.

## I. U.S. DISASTER DISPLACEMENT

The U.S. government does not label U.S. residents uprooted by disasters as IDPs.<sup>49</sup> Following Hurricane Katrina, “government officials settled on every possible description” except IDPs, instead referring to the displaced as disaster victims or survivors and evacuees.<sup>50</sup> Failure to accurately name this phenomenon, and the people affected by it, impacts how decisionmakers frame the problem and devise solutions.<sup>51</sup> For example, labeling displaced persons as “evacuees” may evoke individuals’ immediate housing needs but fails to capture the additional human rights challenges IDPs face, including limited access to healthcare and due process, increased discrimination, and arbitrary deprivation of property. While the often-used term “climate refugees” is politically and morally powerful,<sup>52</sup> it is legally incorrect,<sup>53</sup> practically inac-

---

WORK (Mar. 2017), <https://perma.cc/39KG-NDT2> (“Amend the Stafford Act to charge [FEMA] with the responsibility for guiding and facilitating planned relocations in the United States.”); Jennifer L. Marlow & Lauren E. Sancken, *Reimagining Relocation in a Regulatory Void*, 7 CLIMATE L. 290, 291 (2017) (examining the limited federal and state regulatory mechanisms available to aid Alaska Native villages seeking to relocate inland). For related international guidance, see generally *Guidance on Planned Relocation*, *supra* note 1 (setting out general principles to assist states that need to undertake planned relocation).

49. See *supra* notes 20–22 and accompanying text.

50. Roberta Cohen, *For Disaster IDPs: An Institutional Gap*, BROOKINGS (Aug. 8, 2008), <https://perma.cc/HL8V-JNV4>.

51. George Lakoff, *Frames and Brains*, in THINKING POINTS: COMMUNICATING OUR AMERICAN VALUES AND VISION 939 (2010).

52. François Gemenne, *One Good Reason to Speak of ‘Climate Refugees’*, 49 FORCED MIGRATION REV. 70, 71 (2015).

53. U.S. residents displaced by disasters rarely if ever cross an international border and are not persecuted in the traditional sense, and thus are not “refugees” as defined under the 1951 Refugee Convention. See *Platform on Disaster Displacement: Key Definitions*, DISASTERDIS-

curate,<sup>54</sup> and often rejected by those to whom it is applied.<sup>55</sup> As an alternative, this Part proposes a conceptual framework describing disaster displacement along a *spectrum* of human mobility that captures the range of circumstances in which individuals may be forced to abandon their homes because of disaster impacts.

### A. Defining Disaster Displacement

There is no established definition for or consensus on who qualifies as a “disaster IDP,” either domestically or internationally.<sup>56</sup> Traditionally, “displacement” is understood as the *forced* movement of persons, and “migration” as the *voluntary* movement of persons.<sup>57</sup> But in a disaster context, it is often impossible to draw a hard line separating those forced from their homes by slow or sudden-onset hazards, and those who move voluntarily. This difficulty arises for two reasons. First, as slow-moving hazards, such as sea-level rise or drought, occur over longer periods of time, it becomes more difficult to say someone’s movement was wholly caused by that hazard, as opposed to other contemporaneous factors. Second, the choice to abandon one’s home, even temporarily, is often determined by existing structural factors including access to assistance, medical care, and evacuation routes; existing familial and social networks; economic resources and access to liquid assets; perceived and real vulnerability to present and future disasters; and cultural or community ties to the land.<sup>58</sup> The more an individual is affected by these factors, the smaller their range of available “choices” to respond to a disaster and its impacts. For example, even if a

---

PLACEMENT.ORG, <https://perma.cc/HD7S-VF9V> (rejecting the term “climate refugee” because of its legal inaccuracy).

54. See KOLMANNKOG, *supra* note 47, at 12 (“It is not possible to isolate climate change as a cause of forced migration . . . the term ‘climate refugees’ implies a mono-causality rarely found in human reality.”).
55. CHRIS KROMM & SUE STURGIS, INST. FOR S. STUDIES, HURRICANE KATRINA AND THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT 3 (2008), <https://perma.cc/Y9RZ-AW5Z> (“These are not refugees. They are citizens of Louisiana and Mississippi, tax-paying citizens. They are not refugees wandering somewhere looking for charity. They are victims of neglect and a situation they should never have been put in in the first place.” (quoting Rev. Al Sharpton after Hurricane Katrina)). This critique also applies internationally. See JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION AND INTERNATIONAL LAW 5, 40–41 & n.10 (2012) (“When you talk about refugees—climate refugees—you’re putting the stigma on the victims, not the offenders.” (quoting then-President of Kiribati Anote Tong)).
56. The Peninsula Principles provide guidance on assisting “climate migrants” but do not propose a framework for differentiating those who are displaced by the effects of climate change and other environmental or economic reasons. *The Peninsula Principles on Climate Displacement within States*, DISPLACEMENTSOLUTIONS.ORG (Aug. 18, 2013), <https://perma.cc/8EJC-6YGB>.
57. PROTECTION AGENDA, *supra* note 1, at 17.
58. See *supra* Part I.

disaster causes the same amount of damage to a row of homes, one resident may be “forced” to accept an otherwise voluntary buyout if her home was uninsured and she has no other assets or networks on which she can rely. By comparison, her neighbor whose home was insured will have more flexibility when deciding whether or not to accept the buyout, and thus can make a more “voluntary” choice to accept the buyout or not.

Professor Jane McAdam, a leading scholar in the field of international migration and climate change, proposes a “continuum” of human mobility as an alternative to the discrete categorizations of forced versus voluntary movement.<sup>59</sup> All forms of mobility along the spectrum include some combination of forced and voluntary elements. Figure 1 below applies McAdam’s spectrum to forms of climate change-related mobility in the United States, including forced evacuations or flight; forms of managed retreat<sup>60</sup> including planned relocation<sup>61</sup> and voluntary buyout programs;<sup>62</sup> and climate gentrification.<sup>63</sup>

---

59. MCADAM, *supra* note 55.

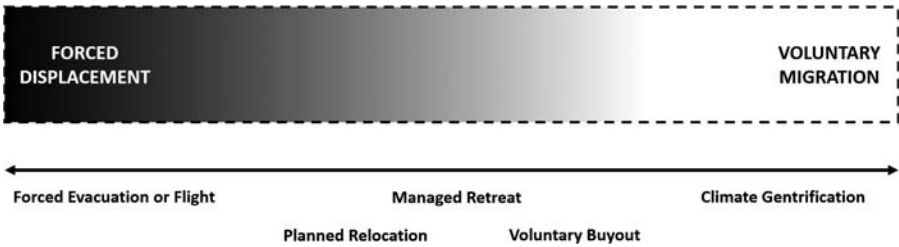
60. Defined as the strategic relocation of structures or abandonment of land to manage natural hazard risk. See Miyuki Hino et al., *Managed Retreat as a Response to Natural Hazard Risk*, 7 NATURE CLIMATE CHANGE 364, 366 (2017).

61. Planned relocation is a process by which individuals or groups move or are assisted to move from their homes or places of temporary residence, are settled in a new location, and provided with the conditions for rebuilding their lives. This process is carried out under the authority of the state to protect people from risks and impacts related to disasters and environmental change, including the effects of climate change. See *Guidance on Planned Relocation*, *supra* note 1, at 9. Planned relocation can be voluntary or involuntary. See PROTECTION AGENDA, *supra* note 1.

62. Voluntary buyout programs are programs in which local, state, or national governments offer to acquire properties destroyed or substantially damaged by a disaster. Those properties may then be redeveloped or restored to open space. See A.R. Siders, *Social Justice Implications of U.S. Managed Retreat Buyout Programs*, 152 CLIMATIC CHANGE 239, 240–41 (2019).

63. Climate gentrification is a process by which climate change impacts make properties more or less valuable depending on their geographic exposure to those impacts and relative degree of engineered resilience. These changes in value in turn affect patterns of urban development that lead to displacement, and sometimes entrenchment, of existing populations consistent with conventional framings of gentrification. See Jesse M. Keenan et al., *Climate Gentrification: From Theory to Empiricism in Miami-Dade County, Florida*, 13 ENVTL. RES. LETTERS (Apr. 2018) at 1, 2 (finding evidence of consumer preferences for higher elevation properties less susceptible to sea-level rise in Miami-Dade County).

FIGURE 1: SPECTRUM OF HUMAN MOBILITY IN RESPONSE TO CLIMATE CHANGE-RELATED HAZARDS



Even on the extreme ends of the spectrum, both voluntary and forced elements are present. For example, in the case of a forced evacuation, individuals still retain agency in deciding if, when, and how to obey the evacuation order; where to flee to; with whom; and if and when to return. That limited agency may be further constrained by practical challenges experienced by the elderly, persons with disabilities, or people who lack the resources to self-evacuate, such as a private vehicle.<sup>64</sup> On the other end of the spectrum, individuals affected by climate gentrification in response to sea-level rise may choose to leave their homes but still be forced to choose from a limited menu of options due to hazard-related factors. For example, in Miami-Dade County, rapid price appreciation of homes has been shown to positively correlate with elevation and perceived vulnerability to sea-level rise, contributing to rapid gentrification in previously insulated neighborhoods.<sup>65</sup> As a result, predominantly Latinx low-income communities at higher elevations are priced out of their traditional neighborhoods and effectively forced to seek more affordable units elsewhere.<sup>66</sup> This spectrum thus seeks to more accurately capture both the complexity of individual decision-making in disaster scenarios and the range of underlying factors that affect the “forced” nature of those decisions.

### B. Drivers of Disaster Displacement in the United States

As these examples illustrate, whether an individual, family, or entire community is displaced by disasters often depends on more than the scale and severity of the disaster. Two factors principally determine who is displaced during and after a disaster: existing physical and social vulnerabilities, and policy measures taken, or not taken, to mitigate, prepare for, and respond to disaster impacts.<sup>67</sup>

64. Fung, *supra* note 7.

65. Keenan et al., *supra* note 63, at 9–10.

66. Robynne Boyd, *Has Climate Gentrification Hit Miami? The City Plans to Find Out*, NAT. RESOURCES DEF. COUNCIL (“NRDC”) (Mar. 11, 2019), <https://perma.cc/LEW8-E87B>.

67. See IASC OPERATIONAL GUIDELINES, *supra* note 46, at 2.

Vulnerability and resilience to disasters is determined by both social<sup>68</sup> and physical exposure. The University of Notre Dame's Urban Adaptation Assessment ("UAA"), which ranks the climate vulnerability of all U.S. cities of 100,000 people or more, defines risk as a combination of physical exposure, sensitivity or degree to which a city's population is affected by climate hazards, and adaptive capacity or ability to respond to climate hazard impacts.<sup>69</sup> Using the UAA's data, researchers have found poverty and race to be key determinants of cities' vulnerability to climate impacts. Cities with higher poverty rates rank lowest in readiness and highest for risks, and the top five low-readiness and high-risk cities have large black and Latino populations.<sup>70</sup> Although these studies do not explicitly measure the likelihood of future displacement, vulnerability and resilience indicators can serve as strong proxies for predicting those most likely to experience severe disaster impacts and thus the greatest risk of displacement.

In addition to existing vulnerabilities, policymakers' response to disasters can cause and prolong displacement by failing to address survivors' protection needs in a timely and effective manner, potentially exposing them to human rights violations.<sup>71</sup> In one especially egregious case, after Hurricane Katrina, New Orleans-based civil rights organizations submitted a petition to the United Nations' Committee for the Elimination of Racial Discrimination alleging that "governmental actions . . . subjected a predominantly African American population to . . . prolong[ed] internal displacement more than two years after the hurricane."<sup>72</sup> Those actions included the allegedly systematic denial of housing assistance, abusive treatment of evacuees, exploitation of reconstruction

- 
68. Measurements of social vulnerability and resilience typically include both population-based indicators, such as educational attainment, unemployment rate, disability, English language proficiency, home ownership, and mobility, as well as community-based indicators, including levels of civic engagement, hospital and medical professional capacities, and religious affiliation. *See generally* LESLEY EDGEMON ET AL., ARGONNE NAT'L LAB., COMMUNITY RESILIENCE INDICATOR ANALYSIS: COUNTY-LEVEL ANALYSIS OF COMMONLY USED INDICATORS FROM PEER-REVIEWED RESEARCH 7 (2018).
69. The study defined a city's readiness as a function of economic, governance, and social factors, including levels of civic engagement, climate awareness, educational attainment and innovation capabilities. NOTRE DAME GLOB. ADAPTATION INITIATIVE, URBAN ADAPTATION ASSESSMENT TECHNICAL DOCUMENT 3 (2018), <https://perma.cc/FS7R-649A>.
70. Eylul Tekin, *How Climate Change Will Impact Major Cities Across the U.S.*, CLEVER (Aug. 6, 2019), <https://perma.cc/A2LL-WS2R>.
71. *See* PROTECTION AGENDA, *supra* note 1, at 24.
72. The complaint documents the incarceration of African American residents without formal charges and with no opportunity to post bail or seek legal representation. During their detention, those residents experienced "inhumane conditions" in the prisons. MONIQUE HARDEN, NATHALIE WALKER & KALI AKUNO, RACIAL DISCRIMINATION AND ETHNIC CLEANSING IN THE UNITED STATES IN THE AFTERMATH OF HURRICANE KATRINA: A REPORT TO THE UNITED NATIONS' COMMITTEE FOR THE ELIMINATION OF RACIAL DISCRIMINATION at i, 10 (2007).

workers, and failure to reopen public health care facilities, all of which “worsened the crisis of displacement” by subjecting disaster IDPs in the Gulf Coast to “brutal treatment and arbitrary incarceration.”<sup>73</sup> Failure to address disaster impacts quickly and effectively also makes communities more vulnerable to future disasters. For example, the Caribbean and Florida coast were still recovering from Hurricane Matthew, which displaced 2.2 million people in 2016, when Hurricanes Irma and Maria hit the region in 2018.<sup>74</sup> The same is true for unaddressed slow-onset hazards or the cumulative effect of many smaller, sudden-onset hazards which, over time, can erode a community’s capacity to withstand low-impact events.<sup>75</sup>

Finally, there are documented feedback loops between vulnerability and federal assistance, where facially neutral programs have been shown to exacerbate existing inequalities and thus reduce a community’s resilience to future disasters. In 2018, researchers found as part of a nationwide study that, at any given level of local damage, the more aid an area receives from FEMA, the more wealth inequality increases in that area, especially along lines of race, education, and homeownership.<sup>76</sup> In 2019, two investigations by National Public Radio (“NPR”) found that FEMA’s cost-benefit calculations, which are designed to reduce taxpayer risk, tend to exacerbate wealth inequality, especially in urban areas affected by flooding;<sup>77</sup> and that nationwide, white communities disproportionately receive more federal buyouts after a disaster than communities of color.<sup>78</sup> In all three studies, the researchers warned that if these negative disparate impacts persist, federal disaster aid will help wealthy communities bounce back from a disaster more quickly and with more resources than low-income communities and communities of color, exacerbating existing inequities.

Increasingly, the federal government is recognizing these equity concerns and the particular challenges displaced persons face.<sup>79</sup> However, this recogni-

---

73. *Id.* at i.

74. IDMC 2018 GRID, *supra* note 4, at 42.

75. *See* PROTECTION AGENDA, *supra* note 1, at 24.

76. Junia Howell & James R. Elliott, *Damages Done: The Longitudinal Impacts of Natural Hazards on Wealth Inequality in the United States*, 66 SOC. PROBS. 448, 450 (2018).

77. Rebecca Hersher & Robert Benincasa, *How Federal Disaster Money Favors the Rich*, NPR (Mar. 5, 2019), <https://perma.cc/9Q6G-G4RS>.

78. Robert Benincasa, *Search the Thousands of Disaster Buyouts FEMA Didn't Want You to See*, NPR (Mar. 5, 2019), <https://perma.cc/V9FD-JGKV>.

79. *See, e.g.*, FEMA, FD 008-03, PRE-DISASTER RECOVERY PLANNING GUIDE FOR LOCAL GOVERNMENTS 13 (2017) (urging local governments to engage disproportionately affected community members in the planning process to “evaluate the risk of these groups and their likelihood of displacement” and to “plan for ensuring [displaced persons] equal participation in post-disaster recovery”); FEMA NAT’L ADVISORY COUNCIL, THE STRATEGIC CHALLENGE FACING EMERGENCY MANAGEMENT 2 (2020) (recognizing that “vulnerable populations are disproportionately affected by disasters,” and recommending that FEMA

tion is often limited to unenforceable guidance documents and discrete disaster response actions, and is not supported by the broader statutory framework that both guides and restrains disaster agencies' actions.<sup>80</sup> This Note recommends integrating a rights-based approach that centers the rights and lived experiences of IDPs to guide federal disaster reform. The following Part reviews the primary rights of IDPs as outlined under the Guiding Principles on Internal Displacement, with a focus on two fundamental rights: freedom from discrimination, and access to assistance that accounts for vulnerable groups' special needs. Parts V and VI then evaluate to what extent these rights are recognized and fulfilled within the current statutory and jurisprudential framework for disaster relief and recovery.

## II. IDPs' RIGHTS AND FEDERAL OBLIGATIONS UNDER THE GUIDING PRINCIPLES

The Guiding Principles on Internal Displacement represent the international community's accepted guidance on how to respect, protect, and fulfill IDPs' rights. Under this guidance, national governments have the "primary duty and responsibility" to provide protection and humanitarian assistance to IDPs and displaced communities.<sup>81</sup> Though certain duties may fall to state, local, or tribal governments or non-state actors, the Guiding Principles charge national governments with ensuring these duties are executed in an effective, nondiscriminatory manner. The table below organizes key rights and obligations under the Guiding Principles into three phases: pre-displacement, during displacement, and post-displacement, with the relevant Principle included in brackets.

---

"simplify its programs" and "support these communities directly with planning and other support").

80. See *infra* Parts V and VI.

81. *Guiding Principles*, *supra* note 2, at Principle 3 ¶ 1.



TABLE 1: RIGHTS AND OBLIGATIONS UNDER THE GUIDING PRINCIPLES

Displacement Phase	Pre-Displacement	During Displacement	Post-Displacement
Disaster Phase	Prevention & Mitigation	Relief	Recovery
Rights of IDPs	Right to protection from arbitrary displacement <sup>82</sup> [6.2]	Right to request and receive protection and assistance from national authorities [3.2]	Right to access durable solutions <sup>83</sup> [28.1]
Governmental Obligations <sup>84</sup>	<b>Guarantee non-discrimination</b> on the basis of race, color, national, ethnic or social origin, social status, disability or similar criteria [4.1] Guarantee protection and assistance <b>taking into account the special needs of vulnerable groups</b> <sup>85</sup> [4.2]		
	Prevent or avoid conditions that might lead to displacement [5]*	Provide protection and humanitarian assistance [3.1]  Ensure safe access to essential food and water, housing, clothing, medical services and sanitation [18.2(b)]	Ensure full participation of IDPs in planning and management of durable solutions [28.2]  Ensure equal recognition and protection under the law [20.1]  Protect IDPs' property <sup>86</sup> from arbitrary and illegal appropriation [21.1]

\*Governments have a particular obligation to protect against the displacement of groups with special attachment to their lands, such as indigenous peoples [9].

82. The prohibition against arbitrary displacement includes displacement in cases of disasters “unless the safety and health of those affected requires their evacuation.” *Id.* at Principle 6 ¶ 2(d). If a person is displaced, that displacement shall last no longer than required by the circumstances. *Id.* at ¶ 3.
83. “Durable solutions” refer to the mechanisms by which IDPs sustainably satisfy their specific assistance or protection needs. IDPs achieve durable solutions through (1) return to their place of origin, (2) local integration, or (3) resettlement elsewhere in the country. *See* THE BROOKINGS-BERN PROJECT ON INTERNAL DISPLACEMENT, IASC FRAMEWORK ON DURABLE SOLUTIONS FOR INTERNALLY DISPLACED PERSONS 5 (2010), <https://perma.cc/8ZP7-ETGC>.
84. Under the Guiding Principles, national authorities bear the primary responsibility to provide protection and humanitarian assistance to IDPs, though that responsibility may be delegated or complemented by other actors, including state, local, and tribal governments. *Guiding Principles, supra* note 2, at Principle 3 ¶ 1. These obligations also apply to “all other authorities” who relate to IDPs, including intergovernmental and non-governmental organizations. *Id.* at Introduction ¶ 3.
85. *Id.* at Principle 4 ¶¶ 1–2. Special needs groups include the sick and elderly, infants, children, pregnant women, persons with disabilities and special transportation needs, persons in hospitals or homes, prisoners, and low-income individuals who may have limited access to private transportation and other assistance. *See generally* Walter Kälin, *Natural Disasters and IDPs’ Rights*, FORCED MIGRATION REV., July 2005, at 10, 10–11.

This Note will focus on the two fundamental rights of IDPs under Principle Four: freedom from discrimination, and access to protection and assistance tailored to IDPs' special needs. In practice, these two rights are interdependent and indivisible—failure to anticipate IDPs' particular protection needs may result in disparate impacts violating the prohibition against discrimination, while respecting IDPs' freedom from discrimination will likely reduce the particular needs of certain vulnerable groups. For purposes of this Note, however, the two rights will be analyzed separately to determine whether they are recognized and fulfilled under the current federal disaster framework.

### A. Freedom from Discrimination

The first part of Principle 4 under the Guiding Principles affirms the rights of IDPs to not be discriminated against, including on the basis of their displaced status.<sup>87</sup> This right is to be upheld and respected throughout all phases of displacement. While the Guiding Principles do not explicitly define discrimination, international human rights norms define discrimination to include both *intentional* discrimination and policies or actions that have a *disparate impact* on particular groups. For example, the U.N. International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), which the United States ratified one year before the U.N. General Assembly endorsed the Guiding Principles, defines an action as discriminatory if it has “an unjustifiable disparate impact upon a group distinguished by race, color, descent, or national or ethnic origin.”<sup>88</sup> Similarly, the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) defines discrimination as “any distinction, exclusion or restriction made on the basis of sex which has the *effect* or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedom.”<sup>89</sup> Incorporating these definitions, the Guiding Principles' prohibition against discrimination can be interpreted to prohibit not only

---

86. “Property” includes customary rights and non-traditional forms of ownership. Kälin, *supra* note 85, at 11.

87. *Guiding Principles*, *supra* note 2, at Principle 1 ¶ 1 (“[IDPs] shall enjoy, in full equality, the same rights and freedom under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.”).

88. Comm. on the Elimination of Racial Discrimination, Rep. on the Work Its Forty-Eighth Session, U.N. Doc. A/48/18, at 115 (1993) (general recommendation XIV ¶ 2).

89. CEDAW, *supra* note 46, at art. 1 (emphasis added). The United States is not a signatory to CEDAW. However, over thirty jurisdictions have adopted local laws or resolutions committing to support and implement CEDAW's nondiscrimination principles. Nine have passed legally binding CEDAW ordinances. IAOHRA & COLUMBIA LAW SCHOOL HUMAN RIGHTS INST., 2018 IAOHRA GENDER EQUITY TOOLKIT 2 (2018), <https://perma.cc/J3NT-ZHLU>.

intentional discrimination, but also facially neutral laws and policies that result in unjustifiable disparate impacts on members of a protected class.

### B. *Protection and Assistance Tailored to IDPs' Special Needs*

The second part of Principle 4 establishes the right of certain IDPs, including “children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons” to protection and assistance “required by their condition” and to treatment that accounts for their “special needs.”<sup>90</sup> This second provision creates an affirmative obligation on governments not only to avoid discrimination, but also to enact “positive measures” to ensure that particularly vulnerable groups are not excluded from relief and recovery operations.<sup>91</sup> In order to execute these positive measures, governments must first assess what those special needs are. Thus, needs assessments and consultation with these vulnerable groups is a necessary prerequisite to fulfilling this right.<sup>92</sup>

The following Parts will evaluate if and how these rights can be integrated into the current federal disaster framework. Part IV first provides an overview of that framework, including the primary agencies and programs, organized by disaster phase. Part V then contrasts the U.S. judicial construction of nondiscrimination with international norms and analyzes the statutory mechanisms that both respect and limit IDPs’ ability to exercise that right. Part VI then reviews the types of disaster assistance provided to IDPs in the pre-, during, and post-disaster phases and assesses what statutory barriers exist to tailoring that assistance to address vulnerable groups’ special needs.

## III. OVERVIEW OF THE FEDERAL DISASTER SYSTEM

The federal disaster system is designed to react to major disasters through short-term, discretionary assistance. Federal assistance to affected states, territories and tribes is triggered by discretionary executive action, imposing few obligations on the federal government even after a disaster has occurred. Federal disaster response is dictated by the Stafford Act and subsequent amendments, including, most recently, the Disaster Recovery Reform Act (“DRRA”) of 2018.<sup>93</sup> Under the Stafford Act, the federal government has no affirmative

---

90. *Guiding Principles*, *supra* note 2, at Principle 4 ¶ 2.

91. David Fisher, *The Right to Humanitarian Assistance*, in *INCORPORATING THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT INTO DOMESTIC LAW: ISSUES AND CHALLENGES* 47, 83 (Walter Kälin et al. eds., 2010).

92. *See* IASC *FRAMEWORK ON DURABLE SOLUTIONS*, *supra* note 83, at 19–21 (“Needs assessments and consultations with IDPs . . . are essential to ensure that the specific needs and rights of IDPs are taken into account.”).

93. Pub. L. No. 115-254, 132 Stat. 3186.

obligation to act pre-disaster to prevent conditions that lead to internal displacement. Rather, the federal government has the discretion to warn the public of hazards and reduce immediate threats to life, property, public safety, and health, as well as assist in the development of state mitigation plans and emergency preparedness programs.<sup>94</sup> The vast majority of funds are allocated or appropriated, planned for, and spent *after* a disaster occurs.<sup>95</sup> For example, in response to the 2017 disasters, the federal government spent nearly \$130 billion—10% of all federal discretionary spending in FY 2018<sup>96</sup>—with 94% of those funds allocated post-disaster.<sup>97</sup> Most disaster funds flow either through FEMA’s Disaster Relief Fund or the Department of Housing and Urban Development’s (“HUD”) Community Development Block Grant program for Disaster Recovery (“CDBG-DR”), discussed below. This Part reviews the primary players within the disaster response system, and the limits imposed upon those players by their statutory authority, or lack thereof.

The Stafford Act authorizes the President to declare a major disaster or emergency and provide federal assistance if providing an “effective response” is beyond the capabilities of the affected state or tribal governments.<sup>98</sup> The Act defines a major disaster as “any natural catastrophe . . . or, regardless of cause, any fire, flood, or explosion[,] . . . which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance” to supplement State and local disaster relief efforts.<sup>99</sup> After the President decides to declare a major disaster, FEMA coordinates the federal disaster response,<sup>100</sup> guided by the National Planning Frameworks.<sup>101</sup> Over thirty other agencies are involved in that response, with HUD and the Small Business Administration (“SBA”) playing an increasingly significant role, especially in post-disaster recovery. This Part provides an overview of the most significant programs active in the pre-, during, and post-disaster phases.

---

94. See 42 U.S.C. § 5165 (2018) (outlining discretionary federal contributions to state and tribal mitigation planning); *id.* § 5170(b) (predicating the provision of “assistance essential to meeting immediate threats to life and property resulting from a major disaster” on the direction of the President).

95. See *infra* tbl. 2.

96. *Id.*; see *Discretionary Spending in 2018*, CONG. BUDGET OFFICE (June 18, 2019), <https://perma.cc/2TJE-TE6F> (listing total discretionary funding in 2018 as \$1.3 trillion, of which \$130 billion is 10%).

97. See *infra* tbl. 2. Of the approximately \$128.8 million allocated in FY 2018, \$120.5 million was allocated post-disaster, or approximately 94%.

98. 42 U.S.C. § 5170.

99. *Id.* § 5122(2).

100. See Exec. Order No. 12,148, 44 Fed. Reg. 43,239 (1979).

101. The National Planning Frameworks include five frameworks addressing disaster prevention, protection, mitigation, response, and recovery. The Frameworks are prepared by FEMA in cooperation with other agency partners to provide guidance delineating the roles and responsibilities of each agency during a disaster. See *National Planning Frameworks*, FEMA (Oct. 30, 2019), <https://perma.cc/A75M-J6QR>.

*A. Pre-Disaster: Incentivizing Preparedness*

Pre-disaster preparedness is essential for assessing and mitigating disaster risks, including the risk of displacement. Failure to plan for future disasters exacerbates risk through unregulated development in high-risk areas, including coastal zones and floodplains. Shortsighted investments in hard protections, like seawalls or berms, can also create a positive feedback loop called the “levee effect” where development builds up behind the wall, forcing the city or state to build higher walls over time rather than engage in managed retreat.<sup>102</sup> Federal programs that fail to account for climate change–related risks, like the National Flood Insurance Program (“NFIP”), further exacerbate these risks by effectively incentivizing development in high-risk zones, making more individuals and communities vulnerable to future disaster displacement.<sup>103</sup>

- 
102. See Hino et al., *supra* note 60, at 364. Hard defenses also displace water, potentially increasing the impacts of flooding and storms on adjacent neighborhoods. See Liz Koslov, *The Case for Retreat*, 28 PUB. CULTURE 359, 363 (2016). These hard defenses can also create reliance interests; in California, for example, courts have held state agencies and municipalities liable for property damage resulting from the removal of or failure to maintain hard defenses. See, e.g., *Pac. Shores Prop. Owners Ass’n v. Dep’t of Fish & Wildlife*, 198 Cal. Rptr. 3d 72, 99–100 (Cal. Ct. App. 2016) (finding the Department intentionally decreased flood protections the County had provided “for decades” in order to protect environmental resources and was thus strictly liable for flooding damage to plaintiffs’ property); *Arreola v. Cty. of Monterey*, 122 Cal. Rptr. 2d 38 (Cal. Ct. App. 2002) (finding the counties negligent and liable for inverse condemnation, dangerous condition of public property, and nuisance for deliberately failing to maintain levees protecting plaintiffs’ properties and constructing a highway that exacerbated flooding).
103. FEMA administers the NFIP, which provides federally backed flood insurance in communities that agree to adopt and enforce floodplain management ordinances. In addition, FEMA’s Flood Mitigation Assistance program provides funds to mitigate flood risk for buildings insured under the NFIP. *Hazard Mitigation Assistance*, FEMA (Sept. 18, 2019), <https://perma.cc/9F8E-53RP>. In theory, the NFIP serves to mitigate individual disaster losses while incentivizing safer development by pricing insurance to reflect future disaster risk. In its current form, however, the NFIP incentivizes development and rebuilding in floodplains by underpricing that long-term risk. See Justin Pidot, *Deconstructing Disaster*, 2013 BYU L. REV. 213, 219–20. These issues are exacerbated by the fact that twenty-one states have no statutory or regulatory requirements that a seller disclose information about a property’s flood risk or past flood damage to potential homebuyers. See Joel Scata, *Home Buyers Face Stacked Deck to Learn of Past Floods*, NRDC: EXPERT BLOG (Aug. 16, 2018), <https://perma.cc/XW7N-ER4G> (reviewing all fifty states’ real estate disclosure laws regarding flood risk). As a result, NFIP claims far exceed premiums, driving the program into excessive debt, with more than half of the \$69 billion in claims paid by the NFIP since 1973 going to Louisiana and Texas. Thomas Frank, *Flood Insurance Program Increasingly Underwater as Payouts Shatter Records*, E&E NEWS (June 19, 2019), <https://perma.cc/G825-54TL>. In October 2017, Congress canceled the NFIP’s \$16 billion debt, effectively forcing taxpayers to cover past claims. Less than two years later, the NFIP’s total debt had risen again to \$20.5 billion. Thomas Frank, *Federal Damage Payments Shatter Record Set After Katrina*, E&E NEWS (June 19, 2019), <https://perma.cc/DK8R-4YBQ>. As of this writing,

Despite the importance of pre-disaster preparedness, the federal disaster system provides little funding to support such programs, with the majority of FEMA, HUD, and SBA resources allocated, planned for, and spent in the aftermath of disasters.<sup>104</sup> This is largely a byproduct of the Stafford Act's structure, which requires the President to declare a major disaster before agencies can expend funds or provide technical support to affected communities. For example, FEMA's Hazard Mitigation Grant Program provides competitive grants to cover up to 75% of the costs associated with mitigation projects to prepare for and recover from future disasters.<sup>105</sup> State and tribal governments can only apply for these grant funds, however, after a disaster has struck and the President has approved the state or tribal government's disaster declaration request, all but ensuring funds will be used for relief and recovery rather than mitigation efforts.<sup>106</sup>

One exception to this framework is FEMA's Pre-Disaster Mitigation ("PDM") Fund—a competitive grant program available to state, local, territorial, and tribal governments for cost-effective pre-disaster hazard mitigation.<sup>107</sup> PDM funds may be used to support "effective public-private natural disaster hazard mitigation partnerships," vulnerability assessments and hazard mitigation plans, and infrastructure improvements.<sup>108</sup> PDM projects, like the Hazard

Congress has yet to reauthorize the NFIP after more than two years of passing short-term extensions. For a more comprehensive overview of proposed reforms to the NFIP, see Dena Adler et al., *Changing the National Flood Insurance Program for a Changing Climate*, 49 ENVTL. L. REP. 10,320 (2019).

104. It is important to note the substantial role that state and local governments play in planning for and implementing disaster response programs, especially regarding minor disasters that do not trigger a response under the Stafford Act. However, the lack of federal funding available for pre-disaster planning limits the capacities of state, local, and tribal governments to meaningfully engage in disaster preparedness planning efforts before major disasters strike, especially in communities that do not have access to federal funding from a prior major disaster declaration.
105. Hazard Mitigation Grant Program funds can also be used to finance property buyouts of high-risk properties, based on pre-disaster market values. See Hino et al., *supra* note 60, at 365–66.
106. In order to qualify for the Hazard Mitigation Grant Program, applicants must also have a FEMA-approved Hazard Mitigation Plan that assesses the economic efficiency of the proposed mitigation actions. 44 C.F.R. § 201.6 (2019). These plans must include a hazard identification and risk assessment that has four components: hazard identification, profiling of hazard events, inventory of assets, and a vulnerability assessment estimating potential human and economic losses. *Id.* § 201.4(c)(2); see also *Hazard Identification and Risk Assessment*, FEMA (Feb. 5, 2020), <https://perma.cc/Z9C6-HWWK>. Local mitigation plans must contain a cost-benefit analysis examining the economic assessment of each mitigation action. 44 C.F.R. § 201.6(c)(3)(iii).
107. A minimum of 6% of PDM funds must be set aside for federally recognized tribes. See 42 U.S.C. § 5133(i) (2018); FEMA, FY 2018 PRE-DISASTER MITIGATION (PDM) GRANT PROGRAM FACT SHEET, <https://perma.cc/FD83-R8AG>.
108. 42 U.S.C. § 5133(e)(1)(B)(i).

Mitigation Grant Program, are subject to a 75% federal cost-share requirement, with the remaining 25% derived from non-Federal sources.<sup>109</sup> PDM allocations are often unpredictable, and historically much smaller than post-disaster allocations. For example, in FY 2017, Congress appropriated \$90 million to the PDM Fund to be distributed among all states, territories, and tribal governments.<sup>110</sup> By comparison, that same year Congress appropriated \$7.3 billion to FEMA's Disaster Relief Fund, which supports FEMA's administrative costs along with individual and public assistance programs for post-disaster relief. Congress then granted an additional \$49.6 billion in supplemental appropriations to the Disaster Relief Fund to address relief and recovery needs after the 2017 disasters.<sup>111</sup>

A new amendment to the Stafford Act increased the availability and predictability of pre-disaster funding. In 2018, Congress amended the Stafford Act by passing the DRRA, which included incremental reforms to allow federal aid recipients to use certain funds to improve the enforcement of local building codes,<sup>112</sup> update damaged infrastructure,<sup>113</sup> improve damage inspections post-disaster.<sup>114</sup> It also requires the Federal Highway Administration to update guidance on evacuation routes.<sup>115</sup> These incremental changes serve to help areas affected by disasters identify high-need areas and use funds to build back in more resilient ways, rather than simply rebuilding infrastructure exactly as it was pre-disaster. Most importantly, the DRRA created the Building Resilient

109. "Small impoverished communities" may be eligible for a 90% federal cost share. *Id.* § 5133(h). The Stafford Act defines such communities as 3,000 or fewer individuals that are "economically disadvantaged, as determined by the State in which the community is located and based on criteria established by the President." *Id.* § 5133(a).

110. FEMA, FY2017 PRE-DISASTER MITIGATION (PDM) GRANT PROGRAM FACT SHEET, <https://perma.cc/8M8F-DTHZ>. Pre-Disaster Mitigation appropriations have increased over the past two years, with \$250 million appropriated in each of FY2018 and FY2019. FEMA, FY2019 PRE-DISASTER MITIGATION (PDM) GRANT PROGRAM FACT SHEET, <https://perma.cc/BNB7-YSPD>; *Pre-Disaster Mitigation Program FY 2018 Subapplication Status*, FEMA, <https://perma.cc/JCU9-ZFWE>.

111. *See infra* tbl. 2.

112. Federal disaster aid can now be used to hire more building inspectors to ensure repairs are done in compliance with building codes, making those structures less vulnerable to future disaster damage. *See* FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 1206, 132 Stat. 3186, 3440 (DRRA).

113. The DRRA allows FEMA funds to rebuild damaged infrastructure to meet the latest building standards and design specifications, whereas the Stafford Act previously only allowed FEMA to rebuild to existing local codes or the pre-disaster condition. *See id.* § 1235(b).

114. Communities can now use disaster aid to pay for damage assessments to determine whether a structure has sustained "substantial damage"—i.e., damage exceeding 50% of its value—and thus must be relocated or rebuilt to better withstand future flooding. *See id.* § 1206.

115. The updated guidance requires the Federal Highway Administration to consider whether evacuation routes have been damaged by past disasters and to consider communities' most vulnerable residents' needs, including access to emergency shelters and ability to return home. *See id.* § 1209.

Infrastructure and Communities program (“BRIC”), which authorizes FEMA to allocate 6% of all disaster costs from the previous year to a competitive grant program.<sup>116</sup> Those grant funds can be spent the following year on mitigation measures to reduce communities’ vulnerability to future disasters.<sup>117</sup>

*B. During and Immediately Post-Disaster: Providing Relief and Assistance*

The bulk of federal disaster funding is spent during and immediately post-disaster for emergency relief and humanitarian assistance.<sup>118</sup> FEMA’s largest disaster programs—Individual Assistance<sup>119</sup> and Public Assistance<sup>120</sup>—provide resources immediately after a disaster strikes to support disaster survivors and emergency work projects, including debris removal and emergency protective measures.<sup>121</sup> All Individual and Public Assistance projects are funded through FEMA’s Disaster Relief Fund, which receives annual appropriations from Congress, and often substantial supplemental appropriations after a major disaster. The U.S. Army Corps of Engineers (“U.S. ACE”) also supports emergency response priorities including debris management, temporary housing, and infrastructure assessments.<sup>122</sup>

---

116. *See id.* § 1234.

117. *Id.*

118. *See infra* tbl. 2.

119. The Individual Assistance Program provides financial assistance directly to survivors for expenses that cannot be met through insurance or low-interest loans, such as temporary housing, counseling, unemployment compensation, or medical expenses. U.S. GOV’T ACCOUNTABILITY OFFICE (“GAO”), GAO-19-232, DISASTER RECOVERY: BETTER MONITORING OF BLOCK GRANT FUNDS IS NEEDED 5–6 (2019). The DRRR also made three critical changes to the Individual Assistance program that could help displaced homeowners repair and return home more quickly. First, the DRRR removed rental assistance from counting towards individual and household assistance, enabling homeowners to access additional funds to make repairs. Second, it created a separate, equal cap for “other needs assistance” so that families can pay both repair and other costs post-disaster. Third, it excluded accessibility-related improvements to ensure purchasing power parity for individuals with disabilities. These three changes, in theory, made it easier for homeowners to make the repairs required to return home as soon as possible. FAA Reauthorization Act § 1212.

120. The Public Assistance Program provides federal disaster grants to state, local, tribal, and territorial governments and certain types of nonprofit organizations for debris removal, emergency protection, and facilities restoration. GAO-19-662T, *supra* note 119.

121. The Public Assistance Program also funds “permanent work” projects as part of long-term recovery processes. *See infra* Section IV.C.

122. U.S. ACE also has its own authority to respond directly to state and local needs related to flooding or coastal emergencies under § 5 of the Flood Control Act. *See* Pub. L. 84-99, 69 Stat. 186 (1955); *Emergency Operations*, U.S. ACE (Feb. 14, 2020), <https://perma.cc/8A2Z-3WN2>.



C. *Post-Disaster: Funding Long-Term Recovery*

FEMA's largest source of post-disaster recovery funding is "permanent work" executed as part of the Public Assistance program. These projects include repairs to roads and bridges; buildings and equipment; utilities; and parks and recreation.<sup>123</sup> In 2013, Congress amended the Stafford Act to allow FEMA and aid recipients to use "alternative procedures" where, instead of FEMA funding the actual cost of a project, project costs are based on fixed-cost estimates to incentivize timely and cost-effective repairs.<sup>124</sup> However, grantees in Puerto Rico and the U.S. Virgin Islands have received a disproportionately smaller amount of permanent work funds and experienced much longer delays than grantees on the mainland.<sup>125</sup> These disparities are in part due to concerns regarding the clarity of FEMA's guidance and the time and resources required to transition to a new Public Assistance delivery model.<sup>126</sup>

In addition to FEMA's Public Assistance program, Congress has increasingly relied on a supplemental funding mechanism to channel appropriations to states and communities devastated by major disasters: HUD's Community Development Block Grant program for Disaster Recovery ("CDBG-DR"). The CDBG-DR program is funded through special appropriations authorized by the underlying Housing and Community Development Act.<sup>127</sup> CDBG-DR funds can be spent on a wider range of activities than FEMA assistance, including housing, economic development, neighborhood revitalization, and other community development activities.<sup>128</sup> For example, Puerto Rico's approved CDBG-DR activities for its 2017 allocation included \$15 million to develop tourism marketing; \$10 million to provide access to shared office space and resources; \$10 million to provide job skills training related to recovery efforts including building code enforcement, construction, and lead risk abatement; and \$100 million in local match requirements for FEMA's Public Assistance

---

123. GAO, GAO-19-662T, *FEMA'S DISASTER RECOVERY EFFORTS IN PUERTO RICO AND THE U.S. VIRGIN ISLANDS* 10 (2019).

124. *Id.* at 8.

125. Mark Walker & Zolan Kanno-Youngs, *FEMA's Hurricane Aid to Puerto Rico and the Virgin Islands Has Stalled*, N.Y. TIMES (Nov. 27, 2019), <https://perma.cc/X6BM-DXQA> (reporting 190 permanent work projects funded in Puerto Rico out of 9,000 requests; 218 projects funded in the U.S. Virgin Islands, out of 1,500 requests; 3,700 projects funded in Texas; and more than 3,700 projects funded in Florida).

126. GAO-19-662T, *supra* note 123, at 19.

127. The CDBG program was created by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, and is overseen by HUD's Office of Community Planning and Development ("CPD"). In 2004, HUD established the Disaster Recovery and Special Issues Division within CPD's Office of Block Grant Assistance to manage CDBG-DR grantees with total allocations of \$500 million or more. *See* GAO-19-232, *supra* note 119, at 9.

128. Community Development Block Grant Program Regulations, 24 C.F.R. § 570 (2019).

and Hazard Mitigation Program.<sup>129</sup> CDBG-DR funds can also cover losses not covered by insurance or other federal programs that take effect earlier in the relief process, including applications denied by FEMA or the SBA.<sup>130</sup>

Though Congress has used the CDBG-DR program to meet unmet disaster recovery needs since 1992, the program lacks permanent statutory authority.<sup>131</sup> Thus, each time Congress allocates funds to the CDBG-DR program, HUD must issue a *Federal Register* notice identifying unmet needs and outlining the grant application process and requirements for grantees' use of those funds. The requirements in each notice often vary, increasing grantees' administrative burdens. For example, in September 2017, Louisiana had seven open CDBG-DR grants with requirements littered throughout forty-five notices; Texas had six open grants subject to forty-eight different notices.<sup>132</sup> These administrative requirements are often imposed post-disaster on already underfunded state agencies with limited or no experience implementing grants of this size.<sup>133</sup> Often, grantees must hire additional staff to comply with the CDBG-DR's grant requirements before they can receive allocated funds but cannot afford to train and hire the staff they need. For example, in a May 2018 report, HUD's Office of the Inspector General found that Texas did not have enough staff to adequately administer its 2017 CDBG-DR funds, with 37% of the grantee's full-time positions vacant.<sup>134</sup> However, without its 2017 allocation, Texas lacked the reserve budget necessary to hire new staff.<sup>135</sup>

The lack of statutory authority for CDBG-DR also allows HUD to escape its equitable mandate that otherwise applies to all CDBG programs. When Congress appropriates CDBG-DR funds, it often grants HUD the authority to waive or modify some of the statutory and regulatory provisions governing the permanent CDBG program to give states and tribal governments greater flexibility. These waivers, however, can also extend to the program's three equitable priorities that require projects to (1) benefit low- and moderate-income persons; (2) aid in the prevention or elimination of slums or blight; and (3) meet

---

129. GAO-19-232, *supra* note 119, at 71.

130. *Id.* SBA assistance may include direct loans to help businesses, nonprofit organizations, homeowners, and renters repair or replace property damaged or destroyed in a federally declared disaster. See 15 U.S.C. § 636(b) (2018) (statutory guidelines for the disbursement of disaster loans by the Small Business Administration); GAO-19-232, *supra* note 119, at 6. HUD officials often give grantees the discretion to use allocated funds to assist those either denied assistance by the SBA or FEMA, treating these individuals' circumstances not as disqualifying criteria but rather as potential indicators of unmet need. GAO-19-232, *supra* note 119, at 23.

131. GAO-19-232, *supra* note 119, at 38.

132. *Id.* at 42.

133. Designated grantees often must first certify that they have "sufficient financial controls, procurement processes, and procedures to prevent duplication of benefits." *Id.* at 2.

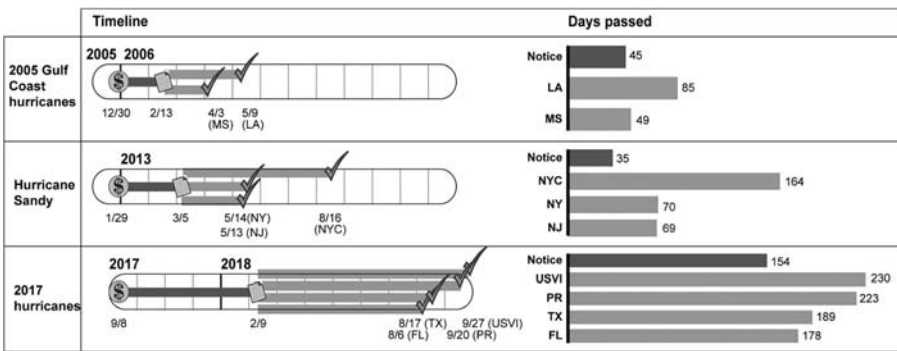
134. *Id.* at 18.

135. *Id.*

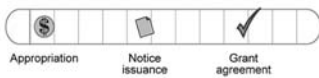
urgent need.<sup>136</sup> In consecutive *Federal Register* notices from 2001–2016, HUD waived the requirement that states spend 70% of their CDBG funds (including CDBG-DR funds) on activities benefitting low- and moderate-income households.<sup>137</sup>

Finally, the CDBG-DR’s supplemental statutory authority also causes significant programmatic delays directly impacting the speed and efficacy of long-term disaster recovery programs. Once Congress issues a supplemental appropriation to the CDBG-DR program, HUD may take between one and five months to publish the relevant *Federal Register* notice, and then an additional six months to enter into grant agreements with affected states, meaning states and territories may not receive CDBG-DR funds until one year after a disaster strikes.<sup>138</sup> For states and territories devastated by disasters, these delays can make the difference between an effective recovery and residents becoming permanently displaced. Figure 2 shows how the total time delay between Congress allocating CDBG-DR funds and the final grant agreement has increased significantly over the past decade.

FIGURE 2 TIME HUD TOOK TO ISSUE *FEDERAL REGISTER* NOTICES AND ENTER INTO GRANT AGREEMENTS FOR THE GULF COAST HURRICANES, HURRICANE SANDY, AND 2017 HURRICANES



- Legend:
- FL Florida
  - LA Louisiana
  - MS Mississippi
  - NJ New Jersey
  - NY New York
  - NYC New York City
  - PR Puerto Rico
  - TX Texas
  - USVI U.S. Virgin Islands



■ Days between appropriation and notice issuance  
 ■ Days between notice and grant agreement

Source: GAO analysis of Department of Housing and Urban Development data. | GAO-19-232

136. 24 C.F.R. §§ 570.208, 570.483(b)–(d) (2019).

137. GAO-19-232, *supra* note 119, at 38.

138. *Id.* at 40. Grantees may also contract with subrecipients, including nonprofit organizations, to execute CDBG-DR programs. *Id.* at 14 n.29.

In summary, the statutory framework and funding mechanisms upon which federal disaster programs rely make these programs (1) reactionary, (2) subject to the discretion of Congress and the President, and (3) prioritize immediate relief rather than promote efficient, effective preparedness and long-term recovery. As Table 2 shows below, of the \$113 billion spent in response to the 2017 disasters, 0.08% of those funds were spent on preparedness efforts, and 93% was allocated through supplemental appropriations in reaction to the 2017 storm season. While new funding mechanisms like BRIC have the potential to support increased investment in pre-disaster resiliency, the lack of permanent, predictable mechanisms for pre-disaster preparedness and post-disaster recovery inherently limits states' and tribes' abilities to prepare for the next disaster.

TABLE 2: INITIAL AND SUPPLEMENTAL CONGRESSIONAL ALLOCATIONS TO ADDRESS DISASTERS IN 2017 (IN THOUSANDS OF DOLLARS)

Disaster Phase	Agency	Program	FY2017 Appropriations (\$000)	2017-18 Supplemental Appropriations <sup>139</sup> (\$000)	Activities
Pre-Disaster Preparedness	FEMA	Pre-Disaster Mitigation	90,000 <sup>140</sup>	0	Provides competitive grants for mitigation projects with 10% set aside for federally recognized tribes.
	Subtotal		90,000	0	
Post-Disaster Relief & Recovery	FEMA	Disaster Relief Fund*	7,328,515 <sup>141</sup>	49,600,000	Provides grants to governments and nonprofits for emergency protection, debris removal, and facility restoration. Provides funds to help survivors cover certain expenses including temporary housing, counseling, unemployment compensation, or medical expenses.
		NFIP	181,799 <sup>142</sup>	16,000,000	Pays claims by policy holders for flood-damaged properties.
	HUD	CDBG-DR	[program lacks statutory authority]	35,400,000	Provides flexible funding for long-term recovery activities related to community development.
	U.S. ACE	--	37,000 <sup>143</sup>	17,400,000	Supports emergency response priorities; initiates recovery efforts by assessing and restoring critical infrastructure.
	SBA	Disaster Loan Program	650,000 <sup>144</sup>	2,100,000	Offers direct loans to businesses, nonprofits, homeowners, and renters to repair or replace damaged property.
	Subtotal		8,197,314	120,500,000	
TOTAL (\$000)			8,287,314	120,500,000	128,787,314

\* The Fund supports Individual Assistance, Public Assistance, Hazard Mitigation Assistance, and other FEMA programs.

#### IV. FREEDOM FROM DISCRIMINATION

There is significant documentation of federal disaster assistance disproportionately benefiting privileged groups. Hurricane Katrina exposed major inequities in the federal government's disaster response, including disproportionate access to evacuation routes, housing, and shelters for racial and ethnic minori-

139. WILLIAM L. PAINTER, CONG. RESEARCH SERV., R45084, 2017 DISASTER SUPPLEMENTAL APPROPRIATIONS: OVERVIEW 5–15 (2018).

140. FY 2017 PRE-DISASTER MITIGATION, *supra* note 110.

141. CONG. RESEARCH SERV., R44660, DHS APPROPRIATIONS FY2017: PROTECTION, PREPAREDNESS, RESPONSE, AND RECOVERY 5–9 (2017).

142. The FY2017 budget assumes all NFIP allocations will be offset by fee collections. *Id.* at 9.

143. U.S. ACE, FISCAL YEAR 2017 UNITED STATES ARMY ANNUAL FINANCIAL REPORT 13 (2017), <https://perma.cc/M9HC-S5HY>.

144. U.S. SBA, AGENCY FINANCIAL REPORT: FISCAL YEAR 2017, 31 (2017), <https://perma.cc/5X9Q-3CPF>.

ties.<sup>145</sup> More recently, researchers found that HUD's CDBG-DR design and implementation rules for the 2017 Gulf Coast hurricanes diverted funding away from housing assistance for renters, privileging homeowners and thus reinforcing longstanding housing inequities.<sup>146</sup> In Texas after Hurricane Harvey, 52% of surveyed white residents reported being able to access disaster aid, as compared to 46% of Hispanic residents and 32% of black residents.<sup>147</sup> Other recent investigations found that at any given level of local damage, the more aid an area receives from FEMA, the more wealth inequality increases in that area along lines of race, education, and homeownership; that FEMA's cost-benefit calculations exacerbate wealth inequality; and that nationwide, white communities disproportionately receive more federal buyouts after a disaster than communities of color.<sup>148</sup>

Under the Guiding Principles, these disparate impacts violate the prohibition against discrimination, even without a showing of intent or animus.<sup>149</sup> Though both the Stafford Act and the Housing and Community Development Act ("HCDA") contain nondiscrimination provisions,<sup>150</sup> the First Circuit has held that the HCDA's nondiscrimination provision does not create an independent private right of action.<sup>151</sup> This part will therefore focus on the effectiveness of the Stafford Act's nondiscrimination provision, which does contain a private right of action.<sup>152</sup> The question remains, however, whether disaster survivors, including displaced persons, disparately impacted by federal disaster programs have a cognizable claim under the Stafford Act's nondiscrimination provision, and if so, what forms of relief are available.

---

145. See *supra* notes 30–35 and accompanying discussion.

146. See Kevin Fox Gotham, *Reinforcing Inequalities: The Impact of the CDBG Program on Post-Katrina Rebuilding*, 24 HOUSING POL'Y DEBATE 192 (2014). See generally GAO, GAO-10-17, FEDERAL ASSISTANCE FOR PERMANENT HOUSING PRIMARILY BENEFITED HOMEOWNERS: OPPORTUNITIES EXIST TO BETTER TARGET RENTAL NEEDS (2010).

147. See Sue Sturgis, *Recent Disasters Reveal Racial Discrimination in FEMA Aid Processes*, FACING SOUTH (Sept. 24, 2018), <https://perma.cc/ZU23-E5UF>.

148. See *supra* notes 76–78 and accompanying text.

149. See *supra* notes 87–89 and accompanying text.

150. The HCDA prohibits discrimination on the grounds of race, color, national origin, religion, or sex. 42 U.S.C. § 5309(a) (2018). The HCDA also incorporates protections on the basis of age and disabilities from the Age Discrimination Act of 1975 and the Rehabilitation Act of 1973, respectively.

151. See *Latinos Unidos de Chelsea en Accion (LUCHA) v. Sec'y of Hous. & Urban Dev.*, 799 F.2d 774, 794 (1st Cir. 1986) (finding the HCDA does not create a private right of action, but rather provides for enforcement of the nondiscrimination provision by the HUD Secretary).

152. See sources cited *infra* note 156.

*A. Litigating the Stafford Act's Nondiscrimination Provision*

The Guiding Principles' prohibition on discrimination covers both intentional discrimination and actions that have an unjustifiable disparate impact on protected classes.<sup>153</sup> While the Stafford Act's nondiscrimination provision, 42 U.S.C. § 5151(a), protects a broad range of suspect classes, including age and economic status,<sup>154</sup> federal courts have severely narrowed its application such that no plaintiff has ever brought a successful claim under this provision. In most cases, courts find that plaintiffs failed to show that federal actors intentionally discriminated against them. If plaintiffs challenge the same actions under other Stafford Act provisions or the Administrative Procedure Act ("APA"),<sup>155</sup> courts often find those actions fall within the Stafford Act's discretionary function exception and thus are not subject to judicial review.

While courts have interpreted § 5151(a) to provide aggrieved individuals with a right of action against FEMA,<sup>156</sup> the plaintiff bears the burden of establishing that the government impermissibly discriminated against them.<sup>157</sup> Consistent with Equal Protection Clause and Title VI<sup>158</sup> jurisprudence, courts require § 5151(a) plaintiffs to show that the federal government's actions were motivated by animus or discriminatory intent.<sup>159</sup> This bar is especially high in

---

153. See *supra* Section III.A.

154. These protections go beyond Equal Protection Clause jurisprudence and Title VI protections by explicitly protecting individuals from discrimination on the basis of their economic status and/or age. See 42 U.S.C. § 5151(a) ("[T]he distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status."); 44 C.F.R. § 7.1 (2019) (effectuating the provisions of Title VI of the Civil Rights Act of 1964, "to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from" FEMA); *id.* § 206.11 (conditioning state disaster assistance on full compliance with 44 C.F.R. § 7).

155. Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.)

156. See, e.g., *Graham v. FEMA*, 149 F.3d 997, 1004-05 (9th Cir. 1998); *Grose v. Napolitano*, No. 1:11CV227-LG-RHW, 2012 WL 2912742 (S.D. Miss. July 16, 2012); *LaDay v. Ramada Plaza Hotel LaGuardia*, No. 07-CV-0450 (BMC), 2007 WL 526613, at \*2 (E.D.N.Y. Feb. 13, 2007) (finding § 5151(a) "provides an aggrieved individual with a right of action against FEMA").

157. *Graham*, 149 F.3d at 1001 n.1.

158. Title VI of the Civil Rights Act states that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d) (2018).

159. See *Maleche v. Solis*, 692 F. Supp. 2d 679, 693 (S.D. Tex. 2010) (granting defendant's summary judgment motion after finding that the *pro se* plaintiff failed to present any evidence showing the denial of disaster unemployment assistance benefits was motivated by discriminatory animus based on plaintiffs' economic status); see also *Alexander v. Sandoval*,

disaster scenarios where courts are reluctant to attribute evidence of disparate impact to the federal agency and not the disaster itself. For example, in *McWaters v. FEMA*,<sup>160</sup> plaintiffs brought a class action suit on behalf of low-income individuals who were denied temporary housing assistance and continuing rental assistance, despite being eligible.<sup>161</sup> The District Court for the Eastern District of Louisiana found that though “FEMA’s handling of the aftermath of Hurricane Katrina [was] unorganized, highly bureaucratic, and detached[,] . . . inevitably those with economic resources will recover more quickly than those without.”<sup>162</sup> The court held that § 5151(a) “charges FEMA with acting fairly and equitably across the board,” but plaintiffs had failed to allege a colorable claim of discrimination, “economic or otherwise.”<sup>163</sup> The holding suggests that, in the context of disasters, plaintiffs bear the burden of not only showing the disparate impacts resulted from intentional discrimination, but also disaggregating those impacts from the impacts of the disaster itself or poorly adapted one-size-fits-all policies. This requirement raises an extremely high bar for disaster survivors, including displaced persons, to successfully prove discrimination under the Stafford Act.

Plaintiffs may also seek to prove discrimination by comparing the federal government’s response in different disasters. For example, in *Santos v. FEMA*,<sup>164</sup> Puerto Rican residents displaced by Hurricane Maria alleged that FEMA discriminated against them on the basis of their race, color, English proficiency, and economic status in violation of § 5151(a).<sup>165</sup> The plaintiffs pointed to survivors of Hurricane Harvey whose temporary housing assistance benefits had been extended seven times, whereas Maria survivors’ benefits were extended only three times. Plaintiffs also alleged that financial assistance to Hurricane Harvey was approved much more quickly and at a much higher amount than for Hurricane Maria.<sup>166</sup> In rejecting plaintiffs’ motion seeking a preliminary injunction, the district court held that the plaintiffs’ “conclusory” comparative arguments failed to establish a prima facie case, despite the “low threshold” for doing so.<sup>167</sup> The court rejected plaintiffs’ comparison between the

---

532 U.S. 275, 280 (2001) (holding that Title VI of the Civil Rights Act “prohibits only intentional discrimination”); *Washington v. Davis*, 426 U.S. 229, 240–41 (1976) (holding that while disproportionate impact is not “irrelevant” to evaluating claims of racial discrimination under the Equal Protection Clause, the “invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose”).

160. 436 F. Supp. 2d 802 (E.D. La. 2006).

161. Third Amended Complaint at ¶¶ 166–69, *McWaters*, 436 F. Supp. 2d 802 (No. 2:05-cv-05488).

162. *McWaters*, 436 F. Supp. 2d at 824.

163. *Id.*

164. 327 F. Supp. 3d 328 (D. Mass. 2018).

165. *Id.* at 343.

166. *Id.*

167. *Id.*

two disasters, given “the differences in the disasters, including the number of people and the amount of property affected, the type of damage and the logistical differences in the locations where the hurricanes hit,” supported by “detailed evidence” provided by FEMA regarding the damage caused by Maria versus Harvey.<sup>168</sup> Using this reasoning, it will be all but impossible for disaster survivors to bring a § 5151(a) claim comparing the disparate impacts of two disasters, given that their ability to access information about particular disaster responses will always be inferior to that of FEMA and other agencies. Furthermore, this logic will be especially fatal for § 5151(a) claims from residents of Puerto Rico and other isolated, economically or ethnically homogenous regions because their claims will be limited to comparing individual experiences among residents of the same region.

Plaintiffs are also likely unable to challenge allegedly discriminatory acts under other Stafford Act provisions or the APA because these actions fall within the Stafford Act’s discretionary function exception, 42 U.S.C. § 5148.<sup>169</sup> Section 5148 bars judicial review of “any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty” carried out pursuant to the Stafford Act.<sup>170</sup> Courts analyze whether federal actions fall within the Stafford Act’s discretionary function exception by applying the same test used to evaluate similar claims brought under the Federal Tort Claims Act (“FTCA”).<sup>171</sup> That analysis asks whether an action “is a matter of choice for the acting employee,” and “involves the permissible exercise of policy judgment.”<sup>172</sup>

In 2013, the Seventh Circuit explicitly rejected the idea that *all* actions carried out under the Stafford Act are inherently discretionary.<sup>173</sup> However, the Fifth Circuit and several district courts in disaster-affected regions have consistently relied on the discretionary language of the Stafford Act to shield non-constitutional claims from judicial review. In 2001, the Northern District of

168. *Id.*

169. Of course, the discretionary function exception cannot bar plaintiffs’ constitutional claims—i.e., claims of discrimination that violate the Equal Protection Clause. *See Rosas v. Brock*, 826 F.2d 1004, 1008 (11th Cir. 1987) (“[A]dherence to constitutional guidelines is not discretionary; it is mandatory.”). However, these claims are subject to the same intentionality standard as the Stafford Act’s nondiscrimination provision. *See Washington v. Davis*, 426 U.S. 229, 240 (1976).

170. *St. Tammany Par. ex rel. Davis v. FEMA*, 556 F.3d 307, 322 (5th Cir. 2009) (holding that the Stafford Act’s discretionary function exception precludes judicial review of all disaster relief claims based on federal employees’ discretionary actions).

171. *See id.* at 319 (finding that “discretionary function or duty” has the same meaning in § 5148 as it does in § 2680(a) of the FTCA); *see also In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 583 F. Supp. 2d 758, 767 (E.D. La. 2008) (“[T]his Court’s analysis of the discretionary function exception is the same under both the Stafford Act and the FTCA.”).

172. *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988).

173. *Columbus Reg’l Hosp. v. FEMA*, 708 F.3d 893, 897–98 (7th Cir. 2013).



California held that “[t]he heart of FEMA’s mission [under the Stafford Act] is to distribute limited funds in response to national disasters[,] . . . [which is] inherently a discretionary responsibility.”<sup>174</sup> The District of North Dakota held the same in 2009,<sup>175</sup> as did the Southern District of Texas the following year regarding FEMA’s eligibility determinations for granting Disaster Unemployment Assistance.<sup>176</sup> In 2009, the Fifth Circuit affirmed a district court decision addressing whether FEMA failed to provide adequate shelter, medical services, triage, evacuation, and transportation during Hurricane Katrina. The district court held that plaintiffs’ claims were barred for failure to “meet the threshold requirement for a waiver of immunity under the Stafford Act—i.e., identification of a *mandatory* duty under the law.”<sup>177</sup> Similarly, in 2018, the Eastern District of New York found FEMA’s choice to reallocate previously designated funds post-Hurricane Sandy was discretionary “because there was no prescribed course of action for [FEMA] officers to follow” in either the Stafford Act or FEMA policy.<sup>178</sup> These decisions establish a clear pattern in which FEMA enjoys broad, if not complete, immunity to execute programs pursuant to the Stafford Act, even when that execution results in unjustifiable disparate impacts on members of protected classes.

### B. Conclusion and Recommendations

Federal courts’ narrow interpretation of the Stafford Act’s nondiscrimination provision severely limits legal avenues through which affected individuals and communities can seek redress. Furthermore, the Stafford Act’s discretionary framing likely bars non-constitutional claims<sup>179</sup> plaintiffs may bring to challenge federal actions authorized by the Stafford Act under other statutes, such

- 
174. *City of San Bruno v. FEMA*, 181 F. Supp. 2d 1010, 1014 (N.D. Cal. 2001); *see also St. Tammany Par.*, 556 F.3d at 325 (holding that § 5148 shielded FEMA’s decision not to approve funding for further sediment dredging because neither the Stafford Act nor implementing regulations create a mandatory duty to dredge).
175. *United Power Ass’n v. FEMA*, No. A2-99-180, 2000 WL 33339635, at \*3–4 (D.N.D. Sept. 13, 2000) (finding § 5148 of the Stafford Act shields FEMA’s funding eligibility determinations from judicial review).
176. *Maleche v. Solis*, 692 F. Supp. 2d 679, 688 (S.D. Tex. 2010).
177. *Freeman v. U.S. Dep’t of Homeland Sec.*, No. CIV A 06-4846, 2007 WL 1296206, at \*8 (E.D. La. Apr. 30, 2007), *aff’d sub nom*, *Freeman v. United States*, 556 F.3d 326 (5th Cir. 2009) (emphasis in original).
178. *Dubow v. FEMA*, No. 2:16-cv-3717 (DRH)(AKT), 2018 U.S. Dist. LEXIS 8163, at \*16 n.3 (E.D.N.Y. Jan. 18, 2018) (finding plaintiff Long Beach residents failed to establish an injury in fact because FEMA’s distribution of disaster-relief funds post-Superstorm Sandy was discretionary, and even if such distribution was not discretionary, FEMA complied with the plain language of the statute by finding the expenditure was in the public’s “best interest” and served the “general area”).
179. *See, e.g., Lockett v. FEMA*, 836 F. Supp. 847, 854 (S.D. Fla. 1993) (finding that the court had jurisdiction to hear plaintiffs’ disparate treatment claim regarding FEMA’s provision of

as the APA. There are good reasons to limit the federal government's liability in a disaster response: avoid judicial second-guessing of expert agencies responding to emergency situations; limit the financial and administrative burden of litigation; and encourage agencies to make decisions based on need rather than fear of liability. However, granting federal disaster agencies broad immunity simultaneously restricts the ability to communities disparately impacted by those agencies' actions to seek legal redress. As a result, disaster survivors, including displaced persons, must pursue extralegal avenues<sup>180</sup> to affirm and exercise their right to nondiscrimination as envisioned under the Guiding Principles.

Internally, disaster agencies should seek to align their programming with current Guidance on the implementation of Title VI of the Civil Rights Act. First issued in 2016 by the Departments of Justice, Health and Human Services, HUD, Homeland Security, and Transportation, the joint guidance instructs recipients of federal financial assistance engaged in "emergency management" on how to comply with Title VI.<sup>181</sup> Though not legally enforceable, this Guidance is aligned with the Guiding Principles' prohibition against discrimination insofar as it protects members of protected classes from unjustifiable disparate impacts that may result from facially-neutral policies. Citing lessons learned after Hurricanes Katrina and Rita, the Guidance prohibits recipients of federal assistance from "implementing facially-neutral policies and practices that have a disproportionate impact on protected groups."<sup>182</sup> Furthermore, the Guidance emphasizes that compliance with such requirements "becomes even more important during . . . disasters in order to ensure that no one is unjustly denied the services and support they need during times of crisis, when their physical safety or well-being are often at greatest risk."<sup>183</sup> As of this writing, this Guidance document has not been withdrawn, thus providing relevant and timely best practices for federal disaster agencies on how to avoid

---

temporary housing assistance brought under § 5151(a) "based upon the constitutionality, or lack thereof, of defendants' actions" (citation omitted)).

180. Plaintiffs have had more success alleging states' or municipalities' disaster programs unlawfully discriminated against them under other statutes, such as the Americans with Disabilities Act. *See, e.g.*, Aleksandra "Sasha" George & Erin Flannery Keith, *Disability Rights and Dignity in Disasters*, 34 NAT. RESOURCES & ENV'T 53 (2019) (documenting three instances where federal district courts have found that municipalities violated Title II of the Americans with Disabilities Act when their emergency disaster response plans failed to meaningfully accommodate persons with disabilities).
181. U.S. DEP'T OF JUSTICE ET AL., GUIDANCE TO STATE AND LOCAL GOVERNMENTS AND OTHER FEDERALLY ASSISTED RECIPIENTS ENGAGED IN EMERGENCY PREPAREDNESS, RESPONSE, MITIGATION, AND RECOVERY ACTIVITIES ON COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (2016), <https://perma.cc/P9PC-8937> [hereinafter TITLE VI EMERGENCY GUIDANCE].
182. *Id.* at 3.
183. *Id.*

disparately impacting vulnerable groups in the implementation of disaster programs.<sup>184</sup>

## V. PROTECTION AND ASSISTANCE TAILORED TO IDPs' SPECIAL NEEDS

Often disparate impacts result from a failure to account for individuals' particularized assistance and protection needs.<sup>185</sup> Under the Guiding Principles, vulnerable IDP groups, including children, mothers, persons with disabilities and the elderly, are entitled to protection and assistance that accounts for their special needs.<sup>186</sup> In order to assess and satisfy these needs, governments must first consult with members or representatives of these groups and design programs taking their identified needs into account.<sup>187</sup> Though public consultation and participation processes will differ depending on the context, effective consultation processes should at minimum:

- Ensure all relevant actors are involved or, at minimum, represented as early as possible and throughout the planning process.
- Explicitly address the public's concerns and inputs in reports and decision making.
- Provide all relevant actors with access to project information.<sup>188</sup>
- Provide opportunities for meaningful stakeholder participation at each stage of the project's design and implementation.

In a disaster context, executing these processes after a disaster has occurred is all but impossible, especially with IDPs who are likely dispersed across the country and attending to emergency needs. Thus, effective consultation and needs assessments must begin pre-disaster. Post-disaster, agencies must assess the extent these programs effectively met the particularized needs of displaced persons and what improvements can be made going forward.

Under U.S. law, disaster survivors have no right to federal disaster assistance, making pre-disaster consultation and post-disaster analysis all the more

---

184. See *Civil Rights Title VI in Federally Assisted Programs*, FEMA, <https://perma.cc/8G7P-QQ2Z>.

185. See *supra* Part III.

186. *Guiding Principles*, *supra* note 2, at Principle 4 ¶ 2.

187. See IASC OPERATIONAL GUIDELINES, *supra* note 46, at 11.

188. INT'L INST. FOR SUSTAINABLE DEV., PUBLIC CONSULTATION AND PARTICIPATION 1 (2020), <https://perma.cc/NK6S-H7LX>. Access to information encompasses both physical access, that is, information shared through various physical and online media, and linguistic access, that is, information available in all relevant languages and in easy-to-understand terms where possible. See LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 110 (2001); THE BROOKINGS-BERN PROJECT ON INTERNAL DISPLACEMENT, MOVING BEYOND RHETORIC: CONSULTATION AND PARTICIPATION WITH POPULATIONS DISPLACED BY CONFLICT OR NATURAL DISASTERS 4 (2008), <https://perma.cc/SMN9-9R5Z>.

important.<sup>189</sup> While current FEMA guidance generally prioritizes pre-disaster consultation with vulnerable groups, it is not legally enforceable nor does it require disaster agencies to allocate resources to support these activities. For example, the National Preparedness Framework encourages agencies to take a “whole community” approach, using community consultations to assess future disaster-related needs.<sup>190</sup> However, agencies’ ability to comply with such guidance is severely constrained by the relevant statutory frameworks<sup>191</sup> and limited access to relevant data regarding populations’ special protection needs. This Part analyzes those limitations in the pre-, during, and post-disaster phases, and concludes by recommending potential solutions.

### A. Pre-Disaster Consultation

Consultation is far more effective pre-disaster because vulnerable communities have a greater capacity to participate in both short- and long-term planning processes. However, the vast majority of federal disaster funds are currently spent after a disaster occurs, when communities are least able to participate in those processes.<sup>192</sup> While recent reforms to the Stafford Act increased the amount of pre-disaster funding available to states, these reforms did not include requirements that grantees consult with vulnerable populations, including populations vulnerable to displacement, and thus provide no guarantee that such programs will address the particular protection and assistance needs of such groups.

While the BRIC program increases the amount of pre-disaster funding available,<sup>193</sup> BRIC’s public participation requirements are insufficient to assess

---

189. In 2006, the Eastern District of Louisiana interpreted a Stafford Act provision to provide eligible individuals with a “legitimate claim of entitlement” and thus a constitutionally protected property right to temporary housing assistance. *McWaters v. FEMA*, 436 F. Supp. 2d 802, 818 (E.D. La. 2006). However, the Fifth Circuit abrogated that decision two years later in *Ridgely v. FEMA*, 512 F.3d 727 (5th Cir. 2008), holding that the Stafford Act contains no mandatory language compelling FEMA to provide continuing temporary housing assistance payments, and thus eligible persons had no constitutionally protected right to that assistance. *Id.* at 736; *see also Santos v. FEMA*, 327 F. Supp. 3d 328, 343 n.12 (D. Mass. 2018) (“[I]t has been widely recognized that the holding in *McWaters* has been abrogated by the Fifth Circuit’s ruling in *Ridgely*.”). Since *Ridgely*, no court has held that individuals or communities have affirmative rights to federal disaster assistance under the Stafford Act.

190. The “whole community” includes individuals and families; businesses; nonprofit, faith-based, and community organizations; schools; media outlets; and government. *Whole Community*, FEMA, <https://perma.cc/57GD-SQMC>.

191. *See supra* Section IV.A.

192. *See infra* Part IV.

193. FEMA estimates annual BRIC funds to be between \$300 and \$500 million per year, which state, local, and tribal governments can then apply for through a competitive grant program. Because BRIC funds are calculated as a percent set aside from the previous year’s disaster grant expenditures, FEMA estimates there will be “significantly greater” BRIC funding following years with catastrophic disasters. Shannon Burke, *Understanding FEMA’s New Policy*

and integrate the population-specific protection and assistance needs of vulnerable populations into disaster response programs. In order to receive BRIC funds, grantees<sup>194</sup> must have a FEMA-approved mitigation plan.<sup>195</sup> While grantees may elect to focus on social vulnerabilities, federal regulations largely prioritize evaluating the economic value of at-risk infrastructure, not the risk to vulnerable populations within identified hazard areas.<sup>196</sup> Furthermore, while grantees must describe their planning process, including who was involved, regulations do not require standard state mitigation plans to incorporate public participation or a public comment period.<sup>197</sup> Regulations regarding local and tribal mitigation plans do include explicit public consultation requirements,<sup>198</sup> however the plans again focus on the economic value of physical infrastructure within the hazard area, not social losses or vulnerabilities, with the exception of sacred tribal sites.<sup>199</sup> FEMA has publicly stated that the BRIC program will incorporate new considerations for “community lifelines”—seven program areas that enable critical human health and safety or economic security functions.<sup>200</sup> However, absent more guidance, it is unclear whether implementation of BRIC programs will include consultation mechanisms to assess the particular “lifeline” needs of vulnerable populations.

### B. During and Immediately Post-Disaster Consultation

In the immediate aftermath of a disaster, eligible individuals can access federal assistance through discrete funding programs. In this emergency stage, there is little to no opportunity for consultation or participation to influence the design of that assistance. While FEMA is required to “consider” the demographics of the impacted population, including the percentage of elderly and low-income persons, persons with disabilities, and with limited English

---

*Guidelines Before Disasters Hit*, NAT'L ASS'N OF COUNTIES (Mar. 4, 2019), <https://perma.cc/NP25-Y2DR>.

194. Grantees are typically state and tribal governments, which may then partner with subgrantees including state agencies, local governments, nonprofit organizations, or tribal governments. See 44 C.F.R. § 201.2 (2019).
195. *Hazard Mitigation Planning, Grant Application and Evaluation, and Risk Based Funding*, FEMA (June 13, 2019), <https://perma.cc/6SMX-NVHW>.
196. See *supra* note 106.
197. 44 C.F.R. § 201.4(c)(1). Though FEMA regulations require state mitigation planning processes to include coordination with, *inter alia*, “interested groups,” the term is not defined. *Id.* §§ 201.4, 201.2.
198. *Id.* §§ 201.6(b), 201.7(c).
199. *Id.* §§ 201.6(c)(2)(ii), 201.7(c)(2)(ii).
200. The seven lifelines are safety and security; food, water, shelter; health and medical; transportation; hazardous wastes; communications; and energy (power and fuel). *Infrastructure Mitigation Projects and Community Lifelines*, FEMA (June 6, 2019), <https://perma.cc/Z67F-FBA7>.

proficiency,<sup>201</sup> this information is often derived from census data<sup>202</sup> and does not necessarily determine the amount or type of assistance available to those individuals.<sup>203</sup> Furthermore, FEMA's post-disaster internal evaluations do not disaggregate disaster survivors and provide zero analysis of whether disaster programs successfully assessed and addressed the particularized needs of vulnerable groups.<sup>204</sup> Failure to engage in this analysis both inhibits FEMA from making critical programmatic changes and limits the public's ability to hold disaster agencies accountable. For example, in a recent program audit, the GAO found that FEMA Administrators failed to establish objectives before implementing a new approach to disability integration, and shifted responsibility for assisting individuals with disabilities to all FEMA staff without providing the necessary training.<sup>205</sup> FEMA also failed to educate non-federal partners on FEMA's data sharing processes, preventing states and nonprofits from directly assisting individuals who requested federal assistance.<sup>206</sup> While many of these challenges are exacerbated by the timing of disaster funding (discussed below), these gaps can be partially mitigated by issuing consistent federal guidance and engaging in post-disaster evaluations that specifically identify and recommend measures to close protection gaps for vulnerable groups. FEMA can also clarify its data collection and sharing protocols, thus enabling both federal and nonfederal partners to better identify vulnerable populations and address their particularized protection needs directly.

### C. *Post-Disaster Consultation and Long-Term Recovery*

After the dust settles post-disaster, communities begin the long, uncertain recovery process. Effective, inclusive recovery processes can facilitate the return of displaced persons, while fractured, inequitable recovery processes entrench

---

201. 44 C.F.R. § 206.48(b)(3).

202. See *Individual Assistance Declaration Factors*, FEMA (May 30, 2019), <https://perma.cc/ST6M-GWBC> (directing applicants to the U.S. Census Bureau webpage to find the requisite "Population Demographics" data).

203. This assessment is prepared by the relevant FEMA region after a state or tribal government makes a disaster declaration request as part of the Regional Administrator's Validation and Recommendation ("RVAR"). GAO, GAO-18-366, *INDIVIDUAL ASSISTANCE REQUESTS OFTEN GRANTED, BUT FEMA COULD BETTER DOCUMENT FACTORS CONSIDERED* 9–10 (2018).

204. See, e.g., FEMA, 2017 HURRICANE SEASON FEMA AFTER-ACTION REPORT (2018), <https://perma.cc/7MFL-F7UU> (assessing the agency's response to the 2017 Hurricanes with zero discussion of the storms' impact on vulnerable populations, including women and girls); VIGAUD-WALSH, *supra* note 35 (documenting how the absence of federal and territorial protocols for shelters contributed to the abuse of women, girls, and toddlers following Hurricane Maria).

205. GAO, GAO-19-318, *FEMA ACTION NEEDED TO BETTER SUPPORT INDIVIDUALS WHO ARE OLDER OR HAVE DISABILITIES* 42–43 (2018).

206. See *id.* at 24.

preexisting inequalities and prevent displaced persons from returning home.<sup>207</sup> The source, timing, and structure of federal recovery funds can therefore play an outsized role in determining how inclusive and effective post-disaster recovery programs are. The largest source of post-disaster recovery funding is HUD's CDBG-DR.<sup>208</sup> These funds are more flexible than those provided by FEMA or the SBA, and thus could theoretically be used to assess and fulfill IDPs' particularized needs. However, the CDBG-DR program lacks permanent statutory authority, permitting HUD to waive public consultation requirements while producing significant administrative delays, preventing effective consultation and population-specific data collection, and inhibiting IDPs' access to basic assistance.

The permanent CDBG program is governed by regulations that include explicit public consultation requirements to inform grant design.<sup>209</sup> While these requirements do not automatically apply to the CDBG-DR program, HUD can require CDBG-DR grantees to comply with these requirements through applicable *Federal Register* notices.<sup>210</sup> Most importantly, CDBG regulations prioritize outreach to and the participation of "vulnerable populations," including the disabled, low- and moderate-income individuals, and individuals with limited English proficiency.<sup>211</sup> However, Congress frequently permits HUD to waive these requirements in its CDBG-DR allocations in order to "ensure disaster recovery grants are awarded in a timely manner."<sup>212</sup> In exchange, however, disaster survivors may not have the opportunity to inform how these enormous grants are spent. For example, in Puerto Rico after Hurricane Maria, the public had only fourteen days to comment on the HUD-approved Action Plan, which was initially published only in English.<sup>213</sup>

---

207. *See supra* Section II.B.

208. Though significant recovery funds also come from FEMA's permanent work program, these funds are dedicated to infrastructure, and are less relevant to addressing the particular assistance or protection needs of IDPs. *See supra* Part II.

209. CDBG citizen participation requirements include posting annual Action Plans for public comment and addressing all comments received during that period. *See* 24 C.F.R. §§ 91.320, 91.115(b)(5) (2019). Selected grantees may also be required to adopt a Citizen Participation Plan. If these plans are required, the grantee must certify it is following a participation plan that includes, *inter alia*, providing reasonable and timely access to local meetings, and the opportunity for individuals to review proposed activities and program performance; providing timely written answers to written complaints and grievances; and identifying how the needs of non-English speaking residents will be met in public hearings where they can be expected to participate. *See id.* § 570.431.

210. *CDBG-DR Action Plan*, HUD, at 26 (Feb. 19, 2020), <https://perma.cc/4FNE-4MQL>. Separate participation requirements apply to U.S. territories or "insular areas." *See* 24 C.F.R. § 570.441.

211. *See* 24 C.F.R. § 570.431.

212. *CDBG-DR Action Plan*, *supra* note 210.

213. VIGAUD-WALSH, *supra* note 35, at 5.

The CDBG-DR program's lack of statutory authority also contributes to significant administrative delays,<sup>214</sup> making it all but impossible for grantees to consult with IDPs when applying for and then expending funds. In reviewing dozens of CDBG-DR Action Plans, one researcher found "in virtually none has a grantee explicitly tied recovery activities to the long-term visions and needs a community had before the disaster."<sup>215</sup> Because Congress often allocates CDBG-DR funds for a given disaster after other disaster response functions are activated, there is little room to integrate relevant stakeholders in CDBG-DR activity planning and streamline their interactions with the federal government.<sup>216</sup> Furthermore, CDBG-DR allocations are based on other agencies' data collections and damage estimates. These data, including FEMA damage and verified loss assessments, often focus on economic infrastructure rather than the individualized or population-level socioeconomic data HUD and CDBG-DR grantees need to provide tailored assistance and protection to vulnerable populations.<sup>217</sup>

Finally, these administrative delays may also prevent disaster survivors and IDPs from accessing basic assistance, let alone specialized assistance. CDBG-DR grantees often require eligible recipient households (including low-income and other limited-resource families) to complete duplicative information requests and produce extensive paperwork in support of the assessment of benefits duplication—leading to increased attrition, inequitable assistance delivery, and delayed recovery. These are the same households whose verified losses have a proportionally greater impact on their livelihoods and well-being.<sup>218</sup>

#### D. Conclusion and Recommendations

Continued reliance on the CDBG-DR's supplemental authority to fund long-term recovery will only contribute to excessive delays while excluding community stakeholders from the recovery planning process. Both Democrats and Republicans have urged Congress to permanently authorize the CDBG-

---

214. See GAO-19-232, *supra* note 119, at 40; *supra* Part III.

215. *Community Development Block Grant-Disaster Recovery Program: Stakeholder Perspectives: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 115th Cong. 7 (2018) (statement of Carlos Martín, Senior Fellow, Urban Institute) [hereinafter Statement of Carlos Martín].

216. *Id.* at 6.

217. See *id.* at 6–7.

218. These losses are often significant due to the different funding requirements imposed by HUD and FEMA. For example, Puerto Rico estimated potential unmet needs to be approximately \$5.8 billion, including FEMA applicants who were denied due to an inability to prove property ownership. In both Florida and Puerto Rico, HUD granted aid to applicants who had been previously denied SBA loan assistance given those denials may be based on an individual's inability to repay, despite potentially having unmet needs. GAO-19-232, *supra* note 119, at 22–23.



DR program.<sup>219</sup> Codifying a single disaster recovery program in regulations would put in place a permanent formal framework for future disasters; reduce the volume of *Federal Register* notices used and other informal forms of guidance for each disaster; and mitigate time delays in implementing assistance.<sup>220</sup> Permanent authorization of the CDBG-DR program would also reduce financial waste and improve program monitoring by providing consistent guidance to grantees on financial processes and procedures.<sup>221</sup>

Permanent authorization alone, however, is insufficient to ensure IDPs' special needs are accounted for and integrated into federal disaster response programs. While FEMA's Pre-Disaster Mitigation plans anticipate economic risk to physical infrastructure, HUD should consider developing an equivalent process to assess social risk to vulnerable populations of future disasters and incorporate those assessments into grantees' CDBG-DR proposals. This process could incorporate the existing citizen participation requirements under the CDBG program and would support FEMA's goal to strengthen "community lifeline" capacities under the BRIC program.

As the scale of disaster funding increases, direct community consultation is also essential to balancing the interests of more powerful stakeholders. Elizabeth Yeampierre, a Puerto Rican advocate and long-time environmental justice leader, warns of "casting affected populations as passive applicants rather than participants in their own recovery," while the "emergency atmosphere" becomes a pretext to push through a "wish list" for real estate developers and financiers, often at the expense of those same affected communities.<sup>222</sup> Meaningful consultation that allows for local initiative and control over decision-making processes can disrupt these existing power differentials and help ensure that the particularized needs and vision of IDPs are not ignored.<sup>223</sup> Thus, even if a permanent CDBG-DR program includes public participation requirements, disaster agencies and grantees must integrate additional protocols and protections to ensure that participation is meaningful. Otherwise, the particularized protection needs of IDPs and other vulnerable groups will continue to be overlooked in both disaster preparedness and response programs.

---

219. On December 5, 2017, Rep. Ann Wagner (R-MO) introduced the "Reforming Disaster Recovery Act of 2018," which would permanently authorize the CDBG-DR program, codify standards that prioritize funding for low- and moderate-income disaster survivors, and establish a CDBG-DR Reserve Fund that would be available for disaster-affected areas immediately following a major disaster declaration. The bill was also sponsored by Reps. Dennis Ross (R-FL), Claudia Tenney (R-NY) and Al Green (D-TX). See *Reforming Disaster Recovery Act of 2018*, H.R. 4557, 155th Cong. (2018).

220. Statement of Carlos Martín, *supra* note 216, at 10.

221. See GAO-19-232, *supra* note 119, at 38.

222. Elizabeth Yeampierre & Naomi Klein, *Imagine a Puerto Rico Recovery Designed by Puerto Ricans*, INTERCEPT (Oct. 20, 2017), <https://perma.cc/9DHW-T9TC>.

223. See Koslov, *supra* note 102, at 363.

## CONCLUSION

Failure to consider and address U.S. disaster displacement puts millions of individuals at risk every year. While recent reforms to the federal disaster framework have focused on financial and, to some extent environmental, sustainability, it is critical to center the rights of disaster IDPs in order to identify existing protection gaps and potential opportunities for reform. Analyzing two key rights under the Guiding Principles on Internal Displacement—freedom from discrimination and access to assistance that addresses vulnerable groups’ special needs—reveals how federal jurisprudence and statutory framework for disaster response prevent these rights from being recognized and fulfilled.

The Stafford Act’s nondiscrimination provision does not protect individuals who experience disparate impacts resulting from federal disaster programs. The provision also fails to provide these individuals with a legal remedy for all but the most obvious intentional discrimination, given the high burden of proof plaintiffs face. Furthermore, the federal courts’ broad interpretation of the Stafford Act’s discretionary function exception shields almost all federal disaster-related actions from judicial review, with the exception of constitutional claims. Current Guidance on compliance with Title VI aligns with the Guiding Principles by explicitly prohibiting recipients of federal disaster assistance from “implementing facially-neutral policies and practices that have a disproportionate impact on protected groups.”<sup>224</sup> Unfortunately, this guidance is not legally enforceable. Thus, IDPs disparately impacted by federal disaster programs must rely on extralegal mechanisms to hold federal disaster agencies accountable.

Neither the Stafford Act nor the HDCA grant IDPs an affirmative right to access disaster assistance, let alone particularized assistance. While HUD’s CDBG-DR provides the largest and most flexible source of long-term recovery funding, the program’s lack of permanent statutory authority inhibits consultation with vulnerable groups; prevents the timely collection and sharing of data on vulnerable groups and their particularized needs; and inhibits IDPs from accessing basic assistance. While the 2018 DRRRA created new mechanisms to fund pre-disaster mitigation, the Act provides no guarantees or mechanisms to ensure individuals and communities vulnerable to displacement are able to participate in the design of mitigation programs. Congress should take up current bipartisan proposals to permanently authorize the CDBG-DR program, including HUD’s equitable priorities and mandatory, meaningful consultation requirements with vulnerable communities.

---

224. *See supra* Section V.B.