

Preparing for the Climate Crisis: OSHA, Deadly Heat, and Emergency Powers

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In April of 2023, the Occupational Safety and Health Administration reviewed a petition brought by seven State Attorneys General urging the agency to issue an emergency rule addressing deadly workplace heat exposure. The agency acknowledged the acute hazards that heat poses to workers but decided against emergency intervention. A few months later, extreme heat waves garnered national attention, and President Biden faced sharp criticism for failure to take stronger action to prevent heat-related workplace deaths.

This Article draws on the example of OSHA's consideration of an emergency heat rule to offer a new way of thinking about the use of emergency power by federal administrative agencies in the climate context. The Article adds to the emerging body of literature comparing the COVID-19 pandemic to the climate crisis and presents a new pathway for navigating existing debates over administrative agency decision making and democratic legitimacy surrounding the use of emergency powers. The Article then offers new recommendations for federal administrative agencies that may be called upon to deploy emergency powers to address the climate crisis in the future. The Article argues that agencies should begin compiling lessons learned from the COVID-19 pandemic now and proactively plan for climate emergency responses that will withstand judicial challenge. Overall, these recommendations are designed with a focus on community engagement as a means of protecting democratic legitimacy and yielding more impactful and equitable governmental responses.

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INTRODUCTION**

Felipe Pascual was pouring cement at a job site near Houston on June 16, 2023, when he collapsed from heat exhaustion.¹ He was rushed to the emergency room where he died from hyperthermia.² Two days prior to Pascual's death, Texas Governor Greg Abbott signed a law preempting local workplace protection mandates, including local ordinances requiring water and rest breaks for construction workers facing extreme heat.³ Texas labor leaders described the so-called "Death Star bill" as a potential death sentence for workers like Pascual.⁴

Heat is the leading weather-related killer,⁵ but historically, it has not been treated as an emergency under federal law.⁶ Extreme heat exposure can cause exhaustion, muscle breakdown, kidney injury, and death.⁷ It exacerbates diabetes and heart disease.⁸ Extreme heat also worsens air quality⁹ and is particularly dangerous when combined with particulate matter from wildfire smoke.¹⁰ There is no federal standard for occupational heat exposure, although workers' rights

** The content of this Article was finalized on February 1, 2024. Due to the timeline of the publishing process, updates that occurred after this date were not included.

1. *Fort Bend Co. construction worker dies after collapsing at job site in extreme heat, officials say*, ABC EYEWITNESS NEWS (July 1, 2023), <https://abc13.com/fort-bend-county-construction-worker-death-felipe-pascual-dies-at-job-site-texas-heat-wave/13449783/>.

2. *Id.*

3. H.B. 2127, 88th Leg., 2023-2024 (Tx. 2023).

4. Sonia Garcia, *New Texas bill ending water break mandates is a death sentence for construction workers, experts say*, HOUSTON CHRONICLE (June 22, 2023), <https://www.houstonchronicle.com/news/houston-texas/trending/article/water-break-construction-worker-texas-bill-18162935.php>. The Texas law will not take effect until September 1, 2023 and therefore would not have affected Pascual. However, Pascual's death was noted as an example of the need for workplace heat protections by opponents of the law. *See also* Jordan Barab, *Heat Kills Another Texas Worker After Abbott Rescinds Heat Protections*, CONFINED SPACE (July 1, 2023), <https://jordanbarab.com/confinedspace/2023/07/01/heat-kills-another-texas-worker-after-abbott-rescinds-heat-protections/>.

5. Kate Selig, *Pressure builds for FEMA to declare deadly heat events as disasters*, WASH. POST (June 29, 2023), <https://www.washingtonpost.com/climate-environment/2023/06/29/fema-heat-waves-disasters/>.

6. The Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act"), 42 U.S.C. § 5122(2), does not list "extreme heat" as a natural disaster, and the Federal Emergency Management Agency (FEMA) has yet to declare a heat wave a natural disaster under the Stafford Act for purposes of providing federal support for an emergency response. On June 9, 2023, Congressman Gallego (AZ) introduced the Extreme Heat Emergency Act of 2023, which would amend the Stafford Act to include "extreme" heat in the definition of "natural disaster." H.R. 3965, 118th Cong. (1st Sess. 2023).

7. BRENDA JACKLITSCH ET AL., CRITERIA FOR A RECOMMENDED STANDARD OCCUPATIONAL EXPOSURE TO HEAT AND HOT ENVIRONMENTS 23-58 (Nat'l Inst. for Occupational Safety and Health [hereinafter NIOSH], 2016), <https://www.cdc.gov/niosh/docs/2016-106/default.html>.

8. *Id.* at 40.

9. Karishma S. Becha, *THE IMPACT OF EXTREME HEAT ON ENVIRONMENTAL JUSTICE COMMUNITIES IN CALIFORNIA: ASSESSING EQUITY IN CLIMATE ACTION PLANS 1* (Univ. of S. F., 2020), <https://repository.usfca.edu/cgi/viewcontent.cgi?article=2199&context=capstone>.

10. Noam Rosenthal et al., *Population co-exposure to extreme heat and wildfire smoke pollution in California during 2020*, 02500 ENV'T RES. CLIMATE 1 (Aug. 25, 2022).

advocates and community groups have long pushed for one.¹¹ In 2021, the federal Occupational Safety and Health Administration (OSHA) announced that it would begin considering a federal standard.¹²

Pascual's death did not come without warning. In February of 2023, in anticipation of a dangerously hot summer for workers, a coalition of seven Attorneys General, led by New York Attorney General Letitia James, filed a petition urging OSHA to issue an emergency rule for occupational heat exposure to take effect in the summer of 2023, pending OSHA's permanent rulemaking.¹³ The Attorneys General argued that extreme workplace heat poses a grave danger to tens of millions of workers and that OSHA's existing mechanisms to protect workers are insufficient to protect workers from injury and death.¹⁴ The Attorneys General noted that OSHA's standard rulemaking process can take up to ten years to complete, further highlighting the need for emergency intervention.¹⁵ On April 17, 2023, OSHA denied the petition, noting the legal challenges it had faced in the past when promulgating temporary emergency standards.¹⁶ Specifically, the agency cited a string of cases striking down prior OSHA emergency rules, including *National Federation of Independent Business v. OSHA*, in which the Supreme Court stayed OSHA's enforcement of an emergency rule regarding COVID-19 vaccination and testing requirements for private employers, finding that the federal agency lacked the requisite statutory authority.¹⁷

With no federal or state occupational heat standard in place, Pascual's death occurred amidst record-breaking heat waves in Texas that also covered large swathes of the nation over the summer.¹⁸ Phoenix saw 110 degrees Fahrenheit

11. See, e.g., EXTREME HEAT AND UNPROTECTED WORKERS: PUBLIC CITIZEN PETITIONS OSHA TO PROTECT THE MILLIONS OF WORKERS WHO LABOR IN DANGEROUS TEMPERATURES 25 (Pub. Citizen, 2018), https://www.citizen.org/wp-content/uploads/extreme_heat_and_unprotected_workers.pdf.

12. Advance notice of proposed rulemaking on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 86 Fed. Reg. 59,309 (Oct. 27, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, 1928), <https://www.federalregister.gov/documents/2021/10/27/2021-23250/heat-injury-and-illness-prevention-in-outdoor-and-indoor-work-settings> [hereinafter OSHA ANPRM].

13. Attorneys General of New York, et al., *Petition for an Emergency Temporary Standard for Occupational Heat Exposure for Outdoor and Indoor Workers*, filed with the Assistant Secretary of Labor for Occupational Safety and Health (Feb. 9, 2023), https://stateimpactcenter.org/files/AGActions_2023.02.09-Multistate-Petition-to-OSHA-Emergency-Temporary-Standard-for-Extreme-Heat.pdf [hereinafter AG Petition].

14. *Id.* at 2. The State Attorneys General explained that OSHA's current approach of relying on the "General Duty Clause" of the federal OSH Act has not proven to be sufficient to prevent workplace deaths from extreme heat. See 29 U.S.C. § 654(a)(1) and *infra* note 28.

15. AG Petition, *supra* note 13, at 1, 3 n.7 (citing *The OSHA Rulemaking Process*, OSHA (last updated Oct. 15, 2012), https://www.osha.gov/sites/default/files/OSHA_FlowChart.pdf).

16. *Denial of February 9, 2023 Attorneys General petition for OSHA to develop an emergency temporary standard (ETS) for occupational heat exposure*, Assistant Sec'y of Labor for Occupational Safety & Health, (Apr. 17, 2023), https://stateimpactcenter.org/files/AGActions_Heat-Multistate-Petition-OSHA-Response.pdf [hereinafter OSHA denial].

17. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 117-20 (2022) (per curiam) [hereinafter *NFIB v. OSHA*].

18. See, e.g., Matthew Cappucci & Dylan Moriarty, *Inside the most extreme heat wave the Southern U.S. has faced*, WASH. POST (July 21, 2023), <https://www.washingtonpost.com/weather/2023/07/21/us->

or higher for thirty-one consecutive days.¹⁹ Coastal waters off Florida sizzled at a record-breaking 101 degrees.²⁰ Scientists calculated that July of 2023 was the hottest month recorded to date, shattering more than 2,400 heat records in the United States, according to the National Oceanic and Atmospheric Administration.²¹

By mid-July 2023, conditions for workers exposed to extreme heat reached a breaking point. Heat-related emergency room visits spiked.²² UPS workers threatened to strike over insufficient air conditioning in delivery vehicles.²³ McDonald's workers in Los Angeles engaged in a walk-off when temperatures in kitchens hit above 100 degrees.²⁴ In response to the events unfolding in Texas, Representative Greg Casar (D-Texas) went on an all-day "thirst strike" on the steps of the Capitol on July 25, 2023, to call for a federal heat rule to protect

heat-wave-heat-dome-climate/; *June marked by record-setting U.S. heat waves, severe weather*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. (July 11, 2023), <https://www.noaa.gov/news/june-marked-by-record-setting-us-heat-waves-severe-weather>; Nathan Rott, *U.S., European heat waves 'virtually impossible' without climate change, study finds*, NPR (July 25, 2023), <https://www.npr.org/2023/07/25/1189837347/u-s-european-heat-waves-virtually-impossible-without-climate-change-new-study-fi>; Richard C. Keller, *Extreme heat is killing more people – and the worst is yet to come*, USA TODAY (July 21, 2023), <https://www.usatoday.com/story/opinion/2023/07/21/heat-deaths-increase-climate-change-effects-worse/70436488007/>; Seth Borenstein, *Summer of record-breaking heat paints story of a warming world, scientists say*, PBS NEWS HOUR (July 22, 2023), <https://www.pbs.org/newshour/science/summer-of-record-breaking-heat-paints-story-of-a-warming-world-scientists-say>.

19. Catherine Clifford, *Phoenix suffers a record 31 straight days of 110-degree highs, and more heat is on the way*, CNBC NEWS (Aug. 1, 2023), <https://www.cnbc.com/2023/08/01/phoenix-sets-record-of-31-straight-days-of-110-degree-temps.html#:~:text=The%20high%20temperature%20at%20Phoenix,110%20degrees%20Fahrenheit%20or%20higher.>

20. Ian Livingston & Jason Samenow, *In hot water: South Florida ocean tops 100 degrees*, WASH. POST (July 26, 2023), <https://www.washingtonpost.com/weather/2023/07/25/florida-record-warm-ocean-climate/>.

21. Claire A. O'Shea, *NASA Clocks July 2023 as Hottest Month on Record Ever Since 1880*, NAT'L AERONAUTICS & SPACE ADMIN. (Aug. 14, 2023), <https://www.nasa.gov/press-release/nasa-clocks-july-2023-as-hottest-month-on-record-ever-since-1880>; Nat'l Oceanic and Atmospheric Admin., *Data Tools: Daily Weather Records* (last visited Mar. 21, 2024), <https://www.ncdc.noaa.gov/cdo-web/datatools/records>.

22. Matthew Griffin, *Emergency Rooms Swamped as Record Heat Above 100F Wilts US South*, BLOOMBERG (July 21, 2023), <https://www.bloomberg.com/news/articles/2023-07-21/emergency-rooms-swamped-as-record-100f-heat-wilts-us-south#xj4y7vzkg>.

23. Joe Hernandez, *UPS workers facing extreme heat win a deal to get air conditioning in new trucks*, NPR (June 14, 2023), <https://www.npr.org/2023/06/14/1182147381/ups-workers-facing-extreme-heat-win-a-deal-to-get-air-conditioning-in-new-trucks>. UPS workers were concurrently negotiating other labor terms, such as increased wages.

See Noam Scheiber, *UPS Employees Approve New Contract, Averting Strike*, N.Y. TIMES (Aug. 22, 2023), <https://www.nytimes.com/2023/08/22/business/economy/ups-contract-vote-teamsters.html>.

24. Coral Davenport, *Heat Is Costing the U.S. Economy Billions in Lost Productivity: From meatpackers to home health aides, workers are struggling in sweltering temperatures and productivity is taking a hit*, N.Y. TIMES (July 31, 2023), <https://www.nytimes.com/2023/07/31/climate/heat-labor-productivity-climate.html>.

workers.²⁵ He also filed a letter, joined by more than 100 members of Congress, urging OSHA to issue a federal occupational heat standard to protect workers.²⁶

Two days later, President Biden announced the first-ever Hazard Alert for occupational heat and asked the Department of Labor to “ramp up enforcement to protect workers from extreme heat.”²⁷ However, the agency still lacked an enforceable federal occupational heat standard.²⁸ Had OSHA granted the Attorneys General’s petition and issued an emergency rule targeting high-risk workers in time for the summer of 2023, the administration would likely have been in a much stronger position to mitigate workplace injuries and deaths resulting from heat waves and protect workers like Pascual.

OSHA’s consideration of an emergency rule addressing hazardous workplace heat presents a fruitful case study for other federal administrative agencies who may be confronted with questions surrounding the use of emergency powers to respond to emerging climate hazards and other aspects of the climate crisis. The record-breaking heat waves of summer 2023 represent a pivotal moment in climate governance at a time when government failure to take stronger climate action is increasingly coming under attack.²⁹ Moreover, the

25. Julia Shapero, *Texas Democrat goes on ‘thirst strike’ for heat rule to protect workers*, THE HILL (July 25, 2023), <https://thehill.com/homenews/house/4118884-texas-democrat-goes-on-thirst-strike-for-heat-rule-to-protect-workers/>.

26. Letter from Greg Casar, et al. to Julie Su, Acting Secretary U.S. Department of Labor (July 24, 2023), <https://casar.house.gov/sites/evo-subsites/casar.house.gov/files/evo-media-document/congressional-letter-to-biden-administration-on-extreme-heat.pdf>.

27. Press Release, White House, FACT SHEET: President Biden Announces New Actions to Protect Workers and Communities from Extreme Heat (July 17, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/27/fact-sheet-president-biden-to-announce-new-actions-to-protect-workers-and-communities-from-extreme-heat/#:~:text=President%20Biden%20has%20asked%20the,weather-related%20deaths%20in%20America.>

28. OSHA can potentially use Section 5(a)(1) of the Occupational Safety and Health Act of 1970 [hereinafter OSH Act], known as the “General Duty Clause,” to enforce on a case-by-case basis against employers that expose their workers to extreme heat. *See* 29 U.S.C. § 654(a)(1). Section 5(a)(1) states that employers have a general duty to furnish to each of their employees employment and a place of employment free from recognized hazards that cause or are likely to cause death or serious physical harm to employees. *Id.* To prove a violation of the General Duty Clause, OSHA needs to establish—in each individual case—that: (1) The employer failed to keep the workplace free of a hazard to which its employees were exposed; (2) the hazard was recognized; (3) the hazard was causing or likely to cause death or serious injury; and (4) a feasible means to eliminate or materially reduce the hazard existed. *Id.* However, OSHA itself has noted that the General Duty Clause is not sufficient to protect workers because it “does not specifically prescribe hazardous heat exposure thresholds or provide specifics on how employers are to eliminate or reduce their employees’ exposure to hazardous heat.” OSHA ANPRM, *supra* note 12, at 59,314. Moreover, OSHA’s efforts to protect employees from hazardous heat using the General Duty Clause “have been met with significant legal challenges, leaving many workers vulnerable to heat-related hazards.” *Id.* Without “specific, authoritative exposure thresholds for OSHA to rely on,” the agency has struggled to prove the existence of a recognized hazard, “even in cases in which a heat-related fatality has occurred.” *Id.*; *see also, e.g.*, A.H. Sturgill Roofing, Inc., 2019 O.S.H. Dec. (CCH) ¶ 33,712, 2 (04 National/Federal Feb. 28, 2019); Aldridge Elec., Inc., Respondent, 26 O.S.H. Cas. (BNA) ¶ 1449 (O.S.H.R.C.A.L.J. Dec. 2, 2016).

29. *See, e.g.*, Myah Ward, *Biden faces calls to declare climate emergency as he heads to Maui*, POLITICO (Aug. 20, 2023), <https://www.politico.com/news/2023/08/20/biden-climate-emergency-hawaii-00111973>; Gaia Vince, *The Heat Is On Over the Climate Crisis. Only Radical Measures Will Work*, THE GUARDIAN (May 18, 2019), <https://www.theguardian.com/environment/2019/may/18/climate-crisis->

COVID-19 emergency illustrated that piecemeal action by state governments is not equivalent to strong federal leadership when faced with a problem of a national or global scale.³⁰ For a challenge as consequential as the changing climate, governments at all levels need to mobilize and coordinate their response to prevent further catastrophe and respond to immediate climate hazards that disproportionately affect environmental justice communities and marginalized peoples.³¹ The federal government is well-situated to lead such efforts.³²

There has been emerging literature surrounding how emergency powers might be used to address the climate crisis and the costs and benefits of deploying emergency power in this context, including the challenges of balancing governmental expediency alongside democratic legitimacy.³³ These debates are

heats-on-global-heating-four-degrees-2100-change-way-we-live; Mina Juhn, *Taking a Stand: Climate Change Litigants and the Viability of Constitutional Claims*, 89 *FORDHAM L. REV.* 2731, 2749-51 (2021) (describing various cases challenging government inaction on climate change); *Juliana v. United States*, 947 F.3d 1159, 1164 (9th Cir. 2020) (observing that continuing political climate inaction “may hasten an environmental apocalypse”); *Held v. Montana*, Findings of Fact, Conclusions of Law, and Order, Civil Action CDV-2020-307 (Mont. First Jud. D. Ct. Lewis & Clark Cnty., Aug. 14, 2023).

30. See Lance Gable, *Pursuing Climate Justice: Learning the Lessons of the COVID-19 Response*, 16 *ST. LOUIS U. J. HEALTH L. & POL’Y* 5, 25 (2022) (“Another vital lesson [for the climate crisis] that can be learned from the COVID-19 response is that thorough and thoughtful planning and infrastructure are necessary to prepare for and address future large-scale crises, but they are not sufficient to ensure an effective response. Competent leadership is essential. Leaders who do not take seriously the threat of a pandemic or the climate crisis whether due to incompetence, inattention, or malfeasance can quickly undermine the effectiveness of a response.”).

31. See César Rodríguez-Garavito, *Climatizing Human Rights: Economic and Social Rights for the Anthropocene* at *13-14 (OXFORD HANDBOOK OF ECON. & SOC. RTS., Working Paper No. 21-41, 2022) (“The time to cope with the climate emergency with conventional measures has passed. My generation (Generation X) was a product of globalization, and we largely wasted the thirty crucial years we had to take gradual steps against global warming, ever since scientists sounded the first audible alarm bells in the late 1980s. Today, Generation Z teenagers go on school strikes to remind us of what the IPCC has concluded: to avoid the most catastrophic climate change scenarios and the subsequent human rights crisis, urgent measures that cut carbon emissions in half by 2030 at the latest are the only way out.”); see also Alique G. Berberian et al., *Racial Disparities in Climate Change-Related Health Effects in the United States*, 9 *CURRENT ENV’T HEALTH REP.* 451, 459-60 (Sept. 2022) (finding disparate health impacts of climate change on people of color).

32. See Ashley M. Gregor, *Toward a Legal Standard of Tolerable Heat*, 44 *COLUMBIA J. ENV’T L.* 479, 480, 485, 552 (2019) (arguing that “[e]ven though industry-specific organizations, advocacy groups, and state and local governments are taking strides to tackle this growing concern, it is also incumbent upon the federal government to adopt baseline, action-forcing standards recognizing the intolerability of extreme heat,” and laying out a framework for a coordinated federal approach to extreme heat safety, including “adaptive policies based on context and population”).

33. See, e.g., Mark P. Nevitt, *On Environmental Law, Climate Change & National Security Law*, 44 *HARV. ENV’T L. REV.* 321, 351-56 (2020); Daniel A. Farber, *Exceptional Circumstances: Immigration, Imports, the Coronavirus, and Climate Change as Emergencies*, 71 *HASTINGS L.J.* 1143, 1169-71 (2020); Ted Nordhaus & Alex Trembath, *Is Climate Change like Diabetes or an Asteroid?*, *THE BREAKTHROUGH INST.*, (Mar. 4, 2019), <https://perma.cc/2SXY-A3QU>; Dougald Hine & Duncan McLaren, *Climate Emergency: The Democracy Fork*, *OPEN DEMOCRACY* (Dec. 11, 2019), <https://perma.cc/LP5E-CCX5>; Maryam Jamshidi, *The Climate Crisis is a Human Security, not a National Security Issue*, 93 *S. CAL. L. REV. Postscript* 36, 37-38 (2019); Mark P. Nevitt, *The Commander in Chief’s Authority to Combat Climate Change*, 37 *CARDOZO L. REV.* 437, 476-77 (2015); see generally Mark Nevitt, *Climate Security Insights from the COVID-19 Response*, 98 *IND. L.J.* 815 (2023); Charles R. Corbett, *The Climate Emergency and Solar Geoengineering*, 46 *HARV. ENV’T L. REV.* 197 (2022) (summarizing prior scholarship and examining theories of “climate emergency,” including implications

important and should be continued as the climate crisis accelerates. However, the public outcry over the lack of federal intervention to address deadly workplace heat in the summer of 2023 suggests that we are beyond the point of theory, and we have entered the time of action. Where emergency powers are available to save lives or prevent significant damage to property and ecosystems, governments will be faced with decisions about exercising such powers.³⁴ There is a vital need for federal administrative agencies to prepare for the possibility of deploying emergency powers to address the climate crisis. The question is not whether emergency powers will be needed but rather when and how to deploy them effectively and justly, given the unique challenges presented by the climate emergency.

This Article adds to the existing literature by offering a new way of thinking about federal agency emergency power in the climate context, based on lessons from the real-world example of OSHA's consideration of an emergency heat rule. The example is useful in two primary ways. First, the agency's decision came on the heels of the COVID-19 emergency. The use of emergency power during the COVID-19 pandemic raised serious questions regarding democratic legitimacy and indelibly changed the legal and political landscape regarding governmental emergency responses.³⁵ Several key themes that arose during the COVID-19 emergency—the need for strong federal action amidst a patchwork of state policies, disparate impacts on vulnerable populations, and concerns regarding the legitimacy of emergency powers—reemerged as OSHA considered an emergency rule to address extreme heat. The OSHA case study illustrates the need to apply lessons from the pandemic to avoid repeating the same

for constitutional democracy and international climate policy); Mark P. Nevitt, *Delegating Climate Authorities*, 39 YALE J. REG 778 (2022); Mark P. Nevitt, *Is Climate Change a National Emergency?*, 55 U.C. DAVIS L. REV. 591 (2021).

34. See Farber, *supra* note 33, at 1175 (“If more conventional means of policy change through Congress or rulemaking remain clogged, there will be continuing pressure on Presidents to use any available tool to act on their own.”).

35. See, e.g., Amanda L. Tyler, *Judicial Review in Times of Emergency: From The Founding Through The Covid-19 Pandemic*, 109 VA. L. REV. 489, 525 (May 2023) (analyzing COVID-19 emergency case law and situating it within a historical account of judicial review of governmental emergency actions); Amy L. Stein, *Domestic Emergency Pretexts*, 98 IND. L. J. 479, 483-84 (2023); Kenny Mok & Eric A. Posner, *Constitutional Challenges to Public Health Orders in Federal Courts During the COVID-19 Pandemic*, 102 B.U. L. REV. 1729, 1731-32 (2022) (examining federal judicial cases involving nonreligious civil-liberties challenges to COVID-19-related public health orders from the start of the pandemic in early 2020 to January 27, 2022); see generally Nevitt, *National Emergency?*, *supra* note 33 (exploring the non-legislative options for addressing climate change and their implications on democratic norms); Fionnuala Ni Aolain, *Exceptionality: A Typology of COVID-19 Emergency Powers*, 26 UCLA J. INT'L L. FOREIGN AFFS. 49 (2022); Ira P. Robbins, *Sunshine Laws Behind the Clouds: Limited Transparency in a Time of National Emergency*, 56 U.C. DAVIS L. REV. 1 (2022); Farber, *supra* note 33 (describing use of emergency powers by President Trump during the COVID-19 pandemic); Avi Weiss, *Binding the Bound: State Executive Emergency Powers and Democratic Legitimacy in the Pandemic*, 121 COLUM. L. REV. 1853 (2021) (a comprehensive analysis of emergency powers used by state governors across the country during the COVID-19 pandemic and the litigation and legislative challenges to such exercise of state emergency powers); Eric Richardson & Colleen Devine, *Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights*, 42 MICH. J. INT'L L. 105 (2020).

inefficiencies and inequities that arose during prior emergencies as the climate crisis accelerates.

Second, OSHA was faced with the possibility of issuing an emergency rule in the midst of growing Supreme Court skepticism toward federal administrative action. Several scholars have described an increased use of antiregulatory canons and methodologies by justices who are wary of the administrative state generally, and environmental protection specifically, in ways that undermine democracy and constrain administrative agencies from taking bold action to address large, complex crises.³⁶ In particular, the Court's focus on the major questions doctrine has loomed large.³⁷ In OSHA's decision letter describing its reasons for declining to take emergency action, the agency pointed to concerns that an emergency standard would be struck down, citing Supreme Court precedent that invalidated an OSHA emergency rule issued during the pandemic.³⁸ In this regard, the OSHA case study offers a notable example of how the Court's administrative law jurisprudence is already affecting administrative agency decision making with regard to the question of climate emergency powers.

This Article uses the example of OSHA's consideration of an emergency heat rule to present a new pathway for navigating the ongoing debates over democratic legitimacy and administrative agency decision making surrounding the use of emergency powers. The Article seeks to build on the emerging body of literature comparing the COVID-19 pandemic to the climate crisis,³⁹ by focusing on the use of emergency power by federal administrative agencies from the standpoint of efficacy, equity, and legitimacy. The Article then offers new recommendations for federal administrative agencies that may be called upon to deploy emergency powers to address the climate crisis in the future. Specifically, I argue that federal administrative agencies should begin compiling lessons

36. See generally, e.g., Jody Freeman & Matthew Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 S. CT. REV. 1 (2023); Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L. J. 635 (2023); Benjamin C. Skillin, *Major Questions Require Major Coordination: Enhancing Regulatory Coordination to Combat Nondelegation and Anti-Deference Judicial Scrutiny*, 64 B.C. L. REV. 1283 (2023); William W. Buzbee, *The Antiregulatory Arsenal, Antidemocratic Can(n)ons, and the Water Wars*, 73 CASE W. RES. L. REV. 293, 293 (2022); Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174 (2022); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Stephen I. Vladeck, *Response: Emergency Relief During Emergencies*, 102 B.U. L. REV. 1787 (2022).

37. See generally Skillin, *supra* note 36; Richardson, *supra* note 36; Sohoni, *supra* note 36.

38. OSHA denial, *supra* note 16, at 2.

39. See, e.g., Nevitt, *On Environmental Law*, *supra* note 33, at 351-56; Gable, *supra* note 30, at 25; Kristie L. Ebi, et al., *Interactions Between Two Existential Threats: COVID-19 and Climate Change*, 34 CLIMATE RISK MGMT. 1, 1-2 (2021); Cinnamon P. Carlarne, *From COVID-19 to Climate Change: Disaster & Inequality at the Crossroads*, 12 SAN DIEGO J. CLIMATE & ENERGY L. 19, 19-22 (2021); Carolina Arlota, *The United States Climate Change Policies and COVID-19: Poisoning the Cure*, 41 PACE L. REV. 409, 410-11 (2021); Victor B. Flatt, *Holding Polluters Accountable in Times of Climate and COVID Risk: The Problems with "Emergency" Enforcement Waivers*, 12 SAN DIEGO J. CLIMATE & ENERGY L. 1, 2-3 (2021); MIKE HULME, ET AL., *Social Scientific Knowledge in Times of Crisis: What Climate Change Can Learn from Coronavirus (and Vice Versa)*, WILEY INTERDISC. REV.: CLIMATE CHANGE 1 (2020); Sara C. Bronin, *What the Pandemic Can Teach Climate Attorneys*, 72 STAN. L. REV. ONLINE 155, 155 (2020); see generally Nevitt, *National Emergency?*, *supra* note 33.

learned from the COVID-19 pandemic now and proactively plan for climate emergency responses that will withstand judicial challenge. In particular, agencies should: 1) learn from state governments, while taking stock of their own emergency powers to ensure strong federal leadership on emerging climate issues before conditions worsen; 2) center the lived experiences of those most harmed by climate impacts by proactively engaging vulnerable populations when assessing whether emergency intervention is needed; and 3) forge a way forward through the evolving Supreme Court jurisprudence regarding legislative delegations of emergency authority to administrative agencies, while building democratic legitimacy through community engagement.

Part I of this Article situates the example of OSHA's consideration of an emergency heat rule within the broader context of emergency powers. It begins with an overview of prior governmental emergency actions (and inactions) in the climate space. Next, it summarizes how the COVID-19 pandemic shaped the legal and political landscape of governmental emergency powers. Finally, Part I describes a newly developing body of literature that applies insights from the COVID-19 emergency to the climate emergency context.

Part II of this Article examines the case study of OSHA's consideration of an emergency rule addressing workplace heat exposure for summer 2023. It begins with an analysis of why heat is so dangerous for workers, including systemic socioeconomic and racial inequities that make occupational heat exposure particularly hazardous for workers in several critical industries, including agricultural workers, construction workers, warehouse and delivery workers, and food service workers. Part II then describes OSHA's consideration of an emergency occupational heat standard and factors that contributed to OSHA's decision not to take emergency action.

Part III offers key insights from the OSHA case study, drawing upon salient themes from the use of emergency power during the COVID-19 pandemic. This Part presents recommendations for federal administrative agencies that may be called upon to consider using emergency powers to address the climate crisis in the future. These recommendations include concrete steps administrative agencies should take now to be better equipped to deploy emergency powers in a manner that is effective and equitable and that will withstand legal scrutiny. Because the OSHA case study is focused on the use of emergency power to address emerging climate impacts, such as heat waves, the recommendations may be most useful to administrative agencies considering the use of emergency power in similar situations. However, the recommendations may also be useful for administrative agencies who may be called upon to use emergency powers to address other aspects of the climate crisis, such as the reduction of greenhouse gas (GHG) emissions or climate adaptation efforts. Overall, these recommendations are designed with a focus on community engagement as a means of protecting democratic legitimacy and yielding more impactful and equitable governmental responses.

I. BACKGROUND: EXAMINING THE USE OF EMERGENCY POWERS TO ADDRESS THE CLIMATE CRISIS IN THE WAKE OF THE COVID-19 PANDEMIC

The concept of using governmental emergency powers to address the climate crisis is not new, but it is gaining traction.⁴⁰ Demands for President Biden to declare a climate emergency hit a fever pitch in the summer of 2023, amid heat waves and forest fires.⁴¹ This Part analyzes the use of emergency powers by governments to address various aspects of the climate crisis, the role that the COVID-19 pandemic played in shaping emergency law discourse, and the new literature that has sprung up in relation to the intersection of COVID-19 and climate emergencies.

A. Overview of Climate Emergency Powers

1. Existing Emergency Responses to Climate Impacts and Limitations of the Current Approach

Governmental emergency power has traditionally been used in response to singular, time-limited trigger events, such as individual hurricanes or tornadoes.⁴² Even for longer lasting emergencies, such as wars and pandemics, emergency powers have been executed with the expectation of an end date. Several scholars have noted the challenge of applying the traditional emergency law framework to a collective set of interrelated environmental and ecological hazards that will accelerate over time without a known end date.⁴³

Notwithstanding the limitations of the traditional emergency law model, state and local governments have already begun to mobilize emergency powers to address individual climate impacts like deadly heat waves, droughts, forest fires, and other ecological hazards that state officials publicly attribute to climate change.⁴⁴ For example, in early 2023, California Governor Gavin Newsom

40. See Hine & McLaren, *supra* note 33; see also GEOFF MANN & JOEL WAINWRIGHT, CLIMATE LEVIATHAN: A POLITICAL THEORY OF OUR PLANETARY FUTURE 28-30 (2018) (arguing that the climate crisis could lead to a planetary state of emergency and highlighting the need for a new type of planetary sovereign to govern it).

41. See, e.g., Ward, *supra* note 29 (“I refuse to accept that people choosing between burning alive or jumping into the ocean for hours on end is our new normal. This is a crisis and we need to treat it that way. That starts with President Biden declaring a national climate emergency to unlock vast federal resources and emergency powers to help our communities prepare for and recover from these deadly climate disasters.”) (quoting Rep. Earl Blumenauer (D-Or.)).

42. See Fed. Emergency Mgmt. Agency, *Database of Disaster Declarations* (last visited Mar. 21, 2024), <https://www.fema.gov/disaster/declarations>.

43. See, Corbett, *supra* note 33, at 199; cf. Nevitt, *On Environmental Law*, *supra* note 33, at 340-44 (outlining how the already nebulous concept of “national security” is further complicated by the nuances of wide-reaching environmental hazards).

44. See Fed. Emergency Mgmt. Agency, *Current Disasters* (last visited Mar. 23, 2024) (listing FEMA’s state emergency responses, which at the time of writing include flooding in Alaska, forest fires in Hawaii, and Storms in Illinois and Tennessee), <https://www.fema.gov/disaster/current>; Kanishka Singh & Joseph Ax, *Climate change means New York City’s flooding is ‘new normal,’ governor says*, REUTERS (Sept. 30, 2023), <https://www.reuters.com/world/us/new-york-citys-heavy-rain-is-new-normal-due-climate-change-governor-says-2023-09-30/>.

declared a state of emergency in response to flooding from atmospheric rivers in the Tulare Lake Basin and San Joaquin River Basin.⁴⁵ At the Governor's request, President Biden issued a Presidential Emergency Declaration⁴⁶ and a Presidential Major Disaster Declaration⁴⁷ to bolster state and local recovery efforts. In public statements surrounding these declarations, both the Governor and the President publicly invoked the climate crisis.⁴⁸ Pursuant to the state emergency declaration, Governor Newsom used executive emergency orders to suspend certain state laws and regulations in order to expedite emergency flood diversion, levee repair, and debris removal projects.⁴⁹

In another recent example, Puerto Rico's governor declared a state of emergency for coastal erosion caused by climate change in April of 2023.⁵⁰ The emergency declaration was largely designed to unlock federal and local funding, and also included directives to regulatory agencies to implement concrete measures to prevent, mitigate, and build resiliency against sea level rise and coastal erosion.⁵¹ The declaration followed a 2021 Puerto Rico declaration of ecological emergency addressing hard coral tissue loss disease caused by climate change.⁵²

Federal responses to emerging climate impacts have often lagged behind such state efforts and have been the subject of increased criticism. For example, the Federal Emergency Management Agency (FEMA) has received criticism for its failure to adequately address the increasing number of weather disasters prompted by the climate crisis.⁵³ FEMA's authorizing statute, the Stafford Act, does not list extreme heat as a disaster category.⁵⁴ However, FEMA

45. Press Release, Off. of Governor Gavin Newsom, Governor Newsom Proclaims State of Emergency and Mobilizes State Government Ahead of Winter Storms, (Jan. 4, 2023), <https://www.gov.ca.gov/2023/01/04/governor-newsom-proclaims-state-of-emergency-and-mobilizes-state-government-ahead-of-winter-storms/>.

46. Press Release, White House, President Joseph R. Biden, Jr. Approves California Emergency Declaration (Mar. 10, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/03/10/president-joseph-r-biden-jr-approves-california-emergency-declaration-3/>.

47. Press Release, White House, President Joseph R. Biden, Jr. Approves California Disaster Declaration (Apr. 3, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/03/president-joseph-r-biden-jr-approves-california-disaster-declaration-4/>.

48. Jeff Mason & Steve Gorman, *Biden highlights climate change as he tours California areas lashed by storms*, REUTERS (Jan. 20, 2023), <https://www.reuters.com/world/us/biden-tours-storm-ravaged-california-coast-thursday-2023-01-19/>; David Knowles, *As storms batter California, Newsom says state is 'proof that the climate crisis is real'*, YAHOO! NEWS (Jan. 11, 2023), <https://news.yahoo.com/as-storms-batter-california-newsom-says-state-is-proof-that-the-climate-crisis-is-real-210347192.html>.

49. See generally Cal. Exec. Order No. N-6-23 (Mar. 31, 2023); Cal. Exec. Order No. N-7-23 (May 17, 2023).

50. *Governor declares coastal erosion state of emergency*, SAN JUAN DAILY STAR (Apr. 12, 2023), <https://www.sanjuandailystar.com/post/governor-declares-coastal-erosion-state-of-emergency>.

51. *Id.*

52. *Id.*

53. Eileen Sullivan, *FEMA's Support for Maui Will Likely Be Closely Watched: The agency has been criticized for slow responses to major disasters in the past*, N.Y. TIMES (Aug. 11, 2023), <https://www.nytimes.com/2023/08/11/us/fema-hawaii-fires.html>.

54. 42 U.S.C. § 5122(2), *supra* note 6.

Administrator Deanne Criswell offered congressional testimony in September of 2023, stating her view that FEMA has legal authority under the Stafford Act to grant an extreme heat disaster application from a state or local government, if warranted, and that legislative change is not needed.⁵⁵

Critics have also noted that FEMA's response to droughts and forest fires, which are within the agency's jurisdiction, has felt disorganized and lacking from the standpoint of communities experiencing these hazards.⁵⁶ For example, in the midst of devastating forest fires in Lahaina, Hawai'i in August 2023, media outlets reported anger among local residents regarding the lack of coordination among federal and state emergency responders.⁵⁷ As one reporter noted, "Many Maui survivors say the federal response has been inadequate and slow, a mark of the steep challenge FEMA faces in responding amid escalating climate crises. . . . The federal government has not come up with a national strategy that plans for the accelerating pace of disasters."⁵⁸

In 2022, Senator Coons introduced the National Climate Adaptation and Resilience Strategy Act of 2022,⁵⁹ which would require the federal government to produce a National Climate Adaptation and Resilience Strategy that presents a unified federal plan to increase the resilience of frontline communities. Citing this bill, David Hayes, former Special Assistant to the President for Climate Policy, offered a series of proposals on how the federal government could improve its emergency response to slower-developing climate impacts like droughts, extreme heat, and wildfires.⁶⁰ The report includes useful suggestions, such as the establishment of a Chief Resilience Officer to coordinate the government's emergency climate response, and close collaboration with frontline communities and tribal, state, and local governments.⁶¹

As the climate crisis continues, we can expect to see more calls for federal agencies to step up their emergency responses to climate impacts, including through the use of emergency rulemaking, which is described in more detail in I.A.3 below and forms the basis for the OSHA case study described in Part II.

55. *FEMA: The Current State of Disaster Readiness, Response, and Recovery Before the Subcomm. on Econ. Dev., Public Bldg., and Emergency Mgmt.*, 118th Cong. 42 (2023); H.R. 3965, *supra* note 6.

56. Sullivan, *supra* note 53.

57. Kellen Browning & Mitch Smith, 'We Need Some Help Here': West Maui Residents Say Government Aid Is Scant, N.Y. TIMES (Aug. 13, 2023), <https://www.nytimes.com/2023/08/13/us/west-maui-hawaii-wildfires-aid.html> ("[R]esidents have complained that the official response has been remarkably lacking, describing the scattered fire warnings on Tuesday as insufficient, and the response since then as a failure that has not met their overwhelming, urgent needs.")

58. Lisa Rein et al., *Maui survivors say government help still lags: FEMA is confronting growing disasters fueled by climate change while suffering staffing and funding shortages*, WASH. POST (Aug. 17, 2023), <https://www.washingtonpost.com/politics/2023/08/17/fema-maui-response-lahaina-fires-biden/>.

59. National Climate Adaptation and Resilience Strategy Act, S. 3531, 117th Cong. (2022).

60. See generally David J. Hayes, CLIMATE CHANGE REQUIRES NEW APPROACHES TO DISASTER PLANNING AND RESPONSE, (Belfer Center for Science and International Affairs, 2023), https://www.belfercenter.org/sites/default/files/files/publication/Paper17_Hayes_DisasterPlanning_V6.pdf.

61. *Id.* at 7.

2. Government Declarations of a “Climate Emergency”

In addition to the piecemeal state and federal responses to individual climate impacts, there has been increasing attention to the question of whether the climate crisis, as a whole, should be considered an emergency in itself. Some have challenged the notion of classifying the climate crisis as a singular “emergency,”⁶² while others have offered a framework for assessing how to determine when a climate “emergency” exists.⁶³ Despite these challenges, governments around the world are already describing the dangerous effects of cumulative GHG emissions as an overall crisis that demands coordinated governmental intervention.⁶⁴ In recent years, there has been an increasing amount of “emergency” and “crisis” rhetoric used to describe the changing climate in the public sphere.⁶⁵ As noted below, this rhetoric has led to a growing number of declarations of a climate emergency, often followed by commitments to take further action, but little in terms of activation of special emergency powers on a broad scale. The following Subpart outlines the growing movement among jurisdictions globally to take stronger climate action, including efforts to situate climate emergency governance within a human rights framework, and governmental declarations of a “climate emergency.” The Subpart also explores the ongoing debate regarding whether the U.S. President should issue a climate emergency declaration.

a. Emerging Global Trend: Situating Climate Emergency Governance within a Human Rights Framework

On a global scale, the discourse surrounding the need for stronger governmental intervention to address the climate crisis has increasingly incorporated human rights frameworks and perspectives.⁶⁶ For example, a report

62. See, e.g., Nordhaus & Trembath, *supra* note 33; Hine & McLaren, *supra* note 33; Jamshidi, *supra* note 33 at 37-38.

63. See, e.g., Corbett, *supra* note 33, at 199; Nevitt, *National Emergency?*, *supra* note 33, at 648.

64. *Climate Emergency Declarations in 2,335 jurisdictions and local governments cover 1 billion citizens*, CLIMATE EMERGENCY DECLARATION (last updated Feb. 22, 2024), <https://climateemergencydeclaration.org/climate-emergency-declarations-cover-15-million-citizens/>.

65. See Corbett, *supra* note 33, at 198 (noting that “[p]ublic language on climate change has escalated over the last few years, following widespread media coverage of soaring CO2 levels and record-breaking wildfires, heatwaves, storms, and floods,” and pointing to the fact that Oxford Languages chose “climate emergency” as its word of the year in 2019, capturing “a growing shift in people’s language choice”).

66. See, e.g., Rodríguez-Garavito, *supra* note 31, at 6 (arguing that the traditional separation between economic and social rights, on the one hand, and environmental rights, on the other, is no longer tenable under the conditions of the Anthropocene, and that social and environmental rights need to be seen as two sides of the same coin); César Rodríguez-Garavito, *Litigating the Climate Emergency: The Global Rise and Human Rights-Based Litigation for Climate Action*, in *LITIGATING THE CLIMATE EMERGENCY: HOW HUMAN RIGHTS, COURTS, AND LEGAL MOBILIZATION CAN BOLSTER CLIMATE ACTION* (Cambridge Univ. Press, 2022); Sophie Marjanac & Sam Hunter Jones, *Staying Within Atmospheric and Judicial Limits: Core Principles for Assessing Whether State Action on Climate Change Complies with Human Rights*, in *LITIGATING THE CLIMATE EMERGENCY: HOW HUMAN RIGHTS, COURTS, AND LEGAL MOBILIZATION CAN BOLSTER CLIMATE ACTION* (Cambridge University Press, 2022); U.N. Special

issued this year jointly by the Sabin Center for Climate Change Law at Columbia University and the U.N. Environment Programme tracking climate litigation trends globally observed that litigants are increasingly arguing for stronger governmental intervention to address climate change by relying on human rights enshrined in international law and national constitutions.⁶⁷ The report notes that courts are finding strong human rights linkages to climate change, which is leading to greater protections for the most vulnerable groups in society, as well as increased accountability, transparency, and justice.⁶⁸

This trend can also be seen in discourse surrounding the use of emergency powers to address the climate crisis. For example, Rodríguez-Garavito argues that governments should apply economic and social rights conceptual and legal tools to the climate emergency, both by addressing the impacts of the climate emergency on economic and social rights and by ensuring that climate action follows human rights norms regarding substantive and procedural equity.⁶⁹ In at least one case, petitioners relied on human rights arguments when bringing a petition urging the Secretary-General of the United Nations to declare a children's rights crisis and unlock international governance powers to take more aggressive climate action.⁷⁰ The current Secretary-General has increasingly used human rights rhetoric in favor of national and subnational climate emergency declarations, and the human rights framework has also been used by jurisdictions that have adopted climate emergency declarations, as described in the next Part.

b. Existing Declarations of a Climate Emergency

In December of 2020, United Nations Secretary-General António Guterres gave opening remarks at the Climate Ambition Summit and called on “all leaders worldwide to declare a State of Climate Emergency in their countries until carbon neutrality is reached.”⁷¹ In a speech in New York City in the summer of 2023, Secretary-General Guterres' language was markedly more urgent: “The era of global warming has ended; the era of global boiling has arrived.”⁷² As of

Rapporteur on extreme poverty and human rights, *Report, Climate Change and Poverty*, A/HRC/41/39, ¶ 13 (July 17, 2019); Cinnamon P. Carlarne, *Climate Courage: Remaking Environmental Law*, 41 STAN. ENV'T L. J. 125, 162 (2022); Alan W. Clarke, *Climate Change, Migration, and Pandemics: Human Rights in the Anthropocene*, 47 VT. L. REV. 1, 2 (2022).

67. MICHAEL BURGER & MARIA ANTONIA TIGRE, GLOBAL CLIMATE LITIGATION REPORT: 2023 STATUS REVIEW 36-38 (Sabin Ctr. for Climate Change Law, Columbia Law School & U.N. Env't Programme, 2023), https://scholarship.law.columbia.edu/sabin_climate_change/202.

68. *Id.*

69. Rodríguez-Garavito, *supra* note 31, at 28-29.

70. In 2021, a group of sixteen children filed a petition asking the Secretary-General to the United Nations to declare a climate emergency, mobilize a United Nations comprehensive response to the children's rights crisis over climate change, and activate a crisis management team to oversee immediate and comprehensive global action on climate change. *Sacchi v. Argentina*, U.N. Comm. on the Rights of the Child (Oct. 12, 2021).

71. U.N. Secretary-General, Remarks at the Climate Ambition Summit (Dec. 12, 2020) (transcript: <https://perma.cc/R22G-WABJ>).

72. Catherine Clifford, *'The era of global boiling has arrived,' says UN boss, as White House announces provisions to protect workers from extreme heat*, CNBC (July 27,

January 2024, at least eighteen national governments and the European Union have declared a climate emergency.⁷³ Within the United States, the state of Hawai‘i⁷⁴ and more than 190 other cities, counties, and local jurisdictions⁷⁵ have issued climate emergencies—but the federal government has not.

As experts on climate emergency powers have noted, there is an important distinction between declarations of a climate emergency that are largely symbolic on the one hand,⁷⁶ and executive declarations under emergency laws that authorize a suspension of democratic processes or other civil protections ranging from privacy protections to public engagement processes, on the other.⁷⁷ To date, most activity has been with regard to the former.

However, even a declaration of a climate emergency without the power to suspend “blue sky” processes—laws and regulations that are operable in a non-emergency context—may still impact outcomes. For example, in 2021, the Hawai‘i legislature passed a declaration of a climate emergency, which incorporated quasi-substantive provisions.⁷⁸ The resolution was constrained by the caveat that “nothing in this measure constitutes a declaration of an emergency for purposes of any act authorizing the exercise of any special or extraordinary power during the period of a state emergency or other type of declared emergency.”⁷⁹ The Hawai‘i Supreme Court relied on this emergency declaration in a ruling in 2023 affirming the state Public Utility Commission’s rejection of a power purchase agreement that would have authorized power from the burning of trees to fuel Hawai‘i’s electric grid.⁸⁰ The court determined, *inter alia*, that the power purchase agreement failed to adequately demonstrate reforestation commitments and would be inconsistent with the legislative declaration.⁸¹ The court stated:

The people of Hawai‘i have declared ‘a climate emergency.’ Hawai‘i faces immediate threats to our cultural and economic survival: sea level rise, eroding the coast and flooding the land; ocean warming and acidification, bleaching coral reefs and devastating marine life; more frequent and more extreme droughts and storms. For the human race as a whole, the threat is no less existential.⁸²

2023), <https://www.cnn.com/2023/07/27/the-era-of-global-boiling-has-arrived-says-un-boss-antonio-guterres.html>.

73. See *Climate Emergency Declarations in 2,335 jurisdictions and local governments cover 1 billion citizens*, *supra* note 64.

74. Hawaii Sen. Con. Res. No. 44, 31st Leg. (2021).

75. See S. Con. Res. 9, 118th Congress (2023-2024) (summarizing jurisdictions).

76. See Corbett, *supra* note 33, at 199 (noting the large number of nonbinding climate emergency declarations).

77. See Stein, *supra* note 35, at 1193 (cataloging over 2,100 statutes referring to national security and over 800 referring to national emergencies, with nearly 400 referring to presidential national security powers); Nevitt, *National Emergency?*, *supra* note 33, at 614.

78. Hawaii Sen. Con. Res. No. 44, 31st Leg. (2021).

79. *Id.*

80. See *generally In re Hawai‘i Electric Light Co.*, SCOT-22-0000418 (Haw. Mar. 13, 2023).

81. *Id.* at 15-20.

82. *Id.* at 19.

In a concurring opinion, Justice Wilson situated the Hawai'i climate emergency declaration in a human rights framework by citing to international human rights law precedents and remarking that “[c]limate change is a human rights issue at its core.”⁸³ Because Hawai'i is the first and only state within the United States to have declared a climate emergency, it remains to be seen how the law of nonbinding climate emergency declarations will continue to play out in the future.

c. An Ongoing Debate: Should the President Declare a Climate Emergency?

Notably, the U.S. government has not declared a climate emergency as a matter of law.⁸⁴ President Biden has frequently referred to the climate crisis as an “emergency” in his public remarks,⁸⁵ and he has made affirmative climate policy a cornerstone of his administration, most visibly through landmark federal legislation such as the Infrastructure Investment and Jobs Act⁸⁶ and the Inflation Reduction Act.⁸⁷ He has also overseen significant rulemaking efforts aimed at reducing GHG emissions in the energy,⁸⁸ transportation,⁸⁹ and buildings⁹⁰ sectors. President Biden continues to champion procedural changes to administrative review processes for renewable energy projects, so called “permitting reforms,” with the goal of expediting construction for such projects.⁹¹ Furthermore, he has made structural governance changes, such as

83. *In re Hawai'i Electric Light Company, Inc.*, SCOT-22-0000418 (Haw. March 13, 2023) (West's Hawaii forthcoming, Pacific forthcoming) (Wilson, J., concurring).

84. S. Con. Res. 22, 116th Cong. (2019). As noted above, President Biden has issued emergency declarations in response to individual climate impacts, such as forest fires and hurricanes. *See, e.g.*, Press Release, White House, President Joseph R. Biden, Jr. Approves California Emergency Declaration, *supra* note 46.

85. Kelly Garrity, *Biden says he has 'practically' declared a climate emergency. But he actually hasn't*, POLITICO (Aug. 9, 2023), <https://www.politico.com/news/2023/08/09/biden-climate-emergency-00110486>.

86. *See* Infrastructure Investment and Jobs Act, U.S. Public Law No. 117-58 (2021).

87. *See* Inflation Reduction Act, U.S. Public Law No. 117-169 (2022).

88. *See, e.g.*, EPA, New Source Performance Standards for Greenhouse Gas Emissions from New and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emissions Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33240 (May 23, 2023) (to be codified at 40 C.F.R. pt. 60) (proposing Clean Air Act emission limits and guidelines for carbon dioxide from fossil fuel-fired power plants based on cost-effective and available control technologies). The rulemaking is still pending as of the time of this writing.

89. From 2021 to 2023, the EPA introduced several rulemaking efforts to reduce GHG emissions from cars, trucks and buses. *See, e.g.*, EPA, *Regulations for Greenhouse Gas Emissions from Commercial Trucks & Buses* (last updated Mar. 22, 2024), <https://www.epa.gov/regulations-emissions-vehicles-and-engines/regulations-greenhouse-gas-emissions-commercial-trucks>.

90. *See, e.g.*, 40 C.F.R. § 63 (amend. July 21, 2022).

91. *See* Press Release, White House, Biden-Harris Administration Proposes Reforms to Modernize Environmental Reviews, Accelerate America's Clean Energy Future, and Strengthen Public Input (July 28, 2023), <https://www.whitehouse.gov/ceq/news-updates/2023/07/28/biden-harris-administration-proposes-reforms-to-modernize-environmental-reviews-accelerate-americas-clean-energy-future-and-strengthen-public-input/>.

establishing a Climate Policy Office within the White House.⁹² In August of 2023, the EPA named mitigation of climate change a national enforcement priority for the first time.⁹³

Many of these initiatives have drawn controversy and, at times, litigation.⁹⁴ However, they have all been implemented under standard, “blue skies” procedures for enacting and implementing legislation and regulations. President Biden has not, as of yet, chosen to rely on special emergency powers in the implementation of his federal climate policy, despite ongoing pressure to do so.⁹⁵ For example, a bill that would require the President to “declare a national emergency under section 201 of the National Emergencies Act (50 U.S.C. § 1621) with respect to climate change,” was introduced in 2021.⁹⁶ The following year, Representative Blumenauer of Oregon led sixty House colleagues in writing a letter urging President Biden to declare a national climate emergency and urging Congress to enact the bill.⁹⁷ In May 2023, Rep. Blumenauer, Rep. Ocasio-Cortez of New York, and Sen. Sanders of Vermont introduced a nonbinding congressional resolution that would express “the sense of Congress that there is a climate emergency,” and would “[demand] that the president wield both existing authorities and emergency powers to ensure a national, social, industrial, and economic mobilization of the resources and labor of the United

92. White House Presidential Action, *Presidential Executive Order on Tackling the Climate Crisis at Home and Abroad* (Jan. 21, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/> (establishing the White House Office of Domestic Climate Policy).

93. EPA News Release, EPA Announces Federal Enforcement Priorities to Protect Communities from Pollution (Aug. 17, 2023), <https://www.epa.gov/newsreleases/epa-announces-federal-enforcement-priorities-protect-communities-pollution>.

94. Of the legal challenges to Biden’s climate policies, *West Virginia v. EPA*, 597 U.S. 697 (2022), has garnered the most attention. The Court applied the “major questions doctrine” to hold that Congress did not grant the EPA authority under Section 111(d) of the Clean Air Act to set emissions caps for power plants by shifting electricity production from higher-emitting to lower-emitting producers. *See id.* at 723. The Court used a two-prong framework for determining when the major questions doctrine applies, which asks whether the agency action (a) is “unheralded” and (b) represents a “transformative” change in the agency’s authority. *Id.* at 724. The major questions doctrine has generated significant academic literature. *See generally, e.g.*, Natasha Brunstein & Donald L. R. Goodson, Unheralded and Transformative: The Test for Major Questions After *West Virginia*, 47 WILLIAM & MARY ENV’T L. & POL’Y REV. 47 (2022); Sohoni, *supra* note 36; Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 320 (2022); Jack Michael Beermann, *The Anti-Innovation Supreme Court: Major Questions, Delegation, Chevron and More* (William & Mary L. Rev., Working Paper No. 4,383,132, 2024), <https://ssrn.com/abstract=4383132>. As described below, *infra* Part I.B, the Court has relied on the major questions doctrine in case law invalidating agency emergency powers during the COVID-19 pandemic.

95. *See* Peter Kalmus, *Joe Biden must declare a climate emergency. And he must do so now*, THE GUARDIAN (July 27, 2023), <https://www.theguardian.com/commentisfree/2023/jul/27/joe-biden-climate-emergency-peter-kalmus>.

96. Climate Emergency Act, H.R. 794, 117th Cong. § 2(a) (1st sess. 2021).

97. Press Release, Rep. Earl Blumenauer, Blumenauer Urges Biden to ‘Unleash Every Resource’ and Declare a National Climate Emergency, Leads 60 House Colleagues in Letter, (July 19, 2022), <https://blumenauer.house.gov/media-center/press-releases/blumenauer-urges-biden-to-unleash-every-resource-and-declare-a-national-climate-emergency-leads-60-house-colleagues-in-letter>.

States at a massive scale to mitigate and prepare for the consequences.”⁹⁸ None of these federal proposals have been adopted.

There is a growing body of scholarship analyzing what would happen if the President did issue a climate emergency declaration as a matter of law, and how presidential emergency powers could be leveraged to address the climate crisis more generally.⁹⁹ The Brennan Center for Justice has created a guide to federal emergency powers that is useful in this regard.¹⁰⁰ For example, some scholars have applied the Brennan Center’s tool and have concluded that a Presidential declaration of a climate emergency under the National Emergencies Act, among other laws, would unlock a series of emergency powers that could be used to reduce GHG emissions and support a host of adaptation and resiliency efforts.¹⁰¹ Nevitt, Farber, and Corbett, among others, provide a more comprehensive analysis of how emergency powers could be used to support decarbonization efforts.¹⁰² Some key examples described in their work include: suspension of offshore oil and gas leases; intervention in industrial manufacturing to ensure essential production of electric vehicle batteries; acceleration of development of wind and solar energy projects, including expedited siting of new power lines and infrastructure; sanctions to GHG-intensive imports; loan guarantees to critical industries; or limitations on exports of fossil fuels to other countries.¹⁰³

On the other hand, other scholars and policy makers have raised doubts that a presidential declaration of a climate emergency under existing emergency law frameworks would be a meaningful step toward addressing the climate crisis, and have pondered whether a formal declaration of a climate emergency could instead result in political pushback and litigation that might ultimately distract from affirmative climate policy.¹⁰⁴ As explained below in Part I.B., there is some uncertainty regarding whether the use of emergency power to address the climate crisis would be upheld against legal challenge, given recent Supreme Court decisions constraining the use of federal agency emergency powers during the COVID-19 pandemic. We can assume that this debate will evolve as global surface temperatures continue to rise. While a formal declaration of a climate

98. H. Con. Res. 9, 118th Cong. (2023), https://blumenauer.house.gov/sites/evo-subsites/blumenauer.house.gov/files/evo-media-document/blumen_026_xml-1.pdf.

99. See, e.g., Nevitt, *The Commander in Chief’s Authority*, *supra* note 33, at 476-77; Farber, *supra* note 33, at 1169-71; see generally Corbett, *supra* note 33 (summarizing prior scholarship and examining theories of climate emergency, including implications for constitutional democracy and international climate policy); Nevitt, *On Environmental Law*, *supra* note 33.

100. See generally Brennan Ctr. for Just., *A Guide to Emergency Powers and Their Use* (last updated Feb. 8, 2023), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use>; JEAN SU & MAYA GOLDEN-KRASNER, *THE CLIMATE PRESIDENT’S EMERGENCY POWERS: A LEGAL GUIDE TO BOLD CLIMATE ACTION FROM PRESIDENT BIDEN* (Ctr. for Biological Diversity, 2022), <https://www.biologicaldiversity.org/programs/energy-justice/pdfs/Climate-Emergency-Powers-Report.pdf>.

101. See, e.g., Kalmus, *supra* note 95.

102. Nevitt, *The Commander in Chief’s Authority*, *supra* note 33, at 476-77; Farber, *supra* note 33, at 1169; Corbett, *supra* note 33, at 199-201.

103. Farber, *supra* note 33, at 1169; Corbett, *supra* note 33, at 199-201.

104. See, e.g., Jamshidi, *supra* note 33, at 37-38.

emergency by the U.S. President has the potential to radically alter governmental authority on a wide range of issues, federal agencies need not—and should not—wait for such a formal declaration to begin preparing for future deployment of emergency powers. As the following Subparts illustrate, calls to use federal emergency powers to address climate impacts may arise even without such a declaration, bringing with them further questions regarding efficacy, equity, and legitimacy.

3. *Emergency Rulemaking*

There is also a type of emergency power that exists exclusively within the administrative state and that allows administrative agencies to suspend normal procedural safeguards when public health or safety is in jeopardy, or in other specified circumstances.¹⁰⁵ This includes emergency rulemaking, as well as a host of other emergency and expedited administrative actions, such as emergency stop work orders.¹⁰⁶ At the federal level, there are “good cause” provisions under the Administrative Procedure Act that allow agencies to avoid standard notice and comment requirements for rules in certain circumstances.¹⁰⁷ In some cases, agencies are given additional authority for emergency rulemaking under particular statutes.¹⁰⁸ Comparable provisions exist in many state and local rulemaking procedures.¹⁰⁹ However, administrative agency decisions to forego regular notice and comment procedures have not been without controversy. Overreach by the Trump administration in this regard was subject to court censure and public condemnation, particularly in conjunction with the administration’s efforts to roll back rules issued by the Obama administration.¹¹⁰

105. See, e.g., THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 6-8 (Cong. Rsch. Serv., 2013) (describing exceptions to the standard rulemaking process under the Administrative Procedure Act).

106. See, e.g., N.Y.C., BLDG. CODE § 28-207.2 (2008) (establishing stop work orders).

107. See 5 U.S.C. § 553(b) (waiving notice requirements “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”).

108. For example, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), enacted to provide economic aid during the COVID-19 pandemic, expressly waived notice and comment requirements for rules implementing particular programs, such as the Paycheck Protection Program. See Pub. L. 116-136 (116th Cong. 2020); Small Business Admin., *Interim Final Rule, Business Loan Program Temporary Changes; Paycheck Protection Program*, 85 FR 20,811, 1114 (Apr. 15, 2020), <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>.

109. See, e.g., New York State Administrative Procedure Act, N.Y. A.P.A. §202(6)(a) (“Notwithstanding any other provision of law, if an agency finds that the immediate adoption of a rule is necessary for the preservation of the public health, safety or general welfare and that compliance with the requirements of subdivision one of this section would be contrary to the public interest, the agency may dispense with all or part of such requirements and adopt the rule on an emergency basis.”).

110. See *NRDC v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018) (“Notice and comment are not mere formalities. They are basic to our system of administrative law. They serve the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications and, in so doing, foster reasoned decision making. These premises apply with full force to this case. This is not a situation of acute health or safety risk requiring immediate administrative action. And it is not a situation in which surprise to the industry is required to preempt manipulative tactics.”); *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 755, 775-78 (9th Cir. 2018); *California v. Azar*, 911 F.3d 558, 575-81 (9th Cir. 2018); *Nat’l Venture Capital Ass’n v. Duke*,

Within the landscape of emergency powers, emergency rulemaking can operate with or without a formal presidential declaration.¹¹¹ A presidential declaration of a national emergency can lend support to the use of emergency rulemaking by an administrative agency. However, as discussed in Part I.B. below, recent court decisions have made clear that a presidential declaration alone will not insulate the agency from legal challenge.

While there has yet to be a federal emergency rulemaking action that targets the climate crisis in a formal way, some state governments have used emergency rulemaking to address emerging climate impacts, such as heat waves and forest-fire smoke, with express acknowledgment of the climate crisis. In the summer of 2019, the California Occupational Safety and Health Standards Board adopted an emergency rule aimed at protecting workers exposed to smoke from wildfires.¹¹² Similarly, in 2021, Oregon's Occupational Safety and Health Administration issued an emergency rule addressing workplace heat exposure.¹¹³ The state agency head noted: "In the face of an unprecedented heat wave in the Pacific Northwest—and tragic consequences—it is absolutely critical that we continue to build up our defenses against the effects of climate change, including extreme heat events."¹¹⁴ In both states, these rules were adopted with streamlined procedures during the emergency event, and were later replaced by permanent rulemakings that underwent the full notice and comment process.¹¹⁵

This type of emergency power, which authorizes an agency to waive standard notice and comment rulemaking procedures under special circumstances, was at issue when the coalition of Attorneys General petitioned OSHA to issue an emergency standard addressing occupational heat exposure. Had OSHA used its emergency rulemaking authority to address the record-breaking heatwave of 2023, it would have been a notable use of federal

291 F. Supp. 3d 5, 8 (D.D.C. 2017); *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 572 (E.D. Pa. 2017), *aff'd sub nom. Pennsylvania v. President, U.S.*, 930 F.3d 543, 567 (3d Cir. 2019), as amended (July 18, 2019), *cert. granted sub. nom. Trump v. Pennsylvania*, 140 S. Ct 918 (2020) (mem.); *see also* Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 39 (2019); Farber, *supra* note 33, at 1169.

111. For example, the OSH Act, which establishes the criteria under which OSHA may issue an Emergency Temporary Standard, does not require a presidential declaration of emergency. *See* 29 U.S.C. § 655(c)(1).

112. Mitch Steiger, *CA Passes Emergency Rule Protecting Workers Exposed to Smoke from Wildfires*, CAL. LAB. FED. (July 25, 2019), <https://calaborfed.org/ca-passes-emergency-rule-protecting-workers-exposed-to-smoke-from-wildfires>.

113. Adoption of Temporary Rules to Address Employee Exposure to High Ambient Temperatures, OR. ADMIN. R. 437-002-0156, 437-004-1131 (July 8, 2021).

114. Or. Occupational Safety and Health Admin., *Oregon OSHA adopts emergency rule bolstering protections for workers against the hazards of high and extreme heat* (last updated July 8, 2021), <https://osha.oregon.gov/news/2021/pages/nr2021-26.aspx>.

115. *See* CAL. CODE REGS. tit. 8, § 5141.1; OR. ADMIN. R. 437-002-0156 (2022).

emergency rulemaking power to address the rising surface temperatures associated with climate change, as described below in Part II.¹¹⁶

Overall, we are seeing advocates, lawyers, and policy makers pay increasing attention to how emergency powers granted under local, state, federal, and international law might be used to address the unfolding climate crisis. As of yet, we have seen relatively little direct exercise of emergency powers to address the climate crisis by federal agencies. In order to better understand what the future use of emergency powers by federal agencies might look like in the context of the climate crisis, we need to assess how the COVID-19 pandemic shaped public, governmental, and judicial perceptions of emergency power. This topic is addressed in the next Part.

B. *How the COVID-19 Pandemic Shaped Emergency Powers*

1. *Overview*

In very real and tangible ways, the pandemic has permanently shaped the public's view of governmental emergency powers. Notably, the pandemic did not lead to public consensus regarding what constitutes an emergency or what role the government should play in responding to one.¹¹⁷ As Corbett aptly notes, “[w]hat, after COVID-19, could be more contentious and contestable than ‘emergency’?”¹¹⁸ The dynamic display of emergency powers during the pandemic—and the polarized political responses to it¹¹⁹—added complexity to the existing discourse¹²⁰ surrounding the use of governmental emergency powers and the appropriate role of deliberative decision making by administrative

116. In an article written prior to *West Virginia v. EPA*, 597 U.S. 697 (2022), Mark Nevitt outlines how federal administrative agencies could use delegated emergency powers to address the climate crisis. Nevitt, *Delegating Climate Authorities*, *supra* note 33, at 807-813.

117. See Tyler, *supra* note 35, at 562 (“In the United States, the divide over COVID-19 policies largely tracked the surrounding political landscape. Further, it involved disagreements not just about the question whether COVID-19 presented a real emergency, but also a deep divide over even basic facts.”).

118. Corbett, *supra* note 33, at 203.

119. See generally Ben Penn, *OSHA Exposed to Culture Wars Backlash Through Vaccine Mandate*, BLOOMBERG L. (Sept. 21, 2021), <https://news.bloomberglaw.com/daily-labor-report/osha-exposed-to-culture-wars-backlash-through-vaccine-mandate>.

120. See, e.g., Farber, *supra* note 33, at 1145 (“Trump has greatly intensified the use of emergency powers and has openly used these measures to defy Congress and evade judicial review.”); CHRISTOPHER A. CASEY ET AL., THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 17 fig.1 (Cong. Rsch. Serv., Mar. 25, 2022) (noting that the number of declared national emergencies has risen steadily in the past twenty years); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 551 (2018) (“In general, this study finds in both [Democratic and Republican] administrations bold attempts to accrete executive power; presidential administration insinuating itself more and more into areas where proponents of presidentialism have cautioned against aggressive use of presidential directive authority; and the rise of organizational techniques, like policy czars and ‘shadow cabinets,’ that institutionalize presidential control in the absence of specific presidential directions.”).

agencies.¹²¹ The lessons learned from the pandemic about the use of emergency powers are still unfolding, but a few key trends are visible.

First, the COVID-19 pandemic gave rise to new uses of emergency powers by governments at all levels, although there were robust debates about the over- or under- use of these powers.¹²² President Trump and President Biden both invoked the Defense Production Act of 1950 in novel ways outside of a wartime context,¹²³ for example, to increase production of N-95 masks,¹²⁴ force meatpacking plants to remain open,¹²⁵ and accelerate vaccination and testing efforts.¹²⁶ President Trump relied on the COVID-19 emergency to issue a host of sweeping emergency executive orders on topics ranging from immigration¹²⁷ to economic recovery.¹²⁸ At the state level, governors used emergency powers

121. For example, scholars have long debated the role of Presidential power in establishing policy through administrative rulemaking, raising considerations such as governmental efficacy, democratic legitimacy, and separation of powers. These questions become particularly critical in the context of a national emergency when executive power is heightened. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 684-88 (2016); Sidney A. Shapiro & Richard Murphy, *Constraining White House Political Control of Agency Rulemaking Through the Duty of Reasoned Explanation*, 48 U.C. DAVIS L. REV. 1457, 1459-65 (2015); Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 19 FORDHAM L. REV. 2487, 2487-88 (2011); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 264-70 (2006); ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: BEYOND THE MADISONIAN REPUBLIC* 14 (2010), <https://doi.org/10.1093/acprof:osobl/9780199765331.001.0001>.

122. *See, e.g.*, Tyler, *supra* note 35, at 525 (analyzing COVID-19 emergency case law and situating it within a historical account of judicial review of governmental emergency actions); Mok & Posner, *supra* note 35, at 1733-35 (examining federal judicial cases involving nonreligious civil-liberties challenges to COVID-19-related public health orders from the start of the pandemic in early 2020 to January 27, 2022); Nevitt, *Climate Security Insights*, *supra* note 33, at 848-51 (noting the failure of international and national governing entities to address the global security and human health risks associated with the COVID-19 pandemic); *see generally* Ni Aolain, *supra* note 35 (a global review of the use of emergency powers to address the pandemic, including international, national, and sub-national assertion of emergency powers); Farber, *supra* note 33, at 1147-69 (describing use of emergency powers by President Trump during the COVID-19 pandemic); Weiss, *supra* note 35 (a comprehensive analysis of emergency powers used by state governors across the country during the COVID-19 pandemic and the litigation and legislative challenges to such exercise of state emergency powers); Lindsay K. Cloud et al., *A Chronological Overview of the Federal, State, and Local Response to COVID-19*, in *ASSESSING LEGAL RESPONSES TO COVID-19* 12 (2020), <https://perma.cc/GQ6E-BM7G>.

123. The Defense Production Act of 1950, as amended, confers upon the president a broad set of authorities to influence domestic industry in the interest of national defense. *See* P.L. 81-774, 50 U.S.C. §§ 4502(a)(4), 4517(a). The authorities can be used across the federal government to shape the domestic industrial base so that, when called upon, it is capable of providing essential materials and goods needed for the national defense. *See, e.g.*, Cong. Rsch. Serv., *The Defense Production Act of 1950: History, Authorities, and Considerations for Congress* (last updated Mar. 2, 2020), <https://sgp.fas.org/crs/natsec/R43767.pdf>.

124. Exec. Order 13,911, 85 Fed. Reg. 18,403 (Mar. 27, 2020).

125. Exec. Order 13,917, 85 Fed. Reg. 26,313 (Apr. 28, 2020).

126. Exec. Order 13,987, 86 Fed. Reg. 7019 (Jan. 20, 2021).

127. *See* Proclamation No. 9,996, 85 Fed. Reg. 15,341 (Mar. 14, 2020).

128. *See* Exec. Order 13,924, 85 Fed. Reg. 31,353 (May 19, 2020).

in dramatic ways,¹²⁹ such as shuttering businesses that were not deemed “essential”¹³⁰ and shifting schools to remote instruction.¹³¹

At the same time, many have criticized national and international governing bodies for not utilizing emergency powers swiftly or effectively enough, and for failing to provide a coordinated response to the pandemic.¹³² As a result, the burdens of emergency policy making to protect public health were largely shouldered by over-strapped state and local governments, who were confronted with an unprecedented series of challenges ranging from minimizing spread of the disease in schools, hospitals, and congregate housing, to tracking case counts and administering vaccines to local populations.¹³³

Second, human rights advocates and scholars have raised cautions and concerns about the use of emergency powers during this period with regard to implications for democratic governance.¹³⁴ Some have observed that the use of emergency powers to address a public health emergency led to opportunities for unwarranted state aggression.¹³⁵ Because emergency powers have generally

129. Samuel Wonacott, *All 50 States Have Active Declared Emergencies Related to the Coronavirus Pandemic*, BALLOTPEDIA NEWS (July 29, 2020), <https://news.ballotpedia.org/2020/07/29/all-50-states-have-active-declared-emergencies-related-to-the-coronavirus-pandemic/>; see generally Kelly J. Deere, *Governing by Executive Order During the Covid-19 Pandemic: Preliminary Observations Concerning the Proper Balance Between Executive Orders and More Formal Rule Making*, 86 MO. L. REV. 721 (2021) (summarizing state COVID-19 emergency actions).

130. See, e.g., Press Release, N.Y. State Off. of the Governor, Governor Cuomo Signs the ‘New York State on PAUSE’ Executive Order, (Mar. 20, 2020), <https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order>.

131. See, e.g., Mass. Executive Order, COVID-19 Order No. 28, *Order Extending the Temporary Closure of All Public and Private Elementary and Secondary Schools* (Apr. 21, 2020), [https://www.mass.gov/doc/april-21-2020-school-closure-extension-order/download#:~:text=Order%20the%20following%3A-,All%20public%20and%20private%20elementary%20and%20secondary%20\(K%2D12\),prior%20to%20June%2029%2C%202020](https://www.mass.gov/doc/april-21-2020-school-closure-extension-order/download#:~:text=Order%20the%20following%3A-,All%20public%20and%20private%20elementary%20and%20secondary%20(K%2D12),prior%20to%20June%2029%2C%202020).

132. See e.g., Nevitt, *Climate Security Insights*, *supra* note 33, at 850-51; Farber, *supra* note 33, at 1146-47 (“A President’s failure to make full use of these powers, when circumstances call for more aggressive action, may also reflect similar problems: a closed decision-making process in which expert analysis is undervalued, and in which Congress is sidelined. Presidential leadership is undoubtedly crucial in responding to emergencies, but relying so heavily on any single individual’s unguided discretion carries both the risk of overreliance on emergency powers and the risk of under-reliance on them when they are really needed.”); Brendan Williams, *COVID-19, Constitutional Law, and Catastrophe*, 20 U. N.H. L. REV. 153, 192-93 (2021) (contending that the “United States was confronted with an unprecedented challenge, and our system of government utterly failed to meet it”); Elizabeth Goitein, *Emergency Powers, Real and Imagined: How President Trump Used and Failed to Use Presidential Authority in the COVID-19 Crisis*, 11 J. NAT’L SEC. L. & POL’Y 27, 28 (2020) (“[W]hen it comes to deploying emergency powers that would assist in disease mitigation, however, President Trump has been restrained to a fault.”).

133. See, e.g., Weiss, *supra* note 35, at 1866-76; Richard R. Carlson, *OSHA and Public Health in an Emergency and a Culture War*, 87 MO. L. REV. 1001, 1012 (2022) (observing that “[a]side from federal transportation rules, the most important legally binding COVID-19 regulations were by state and local governments”); see generally Farber, *supra* note 33.

134. See, e.g., Weiss, *supra* note 35, at 1883 (summarizing critiques of use of emergency power during the COVID-19 pandemic and summarizing: “ensuring compliance with mitigation recommendations over a long duration requires a solution that balances technocratic, responsive agility with democratic legitimacy. This is particularly the case for emergencies where costs and tradeoffs of certain solutions vary greatly among the population.”); see generally Ni Aolain, *supra* note 35; Nevitt, *National Emergency?*, *supra* note 33; see also Richardson & Devine, *supra* note 35, at 124.

135. See Ni Aolain, *supra* note 35, at 63.

been reserved for war, insurgency, and terrorism, they have the potential to bring the apparatus for state violence.¹³⁶ Emergency powers also tend to limit transparency, accountability, and participation in the political process.¹³⁷ As a result, some have argued that marginalized peoples, such as people of color, indigenous peoples, women, immigrants, religious and language minorities, LGBTQ communities, people with disabilities, and low-income people, were at heightened risk of abuse during the COVID-19 pandemic.¹³⁸

In many ways, the COVID-19 pandemic cast light on a longstanding principle of human rights advocacy that measures taken in response to any emergency must be proportionate.¹³⁹ In this regard, the pandemic created complex and significant concerns for Black and Brown communities and other populations that have been historically excluded from governmental decision making, particularly during prior emergency responses.¹⁴⁰ People of color experienced disproportionate harms from the pandemic based on health¹⁴¹ and economic metrics¹⁴² and were in need of governmental aid. Yet at the same time, they were particularly vulnerable to historical and, in many cases, ongoing abuses of power by officials from the same state and local governments who were charged with responding to the emergency.¹⁴³

136. *Id.*

137. Robbins, *supra* note 35, at 1 (“[W]hile some governmental bodies were able to keep up with the threat that COVID-19 posed against transparency, others either failed to acclimate to the new normal or actively took advantage of the circumstances to limit how much the public knew not only about the crisis, but about other public matters as well.”).

138. *See id.* at 19-27; Stein, *supra* note 35, at 483-84 (“Unfortunately, emergencies also create opportunities for malfeasance. Emergencies can cast shadows around legal principles such as rule of law, accountability, due process, and public participation. As many other scholars have lamented, those imbued with these special emergency powers often find themselves with unique opportunities to act without traditional oversight, procedural constraints, or a termination point.”).

139. *See* United Nations Comm’n on Human Rts., *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 1 10(d), U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984).

140. *See generally* Tobias M. Holden et al., *Structural racism and COVID-19 response: higher risk of exposure drives disparate COVID-19 deaths among Black and Hispanic/Latinx residents of Illinois, USA*, 22 BMC PUBLIC HEALTH 312 (2022); ROBERT D. BULLARD and BEVERLY WRIGHT, *THE WRONG COMPLEXION FOR PROTECTION: HOW THE GOVERNMENT RESPONSE TO DISASTER ENDANGERS AFRICAN AMERICAN COMMUNITIES* (NYU Press, 2012) (providing a historical account of disparate impacts felt by Black Americans during natural and non-natural emergencies and government response to them).

141. *Risk for COVID-19 Infection, Hospitalization, and Death By Race/Ethnicity*, CENTER FOR DISEASE CONTROL AND PREVENTION (last updated May 23, 2023), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html>; Brett Milano, *With COVID spread, ‘racism — not race — is the risk factor*, HARV. GAZETTE (Apr. 22, 2021), <https://news.harvard.edu/gazette/story/2021/04/with-covid-spread-racism-not-race-is-the-risk-factor/>.

142. U.S. DEP’T OF HEALTH AND HUMAN SERVS., *THE IMPACT OF THE FIRST YEAR OF THE COVID-19 PANDEMIC AND RECESSION ON FAMILIES WITH LOW INCOMES* 8 (Sept. 2021), <https://aspe.hhs.gov/sites/default/files/2021-09/low-income-covid-19-impacts.pdf> (finding that “people of color, young adults, women, parents of young children, and low-income workers have been disproportionately harmed by the economic effects of the COVID-19 pandemic”).

143. *See, e.g.*, Clifford Villa, *Remaking Environmental Justice*, 66 LOY. L. REV. 469, 505 (2020); Rashid Shabazz, *We Can’t Breathe: COVID-19 and Police Injustice Are Suffocating Black People*, THE ROOT (May 29), 2020, <https://www.theroot.com/we-can-t-breathe-covid-19-and-police-injustice-are-suf->

Finally, elected officials tasked with addressing the pandemic were “grappling with the tension between the agility of technocratic, centralized emergency governance and democratic legitimacy.”¹⁴⁴ It has been widely observed that overall trust in government was damaged in deep and far-reaching ways during the pandemic.¹⁴⁵ As a result, the use of emergency powers during the pandemic triggered new separation of powers debates at the state and federal levels and a flurry of litigation.¹⁴⁶

2. *Judicial Scrutiny of Federal Emergency Action During the COVID-19 Pandemic*

The resulting COVID-19 case law altered the emergency powers landscape in important ways. For example, Tyler notes that in many ways, the COVID-19 emergency represented a departure from the long-standing tradition of judicial deference to governmental actors in times of emergency.¹⁴⁷ In particular, the COVID-19 pandemic was a period in which the Court had an opportunity to apply preferred administrative law approaches, such as the major questions doctrine, as a means of constraining agency action in an emergency context. At the same time, the Court’s rulings do preserve some authority for federal agencies to conduct emergency rulemaking and take other emergency actions. For purposes of this discussion, three key Supreme Court cases form a constellation that can help illuminate how emergency actions by administrative agencies might be viewed by courts in the wake of the COVID-19 pandemic. In each case, the Court considered the scope and scale of the emergency action and scrutinized whether the emergency action was aligned with agency’s traditional exercise of authority.¹⁴⁸

1843735262; Sheryl Gay Stolberg, ‘Pandemic Within a Pandemic’: Coronavirus and Police Brutality Roil Black Communities, N.Y. TIMES (last updated July 27, 2021), <https://www.nytimes.com/2020/06/07/us/politics/blacks-coronavirus-police-brutality.html>.

144. Weiss, *supra* note 35, at 1869.

145. See *id.* (arguing, based on the COVID-19 controversy, that reposing emergency power for a chronic, long-duration emergency solely in the hands of a governor raises an issue democratic illegitimacy, which risks curtailing citizen obedience to public health regulations and invites legislative pushback on emergency powers generally); Frank Newport, *COVID and Americans’ Trust in Government*, GALLUP (Feb. 11, 2022), <https://news.gallup.com/opinion/polling-matters/389723/covid-americans-trust-government.aspx>.

146. For a summary of federal COVID-19 litigation, see, e.g., Mok & Posner, *supra* note 35, at 1733-35 (examining federal judicial cases involving nonreligious civil-liberties challenges to COVID-19-related public health orders from the start of the pandemic in early 2020 to January 27, 2022). For a summary of state COVID-19 litigation, see generally, e.g., Weiss, *supra* note 35. The University of Trento operates an open access database of COVID-19 litigation globally. See *COVID-19 Litigation: Open Access Case Law Database*, Univ. of Toronto (last visited Mar. 22, 2024), <https://www.covid19litigation.org/>.

147. Tyler, *supra* note 35, at 525.

148. See Richard L. Revesz & Max Sarinsky, *Regulatory Antecedents and the Major Questions Doctrine* *4 (Geo. Env’t L. Rev., Working Paper No. 23-25, 2022) (noting that federal courts have increasingly assessed the legality of regulatory action by considering its antecedents, or lack thereof, in prior agency actions).

a. *NFIB v. OSHA*

In *NFIB v. OSHA*, a 2022 per curiam decision, the Supreme Court stayed an OSHA Emergency Temporary Standard,¹⁴⁹ which would have required certain private employers to either mandate that all employees obtain COVID-19 vaccinations or adopt a COVID-19 masking and testing regime for unvaccinated employees.¹⁵⁰ The Court based its decision on the grounds that the emergency rule was effectively a “public health” measure, rather than an occupational health measure, and therefore outside the scope of OSHA’s statutory authority.¹⁵¹ The Court stated that “[p]ermitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA’s regulatory authority without clear congressional authorization.”¹⁵² In a separate concurrence, Justice Gorsuch, joined by Justices Thomas and Alito, invoked the major questions doctrine in support of the Court’s decision.¹⁵³

The Court’s decision to stay OSHA’s emergency rule—notwithstanding a presidential declaration of a national emergency and a large-scale emergency mobilization response to rising COVID-19 death counts—was a striking illustration of the Court’s willingness to cabin the agency’s emergency rulemaking powers. The Court acknowledged OSHA’s response that the emergency rule would save over 6,500 lives and prevent hundreds of thousands of hospitalizations, but stated that it was not the Court’s role to weigh such life-saving benefits against the economic costs of the rule.¹⁵⁴ However, the Court did signal that a narrower rule more rooted in the agency’s historical exercise of authority might withstand judicial scrutiny, noting that “[w]here the virus poses a special danger because of the particular features of an employee’s job or workplace, targeted regulations are plainly permissible.”¹⁵⁵

The majority’s disregard for the gravity of the COVID-19 emergency faced sharp rebuke from the dissenters, led by Justice Breyer. The dissenters viewed the majority’s failure to defer to the agency’s assessment of its own life-saving mandate in favor of a constricted reading of OSHA’s emergency authority and as a form of judicial hubris:

[The majority opinion] stymies the Federal Government’s ability to counter the unparalleled threat that COVID-19 poses to our Nation’s workers. Acting outside of its competence and without legal basis, the Court displaces the judgments of the Government officials given the responsibility to respond to workplace health emergencies. . . . It is perverse, given these circumstances, to read the Act’s grant of emergency powers in the way the majority does—

149. Nat’l Fed’n of Indep. Bus. v. OSHA, 595 U.S. 109, 120-21 (2022) [hereinafter *NFIB v. OSHA*].

150. 86 Fed. Reg. 61402 (2021).

151. *NFIB*, 595 U.S. at 117-18.

152. *Id.* at 118.

153. *Id.* at 121-26 (Gorsuch, J., concurring).

154. *Id.* at 119-20; *but see* Vladeck, *supra* note 36, at 1790 (arguing that weighing such equities is precisely what courts are called to do when reviewing emergency stay applications).

155. *NFIB*, 595 U.S. at 119.

as constraining OSHA from addressing one of the gravest workplace hazards in the agency's history. The Standard protects untold numbers of employees from a danger especially prevalent in workplace conditions. It lies at the core of OSHA's authority. It is part of what the agency was built for.¹⁵⁶

This fierce disagreement within the Court about how to read legislative delegations of authority in the context of an unprecedented emergency, and the implications for the Court's legitimacy, continued throughout the pandemic, as we will see in *Biden v. Nebraska*.

b. *Biden v. Missouri*

In *Biden v. Missouri*, issued on the same day as *NFIB v. OSHA*, the Supreme Court upheld a Health and Human Services (HHS) rule that imposed a COVID-19 vaccination requirement on the staff of Medicaid and Medicare facilities, subject to medical and religious exemptions.¹⁵⁷ The rule was issued pursuant to the abbreviated "good cause" emergency rulemaking procedures authorized under the Administrative Procedure Act.¹⁵⁸ The Court held that the mandate fell within the agency's authority to impose conditions on the receipt of federal Medicare and Medicaid funds.¹⁵⁹ The case is an interesting pairing with *NFIB v. OSHA*, in which the Court took issue with OSHA's rule for being in the "public health" bucket, rather than the "occupational health" bucket. Here, by contrast, HHS was a public health agency tasked with preventing disease control within healthcare facilities. The notion of regulatory history featured prominently.¹⁶⁰ The Court made a point of cataloging prior HHS rules of a similar nature and scope, noting the significance of prior agency regulatory precedent when exercising emergency regulatory power: "The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it. At the same time, such unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have."¹⁶¹

In this case, the Court appeared more willing to allow the facts of the underlying COVID-19 emergency to inform its analysis. This stands in contrast to *NFIB v. OSHA*, where the agency's interest in reducing COVID-19 hospitalizations and deaths was deemed subordinate to the Court's threshold objection to the agency's jurisdictional overreach. Here, having found that HHS had authority to issue the rule, the Court deferred to the Secretary's judgment regarding the need to shortcut standard rulemaking processes in order to get the rule out in time for the winter flu season and prevent further COVID-19

156. *Id.* at 127-36 (Breyer, J., dissenting).

157. *Biden v. Missouri*, 595 U.S. 87, 96-98 (2022).

158. 86 Fed. Reg. 61555 (to be codified at 42 C.F.R. pts. 416, 418, 441, 460, 482, 483, 484, 485, 486, 491) (2021); *see* 5 U.S.C. § 553(b)(B).

159. *Biden v. Missouri*, 595 U.S. at 92-94.

160. *See id.* at 94-95.

161. *Id.* at 97.

infections, hospitalizations, and deaths.¹⁶² This suggests that there is still room for federal agencies to exercise emergency rulemaking powers if they are otherwise able to establish to the Court's satisfaction that they are acting within their statutory authority.

c. *Biden v. Nebraska*

The following year, in *Biden v. Nebraska*, the Supreme Court struck down a Department of Education (DOE) plan to relieve student debt, holding that the plan exceeded the Secretary of Education's statutory authority under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act).¹⁶³ Under the operable statute, the Secretary of Education "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs . . . as the Secretary deems necessary in connection with a war or other military operation or national emergency."¹⁶⁴ Citing the COVID-19 emergency, the DOE plan would have canceled roughly \$430 billion of federal student loan balances.¹⁶⁵

The majority opinion based its decision on two grounds. First, the Court found that while the HEROES Act authorized the Secretary to "waive or modify" existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, it did not authorize the Secretary to "rewrite that statute from the ground up."¹⁶⁶ The Court relied on tools of statutory interpretation, including citations to Black's Law Dictionary, to conclude that the plan did not fall within the plain meaning of "waive or modify."¹⁶⁷ Second, the Court invoked the major questions doctrine to invalidate the student loan forgiveness plan.¹⁶⁸ On this point, the Court noted that the "Secretary has never previously claimed powers of this magnitude under the HEROES Act" and that the "'economic and political significance' of the Secretary's action is staggering by any measure," citing *West Virginia v. EPA*.¹⁶⁹

This case forms a third constellation point in the Court's rulings on federal agency emergency actions during the COVID-19 pandemic. Here, as in *NFIB v. OSHA* and *Biden v. Missouri*, the Court emphasized consistency and conformity with prior agency precedent, even in the case of an unprecedented emergency. In a dissenting opinion, Justice Kagan raised a strong objection to this approach, grounded in her assessment of Congress' clear legislative intent to authorize broad action encompassing the DOE rule and the inherently unpredictable nature

162. *See id.* at 96-97.

163. *Biden v. Nebraska*, 600 U.S. ___, 143 S. Ct. 2355, 2368 (2023). Note that this decision was issued in June 2023, two months after OSHA denied the State Attorneys General's petition for an Emergency Temporary Standard on occupational heat exposure. *See OSHA denial, supra* note 16.

164. 20 U.S.C. §1098bb(a)(1).

165. *Biden v. Nebraska*, 143 S. Ct. at 2362.

166. *Id.* at 2368.

167. *Id.* at 2392.

168. *Id.* at 2372-73.

169. *Id.*

of emergencies. She noted that “past actions [by DOE under the HEROES Act] were more modest because the precipitating emergencies were more modest . . . In providing more significant relief for a more significant emergency—or call it unprecedented relief for an unprecedented emergency—the Secretary did what the HEROES Act contemplates.”¹⁷⁰

Collectively, these three cases illustrate the uncertainty that federal administrative agencies will face when seeking to rely on emergency powers in the future. The effects of this judicial uncertainty played out prominently in the OSHA case study described in Part II. The Court’s tendency toward a narrow reading of statutory authority, even in the face of unprecedented emergency conditions, necessitates advance planning by federal administrative agencies who may be called upon to take emergency interventions to address the climate crisis. Recommendations for such planning are addressed in Part III. Lastly, the trajectory of Supreme Court case law during the COVID-19 pandemic also gave rise to a growing rift within the Court surrounding the Court’s own institutional legitimacy. The dissenters in both *NFIB v. OSHA* and *Biden v. Nebraska* emphasized the contrast between the political accountability of federal administrative agencies, who answer to the politically elected executive, and the lack of apparent accountability of the judiciary.¹⁷¹ This concern regarding democratic legitimacy, vocalized within the Court itself, will be increasingly salient in the coming decades as governments are called upon to address the climate crisis through the use of emergency powers—a type of governance that is inherently fraught with questions surrounding democratic accountability.

C. *Emerging Literature Applying Lessons Learned from the COVID-19 Pandemic to the Climate Emergency*

The COVID-19 pandemic has added context, and at times, ammunition to advocacy efforts urging governments to use their emergency powers to address the climate crisis.¹⁷² As the climate crisis accelerates, leveraging lessons learned

170. *Id.* at 2399 (Kagan, J., dissenting).

171. *See, e.g., NFIB v. OSHA*, 595 U.S. 109, 127 (2022) (Breyer, J., dissenting) (“[W]ithout legal basis, the Court usurps a decision that rightfully belongs to others. It undercuts the capacity of the responsible federal officials, acting well within the scope of their authority, to protect American workers from grave danger.”); *Biden v. Nebraska*, 143 S. Ct. at 2399-2400 (Kagan, J., dissenting):

Wielding its judicially manufactured heightened-specificity requirement, the Court refuses to acknowledge the plain words of the HEROES Act. It declines to respect Congress’s decision to give broad emergency powers to the Secretary. It strikes down his lawful use of that authority to provide student-loan assistance. It does not let the political system, with its mechanisms of accountability, operate as normal. It makes itself the decisionmaker on, of all things, federal student-loan policy. And then, perchance, it wonders why it has only compounded the ‘sharp debates’ in the country?

172. *See Nevitt, supra* note 33, *Climate Security Insights*, at 838-39 (“The COVID-19 response also represented the first time that a ‘major disaster’ was declared under the Stafford Act to address a pandemic and the first time in U.S. history that a major disaster was declared in every single state. With the COVID-19 pandemic now meeting the ‘major disaster’ definition, the door has swung open for the Stafford Act to address a wide swath of climate-related disasters [e.g., floods, wildfires, and hurricanes].”).

from the pandemic will be essential for governments considering the use of emergency powers to avoid repeating past mistakes and to ensure legitimacy, efficacy, and fairness going forward. There is an exciting and emerging body of literature that can help with this process.¹⁷³

For example, Nevitt argues that the pandemic emergency response provides “an extraordinary opportunity to gain powerful, actionable insights to help address the climate crisis,” noting that as we are “still on the heels of a pandemic, the window to take transformational climate action and reduce emissions is shrinking.”¹⁷⁴ Nevitt approaches the topic from the standpoint of national security, describing the international COVID-19 response as a cautionary tale that can help probe the question of whether national and international security laws and policies are set up in a manner to address nontraditional threats such as climate change.¹⁷⁵ Farber takes a domestic focus and explores the use of emergency presidential power during the COVID-19 emergency as a means of understanding how future Presidents might invoke emergency powers to address the climate emergency.¹⁷⁶ Looking to the example of the COVID-19 emergency response, he examines how “[t]he discretion inherent in emergency powers may sometimes prevent necessary government interventions when taking them would be politically unpalatable to the President,” and argues that “vesting unlimited discretion in the President comes with both serious risks and benefits.”¹⁷⁷

Within the realm of administrative agency actions, some commenters have expressed concerns about how the EPA weakened certain environmental protections during the COVID-19 emergency through the use of blanket enforcement waivers of environmental regulations. Flatt and Stein note that in addition to increasing pollution and associated health risks, this type of practice carries the added harm of signaling that environmental protection is not a “critical function” during an emergency.¹⁷⁸ Flatt notes that this trend has also played out in emergency responses to emerging climate impacts, such as forest fires and floods.¹⁷⁹ He argues for pre-planning by key agencies, such as the EPA, in anticipation of future emergencies as the climate crisis accelerates.¹⁸⁰

Other scholars offer recommendations to address democratic legitimacy concerns that sprung from the use of emergency powers during the COVID-19 pandemic that can be applied to the climate crisis. For example, scholars from the London School of Economics have found that the economic costs of governmental “lockdowns” during the early pandemic eroded governmental trust

173. See Introduction, *supra* note 39.

174. Nevitt, *Climate Security Insights*, *supra* note 33, at 820.

175. *Id.* at 820-21.

176. See generally Farber, *supra* note 33.

177. *Id.* at 1175.

178. Flatt, *supra* note 39, at 2-3; Stein, *supra* note 35, at 501-502 (framing emergency waivers of environmental protections during the COVID-19 within an argument about the potential for abuse in emergency policy making).

179. Flatt, *supra* note 39, at 5.

180. *Id.* at 16.

over time and were disproportionately felt by vulnerable populations.¹⁸¹ To address such challenges in the climate emergency context, they advocate for citizens' climate assemblies to help shape a more equitable transition to sustainable policies going forward.¹⁸² Gable and Sherwin emphasize the importance of working against misinformation and the erosion of trust in scientists and other experts, as a cautionary lesson from the COVID-19 pandemic that will be critical for addressing the climate crisis.¹⁸³

This Article seeks to build on this promising body of literature by discussing a real-world example—OSHA's consideration of an emergency occupational heat rule—that can offer new perspectives on the use of climate emergency powers by federal administrative agencies in the wake of the pandemic. The next Part describes this case study.

II. CASE STUDY: OSHA'S CONSIDERATION OF AN EMERGENCY HEAT RULE

OSHA's recent consideration of an emergency rule addressing occupational heat exposure raises important questions about what constitutes an "emergency" in the context of the climate crisis, and how administrative agencies determine when emergency intervention is needed. In this case, OSHA chose not to use its emergency rulemaking powers that were designed to protect employees from "grave danger[s]" in the workplace to set a standard for workplace exposure to extreme heat.¹⁸⁴ The decision is particularly notable, given the extreme heat waves that impacted workers in the summer of 2023, resulting in worker illnesses and deaths.¹⁸⁵ This case study offers important insights for administrative agencies considering the use of emergency powers to address the climate crisis in the future, which are discussed later in Part III.

Part II is organized as follows: Part II.A discusses the data supporting an emergency intervention for occupational heat exposure, including the socioeconomic factors that make heat more dangerous for many essential workers. Part II.B discusses the procedural history surrounding OSHA's most recent decision to deny a petition for an emergency occupational heat standard, including factors that affected OSHA's decision.

181. See generally Candice Howarth et al., *Building a Social Mandate for Climate Action: Lessons from COVID-19*, 76 ENV'T AND RES. ECON. 1107, 1110 (2020).

182. *Id.* at 1110.

183. Gable, *supra* note 30, at 22-23; see generally Brie Sherwin, *Anatomy of a Conspiracy Theory: Law, Politics, and Science Denialism in the Era of COVID-19*, 8 TEX. A&M L. REV. 537 (2021).

184. 29 U.S.C. § 655(c)(1).

185. See generally, e.g., Nevitt, *Delegating Climate Authorities*, *supra* note 33.

A. *The Case for Emergency Intervention to Address Occupational Heat Exposure*

1. *Why Hazardous Heat is Deadly for Workers*

It is well established that extreme heat is damaging to the human body if left unabated.¹⁸⁶ Extreme heat exposure can cause heat rashes, fainting, heat cramps, heat exhaustion, rhabdomyolysis (a complex medical condition involving muscle breakdown), kidney injury, heat stroke, and death.¹⁸⁷ Exposure to hazardous heat can also worsen preexisting medical conditions, such as diabetes and cardiovascular disease.¹⁸⁸ Hospitalization for heat-related illness is associated with organ damage that can persist for years afterward.¹⁸⁹ Recurrent exposure to extreme heat and dehydration has been linked with acute and chronic kidney disease and injury in agricultural workers and others performing manual labor in outdoor work settings.¹⁹⁰ Extreme heat also worsens air quality, especially in urban areas and environmental justice communities that are already overburdened by air pollution.¹⁹¹

According to the Bureau of Labor Statistics Census of Fatal Occupational Injuries, exposure to excessive environmental heat stress has killed 907 U.S. workers from 1992–2019.¹⁹² It is commonly understood that this is a vast

186. See generally Heat Stress—Heat Related Illness, NIOSH, <https://www.cdc.gov/niosh/topics/heatstress/heatrelillness.html>; Climate Change Indicators: Heat-Related Illnesses, EPA, <https://www.epa.gov/climate-indicators/heat-related-illnesses>; PICTURE OF AMERICA REPORT: HEAT-RELATED ILLNESS, CTNS. FOR DISEASE CONTROL & PREVENTION 1 (2017).

187. See generally Ebi et al., *Hot Weather and Heat Extremes: Health Risks*, 398 THE LANCET 698 (2021); JACKLITSCH ET AL., *supra* note 7.

188. See generally JACKLITSCH ET AL., *supra* note 7; PICTURE OF AMERICA REPORT: HEAT-RELATED ILLNESS, *supra* note 186; *Extreme heat projected to increase cardiovascular deaths: NIH-funded study predicts older and Black adults will suffer most*, NAT'L INST. HEALTH (Oct. 30, 2023), <https://www.nih.gov/news-events/news-releases/extreme-heat-projected-increase-cardiovascular-deaths>; Glen P. Kenny et al., *Body temperature regulation in diabetes*, 3 TEMPERATURE 119 (2016).

189. See generally Robert F. Wallace et al., *Prior heat illness hospitalization and risk of early death*, 104 ENV'T RES. 290 (2007).

190. See generally Jason Glaser et al., *Climate Change and the Emergent Epidemic of CKD from Heat Stress in Rural Communities: The Case for Heat Stress Nephropathy*, 11 CLINICAL J. AM. SOC'Y NEPHROLOGY 1472 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4974898/?report=printable>; Richard J. Johnson et al., *Chronic Kidney Disease of Unknown Cause in Agricultural Communities*, 380 NEW ENG. J. MED. 1843 (2019); Cecilia Sorensen & Ramon Garcia-Trabanino, *Perspective essay: A New Era of Climate Medicine—Addressing Heat-Triggered Renal Disease*, 381 NEW ENG. J. OF MED. 693 (2019).

191. See generally, e.g., Renee N. Salas, *Environmental Racism and Climate Change—Missed Diagnoses*, 385 NEW ENG. J. MED. 967 (2021); Karishma S. Becha, *The Impact of Extreme Heat on Environmental Justice Communities in California: Assessing Equity in Climate Action Plans* (Spring 2020) (M.S. thesis, University of San Francisco) (on file with the University of San Francisco Digital Repository at Gleeson Library, Geschke Center) <https://repository.usfca.edu/cgi/viewcontent.cgi?article=2199&context=capstone>.

192. *Occupational Injuries and Illnesses and Fatal Injuries Profiles*, BUREAU OF LAB. STAT., <https://data.bls.gov/gqt/InitialPage> (last visited Mar. 16, 2024); see also Juley Fulcher, *Boiling Point: OSHA Must Act Immediately to Protect Workers From Deadly Temperatures*, PUB. CITIZEN (June 28, 2022), <https://perma.cc/9JPN-7QB5>; Ariel Wittenberg, *OSHA targets heat threats heightened by climate change*, GREENWIRE (Oct. 26, 2021), <https://perma.cc/4CDY-R26H>.

underestimate, given that these types of injuries and illnesses are underreported in the United States.¹⁹³ OSHA notes that there are several reasons why occupational heat injuries and illnesses go unreported.

First, “heat is not always recognized as a contributing factor” by employers or medical providers.¹⁹⁴ For example, hazardous heat can impair complex cognitive functions, which can result in workplace accidents and injuries that may be missed in assessments.¹⁹⁵ In other cases, “health conditions associated with occupational heat exposure may take many years to manifest” and as a result, may not be captured in heat illness statistics.¹⁹⁶ Another major driver of underreporting is employee fear of retaliation. This is more likely to arise among “undocumented, migrant, low-wage, or other vulnerable workers that make up sectors that are at high risk of hazardous heat exposure such as agriculture and construction.”¹⁹⁷ For such workers, fear of job loss, threat of deportation, or lack of knowledge of the statutory right to protection from employer retaliation results in significant underreporting.¹⁹⁸

More research is needed to close this data gap and better understand the full extent of heat-related illnesses and deaths in the workplace. The next Part will explore how consideration of the lived experiences of at-risk workers can help fill out the picture of who is more likely to be harmed from extreme workplace heat, and why.

2. *Disparate Impacts of Hazardous Heat on Vulnerable Populations*

Understanding the lived experiences of workers most harmed by heat exposure is essential to assessing whether emergency intervention is needed. This Part describes some of the factors that make occupational heat exposure more dangerous for workers in several critical industries, including agricultural workers, construction workers, warehouse and delivery workers, and food

193. See OSHA ANPRM, *supra* note 12, at 59,310-11 (citing *Climate Change Indicators: Heat-Related Deaths*, EPA (Apr. 2021), <https://www.epa.gov/climate-indicators/climate-change-indicators-heat-related-deaths>).

194. *Id.* at 59,310 (citing Diane M. Gubernot et al., *The Epidemiology of Occupational Heat-Related Morbidity and Mortality in the United States: A Review of the Literature and Assessment of Research Needs in a Changing Climate*, 58 INT’L J. BIOMETEOROLOGY 1779 (2014)).

195. *Id.* at 59,311 (citing Kristie L. Ebi et al., *Hot weather and heat extremes: health risks*, 398 THE LANCET 698 (2021); Jisung R. Park et al., *Temperature, Workplace Safety, and Labor Market Inequality*, IZA INST. LAB. ECON., DISCUSSION PAPER SERIES, July 2021, 1560 <http://ftp.iza.org/dp14560.pdf>).

196. *Id.* at 59,311 (citing Diane M. Gubernot et al., *The Epidemiology of Occupational Heat-Related Morbidity and Mortality in the United States: A Review of the Literature and Assessment of Research Needs in a Changing Climate*, 58 INT’L J. BIOMETEOROLOGY 1779 (2014)).

197. *Id.* at 59,311.

198. See *id.*; see also *Comments from Farmworker Justice Regarding Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings*, OSHA, Docket No. OSHA-2021-0009 at 3 (Jan. 26, 2022), <https://www.regulations.gov/comment/OSHA-2021-0009-0640> [hereinafter *Farmworker Justice comments*]; *Comments from the National Employment Law Project*, OSHA, Docket No. OSHA-2021-0009-0524 at 10 (Jan. 21 2022), <https://www.regulations.gov/comment/OSHA-2021-0009-0524> [hereinafter *NELP comments*].

service workers.¹⁹⁹ It is important to note that the effects of occupational heat exposure are not borne equally. For example, workers identifying as Black, Hispanic, or Latino experience disproportionately high rates of occupational heat-related illnesses, and non-U.S. citizens are more likely to die on the job because of extreme heat exposure than their U.S. citizen counterparts.²⁰⁰ These disparities play out prominently in the industries that are most at risk for heat-related illness and death, such as farmworkers,²⁰¹ construction workers,²⁰² delivery workers, warehouse workers,²⁰³ and food service workers.²⁰⁴ For example, one report indicated that agricultural workers were roughly twenty times more likely to die of heat-related causes as compared with other types of workers, and that the majority of these deaths were immigrant workers.²⁰⁵

Systemic inequalities contribute to the problem. Vulnerable workers may face compounding environmental harms in their workplaces or homes, such as pesticides in the case of farmworkers or higher levels of air pollution in the case of workers doing highway repairs. Many vulnerable workers lack air conditioning in their homes to mitigate daytime heat impacts.²⁰⁶

These factors are highly relevant when assessing the severity of extreme heat and whether it constitutes an “emergency” for certain segments of the workforce. For example, as calculated by the National Weather Service, the heat

199. See AG Petition, *supra* note 13, at 1, 14 n.89 (citing Rachel Licker et al., *Quantifying the Impact of Future Extreme Heat on the Outdoor Work Sector in the United States*, 10 *ELEMENTA* 1 (2022); Jisung Park et al., *Temperature, Workplace Safety, and Labor Market Inequality*, (Wa. Ctr. for Equitable Growth, Working Paper, 2021), <https://equitablegrowth.org/working-papers/temperature-workplace-safety-and-labor-market-inequality/>).

200. See Comments from the National Family Farm Coalition Regarding Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, Docket No. OSHA2021-0009 at 5-6 (Jan. 26, 2022); see generally Diane Gubernot et al., *Characterizing occupational heat-related mortality in the United States, 2000–2010: An analysis using the census of fatal occupational injuries database*, 58 *AM. J. INDUS. MED.* 203 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/pmc4657558/>.

201. See U.S. DEP’T AGRIC., *2017 Census of Agriculture: United States Summary and State Data*, 1 *GEO. AREA SERIES* 90, Table 71 (Apr. 2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf; Cresencio Rodriguez-Delgado & Chloe Jones, *Farmworkers are dying in extreme heat. Few standards exist to protect them*, *PBS NEWS HOUR* (Aug. 6, 2021), <https://perma.cc/9DRY-U4PM>; see generally Gubernot et al., *supra* note 200.

202. See Scott Earnest et al., *50 Years of NIOSH Construction Safety and Health Research*, *CTRS. FOR DISEASE CONTROL & PREVENTION* (Aug. 16, 2021), <https://blogs.cdc.gov/niosh-science-blog/2021/08/16/construction-50th/> (noting that construction workers are prone to injuries and fatalities, and “[n]early 30% of the workforce is of Hispanic origin”).

203. See Claudia Irizarry Aponte & Samantha Maldonado, *UPS Drivers Demand AC in Trucks Following Heat Wave: “It’s Like Walking Into Hell,”* *THE CITY* (Jul. 27, 2022), <https://www.thecity.nyc/work/2022/7/27/23281777/ups-drivers-trucks-heat-wave-hell>; Anna M. Phillips, *How Hot Is It Inside Southern California’s Warehouses? Ask the Workers at Rite Aid*, *L.A. TIMES* (Oct. 12, 2021), <https://www.latimes.com/environment/story/2021-10-12/heat-risk-rite-aid-workers-southern-california-warehouse>.

204. See Food Services and Drinking Places: NAICS 722, *U.S. BUREAU LAB. STAT.*, <https://www.bls.gov/iag/tgs/iag722.htm> (last updated Jan. 25, 2023).

205. See Centers for Disease Control and Prevention, *Heat-related deaths among crop workers—United States, 1992–2006*, 57 *MORBIDITY & MORTALITY WKLY REP.* 649, <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5724a1.htm> (last updated June 19, 2008).

206. See OSHA ANPRM, *supra* note 12, at 59,313.

index²⁰⁷ does not account for compounding health and environmental factors, such as age, presence of comorbidities, use of personal protective equipment (PPE), or exposure to co-pollutants such as pesticides or particulate matter, which might make high temperatures more dangerous for particular workers.²⁰⁸ Therefore, a full picture of the effects of extreme heat on at-risk workers requires a critical analysis of social systems that were not designed to prevent or redress compounding injustices. As explained in the following Subparts, failure to consider these factors can have devastating consequences.

a. Farmworkers

Agricultural work is one of the most dangerous occupations in the United States,²⁰⁹ and agricultural workers are disproportionately harmed by heat stress.²¹⁰ There are several factors that make agricultural workers vulnerable to the dangers of heat. For example, farmworkers in many states are excluded from basic worker protections, including overtime pay and the right to unionize.²¹¹ Many agricultural workers earn low wages, which are often dependent on a worker's productivity.²¹² These factors make agricultural workers less likely to be aware of or take advantage of their right to take rest or water breaks in extreme heat.

Agricultural workers are also subject to weaker child labor protections. Under U.S. law, children as young as twelve years old (and sometimes younger) can be hired to work on farms outside of school hours with parental permission, while children age sixteen or older may work unlimited hours.²¹³ Children are

207. *Heat Index Calculator*, NAT'L WEATHER SERV., <http://www.wpc.ncep.noaa.gov/html/heatindex.shtml> (last visited Mar. 16, 2024).

208. See Michael J. Coren, *The world needs a new way to talk about heat*, WASH. POST (Jul. 25, 2023), <https://www.washingtonpost.com/climate-environment/2023/07/25/heat-index-wet-bulb-temperatures-dangerous/>.

209. See *Injuries, illnesses, and deaths in agriculture, 2015–19*, BUREAU LAB. STAT. (Sept. 22, 2021), <https://www.bls.gov/opub/ted/2021/injuries-illnesses-and-deaths-in-agriculture-2015-19.htm>.

210. See Farmworker Justice comments, *supra* note 198, at 2 (“OSHA enforcement data contain reports of 65 agricultural worker deaths caused by heat stress between 2002 and 2020, accounting for one-sixth of occupational fatalities from heat stress during this period, even though agricultural workers represent only 1.4% of all employed workers in the U.S.”) (citing Ignacio Calderon, *Temperatures continue to rise and farmworkers continue to be at risk*, MIDWEST CTR. FOR INVESTIGATIVE REPORTING (Oct. 21, 2021), <https://investigatamidwest.org/2021/10/21/temperatures-continue-to-rise-and-farmworkers-continue-to-be-at-risk/>; *Ag and Food Sectors and the Economy*, U.S. DEP'T AGRIC., <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/> (last updated Nov. 8, 2021)).

211. See generally Daniel Costa et al., *Federal labor standards enforcement in agriculture: Data reveal the biggest violators and raise new questions about how to improve and target efforts to protect farmworkers*, ECON. POL'Y INST. (Dec. 15, 2020), <https://files.epi.org/pdf/213135.pdf>.

212. See OSHA ANPRM, *supra* note 12, at 59,320 (citing Wadsworth G et al., *Pay, power, and health: HRI and the agricultural conundrum*, 44 LAB. STUD. J. 214 (2019), <https://doi.org/10.1177/0160449X18767749>).

213. See *Child Labor Bulletin 102: Child Labor Requirements in Agricultural Occupations Under the Fair Labor Standards Act*, U.S. DEP'T LAB. 3, <https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/childlabor102.pdf> (last updated Nov. 2016).

particularly vulnerable to extreme heat.²¹⁴ A coalition led by Farmworker Justice notes in its comments to OSHA that there are an estimated 400,000 to 500,000 child farmworkers in the United States.²¹⁵ Although the incidence of heat exposure among child workers has not been widely studied, one study of North Carolina child farmworkers between the ages of ten and seventeen years found that nearly half of them reported one or more heat illness symptoms in the previous year.²¹⁶ Supervisors' attitudes were frequently cited by children in the study as a reason they could not take sufficient water and rest breaks.²¹⁷

Additionally, approximately half of farmworkers are undocumented,²¹⁸ leaving them vulnerable to potential retaliation by their employers in the form of job loss, immigration enforcement, or both. Advocates note that this potential for retaliation has a strong chilling effect on workers' ability to speak up, and many workers tolerate unsafe and unhealthy conditions because they are afraid of potential repercussions for coming forward.²¹⁹

Substandard farmworker housing conditions place many farmworkers at further increased risk from heat stress. Many employer-provided agricultural worker camps do not have air conditioning or adequate ventilation, which leaves their bodies without adequate means to cool down from the extreme heat they experience at work.²²⁰ Many agricultural employers do not offer health insurance or other benefits such as sick leave, and language barriers can further impede adequate access to medical care for many farmworkers.²²¹ Agricultural workers also experience compounding effects from physical exertion, protective clothing, and exposure to pesticides.²²²

Many of these factors were relevant for Miguel Angel Guzman Chavez, a farmworker who died of heat exposure in 2018. Mr. Chavez had come to the United States five days prior as an immigrant from Mexico and had not been allowed proper acclimatization (a process by which the human body gradually

214. *Protecting Children's Health During and After Natural Disasters: Extreme Heat*, EPA <https://www.epa.gov/children/protecting-childrens-health-during-and-after-natural-disasters-extreme-heat> (last updated June 15, 2023).

215. Farmworker Justice comments, *supra* note 198, at 4 (citing Benjamin Hess, *Children in the Fields: an American problem*, ASS'N FARMWORKER OPPT'Y PROGRAMS (2007), <https://afop.org/wpcontent/uploads/2010/07/Children-in-the-Fields-Report-2007.pdf>).

216. *Id.* (citing Taylor J. Arnold et. al., *Heat-Related Illness Among Latinx Child Farmworkers in North Carolina: A Mixed-Methods Study*, 30 NEW SOL. 111, 111-126 (Aug. 2020)).

217. *See id.*

218. *See Research Report No. 13, Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers*, U.S. DEP'T LAB., at 5 (2018), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf.

219. Farmworker Justice comments, *supra* note 198, at 3.

220. *See id.* at 14-15.

221. *Id.* at 4, 8.

222. *See generally* Comments submitted by the UFW Foundation, *Re: Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings* (Docket No. OSHA-2021-0009) (Jan. 26, 2022), <https://www.regulations.gov/comment/OSHA-2021-0009-0763> [hereinafter UFW Foundation comments].

becomes accustomed to heat) by his employer.²²³ The UFW Foundation describes his death as follows:

He was not used to the high heat and humidity, and became ill at the height of the daily heat at about 4 p.m. while picking tomatoes . . . Miguel Angel's colleagues, who worked and lived with him in barrack-style housing without air conditioning, shared that they had worked 16 hour days (more hours than had been outlined in their H-2A contract) during the week that Miguel Angel died from heat exposure.²²⁴

This example highlights how social factors can contribute to the dangers of occupational heat exposure for vulnerable workers whose deaths might have been prevented with proper governmental oversight and intervention.

b. Essential Workers in Urban Settings

Workers in several essential industries in urban environments are also at heightened risk of illness and death from workplace heat exposure as a result of compounding factors specific to their circumstances.²²⁵ These include construction workers, delivery workers, warehouse workers, and food service workers, among others. In cities that run on the services of the restaurant industry, workers suffer increasingly dangerous effects from hot kitchens.²²⁶ Similarly, warehouse workers face increasingly dire conditions in indoor workplaces that trap heat and often lack air conditioning or proper ventilation.²²⁷ As the State Attorneys General noted in their petition to OSHA: "During a June 2021 heat wave in Oregon, at least 80 people died from heat-related illnesses, including a middle-aged trainee at a Walmart distribution center who collapsed at the end of his shift after stumbling and having difficulty speaking."²²⁸

Workers in urban environments are particularly vulnerable to urban heat island effects, which disproportionately burden Black and Brown

223. *Id.* at 3.

224. *Id.* at 3-4.

225. *See, e.g.*, AG petition, *supra* note 13, at 17-22; Comments submitted by Public Citizen, Docket No. OSHA-2021-0009 (Jan. 26, 2022), <https://www.regulations.gov/comment/OSHA-2021-0009-0712>; Comments submitted by Catalyst Miami, Docket No. OSHA-2021-0009 (Jan. 19, 2022), <https://www.regulations.gov/comment/OSHA-2021-0009-0522>; Comments submitted by the National Employment Law Project, Docket No. OSHA-2021-0009 (Jan. 21, 2022), <https://www.regulations.gov/comment/OSHA-2021-0009-0524>.

226. *See, e.g.*, *Food Services and Drinking Places: NAICS 722*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/iag/tgs/iag722.htm> (last updated Mar. 15, 2024); Peter Romeo, *Workplace Regulators Eye New Safeguards Against Excessive Heat*, REST. BUS. (Apr. 29, 2022), <https://www.restaurantbusinessonline.com/operations/workplaceregulators-eye-new-safeguards-against-excessive-heat>; Matthew Sedacca, *Food-Service Workers Are Suffering from Extreme Heat. Few Rules Exist to Protect Them*, THE COUNTER (Sept. 6, 2021), <https://thecounter.org/food-service-workers-suffer-extreme-heat-high-temperatures/>.

227. *See* Anna M. Phillips, *How Hot Is It Inside Southern California's Warehouses? Ask the Workers at Rite Aid*, L.A. TIMES (Oct. 12, 2021), <https://www.latimes.com/environment/story/2021-10-12/heat-risk-rite-aid-workers-southern-california-warehouse>.

228. AG petition, *supra* note 13, at 22 (citing Ariel Wittenberg & Zach Colman, *Why OSHA Won't Protect Workers from Climate Change*, E&E NEWS (Aug. 6, 2021), <https://www.eenews.net/articles/why-osh-wont-protect-workers-from-climate-change/>).

communities.²²⁹ Under a heat island effect, urbanized areas experience higher temperatures than surrounding areas, due to surfaces such as cement, pavement, or dark rooftops that absorb and store heat, which is then released gradually at night.²³⁰ For people without access to air conditioning, limited nighttime cooling can inhibit their ability to cool down and recover from daytime heat exposure.²³¹ This is particularly problematic for low-wage workers, who may struggle with the high costs of air-conditioning utility bills and may be more concentrated in communities that experience the urban heat island effect.²³² Within cities, the inequitable distribution of tree canopy and greenspaces can cause “intra-urban” heat islands, where heat is concentrated in neighborhoods with higher populations of lower-income residents and people of color.²³³ Urban heat islands can exacerbate occupational heat exposure—and make it more deadly—for both indoor and outdoor workers in urban settings.

B. Framing OSHA’s Refusal to Issue an Emergency Heat Rule

As we consider the various factors that place certain workers at greater risk of harm from occupational heat exposure, it is important to emphasize that workplace deaths from extreme heat are preventable. Time-tested strategies such as water and shade breaks, acclimatization plans, worker education, and employer emergency response protocols have proven effective in preventing death and serious injury resulting from extreme heat.²³⁴ This is a classic example of how governmental intervention can make a difference. However, as noted below, an analysis of existing state and federal requirements reveals significant gaps in the regulatory scheme that leave a majority of workers without mandatory heat exposure standards. The following Subpart describes prior governmental interventions to address dangerous occupational heat exposure and why those interventions have been insufficient. It begins with an overview of OSHA’s statutory authority to issue workplace standards for extreme heat, including through the use of an Emergency Temporary Standard, followed by a description of federal and state action to date.

229. See *Heat Islands and Equity*, EPA, <https://www.epa.gov/heatislands/heatislands-and-equity> (last updated Dec. 12, 2022); *Understanding the Urban Heat Island Index*, CAL. EPA, <https://calepa.ca.gov/climate/urban-heat-island-index-for-california/understanding-the-urban-heat-island-index/> (last visited Jan. 31, 2023); *2023 Extreme Heat Policy Agenda*, WE ACT ENV’T JUST. (July 6, 2023), <https://www.weact.org/wp-content/uploads/2023/07/2023-Extreme-Heat-Policy-Agenda-FINAL.pdf>.

230. See *Understanding the Urban Heat Island Index*, *supra* note 229.

231. See *id.*

232. See *Heat Islands and Equity*, *supra* note 229.

233. See generally Jeremy S. Hoffman et al., *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas*, 8 CLIMATE 12 (2020).

234. See generally JACKLITSCH ET AL., *supra* note 7.

1. Emergency Temporary Standards under the Occupational Safety and Health Act

OSHA has clear authority under the Occupational Safety and Health Act of 1970 (“the OSH Act”) to issue a workplace standard addressing hazardous heat. Congress enacted the OSH Act to assure “safe and healthful working conditions.”²³⁵ The law seeks to reduce the frequency and severity of work-related injuries and illnesses by promoting a comprehensive, nationwide approach to workplace safety. The OSH Act authorizes OSHA to promulgate rules establishing specific occupational safety and health standards.²³⁶

OSHA’s normal rulemaking process generally consists of seven stages and can take more than ten years to complete.²³⁷ At the beginning of the process, OSHA meets with various internal and external stakeholders to determine whether to establish a standard.²³⁸ This process might involve publishing an advanced notice of proposed rulemaking in the Federal Register to solicit public comments on whether the agency should promulgate a rule on a particular topic, as the agency did in the case of occupational heat exposure.²³⁹ If a proposed rule will have an impact on small businesses, the agency is required to convene a Small Business Advocacy Review Panel to hear comments from small businesses on the impacts of such a rule and conduct a regulatory flexibility analysis.²⁴⁰ Pursuant to the OSH Act, the agency considers the economic and technological feasibility of any particular standard when developing proposed rule language.²⁴¹ Then OSHA must publish proposed rule language and solicit public comments on the proposed rule language, before publishing a final rule that can be enforced.²⁴²

The OSH Act authorizes OSHA to follow a much-abbreviated process and issue an “Emergency Temporary Standard” if the agency determines that employees are subjected to “grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and . . . that such emergency standard is necessary to protect employees from such danger.”²⁴³ Emergency Temporary Standards take effect immediately upon publication. These emergency rules are effective for six months, with the

235. 29 U.S.C. § 651(b).

236. 29 U.S.C. § 655.

237. See AG petition, *supra* note 13, at 3 n.7; *The OSHA Rulemaking Process*, OSHA, https://www.osha.gov/sites/default/files/OSHA_FlowChart.pdf (last updated Oct. 15, 2012).

238. See generally *The OSHA Rulemaking Process*, *supra* note 237.

239. See OSHA ANPRM, *supra* note 12.

240. See Small Business Regulatory Enforcement Fairness Act (Regulatory Flexibility Act), 5 U.S.C. § 609(b)(3).

241. See 29 U.S.C. § 655(b)(5); see generally *OSHA’s Feasibility Policy: The Implications of the “Infeasibility” of Respirators*, 129 HARV. L. REV. 2235 (2016).

242. See 29 U.S.C. § 655(b)(2).

243. 29 U.S.C. § 655(e)(1).

expectation that a permanent rule issued pursuant to OSHA's normal rulemaking procedures would then take effect.²⁴⁴

2. Existing Governmental Approaches to Occupational Heat Exposure

a. Federal Action

The push for OSHA to leverage its rulemaking authority under the OSH Act to issue a federal occupational heat standard has a long history. The National Institute for Occupational Safety and Health (NIOSH)—the office within the Centers for Disease Control (CDC) with expertise in workplace safety and health—has been recommending that OSHA establish workplace heat standards since 1972.²⁴⁵ In 2016, NIOSH issued a 200-page report highlighting new research on how heat stress affects workers and expressing concern about worsening effects resulting from the climate crisis.²⁴⁶ OSHA has failed to take enforceable action to implement NIOSH's recommendations.²⁴⁷

Workers' rights advocates and community groups have continuously pushed for a federal workplace heat standard, including petitions led by Public Citizen on behalf of more than 130 organizations.²⁴⁸ In 2021, the Asunción Valdivia Heat Illness and Fatality Prevention Act was introduced in the Senate.²⁴⁹ Named for a farmworker who died of heat stroke after working a ten-hour day in 105-degree heat, the bill would require OSHA to promulgate an

244. The OSH Act is silent on OSHA's authority to extend or renew an Emergency Temporary Standard past the six-month deadline if a grave danger remains and the permanent rule is not yet finalized. *See id.* However, there is some case law to support OSHA's authority to renew an emergency standard after six months in appropriate circumstances. *See, e.g., Fla. Peach Growers Ass'n, Inc. v. U.S. Dep't of Lab.*, 489 F.2d 120, 127 (5th Cir. 1974) (holding that OSHA could amend an emergency temporary standard without formal rulemaking procedures and stating that "it is inconceivable that Congress, having granted the Secretary the authority to react quickly in fast-breaking emergency situations, intended to limit his ability to react to developments subsequent to his initial response").

245. *See* JACKLITSCH ET AL., *supra* note 7, at 101.

246. *See generally id.*

247. *See* Ariel Wittenberg & Zach Colman, *Why OSHA Won't Protect Workers from Climate Change*, E&E NEWS (Aug. 6, 2021), <https://www.eenews.net/articles/why-osh-wont-protect-workers-from-climate-change/> ("A four-month investigation by POLITICO and E&E News found that the agency's reluctance has extended through nine administrations, with bureaucracy and lack of political will combining to continually kick the can down the road."); *see also* Jordan Barab, *Heat: Summertime, and the Workers Are Dying. . .* CONFINED SPACE (July 12, 2022), <https://jordanbarab.com/confinedspace/2022/07/12/heat-summertime-and-the-workers-are-dying/> (offering his perspective as a former OSHA official on why OSHA's process for developing an occupational heat standard has been so slow and noting: "Unfortunately, the development of a complex OSHA standard can take many years, even decades. OSHA's silica and beryllium standard took almost 20 years to finalize. The requirements of the Occupational Safety and Health Act, court decisions over the past 50 years, regulatory Executive Orders, additional laws adding regulatory requirements — and politics — all conspire to slow down OSHA standards. And that's just in Democratic administrations. Republican administrations generally stop all significant work on OSHA standards, adding 4 or 8 years to an already glacial process.").

248. *See Extreme Heat and Unprotected Workers*, *supra* note 11.

249. *See generally* Asunción Valdivia Heat Illness and Fatality Prevention Act of 2021, S.1068, 117th Congress (2021).

occupational heat standard.²⁵⁰ Later that year, the Biden Administration announced that addressing occupational heat exposure was a priority.²⁵¹

Following this Presidential announcement, OSHA published an Advanced Notice of Proposed Rulemaking on October 27, 2021 to establish an occupational heat standard, stating that occupational heat exposure is a serious issue that results in workplace deaths and illnesses each year.²⁵² In its notice, OSHA expressly solicited public comments with regard to many of the socioeconomic risk factors for vulnerability to heat illness and death described in the previous Part, noting: “Disproportionate exposure to hazardous working conditions and their resulting health and safety impacts on workers exacerbates socioeconomic and racial inequalities in the U.S.”²⁵³

In the absence of an enforceable standard for occupational heat exposure, OSHA has released guidance for employers and employees about hazardous heat in an attempt to protect workers from heat-related injury.²⁵⁴ OSHA has also sought to rely on a catch-all provision in the OSH Act, called the “General Duty Clause,” to bring actions on a case-by-case basis against employers that expose their workers to extreme heat.²⁵⁵ OSHA’s efforts to bring “General Duty Clause” enforcement actions against employers for exposing employees to extreme heat in the workplace have faced significant legal hurdles, even in cases where there have been heat-related deaths.²⁵⁶ In such cases, OSHA has been largely unsuccessful in relying on third-party scientific documents—such as NIOSH criteria—to establish that a heat hazard existed in the workplace, which is a necessary element to hold employers accountable.²⁵⁷

b. State Action

Some states have stepped up to fill gaps in OSHA’s absence, including notable initiatives by California, Colorado, Minnesota, Oregon, and Washington.²⁵⁸ Many of the standards are relatively new, but by and large, these

250. *See id.*

251. *See* Press Release, White House, FACT SHEET, *supra* note 27.

252. *See* OSHA ANPRM, *supra* note 12, at 59,310.

253. *Id.* at 59,313.

254. *See id.* at 59,314-15.

255. *See* 29 U.S.C. § 654(a)(1).

256. *See id.*

257. *See, e.g.,* Aldridge Elec., Inc., Respondent., 26 O.S.H. Cas. (BNA) ¶ 1449 (O.S.H.R.C.A.L.J. Dec. 2, 2016) (noting that “none of these documents is a mandatory document that [employers] must follow akin to an OSHA regulation”); Indus. Glass, Respondent, Glass, Molders, Plastic, Pottery & Allied Workers, Loc. 208, Authorized Emp. Representative, 15 O.S.H. Cas. (BNA) ¶ 1594 n.10 (O.S.H.R.C. Apr. 21, 1992) (noting that the NIOSH criteria “[do] not have the force and effect of law”).

258. *See generally* CAL. CODE REGS. tit. 8, § 3395 (2020) (covering outdoor workers); OR. ADMIN. R. 437-002-0156 (2022) (covering outdoor and indoor workers); WASH. ADMIN. CODE §§ 296-62-095 to 296-62-09560 (2023) (covering outdoor workers); Minn. R. 5205.0110 (2014) (covering indoor workers); 7 COLO. CODE REGS. § 1103-15-3 (2024) (covering agricultural workers). Section 18(a) of the OSH Act states that it does not “prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect.” 29 U.S.C. § 667(a). Therefore, because OSHA has not yet issued a federal standard on occupational heat exposure,

state requirements have proven to be straightforward and workable, including common-sense measures such as rest, shade, water, and gradual acclimatization to the heat.²⁵⁹ For example, California’s heat standard requires employers of outdoor workers to provide them with rest, shade, and water, and also to monitor them, with different requirements depending on how high temperatures go.²⁶⁰

Testimony from workers suggests that these state laws have made a significant difference. For example, the UFW Foundation’s comments to OSHA in favor of a federal heat standard included the perspective of a grape picker in California who offered a human rights framing and said: “California regulations have helped because farm worker deaths shouldn’t happen for lack[] [of] something as basic as water and breaks. Now our employers are more aware that we are humans and not robots.”²⁶¹ One study indicated that after California’s standard was enacted in 2005, workplace accidents and injuries during periods of high heat decreased by roughly 30 percent.²⁶² These state efforts are important and could pave the way for further states to take action. For example, two more states, Maryland and Nevada, are developing workplace heat standards.²⁶³

It should be noted, however, that when the OSH Act was enacted in 1970, it was out of a recognized need for coordinated federal action to protect workers.²⁶⁴ Existing state models have arisen with an awareness of this federal framework. Section 18(b) of the OSH Act provides that if a state “desires to

any state can issue a state-level occupational heat standard. *See id.* Additionally, the U.S. Armed Forces deploys extensive heat-related illness prevention and management strategies. *See Warrior Heat- and Exertion-Related Events Collaborative*, CONSORTIUM FOR HEALTH & MIL. PERFORMANCE, <https://www.hprc-online.org/resources-partners/whec> (last visited Mar. 18, 2024). There are also heat standards established by worker-driven programs for particular industries, such as the heat stress protocols included in the Fair Food Program established by the Coalition of Immokalee Workers, which began in 1993 as a community organization of tomato pickers in southwest Florida. *See generally Comment from Reyes Chavez, Gerardo; Coalition of Immokalee Workers in response to Heat Injury and Illness Prevention in Outdoor & Indoor Work Settings*, 86 Fed. Reg. 59309 (Oct. 27, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, 1928), <https://www.regulations.gov/comment/OSHA-2021-0009-0621>.

259. *See* BETHANY DAVIS NOLL ET AL., A ROLE FOR STATE ATTORNEYS GENERAL IN A JUST TRANSITION 28-29 (State Energy and Ent’l Impact Ctr. at NYU Sch. L. and Lab. and Worklife Program Harv. L. Sch.) (Dec. 2022), <https://stateimpactcenter.org/files/A-Role-for-State-Attorneys-General-in-a-Just-Transition.pdf>.

260. *See* CAL. CODE REGS. tit. 8, §3395(c)-(e).

261. UFW Foundation comments, *supra* note 222, at 3.

262. *See* R. Jisung Park et al., *Temperature, Workplace Safety, and Labor Market Inequality*, WASH. CTR. FOR EQUITABLE GROWTH at 27 (Jul. 19 2021), <https://perma.cc/C5AE-L2VR>. The authors note alternative possible explanations for the decrease, but also observed that “several additional analyses suggest that the heat-injury relationship changed significantly and in a non-transitory way around 2005.” *Id.*

263. *See* Md. HB0722, 2020 Reg. Sess.; Nev. Dep’t Bus. & Indus., Guidance for Nevadan Business related to the Heat Illness National Emphasis Program (May 4, 2022), <https://dir.nv.gov/uploadedFiles/dir.nv.gov/content/OSHA/Features/Heat%20Illness%20NEP%20-%20Guidance%20-%202025-4-22.pdf>.

264. *See* 29 U.S.C. § 651(b) (“The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.”).

assume responsibility for development and enforcement . . . of occupational safety and health standards” that relate to an issue addressed by an OSHA standard, the state “shall submit” a state plan covering such standards to OSHA.²⁶⁵ Twenty-one states and Puerto Rico have OSHA approved “state plans,” meaning that in those states the state governments, and not OSHA, are the primary regulators of occupational safety and health and can act without raising any preemption concerns.²⁶⁶ Additionally, some states have authority to issue standards solely with regard to public employees, but not private employees.²⁶⁷

In *Gade v. National Solid Wastes Management Association*, the leading case in this area, a plurality of the Supreme Court held that the “unavoidable implication” of the language of Section 18(a) is that, where there is an OSHA standard in place, a state or city may not develop or enforce its own standards unless it has an OSHA-approved state plan.²⁶⁸ Therefore, while the absence of a federal standard on occupational heat exposure creates an opening for states to act without facing preemption, a future OSHA standard on occupational heat exposure would preclude state action in more than half of states. For example, New York, which is not an OSHA-approved state for private employees, could issue a standard for private employers in New York.²⁶⁹ However, should OSHA eventually issue a federal workplace heat standard, the New York Department of Labor would then be preempted from enforcing its own rule.²⁷⁰ For states such as California that have OSHA-approved plans,²⁷¹ any existing heat standards would need to be reviewed and updated, as necessary, to be at least as protective as any federal standard issued by OSHA in the future.²⁷² On a broad scale, this patchwork of inconsistent state authority creates complications, as well as disincentives for states to assert themselves in the regulation of occupational heat, where they may face future preemption by OSHA.

3. State Petition for a Federal Emergency Heat Rule

On February 9, 2023, a coalition of seven Attorneys General, led by New York Attorney General Letitia James, filed a petition urging OSHA to issue an Emergency Temporary Standard for occupational heat exposure, pending OSHA’s permanent rulemaking.²⁷³ The petition emphasized that “occupational

265. 29 U.S.C. § 667(b).

266. See State Plans, OSHA, <https://www.osha.gov/stateplans/>.

267. See *id.* With the exception of Colorado, each of the states with existing standards are OSHA-plan states.

268. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 99 (1992).

269. See N.Y. LAB. LAW § 27(1) (“Notwithstanding any other provision in this chapter, a safety or health standard promulgated under this section shall apply only to employees not covered by a federal occupational safety or health standard promulgated under section six of the United States Occupational Safety and Health Act of 1970 (Public Law, 91-596).”).

270. See *id.*

271. See State Plans, *supra* note 266.

272. See 29 U.S.C. § 667(c).

273. See generally AG Petition, *supra* note 13.

heat exposure is an issue of environmental and racial justice, as people of color and low-wage workers are disproportionately burdened by heat stress in the workplace,” citing research by advocacy groups who have led the fight for workplace heat standards, such as Farmworker Justice, the Migrant Clinicians Network, and Public Citizen.²⁷⁴

Specifically, the states’ petition requested that OSHA adopt an emergency standard that would take effect when the heat index reaches 80 degrees Fahrenheit and include requirements for employers to provide water, access to shaded or cool areas, rest breaks, acclimatization plans, temperatures and workload monitoring, heat alert plans, employee and supervisor training, recordkeeping, and additional heightened protections for vulnerable workers.²⁷⁵ The Attorneys General acknowledged OSHA’s pending permanent rulemaking proceeding on the issue, but they urged the agency to put a temporary emergency standard in place by May 1, 2023 in anticipation of summer.²⁷⁶

On April 17, 2023, OSHA denied the states’ petition for an emergency occupational heat rule.²⁷⁷ In its response, OSHA acknowledged the importance of addressing extreme heat exposure and the hazard that it poses to workers. However, OSHA emphasized the need to gather public input through notice and comment rulemaking and concluded that pursuing an emergency standard would divert time and resources from its efforts to implement a permanent rule.²⁷⁸ Notably, the agency did not expressly determine whether the legal test for a temporary emergency standard was met, but noted the high legal bar for issuing one, citing *NFIB v. OSHA*.²⁷⁹ OSHA further noted that “any state could promulgate its own [emergency standard] for occupational heat exposure through its state rulemaking procedures.”²⁸⁰ However, as noted above, this option would be less attractive for states that do not have OSHA-approved plans and where OSHA is the primary regulator of workplace health and safety, because these states would face preemption if OSHA promulgates a permanent occupational heat standard.

4. Barriers to Federal Emergency Action on Occupational Heat Exposure

Several underlying factors may have impacted OSHA’s decision to deny the petition for an emergency rule on occupational heat exposure.

274. *Id.* at 1, 22-24.

275. *See id.* at 35.

276. *Id.*

277. *See generally* OSHA denial, *supra* note 16.

278. *See id.* at 2.

279. *See id.*

280. *Id.* at 3.

a. Lack of Agency Resources

First, the agency cited the need to devote resources toward promulgating a permanent rule.²⁸¹ As noted above, OSHA’s rulemaking process is time and resource intensive and includes multiple procedural steps, such as a requirement to engage with small business stakeholders.²⁸² OSHA also performs a robust cost-benefit analysis and looks at impacts on an industry-specific level. OSHA rulemakings can take several years to complete, with some estimates ranging up to ten years.²⁸³

It is possible that the agency made a political calculus that factored in the length of time left in the Biden administration and the possibility—and the value—of issuing a final permanent rule before the end of the presidential term. While a permanent rule would likely build off of a temporary emergency standard, the agency’s response to the petition indicated concern that taking time for an emergency rule would add length to the process overall. Concerns about having adequate resources to issue both an emergency and a permanent rule on occupational heat exposure before President Biden leaves office may have been heightened by the agency’s ongoing capacity issues. OSHA staffing has been cut in recent years, and workplace inspections and enforcement actions have dropped considerably.²⁸⁴ Workplace safety advocates have raised concerns that even if an occupational heat standard were promulgated, OSHA would not have the staff and resources to enforce it.²⁸⁵

There is also some evidence that internal agency incentives may not align with allocating resources toward an emergency rule that would invariably be subject to intense public scrutiny and potential legal challenge. A recent media investigation found that deferral of an occupational heat standard has been an ongoing issue for OSHA, and that “the agency’s reluctance has extended through nine administrations, with bureaucracy and lack of political will combining to continually kick the can down the road.”²⁸⁶

281. *See id.* at 2 (“While we share your belief that we must act now, with respect to your petition for an ETS, OSHA has significant reservations that a federal effort to promulgate an ETS on indoor and outdoor heat will achieve the outcome you desire and could instead have the counterproductive result of further delays in achieving meaningful protections for workers. Consequently, the Agency must deny your petition for an ETS.”).

282. *See id.* at 1-2.

283. *See The OSHA Rulemaking Process*, *supra* note 238.

284. *See generally* Wittenberg & Colman, *supra* note 247. There are indications that this funding deficit is likely to continue. *See, e.g.*, Jordan Barab, *What the Debt Ceiling Agreement Means for Workplace Safety*, CONFINED SPACE (May 30, 2023), <https://jordanbarab.com/confinedspace/2023/05/30/what-the-debt-ceiling-agreement-means-for-workplace-safety/>.

285. *See id.*

286. *Id.* It is worth noting that agencies are generally prohibited from making decisions based on factors outside of their authorizing statute. For example, in *Massachusetts v. EPA*, the Court held that the EPA’s denial of a rulemaking petition to regulate greenhouse gases under the Clean Air Act was arbitrary and capricious because the EPA “offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change,” so it remanded to the EPA to “ground its reasons for action or inaction in the statute.” 549 U.S. 497, 534-35 (2007). Therefore, OSHA’s denial of the Attorneys General’s petition may raise similar questions to the extent that the agency was not strictly

b. Lack of Data

In its denial letter, OSHA noted the high bar that it must meet when issuing an Emergency Temporary Standard, but it did not expressly analyze whether the legal test under the OSH Act—that occupational heat exposure presents a “grave danger” to workers—was met in this case.²⁸⁷ The states’ petition for an emergency rule makes a compelling case that the legal standard was in fact met, given the record already in place at the time OSHA denied the petition.²⁸⁸ This record included: 1) robust data regarding the dangers of occupational heat exposure that OSHA itself cited in its Advanced Notice of Proposed Rulemaking;²⁸⁹ 2) additional data supplied by the states filing the petition; and 3) information about the dangers of extreme heat on highly vulnerable workers in essential industries, as described in many comments submitted by advocates in response to OSHA’s rulemaking.²⁹⁰

However, this record was also incomplete. Worker advocates,²⁹¹ state governments,²⁹² and OSHA²⁹³ itself have all acknowledged that death and illness counts from occupational heat exposure are grossly underreported. OSHA’s Advanced Notice of a Proposed Rulemaking includes an analysis of some of the reasons for this underreporting, citing many of the same socioeconomic barriers faced by the most vulnerable workers (e.g., fear of retaliation, language access, economic hardship, etc.),²⁹⁴ described earlier in this Part. This data gap raises serious questions about whether OSHA has a handle on the full scale and severity of the problem, and whether the agency was properly situated to determine that emergency intervention was not required under the OSH Act.²⁹⁵

c. Uncertainty of Judicial Review

OSHA’s letter denying the petition for an emergency standard speaks to how the agency views its own emergency powers. The agency explained that “the successful promulgation of an [Emergency Temporary Standard] is exceedingly rare.”²⁹⁶ OSHA then cited a string of cases where courts struck

considering the statutory factors that direct when an emergency standard is necessary under the OSH Act. *See generally* OSHA denial, *supra* note 16.

287. *See* 29 U.S.C. § 655(c)(1); OSHA denial, *supra* note 16, at 2-3.

288. *See* OSHA ANPRM, *supra* note 12, at 59,315.

289. *See generally id.*

290. At the time OSHA denied the AG petition for an emergency rule, its comment period for the ANPRM for the permanent rule had closed, so the agency was in possession of the complete set of comments. *See* OSHA denial, *supra* note 16, at 1-2.

291. *See* NELP Comments, *supra* note 198, at 5.

292. *See* AG Petition, *supra* note 13, at 24.

293. *See* OSHA ANPRM, *supra* note 12, at 59,310.

294. *See id.* at 59,311.

295. However, there is some case law indicating that OSHA need not support its determination of a grave danger in support of an emergency temporary standard “with anything approaching scientific certainty.” *See, e.g.,* Asbestos Info. Ass’n N. Am. v. OSHA, 727 F.2d 415, 425 (5th Cir. 1984).

296. OSHA denial, *supra* note 16, at 2.

down or stayed enforcement of emergency standards issued by OSHA, dating back to the 1970s.²⁹⁷ Carlson notes that “OSHA has long been a favorite and representative target for opponents of government regulation.”²⁹⁸ Indeed, of OSHA’s ten prior emergency rules, seven were challenged in court, and only one of those was upheld in full.²⁹⁹

The Supreme Court’s recent precedent challenging the use of emergency powers by administrative agencies during the COVID-19 pandemic, as described in Part I.B.2, likely contributed to OSHA’s caution. The Court’s decision in *NFIB v. OSHA*, staying OSHA’s enforcement of an emergency standard on COVID-19 vaccination and testing requirements for private employers is particularly salient.³⁰⁰ Carlson persuasively argues that this case was not a catastrophic restriction of OSHA’s powers, noting that during the pandemic OSHA successfully issued a different emergency standard for high-risk healthcare sector employers which remained unchallenged.³⁰¹ Nevertheless, OSHA faced significant uncertainty regarding how a court would view its issuance of an emergency heat rule, had it granted the states’ petition.³⁰² At a minimum, the agency would have needed to distinguish any emergency heat standard it sought to impose from the emergency standard that was at issue in *NFIB v. OSHA*. For example, the Court rested its decision in *NFIB* on the fact that exposure to COVID-19 was a baseline hazard experienced by the general population, and not, in the Court’s view, specific to the workplace.³⁰³ Therefore, OSHA would have needed a rationale for why occupational heat exposure, as opposed to heat exposure generally, presented a grave danger to workers covered by an emergency heat standard. As described below, this may indeed be possible, but it would presumably require additional resources from an already under-resourced agency.

III. A PATH FORWARD: RECOMMENDATIONS FOR AGENCIES CONSIDERING EMERGENCY POWERS TO ADDRESS THE CLIMATE CRISIS

The devastating heat waves, forest fires, and floods of 2023 were historic in many ways. Unfortunately, they offer a window into the future. Governments

297. *Id.* (citing *NFIB v. OSHA*, 595 U.S. 109 (2022); *Asbestos Info. Ass’n*, 727 F.2d at 422, 426 (asbestos); *Taylor Diving & Salvage Co. v. Dep’t Lab.*, 537 F.2d 819 (5th Cir. 1976) (diving operations); *Fla. Peach Growers Ass’n v. Dep’t. Lab.*, 489 F.2d 120 (5th Cir. 1974)). However, OSHA successfully enacted an emergency standard limited to healthcare employees. *See* 29 C.F.R. § 1910.502(a).

298. *See* Carlson, *supra* note 133, at 1013 (“OSHA has long been a favorite and representative target for opponents of government regulation.”).

299. *See* *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 609 (5th Cir. 2021) (mentioning the history of challenges to OSHA emergency rules).

300. *See NFIB v. OSHA*, 595 U.S. 109, 120-21 (2022).

301. *See generally* Carlson, *supra* note 133; 29 C.F.R. § 1910.502(a).

302. Indeed, several scholars have situated *NFIB v. OSHA* within an overall movement toward an antiregulatory, anti-administrative law canon that gained momentum during the COVID-19 pandemic. *See generally, e.g.*, Vladeck, *supra* note 36; Buzbee, *supra* note 36; Skillin, *supra* note 36; Richardson, *supra* note 36; Sohoni, *supra* note 36.

303. *See NFIB*, 595 U.S. at 120-21.

will increasingly be called upon to consider emergency powers to address climate impacts that immediately affect their constituents. They may also be compelled to use emergency powers to address the underlying causes of the climate crisis, such as GHG emissions and loss of critical habitats that play a critical role in carbon storage and the overall health and sustainability of life on earth.

There is a vital need to prepare federal administrative agencies faced with the questions of when and how to use emergency powers to address the climate crisis. Agencies must be equipped to react nimbly, effectively, and fairly in their emergency responses. This is a critical moment to leverage lessons learned from the use of emergency powers during the pandemic in furtherance of this goal before the climate crisis accelerates. The example of OSHA's recent consideration of an emergency rule to address deadly occupational heat exposure serves as a fruitful case study for this purpose.

Part III will distill key lessons from the case study that may be useful to administrative agencies called upon to deploy emergency powers to address the climate crisis in the future. Part III.A draws parallels from several themes that arose from the use of emergency powers during the COVID-19 pandemic and played out in similar ways in this case study. Part III.B then offers recommendations for federal administrative agencies considering the use of emergency powers to address the climate crisis to successfully deploy those emergency powers.

A. *Key Lessons from the Case Study of OSHA's Consideration of an Emergency Heat Rule*

The OSHA case study is a real-world example of a federal agency confronted with the question of whether to use emergency powers to address an emerging climate impact—extreme heat. An assessment of the effects of extreme heat on workers reveals that this climate hazard is particularly dangerous for workers in several essential industries and disproportionately impacts Black and Brown workers, immigrants, and other vulnerable populations. Systemic socioeconomic injustices compound the problem. Many of these themes came to the foreground in summer 2023, as extreme heat led to the highly visible deaths of several essential workers, raising alarms from worker advocates and elected officials who criticized OSHA for failing to take swifter action. Several factors influenced the agency's decision not to issue an emergency rule that might have prevented worker deaths from extreme heat this summer, notwithstanding the administration's recognition of the hazards. These included constrained agency resources, concerns about diverting resources from a permanent rulemaking on occupational heat before the end of the Biden administration, lack of sufficient data about the severity of the problem for certain at-risk worker populations, and potential legal challenges to an emergency rulemaking.

Several of the themes raised in the literature analyzing the use of emergency powers during the COVID-19 pandemic are relevant to this case study:

1. *A patchwork of state policies led to mixed outcomes in the absence of strong federal action.*

During the pandemic, states such as New York and Massachusetts set aggressive COVID-19 mitigation strategies ahead of a coordinated federal response,³⁰⁴ while certain conservative states resisted COVID-19 safety measures and went as far as preempting local governments from adopting them.³⁰⁵ Similarly, we have seen how certain state governments have led the way on addressing occupational heat exposure, while other states, such as Texas, have thwarted local government efforts. In the context of the pandemic, as in the OSHA case study, stronger and more coordinated federal leadership could have prioritized national uniform health standards aimed at improving morbidity and mortality outcomes.

2. *Structural inequities contributed to disparate outcomes for certain populations, highlighting the need for better data and direct engagement with vulnerable populations.*

During the COVID-19 pandemic, data regarding health and economic impacts on different populations quickly revealed disparities that tracked underlying socioeconomic and racial inequities.³⁰⁶ As a result, there was a heightened need for governmental mitigation strategies to prevent the spread of COVID-19 for certain at-risk populations, including communities of color with insufficient access to healthcare,³⁰⁷ tribal communities,³⁰⁸ and congregate housing residents,³⁰⁹ such as nursing home residents and prison populations.³¹⁰ In the case of New York City, the need for accurate data collection played a key role in supporting an effective and equitable governmental emergency response.³¹¹ At the same time, vulnerable populations were at heightened risk of

304. See, e.g., Press Release, N.Y. State Off. of the Governor, *supra* note 130.

305. See, e.g., Bobby Caina Calvan, *Florida governor signs law preempting local COVID edicts*, ASSOC. PRESS (May 3, 2021), <https://apnews.com/article/florida-coronavirus-laws-health-083b2c00304c9569a78040ca741aeba1>.

306. See, e.g., Holden et al., *supra* note 140, at 125.

307. *Racial Inequities in COVID-19 Hospitalizations During the Omicron Wave in NYC*, N.Y.C. DEP'T HEALTH & MENTAL HYGIENE, 11 (Mar. 2, 2022), <https://www.nyc.gov/assets/doh/downloads/pdf/covid/black-hospitalizations-omicron-wave.pdf>.

308. See Spero M. Manson & Dedra Buchwald, *Bringing Light to the Darkness: COVID-19 and Survivance of American Indians and Alaska Natives*, 5 HEALTH EQUITY 59, 60-61 (2021).

309. See generally *COVID-19 Guidance for Shared or Congregate Housing*, CDC (Apr. 2020), <https://stacks.cdc.gov/view/cdc/87282>; Pauline D. Terebuh et al., *Characterization of community-wide transmission of SARS-CoV-2 in congregate living settings and local public health-coordinated response during the initial phase of the COVID-19 pandemic*, 15 INFLUENZA & OTHER RESPIRATORY VIRUSES 439 (2021).

310. See generally Ann E. Carson et al., *Special Report: Impact of COVID-19 on State and Federal Prisons, March 2020–February 2021*, U.S. DEP'T JUST. (Aug. 2022), <https://bjs.ojp.gov/content/pub/pdf/icsfp2021.pdf>.

311. See *Racial Inequities in COVID-19 Hospitalizations*, *supra* note 307, at 12-15; *Race to Justice: Community Engagement Framework*, N.Y.C. DEP'T HEALTH & MENTAL HYGIENE, 21-22 (May 2017), <https://www1.nyc.gov/assets/doh/downloads/pdf/che/community-engagement-framework.pdf>; see

being underserved by governmental officials looking to suppress COVID-19 statistics.³¹² Similar structural injustices affect workers experiencing extreme heat exposure in the workplace. The OSHA case study illustrates how a lack of sufficient data about highly vulnerable populations constrained the agency's ability to accurately assess the severity of extreme heat as a hazard for workers. Therefore, consideration of the lived experiences of those most harmed by extreme heat, as told by workers themselves or their direct advocates, can help inform a governmental analysis of whether emergency intervention is needed.

3. Concerns regarding the legitimacy and legality of emergency powers affect policy making.

As described in Part II, governments at all levels faced criticism and litigation regarding their use of emergency power during the COVID-19 pandemic. The Supreme Court addressed controversies regarding the use of emergency powers by administrative agencies multiple times throughout the pandemic, leading to new administrative law jurisprudence, such as new applications of the major questions doctrine, and altering the course of COVID-19 policy making. OSHA specifically referenced prior COVID-19 case law in its decision not to issue an emergency rule on occupational heat exposure.³¹³

Building on these common themes between the COVID-19 pandemic and the OSHA case study, the following Subpart offers recommendations for federal agencies faced with questions about the use of emergency powers to address the climate crisis in a future that will be shaped by increasingly severe governance challenges.

B. Recommendations

The question of when emergency powers should be used to address the climate crisis is not going away. There are tangible steps that federal administrative agencies can take right now to prepare for deployment of emergency powers to address climate impacts in the future. Three key

generally DOHMH health advisory #3: *Collect and report race and ethnicity data to help ensure equitable access to COVID-19 vaccines*, N.Y.C. DEP'T HEALTH & MENTAL HYGIENE, <https://www1.nyc.gov/assets/doh/downloads/pdf/han/advisory/2021/covid-19-vaccine-race-ethnicity-data.pdf>; *Epi Data Brief: Inequities in Experiences of the COVID-19 Pandemic, New York City*, N.Y.C. DEP'T HEALTH & MENTAL HYGIENE (May 2021), <https://www.nyc.gov/assets/doh/downloads/pdf/epi/databrief123.pdf>; Daniel Carrión et al., *Neighborhood-level disparities and subway utilization during the COVID-19 pandemic in New York City*, 12 NATURE COMM'NS 1 (June 2021), <https://doi.org/10.1038/s41467-021-24088-7>.

312. See Attorney General Letitia James, *Nursing Home Response to COVID-19 Pandemic* (Jan. 30, 2021), <https://ag.ny.gov/sites/default/files/2021-nursinghomesreport.pdf> (finding that a larger number of nursing home residents died from COVID-19 than the New York State Department of Health's published nursing home data reflected and may have been undercounted by as much as 50 percent); see also Robbins, *supra* note 35, at 49 ("Several government bodies cited broad exemptions and loopholes in public records laws to deny requests for COVID-19 related information . . . These workarounds, while originally intended to protect state interests, such as privacy and national security, enable government entities to shield from the public critical emergency-related information.").

313. OSHA denial, *supra* note 16, at 2.

recommendations flow from the OSHA case study that can be used to guide administrative agencies considering emergency powers in this context. Within each recommendation, assessment and incorporation of lessons learned from the use of emergency powers during the COVID-19 pandemic is vital.

1. Learn from Frontrunner States and Take Stock of Federal Agency Emergency Powers Now to Ensure Effective Federal Leadership before Conditions Worsen

a. Consult with States Already Using Emergency Powers to Address Climate Impacts

Federal agencies considering emergency intervention to address the climate crisis have the benefit of being able to learn from state governments that have begun to flex their emergency powers for this purpose. The OSHA case study illustrates this point nicely. At least three of the states that have occupational heat exposure standards also issued emergency rules that were deemed necessary in the midst of local heat waves.³¹⁴ For example, in August 2005, after five workplace heat-related fatalities were reported to authorities, California adopted an emergency heat standard to address occupational heat-related illness and death, which was later followed by a permanent rule.³¹⁵ Washington first promulgated a permanent occupational heat standard in 2008, but then issued more protective emergency standards during the record-breaking summer heat waves of 2021 and 2022 using abbreviated rulemaking procedures.³¹⁶ These state standards have proven to be largely workable, and some have undergone iterations and improvements over time.³¹⁷ If OSHA were interested in issuing an emergency occupational heat standard in the future, it could draw upon these state standards to help inform and strengthen a federal rule.³¹⁸ For example, OSHA could utilize the data from these states regarding the mechanics of the rule, such as threshold temperatures or acclimatization plans, or it could incorporate state-level data in its economic or technical feasibility analysis. Now

314. See CAL. CODE REGS. tit. 8, § 3395(g); OR. ADMIN. R. 437-002-0156; WASH. ADMIN. CODE §§ 296-62-095 to 296-62-09560.

315. See *Congressional Testimony Re: California's Heat Illness Prevention Standard*, CAL. DEP'T INDUS. REL. (July 22, 2019).

316. See WASH. ADMIN. CODE § 296-62-09555; see also Hal Bernton, *Washington Releases New Heat Rules to Increase Protections for Outdoor Workers*, SEATTLE TIMES (July 9, 2021), <https://www.seattletimes.com/seattlenews/washington-releases-new-heat-rules-to-increase-protections-for-outdoor-workers/>.

317. California's occupational heat standards have evolved over time since 2005. The state is currently developing a standard to apply to indoor workers. See *Heat Illness Prevention in Indoor Places of Employment, Proposed Rule*, CAL. DEP'T INDUS. REL. (Mar. 31, 2023), <https://www.dir.ca.gov/oshsb/Indoor-Heat.html>.

318. In OSHA's letter denying the AG petition for an emergency rule on occupational heat exposure, OSHA noted that state agencies are not subject to the same high legal threshold for issuing emergency rules that binds OSHA. OSHA denial, *supra* note 16, at 3. However, even if this were true, OSHA did not explain why the substance of the state occupational heat standards could not be leveraged to accelerate a federal emergency rule. See OSHA denial, *supra* note 16, at 2-3.

is the time to learn from such state examples and consider how federal emergency interventions can provide strong leadership before conditions worsen.

Every federal administrative agency that could potentially be called upon to use emergency powers to address the climate crisis should take stock of its emergency powers and assess whether there are any comparable state agencies that have already used emergency powers to address crises that the federal agency is likely to encounter in the near term. Federal agencies should consult directly with such “frontrunner states” and seek to learn from the states’ experiences as they prepare for the potential deployment of federal emergency powers in the future.

b. Apply Insights from the COVID-19 Pandemic about Federal Emergency Responses and Consider Federal-State Partnerships

Federal agencies should perform a comprehensive review of how their emergency powers were deployed, if at all, during the pandemic, and glean lessons learned for use during future emergencies, such as the climate crisis. At least one federal agency has already begun this process. In August 2023, the Food and Nutrition Service (FNS) within the U.S. Department of Agriculture (USDA) published a proposed rule updating its emergency food programs based on the large-scale deployment of the emergency food network that it helped administer during the COVID-19 pandemic.³¹⁹ In its notice of proposed rulemaking, the agency noted: “As the pandemic subsides, FNS has a key opportunity to apply lessons learned to improve food distribution programs, including through regulatory updates. These proposed changes are intended to help ensure that eligible populations are able to more easily access the programs and streamline requirements for program operators.”³²⁰ For example, several of the lessons learned involved ensuring that state agency partners implementing emergency food programs communicated information to the public in a way that was more accessible, such as offering materials in appropriate languages.³²¹ Other federal agencies that deployed emergency powers during the COVID-19 pandemic should likewise share lessons learned, and agencies that may be called upon to deploy emergency powers to address the climate crisis should incorporate such learnings, where applicable.

In particular, federal administrative agencies should assess how federal-state partnerships functioned during the pandemic. This assessment should include positive federal-state working models, including instances of effective federal-state cooperation during the pandemic. For example, the U.S. Department of Education used its emergency powers delegated by Congress to

319. See generally *Food Distribution Programs: Improving Access and Parity*, 88 Fed. Reg. 54,908 (proposed Aug. 14, 2023) (to be codified at 7 C.F.R. pts. 247, 250, 251, 253, and 254), <https://www.federalregister.gov/documents/2023/08/14/2023-17467/food-distribution-programs-improving-access-and-parity>.

320. *Id.* at 54,908.

321. See *id.* at 53,931-32.

waive certain requirements regarding the use of school lunches to allow meals to be distributed even when schools were closed.³²² This allowed jurisdictions like New York to operate food distribution hubs located at schools that handed out free meals in bulk to families at the height of the pandemic when food insecurity was on the rise.³²³ Such positive intergovernmental collaborative models should be compiled now so that they can be utilized in the future as the climate crisis accelerates.

This assessment should also include instances where state inaction or obstruction contributed to negative outcomes and the need for heightened federal intervention. As agencies assess their emergency powers in light of lessons learned from the pandemic, full consideration should be given to the interplay between the use of emergency powers at the federal, state, and local levels, and how these interlocking and overlapping schemes can be deployed in a coordinated, effective, and equitable way. As noted above, Hayes has proffered recommendations for a streamlined federal emergency response to emerging climate impacts through a centralized climate emergency office whose duties, among others, would involve coordination with states and tribal governments.³²⁴ These recommendations are well worth considering. However, even in the absence of such governmental restructuring, taking stock of the conditions of federal-state partnerships at the individual agency level is critical to effective deployment of federal emergency powers in the future.

The OSHA case study further highlights this point. At the time that OSHA was considering the Attorneys General’s petition for an Emergency Temporary Standard for occupational heat exposure, frontrunner states like California, Oregon, and Washington could have charted a course for federal emergency action on the issue. This was a missed opportunity to learn from states that had already taken action. However, state inaction was also relevant to the story. In fact, it was the cruelty of Texas’ decision to preempt local worker protection laws that ultimately seemed to capture the attention of the federal government.³²⁵ Shortly after Texas passed its law, President Biden issued the first ever “Heat Hazard Alert” aimed at protecting workers from extreme heat.³²⁶ However, in the absence of an enforceable federal standard, the administration was left with

322. See *Child Nutrition COVID-19 Non-congregate Feeding Nationwide Waiver*, U.S. DEP’T AGRIC., FOOD & NUTRITION SERV., <https://www.fns.usda.gov/cn/covid-19-child-nutrition-response-2> (last updated Mar. 20, 2021) (allowing the National School Lunch Program, School Breakfast Program, Child and Adult Care Food Program, and the Summer Food Service Program to serve meals outside of the standard group setting).

323. See N.Y.C. OFF. OF THE MAYOR, COVID-19 FOOD RESPONSE 2 (Dec. 2021), <https://www.nyc.gov/assets/opportunity/pdf/policybriefs/get-food.pdf> (“When NYC schools shut down in March 2020, DOE quickly pivoted to offering ‘grab and go’ meals. These free meals, which were available at over 500 school sites across the City . . .”); N.Y.C. OFF. OF THE MAYOR, FEEDING NEW YORK: THE PLAN FOR KEEPING OUR CITY FED DURING THE COVID-19 PUBLIC HEALTH CRISIS 13 (2020), <https://nyc.gov/assets/home/downloads/pdf/reports/2020/Feeding-New-York.pdf>.

324. See generally Hayes, *supra* note 60.

325. See generally Davenport, *supra* note 24 (mentioning the Texas law which preceded President Biden’s Heat Hazard Alert).

326. See Press Release, White House, FACT SHEET, *supra* note 27.

little power to meaningfully protect workers in states like Texas where the state government was actively hostile to worker protections. Federal agencies must anticipate that in our existing political landscape, some state governments will actively obstruct life-saving mitigation measures. In such circumstances, strong federal leadership has the potential to save lives before climate conditions worsen.

c. Build Capacity for Federal and State Emergency Responses

Finally, there is a vital need for capacity building within federal and state agencies responsible for enforcing laws addressing climate impacts and other climate-oriented policies. There are lessons from the OSHA case study here too, as the agency cited resource constraints in its letter denying the emergency rule petition and implied that promulgation of both an emergency rule and a permanent rule would strain the agency. This is deeply concerning, given the known budget cuts to OSHA and the resource constraints on other agencies critical to the climate emergency response. Federal agencies should include preparation for effective deployment of emergency powers in their agency needs assessments, and Congress should allocate federal funds to federal agencies—and to their state agency counterparts—for this purpose.

The governance challenges faced by federal administrative agencies will only increase as the climate crisis accelerates. Federal administrative agencies should recognize the need to update their governance strategies in light of the range of crises and emergencies that climate change will bring about. Specifically, they should take practical steps now to assess: 1) the current use of emergency powers by state governments to address emerging climate impacts, including an assessment of how such state models can be helpful to federal emergency responses; 2) the prior use of federal agency emergency power during the COVID-19 pandemic, including federal-state dynamics; and 3) the federal agencies' needs with regard to the use of emergency power in the future to address the climate crisis.

2. Center the Lived Experiences of Those Suffering the Most Harm

Perhaps the most striking aspect of the OSHA case study is the tension between OSHA's decision not to take emergency intervention in April of 2023 and the lived experiences of essential workers who suffered the debilitating effects of extreme heat a few months later. Because systemic and concurrent injustices compound to make heat more deadly for many workers in certain essential industries, generalized data alone does not reveal the full picture. Hearing from workers themselves about their lived experiences is essential to understanding why an employer's failure to provide adequate shade or water is so hazardous for the most vulnerable workers. The OSHA case study illustrates the consequences of discounting the lived experiences of vulnerable populations when considering emergency power.

a. Engage Vulnerable Populations and Affected Communities Directly When Considering Whether Emergency Intervention Is Needed

Administrative agencies who may be in a position to use emergency powers to address the climate crisis should identify vulnerable populations most at risk of being harmed by climate impacts now and develop mechanisms to engage directly with those populations prior to deployment of emergency authority. Such engagement should occur at the time the agency is considering whether use of emergency power is warranted, and also as the agency considers how to deploy emergency powers. Agencies should seek to center the lived experiences of those most affected by climate impacts, particularly with regard to populations that have been historically excluded from governmental decision making. When engaging in this process, agencies should identify and incorporate lessons learned from the pandemic and in particular should perform a critical assessment of how existing socioeconomic and racial inequities both exacerbate climate impacts and create challenges for governmental emergency responses. This assessment is much needed to ensure emergency powers are deployed in a way that is fair, legitimate, and impactful. Moreover, administrative agencies should conduct a serious analysis of how emergency power frameworks themselves can be shaped to allow for engagement with such vulnerable populations at various stages of an emergency. For example, emergency rulemaking procedures typically truncate or eliminate formal public participation processes. However, this does not foreclose the possibility of other forms of community engagement during emergency policy development or implementation.

Villa offers the “vulnerability theory,” developed by feminist legal theorist Martha Albertson Fineman,³²⁷ as one powerful framework for policy makers looking to consider the needs of vulnerable populations when addressing environmental harms.³²⁸ Villa draws lessons from the COVID-19 pandemic and observes how the virus affected individuals within the population differently depending on factors, such as age, race, or access to healthcare.³²⁹ Such factors made different people more or less vulnerable to harm, and therefore in greater or lesser need of governmental intervention. Villa argues that policy makers and community advocates should use Fineman’s “vulnerability theory” to identify the people most at risk from environmental hazards and most in need of proactive governmental attention to protect their health and safety. As Villa explains:

Vulnerability initially should be understood as arising from our embodiment . . . Our embodied humanity carries with it the ever-present possibility of . . . disease, epidemics, resistant viruses, or other biologically-based catastrophes. Our bodies are also vulnerable to other forces in our

327. See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J. L. & FEMINISM* 1, 9 (2008) (“The concept of vulnerability can act as a heuristic device, pulling us back to examine hidden assumptions and biases that shaped . . . original social and cultural meanings.”).

328. Villa, *supra* note 143, at 511.

329. *Id.* at 513.

physical environment. There is the constant possibility that we can be injured and undone by errant weather systems, such as those that produce flood, drought, famine, and fire. . . . Age, for example, is not a suspect class traditionally recognized by courts for purposes of triggering strict scrutiny, and yet we know that children and the elderly may be exceptionally vulnerable segments of any community.³³⁰

Villa then applies vulnerability theory as a way of informing environmental justice and climate justice, noting that “[r]emedies for the protection of older people from the threat of wildfires might include better community evacuation and transportation planning, to ensure assistance for people unable to drive or walk.”³³¹

Villa’s insights about Fineman’s vulnerability theory can be applied to the case of federal administrative agencies considering emergency powers to address the climate crisis. Agencies should proactively include environmental justice communities and organizations representing vulnerable populations when developing processes for community engagement surrounding the use of emergency powers in the climate context to ensure that governmental emergency interventions are tailored to the specific vulnerabilities that place certain people at greater risk of harm. President Biden has already stated in a variety of settings that addressing environmental justice and climate equity are national priorities,³³² and federal agencies such as the EPA and the Federal Energy Regulatory Commission (FERC) have employed proactive community engagement strategies to involve environmental justice communities, tribal governments, and other marginalized peoples in agency decision making.³³³ For example, the EPA uses an Environmental Justice Collaborative Problem Solving

330. *Id.* at 510.

331. *Id.* at 515.

332. *See, e.g.*, Exec. Order No. 14096, 88 C.F.R. 71041 (2023); *Executive Order on Revitalizing Our Nation’s Commitment to Environmental Justice for All*, THE WHITE HOUSE (Apr. 21, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/04/21/executive-order-on-revitalizing-our-nations-commitment-to-environmental-justice-for-all/>.

333. The National Environmental Justice Advisory Council, established September 30, 1993, provides the EPA with advice and recommendations about broad, cross-cutting issues related to environmental justice, from stakeholders involved in environmental justice dialogue. *See generally*, *Promising Practices for EJ Methodologies in NEPA Reviews*, EPA (Mar. 2016), https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf (compiling methodologies gleaned from current agency practices concerning the interface of environmental justice considerations through processes under the National Environmental Policy Act). By executive order, President Biden’s Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad* (signed January 27, 2021), established the White House Environmental Justice Advisory Council to advise the Chair of the Council of Environmental Quality and the newly established White House Environmental Justice Interagency Council to increase the Federal Government’s efforts to address environmental injustice. *See Executive Order on Tackling the Climate Crisis at Home and Abroad*, *supra* note 92. In March 2023, the Federal Energy Regulatory Commission (FERC) held a Roundtable on Environmental Justice and Equity in Infrastructure Permitting to provide an opportunity for the Commissioners and staff to engage with environmental justice community members, advocates, researchers, industry representatives, and government leaders. *Roundtable on Environmental Justice and Equity in Infrastructure Permitting*, FERC (Mar. 29, 2023), <https://www.ferc.gov/news-events/events/roundtable-environmental-justice-and-equity-infrastructure-permitting>.

Model to address local environmental or public health issues in a collaborative manner with direct engagement from communities.³³⁴ Moving beyond these efforts, administrative agencies should proactively seek out the input and meaningful involvement of environmental justice communities when assessing and deploying climate emergency powers.³³⁵

Another useful model for comparison is the Emergency Planning and Community Right-to-Know Act (EPCRA), insofar as it establishes a system to notify and involve communities in emergency planning regarding local environmental hazards.³³⁶ EPCRA was enacted in 1986 to address community concerns regarding the handling and storage of toxic chemicals.³³⁷ The law includes four main components: 1) emergency planning at the state and local levels, including the creation of Local and Tribal Emergency Planning Committees (LEPCs and TEPCs), which prepare local chemical emergency response plans; 2) emergency notifications to communities regarding release of toxics; 3) public reporting regarding storage and transportation of hazardous chemicals by industrial facilities; and 4) a toxics release inventory designed to inform communities about the release hazardous substances.³³⁸ As Purifoy notes, the LEPC model has been a powerful tool for promoting environmental justice principles and allowing local communities to share in decision making regarding emergency planning for local hazards that affect them.³³⁹ However, she cautions that severe underfunding of LEPCs at the state and federal levels has impacted their efficacy and undermined participation by communities themselves, as communities are less likely to invest in a process that has limited impact.³⁴⁰ Similarly, Pirk notes that while EPCRA's mechanisms to include communities in emergency planning have helped support environmental justice principles of community engagement, communities often require technical assistance to understand chemical hazard data disclosed under the statute, and a lack of

334. See *The Environmental Justice Collaborative Problem-Solving Cooperative Agreement Program*, EPA, <https://www.epa.gov/environmentaljustice/environmental-justice-collaborative-problem-solving-cooperative-agreement-5> (last updated Nov. 27, 2023).

335. *But cf.* Carlame, *supra* note 66, at 183-84 (arguing that inclusion of marginalized peoples has not historically occurred within the traditional environmental movement: "Environmental and climate law are defined by 'profound inequities in power.' Power, understood as 'the ability to effect substantive policy outcomes by influencing what the government will or will not do,' has never been equitably distributed in the environmental context. The environmental and climate justice movements are testament to the gross imbalances of power that characterize legal and political frameworks. Alongside the EJ and climate justice movements, the youth climate movement and Indigenous peoples movements seek to harness power through collective action. Hierarchies of power, however, are deeply embedded in our democracy.").

336. See generally Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986, Pub. L. No. 99-499, 100 Stat. 1728 (codified at 42 U.S.C. § 11001-11050).

337. See generally 42 U.S.C. § 11023.

338. *Id.* §§ 11001-11023.

339. See Danielle M. Purifoy, *A Retrospective on the Environmental Right-to-Know Act*, 13 YALE J. HEALTH POL'Y, L., & ETHICS 375, 415 (2013).

340. See *id.* at 399.

support in this area has been a barrier to community participation.³⁴¹ Therefore, EPCRA's model for local emergency planning is worth considering as federal agencies consider updating their governing approaches to make them more nimble to address emergency climate impacts. At the same time, careful consideration should be given to ensuring that there is adequate funding and technical support for communities to allow them to meaningfully engage with agencies in the development of emergency plans and responses.

b. Utilize Community Partnerships to Gather Data About Vulnerable Populations in Accordance with Environmental Justice Principles

One important way that agencies can engage vulnerable populations now to assess whether the use of emergency power is warranted is by engaging communities and affected populations directly in data gathering. This should be done in accordance with environmental justice principles. Best practices to consider include following a community-based participatory research approach,³⁴² utilizing citizen science and community-owned and managed research principles,³⁴³ and adopting the EPA's Collaborative-Problem Solving Model or similar models.³⁴⁴ For example, in October 2023, the federal Office of Science and Technology Policy issued a request for information (RFI) "to assist in developing a coordinated Federal strategy to identify and address gaps in science, data, and research related to environmental justice."³⁴⁵ The RFI, which will help support the agency's biennial Environmental Justice Science, Data, and Research Plan, specifically asked for information on how federal administrative agencies can partner with communities to address vital data gaps related to environmental justice.³⁴⁶ Specifically, the RFI sought recommendations for federal agencies on "encouraging participatory science, such as research or data collection undertaken by communities or the public, and, as appropriate, integrating such science into agency decision-making processes."³⁴⁷ This is a promising development, and the results may be relevant and useful to agencies who are faced with questions of whether and how to use emergency power to address emerging climate impacts. However, the RFI made no direct mention of

341. Sara Pirk, *Expanding Public Participation in Environmental Justice: Methods, Legislation, Litigation and Beyond*, 17 J. ENV'T L. & LITIG. 207, 211 (2002).

342. See generally, e.g., Adwoa Commodore et al., *Community-based participatory research for the study of air pollution: a review of motivations, approaches, and outcomes*, 189 ENV'T MONITORING & ASSESSMENT 377 (2017).

343. See generally, e.g., Christopher Heaney et al., *The West End Revitalization Association's Community-Owned and -Managed Research Model: Development, Implementation, and Action*, 1 PROGRESS CMTY. HEALTH P'SHIP 339 (2007).

344. See generally Sacoby Wilson et al., *Use of EPA collaborative problem-solving model to obtain environmental justice in North Carolina*, 1 PROGRESS CMTY. HEALTH P'SHIP 327 (2007).

345. Request for Information to Support the Development of a Federal Environmental Justice Science, Data, and Research Plan, 88 Fed. Reg. 71,041 (2023), <https://www.federalregister.gov/documents/2023/10/13/2023-22527/request-for-information-to-support-the-development-of-a-federal-environmental-justice-science-data>.

346. See *id.* at 71,042.

347. *Id.*

emergency planning or response with regard to the climate crisis. Therefore, the Biden administration should consider updating this RFI or developing other mechanisms to specifically address how community-led data partnerships might be utilized in assessments of emergency responses.

The case study of OSHA's consideration of an emergency heat rule is illustrative of how lack of data about the lived experiences of vulnerable populations can be highly relevant when an agency considers whether to use emergency power to address a climate impact, such as extreme heat. The agency acknowledged that it does not have accurate data on the full extent of the deaths and illnesses caused by occupational extreme heat exposure, raising serious questions about whether the agency was well situated to determine that emergency intervention was not warranted. The agency also found that certain socioeconomic factors, such as fear of employer retaliation, which is common for low-wage and undocumented workers in certain essential industries, contributed to such underreporting.³⁴⁸ Such a data gap, which may itself invite judicial scrutiny, is particularly concerning for an agency that has already articulated concerns about judicial challenge.

There are multiple community engagement strategies that OSHA could be utilizing now to address this data gap. For example, in California, the United Farm Workers and the UFW Foundation partner directly with California's Division of Occupational Safety and Health to facilitate reporting of and responses to Heat Illness Prevention Regulation violations, and they provide joint trainings of employers and workers.³⁴⁹ The Harvard Food Law and Policy Clinic argues that in light of government resource constraints, enforcement agencies should pursue more partnerships like this with trusted community organizations to facilitate additional monitoring and reporting of workplace violations.³⁵⁰ Such partnerships could also be used by federal agencies like OSHA to gather data regarding when emergency intervention is warranted or how to shape an emergency rule to effectively target workers most at risk.

Community partnerships could also be used to gather information about how heat combines with local environmental conditions to escalate health hazards for certain workers in urban environments. As explained above, workers feeling the effects of urban heat islands or the combined hazards of extreme heat and air pollution face increased risk of morbidity and mortality that would not be captured by looking at general metrics like the heat index. Federal agencies like OSHA could partner with community advocates that operate community air

348. See OSHA ANPRM, *supra* note 12, at 59,311.

349. This particular agreement arose out of litigation in California brought by workers, and there is evidence that it has led to positive outcomes. See Geoffrey Mohan, *Cal-OSHA Settles Farmworker Suits Over Heat-Related Deaths*, L.A. TIMES (June 11, 2015), <https://www.latimes.com/business/la-fi-cal-osh-farm-workers-20150612-story.html>; see generally *Bautista Settlement Summary*, UNITED FARM WORKERS (2017), <https://ufw.org/wp-content/uploads/2017/04/BautistaSettlementSummary.pdf>; *Bautista Memorandum of Understanding*, UNITED FARM WORKERS (June 2022), <http://www.ufw.org/pdf/BautistaMOUFinal.pdf>.

350. See FARM BILL LAW ENTER., 2023 FARM BILL: FARMWORKERS 28 (June 2022), <https://chlp.org/wp-content/uploads/2022/06/2023-Farm-Bill-Farmworkers.pdf>.

quality programs to get a more accurate picture of the level of hazard that heat presents to such vulnerable workers. For example, the New York City Environmental Justice Alliance is undertaking a community air survey specific to certain environmental justice neighborhoods in New York City that factors in extreme heat and air pollution.³⁵¹ Community-level data collected with an awareness of cumulative and compounding risk factors can better equip administrative agencies to accurately assess when an “emergency” exists and how to ensure that emergency interventions protect vulnerable populations.

c. Build Off of Local Approaches to Community Partnerships

Cities are already beginning to proactively seek out community partnerships to make their emergency responses more effective and more equitable. For example, Philadelphia has a novel public engagement program that works with local community groups who “adopt” one or more sites of green stormwater infrastructure, such as rain gardens, planters, and tree trenches that retain excess rainfall to mitigate flooding and overloading of the city’s sewers during storms. The green infrastructure also provides additional greenery to the urban environment. Under this “Soak It Up Adoption” program, community groups take responsibility for cleanup, maintenance, and reporting to the water department.³⁵² The program also provides education to neighborhood residents about stormwater runoff, storm preparedness, and green infrastructure. One of the main functions of this program is to engage local residents in the maintenance of the city’s storm system and stormwater mitigation. The community reporting piece serves an important function in helping the city government identify maintenance issues that it would not otherwise have resources to monitor, which is highly relevant for emergency storm preparedness.

Houston is another city taking a novel approach by proactively seeking community engagement with youth in its emergency preparedness programming. The City of Houston Youth Emergency Preparation Campaign³⁵³ is an educational campaign developed in partnership with youth leaders. The program targets children ages thirteen to eighteen but also seeks to reach Houston’s most underserved communities more broadly, with the idea that children are a connection point to non-English speakers, immigrants, and low-income

351. See Notes from N.Y.C. Environmental Justice Alliance (July 13, 2023) (on file with author); N.Y.C. ENV’T JUST. ALL., COMMUNITY AIR MAPPING PROJECT FOR ENVIRONMENTAL JUSTICE REPORT 6-7 (Feb. 2021), <https://nyc-eja.org/wp-content/uploads/2021/02/CAMP-EJ-2020-Report-Final-021821-Reduced.pdf>; see also NY S. 8431, (enacted as Ch. 563 L. 2022) (directing the Department of Environmental Conservation, in consultation with the environmental justice interagency coordinating council and the climate justice working group, to conduct a study on the impacts of the urban heat island effect on disadvantaged communities).

352. See *Soak it up adoption*, PHIL. WATER DEP’T, <https://water.phila.gov/adoption/about/>; Christina Griffith, *A Win for Water*, PHIL. CITIZEN (Mar. 10, 2022), <https://thephiladelphiacitizen.org/soak-it-up-adoption-philly/>.

353. See *City of Houston Works to Improve Emergency Preparedness Among Young People*, HOUS. OFF. OF THE MAYOR (Aug. 3, 2023), <https://mailchi.mp/houstontx/city-of-houston-works-to-improve-emergency-preparedness-among-young-people?e=4050453e79>.

communities. The program addresses topics such as staying safe in the heat and preparing for floods, but it also aims to prepare youth for non-natural disaster emergencies such as school shootings and mental health crises.³⁵⁴

Federal administrative agencies that may be called upon to use emergency powers to address the climate crisis should look to states, cities, and tribal governments for models of community partnerships that will facilitate an exchange of information about the lived experiences of those most affected by the climate crisis and related emergencies. Developing relationships with communities and vulnerable populations early on is essential to gaining a full understanding of the challenges and hazards that the climate crisis presents. Moreover, direct community engagement with those most at risk should inform an administrative agency's decisions regarding whether emergency intervention is needed and how to target interventions effectively and equitably. Where possible, federal agencies should coordinate with states, cities, and tribal governments in their engagement efforts to avoid engagement fatigue among local communities and vulnerable populations.

d. Consider Global Human Rights-Based Frameworks

As described previously, the question of when to use emergency powers to address the climate crisis fits within a growing movement to situate affirmative climate policy within a human rights framework more broadly.³⁵⁵ Based on a large-scale assessment of climate litigation, human rights-based arguments are featuring in an increasing number of climate cases both within the United States and globally.³⁵⁶ These arguments seek greater affirmative governmental interventions to protect vulnerable populations from climate impacts through more aggressive reduction of GHG emissions and stronger mitigation strategies and responses, including the use of emergency powers.³⁵⁷ Such human rights-based approaches center the experiences of people most harmed by the climate crisis along with the structural inequalities that make particular populations more vulnerable to climate impacts.³⁵⁸

Federal administrative agencies now have a significant opportunity to learn from these global trends and to gain insights from governments around the world grappling with similar challenges. For example, some litigants have been successful when bringing climate cases under a human-rights based framework by voicing the lived experiences of people who are most burdened by climate impacts. The Colombian Supreme Court held in 2018 that the Colombian government had violated the fundamental rights of a group of twenty-five youth plaintiffs already experiencing climate harms by failing to meet its international commitments to curb deforestation in the Amazon as a climate mitigation

354. *See id.*

355. *See generally* Carlarne, *supra* note 66.

356. *See generally id.*

357. *Id.* at 161-63.

358. *See id.* at 161-62.

measure.³⁵⁹ More broadly, the confluence of international human rights law and the climate crisis has led to some sobering warnings for governments at risk of basing their determination of what constitutes an emergency on the experiences of those most insulated from the climate crisis. For example, the 2019 UN Special Rapporteur on human rights and the environment, Philip Alston, warned against “a climate apartheid scenario in which the wealthy pay to escape overheating, hunger and conflict while the rest of the world is left to suffer.”³⁶⁰ Federal agencies, such as OSHA, should heed these warnings when conducting their own assessments of what constitutes an “emergency” and actively look to the experiences of those most at risk of facing deprivations of life, health, and safety resulting from the climate crisis.

Taking a proactive strategy of community engagement that seeks to understand, and then be responsive to highly vulnerable populations when thinking about climate emergency powers, will better prepare federal administrative agencies to be global leaders in climate policy. Strategies to help promote emergency responses that are more effective and equitable may include: 1) engaging communities directly when making decisions regarding when and how to use emergency power; 2) building community partnerships to improve data about at-risk populations; 3) learning from local models; and 4) expanding the aperture of engagement to situate emergency planning within global human rights movements. These strategies may also help build the democratic legitimacy of governmental emergency responses, which is increasingly salient for federal administrative agencies, as described in the next Subpart.

3. Forge a Way Forward Through the Evolving Jurisprudence Regarding Legislative Delegations of Emergency Authority

The question of judicial review is gaining increasing importance for federal administrative agencies. Large questions loom regarding both the Supreme Court’s major questions doctrine and the level of deference administrative agencies will be afforded by courts in the future.³⁶¹ Several scholars have observed an emergent arsenal of antiregulatory canons being deployed to challenge administrative agency actions and empower judges at the expense of

359. See *Demanda Generaciones Futuras v. Minambiente*, Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. de Casación Civil, abril 5, 2018, L.A.T. Villabona, Radicación 11001 22 03 000 2018 00319 00 (Colom.).

360. UN Special Rapporteur on extreme poverty and human rights, Report, *Climate Change and Poverty*, A/HRC/41/39, ¶ 13 (July 17, 2019). See also Philip Alston, *Extreme Inequality as the Antithesis of Human Rights*, Open Global Rights, (Aug. 27, 2015), <https://www.openglobalrights.org/extreme-inequality-as-the-antithesis-of-human-rights/>; see also César Rodríguez-Garavito, *Climatizing Human Rights: Economic and Social Rights for the Anthropocene*, 21-41, Oxford Handbook of Economic and Social Rights, Forthcoming, 1, 13-14 (Oct. 19, 2022) (framing the Special Rapporteur’s comments in the context of an overall trend within international human rights law of increasingly grappling with the current reality presented by the climate crisis).

361. See generally, e.g., Brunstein & Revesz, *supra* note 94; Deacon & Litman, *supra* note 94; Beerman, *supra* note 94.

democratic choices by legislatures.³⁶² This backdrop of legal precarity surrounding administrative agency decision making is directly relevant to the question of agency emergency powers.

The OSHA case study about occupational heat exposure is a sobering example of how the Court's recent administrative law jurisprudence is already affecting agency decision making with regard to emergency powers. It seems likely that the Court's decision in *NFIB v. OSHA* had some chilling effect on the agency's willingness to use its emergency rulemaking authority to prevent deaths from heat. In its denial letter, the agency did not expressly analyze whether the standard for emergency rulemaking was met, but rather, it cited directly to *NFIB v. OSHA* in support of its decision to deny the emergency rulemaking petition.³⁶³ The fact that the agency did not directly dispute the need for urgent governmental intervention at least raises the question of whether the agency would have been more willing to issue an emergency rule if the Court's approach to federal agency emergency authority during the COVID-19 pandemic had been different.

It is important to ask whether such temerity regarding use of potentially lifesaving emergency interventions will be sustainable as the climate crisis accelerates. As global surface temperatures continue to rise, along with co-occurring disruptions in the form of hurricanes, forest fires, floods, droughts, food shortages, and human migrations, federal administrative agencies will be increasingly confronted with whether to utilize their statutorily delegated emergency powers.

a. Consider Legal Strategy Now

Administrative agencies that may be called upon to use emergency powers to address the climate crisis should conduct a legal analysis of 1) how their emergency powers might be deployed within applicable statutory authority; 2) potential legal challenges; and 3) how to prepare against such challenges now, with consideration of the Supreme Court's evolving administrative law jurisprudence. Agencies should begin this analysis now and should use the community engagement strategies described above to gather information about at-risk populations most likely to be affected by an emergency rule. Partnering with community organizations to collect more informed data about vulnerable populations, as described in the previous recommendation, can help support an administrative record in defense of emergency intervention. Getting a head start on such a legal analysis will be vital for administrative agencies who may need to promulgate emergency rules in short order.

In the case of occupational heat exposure, for example, OSHA could begin crafting an emergency rule that is more similar in kind to its rule targeting COVID-19 in health care settings that survived the pandemic intact.³⁶⁴ Such a

362. See generally, e.g., Brunstein & Revesz, *supra* note 94; Deacon & Litman, *supra* note 94; Beerman, *supra* note 94.

363. See OSHA denial, *supra* note 16, at 2.

364. See 29 C.F.R. § 1910.502(a).

rule could address emergency heat in the summers ahead, while the permanent rulemaking process is likely to still be underway. The agency might consider targeting the most at-risk industries, such as agriculture, construction, warehouse, delivery, and food service, or further limiting the rule to geographic regions most susceptible to extreme heat, such as the southwest and southeast. In such a rule, OSHA could explain why job-related factors elevate the risks of heat illness or death above the general population for such categories of high-risk workers. For example, agricultural and construction workers must wear personal protective equipment (PPE) that further elevates body temperatures, construction and utility workers performing roadwork must spend extended hours on asphalt that absorbs extreme heat, and food service workers in kitchens without adequate cooling systems can be subject to extreme heat that is well above the baseline for other indoor settings. This type of analysis would help strengthen such an emergency rule against the type of challenge in *NFIB v. OSHA*, where the Court took issue with the breadth of OSHA's rule and questioned whether workers covered by the rule would be at risk of contracting COVID-19 at rates any higher than the baseline risk of contracting COVID-19 among the general population.³⁶⁵

When considering a future emergency rule to address the climate crisis, administrative agencies should give careful consideration toward building a record of regulatory precedent. For example, the Court found this factor relevant in *Biden v. Missouri*, when it upheld HHS's expedited rule related to COVID-19 vaccination requirements in health-care settings.³⁶⁶ Revesz and Sarinsky argue that administrative agencies concerned about administrative law challenges should consider including an analysis of regulatory antecedents in their public rulemaking records. They explain that this will help the agency respond to claims that the agency action was unheralded and thereby reduce the agency's vulnerability to major questions doctrine challenges or related challenges.³⁶⁷ In the case of OSHA, focusing resources on high-risk workers in certain industries or physical settings has been a key element of its approach to worker safety since the agency's inception.³⁶⁸ In a future emergency heat rule, the agency could cite to prior agency rulemakings as part of an argument that the agency was acting well within its traditional jurisdictional scope. For example, if the agency was targeting workers who face heightened risk of heat-related illness due to PPE, the agency could cite prior rulemakings wherein OSHA established requirements regarding the use of PPE.³⁶⁹ Similarly, the agency might consider building on its existing PPE standards by adding heat-specific PPE, such as cooling vests or reflective clothing that can lower the body's temperature via the albedo effect, as Gregor notes.³⁷⁰ Such requirements, which might be particularly helpful for

365. See *NFIB v. OSHA*, 595 U.S. 109, 115-16 (2022).

366. See *Biden v. Missouri*, 595 U.S. 87, 96-97 (2022).

367. Revesz and Sarinsky, *supra* note 148, at 2.

368. See M. Chain Robbins, *Truth and Rumor about OSHA*, 33 FED. BAR J. 149, 149-50 (1974).

369. See, e.g., 29 C.F.R. § 1910.132(d).

370. See Gregor, *supra* note 32, at 550.

outdoor workers,³⁷¹ could be more easily framed as a simple extension of regulatory precedent.

Another key area of focus for administrative agencies thinking about how to successfully defend future emergency actions is the procedural posture of potential legal challenges. Several scholars³⁷² have observed that many of the legal challenges to emergency actions during the COVID-19 pandemic came in the form of requests for emergency judicial intervention, such as stays or temporary restraining orders. Vladeck notes that this procedural posture puts an administrative agency defending an emergency action in a tough position because the time for briefing is abbreviated and the only record before an appellate court is the motion for a preliminary injunction or temporary restraining order at the district court, rather than a full record on the merits.³⁷³ He also raises concerns that in *NFIB v. OSHA*, which came to the Court as a review of a motion to stay, the Court gave “short shrift” to the traditional balancing of the equities that is supposed to take place when the Court considers emergency judicial intervention.³⁷⁴ As a result, the Court gave insufficient deference to OSHA’s assessment of the potential harm (for example, deaths) caused by immediately blocking the emergency rule, pending litigation on the merits.³⁷⁵ All of this speaks to the importance of preparing for future challenges to emergency interventions now.

Administrative agencies that may be called upon to use emergency powers to address the climate crisis should strategize how they might defend such actions in the face of a request for emergency judicial intervention. An agency should consider what record the agency can build now regarding statutory authority in the face of a Court that might be unmoved by, or even indifferent to, the life-saving benefits of the agency’s emergency action. In light of potential resource constraints, federal agencies might also consider partnerships with advocacy, academic, or philanthropic organizations with relevant expertise to help with data collection that would buttress these efforts.

371. *See id.*

372. *See generally, e.g.,* Mok & Posner, *supra* note 35, at 1739; Vladeck, *supra* note 36, at 1794-95; Tyler, *supra* note 35, at 495 (citing STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023)) (describing the so-called “shadow docket” by which the Supreme Court fast-tracks cases to the Court via emergency judicial procedural postures, such as temporary restraining orders or preliminary injunctions, without the benefit of full briefing and argument).

373. Vladeck, *supra* note 36, at 1792.

374. *Id.* at 1788, 1792.

375. *See id.* at 1789, 1796 (“[T]he COVID-19 cases provide a uniquely useful window into one feature of litigation *during* emergencies - the extent to which much of that litigation is characterized by requests for emergency relief. So far as I can tell, we have not historically paid much attention to the unique confluence of emergency relief and (public health) emergencies. But we ought not waste the opportunity that COVID-19 has provided us.”).

b. Use Public Engagement to Build Democratic Legitimacy

One of the most potent strategies that administrative agencies can deploy when faced with a Court that may question their legal authority to take emergency intervention to address the climate crisis is to proactively seek out approaches that promote democratic legitimacy. As described in Part II, the risk of undermining democratic legitimacy is one of the biggest challenges of governmental emergency power, as the COVID-19 pandemic illustrated in dramatic ways. Special emergency powers that suspend or truncate standard procedural protections—aimed at promoting public participation and ensuring government transparency and accountability—carry heightened risk of abuse.³⁷⁶

The work of Hannah Arendt emphasizes the importance of public engagement and open discourse at moments of emergency when governmental power is most ripe for abuse. She notes:

What first undermines and kills political communities is loss of power and final impotence; and power cannot be stored up and kept in reserve for emergencies, like the instruments of violence, but exists only in its actualization. Where power is not actualized, it passes away, and history is full of examples that the greatest material riches cannot compensate for this loss.³⁷⁷

Arendt's warnings about the antidemocratic currents that can wreak havoc on a society in crisis³⁷⁸ must remain top of mind for governments as they consider which governmental interventions are needed to meet the overwhelmingly urgent challenge of the climate crisis, and ultimately, as they consider the question of emergency power. Indeed, Arendt's words are hauntingly similar to the words of Varshini Prakash, a climate youth activist expressing concerns about the exclusion of marginalized voices in climate policy making: "People power without political power will not suffice . . . we need allies in office—because otherwise, we're just railing against a group of people who aren't accountable to our values or our communities."³⁷⁹ Applying these concepts, administrative agencies should consider how deploying emergency powers in a way that is in step with local community needs and desires can serve as a safeguard against abuses of emergency power. Agencies should prioritize community partnerships and community engagement strategies that will help support the legitimacy of their future emergency actions to address the climate crisis.

This brings us back to the Supreme Court. The Court has cited concerns about separation of powers—and specifically, concerns about overreach by the

376. Cf. HANNAH ARENDT, *THE HUMAN CONDITION* 200 (2nd ed. 2018) (outlining the antidemocratic elements of emergency powers).

377. *Id.*

378. See generally HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1973).

379. See Ezra Klein, "No Permanent Friends, No Permanent Enemies": Inside the Sunrise Movement's Plan to Save Humanity, *VOX* (July 21, 2019), <https://www.vox.com/> (quoting Varshini Prakash).

executive branch in the form of unilateral emergency action—in its decisions invalidating the use of federal emergency powers.³⁸⁰ However, a growing number of scholars have identified a different antidemocratic current at risk of undermining governmental legitimacy within the Supreme Court itself.³⁸¹ Freeman and Stephenson, among others, have argued that the current Court is taking an overly narrow reading of administrative agency power, which is leading to anti-majoritarian outcomes that constrain the federal government's ability to address pressing problems, such as the climate crisis.³⁸² Such concerns have also been raised powerfully by dissenting justices within the Court.³⁸³ While sufficient analysis of these trends is outside the scope of this paper, the OSHA case study suggests that federal administrative agencies may be increasingly concerned that the Court will pare their statutory authority to limit their ability to use lawful emergency power to respond to climate catastrophe, even when affected communities favor emergency governmental intervention.

There is an argument to be made that when faced with a branch of government that is straining democratic values, the most potent response is a form of governance that seeks to restore democratic legitimacy through direct public engagement. If community voices can help shape how administrative agencies think about emergencies, could that lead to more defensible governmental interventions? Viewed from this lens, the OSHA case study presages a quagmire almost certain to recur in the age of the climate emergency—whom does the government serve? Is the agency's duty to please the Court, or is it to answer to the people most at risk of being harmed by an emergency? What happens if the two are in tension with each other? Careful consideration of these questions will be vital as the climate crisis unfolds.

380. See Tyler, *supra* note 35, at 495 (describing the Court's invocation of its role in protecting separation of powers under the Constitution when curbing what it viewed as overreach by the executive during the COVID-19 emergency); see, e.g., Biden v. Nebraska, 600 U.S. ___, 143 S. Ct. 2355, 2368 (2023).

381. See, e.g., Freeman & Stephenson, *supra* note 36, at 22-31 (critiquing the major questions doctrine (MQD) as judicial aggrandizement because it devolves discretion onto judges); see also Chafetz, *supra* note 36, at 649 (discussing the development of the MQD); Blake Emerson, *The Binary Executive*, 132 YALE L. J. FORUM 756, 784-85 (arguing that the MQD is a form of judicial aggrandizement that is impermissible because it results in judges wielding executive power); Nevitt, *Delegating Climate Authorities*, *supra* note 33, at 781 (written before *West Virginia v. EPA*, and noting: "Increasingly, any attempt to address climate change will require navigating administrative law doctrines. This includes the major questions doctrine, Chevron deference, and the nondelegation doctrine, which is poised to act as a 'climate spoiler' that may undercut bold legislative and regulatory climate action."); see generally Skillin, *supra* note 36; Buzbee, *supra* note 36.

382. Freeman & Stephenson, *supra* note 36, at 29 ("But in this case, the aggressive anti-delegation MQD that the *West Virginia* concurrence advocated, and that the *West Virginia* majority appeared to embrace, is likely to have bad consequences. As other critics have pointed out, this anti-delegation MQD, if deployed broadly, would prevent agencies from addressing unforeseen and important problems, even when existing statutes appear designed to give agencies the authority to do precisely that. Additionally, as we have emphasized in this Article, the anti-delegation MQD is far more likely to weaken democratic accountability than strengthen it, by shifting considerable discretionary power to the judiciary, undermining executive branch transparency, and exacerbating minority obstructionism in Congress.")

383. For example, in *NFIB v. OSHA*, the dissenters labeled the majority as "acting outside [the Court's] competence and without legal basis." 595 U.S. 109, 127 (2022) (Breyer, J., dissenting).

CONCLUSION

This Article opened with the example of a construction worker's death from extreme heat in June of 2023, and the outrage about why stronger action had not been taken to address the dangers of occupational heat exposure this summer. Two months later, Hawai'i experienced tragic forest fires that decimated communities and resulted in the highest death count from a forest fire in modern history.³⁸⁴ Community responses reflected confusion regarding what federal agencies were doing to respond and anger that there was not more governmental intervention sooner.³⁸⁵ Climate youth activists, who had already brought litigation against the state of Hawai'i for failure to take stronger climate action, expressed particular distrust in the federal government.³⁸⁶ As Carlarne notes: "For the youth movement, climate change is an urgent and existential manifestation of a much bigger systemic problem. Climate change is a critical symptom of a broken system—a system 'that produces other forms of violence, injustice and inequality, including racism.'"³⁸⁷

These examples suggest that we may be at risk of facing a future where democratic legitimacy is eroded among the next generations of Americans who denounce a government that did not act to save lives in the face of an accelerated catastrophe or that acted ineffectually or unjustly, without sufficient knowledge of the lived experiences of those most in need of governmental protection. Federal agencies should learn from such examples and undertake robust community engagement now to understand community needs and vulnerabilities before they are placed in a position to have to deploy emergency powers. In so doing, federal agencies should partner with state, local, and tribal governments to develop a better understanding of potential risks within affected communities that might warrant emergency rulemaking. The strategy of direct community engagement surrounding the use of emergency power may or may not ultimately move the current Supreme Court. However, it could help build an emergency framework on the ground that is responsive to the needs of those most harmed by the climate crisis, and ultimately, toward protecting democratic legitimacy in the long term.

In many ways, OSHA's consideration of an emergency rule for occupational heat exposure occurred in a liminal space between the two emergencies of the COVID-19 pandemic and the climate crisis. OSHA was confronted with the question of emergency power just before the death toll from hazardous heat began to rise to the point of garnering national attention, amplifying the calls for stronger climate action. At the same time, OSHA's

384. See Adeel Hassan and Damien Cave, *Latest About the Maui Wildfires: Names of the Missing Are Released*, N.Y. TIMES (Aug. 25, 2023), <https://www.nytimes.com/article/maui-wildfires-hawaii.html>.

385. Browning & Smith, *supra* note 57.

386. *How Hawai'i's Youth Advocates are Fighting for Hawai'i's Future*, EARTHJUSTICE (Aug. 14, 2023), <https://earthjustice.org/feature/hawaii-youth-climate-lawsuit>.

387. Carlarne, *Climate Courage*, *supra* note 66, at 161-62.

decision to refrain from an emergency rule suggests that the experience of judicial censure in response to the agency's use of emergency power during the COVID-19 pandemic was still fresh in the agency's memory.

This case study highlights several key considerations that can help guide administrative agencies contemplating the use of emergency powers to address the climate crisis, building on the experiences of federal, state, and local governments during the COVID-19 pandemic, and drawing on human rights and environmental justice principles. It also illustrates the vital need for proactive planning in anticipation of legal challenges to emergency intervention. Agencies should not wait for the crisis to reach a more extreme state before adapting their governing approaches to the new and unfolding reality. There are several actions administrative agencies can be taking right now to prepare themselves for future deployment of emergency powers to address the climate catastrophe in a way that is responsive to the needs of the most vulnerable and that strengthens rather than erodes democratic legitimacy.

We welcome responses to this Article. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.