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Smoky Wine Variety: How Federal Crop Insurance Hinders Grape Growers Affected by Wildfire Smoke

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SMOKY WINE VARIETY: HOW FEDERAL CROP INSURANCE HINDERS GRAPE GROWERS AFFECTED BY WILDFIRE SMOKE

London T. Weston[†]

Abstract

This Note comparatively argues that while both Californian and Australian grape growers lose millions of dollars from crops damaged by wildfire smoke taint, the two countries support and insure their farmers very differently. When both areas of the world are susceptible to the damaging effects of climate change, why are the producers not susceptible to the same type of crop relief? After a careful analysis of the types of insurance the United States and Australian governments offer grape growers, the inequity stands between the systematic approach to insuring citizens against wildfires. In America, federal crop insurance only protects crops touched by the flames of wildfires, whereas, in Australia, the government recognizes the consequential effects of wildfires—smoke taint—and provides relief to their farmers for those crops damaged by smoke. The United States will fall behind the world in the wine industry, and more importantly, the billion-dollar viticulture industry in California will cease to exist, and millions of Americans will lose their jobs, homes, and hope without the support of the federal government. Thus, the United States must reevaluate the long-standing federal crop insurance policies and emulate those policies in Australia so that grape growers may feel overdue relief.

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I. INTRODUCTION

As the dew rises into the soft colors of the sunrise, a proud farmer strolls through the narrow aisles of his art and hard work—a field of grape vines. He admires the empty vines after a plentiful harvest last fall. One of his sommeliers meets him in the aisle with the first 2020 variety glass of their famed cabernet sauvignon. When the juice meets his tongue, the farmer expects to taste bitterness, sweetness, or sourness; instead, with his eyes closed all he can taste are the memories of his childhood and barbeques at his home in Calistoga. He smiles at the memory of the smoky crisp chicken and company; then, overcome with reality, flings his eyes open and spits the wine out. Falling onto his knees on the morning of distribution, the farmer realizes his worst fear—the wildfires months ago in September *spoiled* his vineyard, not from the actual physical fire burning but from the fallout of the following weeks of smoke-filled air absorbing into his grapes.¹

1. See generally Monisha Ravisetti, *California Wine Ruined by Wildfires Leads Chemists to Analyze Grapes for Smoke*, CNET (Mar. 12, 2022), <https://www.cnet.com/science/climate/california-wine-ruined-by-wildfires-leads-chemists-to-analyze-grapes->

Unfortunately, California winemakers and grape growers experience a loss of wine from smoke-tainted grapes, similar to this hypothetical farmer. If wildfire smoke harms the health of the public through toxic air molecules, then those toxic air molecules also infiltrate American crops.² With the rising atmospheric temperature causing climate change, wildfires tear through the West and claim millions of acres in California each year.³ Wildfires affect many streams of revenue in California, from tourism to farming.⁴ However, agriculture seems to be most inequitably harmed by climate change, for there is no alternative to growing crops on a scorched field other than accepting loss and replanting. The magnitude of economic loss by natural disasters increases each year, and in 2017 the cost of recovery and loss of crops amounted to over \$5 billion.⁵ While these disasters occur more frequently, insurance companies restructure their policies because they are losing too much money providing relief year after year.⁶ Thus, farmers are not receiving enough relief for their crop loss.

for-smoke/ [https://perma.cc/UT7W-A67H]. The general process of winemaking from harvest to distribution may take anywhere from four weeks to six months depending on the grape variety. *Grapes*, ALMANAC.COM, https://www.almanac.com/plant/grapes (2021) [https://perma.cc/MVY8-TAPC].

2. See Cara Murez, *Western Wildfires are Making Easterners Sick: U.S. Study*, U.S. NEWS (Oct. 7, 2021, 8:01 AM), https://www.usnews.com/news/health-news/articles/2021-10-07/western-wildfires-are-making-easterners-sick-us-study (smoke from wildfires creates health problems and that impact on public health is currently underestimated); see also *Produce Safety After a Fire*, UNIV. CAL. AGRIC. NAT. RES., https://ucanr.edu/sites/SoCo/files/315093.pdf, [https://perma.cc/D6FB-B3LX].

3. Alexandra Meeks, *Wildfires in California this Year Have Scorched 3 Times More Land Than Within the Same Time Period During Last Year's Record Season*, CNN (July 13, 2021), https://www.cnn.com/2021/07/13/weather/california-wildfires-record-season/index.html [https://perma.cc/FH6X-3L5N] (reporting California's 2021 wildfire season destroyed three times the amount of land as 2020, record breaking destruction).

4. Rachel Levin, *Can California Tourism Survive Climate Change?*, N.Y. TIMES (Oct. 26, 2021), https://www.nytimes.com/2021/10/26/travel/california-tourism-climate-change.html [https://perma.cc/6TGV-PF4P] (reporting climate change is costing California by destroying acres of land and causing unbearable climates to visit, like air thick with smoke).

5. Sam Bloch, *2017's Natural Disasters Cost American Agriculture Over \$5 Billion*, THE COUNTER (Jan. 4, 2018, 6:55 PM), https://thecounter.org/2017-natural-disasters-agriculture-damage-5-billion/ [https://perma.cc/2BZC-89VY] (reporting 22% of California's vineyards were lost to wildfires).

6. Insurance Business, *Here's What the California Drought Means for Insurance Professionals*, INS. BUS. AM. (May 6, 2015), https://www.insurancebusinessmag.com/us/news/catastrophe/heres-what-the-california-drought-means-for-insurance-professionals-22411.aspx [https://perma.cc/3MUJ-423Q] (stating California residents are urged to purchase additional insurance policies to cover wildfire damage); see also *Natural Disasters Occurring Three Times More Often Than 50 Years Ago: New FAO Report*, UN NEWS (Mar. 18, 2021), https://news.un.org/en/story/2021/03/1087702

The United States government provides a federal crop insurance program available to any American farmer. Included in the complex federal crop insurance policies, the government created a safety net of relief for farmers affected by natural disasters.⁷ However, the policies expressly limit the causes of loss by listing natural disaster events in the crop provisions.⁸ To the dismay of grape growers, smoke taint fails to be named as a cause of loss. Grape growers are faced with this concern now: when their grapes, and eventually wine, are spoiled by smoke caused by wildfires, does the federal crop insurance provide relief for them although their vineyards are indirectly affected by wildfires (not burned)? Current statutory and common law answers no.

Climate change does not target one area of the world, however. Wildfires devastate Australia's country as well.⁹ The Australian government approaches its farm relief process differently than the United States, although the American government influences Australian legislation to a great extent.¹⁰ Climate change and recognizing scientific change are topics that the American and Australian public view differently.¹¹ This stark difference in opinion between these two countries manifests itself through crop insurance legislation. As aforementioned, the Federal Crop

[<https://perma.cc/TB5V-MBZS>] (“[D]isasters happen three times more often today, than in the 1970s and 1980s.”).

7. *Protection and Recovery*, USDA, <https://www.farmers.gov/protection-recovery> [<https://perma.cc/53RF-GLNW>] (stating farmers' options for relief are based on the destruction caused by each natural disaster).

8. RMA Directive 10-0053, *Grape Crop Provisions* (U.S.D.A. 2021) (“§ 10 (a) . . . adverse weather conditions; (2) Fire . . . (3) Insects . . . (4) Plant disease . . . (5) Wildlife; (6) Earthquake; (7) Volcanic eruption; or (8) Failure of irrigation water supply . . .”).

9. Carolyn Gramling, *Climate Change Drove Australian Wildfires to Extremes*, SCI. NEWS EXPLORES (Apr. 29, 2020), <https://www.snexplores.org/article/climate-change-drove-australian-wildfires-to-extremes#:~:text=New%20research%20suggests%20the%20recent,by%20at%20least%2030%20percent> [<https://perma.cc/QBC3-EH3R>] (reporting climate change has increased Australia's fire risk by more than 30%).

10. See AUSTL. FARM INST., *US Farms More Diverse and More Reliant on Government Support Than Australian Farms*, <https://www.farminstitute.org.au/us-farms-more-diverse-and-more-reliant-on-government-support-than-australian-farms/> [<https://perma.cc/J7PL-JJW4>]; Robert French, *United States Influence on the Australian Legal System*, 43 U.W. AUSTL. L. REV. 11, 11 (2018); see also John Lee, *The risks to Australia's democracy*, BROOKINGS (Jan. 22, 2021), <https://www.brookings.edu/articles/the-risks-to-australias-democracy/> [<https://perma.cc/4VSU-FXEK>] (Australians prides themselves on their true liberal democracy).

11. Elzy Kolb & Samuel Stebbins, *Countries Doing the Most (and Least) to Protect the Environment*, USA TODAY (July 14, 2019), <https://www.usatoday.com/story/money/2019/07/14/climate-change-countries-doing-most-least-to-protect-environment/39534413/> [<https://perma.cc/F29G-HBKQ>] (the United States ranks lower than Australia, at seven and five respectfully, for battling climate change).

Insurance Corporation's policies are complex and protected by red tape. Contrarily, the Australian government prioritizes protecting their citizens from adverse climate change effects, specifically smoke taint from wildfires through their multi peril crop insurance ("MPCI"). The Australian MPCI commonly provides farmers affected by *any* weather-related disaster from crop loss.¹²

This Note argues that under the statutory language in the Federal Crop Insurance Corporation's ("FCIC") Crop Provision for grapes, and specifically in California, the obstacles farmers must overcome to receive insurance coverage for their smoke-tainted grapes after a natural disaster of a wildfire are burdensome and grueling and the government either must amend the causes of loss or accept smoke taint as a branch of wildfire damage for three reasons. First, with the increasing threat and destruction of wildfires in California, smoke taint will eventually affect almost every grape grower. Second, few private insurance policy clauses are being amended to include smoke taint as a cause of loss, and the federal government should offer a broader scope of causes for claims. Third, grape growers may not succeed in litigation claiming crop loss by the indirect effect of smoke under a wildfire cause of loss. Whereas, across the Pacific, where wildfires threaten a grape grower's business in Australia, the government protects those farmers' lost crops and revenue without the obstacles they would face in California. Australia created an equitable and seamless policy for grape growers to recover from smoke taint damage.

Part II of this Note explains the biological way grapes are affected by wildfire smoke and how grape growers with smoke-tainted grapes file claims with the federal insurance policy. Part III compares the United States' insurance policies to the Australian government's approach to crop insurance. Part IV then uncovers the obstacles and issues farmers have with current federal crop insurance policy, and even with private insurance, there are few avenues of recovery for crops damaged by smoke. This Note further argues that the federal crop insurance policies in the United States should mimic the liberal standard of crop insurance claims in Australian law. The future amended crop provisions of the FCIC should include smoke as a cause of loss to equitably relieve these farmers from the stress of litigating their claims to receive smoke disaster relief. Finally, Part V of this Note projects a hopeful future in new

12. Marco Hatt et al., *Options for Insuring Australian Agriculture*, AUSTL. BUREAU OF AGRIC. & RES. ECON. & SCIS. 6 (2012), <https://www.awe.gov.au/sites/default/files/sitecollectiondocuments/ag-food/drought/ec/nrac/work-prog/abares-report/abares-report-insurance-options.pdf> [<https://perma.cc/9NGU-M54C>].

legislation that grape growers may have more equitable remedies for their damaged crops by wildfire smoke.

II. SMOKE TAINT AND FEDERAL CROP INSURANCE FOR GRAPE GROWERS

A. *Increasing occurrences of natural disasters and the damage caused by them require Congress to insure American farmers' crops.*

In the 1930s, the West was described as “a path of people in flight, refugees in dust and shrinking land, from the thunder of tractors and shrinking ownership . . . from the floods that bring no richness to the land and steal what little richness is there.”¹³ Farmers struggled through the Great Depression with high crop costs, low selling profits, and threats of natural disasters, like drought and dust storms, for western cultivators.¹⁴ With a great risk of crop loss, private insurance companies denied farmers crop insurance.¹⁵ In 1936, Congress passed the Federal Crop Insurance Act (“FCIA”) to battle the disproportion of crop losses and expenses in support of American farmers.¹⁶ The FCIA provided crop owners with crop insurance to promote welfare and economically stabilize the agriculture industry.¹⁷ For the enforcement and regulation of this crop insurance, Congress created an executive agency within the Department of Agriculture, the FCIC.¹⁸ Through authority granted by the FCIA, the FCIC issues crop insurance to any crop owner who would like to purchase insurance through the FCIC or a private insurance company.¹⁹ The insurance policies offered by the FCIC are regulated through the Risk Management Agency (“RMA”) by publishing the regulations to the Federal Register.²⁰ The RMA, in conjunction with the FCIC, defines a “cause of loss” as protection against unavoidable, naturally occurring events.²¹ The RMA lists the covered natural events per crop, but

13. JOHN STEINBECK, *THE GRAPES OF WRATH* 118 (Annotated ed., Penguin Classics 2006) (1939).

14. Tom Morain, *The Great Depression Hits Farms and Cities in the 1930s*, IOWA PBS (2018), <https://www.iowapbs.org/iowapathways/mypath/great-depression-hits-farms-and-cities-1930s> [<https://perma.cc/8SVX-WT7M>].

15. *Owen v. Fed. Crop Ins. Corp.*, No. 19–CV–00161, 2020 WL 5913668, at *1 (S.D. Tex. July 7, 2020) (stating that the RMA establishes the standard crop insurance policy guidelines).

16. *See generally* 7 U.S.C. §§ 1501–24.

17. § 1502(a) (“[T]he purpose . . . [is] to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance.”).

18. § 1503.

19. § 1508(a)(1).

20. § 6933.

21. RMA Directive 21.1-BR, *Common Crop Insurance Policy* § 12 (U.S.D.A. 2020).

generally, for all crops, “damage that only becomes evident after the end of the insurance period” is not covered.²² Insurance periods vary between each crop provision. Most commonly, an insurance period begins at the date of insurance, spring season, and ends at the start of harvest, fall season. Thus, any crop inspected after harvest with damage from a natural event will not be covered by the federal insurance program.

B. *The Supreme Court’s holding reinforced the Federal Crop Insurance Corporation’s legality and functionality.*

The Supreme Court of the United States upheld the FCIC’s refusal to grant recovery to a wheat farmer’s damaged, reseeded crop because his insurance policy did not cover his reseeded crops, although an FCIC agent advised him otherwise.²³ In the fall of 1944, Idaho wheat growers planted 400 acres of wheat.²⁴ Unfortunately, the first few months of winter in 1945 killed those acres of wheat, and the farmer replanted the 400 lost and an additional 60 acres of wheat a few months later in the spring. The growers consulted their local federal insurance agents to obtain financial insurance relief for their recultivated wheat and new wheat.²⁵ After the advice of an FCIC agent and signing a form of application for insurance, the growers were approved for and purchased federal crop insurance for their total 460 acres of wheat.²⁶ Subsequently again, all 460 acres of their wheat were damaged by the 1945 summer drought. Taking all necessary steps to recover for their crop damage under their insurance policy, the farmers finalized the recovery process by paying the insurance premium.

Upon claim review, the FCIC informed the wheat farmers that their crops were uninsured. A jury entered judgment in favor of the farmers for \$3,960.30. On appeal, the Supreme Court of Idaho entered judgment in favor of the FCIC’s enforcement of its regulations and denied equitable estoppel for the farmers asserting they did not have sufficient knowledge about the crop insurance regulations. When they consulted the local insurance agent, it acted like a private insurer because it is an agency and not the actual government.²⁷ On appeal to the Supreme Court, the government argued that the FCIC is a public agency in

22. *Id.* § 12(f) (crop damage must be discovered in a timely manner within the insurance period).

23. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).

24. *Merrill v. Federal Crop Ins. Corp.*, 174 P.2d 834, 834 (Idaho 1946).

25. *Id.*

26. *Id.*

27. *Id.* at 836.

corporate form and has the authority to enforce regulations in the Federal Register, despite the party's assertion against actual knowledge of the regulations or hardships endured from ignorance of those regulations.²⁸ The Court agreed with this argument, reasoning, "anyone entering into an agreement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."²⁹ The Court ended the opinion with a strict statutory reading that although it was sympathetic to the loss of the wheat farmer's crop, the regulations clearly enacted by the FCIC cannot be bent to accommodate hardships.³⁰ The dissent criticizes this viewpoint and questions whether every crop insurer must know what the Federal Register contains pertaining to their crop coverage.³¹ This binding precedent assumes yes; the FCIC's regulations of crop insurance coverage are strict and enforceable despite crop growers' reasonable reliance on actual knowledge provided by their own statutory reading or an FCIC agent.

Today, wildfires in the United States threaten and terrorize the West. The uncontrollable flames threaten loss of property, livestock, national parks, and wine. A grape's skin is permeable to the smoke from wildfires, and Californian grape growers may not expect or know their grapes will have smoke damage from wildfires nearby.³² The taste of smoke does not appear in the grape until after harvest and fermentation into wine, which could be weeks after the wildfire has been contained.

The FCIC's grape crop provision lists fire as a cause of loss for coverage by the policy.³³ However, whether that provision includes damage from smoke caused by fire is not expressly stated. The grape crop provision does not insure an "inability to market the grapes for any reason other than actual physical damage from an insurable cause specified in this section."³⁴ The issue becomes whether a smoke-tainted grape qualifies as "actual physical damage" under the FCIC insurance policy. In a claim for insurance coverage, a court held that the physical damage from a substance constitutes damage from its effect on property and not the origin of the substance.³⁵ Thus, a grape may be sympathized as property

28. *Merrill*, 332 U.S. at 384–85.

29. *Id.* at 384.

30. *Id.* at 386.

31. *Id.* at 387.

32. Aaron Smith, *Wining About Wildfire Smoke*, UC DAVIS (Aug. 1, 2020), <https://asmith.ucdavis.edu/news/smoke> [<https://perma.cc/JS8M-SALD>].

33. RMA Directive 10-0053, *Grape Crop Provisions* § 10(a)(2) (U.S.D.A. 2021).

34. *Id.* § 10(b)(2).

35. *Am. Food Sys. v. Fireman's Fund Ins. Co.*, 530 F. Supp. 3d 74, 80 (D. Mass. 2021).

when wildfire smoke permeates the skin.³⁶ However, private insurance companies offering coverage for property other than crops have won on the merits in cases where the court holds that an owner's home damaged only by wildfire smoke cannot recover for the damage caused by the smoke.³⁷ Reoccurrences of catastrophic wildfires in the West increase the likelihood of smoke-tainted Californian grapes.

With the increased risk of grape loss, insurers raise the premiums for grape growers who wish to be insured.³⁸ The timeline for grape growers to file their claims has shrunk as well. Prior to harvest, testing must be done for grapes that are covered for smoke damage.³⁹ If smoke taint occurred before fermentation and the claim is being made after fermentation, then there is no cause of loss.⁴⁰ Therefore, the narrow timeline to file a claim is based on a farmer's affirmative action to collect evidence of a smoke-tainted grape prior to harvest and fermentation.

III. AUSTRALIA'S PROACTIVE APPROACH TO SMOKE TAINT CLAIMS

In stark contrast to the FCIC, Australia's Legislature structured a more comprehensive federal crop insurance policy. Australian farmers may choose from four traditional insurance products; they are as follows: named peril insurance, multi peril crop insurance, crop revenue insurance, and mutual funds or farmer pool.⁴¹

First, the named peril insurance covers farmers for specific risks of their choosing.⁴² A grape grower would most likely not purchase this plan because the risks protected do not expressly include smoke taint but only generally reference fire.

36. *Id.*

37. *Shirley v. Allstate Ins. Co.*, 392 F. Supp. 3d 1185, 1189 (S.D. Cal. 2019). *But see* *Or. Shakespeare Festival Ass'n v. Great Amer. Ins. Co.*, 2016 WL 3267247 (D. Or. 2016) (holding that smoke damage to a theater sustained a "physical loss or damage to property" because the theater became unusable for its intended purpose).

38. Jake Bittle, *As wildfires worsen, more California farms are deemed too risky to insure*, GRIST (July 28, 2021), <https://grist.org/agriculture/as-wildfires-worsen-more-california-farms-are-deemed-too-risky-to-insure/> [<https://perma.cc/9K2K-YC6Y>].

39. Kate Prengaman, *In case of smoke, take quick action*, GOOD FRUIT GROWER (May 23, 2018), <https://www.goodfruit.com/in-case-of-smoke-take-quick-action/> [<https://perma.cc/Z347-E8HJ>] ("... [G]rowers must begin the insurance process before they know for sure if they have smoke taint.").

40. *Ensuring smoke taint losses are covered by insurance*, ALLEN GROUP (2021), <https://allengroupllp.com/ensuring-smoke-taint-losses-are-covered-by-insurance/> [<https://perma.cc/W8HL-NRHV>] (without adequate proof, there is a risk that insurance carriers may deny any claim of smoke damage).

41. Hatt et al., *supra* note 12, at 6-7.

42. *Id.* at 6.

Second, and discussed later in this Note in greater detail, is the multi-peril crop insurance. Although structurally complex, these plans protect crop loss from all weather-related events. Viticulture farmers are most likely to purchase this type of insurance for their grape vines to protect their grapes from the damage of actual wildfire and smoke taint. Because this form of Australian crop insurance is most analogous to the FCIC provisions, the specifics are discussed later in this Note.

Third, crop revenue insurance operates similarly to multi-peril crop insurance but instead calculates relief based on revenue lost from crop loss.⁴³ Later discussed in this Note are the collateral damages caused by not receiving funding for the loss of crops, and that result is a loss of revenue via grape purchase agreements.⁴⁴ Farmers and wineries in the United States would benefit greatly from this type of insurance to protect their businesses.

Fourth, mutual funds, otherwise known as a farmer pool, are not traditional insurance policies but operate similarly where a farmer may access funds in a time of need.⁴⁵ Access to an account must be predicated by some showing of need, and without show of need the money remains in the account.

Finally, like the United States' emergency grants, the Australian government emergency agencies react to natural disasters by granting funding for the loss of crops. However, these funds are approved and available prior to knowledge of a possible natural disaster so that when the farmer discovers that his grapes are unfit from smoke taint, they can seek relief from the grant program without delay.

A. *Australian National Crop Insurance reassures grape growers affected by smoke taint.*

The United States' FCIC provisions are similar structurally and effectively, to the Australian multi peril crop insurance. Some similarities between the statutes include how the loss is calculated. Both statutes measure the amount of relief needed by the crop yield that was lost. Also, the most common claims are for weather and natural disaster causes of loss. Although both statutes cover diseases to crops, they have provisions that require farmers to take measures to protect their crops from those destructive diseases, whereas weather-related events do not require any predicate measures of crop protection.

43. *Id.*

44. *See infra* Section IV.A.

45. *See* Hatt et al., *supra* note 12, at 7.

However, in the provisions regarding smoke taint recovery, the statutes are recognizably different in many aspects as well. First, the weather-related causes of loss are much broader in Australia's statute, covering all events versus the American statute expressly and strictly naming viable causes of loss for recovery funding. Second, for grape growers specifically, American policy requires them to extensively prove and file their smoke taint levels in grapes. In Australia, claiming that damage will grant grape growers a claim. Finally, under American law, a grape grower who has secured federal crop insurance may not receive additional aid from grant programs. However, all Australian farmers are entitled to the grants and emergency funds provided by the Department of Agriculture, Water, and the Environment.⁴⁶

Australian wildfires' (also known as bushfires) severity require the Australian government to react to the loss and damage. The bushfires cause billions of dollars of damage, especially when the bushfires range as far as they did in 2020.⁴⁷ However, a primary purpose of the Australian government's reaction to the bushfire devastation is to provide emergency grants.⁴⁸ Anything immediately damaged by the bushfires may be funded, and each farm may receive up to \$75,000 for the damage.⁴⁹

The Australian government's Department of Agriculture grants emergency bushfire funds to farmers and producers, whereas, in the United States, the Department of Homeland Security controls the emergency grant budget. With the Australian Department of Agriculture budgeting and allocating emergency funds to farmers, the money targets exact needs and reaches an understanding of the severity of bushfire damages to farmers and their crops. However, the Department of Homeland Security manages many agencies and thus allocates funds accordingly.⁵⁰

46. Department of Agriculture, Water and the Environment, *Current Grant Opportunity View - G04733*, AUSTRALIAN GOV'T, <https://www.grants.gov.au/Go/Show?GoUuiid=324a481b-66c4-4101-ab0d-f5a9cf8ff173> [<https://perma.cc/32Q3-7T4A>].

47. *Australia fires: A visual guide to the bushfire crisis*, BBC NEWS (Jan. 31, 2020), <https://www.bbc.com/news/world-australia-50951043> [<https://perma.cc/MP4X-DTVS>].

48. Paul Karp, *Bushfire recovery: how is Australia's \$2bn fund being spent?*, THE GUARDIAN (Jan. 17, 2020, 2:00 PM), <https://www.theguardian.com/australia-news/2020/jan/18/bushfire-recovery-how-is-australias-2bn-fund-being-spent> [<https://perma.cc/6NGV-S67S>].

49. *Id.*

50. *U.S. Department of Homeland Security*, BALLOTPEdia, https://ballotpedia.org/U.S._Department_of_Homeland_Security#:~:text=The%20Department%20of%20Homeland%20Security%20oversees%20the%20U.S.%20Customs%20and,Transportation%20Security%20Administration%20 [<https://perma.cc/S2ZC-7XGP>].

Not only does the Department of Homeland Security not have significant ties to viticulture, but there are many other agencies that demand their attention and funding.⁵¹ Here, the United States federal government could easily redelegate the agency powers to grant the Department of Agriculture the emergency grant spending power. Therefore, like in Australia, the decisionmaker issuing funding to farmers will have more expertise in the trade and a further understanding of the magnitude of loss from wildfire damage beyond fires.

B. *Judicial interaction with the statute is not needed because the statute is broad.*

The Australian judicial system operates similarly to the United States. The Australian Constitution grants the High Court of Australia, comprised of seven Justices, the similar power that the United States Constitution grants the Supreme Court.⁵² In fact, the framers of the modern Australian government drafted the American Constitution's structure and language.⁵³ Additionally, judicial review, as established in *Marbury v. Madison* in the United States, has been a wholly adopted concept for Australian jurisprudence.⁵⁴ Considering the similar setting of the Australian judicial system, comparing statutory review between Australia and the United States can be easy because the legislation passed in each country must withstand judicial review. Thus, if an Australian statute functions freely and positively in Australia, then a similar law in the United States would most likely yield the same results due to the structural and societal similarities between the two countries.⁵⁵

In fact, Australian farmers keenly observe the legal battles that Californian grape growers with smoke-tainted grapes litigate. One Australian grape grower says that the influence that the court cases have on their judicial system will have a great influence. However, the winning

51. *Id.* (overseeing U.S. Customs and Border Patrol, U.S. Immigration and Citizenship Enforcement (ICE), U.S. Coast Guard, Federal Emergency Management Agency (FEMA), U.S. Secret Service, and the Transportation Security Administration (TSA)).

52. Nicholas Aroney & John Kincaid, *Comparing Australian and American Federal Jurisprudence*, THE WASHINGTON POST, (May 12, 2017, 11:00 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/12/comparing-australian-and-american-federal-jurisprudence/> [https://perma.cc/P8Q6-G53D].

53. *Id.*

54. *Id.*

55. *Id.* ("When interpretations of the two constitutions are compared, despite important similarities, the influence of differences in politics, history, and context is also apparent. The two countries are excellent test cases for comparing federal constitutions precisely because they are so similar and yet different.").

litigation in favor of a grape grower in California would not affect an Australian grape grower if the issue is whether smoke taint is a sufficient cause of loss for a crop insurance claim—in Australia, smoke taint already prevails as a cause for insurance monies.⁵⁶

The multi-peril crop insurance provides relief to farmers whose crops have been affected by the smoke from Australian wildfires. However, one may use emergency use of insurance claims.

Australian Farmers utilize these claims and grants only in dire situations. In fact, in 2020, Australian wildfires burned about 30 million acres.⁵⁷ To recover from the devastation, Australia's Federal Government provided over \$2 billion in grants.⁵⁸ The ratio of acres burned to financial support from the Australian government to acres burned is over 66:1.⁵⁹ Providing emergency grants or funds to populations affected by tragedy does not ensure abuse of the national government. In American politics, some view emergency grants as a privilege to people who do not deserve those financial resources. That view also contains the common misconception that providing these services will increase the likelihood of fraud. Australia exemplifies that this is not reality. Instead, Australian farmers, with the knowledge that this funding is available to them, intuitively and carefully decide when to utilize those funds.

56. Jamie Tarabay & Michelle Elias, *Like Licking an Ashtray: Fires' Invisible Threat to Australia's Wines*, THE NEW YORK TIMES (Mar. 6, 2020), <https://www.nytimes.com/2020/03/06/world/australia/wines-fires.html> [<https://perma.cc/URA8-P4WQ>].

57. Compare Kate Wheeling, *Australia's Most Extreme Bushfire Season, Statistically Speaking*, EOS (Nov. 30, 2020), <https://eos.org/research-spotlights/australias-most-extreme-bushfire-season-statistically-speaking> [<https://perma.cc/TEK8-CDBE>], with *2020 Incident Archive*, CALFIRE – STATE OF CALIFORNIA, <https://www.fire.ca.gov/incidents/2020/> [<https://perma.cc/W5SE-LGGV>] (over a million and a half acres burned in 2020 from wildfires in California alone).

58. Compare *Australian Budget Surplus In Doubt As Bushfire Funding Boosted*, THOMSON REUTERS (Jan. 19, 2020, 7:17 PM), <https://www.reuters.com/article/us-australia-bushfires/australian-budget-surplus-in-doubt-as-bushfire-funding-boosted-idUSKBN1ZJ029> [<https://perma.cc/V55Z-FU54>], with Brianna Taylor, *How Much Are California's Wildfire Efforts Costing Taxpayers?*, THE SACRAMENTO BEE (Sept. 28, 2021), <https://www.governing.com/finance/how-much-are-californias-wildfire-efforts-costing-taxpayers#:~:text=The%20emergency%20fund%20budget%2C%20which,Fire's%20emergency%20fire%20suppression%20activities> [<https://perma.cc/5E5Q-3QZQ>] (United States Federal Government provided California with over \$600 million in grants for wildfire relief).

59. Compare *Bushfire Relief and Recovery: Get the facts on Australian Bushfires*, Australian High Commission – UK, <https://uk.embassy.gov.au/lh/h/bushfirerecovery.html> [<https://perma.cc/FG5L-7576>], with Kat Kerlin, *California's 2020 Wildfire Season*, UC Davis (May 4, 2022), <https://www.ucdavis.edu/climate/news/californias-2020-wildfire-season-numbers#:~:text=The%20fires%20killed%2033%20people,burned%20between%201980%20and%201999> [<https://perma.cc/HZE8-CMWC>] (the California ratio of dollars to acres is 400:1).

In some instances where a farmer might seem in need, they seek other avenues before using government funding. Through their judgment, they are still leaving these resources for those who are seriously affected.

IV. GRAPE GROWERS' HAZY PROCESS FOR RECOVERY OF SMOKY GRAPES AND LOST INCOME

The FCIC offers crop insurance only to farmers who qualify for their policies. To qualify, the FCIC requires documentation and recordation of the farmer's business and financial status—a requirement only large farmers may be able to accomplish before the insurance start date. First, the farmer must be an "eligible entity" under the FCIA.⁶⁰ An "eligible entity" is inclusive of most farmers except for those legally defined as an individual or partnership. Second, the farmer must meet with a local insurer to review policies, disclose information, and purchase the applicable plan. Some issues that arise during the application process and delay coverage include under or over-reporting planted acreage per unit, failure to report all farm serial numbers, failure to indicate "added land" on the acreage report and harvesting the crop other than insured.⁶¹ Any of these inaccuracies on an application can cause the RMA to decline and return an application. A farmer must qualify for the insurance before becoming insured, giving the government absolute control over deciding insurance status from inception.

A. *Under the current Federal Crop Insurance Corporation's policies, the government creates burdensome and grueling obstacles for grape growers.*

1. Burdensome and Grueling Obstacles in Grape Growers' Claim Process

Under the current FCIC policy, when a grape grower files an insurance claim for their smoke-tainted grapes, the claim will likely be denied. There are three elements, any of which may cause a grower's insurance claim to fail: (1) the claiming period has passed, (2) the grower may

60. *How the Program Works*, U.S. DEP'T OF AGRIC.: RISK MGMT. AGENCY, <https://www.rma.usda.gov/en/About-RMA/History-of-RMA/How-the-Program-Works#:~:text=The%20Crop%20Insurance%20Contract&text=Under%20the%20contract%2C%20the%20insured,selection%20against%20the%20insurance%20provider> [https://perma.cc/L6F4-2U7E].

61. RMA Directive 21-BR, *Common Crop Insurance Policy*, FAQ (U.S.D.A. 2020).

recover for a portion of their crop loss but never 100%, and (3) the government may not recognize “smoke taint” as an insurable cause of loss.

The timeline to claim crop damage is short, and a grape grower’s timeline for discovering smoke taint damage on their grapes misaligns with the FCIC insurance policies. The hypothetical farmer who discovers his smoke-tainted grapes at the end of growth and beginning of harvest cannot recover under the current language of the Federal Crop Insurance Act. The farmer’s claims are untimely for three reasons: (1) the period to claim relief ends with harvest, (2) the filing process is difficult for small famers, and (3) if no loss is determined, then the farmer receives nothing.

First, the insurance claim date range expires on the date of harvest or November 10th, whichever occurs earlier.⁶² Here, the hypothetical farmer would purchase his insurance at the beginning of growing season, early spring, and when he begins harvesting grapes for sweet, white wines in early fall his insurance coverage would terminate.⁶³ However, most farmers harvest their grapes at different points in the fall. Wildfires burn through the valleys at the start of their harvesting season.⁶⁴ Thus, smoke damage from those fires that occur post-harvest for farmers who start harvesting in early fall, will not be covered because the plans do not cover those post-harvest dates until they renew their insurance policy.⁶⁵ The FCIC imposes this time restraint on farmers which creates an undue burden to appropriately align the insurance policy dates with harvest so that crops impacted by a natural disaster after they begin harvesting will be covered.

Second, if harvest season has not begun, and a farmer’s grapes are still covered by their insurance policy, the farmer must complete copious amounts of reporting through the grueling process of filing a claim with the FCIC. The process creates tension and adds stress to a disappointed and despondent farmer who lost a whole year’s.⁶⁶ The farmer begins the process by issuing a written claim to a local crop insurer who arranges a visit by a loss adjuster to inspect the ruined crops. The timeline to

62. RMA Directive 10-0053, *Grape Crop Provisions* (U.S.D.A. 2021).

63. Wine Institute, *An Insider’s Guide to California’s Wine Harvest*, WINE INSTITUTE (2020), <https://wineinstitute.org/press-releases/an-insiders-guide-to-californias-wine-harvest/> [<https://perma.cc/ZN95-3GRS>].

64. Cal Fire, *2021 Fire Season*, FIRE.CA.GOV (2021), <https://www.fire.ca.gov/incidents/2021/> [<https://perma.cc/4NNK-DEM2>] (wildfires notoriously rage in late August and early September).

65. Ravisetti, *supra* note 1.

66. Elizabeth Hill, *Growing Texas Wine: A Primer for the Practitioner and a Challenge to the Legislature*, 47 TEX. TECH L. REV. 635, 655 (2015) (some farmers may receive zero relief if their loss does not exceed the proposed revenue).

recover is short, so the RMA recommends calling the local crop insurer within 72 hours of discovery of the damage. While waiting for the loss adjuster, all farming activity should be halted.⁶⁷ In the case of grapes damaged from smoke, grape growers may try to preserve the grape and harvest the fruit, nonetheless. If that is the case, a loss adjuster has no urgency to attend the claim because the recovery activity is not contingent on inspection of the crop, unlike replanting which would require more urgency.⁶⁸ Grape growers may face waiting periods to have their smoke damage evaluated only for their claims to be turned down which is disheartening to farmers and could deter future claims of damage done to grapes.

Third, if a cause of loss is not found under the FCIC, a grape grower cannot recover for any loss of profits when suppliers refuse to purchase the smoke-tainted grapes. The FCIC Grape Provisions expressly state that a cause of loss does not include, “[i]nability to market the grapes for any other reason than physical damage. . . we will not pay you an indemnity if you are unable to market due to . . . refusal of any person to accept production.”⁶⁹ After grape growers harvest their grapes, they sell them to wineries or facilities that make wine. The contract entered between the growers and the winemakers is known in the industry as a grape purchase agreement. Some material terms set forth in the agreement include purchase and sale, quality and delivery, termination, and alternative dispute resolution.⁷⁰ At the time of the agreement, the parties agree upon acceptable levels of sugar, acid, and pH for the sold grapes. If the grape does not meet the standard of the agreed-upon levels, then the winery is not obligated to accept the grapes.⁷¹ When a dispute arises between the parties regarding the acceptable standards, the parties have three options to resolve their issues: (1) meet and discuss solutions themselves, (2) use a third-party mediator, or (3) arbitration.⁷²

67. RMA, How to File a Crop Insurance Claim (U.S.D.A. 2021).

68. *Id.*

69. 7 C.F.R. § 457.138 (West, Westlaw through 2023).

70. James W. Terry & Carol A. Kingery, *Grape Purchase Agreements: Why a Handshake Deal May Not Simplify Your Business*, DP&F LAW (Oct. 1, 2008), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwUen-AhW7lmoFHdSTBIMQFnoECCMQAQ&url=https%3A%2F%2Fwww.dpf-law.com%2Fwp-content%2Fuploads%2F2013%2F12%2FGrape-Purchase-Contracts-091208-cl2.doc&usg=AOvVaw29D7hkGXl4hD2aHsSsQ7zp>.

71. *Id.*

72. Savannah Billingham-Hemminger, *Resolving Disputes Before They Decant: An Alternative Dispute Resolution System for Growers and Wine Producers*, 20 PEPP. DISP. RESOL. L.J. 149, 158–59 (2020) (the U.S. should emulate the Australian code that solves disputes between growers and wineries quickly and cheaply).

However, while the dispute is pending in any of these stages, both the winery and grower are required to uphold their agreement ends. Thus, if an arbitration action finds in favor of the grower, then the winery will not receive its grapes, lose income from the purchase, and fail to produce wine to sell. Likewise, if the action decides in favor of the winery, then the grower will have harvested grapes for purchase and lose the income because most wineries likely have entered contracts with other growers. The force majeure clause contained in the grape purchase agreement does not explicitly state that grapes affected by wildfire smoke subject a party to cancellation of the agreement and leave the decision up to an arbitrator on a case-by-case basis.⁷³ Liability for the loss of grapes thus varies in each case. Even if the smoke-tainted grapes were found to be a condition beyond the parties' control and the obligations of each party were abrogated, they nevertheless lose projected profits. The system for recovery of sub-par grapes benefits neither a grower nor a winery. Thus, both the parties and a large industry in California have an interest in insuring grapes that are used to make wine.

2. Litigating for Relief under the Feder Crop Insurance Act

Regardless of the burdensome crop insurance claiming process, a farmer has a low chance of success in litigation for recovery of damaged crops. The FCIC has historically been upheld and favored in cases farmers bring to court.⁷⁴ The Supreme Court case against Idaho wheat farmers in 1947, *Merrill*, has never been overturned and still binds courts today.⁷⁵ Most cases today are settled through the arbitration process. In a more recent court case against the FCIC, the Court applied the same reasoning as it did in *Merrill*, that a farmer who enters into an agreement with the federal government is bound by that agreement despite actual knowledge. Under this strict standard, a farmer nevertheless sought crop insurance for his tomatoes damaged by a disease onset by the area's flooding.⁷⁶ While flooding is an insurable cause under the FCIC policy, crop disease is not because it is presumed to be contributed to by the negligence of the farmer. The Court continues to apply the categories enumerated in the FCIC provisions strictly and, here, presumed against the applicability of natural disasters for crop loss. A grape

73. *Id.* at 153–55.

74. *See* *Federal Crop Ins. Corp. v. Merrill*, 322 U.S. 380 (1947).

75. *Id.*

76. *JPM-RDP Farms, LLC v. United States Dep't of Agric.-Risk Mgmt. Agency*, 2018 WL 1167325 (M.D. Fla. Mar. 6, 2018).

grower seeking insurance recovery for smoke-tainted grapes is more likely than not to be unsuccessful in litigation.⁷⁷

3. Collateral Damage to Grape Growers' Business

As discussed earlier, a collateral miscarriage of lost grapes due to smoke taint emerges in cancellations of contracts between grape growers and purchasers. The threat of cancellation of a contract between farmer and winery can place small farms under extreme amounts of financial stress.⁷⁸ Current contracts do not address the threat of smoke as a natural disaster and will likely need to be amended to include this due to the increase of wildfires in California.⁷⁹ However, if the FCIC makes amendments to the covered losses to include smoke taint, then the loss adjusters will be able to set standards of insurable grapes affected by grapes and increase research on how much smoke in the air contributes to a damaged grape.⁸⁰ While farmers await these dire amendments, contract negotiations between farmers and wineries will continue to be settled on a case-by-case basis.

B. *American private insurance policies also create hurdles for grape growers to recover from their smoke-tainted crops.*

Like natural disaster litigation issues, lawsuits against private insurers of wildfires have notoriously been strict with their policies.⁸¹ A suburban family in Southern California sought to recover for damage done to their home by the Lilac Wildfire that burned near their home in 2017.⁸² The insurance company, Allstate, argued that the family had the burden of proving a “physical loss to the property” and, under their

77. Kim Badenfort, *Wineries Sue Insurers for \$20 Million in Smoke Taint Losses*, WINE INDUSTRY ADVISOR (2019), <https://wineindustryadvisor.com/2019/10/21/wineries-sue-insurers-20-million-smoke-taint-losses> [<https://perma.cc/GE2F-E4YP>] (a court is likely to dismiss a complaint for smoke-tainted wine because the winemakers cannot prove that the damage to the grape, from the wildfire smoke, occurred while the grapes were on the vine).

78. Kelly Ball, *Smoky Grapes: Why the Risk of Smoke Exposure Should Modify Grape Contracts*, 11 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 415, 417 (2019) (grape growers and winemakers also disagree about what constitutes as damage).

79. *Id.* at 425–26.

80. Prengaman, *supra* note 39.

81. See Itzchak E. Kornfeld, Ph.D., *Insurance Coverage for Droughts, Due to Climate Change: The Case for “Loss of Business Income” and “Loss of Use”*, 10 ARIZ. J. ENVTL. L. & POL'Y 151 (2019) (insurance carriers seek to limit their insurable risks to avoid making big payouts to those affected by large natural disasters).

82. *Shirley v. Allstate Ins. Co.*, 392 F. Supp. 3d 1185, 1186 (S.D. Cal. 2019).

policy, could not show that by the existence of smoke vapors, fumes, contaminants, or pollutants.⁸³ While the property undoubtedly was damaged by the smoke, the court granted summary judgment to Allstate and narrowed the interpretation of “contamination of smoke.”⁸⁴ The court reasoned that while the family presented rhetorical questions regarding Allstate’s investigation into the damage done to their home, the burden of proving physical damage ultimately falls to the claimant to establish a material issue in the insurer’s investigation to go to the jury. Here, the court favors a narrower interpretation of insurance policy when recovering for smoke damage due to a wildfire which benefits insurance companies in turning down relief claims. The court may rule in this way to prevent frivolous claims against insurance companies. The number of Californian citizens who are affected by wildfire through smoke damage is increasing; thus, the government’s strict policy to recover under their insurance plans can be seen as an industry standard, and if the claims were broadened, then all farmers would opt for federal insurance rather than seeking private coverage.⁸⁵

While the business model seems fragile, legislators must be asking the pointed question: should natural disaster recovery be weighed between keeping insurance businesses competitive and the desire to protect vulnerable farmers from great loss?⁸⁶ Arguments in favor of narrow interpretation to cultivate a competitive market will have no basis when there is no competition because farmers and their crops are wiped out by tireless loss by natural disasters.⁸⁷

- C. *In comparison, Australian farmers with smoke-tainted grapes use their funding from insurance to create new varieties, replant, or creatively use the unfit grapes to concoct spirits.*

Grape growers are trailblazers in the liquor made from grapes phenomenon. Some grape growers are utilizing their smoke-tainted grapes to create spirits.⁸⁸ Rather than wasting the unfit grapes, Australian

83. *Id.* at 1187.

84. *Id.* at 1185; *Am. Food Sys., Inc. v. Fireman’s Fund Ins. Co.*, 530 F. Supp. 3d 74, 78 (D. Mass. 2021), *aff’d*, No. 21-1307, 2022 WL 2719641 (1st Cir. June 3, 2022).

85. See Brittany Sievers, *Natural Disaster Recovery and Agriculture: How to Keep the Crops Covered*, 24 *DRAKE J. AGRIC. L.* 511 (2019) (instead of seeking an insurance claim after debilitating losses, a farmer may sell his land or farm).

86. See *Or. Shakespeare Festival Ass’n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *7 (D. Or. June 7, 2016) (holding smoke damage to a theater constituted as actual physical damage).

87. Levin, *supra* note 4.

88. Ruby Pascoe, *Cassegrain Wines’ senior winemaker announced as Australian*

sommeliers created a new way to create vodka.⁸⁹ Australian grape growers are not the only ones salvaging their damaged crops because California grape growers also sell their smokey grapes to distilleries and liquor manufacturers.⁹⁰ The resilience of the labor behind the wine industry will shine through the devastation and changing environment.

V. HOPEFUL FUTURE FOR GRAPE GROWERS WITH SOLUTIONS IN THE NEW HOUSE BILL

While the government provides crop insurance for farmers who qualify for their policy, a fresh recovery route opens relief to many farmers affected by natural disasters which are not federally insured. The Wildfire and Hurricane Indemnity Program Plus (“WHIP+”) provided relief to uninsured farmers affected by natural disasters and mitigated their crop losses in 2018 and 2019.⁹¹ On September 30, 2021, President Biden signed into law an extension of WHIP+ to cover crop losses in 2020 and 2021.⁹² For the first time in American agriculture history, the government is proactively protecting farmers’ crops. The smoke damage for grape growers suffering from smoke damage, while unknown for this year, will have undetermined financial assistance administered by the U.S. Department of Agriculture (“USDA”).⁹³

However, in turn by doing this, a growing issue may arise that farmers will exempt themselves from the FCIC plans and file claims for recovery only with WHIP+ to receive the most promised amount of relief for damaged crops.⁹⁴ If the worst recorded wildfire continues to occur year after

Society of Viticulture and Oenology's 2021 Winemaker of the Year, PORT MACQUARIE NEWS (Nov. 24, 2021, 11:33 PM), <https://www.portnews.com.au/story/7516289/national-recognition-for-cassegrain-wines-senior-winemaker/> [<https://perma.cc/2U9X-KUL4>].

89. *Why Grapes?*, COORANBONG AUSTRALIAN VODKA, <https://www.cooranbongvodka.com/why-australia> [<https://perma.cc/FLH8-6M35>].

90. Gabrielle Canon, *How a California distillery is turning fire-damaged grapes into 'something awesome'*, THE GUARDIAN (Sept. 26, 2021, 6:00 PM), <https://www.theguardian.com/us-news/2021/sep/26/how-a-california-distillery-is-turning-fire-damaged-grapes-into-something-awesome> [<https://perma.cc/P5LX-FG4D>].

91. *Wildfire and Hurricane Indemnity Program Plus*, FARMERS.GOV (2021), <https://www.farmers.gov/archived/recover/whip-plus> [<https://perma.cc/W7WT-6HNZ>].

92. 2020 WHIP+ Reauthorization Act, H.R. 267, 117th Cong. § 2 (2021).

93. *President Biden Signs Critical Wildfire Assistance Into Law*, WINE INSTITUTE (2021), <https://wineinstitute.org/news-alerts/president-biden-signs-critical-wildfire-assistance-into-law/> (“The program will provide much-needed relief for California winegrowers . . . who sustained financial losses to crops as a result of . . . smoke exposure . . . in 2020 and 2021.”).

94. *USDA to Begin Payments for Producers Impacted by 2018 and 2019 Natural Disaster*, U.S. DEP’T OF AGRIC. (June 11, 2021), <https://www.fsa.usda.gov/state->

year, the tension will rise between enacting extensions of WHIP+ and FCIC plans.⁹⁵ Eventually, the government will be providing relief for both recovery routes and create competition between each legislation.⁹⁶ Nevertheless, a farmer trying to recover will seek the most equitable and efficient route.

VI. CONCLUSION

The government's understanding of climate change and its effects on our society's institutions, national parks, homes, economy, and agriculture develop through the law and study of natural disasters. Historically, the government and its regulations are reactive.⁹⁷ Smoke-tainted grapes and damaged vineyards by wildfire smoke are not new phenomena.⁹⁸ While the damage discovered by smoke is relatively new in the timeline of natural disaster relief, the government must update the FCIC crop provisions to include smoke as a cause of loss for farmers across America.⁹⁹ The federal law is one of the last American institutions to adopt statutory language that recognizes smoke taint as a viable natural disaster and cause of loss.¹⁰⁰

Obviously, not all policy decisions have full support. The Australian crop insurance system has some issues and unpopularity.¹⁰¹ However,

offices/Florida/news-releases/2021/usda-to-begin-payments-for-producers-impacted-by-2018-and-2019-natural-disasters-?utm_medium=email&utm_source=govdelivery [https://perma.cc/YPQ2-AYK9].

95. Christopher C. French, *America on Fire: Climate Change, Wildfires & Insuring Natural Catastrophes*, 54 U.C. DAVIS L. REV. 817, 819 (2020) (the amount of natural catastrophes have increased and the severity of those natural catastrophes is also increasing).

96. Brittany Sievers, *Natural Disaster Recovery and Agriculture: How to Keep the Crops Covered*, 24 DRAKE J. AGRIC. L. 511, 527 (2019) ("... [T]here are many gaps [in recovery from natural disasters] that leave farmers high and dry.").

97. Richard Wasserstrom, *Postscript: Lawyers and Revolution*, 30 U. Pitt. L. Rev. 125, 131 (1968).

98. ETS, *Smoke Impact in Grapes and Wine*, ETS LABORATORIES (Oct. 27 2022), <https://www.etslabs.com/publications/publication/2> [https://perma.cc/XF8L-BS9] (smoke taint became a California problem after the 2008 wildfires).

99. Matthew H. Bowen, *Advancing the Aquaculture Industry Through the Federal Crop Insurance Program*, 24 OCEAN & COASTAL L.J. 59, 78 (2019) (the FCIC had underinsured aquaculture and thus the industry has been restricted from flourishing).

100. Sean Nealon, *Oregon State receives \$7.65 million grant to study impact of smoke on grapes and wine*, LIFE AT OSU (Oct. 28, 2021), <https://today.oregonstate.edu/news/oregon-state-receives-765-million-grant-study-impact-smoke-grapes-and-wine> [https://perma.cc/NX7Z-2AKP] (educational institutions are granted millions of dollars to study the impact of smoke on grapes and wine after the state Legislature approved funding to Oregon State University for lab testing).

101. Danielle Grindlay, *Australian multi-peril crop insurance industry at a standstill, farmer scepticism its biggest barrier*, ABC NEWS (Feb. 24, 2016),

because of the funding provided via the Australian crop insurance policy plans and other emergency grants, the demographics affected by that legislation (farmers) would argue that the Australian plans are more equitable than the current American crop insurance.

Unfortunately, most of the world will experience the devastating effects of climate change and wildfires. The 2020 bushfires that scorched Australia damaged the climate more than COVID-19.¹⁰² Those effects not only manifest in environmental concerns and damage but to the health and safety of human life.¹⁰³ While the temperature of Earth continues to rise, so do the risks of extreme weather—and extreme dry heat causes wildfires.¹⁰⁴

When a grape grower discovers smoke taint in their wine, they need to be reassured that the government will support their loss. In the absence of recovery for these farmers, the grape and wine industry in California will diminish due to the burdens of growing grapes and the stress of impending doom caused by wildfire or smoke.¹⁰⁵ The absence of the wine industry has substantial effects on other areas of the American economy. A logical line of revenue would be broken. Wineries attract tourists, and the vineyard areas rely on their success, and nearby restaurants, hotels, transportation, etc., all profit from the winery's existence.

The effects of the loss of grapes and farmers who grow grapes would cause substantial harm to the American economy. In order to preserve the fragile state of agriculture, the government must provide equitable

<https://www.abc.net.au/news/rural/2016-02-24/multi-peril-crop-insurance-policy-drought-grain-rainfall/7196234> [<https://perma.cc/98UV-7FZ4>] (farmers are skeptical to insuring their farms).

102. Matthew Cappucci, *Australian fires had bigger impact on climate than covid-19 lockdowns in 2020*, WASH. POST (July 27, 2021), <https://www.washingtonpost.com/weather/2021/07/27/australian-bushfires-smoke-climate-covid/> [<https://perma.cc/EH2Z-J2SD>].

103. Georgia Hitch, *Bushfire royal commission hears that Black Summer smoke killed nearly 450 people*, ABC NEWS (May 25, 2020), <https://www.abc.net.au/news/2020-05-26/bushfire-royal-commission-hearings-smoke-killed-445-people/12286094> [<https://perma.cc/J2UX-DXM2>] (bushfire smoke alone killed almost 450 people).

104. *Extreme weather gets a boost from climate change*, ENV'T DEFENSE FUND (2022), <https://www.edf.org/climate/climate-change-and-extreme-weather> [<https://perma.cc/4RGJ-HB2A>].

105. *Economic Impact of California Wine*, WINE-ECONOMY.COM (2021), <http://www.wine-economy.com/> [<https://perma.cc/XU9M-TD6F>] (employing 422,000 Californians); see also Sharon Omondi, *What Are The Biggest Industries In California?*, WORLDATLAS (2021), <https://www.worldatlas.com/articles/what-are-the-biggest-industries-in-california.html> [<https://perma.cc/GCA4-NNFU>] (California leads all states of income derived from agriculture).

relief to all farmers.¹⁰⁶ Wildfires cause irreversible damage that needs government recognition in any physical form: flames, ashes, *and* lingering smoke. Australian law guides America down a path of equitable relief for the viticulture industry in California and the rest of the United States.

106. Esther Mobley, *Without federal aid for wildfires, California's wine industry could collapse, vintners say*, SAN FRANCISCO CHRON. (2021), <https://www.sfchronicle.com/food/wine/article/Without-federal-aid-for-wildfires-California-s-16479942.php> [<https://perma.cc/CFL5-BXP5>] (farmers who continue to suffer cost of ruined product year after year may have to turn to other lines of work).