IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

LA UNION DEL PUEBLO ENTERO, *et al.*,	§	
Plaintiffs,	§	
	§	Civil Action No.
v.	§	
	§	1:08-cv-487
FEDERAL EMERGENCY MANAGEMENT AGENCY,	§	
	§	
Defendant.	§	

MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs are survivors of Hurricane Dolly. They seek a preliminary injunction to compel Defendant Federal Emergency Management Agency (FEMA) to comply with its non-discretionary duties under 42 U.S.C. §§ 5151(a) and 5174(j) to: (1) publicly disclose the standards that it uses to decide applications for housing repair assistance; and (2) decide these applications in an equitable and impartial manner, without using hidden internal rules that effectively *prevent* low-income families from accessing home repair assistance. Plaintiffs seek this relief to minimize ongoing, irreparable harm to their families in the form of health hazards, displacement, and destruction of their property. In support, Plaintiffs would respectfully show:

OVERVIEW

Congress allows families up to $28,800 in disaster relief, including home repairs. 42 U.S.C. § 5174(c)(2) and (h). FEMA administers this statute. PIE-6 (A list of attached "Preliminary Injunction Exhibits"—cited here as "PIE"—follows this motion).

Plaintiffs are and represent individuals whose homes were damaged by Hurricane Dolly in July 2008. They and thousands like them applied for housing repair assistance, but FEMA denied their applications without telling them the actual reason for the denial. PIE-7 to 18.

FEMA refuses to provide housing repair assistance to roughly half of all applicants in Texas's Rio Grande Valley, some ten thousand families in all. PIE-1 to 2.

FEMA admits that it refused to provide repair assistance to many people in the Rio Grande Valley because it considers the substandard construction of the housing, and not Hurricane Dolly, to be the *main* cause of the damage to the homes. PIE-2, 16, and 17.

FEMA regulations lack ascertainable standards for determining when housing repair assistance will be made available. *See* 44 C.F.R. § 206.117(b)(2) and (c). This violates 42 U.S.C. § 5151(a), which requires FEMA to issue all regulations necessary to "insur[e] that the distribution of [housing repair] assistance ... be accomplished in an equitable and impartial manner...."

Congress not only requires FEMA to publish ascertainable standards, it requires FEMA to do so in a manner that does not discriminate based on "economic status." *Id*. Of course, Texas's Rio Grande Valley is home to a large population of low-income families, many of whom cannot afford to live in anything but substandard housing. The high repair denial rate in the Rio Grande Valley results from FEMA's unpublished and vague rule requiring the rejection of housing repair applications in cases of substandard housing — a rule that *institutionalizes* economic discrimination.

FEMA's lack of ascertainable standards in its regulation, and its use of vague and hidden internal rules, leave families with low incomes and imperfect homes in the dark and at the mercy of FEMA's unfettered discretion. By this lawsuit, Plaintiffs seek housing repair assistance decisions that are based upon the rule of law.

Before filing this lawsuit, Plaintiffs wrote FEMA to learn what legal standards it applies to decide what housing repair assistance will be provided to victims of Hurricane Dolly. PIE-1. In

response, FEMA did not explain, provide any standards, or agree to discuss them. Accordingly, Plaintiffs seek a preliminary injunction requiring FEMA to state ascertainable standards for housing repair assistance that satisfies 42 U.S.C. § 5151(a), and then to apply the standards as it reconsiders the denials of housing repair assistance that it issued to the victims of Hurricane Dolly. Without the injunction, Plaintiffs and low-income families across the Rio Grande Valley — including children, elderly, and disabled people — face irreparable harm in the form of injuries, illness, and displacement. PIE-7 to 14.

FACTS

A. Background

Hurricane Dolly hit the Texas coast on July 23, 2008, resulting in major disaster declaration number 1780. Eight days later, FEMA made federal disaster relief, including home repair assistance, available to families in Cameron, Hidalgo, and Willacy counties. PIE-4 and 6.

Congress allows each family up to $28,800 in total disaster relief services, including home repairs. 42 U.S.C. § 5174(c)(2) and (h). PIE-6.

Means testing of home repair assistance is forbidden except as to insurance, so repair assistance is available to families regardless of their income or assets. *Id*. at § 5174(c)(2)(B).

Congress requires FEMA to issue all necessary regulations to "insur[e] that the distribution of [housing repair] assistance … be accomplished in an equitable and impartial manner, without discrimination on the grounds of … economic status." 42 U.S.C. § 5151(a).

B. FEMA Lacks Ascertainable Standards for Housing Repair Assistance

FEMA's various statements of the legal standards that it applies to decide housing repair applications are not consistently understood or applied by applicants, inspectors, local officials, FEMA contractors, or even FEMA officials themselves.

For example, FEMA states that housing repair assistance is available to "insure the safety or health of the occupant" without stating what immediacy or magnitude of risk qualifies a repair for coverage, so that FEMA may choose to repair only items that pose an immediate or severe threat, or it may choose to repair anything that bears a conceivable relationship to health and safety. 44 C.F.R. § 206.117(b)(2); *id*. at § 206.117(c).

FEMA also states that housing repair assistance is available to "make the residence functional," 44 C.F.R. § 206.117(b)(2)(ii), and defines "functional" so broadly as to approach meaninglessness: "an item or home capable of being used for its intended purpose." *Id*. at § 206.111.

FEMA writes the following to housing repair applicants: "By regulation, the FEMA Individuals and Households Program (IHP) can address only your emergency repairs and needs. This program is not intended to fully restore your property to pre-disaster condition." PIE-5.

While FEMA uses hidden internal rules to deny repair assistance *because* of substandard materials and construction, FEMA's public regulations *allow* assistance to repair homes up to minimal building codes, even if this improves homes beyond their pre-disaster condition. 44 C.F.R. § 206.113(b)(5). FEMA never says if, how, or when it applies this regulation.

C. FEMA Cites "Deferred Maintenance" As Its Internal Reason for Denial

Disaster No. 1780 covers the Rio Grande Valley, one of the poorest regions of the United States, and a region with much housing that is poorly constructed.

FEMA has applied unascertainable standards to deny housing repair assistance to somewhere between ten and fifteen thousand low-income families in the Rio Grande Valley since Hurricane Dolly struck, roughly half of all applicants, including the individual Plaintiffs and members of the organizational Plaintiff. PIE-1 to 2.

FEMA admits that its home repair denial rate is unusually high for Hurricane Dolly, Major Disaster No. 1780. FEMA explains the high denial rate as follows: "A lot of the homes built were built from second hand materials. So the damage was, in most cases, caused from the faulty building of the house, and not the storm." PIE-2.

FEMA collects, maintains, and uses information concerning a category of home repair applications that FEMA labels "deferred maintenance," but publicly available legal standards do not mention "deferred maintenance" or explain how FEMA uses this category of applications. *Id*.

D. FEMA Declines To Discuss Ascertainable Housing Standards

In response to a written request from Plaintiffs' counsel, FEMA has not provided or agreed to discuss its legal standards for deciding home repair applications. PIE-2.

Absence of ascertainable FEMA standards for equitable and impartial distribution of housing repair assistance, as required by 42 U.S.C. § 5151(a), produces the following consequences:

a. FEMA makes arbitrary, subjective decisions about who gets housing repair assistance, and how much assistance is provided in each case;

b. FEMA housing damage inspectors do not use consistent methods to gather the facts upon which its housing repair assistance decisions are based; and

c. applicants for housing repair assistance are not provided sufficient factual or legal information to determine whether to undertake the effort necessary to appeal FEMA's denial of assistance.

E. FEMA's Violation of § 5151(a) Harms Plaintiffs

The individual Plaintiffs suffered damage to their homes from Hurricane Dolly, applied to FEMA for home repair assistance, and were denied this assistance without being told what facts

and legal standards FEMA relied upon to deny this assistance. PIE-7 to 18; *see also* Plaintiffs' Complaint for Injunctive Relief at ¶¶ 27 to 169.

Plaintiff Francisca Perez's experience illustrates the problem at issue in this case.

Ms. Perez is the head of a household which includes her three teenage children and her husband Enrique Silguero, who is disabled. PIE-13.

Ms. Perez's only home is located at Mile 15 1/2 North 5 3/4 in West Elsa, Texas. She and her family have lived there since 1994. *Id*.

Ms. Perez's home suffered extensive damage as a result of Hurricane Dolly. Roof shingles were loosened and otherwise damaged and as a result, the roof leaked. The home was flooded with about two inches of water for two or three days. Portions of the floor warped and tiles were loosened. Mold and mildew developed on her windows and portions of the ceiling and walls. *Id*.

Plumbing problems rendered Ms. Perez's bathtub and toilet temporarily unusable. Waste water would come up from the toilet and bathtub because the septic tank was overflowing with rain water. She had to clean the restroom three times a day for two weeks with bleach and other cleaning agents because the smell was unbearable. There was waste everywhere. *Id*.

Ms. Perez's daughter is an asthmatic. She had to go to the hospital because the smell was too much to handle. *Id*.

Ms. Perez and her husband do not have insurance or any other means to make the repairs that remain necessary to their home. *Id*.

Ms. Perez applied for FEMA home repair assistance under 42 U.S.C. § 5174 (c) (2) FEMA sent an inspector to inspect her home. The inspector ignored Ms. Perez's attempts to point out the disaster-related damages, walking away from her as she was speaking. He altogether neglected to inspect the bathroom with the non-functioning toilet and bathtub. *Id*.

On August 12, 2008, FEMA denied Ms. Perez's application for home repair assistance. Quoted below is the complete and only explanation that FEMA provided for its denial:

> The Federal Emergency Management Agency (FEMA) and State of Texas have carefully considered all available information regarding your request for assistance. Our decision(s) about your request is listed below:
>
> | CATEGORIES | DETERMINATION |
> |---|---|
> | Housing Assistance | IID- Ineligible - Insufficient Damage |
> | Personal Property | $758.97 |
> | ========== | ========== |
> | Total Grant Amount: | $758.97 |
>
> IID- Ineligible- Insufficient Damage
>
> Based on your FEMA inspection, we have determined that the disaster has not caused your home to be unsafe to live in. This determination was based solely on the damage to your home that are related to this disaster.
>
> Although the disaster may have caused some minor damage, it is reasonable to expect you or your landlord to make these repairs. At this time you are not eligible for FEMA housing assistance.
>
> If you do not agree with our decision, you have the right to appeal. Please send us documents such as a statement from local officials, contractor estimates, etc. to show that the damage to your home was caused by the disaster and has caused unsafe or unlivable conditions.

Ms. Perez appealed on August 22, 2008, and provided a contractor statement, which was costly for her to obtain. Most contractors were too expensive and were charging between $200 and $250 to prepare an estimate. Finally she found someone who said he would provide an estimate for less money. She paid a contractor about $50 for an estimate, and the contractor concluded that $6,650.00 would be needed for her disaster-related home repairs. *Id*.

Mrs. Perez took it upon herself to purchase a water pump and empty some of the septic tank water into her own backyard. This took two days and produced waste in the yard. She merely removed some of the water, so if it rains the problem is likely to return. *Id*.

FEMA denied Ms. Perez's appeal on November 1, 2008. Quoted below is the complete explanation that FEMA provided for its second denial of home repair assistance:

> You recently appealed one of FEMA's decisions regarding your application for disaster assistance. We have thoroughly reviewed your case including all of the new information and documents you provided. Our decision(s) about your appeal is listed below:
>
> | CATEGORIES | DETERMINATION |
> |---|---|
> | Home Repair | INO-Ineligible- Other |
> | ========== | ========== |
> | Total Grant Amount: | $0.00 |
>
> Ineligible- Additional Repair Assistance
>
> We have reviewed your appeal for additional Home Repair and any documents you may have provided, along with the FEMA inspection(s) of your home. We have determined that the previous amount of assistance we provided was correct. As a result, your appeal is not approved and you are not eligible for additional FEMA assistance of this type.

Ms. Perez and the other Plaintiffs claim that FEMA violated their statutory right to standards and procedures that comply with 42 U.S.C. § 5151(a). They seek a ruling on this issue to ensure that their claims for housing repair assistance are resolved not only fairly, but promptly to minimize threats to the health and safety of their families.

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, — U.S. —, 2008 WL 4862464 at *9 (Nov. 12, 2008). Likelihood of success on the merits is "arguably the most important" factor. *Tesfamichael v. Gonzales*, 411 F.3d 169, 176 (5th Cir. 2005). Here, all

four factors weigh in favor of the specific and limited preliminary injunction that Plaintiffs seek. *See* Proposed Order, attached.[1]

A. Plaintiffs are Likely to Succeed on the Merits of Their APA Claim

Under the Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq*., courts are empowered to enter injunctive relief as necessary to ensure that federal agencies comply with federal statutes. *Id*. at § 706(2); *see also id.* at § 702 (waiving sovereign immunity). However, "agency action committed to agency discretion by law" is excepted from judicial review. *Id.* at § 701(a)(2). Thus, only agency action that is legally required can be compelled under the APA. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004).

Congress uses the following broad delegation of authority to make housing repair assistance available to disaster victims:

> **Repairs.**
> (A) In general. The President *may* provide financial assistance for—
> (i) the repair of owner-occupied private residences, utilities, and residential infrastructure (such as a private access route) damaged by a major disaster to a safe and sanitary living or functioning condition; and
> (ii) eligible hazard mitigation measures that reduce the likelihood of future damage to such residences, utilities, or infrastructure.
> (B) Relationship to other assistance. A recipient of assistance provided under this paragraph shall not be required to show that the assistance can be met through other means, except insurance proceeds.

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[1] In granting preliminary injunctions to redress prior FEMA shortcomings, courts explain:

> When analyzing the degree of "success on the merits" that a movant must demonstrate to justify injunctive relief, the Fifth Circuit employs a sliding scale involving the balancing the hardships associated with the issuance or denial of a preliminary injunction with the degree of likelihood of success on the merits.

McWaters v. FEMA, 406 F. Supp. 2d 221, 228 (E.D. La. 2005) (citing *Productos Carnic S.A. v. Central American Beef and Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980)); *Ass'n of Cmty. Orgs. for Reform Now v. FEMA*, 463 F. Supp. 2d 26, 33 (D.D.C. 2006), *stayed in part on other grounds*, 2006 WL 3847841 at * 1 (D.C. Cir. 2006).

42 U.S.C. § 5174(c)(2) (emphasis added). Congress often enacts such "short statute[s] with broad goals and imprecise methods of accomplishing them." *Sierra Club v. Sigler*, 695 F.2d 957, 965 (5th Cir. 1983). A "statute's ambiguity [ordinarily] constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). For example, § 5174(c)(2) leaves to FEMA what "a safe and sanitary living or function condition" means, what "hazard mitigation measures" will be eligible for assistance, and whether to make housing repair assistance available at all. Indeed, Congress recognized that § 5174(c)(2) was itself so vague that it would require a regulatory structure to be implemented in practice. This is why Congress placed a non-discretionary duty upon FEMA to create that regulatory structure: "[FEMA] shall prescribe rules and regulations to carry out this section, including criteria, standards, and procedures for determining eligibility for assistance." *Id*. at § 5174(j).

After Hurricane Dolly, FEMA elected to make § 5174(c)(2) repair assistance available to families in Cameron, Hidalgo, and Willacy counties. PIE-3 and 4. By making repair assistance available, FEMA became bound by a non-discretionary duty to do so fairly:

> **Regulations for equitable and impartial relief operations.**
> The President shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status.

42 U.S.C. § 5151(a) (emphasis added).[2]

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[2] *See also McWaters v. FEMA*, 436 F. Supp. 2d 802, 817 (E.D. La. 2006) ("[W]hile the ultimate resources allocated to FEMA from the federal government and Congress may be finite in monetary amount, its provision of those resources must be done equitably under the law and in

1. §§ 5151(a) and 5174(j) Require FEMA to Base its Housing Repair Assistance Decisions Upon Ascertainable Standards

Where Congress's intent is clear in statutory text, "the Court, as well as [federal agencies], must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *BOS Dairy, Inc. v. U.S. Dept. of Agric.*, 209 F.3d 785, 786 (5th Cir. 2000). The text of §§ 5151(a) and 5174(j) could not be clearer on three points: (a) Congress required FEMA to issue regulations that answer the questions left open by 42 U.S.C. § 5174(c)(2); (b) the regulations must state what "standards" FEMA will apply to make housing repair assistance available; and (c) FEMA's standards must insure "equitable and impartial" administration of housing repair assistance. Of course, any standard must be ascertainable for its fairness to be gauged. This is why courts universally require ascertainable standards as a critical element of equitable decisionmaking in a broad array of legal contexts, including:

a. Constitutional Due Process—

> [A]gencies following unwritten policies or procedures violate the due process rights of those who must come before the agency. It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse. While vesting such discretion in an agency may prevent bureaucratic paralysis, due process requires that we be ruled by law and not by fiat.
>
> To allow the [federal agency] to administer a [program] using unwritten standards leads to rule by decree and not by law. Without some reasonably ascertainable standards, the [agency] is free to [act] in whatever fashion and on whatever timetable it may desire. The court cannot countenance such activity. The [agency]

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accordance with regulations designed to 'insur[e] that the distribution of [assistance] shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of ... economic status.' *See* 42 U.S.C. § 5151(a). Th[is] ensures equal treatment and division of resources. *Id.*").

> must operate within its promulgated regulations and if it cannot then it must see to it that additional regulations are written to provide standards for needed action.

Burke v. United States Dept. of Justice, Drug Enforcement Agency, 968 F. Supp. 672, 680-81 (N.D. Ala. 1997) (citations and quotations omitted); *accord Daniels v. Woodbury County*, 742 F.2d 1128, 1134-35 (8th Cir. 1984); *Holmes v. New York City Housing Auth.*, 398 F.2d 262, 265 (2d Cir. 1968);

b. Delegation of Power From Legislative to Executive Branches—

> Ascertainable standards of guilt are imperative in order to protect against arbitrary, erratic, and discriminatory arrests, prosecutions and convictions. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Winters v. New York*, 333 U.S. 507, 515 (1948). Unless the statute itself prescribes sufficiently precise standards, basic policy decisions are impermissibly delegated to the personal predilections of the police, prosecutors and juries. *Smith v. Goguen*, 415 U.S. at 575 (1974); *Grayned v. City of Rockford*, 408 U.S. at 108. "Legislators may not so abdicate their responsibilities for setting the standards of the criminal law." 415 U.S. at 575.

Record Revolution No. 6 v. Parma, 638 F.2d 916, 927 (6th Cir. 1980);

c. The APA's Prohibition on Arbitrary and Capricious Agency Decisionmaking—

> It is well established that there must be sufficient indication in an agency's decision of the basis for its action so that a reviewing court may ascertain whether the agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. [APA,] 5 U.S.C.A. § 706; *Estate of French v. FERC*, 603 F.2d 1158 (5th Cir. 1979). In this ratemaking context, to determine whether the agency's action is in accordance with law, there must be sufficient articulation of the Commission's reasoning for us to ascertain whether the end result is just and reasonable. [T]he Commission's explanation here of the lower limit of the zone of reasonableness is inadequate. While the Commission and the ALJ relied upon allowed rates of return to establish the upper limit on the zone of reasonableness, they curiously did not rely on allowed rates to establish the lower limit. We are only told that the "cost-of-living" index at the time was in the vicinity of 12%, without any indication as to which index was relied upon. Accordingly, we cannot ascertain whether an appropriate index has been identified. We are not told whether the rate of which notice was taken was a monthly rate annualized, a rate calculated over an actual year's span, or a projected inflation rate. Aside from the absence of any indication of whether an appropriate inflation rate has been utilized, the Commission has provided no explanation of its concept of the proper relationship between the appropriate inflation rate and the lower limit of the zone of reasonableness.

Arkansas Louisiana Gas Co. v. Federal Energy Regulatory Com., 654 F.2d 435, 442-43 (5th Cir. 1981) (footnotes omitted); and

d. The Employee Retirement Income Security Act (ERISA)—

> To safeguard . . . the establishment, operation, and administration of employee benefit plans, ERISA sets minimum standards . . . assuring the equitable character of such plans.

Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 364 (2002) (citations omitted).

When Congress enacted §§ 5151(a) and 5174(j), it is presumed to have been aware of this abundant law requiring ascertainable standards for equitable decsionmaking. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Local 737 v. Auto Glass Employees Fed. Credit Union*, 72 F.3d 1243, 1248 (6th Cir. 1996) ("It is a settled principle of statutory construction that when Congress drafts a statute, courts presume that it does so with full knowledge of the existing law."). Nothing in the text of these statutes indicates any intent to depart from this principle. To the contrary, Congress not only required FEMA to issue equitable standards, it required FEMA to "insure" that its standards are adequate to "accomplish" equity.

FEMA therefore violates the plain text of §§ 5151(a) and 5174(j) when it fails to base its housing repair assistance decisions upon ascertainable standards.

2. FEMA Violates §§ 5151(a) and 5174(j) By Failing to Base its Housing Repair Assistance Decisions Upon Ascertainable Standards

FEMA's only regulations addressing eligibility for home repair assistance appear at 44 C.F.R. §§ 206.113, 206.117(b)(2) and 206.117(c)(1). These regulations merely paraphrase the statutory text that appears at 42 U.S.C. §§ 5174(a), (b)(1), and (c)(2), and add nothing substantive to that text. FEMA's regulations are easily summarized as follows: FEMA may make housing repair assistance available if an applicant meets the requirements of 42 U.S.C. § 5174. The Supreme Court calls these "parroting regulations" because "instead of using its expertise and experience to formulate a regulation, [the agency] has elected merely to paraphrase the statutory

language." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006); *accord Mahon v. United States Dep't of Agric.*, 485 F.3d 1247, 1258 (11th Cir. 2007). Courts do not defer to agency interpretations of parroting regulations. *Id*. Such regulations themselves "offer no interpretive guidance" because the statute itself establishes the known contours of the law, and the agency declined to take a position on gaps left by the statute. *Parker v. Office of Personnel Management*, 974 F.2d 164, 167 (Fed. Cir. 1992).

For example, Congress makes assistance available for "the repair of owner-occupied private residences, utilities, and residential infrastructure ... *to a safe and sanitary living or functioning condition*" and for "eligible hazard mitigation measures." 42 U.S.C. § 5174(c)(2)(A) (emphasis added). FEMA simply repeats "safe and sanitary living or functioning condition" and "eligible hazard mitigation measures" as its only regulatory statement of what housing repairs "may" be covered. 44 C.F.R. § 206.117(b)(2)(i); *id*. at § 206.117(c)(1).

FEMA cannot satisfy § 5174(j) with a regulation that simply repeats the statutory standard in § 5174(c)(2)(A) because *Gonzales* shows such regulations to be devoid of effect. If such empty regulations could satisfy § 5174(j), the statute would be meaningless, and this is not allowed. *United States v. Labonte*, 520 U.S. 751, 760 (1997).

FEMA leaves critical questions completely unaddressed in *any* published policy statement, including what magnitude, severity, and immediacy of health risk qualifies a repair for "safety" purposes. Of course most home repairs can be justified in terms of safety. By declining to state any standard for what safety risks merit repair assistance, FEMA retains unfettered discretion to cover most repairs or no repair according to its fiat. As one court explains:

> On its face, the rule proscribes only conduct which is both "unbecoming" and "detrimental to the service." It is obvious, however, that any apparent limitation on the prohibited conduct through the use of these qualifying terms is illusory, for "unbecoming" and "detrimental to the service" have no inherent, objective content from which ascertainable

> standards defining the proscribed conduct could be fashioned. Like beauty, their content exists only in the eye of the beholder. The subjectivity implicit in the language of the rule permits police officials to enforce the rule with unfettered discretion....

Bence v. Breier, 501 F.2d 1185, 1190 (7th Cir. 1974).

For FEMA, safety is in the eye of the beholder. For example, a hole in a roof, window, or wall threatens injury by allowing precipitation, wind and dust, rodents, and intruders to enter. These pose varying degrees of health risk due to cold and heat loss, mold growth and inhalation, electrical shock, slipping, falling debris, animal bites, and assault. Depending on what risk FEMA deems acceptable, it can deem homes "safe" even though a roof is missing in the case of Ms. Villarreal, or the home is unstable in the case of Mr. Zamora, or the floor is subject to leaks and slippage in the case of Mr. Gonzales, a quadriplegic who risks falling while being transferred into bed from his wheelchair.[3]

[3] Further examples of the absence of regulations necessary for equitable and impartial administration include:

(a) absence of any ascertainable standard for "living or functional condition" — stated in 42 U.S.C. § 5174(c)(2)(A) and repeated verbatim in 44 C.F.R. § 206.117(b)(2) and (c)(1) — in light of the fact that any repair arguably makes a home more functional, so that FEMA could cite "living or functional condition" to allow or deny any repair it cares to cover;

(b) absence of any ascertainable standard for when a "predisaster primary residence [is] rendered uninhabitable" — stated in 42 U.S.C. § 5174(b)(1) and repeated in 44 C.F.R. § 206.113(a)(8) — for without objective habitability standards, subjectivity controls what people consider livable conditions for themselves, their family and friends, and strangers; and

(c) consistent use of "may" throughout FEMA's home repair regulations so that they at most say what FEMA may or may not decide to cover in the future without giving any guidance on when, how, or where FEMA may decide what repairs FEMA actually "will" cover (for example, FEMA broadly defines "eligible hazard mitigation measures" to mean almost any conceivable repair, *see* 44 C.F.R. § 206.111, and then adds hazard mitigation measures to a laundry list of items that it "may" cover if it so "determines," *see* 44 C.F.R. § 206.117(c)(viii).

If safety is the primary concern of the statute and regulations,[4] the home repair program cannot be "equitably and impartially" administered without ascertainable safety standards. Applicants, inspectors, contractors, local officials, FEMA appeal officers, and FEMA officials may all well have different ideas about what poses a valid safety threat. Without ascertainable standards, they will all focus on different facts, and they will not be able to communicate as necessary to render equitable and impartial decisions.[5]

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[4] FEMA's lack of ascertainable standards for housing repair assistance is also confirmed by the following inconsistent standard that FEMA inspectors provide to applicants:

> • *Will FEMA pay for all my damages?*
> By regulation, the FEMA Individuals and Households Program (IHP) can address only your *emergency* repairs and needs. This program is not intended to fully restore your property to pre-disaster condition.

PIE-5 (emphasis added). But no relevant FEMA regulation uses the word "emergency," and an "emergency" limitation is not only undefined, it is inconsistent with the "health and safety" and "functionality" standards that appear in the text of FEMA regulations.

[5] FEMA's housing repair denial notices provide further evidence that FEMA lacks ascertainable standards. PIE-19. FEMA uses identical form language to notify all applicants that they are denied housing repair assistance due to insufficient damage. *Id.*

FEMA does not notify applicants of any specific facts that it relies upon to deny this assistance. *Id*. It only informs applicants that FEMA's decision is based on an inspection without indicating what information the inspector sought or what information was found. This prevents "equitable and impartial" administration of housing repair assistance. In *Billington v. Underwood*, 613 F.2d 91, 94 (5th Cir. 1980), for example, a public housing applicant "was not provided with an adequate statement of the basis for the housing authority's determination that he was ineligible for public housing." The court explained that "[s]uch a statement must be sufficiently specific for it to enable an applicant to" know how to respond and prepare evidence in support of the applicant's position. *Id.* Accordingly, "equivalent detail" to that necessary to arrive at the determination itself is required "in the statement of reasons given the rejected applicant . . . in order to enable him to test the veracity of the agency's findings against him." *Id.* Applying these principles, the court concluded that "the housing authority merely parroted the broad language of the regulations" in its letter. *Id.*

Nor does FEMA's form-letter inform applicants of the legal standard that FEMA relies upon, because, for example: (a) the form language does not mention "deferred maintenance;" (b) the language does not indicate who decides what assistance is "reasonable" and how that decision is made; (c) the notices omit any reference to sanitation even though this is a basis for repair under

An example of ascertainable housing safety standards may be found in regulations already written by the U.S. Department of Housing and Urban Development. *See* 24 C.F.R. § 982.401. The United States Department of Agriculture also has housing safety regulations for FEMA's consideration. *See* 7 C.F.R. § 3560.103. If FEMA declines to use objective housing conditions, it could state what constitutes a safety risk in terms of likelihood of injury, seriousness of injury, or immediacy of injury risk. Unless FEMA names some ascertainable standard, however, "safety" can mean anything or nothing at all according to the fiat of the person making, investigating, or deciding each application.[6] This is the epitome of capricious decisionmaking, and the very conduct proscribed by § 5151(a).

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the statute and parroting regulation at 44 C.F.R. § 206.117(b)(2); and (d) the notices separate two standards ("unsafe or unlivable conditions") after first conflating them ("unsafe to live in"). The form language does not tell applicants whether they were denied assistance because (a) deferred maintenance was the main cause of a serious safety problem; (b) the problem is not a sufficient threat to safety; or (c) a serious safety problem that was not caused by deferred maintenance is only "minor" so that "it is reasonable to expect you ... to make these repairs."

FEMA's form letter advises applicants of their right to appeal. But even fully adequate appeal is insufficient by itself to insure equitable and impartial administration of the housing repair assistance program. The right to appeal is meaningless unless it is preceded by adequate notice. *See Kapps v. Wing*, 404 F.3d 105, 125-26 (2d Cir. 2005) ("it is common sense that a scheme which relies on beneficiaries to seek out basic information on why the agency took the action it did will result in 'only the aggressive recev[ing] their due process right to be advised of the reasons for the proposed action'"); *accord Vargas v. Trainor*, 508 F.2d 485, 490 (7th Cir. 1974).

[6] FEMA defines "safe [to] mean secure from disaster-related hazards or threats to occupants." 44 C.F.R. § 206.111. This only compounds the difficulty of deciphering "safe" because it simply defines one vague word in terms of two equally vague and undefined words: hazard and threat.

3. FEMA Discriminates Against Plaintiffs Based on their Economic Status in Violation of § 5151(a) By Basing Housing Repair Assistance Decisions Upon an Undisclosed and Vague "Deferred Maintenance" Policy

The fact that FEMA does not state its home repair policies in regulations has not prevented FEMA from making critical policy choices. An important example is FEMA's "deferred maintenance" policy, which is never mentioned in any regulation.

FEMA confirms that it applies a "deferred maintenance" policy to decide what home damages it will deem to be "disaster-related" under 42 U.S.C. § 5174(b)(1) and 44 C.F.R. § 206.113(a). PIE-2. Under this policy, FEMA somehow evaluates the *pre-disaster* condition of the home, and may deny all or some home repair assistance if it somehow concludes that the damage at issue was "caused by the faulty building of the house, and not the storm." *Id*. FEMA has relied upon its "deferred maintenance" policy to deny housing repair assistance to some ten thousand families after Hurricane Dolly struck the Rio Grande Valley. PIE-1 and 2.

FEMA's deferred-maintenance policy raises important concerns under 42 U.S.C. § 5151(a). Foremost is economic discrimination. Poor people are least likely to be able to afford to maintain their homes, and poor people are most likely to live in areas of substandard housing, including unincorporated subdivisions called *colonias* that are scattered throughout the Rio Grande Valley. Families there did not choose to be hit by Hurricane Dolly. Nor did they delay replacing their roofs in the hope that a hurricane would cause FEMA to pay for the work. Repair costs may well be higher when disasters strike poor areas, but nothing suggests that Congress wanted, or would tolerate, "deferred maintenance" to be used to deny disaster relief *only* to those who need it most: low-income families.

Consider the repair costs that would be submitted to FEMA if an earthquake hit San Francisco. Materials and labor are much more expensive in San Francisco than elsewhere due to

the high cost of living there. Yet apparently FEMA does not have a rule that would prevent the coverage of the higher housing repair costs that would be expected in that particular area, somehow faulting citizens for choosing to live in San Francisco. Instead, FEMA would address the needs of these presumably wealthier disaster victims as the disaster found them.[7] Section 5151(a) requires FEMA to do no less for Rio Grande Valley residents who did not choose to be so poor as to live in substandard housing prior to facing Hurricane Dolly.

For all of these reasons, Plaintiffs maintain that FEMA cannot articulate a deferred maintenance standard that does not institutionalize economic discrimination in violation of § 5151(a). And even if FEMA could theoretically do so, it certainly has not yet done so. Much to the contrary, FEMA's current deferred maintenance policy violates § 5151(a) for many reasons, not least of which are that it appears in no regulation, it was never subject to the notice and comment required by the APA, and it is itself so vague that it cannot be equitably and impartially administered.

FEMA has published no answers to critical questions concerning its deferred maintenance policy, including:

- how a home's condition *prior* to a major disaster can be reliably ascertained after the disaster;
- whether and how fault can be reliably apportioned between a disaster and deferred maintenance when both are causal factors (for example, whether failure to clean gutters

[7] Another important hypothetical is necessary to illustrate the economic discrimination inherent in FEMA's deferred maintenance rule. If a homeowner re-roofs in 2005, maintains that roof perfectly, and a disaster tears off the roof in 2008, FEMA would presumably cover the cost of a new roof, and the homeowner would have effectively gained three years of cost-free roofing. FEMA never makes any mention of depreciation rules designed to recover this type of "windfall" to wealthier homeowners, but its deferred maintenance rule attempts to wholly foreclose repair assistance to low-income homeowners to avoid the identical "windfall."

before the storm would entirely disqualify an applicant for repair assistance, and if not, what facts and legal standard would be used to assign fault for this failure); and

- in light of the fact that "deferred" implies a *conscious* choice to avoid taking an action, the extent to which FEMA's deferred maintenance policy penalizes homeowners who fail to maintain their homes due to inability (i.e. injury, poverty, or unawareness) as opposed to choice.

Unless and until FEMA provides satisfactory answers to these questions, it cannot have yet complied with § 5151(a)'s command that it equitably and impartially administer housing repair assistance in the wake of Hurricane Dolly, without discrimination on the basis of economic status.

B. Plaintiffs Need A Preliminary Injunction to Prevent Irreparable Harm

Plaintiffs naturally seek injunctive relief to keep their families safe, for the present condition of their houses subjects their families to injury, illness, and attack. PIE-7 to 14. Physical suffering and bodily injury are irreparable harms that injunctions are used to prevent. *Harris v. Board of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004); *Hadix v. Caruso*, 461 F. Supp. 2d 574, 598 (W.D. Mich. 2007); *GP-UHAB Hous. Dev. Fund Corp. v. Jackson*, 2006 WL 297704 at * 12 (E.D.N.Y. 2006); *Cole v. Hills*, 396 F. Supp. 1235, 1237 (D.D.C. 1975).

Plaintiffs also endure displacement from their unrepaired homes. PIE-9, 12, and 14. Displacement is another form of irreparable harm that supports preliminary injunctive relief. *Reed v. Heckler*, 756 F.2d 779, 783 (10th Cir. 1985); *McWaters v. FEMA,* 408 F. Supp. 2d at 228-36 ; *McNeil v. New York City Housing Auth.*, 719 F. Supp. 233, 254 (S.D.N.Y. 1989); *Brown v. Artery Organization, Inc.*, 654 F. Supp. 1106, 1118 (D.D.C. 1987); *Mitchell v. United States Dept. Of Hous. & Urban Dev.*, 569 F. Supp. 701, 704-05 (N.D. Cal. 1983).

Finally, Plaintiffs live in extreme poverty, and continued disrepair of their homes costs them money because their possessions continue to be damaged in homes that remain exposed to the elements, they incur costs for makeshift temporary repairs, and they incur costs for seeking alternative shelter. *E.g.* PIE-13 and 14. These costs are themselves irreparable harm, especially for poor people, because the APA does not allow Plaintiffs to recover the costs from FEMA as money damages. *Mississippi Power & Light Co. v. Mississippi Public Service Commission*, 760 F.2d 618, 625 (5th Cir. 1985); *Hinckley v. Kelsey-Hayes Co.*, 866 F. Supp. 1034, 1044 (E.D. Mich. 1994); *Clark v. Harder*, 577 F. Supp. 1085, 1092 (D. Kan. 1983) ("We do not believe a later award of money can repair the damage that might occur to plaintiff if she does not have money to pay for necessary living expenses today.").

C. The Threatened Harm to Plaintiffs Outweighs Any Possible Harm to FEMA

Courts consistently hold that prevention of irreparable harm to the public outweighs administrative costs associated with agency decisionmaking. *E.g. Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) ("Despite the hardships the City may face in delaying some of its development plans and providing relocation benefits, we agree with the district court that it is a far more severe hardship for someone to be displaced from his or her home without assistance and without the certainty of knowing where to move."); *Artist M. v. Johnson*, 917 F.2d 980, 992 (7th Cir. 1990) (agency's monetary loss and increased administrative obligations do not constitute an irreparable harm), *rev'd on other grounds, Suter v. Artist*, 503 U.S. 347 (1992); *Johnson v. United States Dept. of Agric.*, 734 F.2d 774, 789 (11th Cir. 1984) ("relative harm to the government from granting a preliminary injunction pales when compared to the serious injury class members suffer when they are forced from their homes"); *Watson v. FEMA*, 437 F. Supp. 2d 638, 650 (S.D. Tex. 2006), *rev'd on other grounds*, 2006 WL 3420613 at * 1 (5th Cir. 2006); *Stanley v. Baltimore*

County, 2006 WL 1238559 at * 3 (D. Md. 2006) (harm of potential homelessness outweighed agency's interest in enforcement of disputed housing regulations).

D. The Proposed Injunction Would Serve The Public Interest

The final factor to be weighed is the public interest. Courts more readily grant equitable relief that would promote public interest than when only private interests are involved. *California v. American Stores Co.*, 495 U.S. 271, 295 (1990) (citing *Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937)). Constitutional and statutory requirements express the public interest for purposes of preliminary injunctive relief. *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."); *Llewelyn v. Oakland County Prosecutor's Office*, 402 F.Supp. 1379, 1393 (E.D. Mich. 1975) ("the Constitution is the ultimate expression of the public interest"). Because Plaintiffs have shown a substantial likelihood of success on the merits, the public interest weighs heavily in their favor.

Finally, Plaintiffs urge the Court to take judicial notice that public outcry in the aftermath of Hurricanes Katrina and Rita shows an enormous public interest in, and desire for, orderly administration of relief for vulnerable disaster victims, a public interest that would be served by the specific and limited injunction that Plaintiffs seek.

CONCLUSION

Plaintiffs only ask this Court to require FEMA to do what agencies routinely do: publish ascertainable standards, apply those standards equitably and impartially to each applicant, and notify applicants of the facts and legal basis upon which the agency's decisions rest.

Respectfully submitted,

/s/

November 20, 2008

Jerome W. Wesevich
Attorney in Charge for Plaintiffs

S.D. Texas Bar No. 17397
State Bar No. 21193250
TEXAS RIOGRANDE LEGAL AID, INC.
1331 Texas Avenue
El Paso, Texas 79901
Phone: (915) 241-0534
Fax: (915) 533-4108

Emily S. Rickers
S.D. Texas Bar No. 900070
State Bar No. 24046714
TEXAS RIOGRANDE LEGAL AID, INC.
316 South Closner Blvd.
Edinburg, Texas 78539
Phone: (956) 393-6207
Fax: (956) 383-4688

Robert W. Doggett
S.D. Texas Bar No. 36389
State Bar No. 05945650
TEXAS RIOGRANDE LEGAL AID, INC.
4920 North IH-35
Austin, Texas 78571
Phone: (512) 374-2725
Fax: (512) 447-3940

Tracy O. Figueroa
S.D. Texas Bar No. 34715
State Bar No. 24032923
TEXAS RIOGRANDE LEGAL AID, INC.
901 Leopard Street, Room 105
Corpus Christi, Texas 78401
Phone: (361) 888-0282
Fax: (361) 888-0705

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2008, I served a true and complete copy of the foregoing document, with all referenced exhibits and attachments, upon the following counsel for Defendant FEMA:

Mary Ellen Martinet, Senior Counsel
Office of the Chief Counsel
Federal Emergency Management Agency
500 C Street, SW
Washington, DC 20472

Donald J. DeGabrielle Jr.
U.S. Attorney's Office
Southern District of Texas
Suite 1500
919 Milam Street
Houston, TX 77002

I served the documents using overnight mail to the preceding addresses.

/s/

_____

Jerome W. Wesevich