

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

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

**REPLY SUPPORTING EXPEDITED HEARING OF  
MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs sought preliminary injunctive relief on November 20, 2008. Dkt. No. 2. Six days later Plaintiffs sought expedited consideration of their preliminary injunction motion. Dkt. No. 8. Defendant Federal Emergency Management Agency (FEMA) opposes expedited consideration and seeks until January 20, its answer date, to file its response in opposition to preliminary injunction. Dkt. No. 12 at 1-2 (Opposition). Plaintiffs respectfully reply as follows:

1. FEMA Has No Right to Await Its Answer Deadline. Parties have no right to answer before preliminary injunctive relief is litigated and entered. *United States v. Lynd*, 301 F.2d 818, 823 (5th Cir.), *cert. denied*, 371 U.S. 893 (1962). FEMA itself has filed a response brief and participated in a preliminary injunction hearing held fifteen days after a similar complaint and preliminary injunction motion were filed against it. *See Ass’n of Cmty. Orgs. for Reform Now v. FEMA*, 463 F. Supp. 2d 26, 30 (D.D.C. 2006), *stayed in part on other grounds*, 2006 WL 3847841 at \* 1 (D.C. Cir. 2006).

Plaintiffs in this case proved service of their complaint and preliminary injunction motion on November 21, 2008. Dkt. No. 7. By Judge Tagle’s Civil Procedures ¶ 5.D., Defendant

FEMA's response was due twenty days later on December 11. FEMA did not timely respond or request an extension until December 16 when it filed its Opposition.

2. FEMA and Plaintiffs Can Complete Briefing Over the Holidays. FEMA claims that due to its employees' holiday leave, "it will not be possible to gather the factual information necessary to respond to the preliminary injunction motion on an expedited basis." Opposition at 2-3. But FEMA does not specify what work remains to be done on its response.<sup>1</sup> Nor does FEMA say why it could not complete its response in the 25 days since FEMA was served with the preliminary injunction motion on November 21.<sup>2</sup> And contrary to FEMA's unsupported assertion, it must be "possible" for FEMA to gather any necessary facts from its own employees and contractors, because FEMA employees and contractors are uniquely tasked with being prepared to promptly respond to agency needs at *any* time (hence the "E" in FEMA). At bottom, FEMA asks this Court to delay consideration of the preliminary injunction motion out of

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<sup>1</sup> FEMA claims that the preliminary injunction motion "raises complicated legal issues involving multiple plaintiffs with distinct claims." Opposition at 2. FEMA does not name any issue that it considers complex. Plaintiffs view the legal issue raised by the motion as a standard application of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984) to decide whether any housing repair standards offered by FEMA satisfy the two sentences of statutory text in 42 U.S.C. §§ 5151(a) and 5174(j). Compare *Ortega v. Housing Auth. of the City of Brownsville*, 572 F. Supp. 2d 829, 839 (S.D. Tex. 2008) (per Tagle, J., applying *Chevron*). Nor is FEMA correct that the multiple plaintiffs have distinct claims. In a procedurally similar case, the Supreme Court held that individual plaintiff participation is unnecessary for a court to decide whether a federal agency has followed federal law. *UAW v. Brock*, 477 U.S. 274, 287-88 (1986) ("Neither these claims nor the relief sought required the District Court to consider the individual circumstances of any aggrieved [individual.] The suit raises a pure question of law: whether the [agency] properly interpreted the [statute's] eligibility provisions. And the relief requested, and granted by the District Court, leaves any questions regarding the eligibility of individual ... claimants to the ... authorities given jurisdiction over such questions by [statute].").

<sup>2</sup> Indeed, FEMA has known since October 24, 2008 that Plaintiffs would seek preliminary injunctive relief if necessary to ensure statutorily adequate standards for its housing repair decisions. Dkt. No. 2-2, PIE-1.

convenience to FEMA's attorneys and staff. As important as holiday leave is, it pales in comparison to the suffering of children, elderly, and disabled people that would result from any unnecessary delay, as described below. Plaintiffs' counsel recognize this, and are willing to work over the holidays to ensure that preliminary injunction briefing is ready for the Court's consideration by January 5, 2009.

3. Delay Harms Plaintiffs. Each day that briefing is delayed to accommodate holiday leave, Plaintiffs and their children will:

- (a) live in homes that are exposed, unsanitary, and unsafe—for example, Hurricane Dolly blew Plaintiff Villarreal's laminate roof off and into her yard, leaving the inside of the house exposed to the elements, so that mold is spreading, which has already resulted in several trips to the Edinburg Children's Hospital emergency room for Ms. Villarreal's grandchildren (Dkt. No. 1 at ¶¶ 134-48);
- (b) be displaced from their homes and incur unrecoverable costs—for example, Plaintiff Zamora fears a structural collapse if his house is occupied, so for the safety of his wife and three children, he used a credit card to purchase a 1987 Skylark travel trailer that is not made for five people to live in full-time as his family is doing, and pays \$110 per month to park the trailer in a mobile home park (Dkt. No. 1 at ¶¶ 149-169); or
- (c) both—for example, Plaintiff Gallardo remains in her damaged home while her daughter and grandchildren, who prefer to be with her, relocated to another state because the room where they lived is unsafe (Dkt. No. 1 at ¶¶ 62-73).

Plaintiffs respectfully submit that minimizing these harms is more important than protecting holiday leave, which is the only relevant question in this motion to expedite.

FEMA attempts to dispute whether the harms faced by Plaintiffs are irreparable. Opposition at 3. Irreparability is not necessary to the present motion. This is shown by the fact that FEMA made no attempt to show that withholding holiday leave would cause irreparable harm. Irreparability goes only to the merits of the preliminary injunction motion, and that is where Plaintiffs will litigate this issue. *See* Dkt. No. 2-1 at 20-21.

Next, FEMA argues that the relief sought by both the Complaint and proposed preliminary injunction would require “a multi-step federal rule-making process that ordinarily requires a significant amount of time,” rendering the delay that FEMA now seeks *de minimus* in comparison. Opposition at 2-3. But even if compliance with the proposed preliminary injunction would require *regulations* as opposed to interim implementation of published standards that are less formal than regulations (which the parties may later dispute), the Administrative Procedure Act specifically provides that agencies can quickly implement emergency regulations in these situations subject to later revision as the agency deems fit. *See e.g. Parravano v. Babbitt*, 837 F. Supp. 1034, 1048 (N.D. Cal. 1993) (“Plaintiffs object that the Secretary issued his emergency regulation without complying with standard APA notice and comment rule making procedures. ... [But] the APA contains an exception for situations where the agency for ‘good cause’ finds that notice and public procedure would be impracticable. 5 U.S.C. §§ 553(b)(B), 553(d)(3).”). Moreover, regardless of how long a remedy takes to be implemented, Plaintiffs reply that Plaintiffs and their children should not be subjected to fear of danger, discomfort, or actual injury for even one more day than necessary, particularly when the reason for the delay is the one advanced by FEMA here.

Finally, FEMA argues that *Plaintiffs’* delay in bringing this lawsuit shows that they are not harmed by the current conditions of their homes. Opposition at 3-4. This argument simply

misstates the facts. Plaintiffs' claims did not arise in "July 2008" as FEMA says. No one even became *eligible to apply* for repair assistance until July 31, 2008. Dkt. No. 2-2 at PIE-4. FEMA decided Plaintiffs' applications for home repair assistance in August. *Id.* at PIE-18. Plaintiffs appealed, and FEMA denied their appeals in September, October, and November. Plaintiffs wrote FEMA on October 24, 2008 to seek a resolution to these issues. *Id.* at PIE-1. Receiving no satisfactory response from FEMA's lawyers, Plaintiffs worked from early November until November 20 to prepare the preliminary injunction motion that they had promised to FEMA. Dkt. No. 2-1. These facts confirm that Plaintiffs have diligently and efficiently sought to protect their rights and to minimize the harm they suffer. No fact or legal authority suggests otherwise.

In the end, this Court has "considerable discretion" to set any schedule that it deems appropriate in light of the "urgency that is characteristic of preliminary injunctions." 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2949 at n.9 (2d ed. 1995) (*quoting, e.g., Anderson v. Virgin Islands*, 947 F. Supp. 894, 901 (D.V.I. 1996) ("courts are granted considerable discretion when the urgency that is characteristic of preliminary injunctions warrants a hearing on less than five days' notice")). For the above reasons, Plaintiffs urge the Court to: (a) order FEMA to file its response brief by December 29, 2008; (b) order Plaintiffs to file their reply by January 5, 2009; and (c) set the most prompt possible hearing date available to the Court.

Respectfully submitted,

December 17, 2008

/s/ Jerome W. Wesevich

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### **CERTIFICATE OF SERVICE**

I hereby certify that today, December 17, 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 by ECF and electronic mail:

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