

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

BEATRICE B. McWATERS, et al.,

CIVIL ACTION NO. 05-5488

VERSUS

SECTION "K" (3)

**FEDERAL EMERGENCY MANAGEMENT
AGENCY, et al.**

**MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
AND NOVEMBER 28, 2005 MOTION FOR TEMPORARY RESTRAINING
ORDER AND PRELIMINARY INJUNCTION, AND IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION

This case arises out of the efforts of the Federal Emergency Management Agency ("FEMA") to assist State and local governments in helping victims of one of the largest natural disasters in the history of the United States. Since Hurricane Katrina struck the Gulf Coast on August 29, 2005, causing severe flooding and forcing mass evacuations, particularly in and from the City of New Orleans, FEMA has adjusted its programs, waived certain rules, and created an unprecedented, nearly nationwide program of emergency shelter to address the unique circumstances of this disaster. FEMA has also increased its staffing to unprecedented levels, received an unprecedented number of requests for assistance, and provided more assistance than it has ever provided for any single disaster. FEMA recognizes the vast suffering caused by Hurricane Katrina and its aftermath, and is doing all that it can to provide assistance.

Plaintiffs in this case make several sweeping complaints regarding FEMA's response to Katrina, and they seek preliminary injunctive relief, in two motions, to address their complaints. Although plaintiffs' motions are too wide-ranging to permit easy delineation, they assert (1) that FEMA is not processing requests for assistance quickly enough, (2) that FEMA is ending too early its program of emergency shelter in hotels and motels for victims of Katrina, (3) that FEMA has illegally denied assistance whenever multiple applicants with the same address have sought assistance, (4) that FEMA illegally seeks to recoup assistance from Katrina victims who spent their temporary housing assistance on non-housing related expenses, (5) that FEMA has illegally required victims to apply for disaster loans from the Small Business Administration ("SBA") as a condition of receiving housing assistance from FEMA, and (6) that FEMA has violated the Due Process Clause by failing to notify applicants regarding the nature of assistance and the manner in which assistance must be used to remain eligible for continued rental assistance.

Plaintiffs cannot show any likelihood of success on the merits because FEMA is immune from suit on all of plaintiffs' claims. The governing statute expressly provides that the federal government "shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty" under the statute, and plaintiffs' allegations relate solely to FEMA's performance of discretionary functions and duties. See 42 U.S.C. § 5148. Nor could plaintiffs show any likelihood of success on the merits even without this non-liability provision. Plaintiffs have no legal basis to compel FEMA to make disaster assistance determinations within a certain period of time or to continue the hotel/motel program, and plaintiffs' claim that FEMA denied disaster assistance to some applicants when someone else with the same pre-disaster address applied before them is moot, as is their claim that FEMA intends to recoup or deny continued rental assistance for applicants who spent their rental assistance on other, non-rent, expenses. Plaintiffs' claim that FEMA is requiring victims to apply for SBA loans in order to receive FEMA housing assistance is simply in error, and the discretionary nature of federal disaster assistance precludes a finding that plaintiffs have any "property" interest in such assistance (or in notice regarding it) for purposes of the Due Process Clause. In addition to plaintiffs' inability to prevail on the merits, the relief they seek would harm FEMA and the public interest by undermining the agency's discretion and expertise in providing disaster assistance, inviting more suits by dissatisfied applicants, and requiring FEMA to divert significant resources toward defending litigation and away from assisting States and local governments in helping the victims of disaster.

Therefore, plaintiffs' two motions for preliminary relief should be denied, and this action should be dismissed with prejudice.

STATUTORY AND REGULATORY BACKGROUND

The mission of the Federal Emergency Management Agency, as set forth in the Robert T. Stafford Disaster Relief and Emergency Assistance Act (" Stafford Act") and corresponding regulations, is to "assist the efforts of the . . . States in expediting the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas" affected by disasters. 42 U.S.C. § 5121; see Pub. L. No. 100-707, 102 Stat. 4689 (1988). FEMA assists "State and local governments in carrying out their responsibilities to alleviate the suffering and damage that result from major disasters and emergencies by," among other things, "[p]roviding Federal assistance programs for public and private losses and needs sustained in disasters." 44 C.F.R. § 206.3.

A prerequisite to the provision of FEMA assistance in any particular place and time is a request by the State's governor that the President declare the existence of a "major disaster" or emergency in the area. 42 U.S.C. § 5170. The governor's request must be based on "a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary." Id. Based on such a request, the President "may declare . . . that a major disaster or emergency exists," thus triggering the potential availability of FEMA assistance. Id.

If the President declares a "major disaster" or emergency, he retains the discretion to determine and designate the type of assistance available and the areas eligible to receive assistance. This is clear from the language of the Stafford Act, which is written entirely in permissive terms:

In any major disaster, the President may—

(1) direct any Federal agency . . . to utilize its authorities and the resources granted to it under Federal law . . . in support of State and local assistance efforts . . . [and]

(4) assist State and local governments in the distribution of medicine, food, and other consumable supplies, and emergency assistance.

Id. § 5170a.

The Stafford Act authorizes the President to provide "assistance essential to meeting immediate threats to life and property resulting from a major disaster." Id. § 5170b(a). The Act outlines several potential types of "essential assistance," one being "emergency shelter." Id. § 5170b(a)(3)(B). The Act contemplates the provision of federal emergency assistance "in support of State and local emergency assistance efforts to . . . protect property and public health and safety." Id. § 5192(a)(1).

The provisions of the Stafford Act that authorize "Federal assistance to individuals and households" are also written in permissive terms:

[T]he President, in consultation with the Governor of a State, may provide financial assistance, and, if necessary, direct services, to individuals and households in the State who, as a direct result of a major disaster, have necessary expenses and serious needs in cases in which the individuals and households are unable to meet such expenses or needs through other means.

Id. § 5174(a)(1). More specifically, the Act provides that the President "may" provide "[h]ousing assistance" to "individuals and households who are displaced from their predisaster primary residences or whose predisaster primary residences are rendered uninhabitable as a result of damage caused by a major disaster." Id. § 5174(b)(1). The Act speaks of two types of temporary housing assistance — "[f]inancial assistance" and "[d]irect assistance" — the first being funds "to rent alternate housing accommodations," and the second being "temporary housing units," which may be provided "because of a lack of available housing resources" for rental. Id. § 5174(c)(1). The Act empowers the President to "determine appropriate types of housing assistance to be provided . . . based on considerations of cost effectiveness, convenience to the individuals and

households, and such other factors as the President may consider appropriate." Id.
§ 5174(b)(2)(A).

Housing assistance under the Stafford Act is intended to be temporary; indeed, the Act's provisions on "[f]inancial assistance" and "[d]irect assistance" appear under the heading "Temporary housing." Id. § 5174(c)(1). Direct assistance, moreover, is statutorily limited to a period of 18 months. Id. § 5174(c)(1)(B)(ii). The temporary nature of this assistance is reflected in FEMA regulations, which expressly limit the provision of housing assistance to "18 months from the date of the declaration" of a major disaster, absent an administrative finding of "extraordinary circumstances." 44 C.F.R. § 206.110(e). Accordingly, under the regulations, "all recipients" of this type of assistance are expected "to obtain and occupy permanent housing at the earliest possible time." Id. § 206.114(a). In order to receive continued housing assistance, applicants "must establish a realistic permanent housing plan . . . provide[] documentation showing that they are making efforts to obtain permanent housing," and "submit rent receipts to show that they have exhausted the FEMA rent funds." Id. § 206.114(b)(1), (2).

In addition to housing assistance, the Stafford Act authorizes the President, in the same permissive language, to provide "[f]inancial assistance" to address "other needs." 42 U.S.C. § 5174(e). Specifically, the Act provides that the President "may" provide financial assistance "to an individual or household . . . affected by a major disaster to meet disaster-related medical, dental, and funeral expenses," or to "address personal property, transportation, and other necessary expenses or serious needs resulting from the major disaster." Id. By regulation, FEMA requires applicants for "other needs" assistance to apply for a disaster loan from the Small Business Administration to cover the expenses for which such assistance is sought; one criterion of eligibility for "other needs" assistance is denial or inadequacy of an SBA loan. 44 C.F.R.

§ 206.119(a). In relation to both "other needs" assistance and temporary housing assistance, the Act provides that "[n]o individual or household shall receive financial assistance greater than \$25,000 [adjusted for inflation] under this section with respect to a single major disaster." 42 U.S.C. § 5174(h).

The Stafford Act also prohibits "duplication of benefits"; to that end, the Act requires the President, in consultation with any federal agency providing assistance under the Act, to "assure" that no one receives assistance for any part of a loss that is covered by "any other source." *Id.* § 5155. Thus, for example, FEMA regulations require an applicant for assistance under the Act to apply for insurance proceeds to cover any insured loss, and the regulations state that assistance "for one temporary . . . residence" will generally be provided for each "pre-disaster household." 44 C.F.R. §§ 206.113(a), 206.117(b)(1)(i)(A), (ii)(B). This last provision is known as the "Shared Household Rule."

The Act authorizes the promulgation of regulations to carry out its provisions, and expressly permits the President to exercise, "either directly or through such Federal agency as the President may designate," any "power or authority" conferred on him by the Act. 42 U.S.C. § 5164. Pursuant to that provision, the President has delegated "to the Director of the Federal Emergency Management Agency" all of "[t]he functions vested in the President by the Robert T. Stafford Disaster Relief and Emergency Assistance Act," with a few exceptions, most notably the power to declare "major disasters." *See* Exec. Order 12,673, 54 Fed. Reg. 12,571 (Mar. 23, 1989). Finally, under the heading "Nonliability of Federal Government," the Stafford Act specifies that "[t]he Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part

of a Federal agency or an employee of the Federal Government in carrying out the provisions of this Act." 42 U.S.C. § 5148.

FACTUAL BACKGROUND

As stated more fully in the Declaration of Michael Hirsch submitted herewith, the President and FEMA utilized the discretionary authority under the Stafford Act to declare a "major disaster" for several counties in Florida, Alabama, Mississippi, and Louisiana, and an "emergency" for forty-five States that accepted Katrina evacuees. See Declaration of Michael Hirsch ¶ 14 [hereinafter Hirsch Decl.]. Pursuant to 42 U.S.C. §§ 5170a, 5170b, and 5192, the President authorized FEMA to provide emergency shelter assistance to these States, and FEMA established a short-term hotel lodging program to house evacuees in hotels and motels. Id. ¶¶ 16, 39.

The President also authorized FEMA to provide, among other types of assistance, temporary housing assistance in the form of rental and direct assistance, and other needs assistance to Louisiana, Mississippi, and Alabama. Due to the catastrophic nature of the disaster and the mass evacuations, FEMA utilized its discretion to amend its Shared Household Rule to provide temporary housing and other needs assistance for more than one residence when the household was dispersed to different geographic locations. Id. ¶¶ 55-56, 60-61. FEMA also waived its on-site inspection of pre-disaster residences as a condition for receiving temporary housing assistance, and provided numerous eligible applicants whose pre-disaster residences were located in the hardest-hit areas with "Transitional Housing Assistance" in the amount of \$2358.00, based on the average fair market rental for a two-bedroom apartment for three months. Moreover, FEMA recently established a policy permitting those applicants who had received

\$2358.00 and spent it on non-housing expenses before receiving FEMA's notification of award conditions to remain eligible for continued rental assistance.

ARGUMENT

In the Fifth Circuit, preliminary injunctive relief is an "extraordinary remedy . . . to be treated as an exception rather than the rule." Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 363-64 (5th Cir. 2003) (quoting Mississippi Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985)). A preliminary injunction should not be granted unless the plaintiff has "clearly" carried its "heavy burden" of satisfying four specific criteria:

(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.

Karaha Bodas Co., 335 F.3d at 363 (quoting Canal Auth. v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974)); see Enterprise Int'l, Inc. v. Corporación Estatal Petrolera Ecuatoriana, 762 F.2d 464, 472 (5th Cir. 1985). If plaintiff fails to carry its burden on any one of these four requirements, "a preliminary injunction may not issue." Enterprise Int'l, id.; see Black Fire Fighters Ass'n of Dallas v. City of Dallas, 905 F.2d 63, 65 (5th Cir. 1990) ("The denial of a preliminary injunction will be upheld where the movant has failed sufficiently to establish any one of the four criteria.") (emphasis in original); Rdzanek v. Hospital Service Dist. #3, 2004 WL 74312, at *13 (E.D. La. Jan. 15, 2004) ("movant must satisfy all four factors; a failure to satisfy even one of the four factors requires a denial of the preliminary injunction"); Bergquist v. FYBX Corp., 2003 WL 21488117, at *1 (E.D. La. June 20, 2003) ("If the plaintiff fails to carry its burden as to any one of these four factors, [preliminary] injunctive relief cannot be granted."); Travelers Health

Network of La. v. Orleans Parish School Bd., 842 F. Supp. 236, 239 (E.D. La. 1994) ("Failure to satisfy any one of the factors will preclude issuance of the [preliminary] injunction.").

Significantly, the issuance of a preliminary injunction is designed primarily to freeze the status quo until a full hearing permits final relief. See Wenner v. Texas Lottery Comm., 123 F.3d 321, 326 (5th Cir. 1997). The Fifth Circuit has admonished that "[o]nly in rare instances is the issuance of a mandatory preliminary injunction proper." Harris v. Wilters, 596 F.2d 678, 680 (5th Cir. 1979) (per curiam). "Mandatory preliminary relief which goes well beyond simply maintaining the status quo pendente lite is particularly disfavored and should not be issued unless the facts and law clearly favor the moving party." Rush v. National Bd. of Medical Examiners, 268 F. Supp. 2d 673, 678 (N.D. Tex. 2003).

Under these rules, plaintiffs' motions for preliminary injunctive relief should be denied. Plaintiffs have no basis to prevail on the merits, and granting the relief that they seek would disserve the public interest by undermining FEMA's statutory discretion in relation to disaster assistance, ultimately requiring the agency to expend more resources on defending litigation, and diverting resources from assisting the States and local governments in helping the victims of disaster.

I. Plaintiffs Cannot Succeed on the Merits

A. All of Plaintiffs' Claims Are Precluded by Sovereign Immunity

Since the defendants in this action are an executive department of the United States, a component of that department, and departmental employees in their official capacities, it is an action against the United States and is therefore subject to the defense of sovereign immunity. Hawaii v. Gordon, 373 U.S. 57, 58 (1963); Dugan v. Rank, 372 U.S. 609, 620 (1963). The bar of sovereign immunity "applies alike to causes of action arising under acts of Congress, and to those

arising from some violation of rights conferred upon the citizen by the Constitution." Lynch v. United States, 292 U.S. 571, 582 (1934) (citations omitted); see Bartlett v. Bowen, 816 F.2d 695, 722 (D.C. Cir. 1987). Sovereign immunity also bars actions for injunctive relief. See United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 547 (10th 2001) ("absent express provision, a court has no jurisdiction to either restrain the government from acting or compel it to act").

Absent a waiver of sovereign immunity, a district court lacks subject matter jurisdiction over claims against the United States. FDIC v. Meyer, 510 U.S. 471, 475 (1994). Where Congress has waived the United States' sovereign immunity, the "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in the statutory text . . . and will not be implied." Lane v. Peña, 518 U.S. 187, 192 (1996) (citations omitted). And a waiver of sovereign immunity must "be strictly construed, in terms of its scope, in favor of the sovereign." Lane, *id.* The plaintiffs bear the burden of establishing that a waiver of sovereign immunity encompasses their claims. See Lundeen v. Mineta, 291 F.3d 300, 304 (5th Cir. 2002).

The Stafford Act itself contains no waiver of sovereign immunity. Under some circumstances, the Administrative Procedure Act is a valid and applicable waiver. The APA specifically states, however, that it does not provide review of agency action to the extent that "statutes preclude judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (2). As described above, the Stafford Act does "preclude judicial review." The Act provides that the federal government "shall not be liable" for any claim based on a federal agency's or employee's "exercise or performance of or the failure to exercise or perform a discretionary function or duty." 42 U.S.C. § 5148. Congress included this language to ensure that if "mistake[s]" were made in the administration of federal disaster relief, "the Government

may not be sued . . . that there shall be no liability on the part of the Government." See 96 Cong. Rec. 11895, 11912 (1950) (statement by chairman of House Public Works Committee). As explained by the United States Claims Court:

This provision, on its face, clearly precludes federal governmental liability for its action or inaction in providing disaster relief. . . . Congress clearly manifested its intent to raise a statutory barrier to judicial review Additionally, the emergency assistance given under the Act constitute[s] a gratuity. Liability should not be imposed on the federal government for discretionary acts or omissions of its agencies or employees in distributing benefits under such gratuitous programs.

Ornellas v. United States, 2 Cl. Ct. 378, 379-80 (1983).

The FEMA decisions and actions at issue here are clearly "discretionary functions" for purposes of the Stafford Act's non-liability provision. In holding that FEMA actions fall within this provision, the courts rely on the two-prong test developed by the Supreme Court in applying the discretionary function exception of the Federal Tort Claims Act:

The first prong is satisfied when a choice or judgment is involved in the performance of the function, and that choice or judgment is not tempered by a statute, regulation or policy which mandates a particular course of action. If this condition is met, a court then proceeds to the second prong, which provides that the discretionary function exception will apply if the activity in question is grounded in social, economic or political activity.

Sunrise Village Mobile Home Park, L.C. v. United States, 42 Fed. Cl. 392, 399 (1998) (citing Berkovitz v. United States, 486 U.S. 531, 536-37 (1988)) [hereinafter Sunrise Village]; accord City of San Bruno v. FEMA, 181 F. Supp. 2d 1010, 1014-15 (N.D. Cal. 2001) (employing Berkovitz test).

Using this test, the court in Sunrise Village held that FEMA was not liable on plaintiffs' claim that a contractor had improperly performed removal of debris from plaintiffs' property. The court observed that "no statute or regulation controls the government's monitoring of a contractor's work," such that "the extent of monitoring required or actually accomplished is

necessarily a question of judgment or discretion." 42 Fed. Cl. at 399. The court also found it "unquestionable that disaster relief provided under the Stafford Act is grounded in social, economic and political policy." *Id.* Similarly, the court in City of San Bruno rejected FEMA liability for its denial of disaster assistance after the collapse of a hillside due to heavy rains. "[I]t is undisputed," the court held, "that FEMA ultimately has discretion regarding which projects to fund. Furthermore, the allocation of limited resources among victims of disaster is clearly a matter involving 'policy judgment.'" 181 F. Supp. 2d at 1015.

The plaintiffs here challenge FEMA's application or alleged application of certain statutes and regulations, the pace of the agency's processing of applications for assistance, its actions in relation to notifying applicants, and decisions regarding when and where to provide federal disaster assistance. These claims fall squarely within the two-pronged test in Sunrise Village and City of San Bruno. First, the actions challenged here obviously involve some degree of "judgment . . . not tempered by a statute, regulation or policy which mandates a particular course of action." Sunrise Village, 42 Fed. Cl. at 399. As described above, the Stafford Act repeatedly uses the word "may" in describing FEMA's duties. The actions and decisions challenged here are, furthermore, matters involving "policy judgment." City of San Bruno, 181 F. Supp. 2d at 1015; see Burgos-Montes v. Municipality of Yauco, 294 F. Supp. 2d 141 (D.P.R. 2003) (dismissing municipality's third-party complaint against FEMA for alleged failure to provide promised funding). Second, if the extent to which FEMA supervises a contractor is "grounded in social, economic and political policy," see Sunrise Village, 42 Fed. Cl. at 399, then surely the same should be said about how it applies the Stafford Act in relation to a given disaster, the pace of its processing of applications, the extent to which it provides notice to applicants, and which types of assistance it chooses to provide and when it provides them.

Plaintiffs argue that FEMA somehow lost its discretion to designate the types of assistance available and to provide disaster assistance to States and local governments and Katrina victims, because "the President declared the Gulf Coast Region a disaster area, and Congress approved funds earmarked" for Katrina relief. See Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction at 16 [hereinafter Pls' Memo.]. First, this argument ignores the plain language of the Stafford Act. The Act provides the President with the discretion to declare a major disaster or emergency and to determine whether to provide federal assistance to State and local governments and individuals. 42 U.S.C. § 5170 ("the President may declare under this Act that a major disaster or emergency exists"); id. § 5170a ("In any major disaster, the President may" provide assistance to State and local governments); id. § 5170b ("Federal agencies may on the direction of the President, provide assistance essential to meeting immediate threats"); id. § 5170c ("The President may contribute up to 75 percent of the cost of hazard mitigation"); id. § 5172 ("The President may make contribution to State or local government for the repair, restoration, reconstruction, or replacement of a public facility"); id. § 5174 ("The President . . . may provide" temporary housing and other needs assistance.); id. § 5192 ("In any emergency, the President may" provide State and local governments with assistance to "save lives, protect property and public health and safety"). Indeed, after declaring a major disaster for Louisiana, Alabama, Mississippi, and Florida, the President designated temporary housing and other needs assistance for Louisiana, Alabama, and Mississippi, but not Florida. If the declaration of an emergency or major disaster were to eliminate FEMA's discretion to designate the types of assistance needed and when to provide assistance, then FEMA would never have such discretion, notwithstanding the Stafford Act's use of the permissive "may" in every section regarding the provision of assistance.

Plaintiffs have cited no judicial decision holding that a disaster declaration eliminates FEMA's discretion regarding assistance, and defendants are unaware of any such decision.

Second, Congress's appropriation of funds specifically for Katrina relief does not eliminate FEMA's discretion in distributing those funds. The appropriation of funds for a disaster affecting hundreds of thousands of people is completely different, for example, from any appropriation of funds for a single, discrete project; a broad, general appropriation for a disaster necessarily relies on the expertise and statutory discretion of the administering agency to allocate and distribute the funds, rather than merely showering money upon any person who claims an entitlement to payment. In appropriating FEMA funds for Katrina relief, Congress did not amend the Stafford Act in any way, nor mandate that the funds be spent in any particular manner. See Pub. L. No. 109-61, 119 Stat. 1988 (2005); Pub. L. No. 109-62, 119 Stat. 1899 (2005).¹

Plaintiffs also rely on the Mandamus Act, 28 U.S.C. § 1361, as a jurisdictional basis. See First Amended Complaint ¶ 17. The Mandamus Act can apply, however, only where the defendant "owes [the plaintiff] a clear nondiscretionary duty." Heckler v. Ringer, 466 U.S. 602, 616

¹ Plaintiffs also assert that FEMA surrendered its discretion — and its immunity — by indicating that it "will" provide assistance for Katrina victims. See Memorandum in Support of Plaintiffs' November 28, 2005 Motion for Temporary Restraining Order and Preliminary Injunction at 20-21 [hereinafter Pls' Nov. 28 Memo.]. As noted above, however, a waiver of sovereign immunity must be "unequivocally expressed" in the statutory text, and will be "strictly construed . . . in favor of the sovereign." Lane, 518 U.S. at 192. An extra-statutory statement by an agency that it intends to provide certain benefits to a broad class of persons cannot waive the sovereign immunity of the United States as to all such individuals. See Resolution Trust Corp. v. Miramon, 935 F. Supp. 838, 841 (E.D. La.1996) ("Only Congress has the power to waive a federal agency's sovereign immunity . . ."); accord Forman v. Small, 271 F.3d 285, 295 (D.C. Cir. 2001) ("officers of the United States possess no power through their actions to waive an immunity of the United States") (quoting United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 660 (1947)). Furthermore, a contrary rule would encourage FEMA to refrain from indicating what assistance it intends to provide in relation to a disaster.

(1984) (emphasis added). As described above, all of the statutes governing the actions challenged here are couched in discretionary, not mandatory, terms.

Moreover, the fact that plaintiffs plead claims under the Due Process Clause in addition to the Stafford Act cannot defeat Congress's intent in shielding FEMA from liability in relation to its "discretionary function[s] [and] dut[ies] in carrying out the provisions of [the Stafford] Act." 42 U.S.C. § 5148. If a constitutional claim against FEMA were allowed to defeat FEMA's statutory immunity from liability, then the Stafford Act would be a nullity, because almost any claim can, in one way or another, be characterized as a constitutional claim. As the court said in

City of San Bruno:

The weakness of [plaintiffs'] argument is further exposed by an examination of the consequences of permitting review of FEMA eligibility determinations. If every applicant could litigate a denial of eligibility the purpose of sovereign immunity would be defeated. FEMA's resources would be diverted to defending eligibility decisions.

181 F. Supp. 2d at 1015. And resources diverted to defending eligibility decisions are diverted from those who need FEMA's assistance.

B. Plaintiffs Have No Legal Basis for Compelling FEMA to Decide Requests for Assistance Within a Certain Period of Time

The primary focus of plaintiffs' first motion for preliminary relief is the pace of FEMA's progress in processing the more than 1,400,000 requests for temporary housing assistance it has received as a result of Hurricane Katrina. See Hirsch Decl. ¶ 53. Katrina has generated more requests for assistance, and imposed more of a strain on FEMA's resources, than any other single disaster. Id. ¶¶ 23-33, 53. FEMA is processing claims as expeditiously as it can; plaintiffs' motion does not — and could not — argue otherwise. Nevertheless, plaintiffs seek to compel FEMA to "process applications . . . in a reasonably prompt and equitable manner to be approved by the Court," with the definition of "reasonably prompt" apparently to be determined by the

plaintiffs. See [Proposed] Temporary Restraining Order and Preliminary Injunction at 3 [hereinafter Pls' Proposed Order]. In other words, despite the absence of any statutory or regulatory deadlines for the provision of disaster assistance, plaintiffs would impose deadlines on FEMA for processing applications, without regard to the finite nature of the agency's resources, and without regard to the circumstances of any particular application, such as whether more information is needed from the applicant, whether the agency is able to contact the applicant when necessary, or whether the agency may be concerned that the application may be fraudulent.

Besides the impracticality of fixing and administering any set of arbitrary deadlines for processing applications, plaintiffs have no conceivable legal basis for compelling FEMA to process requests for assistance within a specific timeframe. As noted above, the Stafford Act does not establish any such deadlines. Plaintiffs' quotation from the legislative history, where a Congressman mentioned a "mandate" that FEMA place disaster victims in "a temporary housing situation" within a certain period of time, actually highlights the absence of any such "mandate" in the Act. See Pls' Memo. at 19. Indeed, in amending the temporary housing provision of the Stafford Act in 2000, Congress removed a provision that formerly required FEMA to make eligibility determination within seven days "[w]henever practicable." See Pub. L. No. 106-390, § 206; 114 Stat. 1557 (2000) (amending 42 U.S.C. § 5174); see also Pub. L. No. 100-707, § 408(e), 102 Stat. 4689 (1988). The monotonously permissive language of the Act — using the discretionary word "may" in every provision authorizing the government to provide assistance and to choose among different types of assistance — further forecloses any inference that FEMA can be required to process applications within a certain period of time.²

² The discretionary nature of federal disaster assistance distinguishes this case from the decisions on which plaintiffs rely in arguing that the pace of FEMA's processing violates due process. See Pls' Memo. at 22. Both Mathews v. Edridge, 424 U.S. 319 (1976), and United

Nor can the Act's reference to processing applications "in an equitable and impartial manner" be read as requiring that all requests for assistance be decided and approved within the same period of time after submission. See 42 U.S.C. § 5151(a); see also Pls' Memo. at 19.³ FEMA could not process all 1.4 million post-Katrina requests for assistance simultaneously and immediately, and some requests inevitably pose more issues needing resolution than others. Moreover, plaintiffs do not (and could not) argue that FEMA is deliberately laying aside certain requests to decide others more expeditiously. See Hirsch Decl. ¶¶ 57-61 (describing automatic versus manual resolution of requests for assistance).

C. Plaintiffs Have No Legal Basis for Compelling FEMA to Continue the Hotel/Motel Program

The sole focus of plaintiffs' second pending motion for preliminary relief is the impending termination of the special hotel/motel program FEMA took over from the Red Cross after Hurricane Katrina. See id. ¶¶ 37-42. This program is funded under Sections 403 and 502 of the Stafford Act, which authorize FEMA to provide "emergency shelter" when "essential to meeting immediate threats to life and property resulting from a major disaster." See 42 U.S.C. §§ 5170b(a)(3)(B), 5192. The funds are discretionary, and are paid to the States where the evacuees are located, not to the evacuees. See Hirsch Decl. ¶ 37; see also 42 U.S.C. § 5192 (provision of federal emergency assistance "in support of State and local emergency assistance efforts to . . . protect property and public health and safety").

States v. Batson, 782 F.2d 1307 (5th Cir. 1986), dealt with federal entitlement programs — the first with Social Security disability benefits and the second with an agricultural price support program. See infra text at ___ - ___.

³ Additionally, the cited statute does not itself require FEMA to process applications "in an equitable and impartial manner," but rather requires the promulgation of regulations that include "provisions for insuring" that FEMA's activities are carried out in that manner. See 42 U.S.C. § 5151(a); see also 44 C.F.R. § 206.11(b).

FEMA took over the hotel/motel program from the Red Cross on October 25, 2005, with the goal of transitioning evacuees from emergency shelters under Section 403 of the Act to temporary housing assistance under Section 408. See Hirsch Decl. ¶ 39; see also 42 U.S.C. § 5174. The agency is extending the program to December 15 throughout the country, and to January 7, 2006, in the ten States where 93% of the hotel evacuees are located, if requested by the States.⁴ See Hirsch Decl. ¶ 41.⁵ In those ten States, therefore, the program will have lasted a total of two and a half months under FEMA's administration, and longer than that before FEMA took over the program. Two and a half months is a significant period of time for a program intended to provide "emergency shelter" to address an "immediate threat." See 42 U.S.C. 5170b(a)(3)(B).

Moreover, plaintiffs' attempt to compel FEMA to continue the hotel/motel program beyond these dates illustrates one important reason why the Stafford Act confers discretion on FEMA in allocating its finite resources for housing assistance, and why the agency should be allowed to continue to exercise that discretion: Housing hurricane evacuees in hotels and motels is obviously more costly than housing them through other means. Every dollar that is spent on

⁴ Permitting extension of the program in those ten States, but not in other States, should not be a concern under the Equal Protection Clause. Since 97% of hotel evacuees are located in those ten States, FEMA's effort to conserve finite resources and streamline administration of the program would be a sufficiently rational basis to satisfy equal protection. See, e.g., Vanderberg v. Donaldson, 259 F.3d 1321, 1324 (11th Cir. 2001) (relying on conservation of governmental resources as legitimate interest for purposes of equal protection); Aleman v. Glickman, 217 F.3d 1191, 1203 (9th Cir. 2000) (same).

⁵ Plaintiffs assert that the ten States will have to "meet[] conditions over which Plaintiffs have no control." See Pls' Nov. 28 Memo. at 15. In reality, however, the only "condition" that each State will need to meet is to describe a plan for housing the evacuees who are currently located in hotels. See Hirsch Decl. ¶ 41. Particularly given this very low threshold, it is highly likely that all ten States will request the extension.

the hotel/motel program after January 7 would be a dollar that FEMA would be unable to spend on other means of assistance, such as rent and direct housing assistance.⁶

D. Plaintiffs' Requests for Relief Regarding the Shared Household Rule and the Recoupment of Assistance Have Become Moot

Two of plaintiffs' requests for preliminary relief — those related to the "Shared Household Rule" and FEMA's alleged recoupment of assistance (and denial of continuing assistance) based on an applicant's failure to use the initial housing assistance only for housing purposes — have become moot. See Pls' Proposed Order at 3, 4. Indeed, plaintiffs' request for relief regarding the "Share Household Rule" had become moot even before they filed their original complaint on November 10, 2005. Since an actual case or controversy must exist at all stages of a case and not merely when the claim is filed, the courts do not have jurisdiction over claims that have become moot and are thus no longer "live." See Parole Comm'n v. Geraghty, 445 U.S. 395, 396-97 (1980). Thus, mootness has been described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." Id. at 397 (quoting Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973)).

As described above, the Stafford Act prohibits duplication of benefits, such that FEMA will generally provide assistance toward only "one temporary . . . residence" for each "pre-disaster household." 44 C.F.R. § 206.117(b)(1)(i)(A), (ii)(B); see 42 U.S.C. § 5155.

⁶ Nor would termination of the hotel/motel program "discriminate" against applicants based on economic status in violation of the Stafford Act. See 42 U.S.C. § 5151(a) (requiring that FEMA regulations "include provisions for insuring that . . . the processing of applications . . . be accomplished . . . without discrimination on the grounds . . . economic status"). Contra Pls' Nov. 28 Memo. at 26. Such a claim of "disparate impact" discrimination could be made in any disaster — indeed, any time FEMA terminates assistance — since applicants who have more of their own funds are obviously more able to provide for their own needs without FEMA assistance.

Nevertheless, in recognition of the huge displacement of persons and the significant breakup of households caused by Hurricane Katrina, FEMA determined, on September 19, 2005, to modify the Shared Household Rule for purposes of Katrina assistance. Under that modification, "assistance for more than one residence may be provided to a household whose members are displaced and living in different geographical locations from one another as a result of Hurricane Katrina." See Hirsch Decl. ¶ 60 & Attachment G. This modification addresses plaintiffs' concerns regarding large families, individuals who were living in boardinghouses, and multiple dwellings with similar addresses. This modification also mooted — even before the original complaint was filed — plaintiffs' request for an order prohibiting defendants from "denying Assistance to applicants based solely on the fact that another applicant with the same address and/or phone number previously applied for temporary housing assistance." See Pls' Proposed Order at 3.

As also described above, FEMA housing assistance is intended to be spent on housing expenses, and FEMA regulations require applicants for continued assistance to "submit rent receipts to show that they have exhausted the FEMA rent funds." 44 C.F.R. § 206.114(b)(2). In providing assistance in the aftermath Katrina, FEMA decided to waive its on-site inspection of pre-disaster residences and provide Transitional Housing Assistance (\$2358) for applicants who lived in the areas hardest hit by Katrina. Thus, FEMA requested the Department of the Treasury to send a check or make an electronic deposit to the recipients' bank accounts immediately, whereas the letters telling recipients the purpose of the assistance were only sent later by FEMA. See Hirsch Decl. ¶¶ 47-48. In recognition of the fact that some applicants received the letter explaining the limits on the use of the funds after receiving the check or deposit, FEMA, on November 23, 2005, waived the requirements that the initial assistance be spent only for housing

and that rental receipts be submitted as a condition for continued assistance. Id. ¶ 49. Instead, applicants must only certify, on a one-page form provided by FEMA, that they received the initial assistance before receiving the letter explaining its purpose, and that they used the assistance for serious and essential needs because they lacked sufficient funds to address those needs. Id. This moots plaintiffs' request for an order prohibiting defendants from "seeking to recoup from recipients any rental assistance not used for rent" or "denying continuing rental assistance" on the same basis. See Pls' Proposed Order at 4.

E. Plaintiffs' "SBA Loan" Claim Is Factually Incorrect

Plaintiffs also seek preliminary relief prohibiting FEMA from "requiring applicants for temporary housing assistance to complete an SBA loan application . . . as a prerequisite to apply for or receiving temporary housing assistance." See id. at 3. This request reflects a misunderstanding, on plaintiffs' part, of the types of FEMA assistance, and confusion between the different types of assistance. FEMA does not require applicants to apply for SBA loans in order to receive temporary housing assistance. See Hirsch Decl. ¶ 67. If, on the other hand, applicants desire assistance to address "other needs" — that is, "to meet disaster-related medical, dental, funeral expenses" or "personal property, transportation, and other necessary expenses or serious needs resulting from the major disaster," 42 U.S.C. § 5174(e) — FEMA regulations require them to apply for a disaster loan from the SBA. 44 C.F.R. § 206.119(a) (providing that one criterion of eligibility for "other needs" assistance is denial or inadequacy of an SBA loan). But "other needs" assistance is different and separate from housing assistance. Although, as plaintiffs point out, the Stafford Act precludes denying certain types of assistance "solely on the basis that the [applicant] has not applied for or received any loan . . . from the Small Business

Administration," assistance for "other needs" is not one of those types of assistance. 42 U.S.C. § 5174(a)(2). Thus, plaintiffs' request for preliminary relief in this regard is without merit.

F. Plaintiffs Have No Protectable "Property" Interest in FEMA Assistance for Purposes of the Due Process Clause

Lastly, plaintiffs allege that FEMA has violated the Due Process Clause. Specifically, they allege that FEMA violated their procedural due process rights by failing to provide them with notice of its decisions and of the availability and nature of disaster assistance. Plaintiffs also claim, apparently, that FEMA violated their substantive due process rights in making disaster assistance determinations. These claims are without merit, however, because federal disaster assistance does not constitute "property" under the Due Process Clause.

In some limited circumstances, the Due Process Clause may apply to governmental benefits if they can be classified as "property." A benefit constitutes "property," however, only if the plaintiff has a "legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). As the Fifth Circuit has said:

We have consistently held that the mere existence of a governmental program or authority empowered to grant a particular type of benefit to one such as the plaintiff does not give the plaintiff a property right, protected by the due process clause, to receive the benefit, absent some legitimate claim of entitlement — arising from statute, regulation, contract, or the like — to the benefit. This is true for a continuation of a benefit.

Blackburn v. City of Marshall, 42 F.3d 925, 941 (5th Cir. 1995) (emphasis in original) (citations omitted).

The courts have repeatedly held that there can be no "legitimate claim of entitlement" to a governmental benefit if discretion is exercised in providing the benefit. For example, in Hill v. Group Three Housing, the Eighth Circuit held that private property owners retain sufficient discretion in selecting tenants for Section 8 housing that eligible persons have no protectable

property interest in such housing benefits — even though the owners' discretion is somewhat "circumscribe[d]" by federal guidelines. 799 F.2d 385, 389-92 (8th Cir. 1986). Similarly, another court has held that no property interest is created "where a statute leaves discretion with the government in awarding benefits." PDK Labs Inc. v. Reno, 134 F. Supp. 2d 24, 32 (D.D.C. 2001).

As described above, the granting of federal disaster assistance is entirely a matter of governmental discretion. The Stafford Act uses discretionary language at every turn: the President "may" declare a major disaster, 42 U.S.C. § 5170, and FEMA "may" provide financial assistance or direct services to individuals and households after a major disaster, id. § 5174(a)(1), "may" provide housing assistance, id. § 5174(b)(1), "may" provide financial assistance to address other needs, id. § 5174(e), and "may" provide other essential assistance. Id. § 5170b(a). This language has none of the "mandatory quality" that creates legitimate property interests. See Soeken v. Herman, 35 F. Supp. 2d 99, 105 (D. D.C. 1999). Not surprisingly, the courts have held that FEMA exercises discretion in providing assistance under the Act. See Sunrise Village Mobile Home Park, L.C. v. United States, 42 Fed. Cl. 392, 399 (1998); City of San Bruno v. FEMA, 181 F. Supp. 2d 1010, 1014-15 (N.D. Cal. 2001); Ornellas v. United States, 2 Cl. Ct. 378, 379-80 (1983). Thus, there can be no "legitimate claim of entitlement" — and no constitutionally protectable property interest — in federal disaster assistance or in receiving notice regarding such assistance.

In attempting to find a "legitimate claim of entitlement" in the Stafford Act, plaintiffs argue that the Act "afford[s]" eligible individuals "an orderly and continuous means of assistance." See Memorandum in Support of Plaintiffs' November 28, 2005 Motion for Temporary Restraining Order and Preliminary Injunction at 22-24, 26-27 [hereinafter Pls' Nov.

28 Memo.]. Plaintiffs fail to mention, however, that this argument is based on language in the Act's "findings and declarations" section rather than in any substantive provision:

It is the intent of the Congress, by this Act, to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from . . . disasters

42 U.S.C. § 5121(b). Congressional findings and declarations of purpose do not create substantive rights. See Conboy v. AT & T Corp., 241 F.3d 242, 257 n.14 (2d Cir. 2001). This language is not, therefore, a "mandate," as plaintiffs assert, see Pls' Nov. 28 Memo. at 24, and it cannot create a legitimate claim of entitlement to federal disaster assistance, or to continued assistance.

II. Granting the Requested Preliminary Relief Would Harm the Defendants and the Public Interest

Besides the fact that plaintiffs have no substantial likelihood — indeed, no likelihood — of prevailing on the merits, the preliminary relief requested here would harm the defendants and the public interest. See Karaha Bodas Co., 335 F.3d at 363. Congress deliberately gave the government the broadest possible discretion in the Stafford Act, in order to ensure that the government's resources could be employed in emergency situations as effectively as possible. Permitting this action to proceed, and granting the relief requested in plaintiffs' pending motions, would dramatically undermine the government's ability to do so, and would transfer authority for implementing the Stafford Act from the Executive Branch to the plaintiffs and the Court. Additionally, a decision that FEMA may not terminate the emergency housing program would establish a precedent that could potentially constrain the agency in a number of disaster situations. FEMA must be free, and remain free, to administer its resources without judicial interference. As noted earlier, "[i]f every applicant could litigate a denial of eligibility the

purpose of sovereign immunity would be defeated. FEMA's resources would be diverted to defending eligibility decisions." City of San Bruno, 181 F. Supp. 2d at 1015.

CONCLUSION

Accordingly, Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, and Plaintiffs' November 28, 2005 Motion for Temporary Restraining Order and Preliminary Injunction, should be denied, and this action should be dismissed with prejudice.

* * *

Dated: December 5, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on all counsel of record
by electronic mail on this 5th day of December, 2005.

/s/ W. Scott Simpson

W. SCOTT SIMPSON