

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 06-20651

U.S. COURT OF APPEALS  
**FILED**  
SEP - 6 2006

CHARLES R. FULBRUGE III  
CLERK

CAROLYN WATSON; ANTOINETTE JAMES;  
HAZEL EDWARDS; NICOLE ALSTON; GAIL DEAN HUGHES;  
KIM EDWARD MITCHELL, on Behalf of Themselves  
and All Others Similarly Situated; SUZETTE HALL;  
ELLIS HERD; JOYCE MIXON; WINIFRED WILLIAMS; CHERYL JOHNSON;  
GERALDINE JOHNSON,

Plaintiff-Appellee,

versus

FEDERAL EMERGENCY MANAGEMENT AGENCY;  
MICHAEL CHEFTOFF; DEPARTMENT OF HOMELAND  
SECURITY; HARVEY JOHNSON; R. DAVID PAULSON;  
WILLIAM E. PETERSON,

Defendant-Appellant.

Appeal from the United States District Court  
For the Southern District of Texas, Houston

( )

Before HIGGINBOTHAM, DENNIS, and PRADO, Circuit Judges.

BY THE COURT:

The defendants appeal from the district court's preliminary  
injunction ordering the defendants to reimburse all temporary-

housing recipients for the full amount of HUD's fair market rental value, and further ordering the defendants to allow plaintiffs to use the difference, if any, between HUD's fair market rent rate and plaintiff's actual monthly rent to pay for their utilities. We vacate the district court's order.

The Federal Emergency Management Agency is currently providing temporary housing assistance to evacuees that were displaced by Hurricane Katrina. These assistance payments are authorized under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5170(a)(3)(B), and under its implementing regulations, 44 C.F.R. § 206.117.

The Stafford Act directs that FEMA "may provide financial assistance to individuals or households to rent alternate housing accommodations." 42 U.S.C. § 5174(c)(1)(A)(i). Further, the Act directs that these rental assistance payments "shall be based on fair market rent for the accommodation provided." *Id.* § 5174(c)(1)(A)(ii). And so they are. The relevant implementing regulation provides that FEMA will "base the rental assistance on the Department of Housing and Urban Development's ("HUD") current fair market rates ("FMR") for existing rental units." 44 C.F.R. § 206. These HUD fair market rates are defined by HUD to include "the rent, including the cost of utilities (except telephone)." 24 C.F.R. § 888.111(b). The FEMA regulations, however, provide that

"[a]ll utility costs and utility security deposits are the responsibility of the occupant except where the utility does not meter utility services separately and utility services are a part of the rental charge." 44 C.F.R. § 206.117(b)(1)(i)(C). Thus, FEMA provides temporary assistance for rent only, not separately-metered utilities.

Plaintiffs first contend that FEMA's interpretation the Stafford Act, specifically of the term "fair market rent," is unreasonable and not entitled to Chevron deference.<sup>1</sup> They argue that when Congress amended the Stafford Act in 2002 to include the term "fair market rent," that term's meaning was clearly established by the Department of Housing and Urban Development to include rent and utilities. In response, FEMA argues that the term is open textured, and that FEMA's interpretation is entitled to deference. We need not address this question, however, because FEMA does base its rental assistance upon the cost of rent and utilities. As noted above, FEMA's implementing regulations "base the rental assistance on the Department of Housing and Urban Development's ("HUD") current fair market rates ("FMR") for existing rental units." 44 C.F.R. § 206. And, as further noted, those FMRs include utilities.

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<sup>1</sup>See *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U. S. 837, 842 (1984).

The actual dispute, then, is over FEMA's interpretation of the Stafford Act's phrase "based on." The plaintiffs contend that the Act's provision for temporary-assistance payments "based on fair market rent," means that those temporary-assistance payments should be equal to fair market rent, not some fraction thereof determined by FEMA. The plaintiffs further contend that because these rental assistance payments are "based on" utility cost, as determined by HUD, they should be entitled to use such payments for their utility bills, contrary to FEMA regulations.

We are not persuaded by either argument. First, it is not unreasonable for FEMA to interpret the phrase "based on" to mean only "in reference to," but not "equal to." Thus, FEMA could reasonably base their assistance payments on HUD's FMRs while still reserving the right to pay some fraction or multiple of the FMR. Indeed, as FEMA notes in its brief, natural disasters often cause short-term rents to soar, rising well above the long-term FMRs determined by HUD. FEMA regulations provide flexibility in an emergency to go below (as is the case here) or above (as was the case immediately after Katrina) the HUD FMRs.

Second, neither is it unreasonable for FEMA to interpret the phrase "based on" to mean "in reference to," but not "including." That is, FEMA could reasonably base its temporary assistance payments on the HUD FMRs, which include utilities, but not allow

tenants to apply those payments toward their utility bills. For example, Congress might instead have directed FEMA to make temporary assistance payments "based on" the basket of consumer goods in the relevant market. But, pegging temporary assistance payments to the consumer basket would not necessarily require FEMA to reimburse its evacuees for purchases of consumer goods. FEMA's interpretation of the Act is reasonable in both respects, and is thus entitled to deference under *Chevron*.

For these reasons, we find that plaintiffs are not entitled to prevail on the merits, and we accordingly VACATE the district court's preliminary injunction. Appellees' motion to lift administrative stay is DENIED. Appellees' motion to vacate this court's order of August 2, 2006 is DENIED. Appellees' alternative motion for this court to deny appellants' emergency motion is DENIED.