



## **CRS Report for Congress**

# **Disaster Housing Assistance: A Legal Analysis of *ACORN v. FEMA***

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### **Summary**

This report discusses the ongoing litigation in *Association of Community Organizations for Reform Now (ACORN) v. Federal Emergency Management Agency (FEMA)*, litigation that involves certain evacuees from Hurricane Katrina and Hurricane Rita. In the *ACORN* case now before the Court of Appeals for the District of Columbia, the U.S. District Court for the District of Columbia addressed the constitutional adequacy of the notice provided to hurricane evacuees who were denied long-term housing assistance benefits by FEMA under § 408 of the Stafford Act. The court held that the notice FEMA provided to the evacuees was unconstitutionally vague and did not meet the standards of due process. The court ordered FEMA to provide a more detailed explanation of its denial of § 408 assistance to each affected evacuee and to continue short-term housing assistance under § 403 of the Stafford Act until each evacuee received a revised notice and had adequate time to appeal the denial of § 408 benefits.

On December 22, 2006, a three-judge panel of the United States Court of Appeals for the D.C. Circuit granted, in part, FEMA's emergency motion for a stay pending appeal. The court of appeals stayed the district court's order requiring FEMA to immediately restore § 403 benefits and pay short-term housing assistance that the affected evacuees otherwise would have received from September 1, 2006, through November 30, 2006. The court left in effect the lower court's order requiring that FEMA provide more detailed explanations for the denial of § 408 assistance to affected evacuees and ordered that the appeals be expedited.

On November 29, 2006, the U.S. District Court for the District of Columbia granted a motion for a preliminary injunction filed by the Association of Community Organizations for Reform Now (*ACORN*),<sup>1</sup> on behalf of several thousand Hurricane Katrina and Rita evacuees, and also four individual Hurricane Katrina plaintiffs, all of

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<sup>1</sup> *ACORN* is a membership organization composed of low- and moderate-income families that works to build stronger communities through improvements in housing, safety, healthcare and other services. See [<http://www.acorn.org>].

whom had been receiving short-term housing assistance under § 403 of the Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).<sup>2</sup> In granting the motion, the court ordered the Federal Emergency Management Agency (FEMA) to provide evacuees more detailed explanations for denying them longer term housing assistance benefits under § 408 of the Stafford Act.<sup>3</sup> The court found that FEMA's notice procedures in denying long-term housing benefits under § 408 did not comport with the Due Process Clause of the Constitution.<sup>4</sup> The court also directed FEMA to resume providing short-term housing assistance benefits to all the evacuees who were found ineligible for the long-term housing benefits, until the evacuees receive the more detailed explanations and have had an opportunity to appeal.<sup>5</sup>

FEMA appealed the court's decision<sup>6</sup> and filed a motion for a stay of the court's order pending appeal.<sup>7</sup> The motion was denied,<sup>8</sup> and the district court issued a substitution order again directing FEMA to immediately restore § 403 housing assistance and provide other relief.<sup>9</sup> Later, FEMA explained to the court its expected timetable for compliance and the obstacles it had encountered. Subsequently, FEMA appealed the denial of its motion for a stay to the court of appeals.<sup>10</sup> On December 22, 2006, the Court of Appeals for the D.C. Circuit granted the motion for a stay of the district court's order directing FEMA to resume providing § 403 housing assistance to affected evacuees,<sup>11</sup> but the court left in effect the order requiring that FEMA provide more detailed explanations of its denial of § 408 assistance to affected evacuees.<sup>12</sup>

**Background.** The 2005 Atlantic hurricane season was the most active and costliest in U.S. history, causing over 1,000 deaths and more than \$100 billion dollars in

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<sup>2</sup> Codified at 42 U.S.C. § 5170b.

<sup>3</sup> Codified at 42 U.S.C. § 5174(b).

<sup>4</sup> Association of Community Organizations for Reform Now (ACORN), *et al.* v. Federal Emergency Management Agency (FEMA), Civil Case No. 06cv1521 1, 18 (D.D.C. Nov.29, 2006) (hereinafter Memorandum Opinion) (Leon, J.).

<sup>5</sup> *Id.* at 19.

<sup>6</sup> Notice of Appeal, ACORN v. FEMA, Civil Case No. 06cv1521 (D.D.C. Dec. 5, 2006) (hereinafter Notice of Appeal).

<sup>7</sup> Defendant's Motion for a Stay Pending Appeal, ACORN v. FEMA, Civil Case No. 06cv1521 (D.D.C. Dec. 5, 2006) (hereinafter Defendant's Motion for a Stay Pending Appeal).

<sup>8</sup> Order Denying Defendant's Motion for a Stay and Requesting Additional Information, ACORN v. FEMA, Civil Case No. 06cv1521 (D.D.C. Dec. 8, 2006).

<sup>9</sup> ACORN v. FEMA, Civil Case No. 06cv1521 (D.D.C. Dec. 12, 2006) (hereinafter Substitution Order).

<sup>10</sup> See AP story "FEMA to Restart Katrina Housing Program" (Dec. 18, 2006) at <http://apnews.myway.com/article/20061218/D8M3HUV00.html> .

<sup>11</sup> Association of Community Organizations for Reform Now (ACORN), *et al.* v. Federal Emergency Management Agency (FEMA), Civil Case No. 06-5403 (D.C. Cir. Dec. 22, 2006).

<sup>12</sup> *Id.*

damages.<sup>13</sup> Storms displaced more than 700,000 people in the Gulf Coast region leaving many individuals without adequate shelter.<sup>14</sup> Pursuant to a presidential disaster declaration,<sup>15</sup> FEMA determined that the evacuees from Hurricanes Katrina and Rita qualified for short-term housing rental assistance under § 403 of the Stafford Act.<sup>16</sup> Approximately six months later, in February of 2006, FEMA began the process of transferring eligible evacuees to its longer term housing program under § 408,<sup>17</sup> which provides up to eighteen months of housing assistance to disaster evacuees. To receive longer-term housing assistance, however, individuals must apply and meet certain statutory and regulatory requirements.<sup>18</sup> In March of 2006, FEMA notified thousands of evacuees by letter that they were ineligible to receive long-term housing benefits, and after several extensions FEMA stopped providing short-term housing assistance to the majority of those evacuees deemed ineligible for continuing benefits.<sup>19</sup> This action prompted ACORN, on behalf of its affected members, to file for a temporary restraining order that would prevent FEMA from terminating the temporary housing benefits as planned.<sup>20</sup> ACORN was joined in its suit by individual plaintiffs. Thereafter, the U.S. District Court for the District of Columbia denied plaintiffs' request for a temporary restraining order but converted it into a motion for a preliminary injunction, which was the issue before the court.<sup>21</sup>

**District Court Decision.** The district court, in granting the plaintiffs' motion for a preliminary injunction, found that FEMA's procedures for notifying evacuees of the denial of long-term housing assistance were constitutionally inadequate.<sup>22</sup> In its opinion, the court began by addressing FEMA's procedural challenges to the lawsuit. First, FEMA claimed that the court lacked subject matter jurisdiction over the plaintiffs' claims because the Stafford Act and Administrative Procedure Act provide that actions taken within the discretion of federal agencies are not reviewable in court.<sup>23</sup> The court reasoned

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<sup>13</sup> See, e.g., FEMA Disaster Information Page (Aug. 22, 2006) at [<http://www.fema.gov/news/newsrelease.fema?id=29108>].

<sup>14</sup> For a more detailed discussion of the displacement of hurricane evacuees, see CRS Report RL33141, *Hurricane Katrina: Social-Demographic Characteristics of Impacted Areas*, Thomas Gabe, Gene Falk, Maggie McCarty and Virginia W. Mason.

<sup>15</sup> Presidential Disaster Declaration of Aug. 29, 2005 published in Louisiana; Major Disaster and Related Determinations, 70 Fed. Reg. 58,731 (Oct. 7, 2005).

<sup>16</sup> Codified at 42 U.S.C. § 5170b. These benefits are meant to meet the immediate shelter needs of individuals and households in response to a disaster and their duration is determined in accordance with agency guidelines.

<sup>17</sup> See Memorandum Opinion at 3.

<sup>18</sup> See 42 U.S.C. § 5174(b); 44 C.F.R. § 206.110(h) and § 206.113(b).

<sup>19</sup> Memorandum Opinion at 6.

<sup>20</sup> Id. at 6.

<sup>21</sup> Id. at 2.

<sup>22</sup> Id. at 18.

<sup>23</sup> See 42 U.S.C. § 5148; 5 U.S.C. § 701(a)(1), (2).

that these provisions were inapplicable in this case because the plaintiffs were challenging FEMA's notice of ineligibility and not the reasons for the ineligibility decisions.<sup>24</sup>

Next, the court addressed FEMA's contention that ACORN lacked standing to sue on behalf of its members.<sup>25</sup> FEMA claimed that ACORN lacked standing on the grounds that the due process claims asserted by ACORN must be litigated by each individual applicant, and that the claims related to housing benefits were not germane to ACORN's purpose.<sup>26</sup> The court determined that ACORN met all of the elements for associational standing, including the requirement that the issues in the case be germane to the organization's mission.<sup>27</sup> As to FEMA's assertion that due process claims need to be litigated on an individual basis, the court reiterated its view that the suit raised questions regarding the constitutionality of FEMA's notice procedures in general, as opposed to the individual eligibility for benefits of specific claimants.<sup>28</sup> Furthermore, the court explained that individual participation is not normally required when an association seeks prospective or injunctive relief for its members.

In assessing the plaintiffs' request for preliminary injunctive relief, the court found that the plaintiffs satisfied the requirements of a four-part test enunciated by the D.C. Circuit Court of Appeals in *Katz v. Georgetown University*.<sup>29</sup> The court focused its analysis on the requirement that the plaintiffs must establish a likelihood for success on the merits. To succeed on the merits, the plaintiffs needed to show that the evacuees possessed a property interest in the housing benefits they had been receiving and that FEMA's termination and denial letters did not provide constitutionally adequate notice of the reasons for its decisions or an opportunity for a meaningful appeal.<sup>30</sup> The court discussed the principle that an individual's legitimate claim of entitlement to a government benefit can create a constitutionally protected interest in the benefit.<sup>31</sup> Here, the court determined that the temporary housing assistance benefits FEMA provides without consideration of who will ultimately be eligible for the long-term benefits creates such a constitutionally protected interest.<sup>32</sup> The court reasoned that since all individuals receiving short-term housing assistance are eligible to apply for long-term housing

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<sup>24</sup> Memorandum Opinion at 7.

<sup>25</sup> *Id.* at 8.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 9. The court discussed the organization's creation of a Katrina Survivors Association to counsel individual survivors about emergency housing options, among other activities, as evidence of housing being an important issue to ACORN.

<sup>28</sup> *Id.* at 10.

<sup>29</sup> *Katz v. Georgetown Univ.*, 246 F.3d 685, 687-688 (D.C. Cir. 2001). In order to prevail, plaintiffs must demonstrate: a substantial likelihood of success on the merits, that they would suffer irreparable harm if the injunction was not granted, that an injunction would not substantially injure other interested parties and that the public interest would be furthered by the injunction.

<sup>30</sup> Memorandum Opinion at 11.

<sup>31</sup> *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

<sup>32</sup> Memorandum Opinion at 12.

benefits, then all of the evacuees before the court possessed the same procedural rights in the application process.<sup>33</sup>

In evaluating the constitutional adequacy of FEMA's notice to evacuees, the court looked at several factors.<sup>34</sup> The court discussed the importance of the plaintiffs' private interest in continued housing assistance, the probability of erroneous deprivation of that interest under the procedures used, and the government's ability to provide additional or substitute procedural requirements.<sup>35</sup> In looking at the private interest at stake, the court held that the plaintiffs' interest in continued housing assistance was of a fundamentally important nature.<sup>36</sup> Moreover, the court found that this interest had been protected inadequately, citing FEMA's admittedly erroneous denial of benefits under its procedures in other instances.<sup>37</sup> Regarding the opportunity for meaningful appeal, the court found that the codes and phrases used in the denial letters were cryptic and that the explanatory guide accompanying the letters was vague and non-specific.<sup>38</sup> The court also rejected FEMA's contention that its extensive appeals process mitigates any lack of adequate individual notice. The court reasoned that the vague explanations for FEMA's decisions lead claimants to a great deal of conjecture that reduces the meaningfulness of any appeal. Furthermore, the court determined that FEMA failed to demonstrate that a more detailed explanation of the denials would present an increased burden and cost outweighing the private interest of evacuees facing eviction.<sup>39</sup>

**Substitution Order.** Following the November 29 opinion, FEMA appealed the district court's ruling on December 5<sup>40</sup> and also filed a motion for a stay pending appeal of the district court's order.<sup>41</sup> Subsequently, the court found that the relief it had ordered had been "misinterpret[ed] and mischaracteriz[ed]" in pleadings to it and the court of appeals.<sup>42</sup> Accordingly, the court issued a substitution order on December 12, 2006 that reiterated what relief was due, namely: provision to plaintiffs of more detailed explanations for denials of § 408 assistance, including the factual and statutory bases for denial and "more fulsome" instructions for curing ineligibility or proceeding with an appeal; immediate restoration of § 403 benefits, with those benefits to continue until affected evacuees receive more detailed explanations and have time to pursue an appeal; and payment to plaintiffs of the amount of § 403 assistance they would have otherwise

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<sup>33</sup> Id.

<sup>34</sup> The court drew these factors for the evaluation of due process from *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>35</sup> Memorandum Opinion at 13.

<sup>36</sup> Id.

<sup>37</sup> Id. at 15.

<sup>38</sup> Id. at 14.

<sup>39</sup> Id. at 16.

<sup>40</sup> Notice of Appeal at 1.

<sup>41</sup> Defendant's Motion for a Stay Pending Appeal at 1.

<sup>42</sup> Substitution Order at 1.

received from September 1, 2006 through November 30, 2006.<sup>43</sup> In its motion for a stay pending appeal, FEMA argued that reinstating § 403 assistance to the evacuees deemed ineligible for § 408 assistance would be “an extraordinarily difficult, if not impossible, task.”<sup>44</sup> According to FEMA, the difficulty arises because reinstating § 403 benefits involves the cooperation of both state and local governments in order to provide housing assistance.<sup>45</sup> In responding to Hurricane Katrina, FEMA created the § 403 Apartment Program and administered the program through municipal governments. Under this program, FEMA reimbursed states that entered into lease agreements for apartments to be used as shelter for evacuees.<sup>46</sup>

On December 22, 2006, the court of appeals granted FEMA’s emergency motion for a stay pending appeal of the district court’s order requiring FEMA to “immediately restore” § 403 housing assistance benefits and pay housing assistance benefits that the affected evacuees otherwise would have received from September 1, 2006, through November 30, 2006.<sup>47</sup> However, the court of appeals denied FEMA’s motion for a stay pending appeal regarding the district court’s order directing FEMA to provide more detailed explanations for the denials of § 408 benefits and instructions on how to proceed with an appeal to the affected evacuees, and the court of appeals also ordered that the appeals be expedited.<sup>48</sup>

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<sup>43</sup> *Id.* at 1-2.

<sup>44</sup> Defendant’s Motion for a Stay Pending Appeal at 12.

<sup>45</sup> *Id.* Resuming § 403 assistance requires cooperation at the state and local level because § 403 assistance is not directly provided to disaster victims. Instead, § 403 assistance was administered through public assistance grants to states. *See, e.g.*, 44 C.F.R. § 206.202.

<sup>46</sup> *See, e.g.*, Sheltering and Housing Katrina Evacuees (Dec. 22, 2006) at [<http://www.fema.gov/news/newsrelease.fema?id=32467>]. Reportedly, FEMA testified on Dec. 18, 2006 that it was hoping to restart the short-term benefits within a week to comply with the District Court’s order. FEMA also stated that it was working on preparing more easily understandable letters for evacuees. At the same time, FEMA had appealed the denial of its motion for a stay to the court of appeals. *See* AP story “FEMA to Restart Katrina Housing Program” (Dec. 18, 2006) at [<http://apnews.myway.com/article/20061218/D8M3HUV00.html>].

<sup>47</sup> Association of Community Organizations for Reform Now (ACORN), *et al.* v. Federal Emergency Management Agency (FEMA), Civil Case No. 06-5403 at 1 (D.C. Cir. Dec. 22, 2006). The court of appeals explained that the benefits had already terminated as of Aug. 31, 2006 or lapsed after the district court denied the initial motion for a temporary restraining order.

<sup>48</sup> *Id.* at 1. In the order, the court established a briefing schedule that set March 7, 2007 as the receipt date for the appellant’s reply brief.