IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE INCLUSIVE COMMUNITIES PROJECT, INC.,

Plaintiff,

v.

07-CV-945-L

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant.

DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION; ACCOMPANYING BRIEF; CERTIFICATE OF INTERESTED PERSONS

For the reasons set forth in the accompanying brief, defendant, the United States Department of Housing and Urban Development, hereby respectfully moves this Court, pursuant to Fed. R. Civ. P. 12(b)(1) and Local Rule 7.1, to dismiss this action for lack of subject matter jurisdiction. Pursuant to Local Rule 7.4, a Certificate of Interested Persons is attached.

Dated: October 2, 2007

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

RICHARD B. ROPER
United States Attorney

s/ James D. Todd Jr
MICHAEL SITCOV
Assistant Branch Director
JAMES D. TODD JR
Senior Counsel
U.S. Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington DC 20001
(202) 514-3378
james.todd@usdoj.gov
Attorneys for Defendant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

FEDERAL REGISTER NOTICES

LEGISLATIVE HISTORY

INTRODUCTION

In what they characterize as an effort to "break down barriers to the creation of racially and economically inclusive communities," Compl. ¶ 2, plaintiff has sued the U.S. Department of Housing and Urban Development ("HUD") on account of HUD's role in setting Section 8 payment levels in the Dallas area. Plaintiff brings suit under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, alleging violations of Section 8 of the U.S. Housing Act, 42 U.S.C. § 1437f(o) (the "voucher program"), and the Fair Housing Act, 42 U.S.C. § 3608(e)(5). However, as set forth below, this Court lacks subject matter jurisdiction over plaintiff's claims because plaintiff cannot satisfy the case or controversy requirement of Article III of the U.S. Constitution, and because no waiver of sovereign immunity encompasses its claims.

First, plaintiff lacks Article III standing to challenge HUD's actions because plaintiff: (i) seeks injunctive relief for past injuries, (ii) asserts generalized grievances, (iii) asserts injuries on behalf of third parties, and (iv) requests relief that will not redress its injuries or relies on mere speculation about what private landlords, who are not before this Court, might do if this Court were to enjoin HUD's activities. In addition, plaintiff's challenge is, at least in part, now moot.

Second, even if plaintiff had standing to assert any of its claims, this Court would still lack subject matter jurisdiction because Congress has not waived sovereign immunity under APA for these claims. Rather, the APA provides no waiver of immunity over plaintiff's Section 8 claims against HUD because Congress has committed HUD's rent-setting activities to the agency's discretion and has set no standards by which this Court could review those actions. Moreover, the APA bars suit because plaintiff has another adequate remedy at law, namely, suit against the Dallas area housing authorities over their rent setting role in the Dallas area. Finally, the APA bars suit for plaintiff's Fair Housing Act claims against HUD because that Act provides no discrete mandate for HUD to follow in carrying out its role in the Section 8 program.

STATUTORY BACKGROUND

In 1974, Congress amended the United States Housing Act of 1937 ("Housing Act") to create what is known as the Section 8 program. Through Section 8's housing choice voucher program, Congress hoped to "ai[d] low-income families in obtaining a decent place to live," 42 U.S.C.

§ 1437f(a), by subsidizing private landlords who rent to low-income tenants. Under the program, tenants make rental payments based on their income and ability to pay; and public housing authorities ("PHAs"), funded by HUD, make "assistance payments" to the private owners in an amount calculated to make up the difference between the tenant's contribution and a "contract rent" agreed upon by the owner and the PHA. The subsidy is implemented through Housing Assistance Payment ("HAP") contracts entered into between the PHA and a property owner which extensively regulate an owner's management of the property. 42 U.S.C. § 1437f(o)(7). HAP contracts set the maximum allowable rent an owner may charge and the subsidy amount the PHA pays, and require owners to maintain the property in a safe and sanitary condition. *Id.* §§ 1437f(c)(1), 1437f(o)(2), (8).

1. Owner Selection of Tenants

The voucher program reflects Congress's desire to encourage the participation of the private sector in providing low-income housing by leaving management decisions (which includes the selection of tenants) to the private owner. In that regard, the Housing Act mandates that contracts between a PHA and a private owner "shall provide that the . . . selection of families . . . shall be the function of the owner." *Id.* § 1437f(o)(6)(B).[1]

HUD's regulations for the voucher program also recognize the private owner's discretion in the selection of tenants. *See, e.g.,* 24 C.F.R. §§ 982.307(a)(2) ("The owner is responsible for . . . selection of the family to occupy the owner's unit. At or before PHA approval of the tenancy, the PHA must inform the owner that . . . selection for tenancy is the responsibility of the owner."). *See also id.* § 982.452 (same). Thus, the language used in the regulations clearly makes a distinction between a tenant's "eligibility" to participate in the voucher program, *cf. id.* § 982.201(a) ("The PHA may only admit an eligible family to the program"), and the owner's "selection" of that tenant.

Thus, an owner generally has no obligation to participate in the Section 8 program and can refuse to accept a voucher, even if that means an otherwise acceptable family is unable to lease the unit.

---

[1] Previously, Section 8 contained a "take-one, take-all requirement" under § 8(t) of Act, providing that once an owner accepted a certificate or voucher holder in any multifamily project, that owner could not reject other eligible tenants. However, Congress suspended § 8(t) from 1996 through 1998 by appropriations acts, and permanently repealed the provision by the Quality Housing & Work Responsibility Act, Pub. L. No. 105-276, § 545, 112 Stat. 2461, 2596 (1998).

Put another way, a landlord is free to take as many or as few Section 8 tenants as he may choose, just as he is free to take no Section 8 tenants at all.

2. Fair Market Rents

Section 8 requires HUD to set the "fair market rent[] . . . annually for existing . . . units of various sizes . . . in the market area." 42 U.S.C. § 1437f(c)(1). While Congress has established standards for HUD's determination of FMRs, *see, e.g., id.* (requiring FMRs to be adjusted annually on October 1 of each year (hereafter the "fiscal year") based on the "most recent data"), it has provided no standards or guidance defining the term "market area." *See id. See also* Decl. of Kurt G. Usowski in Supp. of Def. Mot. to Dismiss ("Usowski Decl.") ¶ 4 [submitted herewith]. Accordingly, HUD has used the discretion provided to it by Congress to establish multi-county metropolitan areas as defined by the Office of Management and Budget ("OMB") as the principal basis for determining the market area, or "FMR Area," while reserving the authority to make limited exceptions. *Id. See* 24 C.F.R. § 888.113(d). Congress has had the opportunity to direct HUD to use something other than multi-county Metropolitan Areas as the basis for FMR computations, or otherwise to provide standards for determining FMR Areas with each annual HUD appropriations bill, during the periodic process of generally reauthorizing HUD's programs, and in multiple other pieces of incidental legislation affecting HUD programs. Usowski Decl. ¶ 4. However, with the exception of specific statutory direction to establish FMRs for Westchester County, New York, and for Monroe County, Pennsylvania, Congress has not done so. *Id. See* 42 U.S.C. § 1437f(c)(1).

HUD generally bases FMRs on the fortieth percentile of standard quality rental units occupied by "recent movers" in the market, or "FMR" area. 24 C.F.R. § 888.113(b). A fortieth percentile rent means that forty percent of units in the FMR Area rent for the FMR or less, while sixty percent rent for the FMR or more. Usowski Decl. ¶ 9. However, in the late 1990s, HUD became concerned about the ability of voucher tenants to access all parts of large metropolitan housing markets, especially in markets where affordable housing was concentrated in high poverty areas. *Id.* Accordingly, in 2000, HUD issued an interim rule establishing criteria for setting the FMR at the fiftieth percentile rent in large metropolitan FMR Areas that met specific criteria for size, concentration of housing renting at or below the fortieth percentile FMR, and concentration of voucher tenants in particular neighborhoods.

See 24 C.F.R. § 888.113(c).

In the voucher program, the FMR that HUD sets for each Metropolitan Area forms the basis for determining a PHA's "payment standard amount," which the PHA uses to calculate the maximum monthly subsidy for an assisted family to rent a particular unit. *Id.* § 1437f(o)(1)(B); 24 C.F.R. § 982.503(b). The voucher program allows a PHA to vary the payment standard amount between 90 and 110 percent of HUD's published FMR for the area, *id.* § 1437f(o)(1)(B); 24 C.F.R. § 982.503(b), and with HUD approval, the PHA can also vary the payment standard amount above 110 percent for certain high rent areas. *Id.* § 1437f(o)(1)(D); 24 C.F.R. § 982.503(c) ("exception payment standards"). *See also* Usowski Decl. ¶ 6.

From the inception of the Section 8 voucher program up until fiscal year ("FY") 2004, Congress funded the voucher program based on a number of vouchers that were allocated among PHAs by formula established by HUD. Usowski Decl. ¶ 5. Under this funding mechanism, if HUD increased the FMR or a PHA increased its payment standard, additional HUD funds went to affected PHAs to cover the increased rent subsidies. *Id.* In FY2004 and through to the present, Congress changed the funding mechanism for vouchers to a dollar-based budget. *Id.* Now, increases in FMRs or payment standards may mean that a PHA has to serve fewer tenants because paying higher rent subsidies per voucher means fewer vouchers can be supported by a given annual funding allocation. *Id.* Accordingly, PHAs face a tradeoff between the number of vouchers than can be supported and the amount of the subsidy its Section 8 vouchers can provide. *Id.* ¶ 6.[2]

3. Fair Market Rents in the Dallas Area

HUD's FY2005 Dallas two-bedroom FMR, based on the fiftieth percentile rent, as plaintiff

[2] In the current eight-county Dallas FMR Area, the Housing Choice Voucher program is operated by fourteen local PHAs, each of which, because vouchers are portable, has more than ninety percent of its tenants living throughout the Dallas FMR Area, plus the Texas Department of Community Affairs, which has about 39 percent of its tenants throughout the Dallas FMR Area. *Id.* ¶ 7. The local PHAs in the Dallas area are associated with particular cities or counties, but their charters may allow for wider jurisdictions. Under the Consent Decree entered in *Walker v. HUD*, No. 85-1210 (N.D. Tex. Jan. 20, 1987), for example, the Housing Authority of the City of Dallas ("Dallas Housing Authority," or "DHA") has wide jurisdiction to assist tenants with finding housing throughout the Dallas and Fort Worth metropolitan areas.

correctly alleges, was $868. *See* 70 Fed. Reg. 9778 (Feb. 28, 2005).[3] In FY 2006, HUD's FMRs implemented new OMB-defined Metropolitan Statistical Areas ("MSA's") as the basis for HUD's FMR Areas, *see* 70 Fed. Reg. 32402 (June 2, 2005), although with some exceptions to the new OMB-defined areas. *Id.* *See also* Usowski Decl. ¶ 13. HUD defined these exceptions in a way to minimize FMR changes due to altered geography, primarily because of the combination of OMB's old metropolitan areas into larger MSAs. 70 Fed. Reg. at 32403; Usowski Decl. ¶ 13. In general, HUD decided to use the new OMB-defined area as the basis for FMR Areas, but used subareas following the lines of its FY2005 FMR Areas when sub-area base fortieth percentile rents from the 2000 Census differed by more than five percent from the base fortieth percentile rent of the OMB-defined area. Usowski Decl. ¶ 13.[4] Essentially, HUD divided OMB-defined MSAs that had combined HUD's FY2005 FMR Areas when they had substantially different FMRs. *Id.*

In Dallas, OMB's new principal definition of the Metropolitan Area is a combined Dallas-Fort Worth-Arlington Metropolitan Statistical Area (the "Dallas MSA"). *Id.* ¶ 12. OMB's Dallas MSA consists of 12 counties: Collin, Dallas, Delta, Denton, Ellis, Hunt, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise. *Id.* ¶ 14. Based on FY 2005 FMR Area definitions, HUD divided the Dallas MSA into three "HUD Metro FMR Areas" because two of the candidate sub-areas, which were separate FMR Areas in FY2005, had 2000 Census base rents that differed by more than five percent from the 2000 census base rent of the twelve-county area. *Id.*[5] Because the remaining eight-county

---

[3] HUD's FY 2005 FMR for the Dallas area was the result of changes to the Dallas FMR that began in FY 2001, when HUD, after determining that the Dallas FMR Area qualified under HUD's new fiftieth percentile FMR regulations, set the Dallas two-bedroom FMR at $830, up from $749 in FY2000, which had been based on the fortieth percentile rent. *Id.* ¶ 9. HUD continued to use fiftieth percentile rents in FY 2002, FY 2003, and FY 2004, which set the Dallas area FMR at $810, $850, and $871, respectively. *Id.* ¶ 10.

[4] Prior to FY 2006, HUD's Dallas FMR Area was based on the OMB-defined Dallas Primary Metropolitan Statistical Area. Usowski Decl. ¶ 8.

[5] One new FMR Area was Wise County, which under the old OMB Metropolitan Area definitions and HUD's FMR Area definitions in FY2005, was a non-metropolitan county. *Id.* ¶ 15. Since it had sufficient 2000 Census data to compute a 2000 Census base rent, and the base rent differed by more than five percent from the twelve-county area base rent, HUD made Wise County a separate FMR Area. *Id.* Because the other formerly non-metropolitan county added by OMB, Delta County, did not have a sufficient 2000 Census count of two-bedroom, standard-quality, recent-mover, rental units to compute a census base rent of its own, HUD kept it as part of the Dallas FMR Area. *Id.*

HUD also made the three counties in the new OMB-defined area that were in the old Fort Worth FMR Area (Johnson, Parker, and Tarrant) a separate FMR Area because, again, the 2000 Census base rent for

area (Collin, Dallas, Delta, Denton, Ellis, Hunt, Kaufman, and Rockwall) did not have a 2000 Census fortieth percentile base rent that differed by more than five percent from the twelve-county area, HUD used the twelve-county area to set the base rent for the Dallas FMR Area for FY2006. *Id.* ¶ 17. Based on the fiftieth percentile rent, the two-bedroom FY 2006 FMR for the Dallas area would have been $824. *Id.* However, two other events unrelated to HUD's use of new FMR Areas occurred that had the effect of reducing the revised final FY2006 two-bedroom FMR to $733. *Id.*

First, as part of the development of the proposed FY2006 FMRs, HUD conducted another survey of the Dallas area. *Id.* ¶ 18. The survey covered the higher-rent, eight-county area only, not the twelve-county area. The result reduced the fiftieth percentile two-bedroom FMR to $777, as published in the unrevised final FMRs on October 3, 2005. *See* 70 Fed. Reg. 57654 (Oct. 3, 2005). The decline in rent for the Dallas FMR Area, as measured by the survey, directly reflects the very soft rental housing market that existed in Dallas at the time. Usowski Decl. ¶ 18.

Second, on August 25, 2005, HUD determined, after a review required under HUD regulations that govern fiftieth percentile FMR determinations, that the Dallas FMR Area was no longer eligible to remain a fiftieth percentile FMR Area because the Dallas area PHAs' reporting rates on the location of voucher tenants was too low to be considered reliable. *See* 70 Fed. Reg. 50138 (Aug. 25, 2005). *See also* Usowski Decl. ¶ 19. Accordingly, on February 14, 2006, HUD reduced the FMR in the Dallas FMR Area to $733, based on the fortieth percentile rent, for the remainder of FY 2006. *See* 71 Fed. Reg. 7832 (Feb. 14, 2006); Usowski Decl. ¶ 19.[6]

HUD's current FY2008 FMRs, which became effective yesterday, October 1, 2007, not only uses the fiftieth percentile rent but also employ data from the new American Community Survey ("ACS"), a continuously administered survey operated by the Census Bureau. *Id.* ¶ 21. In evaluating the ACS data, HUD compared fiftieth percentile, standard-quality, recent-mover rents for the twelve-county OMB-defined area, and the eight-county Dallas FMR Area. *Id.* The number for the

---

the three counties differed by more than five percent from the twelve-county area base rent. *Id.* ¶ 16.

[6] Although HUD based FY 2006 Dallas Area FMR on the fortieth percentile rent, by the time HUD was developing the FY2007 FMRs, Dallas-area PHAs had improved their reporting on voucher tenant locations sufficiently to be eligible again for a fiftieth percentile FMR. Usowski Decl. ¶ 20. HUD's FY2007 Dallas Area two-bedroom FMR, based on the fiftieth percentile rent, was $798. *Id.*

smaller area was only 1.8 percent higher than the data for the larger area, and as such, was not different by more than was likely to be accounted for by sampling error. *Id.* In other words, the two-bedroom fiftieth percentile rent for the OMB-defined twelve-county Dallas MSA is statistically equivalent to the two-bedroom fiftieth percentile rent for HUD's eight-county Dallas FMR Area as measured by 2005 ACS data. *Id.* Accordingly, HUD's final FY2008 Dallas Area two-bedroom FMR, based on the fiftieth percentile rent, is currently $871. *Id.*

4. Plaintiff's Complaint

Plaintiff alleges that HUD's use of the Dallas MSA to calculate the FMR for FY 2005 and FY 2006 has made "standard quality, non-luxury rental housing unavailable in non-minority market areas." Compl. ¶ 35. Plaintiff further alleges that this injures it by "reducing the number of units that ICP can use to help its clients find housing," and increasing the amount of "time" and "financial assistance" that it must spend "to help its clients find and retain modest rental housing in non-minority concentrated market areas." *Id.* ¶ 35A-C. Further, plaintiff alleges that this injures its clients, who are not before this Court, by "discouraging [them] from choosing . . . units in market areas that offer racially integrated housing . . ." *Id.* ¶ 35D.

To redress its alleged injuries, plaintiff seeks an injunction: (i) first, setting aside FMRs for fiscal years 2006 and 2007 for all of the Dallas FMR Area and instead using HUD's FY 2005 FMR in certain non-minority parts of the Dallas FMR Area, *id.* ¶ 39A, and then (ii) requiring HUD to use undefined "rental housing market areas" as the basis for its FMR determinations that provide black DHA housing voucher participants "equal access" to "White rental housing markets," *id.* ¶ 39C, D, (iii) requiring HUD to use the "[fiftieth] percentile basis" for its FMR calculations, *id.* ¶ 39D, and (iv) "eliminating the disparities between the number and percent of dwelling units made available in predominantly White rental markets and the number and percent of . . . units made available in predominantly minority rental . . . markets," and providing "fair housing opportunities." *Id.* ¶ 39D, E.

STANDARD OF REVIEW

A. Justiciability of Plaintiff's Claims Against HUD

1. Article III Standing

Plaintiff's standing under Article III of the U.S. Constitution to maintain this action in federal court is a threshold jurisdictional matter that must be decided prior to other issues involved in the case. *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 721 (5th Cir. 2007). The "irreducible constitutional minimum of standing" requires that plaintiffs demonstrate (a) an "injury in fact" which is "concrete and particularized," (b) that the injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court," and (c) that it is "*'likely,'* as opposed to merely *'speculative,'* that the injury will be '*redressed* by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (emphasis added) (*quoting in part Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38, 41-42, 43 (1976)). *Accord Ass'n for Retarded Citizens v. Dallas Cty. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 243 (5th Cir. 1994). "This triad . . . constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-104 (1998). *See also Pelican Ch., Assoc. Builders & Contractors, Inc. v. Edwards*, 128 F.3d 910, 916 (5th Cir. 1997). Moreover, these three core requirements of standing are substantially more difficult to establish where, as here, plaintiff is not itself the direct object of the particular government action or inaction challenged in the lawsuit. *Lujan,* 504 U.S. at 562.

2. Mootness

"To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). A request for injunctive relief generally becomes moot upon the happening of the event sought to be enjoined. *Seafarers Int'l Union of N. Am. v. Nat'l Marine Servs., Inc.*, 820 F.2d 148, 151-52 (5th Cir. 1987). At that point, no order of the court can affect the rights of the parties with regard to the requested relief. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974).

B. Standard of Review under the Administrative Procedure Act

A party may not bring suit against the United States absent an explicit waiver of sovereign immunity by Congress. *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941); *Drake v. Panama Canal Com'n*, 907 F.2d 532, 535 (5th Cir. 1990). Such waiver "must be unequivocally expressed in statutory text . . . [and] will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Peña*, 518 U.S. 187, 192 (1996). *See also Rothe Dev. Corp. v. U.S. Dep't of Defense*, 194 F.3d 622, 624 (5th Cir. 1999). Accordingly, plaintiff cannot maintain any claims against HUD absent a waiver of sovereign immunity that covers those claims, and plaintiff is bound by any limitations, substantive or procedural, that any such waiver imposes. *Veldheon v. U.S. Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994).

The only sovereign immunity waiver that could apply to plaintiff's claims appears in the APA. 5 U.S.C. §§ 701 *et seq*. *See Rothe Dev. Corp.*, 194 F.3d at 624. The APA allows for limited judicial review of "[a]gency action made reviewable by statute and final agency action," 5 U.S.C. § 704, but precludes such review when agency actions are "committed to agency discretion by law," *id.* § 701(a)(2); *Heckler v. Chaney,* 470 U.S. 821, 830 (1985), or when there is another "adequate remedy in a court." *Id.* § 704; *Warner v. Cox*, 487 F.2d 1301, 1304 (5th Cir. 1974). Thus, for example, an APA action that might otherwise be properly brought against a federal agency is barred if the plaintiff can obtain its remedy against a non-federal party. *Turner v. Sec'y of HUD*, 449 F.3d 536, 539-41 (3d Cir. 2006).

When judicial review is available, a reviewing court must uphold the agency's action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See also Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 375 n.21 (1989); *City of Abilene v. EPA*, 325 F.3d 657, 664 (5th Cir. 2003). This standard is narrow and deferential, and only requires that the agency articulate a rational relationship between the facts found and the decision made. *City of Abilene*, 325 F.3d at 664. The Court's only role is to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Brazos Elec. Power Co-op. v. FERC*, 205 F.3d 235, 240 (5th Cir. 2000) (citation and internal punctuation omitted).

The APA also permits a reviewing court to "compel agency action unlawfully withheld or

unreasonably delayed." 5 U.S.C. § 706(1). However, review of agency inaction "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. So. Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55, 64 (2004) (emphasis in original). The APA "empowers a court only to compel an agency to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing *how* it shall act." *Id.* (emphasis in original).

ARGUMENT

I. PLAINTIFF'S CLAIMS AGAINST HUD ARE NOT JUSTICIABLE

A. Plaintiff Lacks Standing to Enjoin Past Injuries, Assert Generalized Grievances, Pursue Claims of Third Parties, or Assert Speculative Claims

1. Plaintiff Lacks Standing to Obtain Injunctive Relief for Past Injuries

Plaintiff lacks standing to request an injunction requiring HUD to set FMRs "using the [fiftieth] percentile basis." Compl. ¶ 39D. To obtain injunctive relief such as plaintiff seeks under the APA, plaintiff must show that it is likely to suffer future injury by the defendant and that the sought after relief will prevent that future injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) ("Past exposure to illegal conduct does not in itself show a present case or controversy.") (citation and quotation marks omitted). *See also James v. City of Dallas,* 254 F.3d 551, 563 (5th Cir. 2001) . In this case, HUD has set both the FY 2007 and FY 2008 FMR for the Dallas Area based on the fiftieth percentile rent. Usowski Decl. ¶¶ 20-21. Plaintiff has not only failed to make any allegations about HUD's use of the fortieth percentile rent to set the FY 2006 Dallas Area FMR but also has failed to even allege that HUD is likely to set future Dallas Area FMR based on anything other than the fiftieth percentile rent. *See* Compl. *passim*. Accordingly, plaintiff cannot invoke this Court's remedial powers to enjoin HUD's past actions. *Accord Lyons*, 461 U.S. at 102; *James*, 254 F.3d at 563.

2. Plaintiff Lacks Standing to Assert Generalized Grievances

Plaintiff also lacks standing to request an injunction "eliminating the disparities between the number and percent of dwelling units made available in predominantly White rental housing markets and the number and percent of . . . units made available in predominantly minority rental housing markets." Compl. ¶ 39D. Since plaintiff itself obviously does not allege that it holds or has applied for

a Section 8 voucher, this request cannot be construed as anything other than an improper "sweeping request to generally eradicate the effects of discrimination." *James*, 254 F.3d at 568. *See also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974) ("standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share."). Because such a request "is not specifically targeted to remedy [plaintiff's] personal injuries," *James*, 254 F.3d at 568, plaintiff does not have standing to pursue this claim. In *James*, the Fifth Circuit addressed plaintiffs' request that HUD be ordered "to remedy 'the loss of housing units caused by the HUD funded housing code enforcement and housing code enforcement related demolitions of repairable family units as well as the resulting blight.'" *Id.* In dismissing the claim against HUD for lack of jurisdiction, the Fifth Circuit found this claim was "'a generalized grievance shared in substantially equal measure by all or most citizens,'" and, as such, "cannot provide standing to request injunctive relief." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Like the *James* plaintiffs, plaintiff's request here to eliminate racial disparities in housing opportunities is nothing more than a generalized grievance, which is insufficient to confer standing.

3. Plaintiff Lacks Standing to Bring Claims on Behalf on Its Clients

Plaintiff does not have standing to assert claims on behalf of its clients, that HUD's actions "discourag[e] families with which ICP works from choosing . . . units in market areas that offer racially integrated housing . . ." Compl. ¶ 35D. Generally, a party "'must assert his own rights, and cannot rest his claim to relief on the legal rights of third parties.'" *Kowalski v. Tesmer,* 543 U.S. 125, 129 (2004) (quoting *Warth*, 422 U.S. at 499). Moreover, a party seeking third-party standing to assert the rights of another may do so only when it demonstrates a "'close' relationship with the person who possesses the right, and when it shows a "'hindrance' to the possessor's ability to protect his own right." *Id.* at 130 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991). In this case, plaintiff has not even alleged that it has a "close relation" with its clients, or that they have been "hindered" from raising claims themselves. *See* Compl. *passim*. Accordingly, plaintiff fails to establish that it has standing to assert claims on

behalf of its clients. *See Kowalski*, 542 U.S. at 131-32 (2004).[7]

4. Plaintiff's Proposed Remedies Will Not Redress Its Injuries

Plaintiff lacks standing to challenge HUD's actions because it cannot establish that the judgment it seeks would redress the injuries it has identified. "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself." *Cramer v. Skinner*, 931 F.2d 1020, 1027 (5th Cir. 1991) (quoting *Larson v. Valente*, 456 U.S. 228, 243 n. 15 (1982)). To satisfy the redressability component of standing, plaintiff would have to allege (and ultimately prove) that it is "'likely, as opposed to merely speculative,'" *James,* 254 F.3d at 564 (*quoting Lujan*, 504 U.S. at 561), that a judgment invalidating HUD's FY 2006 and FY 2007 Dallas FMRs, or requiring it to use new and varying FMRs within the Dallas area, would redress its injuries. *See* Compl. ¶ 39 Prayer for Relief. This plaintiff cannot do.

First, plaintiff's request that this Court "order[] HUD to implement the FY 2005 Dallas area Section 8 program rent levels for the non-Black and non-poverty concentrated areas in Collin, Dallas, and Denton counties," Compl. ¶ 39A, will not redress plaintiff's alleged injuries simply because HUD's FMR for the Dallas area for fiscal year 2008, now in effect, is $871, Usowski Decl. ¶ 21, and is higher than the FY 2005 FMR of $868, *id.*, that plaintiff has requested. Compl. ¶ 39A. "To obtain standing for injunctive relief, a plaintiff must show that there is reason to believe that he would directly benefit from the equitable relief sought." *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 312 (5th Cir. 1997). Since plaintiff cannot make this showing here, it lacks of standing. *Accord Steel Co.*, 523 U.S. at 107.

Second, plaintiff cannot establish that, were this Court to order HUD to establish separate FMR Areas for predominately White areas of the Dallas Metropolitan Division, Compl. ¶ 39B-D, a likelihood that its clients would be able to obtain housing in those areas. Plaintiff's allegation of injury is an indirect one because HUD, by plaintiff's own admission, through the voucher program, "assist[s] very-low income families [with] find[ing] and pay[ing] for . . . housing in the *private* housing market,

[7] Nor is it the case that plaintiff may assert associational standing to raise the claims of its client. *See Juvenile Matters Trial Lawyers Ass'n v. Judicial Dep't*, 363 F. Supp. 2d 239, 247 (D. Conn. 2005) (association cannot claims on behalf of its clients but only its members).

Compl. ¶ 4 (emphasis added), rather than directly providing housing to these families. Thus, if plaintiff's clients are unable to find housing with a Section 8 voucher, it would be because the private owners of the apartments, and not defendant, had not selected them. *See* 42 U.S.C. § 1437f(o)(6)(B); 24 C.F.R. § 982.307(a)(2).

"[I]ndirectness of injury, while not necessarily fatal to standing, 'may make it *substantially more difficult* to meet the minimum requirement of Art. III: To establish that, in fact, the asserted injury was the consequence of the *defendant['s]* actions, or that prospective relief will remove the harm.'" *Simon,* 426 U.S. at 44-45 (emphasis added) (*quoting in part Warth,* 422 U.S. at 505). As the Supreme Court explained in *Lujan v. Defenders of Wildlife*:

> When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well. The existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume to control or to predict. . . .

504 U.S. at 562 (emphasis by court) (quotation and citation omitted). Because the PHAs set the payment standard amount, and because it is the private landlords in predominantly White areas who directly cause plaintiff's alleged injury, presumably because they lowered their participation rates in the Section 8 program, plaintiff's burden to establish standing is "substantially more difficult." *Simon,* 426 U.S. at 44-45.

In this case, nothing in Section 8 program requires a landlord in a predominately White area to accept plaintiff's clients as renters, regardless of the FMR set by HUD or the payment standard amount set by the PHA for Section 8 vouchers holders. In order to encourage owner participation in the housing voucher program, nothing in the Housing Act nor in its implementing regulations requires an apartment owner to select an eligible tenant. 42 U.S.C. § 1437f(d)(1)(A); *id.* § 1437f(o)(6)(B). *See also* 24 C.F.R. § 982.307(a)(2); *id.* § 982.452. As the Eighth Circuit has noted about the Section 8 program, "the tenant-selection process is subtle and depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the [private owners] based upon their experience with the difficult and sensitive task of evaluating the [responsibility of tenant

applicants]. . . . [T]here is no set of facts which, if shown, mandate a decision favorable to the individual." *Hill v. Group Three Hous. Dev. Corp.*, 799 F.2d 385, 393 (8th Cir. 1986). Further, nowhere in the Section 8 nor in its regulations is it specified that a PHA must even enter into contracts with owners to participate in the program in every part of its jurisdictional area. *Williams v. Hanover Hous. Auth.,* 871 F. Supp. 527, 532 (D. Mass. 1994). Nor does HUD delineate precisely how a PHA should determine its jurisdictional area. *Id.* Thus, plaintiff cannot make the "substantially more difficult showing" of a likelihood that a favorable judgment will result in more apartment owners in predominantly White areas participating in the Section 8 program, or that owners in predominantly White areas already participating in the Section 8 program will increase their participation, in such a way as to allow one of plaintiff's clients to move into such an area, or move into such an area at less cost of time and financial resources to plaintiff. *Simon,* 426 U.S. at 44-45.

To be clear, the ability of the remainder of plaintiff's requested relief to remedy its injuries is dependent on plaintiff's mere speculation regarding what private owners "might" do if HUD's determination of the Dallas FMR Area is enjoined, and constitutes exactly the type of impermissible speculation the courts have held insufficient to establish standing. For example, in *Allen v. Wright*, 468 U.S. 737, 751, 758 (1984), the Supreme Court held that it was overly speculative as to whether requiring the IRS to enforce its rules which prohibited tax breaks to racially discriminatory *private* schools, would prevent segregated schools, because withdrawal of tax breaks would not necessarily convince these private schools to change policies, or convince parents to transfer their children to nonsegregated schools. *Id.* Similarly, in *Simon*, 426 U.S. at 43-44 (1976), the Court held that it was overly speculative to conclude that suspending tax benefits to *private* hospitals would force those hospitals to take on more indigent patients. *Id.*

Further, *Burton v. Cent. Interstate Low-Level Radioactive Waste Compact Com'n,* 23 F.3d 208 (8th Cir. 1994), addressed claims by plaintiffs seeking an injunction against a government's taxation of public power entities. *Id.* 209-10. In holding that plaintiffs lacked standing, the Eighth Circuit held that, even though plaintiffs might by able to establish the traceability prong of standing, by showing that "LES [a third party] *increased* electricity rates in response to the [defendant's] taxes on LLRW [another third party]," it was still "not by itself enough to confer standing on [plaintiffs]." *Id.*

(emphasis added) The Court explained that:

> [a]lthough *increased* rates may constitute an injury that is traceable to the [defendant's] conduct, [plaintiff has] not alleged that the injury is likely to be redressed by a favorable decision. The complaint asks the court to 'redress [plaintiff's] injuries' by declaring the [defendant's] policies illegal and issuing an injunction preventing the [defendant] 'from any further and future perversion of its legal duties.' [Plaintiff] apparently would have us take it on faith that LES, which is not a party to this action, would adjust its rates if the district court enjoined the [defendant's] taxes on LLRW . . . Thus, it is "merely speculative" here whether a favorable decision would affect the electricity rate that [plaintiff] pays.

Id. at 210 (emphasis in original). *See also Haile v. Town of Addison*, 264 F. Supp. 2d 464, 467 (N.D. Tex. 2003) ("Plaintiff has made no showing that if the Court found the tax to be illegal, that the [third-party] fuel providers, who are not subject to this action, would decrease the price of fuel by $0.12."). Like the *Allen, Simon, Burton* and *Haile* plaintiffs, even if plaintiff here could establish that private owners in predominantly White areas have reduced their participation in the Dallas area PHAs' voucher programs because of HUD's use of the Dallas MSA to calculate the FMR, it remains merely speculative whether those same owners would increase their participation in the Dallas area PHAs' voucher programs if this Court were to set aside HUD's determination.

In sum, plaintiff cannot obtain injunctive relief for past injuries, cannot assert generalized grievances, and cannot assert claims on behalf of its clients. Moreover, none of the redress sought by plaintiff for its remaining claims would likely redress any of plaintiff's injuries. Accordingly, plaintiff lacks standing to pursue its claims, and this action must be dismissed against HUD for lack of subject matter jurisdiction.

B. Plaintiff's Challenges to HUD's Past Fair Market Rents Are Moot

Plaintiff's challenges to HUD's FMR for the Dallas area for both FY 2006 and FY 2007, Compl. ¶¶ 12, 39A, are moot. "A precondition to asserting a claim for a declaratory judgment is that a viable case or controversy exist." *Hainze v. Richards*, 207 F.3d 795, 802 (5th Cir. 2000). Plaintiff has requested this Court set aside HUD's Dallas area FMRs for both FY 2006 and FY 2007. However, because HUD's fiscal year ends on September 30 of the calendar year, 42 U.S.C. § 1437f(c)(1); Usowski Decl. ¶ 3, its FY 2008 FMR is now in effect. *Id.* ¶ 21. Accordingly, no case or controversy remains before this Court concerning HUD's FY 2006 and 2007 FMRs. *See Richland Park Homeowners Ass'n, Inc. v. Pierce*, 671 F.2d 935, 942 (5th Cir. 1982) ("In view of the fact that the

complex has been built and the construction company has been paid, we see no way that HUD's already-satisfied construction financing commitments can now be 'set aside.' . . . Thus, at least with respect to this aspect of the plaintiffs' claim for relief, the claim is now moot.").

To be clear, this is not a case in which plaintiff has sought a declaration that HUD's past practices violated the Housing Act or Fair Housing Act. *Cf. Christopher Vill., Ltd. v. Retsinas*, 190 F.3d 210, 315 (5th Cir. 1999). Rather, by seeking only prospective relief for past actions, Compl. ¶ 39, plaintiff's claims concerning HUD's FY 2006 and FY 2007 FMRs for the Dallas area are moot, and this Court cannot "read into [plaintiff's] complaint additional requests for relief and then proceed to an adjudication on the merits." *Harris v. City of Houston*, 151 F.3d 186, 191 (5th Cir. 1998)) (quotation marks omitted). Accordingly, this Court should dismiss plaintiff's challenges to HUD's past rent setting policies as moot.

II. THIS COURT HAS NO JURISDICTION OVER PLAINTIFF'S CLAIMS BECAUSE THE APA PROVIDES NO WAIVER OF SOVEREIGN IMMUNITY HERE

A. HUD's Determination of the Dallas Market Area Is Committed to Agency Discretion and is Unreviewable by this Court

Even without regard to plaintiff's standing problems, plaintiff cannot obtain relief under the APA because its waiver of sovereign immunity is unavailable to plaintiff. The APA's waiver of sovereign immunity allows any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute" to obtain "judicial review thereof," 5 U.S.C. § 702, but the Act precludes judicial review when the "agency action is committed to agency discretion by law." *Id.* § 701(a)(2). An action is committed to agency discretion when "no judicially manageable standards are available for judging how and when an agency should exercise its discretion. . . ." *Heckler*, 470 U.S. at 830. In *Heckler*, the Court explained the exception's limitation on the judicial review available under the APA:

> [E]ven where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgment absolutely. This construction avoids conflict with the "abuse of discretion" standard of review in § 706–if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for "abuse of discretion."

470 U.S. at 830. Thus, only if Congress "has provided meaningful standards for defining the limits of

[agency] discretion" is there "law to apply" under § 701(a)(2). *Heckler*, 470 U.S. at 834. Accordingly, the Court has "emphasized that § 701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based." *Webster v. Doe*, 486 U.S. 592, 600 (1988).

Although the APA's exception to judicial review is "very narrow," it applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (*citing* S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). *See also Suntex Dairy v. Block*, 666 F.2d 158, 163-64 (5th Cir. 1982). Of course, an agency's own regulations may provide the requisite "law to apply," if those regulations provide standards for a court to apply or require an evidentiary record. *Ellison v. Connor*, 153 F.3d 247, 251, 253 (5th Cir. 1998) (citing cases). By contrast, "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power," *Lincoln* v. Vigil, 508 U.S. 182, 197 (1993) (quotation marks and citation omitted), are unreviewable. In addition, the Fifth Circuit has determined that practical policy issues also should be considered. *See Bullard v. Webster*, 623 F.2d 1042, 1046 (5th Cir. 1980) ("[t]here must be a weighing of the need for, and feasibility of, judicial review versus the potential for disruption of the administrative process.").

In addressing Section 8's project-based assistance program, the Fifth Circuit has noted that the circuit courts have unanimously held that Congress has committed to HUD full discretion in determining whether to grant or deny a rent increase in its administration of the Section 8 program and that the decision on the amount of any increase is unreviewable. *See Christopher Vill., Ltd. P'ship,* 190 F.3d at 315. The court further noted that, in determining rent increase requests, HUD must delicately balance the competing interests of the property owner, the tenants, and the federal government as payor of the Section 8 subsidy. *Id.* Because of the lack of judicially manageable standards, the Fifth Circuit concluded that courts should generally refuse to review HUD's substantive decisions regarding a rent increase. *Id.* (citation omitted). In addition, the court found that HUD must also take into account factors that bear on rental rates such as property taxes, utility rates, and the average rental rate in the area, *see* 42 U.S.C. § 1437f (c)(2)(B), which the courts are ill-equipped to second guess. *Christopher Vill.*, 190 F.3d at 315.

Moreover, the Fifth Circuit has expressly held agency actions unreviewable in situations like the present dispute. In *Suntex Dairy*, the court addressed a statute that required USDA to decide whether issuance of an order would "tend to effectuate the declared policy" of the relevant Act, which was, *inter alia*, to regulate milk marketing. *Suntex Dairy*, 666 F.2d at 160-61. The court found that, even though one statutory provision did not grant complete discretion to the agency, because it also required the agency to hold a public hearing and imposed "rigorous obligations on the [agency] to develop an evidentiary record" to support its determination, *id.* at 164, another provision of the same law only required the agency to determine whether a proposed order was "'the only practical means of advancing the interests of the producers.'" *Id.* at 161 (quoting regulations). The court held that this second provision gave the agency unreviewable discretion because it did not require the consideration of specific factors, the making of findings, or the development of any additional evidentiary record. *Id.* at 164-65. In so holding, the court found that without required findings or an evidentiary record, the judiciary was in no position to gainsay the agency's determination as arbitrary, capricious, or an abuse of discretion. *Id.* at 166.

In *Ellison*, 153 F.3d 247, the Fifth Circuit addressed an Army Corps of Engineers' refusal to issue permits allowing plaintiffs to build camp-homes on their property in the Atchafalaya floodway. *Id.* at 249. Examining both the authorizing statute and the agency's regulations, the court found, first, that the authorizing statute did not contain any standards or evidentiary requirements governing the issuance of regulations and, second, that the regulation itself did not contain any standards governing the agency's decisionmaking. *Id.* at 253. Rather, the regulation simply required the agency to determine whether the property in question will be "'required for public use'" during the period of the contemplated grant and "'whether the requested grant will interfere with any operations of the United States.'" Id. (quoting regulations). Because these standards were so general, and because the regulation did not require the agency to develop any factual record to support its determination, the court held that the agency's refusal to issue permits was committed to agency discretion and thus unreviewable. *Id.*

In this case, Section 8 of the Housing Act sets out HUD's authority to enter into HAP contracts with public housing agencies, and sets out the standards for maximum rents, rent adjustments, monthly

assistance payments, the selection of tenants, inspections, and the like. *See* 42 U.S.C. § 1437f(c)(1)-(2); *id.* § 1437f(o). Apart from authorizing HUD to set and adjust maximum monthly rents "*in the market area* suitable for occupancy by persons assisted under this section," *id.* § 1437f(c)(1) (emphasis added), the statute provides absolutely no standards and requires no evidentiary findings on which a court could base its review of the rationality of HUD's determination of what constitutes such a "market area." *Cf. Christopher Vill.*, 190 F.3d at 315; *Suntex Dairy*, 666 F.2d at 164-65. Indeed, the statute does not even define what a market area is, and the circuit courts, as noted above, have unanimously held that HUD's rent adjustments are unreviewable determinations that are committed to agency discretion. *Christopher Vill.*, 190 F.3d at 315. Thus, the Housing Act commits the determination of what constitutes a market area to HUD's discretion.

Similarly, HUD's Section 8 implementing regulations set out HUD's procedures for setting and adjusting FMRs, *see* 24 C.F.R. § 888, and govern the rest of the Section 8 program. *See id.* § 982. Again, however, apart from simply defining an FMR Area as an OMB Metropolitan Statistical Area, *id.* § 888.113(d), and granting HUD the authority make exceptions to it (which it has done here in creating the Dallas FMR Area), *see id.*, HUD's regulations provide absolutely no standards and requires no evidentiary findings on which this Court could base its review of HUD's determination of what constitutes a particular FMR Area. *Id.* Thus, like the Housing Act, HUD's implementing regulations commit to the agency's discretion the determination of what constitutes an FMR Area. Thus, that determination is unreviewable by a court. *Accord Ellison*, 153 F.3d at 253.

Further, HUD's policy statement that "Metropolitan subparts of new areas that had previously had separate FMRs were assigned their own FMRs if their 2000 Census Base Rents differed by more than five percent from the new OMB area 2000 Census Base Rent," 70 Fed. Reg. 32401, 32403 (June 2, 2005); *see* Usowski Decl. ¶ 13, is just that, a policy statement–a "statement[] issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln*, 508 U.S. at 197. It is not a binding regulation, *Ellison*, 153 F.3d at 253, and it does not require any evidentiary record. *Id.* Thus, it does not provide a sufficient standard on which a court could review the rationality of HUD's determination of what constitutes the Dallas FMR Area.

Finally, the same policy considerations that make review of HUD's rent setting impractical

apply with equal, if not greater, force to its determination of FMR Areas. *Accord Bullard*, 623 F.2d at 1046. Accordingly, HUD's determination of what constitutes the Dallas FMR Area is committed to agency discretion and is unreviewable by this Court. Thus, the APA provides no waiver of sovereign immunity in this instance.

B. The Court Lacks Jurisdiction Over Plaintiff's Claims Against HUD Because Plaintiff Has Another Remedy in a Court

As noted above, the APA's waiver of sovereign immunity applies only if there is "final agency action for which there is *no other remedy in a court*." 5 U.S.C. § 704 (emphasis added). *See also Transohio Sav. Bank v. Dir., Ofc. of Thrift Supervision*, 967 F.2d 598, 607 (D.C. Cir. 1992) ("Whether § 702 of the APA justifies . . . jurisdiction over [plaintiffs'] case depends on whether [their] claims fall under any of the . . . limitations on the APA's waiver of sovereign immunity. The APA excludes from its waiver . . . claims for which an adequate remedy is available elsewhere."); *Warner*, 487 F.2d at 1304 ("Specifically exempted from [APA] review is agency action for which there is some 'other adequate remedy in a court.'") (quoting 5 U.S.C. § 704). Because plaintiff has other adequate remedies at law for each of its alleged injuries, the APA provides no waiver of sovereign immunity here.

First, plaintiff alleges that HUD's past FMR for fiscal years 2006 and 2007 have injured it by "increasing the amount of time per client that ICP must spend," and "increasing the amount of financial assistance that ICP must spend," "in order to help its clients find and retain modest rental housing in non-minority concentrated market areas." Compl. ¶ 35B-C. The APA does not provide a waiver of sovereign immunity for these injuries because plaintiff has another adequate remedy in court, namely, a suit for money damages in the Court of Federal Claims. *See Warner*, 487 F.2d at 1304. Congress has provided the Court of Federal Claims with jurisdiction to "render judgment upon any claim against the United States founded . . . upon . . . any Act of Congress or any regulation of an executive department, . . . for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) ("Tucker Act"). There can be no question that plaintiff's alleged past losses of "time" and "financial assistance," were it to prevail, would be fully compensable in the form of money damages. *See Warner*, 487 F.2d at 1304. Further, plaintiff can make no argument that these are continuing losses, because its requested relief is an order for "HUD to implement the FY 2005 Dallas area Section 8

program rent levels," Compl. ¶ 39A, which are lower than the current fiscal year 2008 Dallas area rent levels. Usowski Decl. ¶ 21. Accordingly, the APA provides no waiver of sovereign immunity here.

Second, § 704 bars the remainder of plaintiff's allegations against HUD's rent setting policy because plaintiff can maintain an action directly against Dallas area Housing Authorities, alleging many of same facts and seeking many of the same remedies. Numerous circuits have held that § 704 bars suit against HUD under the APA when a plaintiff has the ability to pursue a remedy against a private party for discriminatory practices under § 813 of the Fair Housing Act, 42 U.S.C. § 3613(a)(2). *See Turner,* 449 F.3d at 540; *Godwin v. Sec'y of HUD*, 356 F.3d 310, 312 (D.C. Cir. 2004); *Marinoff v. HUD,* 892 F. Supp. 493, 497 (S.D.N.Y. 1995), *aff'd*, 78 F.3d 64 (2d Cir.1996). Moreover, "[a] legal remedy is not inadequate for purposes of [preclusion of review under] the APA because it is procedurally inconvenient for a given plaintiff, or because plaintiffs have inadvertently deprived themselves of an opportunity to pursue that remedy." *Town of Sanford v. U.S.*, 140 F.3d 20, 23 (1st Cir. 1998). *See also Martinez v. U.S.*, 333 F.3d 1295, 1320 (Fed. Cir. 2003) ("The fact that the complaint was untimely filed . . . does not mean that that court could not offer a full and adequate remedy; it merely means that [plaintiff] did not file his complaint in time to take advantage of that remedy."); *Sable Commc'ns of Cal., Inc. v. FCC*, 827 F.2d 640, 642 (9th Cir. 1987).

Here, HUD's regulations implementing the voucher program provide the Dallas area PHAs with several options to increase or decrease area rents in order to increase housing opportunities in non-minority areas. Usowski Decl. ¶ 6. First, the PHAs have the discretion to vary rents between 90 and 110 percent of HUD's published FMR (the "basic range"), *see* 24 C.F.R. § 982.503(b)(1)(i), and the discretion to establish separate payment standard amounts within the basic range for a designated part of an FMR Area. *Id.* § 982.503(b)(1)(ii). HUD approval is not required to establish a payment standard amount in the basic range. *Id.* Second, the PHAs have the discretion, with approval from HUD's regional field office, to vary rents between 110 to 120 percent of HUD's published FMR in an "exception area" if the PHAs can show that median rents in those areas are that much higher. *Id.* § 982.503(c)(2)(ii). Any PHA with jurisdiction in the exception area may use the HUD-approved exception payment standard amount. *Id.* § 982.503(c)(1). Third, the PHAs, with approval from HUD's Assistant Secretary for Public and Indian Housing, may set rents in an exception area that could

include up to an entire county above 120 percent of HUD's published FMR to help families find housing outside areas of high poverty, *id.* § 982.503(c)(3)-(4)(i)(A), again if the PHA can show median rents in those areas are that much higher. *Id.* Each of these payment exceptions provide the Dallas area PHAs, and not HUD, discretion to vary rents appropriately across an FMR Area.

To be clear, the roles and authority of HUD and of PHAs in this regard are entirely distinct. *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 20 (1st Cir. 1991). In *Project B.A.S.I.C.*, the First Circuit explained that:

> HUD and [the PHA] are distinct entities, each representative of a separate sovereign and each with its own mission. That these missions may occasionally coincide is not enough to erase their separateness. Furthermore, HUD's ability to direct [the PHA]'s disbursements is limited by a network of specific contractual and regulatory provisions. Limited powers of this kind, without more, are hardly the stuff of legal identification.

947 F.2d at 20.[8] Here, because Congressional appropriations for Section 8 subsidies provide a fixed sum to each Dallas area PHA, rather than a set contribution for each Section 8 participant, Usowski Decl. ¶ 5, the PHAs must decide for themselves how to allocate those funds, as increasing payments for rental units must either be offset by decreasing payments for units in other areas, or must be offset by maintaining fewer Section 8 program participants. *Id.* Thus, the decision whether to vary the rent within HUD's Dallas FMR Area pursuant to this regulatory scheme only lies with the PHAs.

If plaintiff believes, as it alleges in its complaint, that there is a basis for varying rents above HUD's published FMR for the Dallas area, and it believes that the Dallas area PHAs are unreasonably refusing to do so, plaintiff can bring suit directly under Section 8 against the PHAs to compel them to implement these variances. Because this would provide an adequate remedy to plaintiff for the non-monetary injuries identified in its complaint, *see* Compl ¶ 35, APA § 704 bars suit against HUD, *accord Turner,* 449 F.3d at 540; *Godwin*, 356 F.3d at 312; *Marinoff,* 892 F. Supp. at 497, regardless of whether plaintiff ultimately would succeed in its suit against the PHAs. *Town of Sanford*, 140 F.3d at 23; *Martinez*, 333 F.3d at 1320; *Sable Commc'ns of Cal., Inc.,* 827 F.2d at 642.

---

[8] To be clear, the remaining holdings in Project B.A.S.I.C. are no longer good law in light of SUWA, 542 U.S. at 64, discussed *infra*.

C. The Court Should Dismiss Plaintiff's Section 3608(e)(5) Claims Because HUD Has Neither Failed to Act Nor Wrongfully Withheld Action

Plaintiff is not entitled to relief on its claims arising under 42 U.S.C. § 3608(e)(5). Because this Fair Housing Act provision requires the agency to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further [its fair housing] policies," *id.*, the APA does not provide for review of the HUD's alleged failure to follow this provision. Although the APA allows reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), the Supreme Court has unanimously held that a plaintiff cannot maintain a § 706(1) claim absent a mandatory statutory obligation that an agency take the specific, *discrete* action that the plaintiff wants to be taken. *SUWA*, 542 U.S. at 64.

In *SUWA*, the Supreme Court dismissed an APA claim that sought to compel the Interior Department to ban off-road vehicles in a wilderness area, because the statute at issue simply directed the agency to preserve the character of wilderness areas. *Id.* at 65-67. The Court began its analysis by noting that the term "agency action," although including "a failure to act," is defined in the first instance by reference to "a list of five categories of decisions made or outcomes implemented by an agency–'agency rule, order, license, sanction [or] relief.'" *Id.* at 62 (quoting 5 U.S.C. § 551(13)). The Court explained that:

> All of those categories involve *circumscribed, discrete agency actions*, as their definitions make clear: "an agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy" (rule); a "final disposition . . . in a matter other than rule making" (order); a "permit . . . or other form of permission" (license); a "prohibition . . . or taking [of] other compulsory or restrictive action" (sanction); or a "grant of money, assistance, license, authority," etc., or "taking of other action on the application or petition of, and beneficial to, a person" (relief).

Id. (quoting 5 U.S.C. §§ 551(4), (6), (8), (10), (11)) (emphasis added). The Court then construed the phrase "failure to act" as a failure to take one of the five agency actions earlier defined in § 551(13), emphasizing that "[t]he important point is that a 'failure to act' is properly understood to be limited, as are the other items in § 551(13), to a *discrete* action." *Id.* at 62-63 (emphasis in original).

The Court then explained that "the only agency action that can be compelled under the APA is action *legally required*." *Id.* at 63 (emphasis in original). Therefore, "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete agency action* that it is

required to take." *Id.* at 64 (emphasis in original). This limitation "rules out judicial direction of even discrete agency action that is not demanded by law." *Id.* at 65.

In *SUWA*, as in the present case, the plaintiffs alleged that an agency had failed to comply with a broad statutory mandate. The SUWA plaintiffs claimed that a statute requiring the Bureau of Land Management to "continue to manage [wilderness areas] in a manner so as not to impair the suitability of such areas for preservation as wilderness," 43 U.S.C. § 1782(c), forbade the agency from taking a particular action–permitting the use of off-road vehicles in certain wilderness areas. *Id.* at 65. The Supreme Court rejected the plaintiffs' assertion, explaining:

> If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved–which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management. . . . The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA.

Id. at 66-67 (citations and internal punctuation omitted).

For the same reason, plaintiff here is not entitled to an order compelling compliance with the broad statutory mandate that HUD affirmatively further the goals of fair housing. In the present case, as in *SUWA*, the statute under which plaintiff have filed suit "is mandatory as to the object to be achieved, but it leaves [the agency] a great deal of discretion in deciding how to achieve it." *Id.* at 66. Plaintiff does not identify a circumscribed, discrete agency action that 42 U.S.C. § 3608(e)(5) requires HUD to take. Accordingly, plaintiff cannot maintain a claim for agency inaction under § 3608(e)(5).

Before the Supreme Court decided *SUWA* in 2004, some courts reviewing claims of agency inaction permitted claims under 42 U.S.C. § 3608 to proceed even if a plaintiff did not identify a discrete agency action that the agency was explicitly required to take. *See, e.g., NAACP v. Sec'y of HUD*, 817 F.2d 149, 160-61 (1st Cir. 1987) (asserting that a court applying APA § 706(1) "can compel an official to exercise his discretion where he has obviously failed or refused to do so") (citation omitted). This position is no longer tenable.[9] The Supreme Court in *SUWA* explained that if the relevant statutory provision provides the agency with discretion regarding the actions it may take, an

[9] For this reason, defendant respectfully submits that *Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2005), is not persuasive. *Thompson* did not even acknowledge, must less address, *SUWA*.

APA claim cannot lie for agency inaction. Rather, "§ 706(1) [of the APA] empowers a court only to compel an agency to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing *how* it shall act." *SUWA*, 542 U.S. at 64 (emphasis added).

Finally, even assuming *arguendo* that § 3608(e)(5) contained a mandatory directive that HUD facilitate fair housing opportunities in its Section 8 program, for the reasons set forth in Section B of this brief, *supra*, it still would not provide the Court with any "law to apply" or a meaningful standard against which to judge HUD's exercise of discretion. *See Heckler,* 470 U.S. at 830 ("review [under the APA] is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely."). In this case, § 3608(e)(5) requires HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [fair housing]." As drafted, this section does not require the consideration of specific factors, the makings of findings, or the development of an evidentiary record; it is therefore unreviewable. *Suntex Dairy*, 666 F.2d at 164-65. *See also Resident Council of Allen Parkway Vill. v. HUD*, 980 F.2d 1043, 1056 n.6 (5th Cir. 1993) (no action under the APA could lie for plaintiffs' complaint about HUD's refusal to spend discretionary funds in a particular way because there is no law to apply). Accordingly, § 3608(e)(5) does not provide any meaningful standards to rebut the presumption of unreviewability of agency inaction or upon which to base any assertion that HUD, under 5 U.S.C. § 706(1), must take some specific action.

Thus, the APA precludes review of plaintiff's claims that § 3608(e)(5) requires HUD to create separate FMR Areas within the Dallas FMR Area or take any other affirmative action.

CONCLUSION

For the foregoing reasons, this Court should grant defendant's motion to dismiss for lack of subject matter jurisdiction.

Dated: October 2, 2007

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

RICHARD B. ROPER
United States Attorney

s/ James D. Todd Jr
MICHAEL SITCOV
Assistant Branch Director
JAMES D. TODD JR
Senior Counsel
U.S. Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington DC 20001
(202) 514-3378
james.todd@usdoj.gov
Attorneys for Defendant

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Local Rule 7.4, the following contains a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities who or which are financially interested in the outcome of the case:

Plaintiff: The Inclusive Communities Project, Inc.

Plaintiff's Attorneys: Michael M. Daniel, Esq., Laura B. Beshara, Esq., Daniel & Bashara, P.C.

Defendant: The United States Department of Housing and Urban Development

Dated: October 2, 2007

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

RICHARD B. ROPER
United States Attorney

s/ James D. Todd Jr
MICHAEL SITCOV
Assistant Branch Director
JAMES D. TODD JR
Senior Counsel
U.S. Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington DC 20001
(202) 514-3378
james.todd@usdoj.gov
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2007, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

MICHAEL M. DANIEL, Esq.
Law Office of Michael M Daniel
3301 Elm Street
Dallas TX 75226

LAURA BETH BESHARA, Esq.
Daniel & Beshara
3301 Elm Street
Dallas TX 75226

s/ James D. Todd Jr
JAMES D. TODD JR