UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, *et al.*,	)	
Plaintiffs,	)	
	)	No. 1:08-cv-1938-HHK
v.	)	
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*,	)	
Defendants.	)	

DEFENDANT U.S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT'S MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(1), (6) and LCvR 7.1, defendant, the U.S. Department of Housing and Urban Development, hereby moves to dismiss plaintiffs' complaint for lack of jurisdiction and for failure to state a claim on which relief can be granted. A statement of points and authorities, supporting declaration, and proposed order are attached.

Dated: March 6, 2009

Respectfully submitted,

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DEFENDANT U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

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I. PRELIMINARY STATEMENT

Plaintiffs' claims against defendant, the U.S. Department of Housing and Urban Development ("HUD"), should be dismissed for lack of jurisdiction and for failure to state a claim on which relief can be granted. Plaintiffs, five home-owners and two non-profit fair housing organizations, challenge HUD's informal consultation, approval, and continuing oversight of the State of Louisiana's Road Home program, a program designed and administered by the Louisiana Recovery Authority ("LRA") and funded by three special appropriations from Congress to provide federal disaster recovery assistance. Plaintiffs claim that the state's compensation and incentives grants to homeowners whose homes were damaged or destroyed by Hurricane Katrina impose a disparate impact on African Americans in violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.*, and the Housing and Community Development Act of 1974 ("HCDA"), 42 U.S.C. § 5301 *et seq*. Plaintiffs claim that this discriminatory effect arises from the fact that Louisiana has chosen to limit Road Home compensation and incentive grant awards of up to $150,000 to the lesser of the cost of storm damage or the pre-storm value of the home.

This Court lacks jurisdiction because plaintiffs lack standing under Article III of the U.S. Constitution to maintain this action against HUD. Plaintiffs have failed to allege, and cannot show, that there is a substantial likelihood that the relief they seek from this Court against HUD will redress their injuries even if awarded. Neither the special appropriations that funded the Road Home program, nor any other authority, placed any responsibility on HUD to design or implement the challenged program. Nor do the special appropriations or any other authority require Louisiana to provide any disaster recovery assistance to homeowners, let alone dictate how the compensation and incentives grants should be calculated. Thus, plaintiffs cannot show that an order of this Court setting aside HUD's approval of Louisiana's Road Home program will

provide plaintiffs with Road Home grants awards that are based solely on the cost of storm damage to a home, which is the relief that plaintiffs seek. Accordingly, plaintiffs do not have standing to maintain their claims against HUD.

Even if plaintiffs had standing to maintain this action, this Court would lack jurisdiction with respect to most of the funds at issue. HUD obligated most of the disaster recovery funds to Louisiana, which, in turn, has drawn down those funds as it has implemented the program. Thus, plaintiffs' challenge to the LRA's use of funds HUD has already obligated is moot.

In addition, this Court lacks jurisdiction over plaintiffs' claims against HUD because plaintiffs fail to even allege a waiver of sovereign immunity by the United States that encompasses their claims. Plaintiffs' invocation of this Court's jurisdiction under general federal jurisdiction and civil rights jurisdiction statutes do not provide a waiver of sovereign immunity. Nor do the FHA or the HCDA, which plaintiffs allege HUD has violated, provide any waiver of immunity by the United States. Absent such a waiver, this Court lacks jurisdiction over plaintiffs' claims against HUD.

Nor would the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, provide a waiver by the United States in this case even if plaintiffs asserted their claims under that statute. First, the APA would not provide a waiver because plaintiffs have an adequate remedy at law inasmuch as they can maintain these exact claims for injunctive relief directly against Louisiana state officials under the FHA and the HCDA and directly against the State of Louisiana under Title VI of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000d. Second, the APA would not provide a waiver for plaintiffs' claims that HUD failed to affirmatively further fair housing in violation of the FHA and the HCDA. Neither statute requires HUD to take a discrete action that it failed to take in continuing to approve and oversee the Road Home program. Accordingly, the APA would not provide a waiver of sovereign immunity in this instance.

Finally, even if this Court had jurisdiction over plaintiffs' claims against HUD, plaintiffs have failed to state a cause of action under the FHA and the HCDA. Plaintiffs' claim that the Road Home grant awards impose a disparate impact on African Americans fails to allege that the program imposes a disparate impact on African Americans homeowners as compared to *similarly-situated* white homeowners. Additionally, plaintiffs fail to make any allegations to support a claim that HUD violated its duty to affirmatively further fair housing. Plaintiffs' allegations that the LRA proposed and developed the Road Home program in consultation with HUD, that HUD approved the Road Home program, and that the LRA administers the Road Home program subject to ongoing oversight and continuing approval of HUD, do not plead a violation of HUD's fair housing obligations. Accordingly, plaintiffs fail to state a claim under which relief may be granted.

II. BACKGROUND

A. The Housing and Community Development Act of 1974 and the Community Development Block Grant Program

The Housing and Community Development Act of 1974 ("HCDA" or "Act"), *as amended*, 42 U.S.C. § 5301 *et seq*., seeks to develop viable urban communities by providing decent housing, a suitable living environment, and expanding economic opportunities, principally for persons of low and moderate income. *Id.* § 5301(c). The statute authorizes HUD to make grants, known as Community Development Block Grants ("CDBG") to states, tribes, and local governments to carry out activities in accordance with provisions of the Act, *id.* § 5303, and sets out 25 broad categories of activities for which grantees may use funds. *Id.* §§ 5305, 5305(a). The Act requires that not less than 70 percent of grant funds be used for the benefit of low- and

moderate-income persons. *Id.* § 5301(c).[1] Congress enacted the legislation as a federal block grant statute, under which the day-to-day administration of the federal program, including the actual expenditure of federal funds, is delegated to state and local authorities. *Dixson v. U.S.*, 465 U.S. 482, 486 (1984).

The HCDA distributes funds appropriated by Congress through recipients outside the federal government. *Id.* at 486-87. To that end, the statute provides for a straight-forward application and approval process for federal assistance, *see id.* §§ 5301(b)(3), 5301(d)(1), 5304(b), and shifts the responsibility from the federal government to state and local authorities for the implementation of federally assisted projects. *Brandon v. Pierce*, 725 F.2d 555, 559 (10th Cir. 1984) (citing Conf. Rep. No. 1279, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4449 *et seq.*,), *overruled on other grounds by*, *Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). Accordingly, it is the grant recipients, rather than HUD, that design programs, within the federal constraints, to address local needs. *Dixson*, 465 U.S. at 487. Further, HUD's role is confined to ensuring that the state's interpretation of the statutory and regulatory requirements "are not plainly inconsistent with the Act," 24 C.F.R. § 570.480(c) (giving "maximum feasible deference" to a state's interpretation of these requirements), in order to avoid "unnecessary 'second-guessing by Washington.'" S. Rep. No. 93-693, 93d Cong., 2d Sess. 56, *reprinted in* 1974 U.S.C.C.A.N. at 4273, 4325.

To obtain federal funds, state or local authorities must develop a five-year consolidated plan that assesses housing and homeless needs, analyzes the jurisdiction's housing markets, sets forth strategic plans for meeting priority needs, and sets out action plans. Action plans, in turn, must include required certifications that the applicants will comply with the requirements of the

[1] The statute defines low- and moderate- income persons as individuals whose incomes do not exceed 80 percent of the median income of the area involved. 42 U.S.C. § 5302(a)(20)(A).

program. 42 U.S.C. § 5304(a); *id.* § 12705; 24 C.F.R. § 570.485, *id*. Part 91, Subparts C & D.

HUD's regulations implementing the HCDA require grantees to certify that their projected use of funds "will give maximum feasible priority to activities . . .[(i)] of benefit to low- and moderate-income families, . . .[(ii) that seek] elimination of slums and blight, [or (iii) that seek] to meet other community development needs having a particular urgency because existing conditions pose a serious threat to health and welfare." 24 C.F.R. § 570.483. The regulations provide that an activity generally will be considered to meet the national objective of benefit to low and moderate income persons if: (i) the activity benefits an area that is at least 51 percent low and moderate income; (ii) the activity benefits a limited low- and moderate-income clientele, including services or facilities for the homeless, abused children, the elderly, or migrant farm workers; (iii) the activity provides or improves permanent housing to be occupied by a low- or moderate-income person; or (iv) the activity is designed to create permanent jobs where at least 51 percent of the jobs will be held by or made available to low- and moderate-income persons. *Id*.

A CDBG grantee is also responsible for meeting all program requirements. 42 U.S.C. § 5304(b)(6); 24 C.F.R. § 91.325(b)(7); *id.* § 570.489(a). *See also* Declaration of Jessie Handforth Kome Submitted in Supp. of Def. Mot. to Dismiss ("Kome Decl.") ¶ 6. Each activity must be an eligible one as defined by the statute, meet a national objective, and have been through citizen participation as part of the action plan development and submission process. 42 U.S.C. §§ 5304(b)(3), 5305(a), (c). Grantees must be able to account for all grant funds, comply with all reporting requirements, perform required environmental reviews, and meet all applicable relocation, fair housing, equal opportunity, and labor standards. 42 U.S.C. § 5304(b)(2), (d), (e), (g); 24 C.F.R. § 570.487-491.

After developing proposed plans, the applicants must publish the plan for citizen

comment. 24 C.F.R. § 91.115; *id.* § 91.320. The applicants then submit the plan, summaries of citizen comments, and signed certifications to HUD. *Id.*; *see also id.* § 91.325.

A grantee may request and receive technical assistance from HUD program staff at any time. Kome Decl. ¶ 8. HUD's technical assistance typically involves consultation with the grantee to determine the grantee's objectives and its proposed program designs. *Id.* HUD then provides advice, training, or program models that will ensure the grantee will be able to comply with CDBG program requirements while carrying out the grantee's purposes and implementing its programs. *Id.*

HUD's review of the applicant's plan is limited. 24 C.F.R. § 91.500. HUD has 45 days to review the plan, and the plan is deemed approved unless HUD notifies the jurisdiction within the 45-day period that the plan is disapproved. *Id*. § 91.500(a). HUD may disapprove a plan only if it is inconsistent with the purposes of the Act, it is substantially incomplete, the certifications are not acceptable, or if HUD determines that the applicant has not complied with the CDBG requirements. *Id*. § 91.500(b). The regulations do not permit HUD to disapprove an application based on the grantee's choice of eligible activities. *Id*.; Kome Decl. ¶ 9.

In order to ensure that CDBG funds are not misused, the HCDA authorizes HUD to audit the records of HCDA programs, 42 U.S.C. § 5304(e), and to recover improperly expended funds. *Id.* § 5311(b)(2); *Dixson*, 465 U.S. at 487. HUD may take corrective actions ranging from issuing a warning letter to instituting collections procedures to recover improperly expended funds. 42 U.S.C. § 5311(b)(2); 24 C.F.R. § 570.495. After reasonable notice and opportunity for a hearing, HUD may terminate, reduce, or limit the availability of payments to a grant recipient for failure to substantially comply with the provisions of the Act. 42 U.S.C. § 5311(a); 24 C.F.R. § 570.496(b), (d). *See also Kansas City v. HUD*, 861 F.2d 739 (D.C. Cir. 1988). The statute further authorizes the Department of Justice, upon a referral from HUD, to bring a civil action to

recover misspent or misused CDBG funds. 42 U.S.C. § 5311(b); 24 C.F.R. § 570.496(c).

B. Pub. L. Nos. 109-148, 109-234, and 110-116

In response to the 2005 Hurricanes Katrina, Rita, and Wilma, Congress passed three special appropriations to provide disaster recovery CDBG funds to affected areas in five states, including Louisiana. *See* Pub. L. No. 109-148, 119 Stat. 2779 (Dec. 30, 2005) (the "first appropriation"); Pub. L. No. 109-234, 120 Stat. 418 (June 15, 2006) (the "second appropriation"); and Pub. L. No. 110-116, 121 Stat. 1343 (Nov. 13, 2007) (the "third appropriation"). The first appropriation provided $11,500,000,000 in CDBG funds to the affected states, which Congress directed to "be administered through an entity . . . designated by . . . each State." Pub. L. 109-148. This appropriation *required* HUD to "*waive*, or specify alternative requirements for, *any provision of any statute or regulation*[*, including the HCDA and its implementing regulations*] that [HUD] administers in connection with the obligation by [HUD] or the use by the recipient of these funds or guarantees," except for requirements related to fair housing, nondiscrimination, labor standards, and the environment, "upon a request by the State that such waiver is required to facilitate the use of such funds or guarantees, and a finding by the Secretary that such waiver would not be inconsistent with the overall purpose of the statute, as modified." *Id.* (emphasis added). The first appropriation also authorized HUD to "*waive* the requirement [of the HCDA] that activities benefit persons of low and moderate income, except that at least 50 percent of the funds made available under this heading must benefit primarily persons of low and moderate income *unless* [*HUD*] *otherwise makes a finding of compelling need*." *Id.* (emphasis added). The appropriation required HUD to "publish in the Federal Register any waiver of any statute or regulation." *Id.*[2] Finally, the appropriation required, prior to the obligation of these funds to each state, that the state submit a plan to HUD

[2] The appropriation also provided that it would not lapse. *Id*.

"detailing the proposed use of all funds, including criteria for eligibility and how the use of these funds will address long-term recovery and restoration of infrastructure." *Id.*

The second appropriation provided an additional $5,200,000,000 in CDBG funds to the affected states and authorized (although it did not require) HUD to make these same statutory and regulatory waivers authorized by the first appropriation. Pub. L. No. 109-234. This appropriation earmarked $1,112,650,000 for affordable *rental* housing programs. *Id.*; Kome Decl. ¶ 11. The remainder of the second appropriation was substantially identical to the first. Pub. L. No. 109-234; Kome Decl. ¶ 11. The third appropriation provided an additional $3,000,000,000 "solely for the purpose of covering costs associated with otherwise uncompensated but eligible claims that were filed on or before July 31, 2007, under the Road Home program administered by the State [of Louisiana] in accordance with plans approved by [HUD]." Pub. L. No. 110-116.

C. HUD Waivers of CDBG Program Requirements and Louisiana's Action Plan for CDBG Disaster Recovery Funds

On February 13, 2006, HUD published a Federal Register notice implementing the requirements of the first appropriation. 71 Fed. Reg. 7666 (Feb. 13, 2006). HUD allocated $6,210,000,000 of the first appropriation to Louisiana. *Id.* As directed by Congress in the first appropriation, HUD waived many standard certifications of the CDBG program, including the requirement that 70 percent of funds be used for activities that benefit low- and moderate-income persons, in order "to give grantees even greater flexibility to carry out recovery activities within the confines of the CDBG program national objectives." 71 Fed. Reg. at 7667. In their place, HUD substituted alternative certifications. *Id.* Pursuant to the first appropriation, HUD required the states to certify that activities funded "be for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas

related to the consequences of the hurricanes." *Id.* at 7670. As also directed by the first appropriation, HUD required that, overall, at least 50 percent of disaster recovery grant funds be used for activities that principally benefit low- and moderate-income persons. *Id.* at 7667; *see also id.* at 7668. As further directed by the first appropriation, HUD still required the state to certify that it will affirmatively further fair housing, "which means that it will conduct an analysis to identify impediments to fair housing choice within the state, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard." *Id.* at 7671. HUD did not waive the CDBG program's financial accountability requirements. Kome Decl. ¶ 13.

Louisiana submitted its first action plan in early 2006 and made all required alternative certifications at that time, including the certification that the state would affirmatively further fair housing. Kome Decl. ¶ 14.[3] As is required by the CDBG program, the state already had produced a pre-storm Analysis and Impediments ("AI") to fair housing. *Id.* HUD advised Louisiana to review its AI post-storm and make any updates the state deemed necessary. *Id.*

D. Louisiana's Road Home Program and HUD's Role in Reviewing, Approving and Monitoring the Program

On May 12, 2006, Louisiana submitted Amendment 1 to its original action plan, known as the Road Home Program. Kome Decl. ¶ 15. The program consists of: (i) homeowner compensation and incentives programs; (ii) workforce and affordable rental housing programs; (iii) homeless housing programs; and, (iv) developer incentive programs. *Id.* The Road Home program is administered by the State of Louisiana through the Louisiana Office of Community Development and the Louisiana Recovery Authority, and is funded by HUD through the CDBG program. *Id.* The State of Louisiana is responsible for the implementation, design, and

[3] The state later made these same certifications in order to obtain funds from the second and third appropriations. Kome Decl. ¶ 14.

administration of the Road Home program in conformance with the applicable CDBG program requirements set by HUD. *Id.*

1. Technical Assistance Provided by HUD

In designing the Road Home homeowner compensation and incentives program, Louisiana requested, and HUD provided, some technical assistance. Kome Decl. ¶ 16. The state evaluated the relative costs of implementing a housing rehabilitation and reconstruction program as compared to implementing a homeowner compensation and incentives program. *Id.* State staff called HUD staff several times a week throughout 2006 regarding the details of the homeowner program design. *Id.* HUD's guidance focused on how the activity could meet CDBG national objectives and how the state could manage the program to account for all program funds while meeting the disaster recovery purpose of the supplemental appropriations. *Id.* HUD did not make *any* of the state's program decisions or set *any* funding strategies in the Road Home Program. *Id*. Most of HUD's technical assistance was provided by telephone. *Id.*

Part of the technical assistance HUD provided to state staff concerned sound financial management principles. Kome Decl. ¶ 17. Financial management principles guide the grantee in the design of a program that provides the smallest amount of resources necessary to achieve a desired result. *Id*. HUD explained to state staff that, for example, the compensation and incentives program launched by the state of New York following September 11, 2001, provided no more than $14,500 to any household and achieved success in meeting its goals. *Id*. HUD also explained that the city of Grand Forks, North Dakota, provided $5,000 loan payments as incentives to homeowners who remained in the city for disaster recovery after floods in 1997 caused significant damage to the city and its residences. *Id*.

2. Road Home homeowner compensation and incentives grant

As it developed the Road Home program, Louisiana ultimately chose to provide compensation and incentives grants to eligible homeowners affected by Hurricanes Rita or Katrina of up to $150,000. Kome Decl. ¶ 18. Louisiana decided to base the amount of the compensation and incentives grant on the lower of the pre-storm, fair-market value of the home, or the cost to repair the home. *Id.* The state chose to provide homeowners with three compensation and incentive grant options: (i) stay in their home; (ii) purchase another home in Louisiana; or (iii) sell their home and choose not to remain a homeowner in the state. *See* LRA http://www.road2la.org/homeowner/default.htm.[4] The last day to apply to the Road Home program was July 31, 2007, and the last day to complete an initial appointment was December 15, 2007. *Id.*

In developing the Road Home program, the state considered basing the compensation and incentives payment amounts on the tax valuations of homes. Kome Decl. ¶ 19. As part of the technical assistance HUD provided to the state, HUD stated its concern about using tax values as part of the basis for the calculation of the homeowner payment amount because the tax valuation system(s) in Louisiana, and in New Orleans Parish in particular, were unreliable, resulting in vastly different values for similar homes, with no rational basis. *Id.* The state ultimately chose not to use tax values as a basis for providing compensation and incentives grants. *Id.*

To determine the pre-storm value of a home, Louisiana chose to rely instead on pre-storm

[4] If the homeowner chooses to relocate within Louisiana, the compensation grant depends on the extent of damage to the home. *Id.* If damage to the home is estimated at less than 51% of the pre-storm value of the home, the compensation grant is the lesser of either (a) the pre-storm value minus other assistance provided or (b) the estimated cost of damage minus other assistance. *Id.* If damage to the home is estimated at 51% or more of the pre-storm value of the home, the compensation grant is the pre-storm value minus other assistance provided. *Id.* If the homeowner chooses to relocate outside Louisiana, the compensation grant will be 60% of the in-state relocation option, unless the homeowner is over age 65. *Id.*

appraisals provided by the homeowner-applicants, the repositories of federal mortgage servicers, and the archives of Louisiana appraisal firms. *See* http://www.road2la.org/homeowner/default.htm. Louisiana also chose to allow homeowners to provide a post-storm appraisal from a licensed and certified Louisiana appraiser setting out the property's pre-storm value. *Id*.

Although the state chose to base the calculation of the payment it would make to each homeowner on one of several measures of pre-storm property value or storm damage, compensation and incentives under the Road Home program are not actually for storm damage. Kome Decl. ¶ 20. Rather, the Road Home program provides compensation and incentives for the homeowner's agreement to meet certain recovery conditions, such as remaining in a certain geographic area, maintaining flood insurance on a dwelling, and meeting modern building codes within a set period of time. *Id*.

3. Additional Compensation Grants, Individual Mitigation Measures, and Elevation Allowances

Louisiana also chose to provide Additional Compensation Grants of up to $50,000 for certain homeowners. Kome Decl. ¶ 21. Louisiana provides the Additional Compensation Grants to bridge any gap between the estimated cost of damage and the amount(s) the homeowner receives from other assistance (insurance, FEMA, *etc*.) and the basic compensation and incentives grant, still subject to the $150,000 limit on the grant. *See* http://www.road2la.org/homeowner/default.htm. Louisiana decided to offer Additional Compensation and incentives Grant to applicants with household incomes at or less than 80 percent of the median income in the parish where the house was located. *Id.* In addition to the Additional Compensation Grants, Louisiana chose to provide compensation and incentives grants to homeowners via Individual Mitigation Measures and Elevation Incentives. *Id*. Individual

Mitigation Measures provide incentive grants to homeowners to install home "hardening" features that will protect homes from future storm damage, including storm shutters and roof tie downs. *Id*. Elevation Incentives are grants to elevate site-built homes and mobile homes to meet FEMA's current Advisory Base Flood Elevation or Base Flood Elevation levels to protect against future floods. *Id*.

4. HUD review and approval of the Road Home homeowner program

As part of the technical assistance HUD provided to Louisiana, HUD reviewed the Road Home program's ability to help Louisiana meet the overall benefit requirements of the special appropriations. Kome Decl. ¶ 22. As noted above, the special appropriations' overall benefit requirement is that 50 percent of the state's disaster recovery CDBG expenditures will support activities that benefit low- and moderate-income persons. *Id*. To meet that requirement, Louisiana can count homeowner payments to low- and moderate-income households and rental projects that house low- and moderate-income tenants toward the overall requirement, but it cannot count payments to above-income homeowners, or for above-income rental projects. *Id*. HUD determined that Louisiana's inclusion of the Additional Compensation Grant, Individual Mitigation Measures, and Elevation Allowances could help the state meet the overall benefit requirement. *Id*.

On June 14, 2006, HUD published a Federal Register notice granting additional waivers to Louisiana and approving Louisiana's Road Home program. 71 Fed. Reg. 34451 (June 14, 2006). Finding that additional waivers and alternative requirements are not inconsistent with the overall purpose of the HCDA, HUD waived statutory and regulatory requirements to allow Louisiana to provide compensation to homeowners whose homes were damaged, "if the homeowners agree to meet the stipulations of the published program design." *Id.* HUD also allowed Louisiana to "offer disaster recovery or mitigation housing incentives to promote

housing development or resettlement in particular geographic areas." *Id.* at 34453.[5] In addition, HUD approved Louisiana's use of disaster recovery CDBG funds for, among other things, (i) government buildings; (ii) special economic development job-retention activities; (iii) down payment assistance for new construction; (iv) support of the tourism industry; (v) relocation assistance; and (vi) the one-for-one replacement requirement of housing units damaged by disaster. *Id.* at 34452-53.

On March 6, 2007, HUD provided additional waivers that allowed Louisiana to use CDBG disaster recovery funds for, among other things, (i) research, commercialization, and educational enhancement; (ii) operating subsidies for affordable rental housing; and (iii) rental and utility payment assistance. 72 Fed. Reg. 10014 (Mar. 6, 2007). Kome Decl. ¶ 24.

To date, HUD has obligated $12,400,000,000 to Louisiana to administer the Road Home program. Kome Decl. ¶ 25. As of February 22, 2009, Louisiana had provided approximately $7,800,000,000 in compensation and incentive grants to 140,083 homeowner applicants through the Road Home homeowners program, for an average award of $63,517. *See* http://www.road2la.org/default.htm. In addition to its homeowner compensation and incentives program, Louisiana has devoted approximately $1,540,000,000 CDBG disaster recovery funds to affordable rental housing programs. Kome Decl. ¶ 25. Rental housing assistance programs funded by the grants include the Low-Income Housing Tax Credit ("LIHTC") Piggyback Program, Gulf Opportunity Zone ("GO Zone") tax credits, public housing projects and developer incentives. *Id.* Louisiana also has devoted funds for homeless shelters and homelessness cessation services. *Id.*

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[5] HUD also noted that, under the HCDA and implementing regulations, states "have the discretion to pay pre-flood or post-flood values for the acquisition of properties located in a flood way or floodplain." *Id.* at 34456. HUD noted that "[i]n using CDBG disaster recovery funds for such acquisitions, the grantee must uniformly apply whichever valuation method it chooses." *Id.*

E. Plaintiffs' Complaint

Plaintiffs brought suit against HUD and Paul Rainwater, Executive Director of the LRA, on November 12, 2008. Compl. ¶ 6 (Doc. 1). Plaintiffs assert jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3)-(4), 42 U.S.C. § 3613, and seek declaratory and injunctive relief under 28 U.S.C. §§ 2201-02. Compl. ¶¶ 8-9. Plaintiffs consist of five homeowners, who allege that they lived in New Orleans and that their homes were destroyed by Hurricane Katrina, and two non-profit fair housing organizations. *Id.* ¶¶ 11-17. Plaintiff homeowners allege that they received Road Home grant awards that were less than the cost of storm damage to their homes and that they have been unable to complete repairs on their homes. *Id.* ¶¶ 61-65. The organizational plaintiffs claim that, because of the Road Home program, they have been "substantially injured and frustrated in their mission to promote fair housing," and "have been forced to devote scarce resources to identifying and counteracting defendants' housing practices . . . [and] to educat[ing] the public about the . . . nature of the Road Home program." *Id.* ¶¶ 66-71. The organizational plaintiffs also claim that they "would have devoted their resources to their other activities and services such as expanding equal housing opportunities; . . . providing counseling and referral services to the public . . . ; and assisting residents . . . affected by [the] [h]urricanes, . . . to negotiate mortgage loan modifications and equitable insurance settlements." *Id.* ¶ 73. The individual plaintiffs bring this action "on behalf of themselves and all similarly-situated . . . African American homeowners in New Orleans who have participated in Louisiana's Road Home program or will participate by the first day of trial, whose grant amount was calculated or will be calculated based on the pre-storm value of their homes, and who have selected or will select the program's option of using funds to repair or rebuild their homes." *Id.* ¶¶ 20-21.

Plaintiffs claim that the requirement that the Road Home grant awards not exceed the pre-

storm value of the home (where the pre-storm value is less than the cost of damage) has a discriminatory impact on African Americans. Compl. ¶ 52. Plaintiffs further allege that African American recipients of Road Home grants are more likely than white grantees to have a gap in their rebuilding resources and the cost to rebuild. *Id.* ¶¶ 56, 58. The entirety of plaintiffs allegations against HUD are that: (i) the LRA "proposed and developed" the Road Home program, "in consultation with HUD," (ii) HUD "approved the Road Home grant formula," and (iii) the LRA administers the Road Home program "subject to ongoing oversight and continuing approval of HUD." *Id*. ¶¶ 49-51. As a result of these alleged actions, plaintiffs allege that HUD has: (i) made housing unavailable or denied housing to African American homeowners, in violation of 42 U.S.C. § 3604(a); (ii) discriminated against African Americans in the availability, terms and conditions of real-estate related transactions, in violation of 42 U.S.C. § 3605(a); and (iii) failed to administer housing programs in a manner that affirmatively furthers fair housing, in violation of 42 U.S.C. § 3608(d), (e)(5). *Id.* ¶¶ 74-76. Plaintiffs also allege that HUD "failed to administer the CDBG program in a manner that affirmatively furthers fair housing," in violation of 42 U.S.C. § 5304(b)(2) (requiring "*grantees*" to affirmatively further fair housing). *Id.* ¶ 77. Plaintiffs seek a declaration that HUD has deprived plaintiffs of their rights under the FHA and the HCDA and seek an injunction that would require HUD to "cease violating plaintiffs' rights" and to "recalculat[e] Road Home homeowners grants in a non-discriminatory manner." Compl., Request for Relief.

III. STANDARD OF REVIEW

To prevail on a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), it is the plaintiffs' burden to establish that the court has subject matter jurisdiction to hear the case. *In re Swine Flu Immunization Prods. Liab. Litig.*, 880 F.2d 1439, 1442-43 (D.C. Cir. 1989); *Jones v. Exec. Ofc. of the Pres.*, 167 F. Supp. 2d 10, 13 (D.D.C. 2001).

Moreover, "plaintiff[s'] factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim" because the plaintiffs bear the burden of proof. *Grand Lodge of the Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13-14 (D.D.C. 2001) (internal quotation marks omitted). In making its determination regarding the existence of subject matter jurisdiction, the court may consider matters outside the pleadings, such as a declaration submitted by an agency official. *Lipsman v. Sec'y of the Army*, 257 F. Supp. 2d 3, 6 (D.D.C. 2003).

Plaintiffs' 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. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (standing is a threshold inquiry that "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"); *Am. Library Ass'n v. F.C.C.*, 401 F.3d 489, 492 (D.C. Cir. 2005). 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," 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)). "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). Moreover, these three core requirements of standing are substantially more difficult to establish where, as here, plaintiffs are not themselves the direct object of the particular federal government action or inaction challenged in the lawsuit. *Lujan,* 504 U.S. at 562.

"The doctrine of mootness is a logical corollary of the case or controversy requirement[.]" *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 90 (D.C. Cir. 1986). In cases where challenged conduct ceases, "it becomes impossible for the court to grant any effectual relief whatever to the prevailing party, and any opinion as to the legality of the challenged action would be advisory." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). Accordingly, a court may not rule on the merits of a case in which the claim for relief is moot.

Absent an express statutory waiver, the doctrine of sovereign immunity shields the federal government from suit. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *see also U.S. v. Sherwood*, 312 U.S. 584, 586 (1941). Because sovereign immunity is jurisdictional in nature, *Meyer*, 510 U.S. at 475, "the terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit." *Sherwood*, 312 U.S. at 586. As the Supreme Court has often observed, a waiver of sovereign immunity must be "unequivocally expressed in the statutory text" and "strictly construed, in terms of its scope, in favor of the sovereign." *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (internal quotations omitted). A party bringing suit against the United States bears the burden of proving that the government has unequivocally waived its immunity. *See, e.g., Graham v. Fed. Emergency Mgt. Agency*, 149 F.3d 997, 1005 (9th Cir. 1998); *James v. U.S.*, 970 F.2d 750, 753 (10th Cir. 1992); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988).

Although plaintiffs have not invoked the Court's jurisdiction under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.,* the APA provides, in certain circumstances, a limited waiver of sovereign immunity for suits seeking non-monetary relief against the United States and its agencies. 5 U.S.C. § 702. Under the APA, however, a court may overturn agency action, or compel agency inaction, only if the action or inaction was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or in excess of its statutory

jurisdiction or authority. 5 U.S.C. § 706(1), (2)(A), (C). The question of whether an agency has properly exercised its discretion does not "rais[e] issues of fact," but "primarily raise[s] issues of law." *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996).

Further, when a court has jurisdiction to review an agency action under the APA, it sits as an appellate tribunal—its only function is to determine whether the agency committed legal error, not to supervise future regulatory action by the agency. *Heckler v. Redbud Hosp. Dist.*, 473 U.S. 1308, 1313 (1985). Thus, in the event the Court were to find jurisdiction and rule in favor of plaintiffs, the Court would be empowered only to set aside the agency's action, or order the agency to act, and leave it to the agency to take appropriate further action; the Court would not be empowered to compel specific remedial or affirmative action, or prohibit other future action by the agency. *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999) ("[W]hen a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards.") (quoting *PPG Indus., Inc. v. U.S.*, 52 F.3d 363, 365 (D.C. Cir. 1995)); *id.* at 1011–12 (holding that the district court erred in retaining jurisdiction to devise a specific remedy for the agency to follow).

IV. ARGUMENT

A. Plaintiffs Lack Standing to Maintain Their Claims Against HUD Because They Cannot Satisfy the Redress Prong of Article III's Standing Requirement

Plaintiffs lack standing to challenge HUD's actions because they cannot establish that the judgment they seek would redress the injuries they have identified. "Redressability examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658,

663-64 (D.C. Cir. 1996) (en banc).[6] In this action, plaintiffs seek a declaratory judgment that HUD's "acts, practices, policies, and omissions have deprived [p]laintiffs of their rights under the [FHA] and the [HCDA]," and seek injunctive relief ordering HUD "to cease immediately [its] violation of [p]laintiffs' rights." Compl., Request for Relief ¶¶ (b) - (c). Plaintiffs also seek an injunction "recalculating Road Home homeowner grants in a nondiscriminatory manner." *Id.* ¶ (c). To satisfy the redressability component of standing, plaintiffs would have to allege (and ultimately prove) that it is "likely," as opposed to merely "speculative," *Friends of the Earth, Inc. v. Laidlaw Env'tl Srvs., Inc.,* 528 U.S. 167, 181 (2000)), that a judgment setting aside HUD's approval of Louisiana's Road Home program, and finding HUD's continuing approval and oversight was arbitrary and capricious, would redress their injuries. *See* Compl., Prayer for Relief. This plaintiffs cannot do.

An "adequate examination" of redressability requires that the court first "identify the components of [plaintiffs'] alleged harm." *Freedom Republicans, Inc. v. FEC*, 13 F.3d 412, 416 (D.C. Cir. 1994). Here, plaintiffs identify as a harm to them only that Louisiana's "Road Home grant awards are calculated using the lower of two baseline values: the pre-storm value of the home, or the cost of damage to the home," Compl. ¶ 47, which in turn, allegedly has a disparate impact on African Americans. *Id.* ¶ 52. Plaintiffs' complaint is not that HUD directly imposed these requirements. *See id.* ¶ 49 (alleging that the LRA proposed and developed the Road Home

[6] The D.C. Circuit has explained that when, as is true in this case, "plaintiffs' claim hinges on the failure of [the federal] government to prevent another party's injurious behavior, the "fairly traceable" and redressability inquiries appear to merge. *See Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990). In such cases, both prongs of the standing analysis can be said to focus on principles of causation: fair traceability turns on the causal nexus between the agency action and the asserted injury, while redressability centers on the causal connection between the asserted injury and judicial relief. *See Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). Despite these similarities, however, each inquiry has its own emphasis. Causation remains inherently historical; redressability quintessentially predictive. *See id.*

Program); *id.* ¶ 51 (alleging that the LRA administers the Road Home Program). Instead, they allege only that HUD's initial and continuing approval and oversight of the Road Home grant formula, *id.* at ¶¶ 50-51, is allegedly the cause of their injuries.

However, "indirectness 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 *defendants'* actions, or that prospective relief will remove the harm."' *Simon v. E. Ky. Welfare Rights Org.*, 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 . . . . The existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors . . . 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).

Thus, to satisfy the minimum requirements of Article III, plaintiffs must demonstrate that it is "likely," and not merely "speculative," that the prospective relief they seek (invalidation of HUD's approval of Louisiana's Road Home grant formula, *see* Compl., Prayer for Relief) will result in the removal of the harm they have identified (Road Home grants . . . calculated based on the pre-storm value of the home), Compl. ¶ 60). If plaintiffs are unable to do so, then their injuries would not be redressed by a favorable judgment and their claims must be dismissed for lack of standing. *Steel Co.*, 523 U.S. at 107 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

Here, plaintiffs have not and cannot demonstrate a likelihood that a favorable judgment in

this action against HUD would have any substantial impact on decisions by LRA regarding how to use disaster recovery CDBG funds provided by the special appropriations. Consequently, even if this Court were to declare HUD's approval of Louisiana's Road Home grant awards to be invalid, and HUD's continuing oversight of the program to be arbitrary and capricious, plaintiffs have not even alleged, and cannot establish a likelihood, that the LRA would necessarily create a disaster recovery program that provided something resembling the repair cost reimbursement structure that plaintiffs seek. To be clear, plaintiffs challenge is to HUD's approval and continuing oversight of third-party conduct – Louisiana's decision about how to use disaster recovery funds under the special appropriations. Under these circumstances, invalidation of HUD's approval of the Road Home grant awards and finding its oversight arbitrary and capricious would not necessarily alter Louisiana's use of disaster recovery funds in a way that favors plaintiffs.

Even assuming *arguendo* that "the Road Home formula design disproportionately burdens African American homeowners and hinders their ability to return home compared to white families," as plaintiffs allege, Compl. ¶ 58, both the CDBG program in general, and the special appropriations in particular, vest Louisiana, and not HUD, with the authority to decide how to use these disaster recovery funds consistent with the requirements of the CDBG program as modified by the special appropriations. Kome Decl. ¶¶ 3, 6, 9. Courts have recognized HUD's limited role in approving CDBG funds. *See, e.g., Mejia v. HUD*, 688 F.2d 529, 535 (7th Cir. 1982) (noting HUD's limited power to review applications for CDBG funds). In this case, moreover, the special appropriations required HUD to *waive* its normal statutory and regulatory program requirements of the HCDA at the request of the states and on HUD's finding that such waiver would not be inconsistent with the purposes of the Act. Kome Decl. ¶ 13. Pub. L. 109-148 provided that HUD "*shall waive*, or specify alternative requirements for, *any provision of*

any statute or regulation that [HUD] administers in connection with the obligation by [HUD] or the use by the recipient of these funds or guarantees," except for requirements related to fair housing, nondiscrimination, labor standards, and the environment. *Id.* (emphasis added). Pub. L. 109-234 also authorized HUD to waive these same requirements, *see id.*, which HUD waived (and the waiver of which plaintiffs do not challenge). Compl. *passim*. *See* Kome Decl. ¶ 23. Moreover, the special appropriations cannot be reasonably read to preclude Louisiana from using the pre-storm value of the house as a basis for providing disaster relief. Pub. L. 109-148; Pub. L. 109-234. Nor, if the Court were to set aside HUD's approval of Louisiana's homeowner program, or find its oversight to be arbitrary and capricious, would there be anything in the special appropriations that *requires* the State to provide compensation and incentive grants of up to $150,000, *see id.*, which plaintiffs allege is necessary to allow them to complete repairs and return to their homes. Compl. ¶¶ 60-65. By contrast, New York's use of CDBG disaster recovery funds for a homeowner compensation program following September 11, 2001 provided no more than $14,500 to any household and achieved success in meeting its goals. Kome Decl. ¶ 17. Similarly, the city of Grand Forks, North Dakota, used CDBG disaster recovery funds to provide $5,000 loan payments as incentives to homeowners who remained in the city after flooding. *See id*. Neither of these programs was designed to provide compensation for the cost of damage to a home, yet both satisfied the requirement of HUD's disaster recovery CDBG program. Indeed, there is nothing in these specially-appropriated disaster relief authorizations that would require Louisiana to provide *any* assistance to homeowners of *any* income level at all. Pub. L. 109-148; Pub. L. 109-234.[7] Rather, Louisiana had to obtain a waiver from HUD of the

[7] Of the $5,200,000,000 provided in the second appropriation, Congress required the five states affected by the hurricanes to collectively devote at least $1,000,000,000 for the "repair, rehabilitation, and reconstruction (including demolition, site clearance and remediation) of the affordable *rental* housing stock (including public and other HUD-assisted housing) in the

normal CDBG program requirements just to allow the state to provide compensation and incentive grants to homeowners in the first place. Kome Decl. ¶ 23. In sum, in light of the discretion that the CDBG program and the special appropriations vest with *Louisiana*, plaintiffs cannot establish that an injunction against *HUD* would force Louisiana to provide them with the relief they seek.

Moreover, plaintiffs' speculation regarding what Louisiana "might" do if HUD's approval or oversight are enjoined is exactly the type of speculation the courts have held insufficient to establish standing. *See* Compl. ¶ 60 ("Road Home grants *could* be calculated based [solely] on the cost of damage to the home.") (emphasis added). For example, in *Allen v. Wright*, the Supreme Court held that it was overly speculative whether requiring the IRS to enforce its rules, which prohibited tax breaks to racially discriminatory private schools, would prevent segregated schools, as plaintiff in that case alleged. *Allen*, 468 U.S. at 751. The Court held that even the court-ordered 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.* at 758. Similarly, in *Simon*, 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, as plaintiff in that case had sought. *See Simon*, 426 U.S. at 43-44 (1976). *See also Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (finding no standing based on lack of redressability because the prospect that prosecuting deadbeat dads would result in payment of child support was only speculative).

The D.C. Circuit has also dismissed claims like plaintiffs' for lack of standing on

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impacted areas." Pub. L. 148-109 (emphasis added). Congress made no such requirement that any funds be used for homeowners in any of the appropriations. *See, e.g., id.*

Even the third special appropriation merely provided funds to the Road Home program. Pub. L. No. 110–116. It did not require that these funds be used to assist homeowners. *See id.*

redressability grounds because the remedy sought was purely speculative. In *Freedom Republicans*, *supra*, the court of appeals dismissed for lack of standing a challenge to the Federal Election Commission's alleged failure to enforce Title VI of the Civil Rights Act of 1964 against the Republican Party and its delegate allocation system. *See Freedom Republicans*, 13 F.3d at 417. The court held that the plaintiffs had not established that a possible judicial response would redress their injuries because it would have been "pure speculation" to attempt to predict the potential impact of the threat of withdrawal of all federal funding (which according to the complaint was in excess of $10,000,000) on the Republican Party's decision-making. *See id.* at 418-19 & n.6.

Similarly, in *US Ecology, Inc., v. U.S. Dep't of the Interior*, a private company sued the U.S. Department of Interior for its allegedly unlawful rescission of a decision to approve the transfer of a plot of land to the State of California, which would enable the company to develop a facility on the site as a licensee for the state. The D.C. Circuit held that the injury of the private company was not redressable by a favorable court decision because the company could not demonstrate that the state would accept title to the land from the federal government, let alone that it would proceed with the plaintiff's development contract. *See US Ecology, Inc. v. U.S. Dep't of the Interior*, 231 F.3d 20, 21, 24-25 (D.C. Cir. 2000).

Finally, in *Univ. Med. Ctr. of S. Nev. v. Shalala*, 173 F.3d 438 (D.C. Cir. 1999), a hospital challenged its allegedly unlawful exclusion by the Secretary of Health and Human Services from a list of entities eligible for discounts from drug manufacturers. The D.C. Circuit held that the plaintiff's injury in losing drug discounts was not redressable by a favorable court decision where, even if the court granted declaratory relief that the government unlawfully delayed in placing the hospital on the list of entities eligible for discounts, retroactive discounts would actually be available only if third party manufacturers could be persuaded to pay them. *See Univ.*

Med. Ctr. of S. Nev., 173 F.3d at 441.[8]

In each of these cases, the plaintiffs had not established, nor could the courts predict, how non-federal parties would respond to a favorable decision for the plaintiffs, and thus plaintiffs failed to demonstrate that the requested relief against the federal defendants would redress plaintiffs' injuries. This fatal flaw is also present in this action because neither plaintiffs nor the Court can predict what effect, if any, a favorable court ruling in this case setting aside HUD's approval of the Road Home program, or ordering HUD to exercise its oversight authority over the program, would have on decisions by Louisiana about whether to even continue the program or how to administer the program, let alone on the state's decisions regarding how to

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[8] Other circuits have dismissed similar challenges. For example, in *Rubin v. City of Santa Monica*, 308 F.3d 1008 (9th Cir. 2002), the Ninth Circuit dismissed for lack of standing a challenge to the California Secretary of State's administration of the state's election regulations because of the City of Santa Monica's interpretation of those regulations. The Ninth Circuit held that plaintiff could not establish that "enjoining the Secretary of State from enforcing the election regulations would stop the City of Santa Monica from following them in the future." *Id.* In so holding, the Ninth Circuit found that a "purely speculative" favorable outcome will not suffice to establish the redressability prong. *Id.* at 1020.

Similarly, in *Burton v. Cent. Interstate Low-Level Radioactive Waste Compact Comm'n,* 23 F.3d 208 (8th Cir. 1994), the court 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:

> [although *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, . . . 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).

use disaster recovery funds provided by the special appropriations.[9] Certainly a favorable judgment of this Court would not make it likely that Louisiana would provide compensation and incentive grants of up to $150,000 based solely on the cost of damage to a home, as plaintiffs seek.

In sum, the judgment sought by plaintiffs against HUD in this case would not and could not likely redress plaintiffs' injuries caused by Louisiana. Accordingly, plaintiffs lack standing to pursue their claims against HUD, and this action should be dismissed against HUD for lack of subject matter jurisdiction.

B. Plaintiffs' Claims About HUD's Approval and Oversight of the LRA's Road Home Program are Mostly Moot

Plaintiffs challenge HUD's "approval" and "continuing approval and oversight" of the LRA's Road Home program. Compl. ¶¶ 50-51. Because HUD has already obligated $12,400,000,000 in disaster recovery CDBG funds provided by the special appropriations to Louisiana to implement the Road Home program, plaintiffs' challenge to HUD's approval and continuing oversight of Louisiana's use of these funds is now moot. The D.C. Circuit's case law "unequivocally provides that once the relevant funds have been obligated, a court cannot reach them in order to award relief." *City of Houston, Tex. v. HUD*, 24 F.3d 1421, 1426 (D.C. Cir. 1994). In *W. Va. Health Ctr. v. Heckler*, 734 F.2d 1570 (D.C. Cir. 1984), for example, the court

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[9] To be clear, plaintiffs' claims here are plainly distinguishable from a challenge to a government action which authorizes or permits "third party conduct that allegedly caused a plaintiff injury, when that conduct would *otherwise* have been illegal." *E.g., Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 442 (D.C. Cir. 1998) (en banc) (emphasis added); *Am.'s Community Bankers v. FDIC*, 200 F.3d 822, 827 (D.C. Cir. 2000); *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1499 (D.C. Cir. 1996). In that type of case, invalidation of the federal government's action would redress a plaintiff's injury by rendering the third party's conduct illegal again. In this case, plaintiffs do not allege that HUD's approval is what legalized the LRA's ability to provide "Road Home grants [that] are calculated using the lower of two baseline values: the pre-storm value of the home or the court of damage to the home." Compl. ¶ 47. HUD merely provided the funding for the program.

acknowledged the equitable doctrine permitting courts to award funds after an appropriation has lapsed, if a suit is timely filed (as that case was), but held that no relief was available for one of the fiscal years in question because "all of these funds ha[d] been awarded by the Secretary to various recipients." 734 F.2d at 1577. The D.C. Circuit has relied on similar reasoning in at least two other cases. *See Ambach v. Bell*, 686 F.2d 974, 986 (D.C. Cir. 1982) ("Once the chapter 1 funds are distributed to the States and obligated, they cannot be recouped. It will be impossible in the absence of a preliminary injunction to award the plaintiffs the relief they request if they should eventually prevail on the merits."); *Population Inst. v. McPherson*, 797 F.2d 1062, 1081 (D.C. Cir. 1986) (quoting *Ambach* and *W. Va. Health Ctr.*, and noting that "if the government in the instant case is permitted to distribute the $10 million to other organizations, the appeal will become moot."). Thus, to avoid having its case mooted, a plaintiff must seek a preliminary injunction preventing the agency from disbursing those funds. *City of Houston, Tex. v. HUD*, 24 F.3d at 1427.

In *City of Houston*, the court held that the case was moot on two independent grounds, including the fact that HUD had contractually obligated the CDBG funds at issue more than six months before plaintiff filed its complaint. *Id.*[10] In this case, HUD had already obligated $12,400,000,000 in disaster recovery CDBG funds to Louisiana provided by each of the special appropriations before plaintiffs brought suit. Kome Decl. ¶ 25. Accordingly, plaintiffs' claims against HUD for its approval and continuing oversight of the LRA's use of these funds for its Road Home homeowners program are now moot.[11]

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[10] The other independent ground was that the appropriation had lapsed. *Id*. In this case, Congress provided that the disaster recovery CDBG funds committed by the special appropriations do not lapse. Pub. L. 109-148.

[11] To be clear, HUD does not take the position that plaintiffs' challenge to HUD's continuing approval and oversight concerning funds not yet obligated, Kome Decl. ¶ 25, is moot.

C. Plaintiffs Fail to Allege a Waiver of Sovereign Immunity By the United States

Even if plaintiffs' lack of standing and the mootness of most of their claims were not a bar to this action against HUD, sovereign immunity is also a bar plaintiffs' action against HUD. "The United States, as sovereign, is immune from suit save as it consents to be sued and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Hercules Inc. v. U.S.*, 516 U.S. 417, 422 (1996) (citations and internal punctuation omitted). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed" in the text of the statute on which the claimed waiver is based. *U.S. v. King*, 395 U.S. 1, 4 (1969). Therefore, in analyzing whether Congress has waived the immunity of the United States, waivers must be construed strictly in favor of the sovereign, and not enlarged beyond what the statutory language requires. *McMahon v. U.S.*, 342 U.S. 25, 27 (1951). *See also Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983); *E. Transp. Co. v. U.S.*, 272 U.S. 675, 686 (1927). Accordingly, plaintiffs may not maintain any claims against HUD absent a waiver of sovereign immunity that covers those claims, and plaintiffs are 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) ("Federal courts are courts of limited jurisdiction. Absent jurisdiction conferred by statute, district courts lack power to consider claims. This limitation is doubly significant for suits against the federal government, which, absent express waiver, are barred by the doctrine of sovereign immunity.").

Plaintiffs invoke this Court's jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. §§ 1343(a)(3)-(4), and 28 U.S.C. §§ 2201, 2202. Compl. ¶¶ 8-9. Plaintiffs also invoke the Court's jurisdiction under the FHA, 42 U.S.C. §§ 3601, 3613(a), Compl. ¶ 8, and allege violations of 42 U.S.C. § 3604(a), 42 U.S.C. § 3605(a), 42 U.S.C. § 3608(d), (e)(5). Compl. ¶¶ 74-76. Finally, plaintiffs allege a violation of the HCDA, 42 U.S.C. § 5304(b)(2). Compl.

¶ 77. Although many of these statues may provide the Court with jurisdiction in appropriate circumstances, none of them waives the sovereign immunity of the United States, and thus none provides this Court with jurisdiction over plaintiffs' claims against HUD.

Federal question jurisdiction under 28 U.S.C. § 1331 does not by itself operate as a waiver of sovereign immunity by the United States. *See Sabhari v. Reno*, 197 F.3d 938, 943 (8th Cir. 1999); *Lonsdale v. U.S.*, 919 F.2d 1440, 1443-44 (10th Cir. 1990); *Kester v. Campbell*, 652 F.2d 13, 15 (9th Cir. 1981). Moreover, federal courts have repeatedly and uniformly held that § 1343(a) does not constitute a waiver of the United States' sovereign immunity. *See, e.g., Salazar v. Heckler*, 787 F.2d 527, 528 (10th Cir. 1986); *Beale v. Blount*, 461 F.2d 1133, 1138 (5th Cir. 1972); *Zhu v. U.S.*, 2005 WL 1378914, *3 (D.D.C. 2005); *Byrd v. Smith*, 693 F. Supp. 1199, 1201 (D.D.C.1986). *See also Brian v. Gugin*, 853 F. Supp. 358, 363 (D. Idaho 1994), *aff'd,* 46 F.3d 1138 (9th Cir.1995). In addition, 28 U.S.C. §§ 2201-02 allows for declaratory judgments; it does not confer jurisdiction, nor does it contain a waiver of sovereign immunity by the United States. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 681 (5th Cir. 1999); *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818, 822 (10th Cir. 1981); *Ballistrieri v. U.S.*, 303 F.2d 617, 619 (7th Cir. 1962).

Nor is there any express waiver of the United States' sovereign immunity in the Fair Housing Act or the Housing and Community Development Act of 1974. "[T]he Fair Housing Act does not waive sovereign immunity to permit suits against the federal government." *Zhu v. Gonzales*, 2006 WL 1274767, *5 (D.D.C. May 8, 2006); *Boyd v. Browner*, 897 F. Supp. 590, 595 (D.D.C.1995) ("[T]he Fair Housing Act does not 'unambiguously waive' the government's sovereign immunity defense."). *Accord Anderson v. City of Alpharetta*, 737 F.2d 1530, 1534 (11th Cir. 1984); *Alschuler v. HUD*, 686 F.2d 472, 476, 477-78 (7th Cir. 1982); *Bus. Ass'n of Univ. City v. Landrieu*, 660 F.2d 867, 873 (3d Cir. 1981). *See also Marinoff v. HUD*, 892 F.

Supp. 493, 496 (S.D.N.Y. 1995), *aff'd*, 78 F.3d 64 (2nd Cir. 1996). Lastly, the Housing and Community Development Act of 1974 does not waive the federal government's immunity from suit. *Pleune v. Pierce*, 697 F. Supp. 113, 119 (E.D.N.Y. 1988); *Nabke v. HUD*, 520 F. Supp. 5, 8-9 (W.D. Mich. 1981).

In light of plaintiffs' failure to even allege a waiver of sovereign immunity by the United States, HUD remains immune from suit, and this Court lacks jurisdiction over HUD. Accordingly, plaintiffs' claims against HUD should be dismissed on sovereign immunity grounds.

D. Plaintiffs Could Not Maintain Suit Under the Administrative Procedure Act, Which Provides the Only Possible Waiver of Sovereign Immunity For Their Claims

The only sovereign immunity waiver that could conceivably apply to plaintiffs' claims appears in the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 701 *et seq*. The APA provides a limited waiver of sovereign immunity for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." *Id.* § 702.[12] However, in 5 U.S.C. § 704, "the APA excludes from its waiver of sovereign immunity claims for which an adequate remedy is available elsewhere." *Fornaro v. James*, 416 F.3d 63, 66 (D.C. Cir. 2005). *See also Turner v. Sec'y of HUD*, 449 F.3d 536, 539-41 (3d Cir. 2006) (an APA action that might otherwise be properly brought against HUD is barred because plaintiffs can obtain their remedy against a non-federal party). The statute also precludes review when the underlying statute does not require the agency to take a discrete action which it failed to take. *Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 64 (2004).

[12] The APA does not waive sovereign immunity for suits seeking monetary damages. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260-63 (1999).

In this case, even if plaintiffs were to allege a waiver of immunity under the APA, judicial review of the claims asserted would still be precluded because plaintiffs: (i) have an adequate remedy at law directly against Louisiana state officials and the State of Louisiana; and (ii) have failed to identify specific, discrete actions that the relevant statutes required HUD to take.

1. The APA would not waive sovereign immunity for plaintiffs' claims because there is another adequate remedy at law

Suit against federal agencies can be maintained under the APA only if there is a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. *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."). Here, such an adequate remedy exists because plaintiffs can maintain their discrimination claims — to the extent that any of them are cognizable — directly against the Louisiana state officials under the FHA and the HCDA, and directly against the State of Louisiana under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, alleging the same facts and seeking the same remedies.

Plaintiffs can maintain their claims for declaratory and injunctive relief under the FHA and the HCDA directly against defendant Paul Rainwater, as Executive Director of the LRA, under the doctrine of *Ex Parte Young*. *See Verizon Md., Inc. v. Pub. Serv. Com'n of Md.*, 535 U.S. 635, 646 (2002) ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.") (quotation marks and citation omitted). Neither the FHA nor the

HCDA display any intent to foreclose jurisdiction under *Ex parte Young*. *Accord High Plains Cmty. Devel. Corp. v. Schaefer*, 2007 WL 4180707, *2 (D. Neb. 2007) (FHA doesn't foreclose jurisdiction for suits against states). *Cf. Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 74 (1996) (suit under *Ex parte Young* would be inconsistent with the "detailed remedial scheme" set out in the Indian Regulatory Gaming Act, 25 U.S.C. § 2710).

In addition, in Section 1003 of the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7, Congress expressly abrogated the states' sovereign immunity against suits brought in federal court to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and provided that, in a suit against a state, "remedies (including remedies both at law and in equity) are available . . . to the same extent as such remedies are available . . . in the suit against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2). *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001); *Goonewardena v. NY*, 475 F. Supp. 2d 310, 328 (S.D.N.Y. 2007). Accordingly, plaintiffs can bring suit directly against the State of Louisiana under Title VI.

Because there is an adequate remedy at law here for plaintiffs' claims, § 704 bars this action against HUD. In cases similar to this one, the D.C., Third, and Fourth Circuits found that suits directly against an allegedly discriminating non-federal entity provided an adequate alternative to APA review, and therefore suit under the APA was precluded under § 704. In *Wash. Legal Found. v. Alexander*, 984 F.2d 483 (D.C. Cir. 1993), the D.C. Circuit considered a challenge under the APA to the alleged failure of the Department of Education to enforce the non-discrimination provisions of Title VI against educational institutions that offered some scholarships only to minority students. *Id.* at 484. The court held that because plaintiffs had "an implied right of action under Title VI against the individual colleges and law schools to redress any discrimination they have allegedly suffered, . . .that alternative remedy . . . preclude[d] a

remedy under the APA." *Id.* at 486. *See also Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 191-92 (4th Cir. 1999) (dismissing APA claim against federal defendants because court found that a Title VI claim pursued directly against the state, as a recipient of federal funding, provided adequate alternative remedy). Similarly, in *Women's Equity Action League* ("*WEAL*") *v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990), the D.C. Circuit considered a broad challenge to the alleged failure of the Departments of Education and Labor to enforce various civil rights statutes against educational institutions receiving federal funds. The court upheld the district court's dismissal of the complaint, finding that no right of action was available to the plaintiffs under the APA because of the existence of "implied rights of action against federally-funded institutions to redress discrimination proscribed by Titles VI and IX and express rights of action against federally-funded discriminators under . . . the Rehabilitation Act." *Id.* at 750 (citation omitted).

In *Am. Disabled for Attendant Programs Today* ("*ADAPT*") *v. HUD*, 170 F.3d 381 (3d Cir. 1999), the Third Circuit addressed an APA suit against HUD brought by organizations representing disabled individuals alleging that HUD had abdicated its duty under the FHA and violated its own regulations under the Rehabilitation Act of 1973. *Id.* at 382. The court dismissed the claims, finding that "a private right of action against individual housing providers that receive federal funding is provided for in the text of the [FHA]. This remedy is clearly 'adequate' in the section 704 sense, and so judicial review is inappropriate on all counts." *Id.* at 390. These direct statutory remedies against the entity alleged to be engaging in discrimination were held to be "'adequate,' therefore preclusive of a default remedy under the APA." *Id.*

Moreover, it is well settled that "[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'n of Cal., Inc. v. FCC*, 827 F.2d 640, 642 (9th Cir. 1987). Indeed, the D.C. Circuit has held that the APA "bar[s] suits where a plaintiff's injury may be remedied in another action, even if that remedy would have no effect upon the challenged agency action." *Coker v. Sullivan*, 902 F.2d 84, 90 n.5 (D.C. Cir. 1990) (citation omitted). In *Coker*, the court held that "[a]ctions directly against the states are not merely adequate; they are also more suitable avenues for plaintiffs to pursue the relief they seek. The states are the immediate cause of the injuries of which the Cokers and the Porters complain; these plaintiffs ask [the federal defendant] not to refrain from harming them but rather to cure their state-created injuries." *Id.* at 90.

The courts' holdings in *Wash. Legal Found., WEAL*, and *Coker* control here, and the principles of *Jersey Heights,* and *ADAPT* apply as well. Congress has provided plaintiffs with a fully adequate alternative remedy for their claimed injuries in the form of a cause of action directly against Louisiana state officials with respect to plaintiffs' claims of discrimination under the FHA and the HCDA, and directly against the state under Title VI. Inasmuch as maintaining suit directly against Louisiana state officials and the state provides an adequate legal remedy for all of plaintiffs' claims (to the extent that they are cognizable at all), § 704 precludes plaintiffs from maintaining suit against HUD under the APA. Thus, the APA would not provide a waiver of sovereign immunity by the United States in this instance.

2. Plaintiffs' claims for relief under 42 U.S.C. §§ 3608(d) and (e)(5) and 42 U.S.C. § 5304(b)(2) are not reviewable under the APA

The APA also does not provide a waiver of immunity to review plaintiffs' claims for relief arising under 42 U.S.C. §§ 3608(d) and (e)(5) and 5304(b)(2) in this instance. Sections 3608(d) and (e)(5) require HUD to "administer [its] programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of this subchapter" and to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further [its fair housing] policies." *Id.* §§ 3608(d) and (e)(5). Similarly, the § 5304(b)(2) requires that "*grantees* will affirmatively further fair housing." *Id.* § 5304(b)(2) (emphasis added).[13] However, because the APA does not provide for review of HUD's alleged failure to follow these provisions, it does not provide a waiver of sovereign immunity. 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 it to take. *SUWA, supra*, 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:

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[13] Although plaintiffs' complaint alleges that both HUD and the LRA have violated 42 U.S.C. § 5304(b)(2) in Count Two of their complaint, plaintiffs may have intended to allege only that the LRA, as the grantee, has violated that provision, because it requires only that "*grantees* will affirmatively further fair housing." *Id.*

> 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).

Before the Supreme Court decided *SUWA* in 2004, some courts reviewing claims of agency inaction permitted claims under 42 U.S.C. § 3608(e)(5) 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. HUD*, 817 F.2d 149, 160-61 (1st Cir. 1987) (Breyer, J.) (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. As noted above, the unanimous Supreme Court opinion in *SUWA* (which Justice Breyer joined), explained that if the relevant statutory provision provides the agency with discretion regarding the range of actions it may take, an 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).[14]

As noted above, plaintiffs do not allege that HUD has failed to perform a particular ministerial act. Plaintiffs' only allegations against HUD are that: (i) the LRA "proposed and

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[14] For this reason, the unpublished decision in *M&T Mortgage Corp. v. White*, 2006 WL 47467 (E.D.N.Y. 2006), in which the Court relied on the First Circuit's *NAACP* opinion, is not persuasive. Moreover, *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 909 (8th Cir. 2005) (affirming the *dismissal* of an action alleging violations of § 3608(e)(5)), does not have any precedential value. The *Darst-Webbe* panel merely addressed its earlier order (which pre-dated *SUWA*) that the district court, on remand, determine whether HUD had assessed "those aspects of its proposed course of action that would further limit the supply of genuinely open housing" and assessed "those aspects of the proposed course of action that would increase that supply." *Id.* at 907. In so doing, the court found that its standard of review was merely "to assess whether HUD exercised its broad authority in a manner that demonstrates consideration of, and an effort to achieve, fair housing opportunities." *Id.* However, because the court's holding addressed an order that pre-dated *SUWA*, its finding is *sui generis*. To the extent *Darst-Webbe* is in any way inconsistent with *SUWA*, this Court should simply disregard the decision.

developed" the Road Home program, "in consultation with HUD," (ii) HUD "approved the Road Home grant formula," and (iii) the LRA administers the Road Home program "subject to ongoing oversight and continuing approval of HUD." Compl. ¶¶ 49-51. However:

a. Plaintiffs' challenge to HUD's informal consultation is not final agency action. Plaintiffs do not allege and could not show, that HUD's "consultation" with Louisiana constituted final agency action reviewable under the APA. 5 U.S.C.§ 702. *See Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1165 (D.C. Cir. 2005) ("APA . . . bars review prior to final agency action."); *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 594 (D.C. Cir. 2001) ("If the agency action is not final, the court . . . cannot reach the merits of the dispute.")

b. Plaintiffs' challenge to HUD's approval of Louisiana's Road Home program is moot. For the reasons set forth above in Section IV(B), *supra*, plaintiffs cannot maintain their challenge to HUD's approval and continuing oversight of Louisiana's use of disaster recovery CDBG funds that HUD had already obligated to the state to administer the Road Home homeowners program, as that challenge is moot. *City of Houston*, 24 F.3d at 1427.

c. HUD's oversight of unobligated funds for the Road Home program is not reviewable under APA § 706(1). Plaintiffs' remaining claims potentially subject to review under the APA are that, in light of its statutory obligations to further fair housing, HUD should not approve the obligation of remaining funds to the LRA. Compl. ¶¶ 50-51. These challenges would fall under 5 U.S.C. § 706(1), because all they allege is that HUD is failing to exercise its statutory authority. However, in alleging that HUD is violating §§ 3608(d) and (e)(5) and § 5304(b)(2), plaintiffs are making almost the identical claims that the Supreme Court rejected in *SUWA*. Like the plaintiffs in *SUWA*, plaintiffs here are claiming that HUD's duties under §§ 3608(d) and (e)(5) and § 5304(b)(2) require HUD, in exercising its authority to obligate the remaining funds, to stop the LRA's Road Home compensation and incentives grants for homeowners in its current form. But

in making these allegations, plaintiffs here, just like the plaintiffs in *SUWA*, do not identify a circumscribed, discrete agency action that §§ 3608(d) and (e)(5) and § 5304(b)(2) require HUD to take. *Cf. Alliance to Save Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 9-10 (D.D.C. 2007) (finding that, because 33 U.S.C. § 1344(c) grants the EPA a discrete, discretionary power to veto Army Corps Clean Water Act permitting decisions, EPA's alleged failure to exercise that veto power was reviewable under the APA). Rather, plaintiffs' complaint makes only the vaguest allegations that, in continuing to oversee Louisiana's Road Home program, HUD has failed to affirmatively further its fair housing obligations under §§ 3608(d) and (e)(5) and § 5304(b)(2). Compl. ¶¶ 76-77. Accordingly, in the present case, as in *SUWA*, the statutes under which plaintiffs have filed suit are "mandatory as to the object to be achieved, but [they] leave[the agency] a great deal of discretion in deciding how to achieve it." *Id.* at 66. So much discretion, in fact, that HUD's actions are unreviewable by a court, and the APA does not provide a waiver of immunity in this instance. In sum, plaintiffs cannot maintain their claims that HUD violated its obligations under §§ 3608(d) and (e)(5) or § 5304(b)(2). Because APA relief would not be available here under APA § 706(1), these claims should be dismissed against HUD.

E. The Complaint Should Be Dismissed Because Plaintiffs Fail to State a Claim on Which Relief May Be Granted

1. Plaintiffs' Disparate Impact Against HUD Should Be Dismissed Because No Prohibited Discrimination Is Alleged

Count One, ¶¶ 74-75, alleges that defendants violated 42 U.S.C. § 3604(a), and 42 U.S.C. § 3605(a). But plaintiffs fail to plead facts that would establish a violation of these provisions. Section 3604(a) provides, in relevant part, that it is unlawful:

> To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or

> national origin.

42 U.S.C. § 3604(a). Section 3605 provides, in relevant part, that it is unlawful:

> for any person or other entity *whose business includes engaging in residential real estate transactions* to discriminate against any person in making available such a transaction, or in the terms of conditions of such transaction, because or race, color, religion, sex, handicap, familial statute, or national origin.

42 U.S.C. § 3605(a) (emphasis added). To establish a *prima facie* case of a violation of these provisions, plaintiffs must allege facts showing that HUD's actions produced a discriminatory effect against a protected class. *2922 Sherman Ave. Tenants' Ass'n v. DC*, 444 F.3d 673, 680 (D.C. Cir. 2006). *See, e.g., Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988) ("Under disparate impact analysis, as other circuits have recognized, a *prima facie* case is established by showing that the challenged practice of the defendant actually or predictably results in racial discrimination; in other words that it has a discriminatory effect."). *See also U.S. v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1975) (same). At the motion to dismiss stage, plaintiffs can establish a *prima facie* case of disparate impact by alleging "that a challenged housing practice or policy has caused a statistically significant disparate effect on a protected class." *Graoch Assoc. v. Louisville/Jefferson Cty. Metro Human Relations Comm.*, 508 F.3d 366, 390 (6th Cir. 2007).

Count One alleges that HUD's approval of the LRA's Road Home program disparately impacted African-Americans in violation of the FHA. *See* Compl. ¶¶ 74-75. However, plaintiffs fail to allege a *prima facie* case for disparate impact discrimination on the basis of race or color. Plaintiffs allege that "[t]he requirement that Road Home grant awards not exceed the pre-storm value of the home (where the pre-storm value is less than the cost of damage) has a discriminatory disparate impact on African Americans." Compl. ¶ 52. Plaintiffs further allege that "nearly 80% of homes owned by African Americans in New Orleans were valued at less than

$100,000, while only about 33% of homes owned by whites were valued at less than $100,000." *Id.* ¶ 54. Plaintiffs also allege that "approximately 93% of homes owned by African Americans in New Orleans were valued at less than $150,000, compared to 55% of homes owned by white homeowners." *Id.*

However, plaintiffs fail to allege that African American homeowners experience a disparate impact in the amount they allegedly received under the Road Home grant award as compared to white homeowners. Compl. *passim*. Although the program, to date, has served more 140,000 homeowners, plaintiffs fail to allege statistically-significant disparities in the amounts of the Road Home grant awards that they have received. Thus, plaintiffs fail to allege a violation of the FHA. *Cf. Mountain Side Mobile Estates P'ship v. HUD*, 56 F.3d 1243, 1253 (10th Cir. 1995) ("Although discriminatory effect is generally shown by statistical evidence, any statistical analysis must involve the appropriate comparables.").

Plaintiffs also allege that "comparable" homes have lower values in African American communities than in white communities. Compl. ¶ 53. However, plaintiffs do not allege any statistical disparity in support of this allegation. *Id. passim*. Nor do they allege that the appraisals for their home values are the result of different methods used for different races or different neighborhoods. *Id.* To the contrary, Louisiana allows homeowners to provide their own pre-storm appraisals or to provide a post-storm appraisal from a licensed and certified Louisiana appraiser setting out the property's pre-storm value. *See* http://www.road2la.org/homeowner/default.htm. Not surprisingly, plaintiffs have not alleged that any lower value of their homes is the result of HUD's actions in approving or overseeing the LRA's Road Home program. Thus, this allegation fails to allege a violation of the FHA against HUD.

Plaintiffs also allege that African American recipients of Road Home grants are more

likely than white grantees to have a gap between their rebuilding resources and the cost to rebuild. Compl. ¶¶ 56, 58. Again, plaintiffs fail to allege any statistical disparity to support this allegation. Compl. *passim*. Moreover, for the reasons just stated, plaintiffs' allegations belie the claim that this gap produces a disparate impact based on race. Nor do plaintiffs allege statistically-significant disparities in the awarding of the Additional Compensation Grants of up to $50,000 for low- and moderate-income homeowners, the Individual Mitigation Measures, or the Elevation Allowances to African American homeowners. *Id*.

Finally, plaintiffs fail to allege that HUD, as opposed to the LRA, violated § 3605. In order to state a *prima facie* claim under this section, plaintiffs must plead that they attempted to engage in real estate-related transactions, that defendant refused to transact business with them despite their qualifications, and that defendant continued to engage in that type of transaction with other parties with similar qualifications. *Mich. Protection & Advocacy Serv., Inc. v. Babin*, 18 F.3d 337 (6th Cir. 1994). Plaintiffs do not allege, nor could they allege, that HUD engaged in residential real estate transactions with anyone. *See* Compl. *passim*. Thus, plaintiffs fail to state a claim for relief under 42 U.S.C. § 3605 against HUD.

2. Plaintiffs' Remaining Claims Against HUD Should Be Dismissed

Count One, ¶ 76, and Count Two allege that HUD failed to affirmatively further fair housing in violation of 42 U.S.C. §§ 3608(d) and (e)(5) and in violation of 42 U.S.C. § 5304(b)(2). Compl. ¶¶ 76-77. However, plaintiffs fail to plead facts that allege HUD has violated these provisions.

As noted above, sections 3608(d) and (e)(5) requires HUD to "administer [its] programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of this subchapter" and to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further [its fair housing] policies."

42 U.S.C. §§ 3608(d) and (e)(5). By contrast, § 5304(b)(2) provides that a grant "shall be made only if the grantee certifies to the satisfaction of [HUD] that . . . the grantee will affirmatively further fair housing." *Id.* § 5304(b)(2). First, for the reasons set forth above in Section IV(D)(2), *supra*, plaintiffs do not allege that HUD failed to take a discrete action that either §§ 3608(d) and (e)(5) or § 5304(b)(2) required HUD to take. Compl. *passim*. *See McGrath v. HUD*, 722 F. Supp. 902, 908 (D. Mass. 1989) (Section 3608(e)(5) "does not mandate specific actions or remedial plans which HUD should undertake"). Accordingly, for the reasons set forth above, plaintiffs have failed to state a claim under Count One, ¶ 76, of the Complaint.

Second, as noted above, § 3608(d) and (e)(5) require HUD to affirmatively further fair housing. *Id.* Plaintiffs only allegations about HUD are that: (i) the LRA "proposed and developed" the Road Home program, "in consultation with HUD," (ii) HUD "approved the Road Home grant formula," and (iii) the LRA administers the Road Home program "subject to ongoing oversight and continuing approval of HUD." Compl. ¶¶ 49-51. Because, for the reasons set forth above in Section IV(D), *supra*, plaintiffs fail to state a claim that HUD violated any other provision of the FHA, plaintiffs have failed to make sufficient allegations that HUD failed to further fair housing. Plaintiffs have not alleged that HUD failed to consider the racial impact of the LRA's Road Home program. Compl. *passim*. *Cf. Pleune*, 765 F. Supp. at 47. Rather, the HCDA requires the grantee to certify that it will affirmatively further fair housing in order to obtain federal funds. 42 U.S.C. § 5304(b)(2). Plaintiffs do not allege that Louisiana failed to submit such a certification. Compl. *passim*. Accordingly, plaintiffs have failed to state a claim that HUD has violated § 3608(d) and (e)(5).

Third, plaintiffs have failed to allege that HUD violated § 5304(b)(2). As noted above, this section provides that a grant "shall be made only if the grantee certifies to the satisfaction of [HUD] that . . . the grantee will affirmatively further fair housing." *Id.* § 5304(b)(2). As just

explained, plaintiffs do not allege that the LRA failed to certify that it would affirmatively further fair housing. *See* Compl. *passim*.

In sum, plaintiffs fail to state a claim on which relief may be granted against HUD.

V. CONCLUSION

For the reasons set forth above, this Court should grant HUD's Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim Upon Which Relief May be Granted.

Dated: March 6, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2009, a copy of the foregoing document was filed electronically via the Court's ECF system, through which a notice of the filing will be sent to:

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/s/ James D. Todd, Jr.
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, *et al.*,	)	
Plaintiffs,	)	No. 1:08-cv-1938-HHK
v.	)	
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*,	)	
Defendants.	)	

DECLARATION OF JESSIE HANDFORTH KOME SUBMITTED IN SUPPORT OF DEFENDANT U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

I, Jessie Handforth Kome, hereby declare the following:

1. I am the Deputy Director, Office of Block Grant Assistance ("OBGA"), Office of Community Planning and Development ("CPD"), U.S. Department of Housing and Urban Development ("HUD"). I have held this position since February 2009. From August 2007 to February 2009, I was the Director, Disaster Recovery and Special Issues Division ("DRSI"), in the OBGA. In my DRSI capacity, my duties included general oversight responsibility for grants made from emergency supplemental appropriations of Community Development Block Grant ("CDBG") funds for recovery from certain Presidentially-declared disasters. Prior to this, I was a Community Planning and Development Specialist in DRSI. In that capacity, I was responsible for drafting program technical information and requirements, training grantees, and administering the reporting system for disaster recovery grants. I submit this declaration in support of Defendant HUD's Motion to Dismiss for Lack of Jurisdiction in the above-captioned action. I base this declaration on personal knowledge and on information obtained in my official

capacities as Director of the DRSI and as a Community Planning and Development Specialist at DRSI.

The Housing and Community Development Act of 1974

2. The Housing and Community Development Act of 1974 ("HCDA" or "Act"), as amended, 42 U.S.C. § 5301 *et seq.*, seeks to develop viable urban communities by providing decent housing, a suitable living environment, and expanding economic opportunities, principally for persons of low and moderate income. The statute authorizes HUD to make grants, known as Community Development Block Grants ("CDBG") to states, tribes, and local governments to carry out activities in accordance with provisions of the Act, and sets out 25 broad categories of activities for which grantees may use funds. The Act requires that not less than 70 percent of grant funds be used for the benefit of low- and moderate-income persons. The Act is a federal block grant statute, under which the day-to-day administration of the federal program, including the actual expenditure of federal funds, is delegated to state and local authorities.

3. The HCDA distributes funds appropriated by Congress through recipients outside the federal government. HUD's role is confined to ensuring that the state's interpretation of the statutory and regulatory requirements "are not plainly inconsistent with the Act." 24 C.F.R. § 570.480(c) (giving "maximum feasible deference" to a state's interpretation of these requirements).

4. To obtain federal funds, state or local authorities must develop a five-year consolidated plan that assesses housing and homeless needs, analyzes the states' or local authorities' housing markets, sets forth their strategic plans for meeting priority needs, and sets out action plans. The action plans, in turn, must include required certifications that the

applicants will comply with the requirements of the program. 24 C.F.R. § 570.485, *id.* Part 91, Subparts C & D.

5. HUD's regulations implementing the HCDA require grantees to certify that their projected use of funds "will give maximum feasible priority to activities . . .[(i)] of benefit to low- and moderate-income families, . . .[(ii) that seek] elimination of slums and blight, [or (iii) that seek] to meet other community development needs having a particular urgency because existing conditions pose a serious threat to health and welfare." 24 C.F.R. § 570.483. The regulations provide that an activity generally will be considered to meet the national objective of benefit to low and moderate income persons if: (i) the activity benefits an area that is at least 51 percent low and moderate income; (ii) the activity benefits a limited low-and moderate-income clientele, including services or facilities for the homeless, abused children, the elderly, or migrant farm workers; (iii) the activity provides or improves permanent housing to be occupied by a low- or moderate-income person; or (iv) the activity is designed to create permanent jobs where at least 51 percent of the jobs will be held by or made available to low- and moderate-income persons. *Id.*

6. A CDBG grantee is also responsible for meeting all program requirements. Each activity must be an eligible one as defined by the statute, meet a national objective, and have been through citizen participation as part of the action plan development and submission process. Grantees must be able to account for all grant funds, comply with all reporting requirements, perform environmental reviews, and meet all applicable relocation, fair housing, equal opportunity, and labor standards. 24 C.F.R. § 570.487-491.

7. After developing proposed plans, the applicants must publish the plans for citizen comment. 24 C.F.R. § 91.115; *id.* § 91.320. The applicants then submit the plan, summaries of citizen comments, and signed certifications to HUD. *Id; see also id.* § 91.325.

8. A grantee may request and receive technical assistance from HUD program staff at any time. HUD's technical assistance typically involves consultation with the grantee to determine the grantee's objectives and its proposed program designs. HUD then provides advice, training, or program models that will ensure the grantee will be able to comply with CDBG program requirements while carrying out its purposes and implementing its programs.

9. HUD's review of the applicant's plan is limited. 24 C.F.R. § 91.500. HUD has 45 days to review the plan, and the plan is deemed approved unless HUD notifies the jurisdiction within the 45-day period that the plan is disapproved. *Id.* § 91.500(a). HUD only may disapprove a plan if it is inconsistent with the purposes of the Act, is substantially incomplete, the certifications are not acceptable, or if HUD determines that the applicant has not complied with the CDBG requirements. *Id.* § 91.500(b). The regulations do not permit HUD to disapprove an application based on the grantee's choice of eligible activities. *Id.*

10. In order to ensure that CDBG funds are not misused, the HCDA authorizes HUD to audit the records of HCDA programs, and to recover improperly expended funds. HUD may take corrective actions ranging from issuing a warning letter to instituting collections procedures to recover improperly expended funds. 24 C.F.R. § 570.495. After reasonable notice and opportunity for a hearing, HUD may terminate, reduce, or limit the availability of payments to a grant recipient for failure to substantially comply with the provisions of the Act. 24 C.F.R. § 570.496(b), (d). The statute further authorizes the Department of Justice, upon a referral from HUD, to bring a civil action to recover misspent or misused CDBG funds. 24 C.F.R. § 570.496(c).

Pub. L. Nos. 109-148, 109-234, and 110-116

11. In response to the 2005 Hurricanes Katrina, Rita, and Wilma, Congress passed three special appropriations to provide disaster recovery CDBG funds to affected areas in five

states, including Louisiana. *See* Pub. L. No. 109-148, 119 Stat. 2779 (Dec. 30, 2005) (the "first appropriation"); Pub. L. No. 109-234, 120 Stat. 418 (June 15, 2006) (the "second appropriation"); and Pub. L. No. 110-116, 121 Stat. 1343 (Nov. 13, 2007) (the "third appropriation"). The first appropriation provided $11,500,000,000 in CDBG funds to the affected states, which Congress directed to "be administered through an entity . . . designated by . . . each State." Pub. L. 109-148. This appropriation required HUD to "waive, or specify alternative requirements for, any provision of any statute or regulation[, including the HCDA and its implementing regulations] that [HUD] administers in connection with the obligation by [HUD] or the use by the recipient of these funds or guarantees," except for requirements related to fair housing, nondiscrimination, labor standards, and the environment, "upon a request by the State that such waiver is required to facilitate the use of such funds or guarantees, and a finding by the Secretary that such waiver would not be inconsistent with the overall purpose of the statute, as modified." *Id.* The first appropriation also authorized HUD to "waive the requirement [of the HCDA] that activities benefit persons of low and moderate income, except that at least 50 percent of the funds made available under this heading must benefit primarily persons of low and moderate income unless [HUD] otherwise makes a finding of compelling need." *Id.* The appropriation required HUD to "publish in the Federal Register any waiver of any statute or regulation." *Id.* The appropriation also provided that it would not lapse. *Id.* (providing that the funds will "remain available until expended."). Finally, the appropriation required, prior to the obligation of these funds to each state, that the state submit a plan to HUD "detailing the proposed use of all funds, including criteria for eligibility and how the use of these funds will address long-term recovery and restoration of infrastructure." *Id.*

12. The second appropriation provided an additional $5,200,000,000 in CDBG funds to the affected states and authorized (although it did not require) HUD to make these same

statutory and regulatory waivers authorized by the first appropriation. Pub. L. No. 109-234. This appropriation earmarked $1,112,650,000 for affordable rental housing programs. *Id*. The remainder of the second appropriation was substantially identical to the first. The third appropriation provided an additional $3,000,000,000 "solely for the purpose of covering costs associated with otherwise uncompensated but eligible claims that were filed on or before July 31, 2007, under the Road Home program administered by the State in accordance with plans approved by the Secretary." Pub. L. No. 110-116.

HUD Waivers of CDBG Program Requirements and Louisiana's Action Plan for CDBG Disaster Recovery Funds

13. On February 13, 2006, HUD published a Federal Register notice implementing the requirements of the first appropriation. 71 Fed. Reg. 7666 (Feb. 13, 2006). HUD allocated $6,210,000,000 of the first appropriation to Louisiana. As directed by Congress in the first appropriation, HUD waived many standard certifications of the CDBG program, including the requirement that 70 percent of funds be used for activities that benefit low- and moderate-income persons, in order "to give grantees even greater flexibility to carry out recovery activities within the confines of the CDBG program national objectives." 71 Fed. Reg. at 7667. In their place, HUD substituted alternative certifications. Pursuant to the first appropriation, HUD required the states to certify that activities funded "be for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of the hurricanes." *Id*. at 7670. As also directed by the first appropriation, HUD required that, overall, at least 50 percent of disaster recovery grant funds be used for activities that principally benefit low- and moderate-income persons. *Id*. at 7667; *see also id*. at 7668. As further directed by the first appropriation, HUD still required the state to certify that it will affirmatively further fair housing, "which means that it will conduct an analysis to identify

impediments to fair housing choice within the state, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard." *Id*. at 7671. HUD did not waive the CDBG program's financial accountability requirements.

14. Louisiana submitted its first action plan in early 2006 and made all required alternative certifications at that time, including the certification that the state would affirmatively further fair housing. As is required by the CDBG program, the state already had produced a pre-storm Analysis and Impediments ("AI") to fair housing. HUD advised Louisiana to review its AI post-storm and make any updates the state deemed necessary. Louisiana later made these same certifications to obtain funds from the second and third appropriations.

Louisiana's Road Home Program and HUD's Role in Reviewing, Approving and Monitoring the Program

15. On May 12, 2006, Louisiana submitted Amendment 1 to its original action plan, known as the Road Home Program. The program consists of: (i) homeowner compensation and incentives programs; (ii) workforce and affordable rental housing programs; (iii) homeless housing programs; and, (iv) developer incentive programs. The Road Home program is administered by the State of Louisiana through the Louisiana Office of Community Development and the Louisiana Recovery Authority and is funded by HUD through the CDBG program. The State of Louisiana is responsible for the implementation, design, and administration of the Road Home program in conformance with the applicable CDBG program requirements set by HUD.

16. In designing the Road Home homeowner compensation and incentives program, Louisiana requested, and HUD provided, some technical assistance. The state evaluated the relative costs of implementing a housing rehabilitation and reconstruction program as compared to implementing a homeowner compensation and incentives program. State staff called HUD

staff several times a week throughout 2006 regarding the details of the homeowner program design. HUD's guidance focused on how the activity could meet CDBG national objectives and how the state could manage the program to account for all program funds while meeting the disaster recovery purpose of the supplemental appropriations. HUD did not make *any* of the state's program decisions or set *any* funding strategies in the Road Home Program. Most of HUD's technical assistance was provided by telephone.

17. Part of the technical assistance HUD provided to state staff concerned sound financial management principles. Financial management principles guide the grantee in the design of a program that provides the smallest amount of resources necessary to achieve a desired result. HUD explained to state staff that, for example, the compensation and incentives program launched by the state of New York following September 11, 2001, provided no more than $14,500 to any household and achieved success in meeting its goals. The city of Grand Forks, North Dakota, provided $5,000 loan payments as incentives to homeowners who remained in the city for disaster recovery after floods in 1997 caused significant damage to the city and its residences.

18. As it developed the Road Home program, Louisiana ultimately chose to provide compensation and incentive grants to eligible homeowners affected by Hurricanes Rita or Katrina of up to $150,000. Louisiana decided to base the amount of the compensation and incentives grant on the lower of the pre-storm, fair-market value of the home, or the cost to repair the home.

19. In developing the Road Home program, the state considered basing the compensation and incentives payment amounts on the tax valuations of homes. As part of the technical assistance HUD provided to the state, HUD stated its concern about using tax values as part of the basis for the calculation of the homeowner payment amount because the tax valuation

system(s) in Louisiana, and in New Orleans Parish in particular, were unreliable, resulting in vastly different values for similar homes, with no rational basis. The state ultimately chose not to use tax values as a basis for providing compensation and incentives grants.

20. Although the state chose to base the calculation of the homeowner compensation and incentives grant on either the pre-storm property value or the cost of storm damage, compensation and incentives under the Road Home program are not actually for storm damage. The Road Home program provides compensation and incentives for the homeowner's agreement to meet certain recovery conditions, such as remaining in a certain geographic area, maintaining flood insurance on a dwelling, and meeting modern building codes within a prescribed period of time.

21. Louisiana also provides Additional Compensation Grants of up to $50,000 for certain homeowners. Total compensation and incentive grants are still capped at $150,000. Louisiana offers Additional Compensation and incentives Grant to applicants with household incomes 80 percent and below the median income in the parish where the house was located. In addition to the Additional Compensation Grants, Louisiana provides compensation and incentives grants to homeowners via Individual Mitigation Measures and Elevation Incentives. Individual Mitigation Measures provide incentive grants to homeowners to install home "hardening" features that will protect homes from future storm damage, including storm shutters and roof tie downs. Elevation Incentives are grants to elevate site-built homes and mobile homes to meet FEMA's current Advisory Base Flood Elevation or Base Flood Elevation levels to protect against future floods.

22. As part of the technical assistance HUD provided to Louisiana, HUD reviewed the Road Home program's ability to help Louisiana meet the overall benefit requirements of the special appropriations. As noted above, the special appropriations' overall benefit requirement is

that 50 percent of the state's disaster recovery CDBG expenditures will support activities that benefit low- and moderate-income persons. To meet that requirement, Louisiana can count homeowner payments to low- and moderate-income households and rental projects that house low- and moderate-income tenants toward the overall requirement, but it cannot count payments to above-income homeowners or for above-income rental projects. HUD determined that Louisiana's inclusion of the Additional Compensation Grant, Individual Mitigation Measures, and Elevation Allowances could help the state meet the overall benefit requirement.

23. On June 14, 2006, HUD published a Federal Register notice granting additional waivers to Louisiana and approving Louisiana's Road Home program. 71 Fed. Reg. 34451 (June 14, 2006). Finding that additional waivers and alternative requirements are not inconsistent with the overall purpose of the HCDA, HUD waived statutory and regulatory requirements to allow Louisiana to provide compensation to homeowners whose homes were damaged, "if the homeowners agree to meet the stipulations of the published program design." *Id*. HUD also allowed Louisiana to "offer disaster recovery or mitigation housing incentives to promote housing development or resettlement in particular geographic areas." *Id*. at 34453. In addition, HUD approved Louisiana's use of disaster recovery CDBG funds for, among other things, (i) government buildings; (ii) special economic development job-retention activities; (iii) down payment assistance for new construction; (iv) support of the tourism industry; (v) relocation assistance; and (vi) the one-for-one replacement requirement of housing units damaged by disaster. *Id*. at 34452-53.

24. On March 6, 2007, HUD provided additional waivers that allowed Louisiana to use CDBG disaster recovery funds for, among other things, (i) research, commercialization, and educational enhancement; (ii) operating subsidies for affordable rental housing; and (iii) rental and utility payment assistance. 72 Fed. Reg. 10014 (Mar. 6, 2007).

25. To date, HUD has obligated $12,400,000,000 to Louisiana to administer the Road Home program. Of the remaining funds that Congress has appropriated for disaster recovery, HUD has not yet obligated $1,000,000,000 to Louisiana. In addition to its homeowner compensation and incentives program, Louisiana has devoted approximately $1,540,000,000 CDBG disaster recovery funds to affordable rental housing programs. Rental housing assistance programs funded by the grant include the Low-Income Housing Tax Credit ("LIHTC") Piggyback Program, Gulf Opportunity Zone ("GO Zone") tax credits, public housing projects and developer incentives. Louisiana also has devoted funds for homeless shelters and homelessness cessation services.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge.

Dated: 03/04/2009

Signed: Jerald Hanchett Kome

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FOR THE DISTRICT OF COLUMBIA

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Defendants.	)	

ORDER GRANTING DEFENDANT U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S MOTION TO DISMISS

Before this Court is the motion to dismiss for lack of jurisdiction and for failure to state a claim on which relief can be granted of defendant, the U.S. Department of Housing and Urban Development ("HUD"). For the reasons set forth in HUD's statement of points and authorities submitted along with its motion, and the entire record herein, it is hereby ORDERED that HUD's Motion is GRANTED. It is FURTHER ORDERED that plaintiffs' complaint against HUD is DISMISSED for lack of jurisdiction.

Dated: _____

/s/ Henry H. Kennedy
HENRY H. KENNEDY
United States District Court Judge