**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**DEFENDANT U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S RESPONSE TO MOTION TO DISMISS AND MOTION TO TRANSFER BY DEFENDANT PAUL RAINWATER IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR, LOUISIANA RECOVERY AUTHORITY**

The motion to dismiss of defendant U.S. Department of Housing and Urban Development ("HUD") (Doc. No. 22) demonstrated that the limited waiver of sovereign immunity extended by Congress in § 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, would not apply in this case because Congress has provided plaintiffs with a fully adequate alternative remedy for their discrimination claims against HUD.[1] HUD demonstrated that plaintiffs could bring a cause of action directly against Defendant Paul Rainwater ("Rainwater"), in his official capacity as Executive Director of the Louisiana Recovery Authority ("LRA") with respect to plaintiffs' claims of race discrimination in the administration of Hurricane Katrina disaster recovery Community Development Block Grant ("CDBG") funds under 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.*, and directly against the State of Louisiana under Title VI of

[1] To be clear, HUD's motion to dismiss demonstrated that plaintiffs failed to allege a waiver of sovereign immunity by the United States in any form, and also argued that the APA would not provide a waiver of sovereign immunity in this instance. *See* HUD Mot. to Dismiss at 27-29, 29-39.

the Civil Rights Act of 1964, 42 U.S.C. § 2000d-7.

Defendant Rainwater's motion to dismiss challenges, on behalf of the LRA, plaintiffs ability to bring their race discrimination claims directly against the state agency and also challenges the ability of plaintiffs to seek judicial enforcement of the FHA and the HCDA against him under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). *See* Rainwater Mot. to Dismiss and Mot. to Transfer (Doc. No. 28-2). HUD, both on its own and through the Department of Justice, has authority to enforce Title VI, the FHA, and the HCDA to ensure compliance with their terms. 42 U.S.C. § 2000d-1; 42 U.S.C. § 3612; 42 U.S.C. § 5311. However, because of the inherent limitations on the litigation resources of the United States, HUD has an interest in ensuring that the non-discrimination requirements of Title VI, the FHA, and the HCDA can be enforced by private parties to the extent permitted by the statutes and the Constitution.

Rainwater's claim, on behalf of the LRA, that the Eleventh Amendment to the U.S. Constitution bars plaintiffs' suit because the LRA is the real party at interest, ignores both the applicability of Title VI of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000d, and the Louisiana state legislature's waiver of the LRA's immunity and consent to suit, at least in state court. *See* La. Rev. Stat. § 49:220.4. Title VI not only prohibits race discrimination by recipients of federal funds but also unambiguously waives a state's immunity from suit in federal court as a condition of accepting that financial assistance. Moreover, Congress has authorized a private cause of action under the FHA enforceable in state court. Because plaintiffs can bring suit directly against Louisiana in federal court to enforce Title VI, and because plaintiffs can bring suit directly against the LRA to enforce the FHA in state court, plaintiffs have an adequate remedy at law. Moreover, plaintiffs' ability to pursue claims under Title VI and the FHA provides an adequate remedy to any discrimination claims they may have under the HCDA.

Similarly meritless is Rainwater's claim that the Eleventh Amendment bars plaintiffs' suit against him in his official capacity as Executive Director of the LRA, despite the long-settled exception to this immunity established by *Ex parte Young*, 209 U.S. 123 (1908). It is well settled that *Ex parte Young* permits private parties to bring suit against state officials to require them to conform their conduct with federal law. Rainwater also errs in his contention that his use of federal disaster recovery CDBG funds under the HCDA implicate the "special sovereignty interests" recognized in *Coeur d'Alene Tribe of Idaho v. Idaho*, 521 U.S. 261 (1997). Courts have repeatedly found that the disbursal of federal funds consistent with applicable federal law does not implicate matters essential to state sovereignty.

Finally, this Court should not consider Rainwater's motion to transfer venue to the Middle District of Louisiana, unless and until it determines it has subject matter jurisdiction over plaintiffs' claims against HUD. If the court were to consider the motion, neither the private factors nor the public factors governing transfer motions support Rainwater's motion. Accordingly, Rainwater's motion to transfer should be denied.

## II. ARGUMENT

### A. The Administrative Procedure Act Would Not Waive Sovereign Immunity of the United States for Plaintiffs' Claims Against HUD Because There Are Other Adequate Remedies at Law

HUD's motion to dismiss demonstrated that suit against a federal agency 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 (emphasis added). *See* HUD Mot. to Dismiss at 32-35. The D.C. Circuit has repeatedly found that suit against a federal agency under the APA is precluded whenever suit could be maintained against an allegedly discriminating non-federal entity that has accepted federal funds. *See, e.g., Wash. Legal Found. v. Alexander*, 984 F.2d 483 (D.C. Cir. 1993) (finding no waiver of immunity under the APA in suit against the Department of

Education for Title VI violations because plaintiffs had an implied right of action against individual educational institutions); *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990) (no waiver of immunity under the APA in suit against the Departments of Education and Labor because implied rights of action existed against federally funded institutions).

In this case, plaintiffs bring race discrimination claims under the FHA and the HCDA against HUD for its "consultation," "approval," and "continuing oversight" of the LRA's Road Home program. Compl. ¶¶ 49-51, 74-77. However, contrary to Rainwater's assertion, plaintiffs can maintain these race discrimination claims under Title VI against the State of Louisiana in federal court, under the FHA directly against the LRA in state court, or, against Rainwater (or any other necessary Louisiana state officials), to the extent that plaintiffs raise valid claims for prospective injunctive relief,[2] under the doctrine of *Ex parte Young*. Thus, because Congress has provided plaintiffs with an adequate remedy against the State of Louisiana, the LRA, and Rainwater, the APA does not provide a waiver of immunity by the United States in this instance.

**1. The State of Louisiana Waived its Immunity from Suit in Federal Court Under Title VI Because it Accepted Federal Funds under the HCDA**

Contrary to Rainwater's contention, *see* Rainwater Mot. at 7, neither the state nor the LRA has immunity under the Eleventh Amendment in this instance. The Eleventh Amendment bars private suits against a State sued in its own name, absent a valid abrogation by Congress or waiver by the State. *See Alden v. Maine*, 527 U.S. 706, 755-756 (1999). "Although by its terms the Amendment applies only to suits against a State by citizens of another State," the Supreme Court has "extended the Amendment's applicability to suits by citizens against their own states."

[2] HUD emphasizes that it takes no position as to whether the claims alleged against Rainwater constitute valid claims for prospective injunctive relief.

*Univ. of Ala. v. Garrett*, 531 U.S. 356, 362 (2001). However, Congress may exercise its enforcement power under § 5 of the Fourteenth Amendment to abrogate a state's immunity without its consent, or a state may waive its immunity and consent to suit in federal court. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985).

One way that a state may waive its immunity and consent to suit is by accepting certain federal grants. Congress "may, in the exercise of its spending power, condition its grants of funds to the States upon their taking certain actions that Congress could not require them to take, and . . . acceptance of the funds entails an agreement to the actions." *Id*. at 686. *Accord South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). Nevertheless, Congress must exercise its waiver power explicitly: a congressional waiver provision is constitutional only if it manifests "a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 247.[3]

Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. It is beyond question that Title VI provides a private cause of action against race discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) ("private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages.); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 702 (1979) ("We have no doubt that Congress . . . understood Title VI as authorizing an implied private cause of action for victims of

[3] Although it is true that an effective waiver must be "knowing," accepting federal funds on a clear condition constitutes an objective manifestation of knowledge. As the Court said in *College Savings*, when the condition is explicit, "acceptance of the funds entails an agreement to the actions." *College Savings,* 527 U.S. at 686.

the prohibited discrimination.").

Moreover, Title VI further provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . Title VI of the Civil Rights Act of 1964 or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(1). Every circuit that has considered the question has held that the language of this provision of Title VI unambiguously conditions a state agency's acceptance of federal funds on its waiver of Eleventh Amendment immunity. *See, e.g., Barbour v. Wash. Metro. Area Trans. Auth.*, 374 F.3d. 1161, 1164 (D.C. Cir. 2004) ("the simple choice offered to states [is]: if they accept federal funds, they will lose their immunity."). Albeit in *dictum*, the Supreme Court has said so as well. *Lane v. Peňa*, 518 U.S. 187, 200 (1986) (declaring that "Congress responded to our decision in *Atascadero* by crafting an *unambiguous waiver* of the States' Eleventh Amendment immunity") (emphasis added).

In this case, Rainwater does not challenge the fact that Louisiana received federal financial assistance under the HCDA in the form of disaster recovery CDBG funds. *See* Rainwater Mot. at 6-7. The HCDA contains several non-discrimination provisions. For example, it requires grant recipients "to certify that the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 and the Fair Housing Act." 42 U.S.C. § 5304(b)(2). In addition, the act provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this chapter." *Id.* § 5309(a). By accepting federal financial assistance in the form of disaster recovery CDBG funds under the HCDA, the State of Louisiana has waived its immunity and has consented to suit in federal court by private plaintiffs for

violations of Title VI.

**2. Plaintiffs Can Maintain Their FHA Claims Directly Against the LRA**

Although Rainwater fails to acknowledge it, the Louisiana state legislature has expressly waived the immunity of the LRA from suit, at least in state court. The Louisiana State Constitution provides that "[t]he legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability." La. Const. Art. 12, § 10. In authorizing the LRA, the Louisiana legislature provided that the LRA "shall be a body corporate with power to *sue and be sued*." La. Rev. Stat. § 49:220.4(A)(1) (emphasis added). Louisiana state courts have made clear that the legislature's grant of authority to an entity such as the LRA to "sue and be sued," at least in state court, "amounts to a full Legislative waiver of governmental immunity from suit and liability effective and valid for all purposes." *Warfield v. Fink & McDaniel Plumbing & Heating*, 203 So.2d 827, 829 (La. App. 1967). *See also, e.g., Bd. of Com'rs of Port of New Orleans v. Splendour*, 273 So.2d 19, 25 (La. 1973) ("Since the legislature had granted the City of Shreveport the power to sue and be sued, there was a waiver of whatever immunity the city enjoyed from suit and liability."). Accordingly, the State of Louisiana has waived the immunity of the LRA and has consented to suit against it by private parties against the LRA, at least in state court.

Moreover, Congress has expressly authorized a private cause of action to enforce the FHA in either federal or state court. Specifically, the FHA provides that "an aggrieved person may commence a civil action in an appropriate United States district court *or State court* . . . to obtain appropriate relief with respect to such discriminatory housing practice or breach." 42 U.S.C. § 3613(a) (emphasis added). In light of the Louisiana legislature's waiver of the LRA's immunity and consent to suit, at least in state court, plaintiffs can, at the very least, maintain their

FHA claims, to the extent they are cognizable at all, directly against the LRA in state court.[4]

In addition, plaintiffs can use Title VI and the FHA to challenge the LRA's use of disaster recovery CDBG funds under the HCDA. *See Latinos Unidos De Chelsea En Accion v. HUD*, 799 F.2d 774, 794 (1st Cir. 1986) ("Title[] VI and [the FHA] may still be used to challenge any action of discrimination by recipients of HCDA funds."), even though § 5304 of HCDA may not provide private parties with a direct cause of action against grant recipients such as the LRA. *See id.* (finding that, although Congress's stated intention in the HCDA was to revitalize the nation's cities through increased housing and economic opportunities, "principally for persons of low and moderate income," the statute was not enacted for "especial benefit" of minorities in the sense required for finding a private right of action). *But see Montgomery Imp. Ass'n, Inc. v.HUD*, 645 F.2d 291, 297 (5th Cir. 1981) (finding private right of action to enforce non-discrimination provision of the HCDA against grant recipients).[5] Accordingly, plaintiffs' ability to bring their

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[4] Rainwater argues that the discriminatory denials of grant monies under the Road Home program cannot constitute a violation of the FHA because plaintiffs already owned their homes and were not "hindered in acquiring a dwelling." Rainwater Mot. at 30. Rainwater's claim that the Act does not cover post-acquisition discrimination is erroneous. The broad language of § 3604(a) of the FHA encompasses post-acquisition actions that prevent residents from using and occupying their dwellings and includes no restriction to offenses related to sales or rental transactions. *See* 42 U.S.C. § 3604(a). Courts in this circuit have recognized that the FHA prohibits discrimination that prevents residents from occupying the housing they have already acquired. *See, e.g., 2922 Sherman Ave. Tenants' Ass'n v. Dist. of Columbia*, 444 F.3d 673, 682 (D.C. Cir. 2006) (city's alleged targeting for closure of buildings in disproportionately Hispanic neighborhoods stated claim under 3604(a)); *Wai v. Allstate Ins. Co.*, 75 F. Supp. 2d 1, 6 (D.D.C. 1999) (alleged refusal to provide standard homeowners insurance at ordinary rates to housing provider who rented house to disabled persons states claim of making housing unavailable). We note also that Rainwater's reliance on *Clifton Terrace Assoc. v United Technologies Corp.,* 929 F.2d 714 (D.C. Cir. 1991), is misplaced because that case involved habitability rather than a denial of housing. *See id.* at 719.

To be clear, HUD's motion to dismiss demonstrated that the FHA does not provide a waiver of sovereign immunity by the United States and that plaintiffs failed to state a claim for relief under § 3604(a) for other reasons. *See* HUD Mot. to Dismiss at 28-29, 40-43.

[5] In any event, plaintiffs' sole claim for relief under the HCDA is for a "fail[ure] to administer the [CDBG] program in a manner that affirmatively furthers fair housing." Compl.

race discrimination claims under Title VI against Louisiana and under the FHA against the LRA provides an adequate remedy to their HCDA claims. *Latinos Unidos De Chelsea En Accion*, 799 F.2d at 794. In sum, plaintiffs' ability to maintain their race discrimination claims under Title VI directly against the State of Louisiana and under the FHA directly against the LRA provides an adequate remedy at law to both plaintiffs' FHA and HCDA claims against HUD. As a result, the APA would not provide a waiver of sovereign immunity for plaintiffs' claims against HUD in this instance.

**3. Eleventh Amendment Immunity Does Not Allow States to Violate Federal Law**

Contrary to Rainwater's suggestion, even if Louisiana had not waived its immunity from suit for claims brought under Title VI by accepting funds under the HCDA, and even if the Louisiana state legislature had not waived the LRA's immunity from suit for claims brought under the FHA, it would not mean that Rainwater, in his official capacity as Executive Director of the LRA, would be free to ignore the non-discrimination requirements of the FHA, or that if he did, private parties would not have a remedy against him in federal court. In *Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), the Supreme Court reaffirmed that Eleventh Amendment immunity does not authorize states to violate federal law. Rather, the Court held that even if "Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages . . . [it would] not mean that [private] persons [would]

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¶ 77 (citing 42 U.S.C. § 5304(b)(2)). This claim is identical to that alleged by the plaintiffs under the FHA: "Defendants have . . . failed to administer housing-related programs and activities in a manner that affirmatively furthers fair housing." Compl. ¶ 76 (citing 42 U.S.C. § 3608(d), (e)(5)). HUD's motion to dismiss demonstrated that these claims against HUD are not reviewable because they do not identify a circumscribed, discrete agency action that HUD is required to take. HUD's Motion to Dismiss at 36-40 (citing *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)). Accordingly, the possibility that the HCDA claim may not be enforceable against the LRA would not mean that plaintiffs can maintain this claim against HUD.

have no federal recourse against discrimination." *Id.* at 374 n.9; *see also Alden*, 527 U.S. at 754-755 ("The constitutional privilege of a State to assert its sovereign immunity . . . does not confer upon the State a concomitant right to disregard the Constitution or valid federal law.").

**a. Rainwater Must Conform His Conduct with the Requirements of the FHA and the HCDA under the Doctrine of *Ex parte Young***

To reconcile these very principles — that States have Eleventh Amendment immunity from many private suits, but that they are still bound by federal law — the Supreme Court adopted the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *See Alden*, 527 U.S. at 756. In *Ex parte Young*, the Court held that, when a state official acts in violation of the Constitution or federal law (which the Constitution's Supremacy Clause makes the "supreme Law of the Land"), he is deemed to be acting *ultra vires* and is no longer entitled to the state's immunity from suit. More recently, the Court has unanimously reiterated that *Ex parte Young* permits suits against state officials in their official capacities as long as the "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. v. Pub. Serv. Com'n of Md.*, 535 U.S. 635, 646 (2002). *See also Edelman v. Jordan*, 415 U.S. 651, 664, 667-668 (1974); *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). By limiting relief to prospective injunctions against officials, the doctrine of *Ex parte Young* avoids courts entering judgments directly against the state but, at the same time, prevents the state (through its officials) from continuing illegal action.

In this case, HUD takes no position as to whether the plaintiffs have stated a claim against Rainwater for prospective injunctive relief under the FHA or the HCDA. To the extent that the plaintiffs have met this requirement, however, Rainwater's contention that *Ex parte Young* does not apply is without merit. Rainwater claims that plaintiffs acknowledge that "the LRA, and not Paul Rainwater in his official capacity as Executive Director of the LRA[,] was responsible for

. . . the Road Home . . . grant formula." Rainwater Mot. at 11. He further claims that the Louisiana statute authorizing the LRA "provides that the LRA, not its Executive Director, has the authority to establish 'a clear and effective process for the implementation of action plans for the CDBG.'" Rainwater Mot. at 5-6 (citing La. Rev. Stat. § 49:220.5). But that same statute mandates that "[t]he executive director shall have the . . . power[] . . . to discharge *all* operational, administrative and executive functions of the [LRA]." La. Rev. Stat. § 49:220.5(D) (emphasis added). Because Louisiana state law makes Rainwater responsible for "all . . . functions" of the LRA, the doctrine of *Ex Parte Young* permits suit against him to the extent those actions constitute an ongoing violation of federal law.

Rainwater further attempts to disclaim responsibility for the Road Home program by alleging that the actions of the LRA pass through "multiple layers of review" beyond the agency, including an oversight board and the state legislature itself. Rainwater Mot. at 6-7. However, the federal special appropriations at issue in this case conditioned receipts of the disaster recovery CDBG funds on each governor's designation of an entity that the funds would be "administered through." Pub. L. 109-148. The Governor of Louisiana designated the LRA to be that entity. *See* La. Exec. Order KBB 2005-63 (Oct. 17, 2005). Because the LRA has been designated as the entity responsible for administering the CDBG funds, and because Louisiana state law gives Rainwater power over the administrative functions of the LRA, the suit against Rainwater falls squarely within the *Ex parte Young* exception to Eleventh Amendment immunity, to the extent the plaintiffs' request for relief is properly characterized as one for prospective injunctive relief for an ongoing violation of federal law. *Accord Verizon Md.*, 535 U.S. at 646.

Even if Rainwater were correct that he alone does not control the use of disaster recovery CDBG funds or the Road Home program at issue in this case, it would not mean, as Rainwater suggests, that *Ex parte Young* is inapplicable. Rainwater Mot. at 11. Rather, it would mean only

that, in order to ensure compliance with the requirements of the FHA, plaintiffs would have to bring suit against additional Louisiana state officials in their official capacities under the doctrine of *Ex parte Young*.

**b. *Coeur d'Alene Tribe of Idaho v. Idaho* Does Not Apply**

Rainwater contends that the receipt and disbursal of federal disaster recovery funds under the HCDA implicates special sovereignty interests of the state, and therefore invokes the exception to the *Ex parte Young* doctrine that the Supreme Court articulated in *Coeur d'Alene Tribe of Idaho v. Idaho*, 521 U.S. 261 (1997). *See* Rainwater Mot. at 16-17. However, this assertion ignores the narrow limits of *Coeur d'Alene* and runs contrary to the weight of circuit court precedent declining to extend *Coeur d'Alene* to cases concerning the administration of federally funded programs.

In *Coeur d'Alene*, a plurality of the Court found that in the "particular and special circumstances" of the case, the sovereign interests of the state were so pressing as to permit an exception to *Ex parte Young*. *Coeur d'Alene*, 521 U.S. at 287 (1997). These interests were sufficiently pressing because the dispute concerned Idaho's control of its submerged lands in the face of a suit that was the "functional equivalent" of a quiet title action. *Id.* at 281. Five years later, the Court confirmed the narrow reach of *Coeur d'Alene* in *Verizon Md.*, 535 U.S. at 646. In *Verizon*, a unanimous Court did not undertake any inquiry into whether the suit at hand might implicate special state sovereignty concerns. The Court relied instead on the concurrence and dissent in *Coeur d'Alene* in holding that, to determine whether *Ex parte Young* applies, "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" *Id*. at 646 (quoting *Coeur d'Alene*, 521 US at 296 (O'Connor, J., concurring), and citing *id.* at 288-89 (Souter, J., dissenting)). Similarly, the D.C. Circuit has declined to "extend *Coeur d'Alene*

beyond its "'particular and special circumstance,' which involved the protection of a State's land." *Vann v. Kempthorne*, 534 F.3d 741, 756 (D.C. Cir. 2008) (quoting *Coeur d'Alene*, 521 U.S. at 287). *Accord Tarrant Regional Water District v. Seven Oaks*, 545 F.3d 906, 912 (10th Cir. 2008) (finding no Eleventh Amendment bar to a suit concerning a state's right to use and sell surface waters because the Supreme Court "limited the reach of *Coeur d'Alene*" in *Verizon Md.*). Accordingly, the narrow reach of *Coeur d'Alene* does not encompass the suit against Rainwater in this instance, and *Ex parte Young* should apply to the extent the plaintiffs allege a valid claim for prospective injunctive relief.

Rainwater cites only a single case to support his claim that *Coeur d'Alene* applies. Rainwater Mot. at 17 (citing *Barton v. Summers*, 293 F.3d 944 (6th Cir. 2002)). In that case, the Sixth Circuit found that *Coeur d'Alene* would apply to a suit by Medicaid recipients to intercept tobacco settlement money due to Kentucky and Tennessee. *Barton* 293 F.3d at 951. However, the court rested its decision in large part on Congress's explicit mandate that " the states are specifically allowed to allocate the [settlement] proceeds as they see fit." *Id.* By contrast, Congress has given no such blanket discretion to the states in conjunction with the disaster recovery CDBG funds at issue in this case, but has instead delineated the eligible activities and other requirements for use of the funds. Indeed, unlike the tobacco funds at issue in *Barton*, Rainwater cannot dispute that the funds at issue in this case come directly from the Federal treasury, pursuant to the non-discrimination requirements of the HCDA, rather than from the proceeds of a settlement brought by the states against private companies.[6]

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[6] Of the eight other circuits addressing near-identical challenges to the Medicaid tobacco settlement, none has found *Coeur d'Alene* applicable. *See Cardenas v. Anzai*, 311 F.3d 929 (9th Cir. 2002); *Strawser v. Atkins*, 290 F.3d 720 (4th Cir. 2002); *Greenless v. Almond*, 277 F.3d 601 (1st Cir. 2002); *Harris v. Owens*, 264 F.3d 1282 (10th Cir. 2001); *Watson v. Texas*, 261 F.3d 601 (5th Cir. 2001); *McClendon v. Georgia Dep't of Cmty. Health*, 261 F.3d. 1252 (11th Cir. 2001); *Tyler v. Douglas*, 280 F.3d 116 (2d Cir. 2001); *Floyd v. Thompson*, 227 F.3d 1029 (7th Cir.

Indeed, courts have consistently found that no special sovereignty interests are at stake in an *Ex parte Young* action, like the one at hand, seeking to require state officials to follow the requirements of federal law. *See, e.g., Fla. Ass'n of Rehab. Facilities v. Fla. Dep't of Health & Rehab. Servs*., 225 F.3d 1208, 1218-19 (11th Cir. 2000) (finding "no important sovereignty interests" in "a suit ... seeking to enforce compliance with the federal program under which [the state] ha[s] accepted funds."); *Marie O. v. Edgar*, 131 F.3d 610, 617 & n.13 (7th Cir. 1997) (permitting a *Young*-based suit for provision of early intervention services required under the Individuals with Disabilities Education Act). In the Medicaid context, the Fourth, Ninth, and Eleventh Circuits have all permitted such suits even when the outcome had the potential to increase state expenses. *Antrican v. Odom*, 290 F.3d 178, 189 (4th Cir. 2004) (finding no Eleventh Amendment bar to a suit against state officials alleging inadequacies in the provision of Medicaid dental services); *Children's Hosp. & Health Ctr. v. Belshe*, 188 F.3d 1090, 1095 (9th Cir. 1999) (finding a *Young* exception for a challenge to Medicaid reimbursement rates); *Doe v. Chiles*, 136 F.3d 709, 719-20 (11th Cir. 1998) (permitting a *Young* action for "reasonable promptness" under the Medicaid Act). The weight of precedent, then, dictates that the *Coeur d'Alene* exception does not apply in this matter.

Accordingly, because plaintiffs can maintain suit under the doctrine of *Ex parte Young* against Rainwater (and any other Louisiana State officials who administer the disaster recovery

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2000). The majority of the circuits resolved these challenges on other grounds, but the two circuits that did consider *Ex parte Young* held that it should apply and explicitly found that *Coeur d'Alene* was not controlling. *Cardenas*, 311 F.3d at 938 ("We also reject the defendants' efforts to bring the plaintiffs' claims within the *Coeur d'Alene.*"); *Harris*, 264 F.3d at 1293 ("the Eleventh Amendment does not 'extend to every situation where a state property interest is at issue;' *Coeur d'Alene* represents an 'extreme and unusual case.'") (quoting *Elephant Butte*, 160 F.3d 602, 612 (10th Cir. 1998)). In light of the D.C. Circuit's finding in *Vann v. Kempthorne* concerning the narrow reach of *Coeur d'Alene*, this Court should adopt the reasoning of the *Cardenas* and *Harris* courts and reject that of the Sixth Circuit in *Barton*.

CDBG funds and the Road Home program at issue in this case), plaintiffs have an adequate remedy at law. Here again, the existence of an adequate alternative remedy available to plaintiffs means that the APA would not provide a waiver of sovereign immunity by the United States for plaintiffs' claims against HUD.

**B. Rainwater's Motion to Transfer Is Without Merit**

Rainwater errs when he asserts that this suit should be transferred to the Middle or Eastern District of Louisiana, and that this court can consider such a transfer "at any time." Rainwater Mot. at 38. In fact, a court generally cannot address a motion to transfer until it has established its subject-matter jurisdiction, which is a "fundamentally preliminary" inquiry. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979). Only after this court has determined whether plaintiffs have standing and whether they have overcome the sovereign immunity of defendants HUD and Rainwater can it reach the issue of venue. At that point, if this court has not dismissed the suit against HUD, it should find that transfer under Section 1404(a) is inappropriate. The plaintiff's choice of forum deserves "considerable weight," *Pain v. United Techs. Corp.*, 637 F.2d 775, 783 (D.C. Cir. 1980), and the private and public factors relevant in a transfer determination weigh against disturbing plaintiff's choice to file this suit in the District of Columbia.

**1. This Court Should Determine Whether It Has Subject Matter Jurisdiction Over Plaintiffs' Claims Against HUD Before It Considers Rainwater's Motion to Transfer**

Contrary to Rainwater's contention, Rainwater Mot. at 38, it would not be appropriate for this Court to consider his transfer motion before determining its subject-matter jurisdiction. As noted above, the Supreme Court has long recognized that the issue of subject-matter jurisdiction is "fundamentally preliminary." *Leroy*, 443 U.S. at 180. Courts consistently refuse to consider transfer motions before resolving questions of subject-matter jurisdiction. *See, e.g.*,

*DiPilato v. Commonwealth Ass'n of School Administrators, Local 502*, 588 F. Supp. 2d 631, 634 (E.D. Pa. 2008) (finding that because "no federal question jurisdiction exists . . . this court lacks the power to transfer this case"); *Marotta Gund Budd & Dzera LLC v. Costa*, 340 B.R. 661, 663 n.2 (D.N.H. 2006) ("Transfer under § 1404(a) is possible only if venue is proper in the original forum and federal jurisdiction existed there. If subject-matter jurisdiction is lacking, there is no power to do anything with the case except dismiss") (quoting 15 Charles A. Wright, *et al.*, Fed. Practice and Procedure § 3844 (2005)). *Accord Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988) ("If jurisdiction is lacking at the outset, the district court has "no power to do anything with the case except dismiss.") (quoting 15 Fed. Practice and Procedure § 3844); *Atlantic Ship Rigging Co. v. McLellan*, 288 F.2d 589, 591 (3d Cir. 1961) ("Where, as here, the court lacks jurisdiction over the subject-matter, [a defect that] precludes it from acting at all, a fortiori a court lacks power to transfer."); *O'Quinn v. CNH America, LLC,* 457 F. Supp. 2d 678, 683 n.7 (E.D. Va. 2006) (declining to consider motion to transfer because court found it lacked subject-matter jurisdiction).

The Supreme Court's recent decision in *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp*, 549 U.S. 422 (2007), is not to the contrary. The *Sinochem* Court reiterated that when "a court can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course [is] to dismiss on that ground." *Id.* at 436. In *Sinochem*, however, jurisdictional questions posed an exceptional burden because "the district court's subject-matter jurisdiction presented an issue of first impression" and discovery concerning personal jurisdiction would have been both expensive and time consuming. *Id.* at 435. In this limited circumstance, the Court found that a preliminary dismissal on the grounds of *forum non conveniens* was appropriate without consideration of jurisdiction because such an approach clearly represented "the less burdensome course." *Id.* at 436. The Court emphasized, however, that "[i]n the mine

run of cases jurisdiction 'will involve no arduous inquiry' and both judicial economy and the consideration ordinarily accorded the plaintiff's choice of forum 'should impel the federal court to dispose of [those] issue[s] first.'" *Id.* at 436 (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587-88 (1999)).

Here, both as a matter of law and practicality, this court should first determine whether it has subject-matter jurisdiction over plaintiffs' claims against HUD before considering the motion to transfer. This matter falls squarely within the "mine run of cases" in which establishing jurisdiction first will represent the "less burdensome course." *Sinochem*, 549 U.S. at 436. No further discovery is required for the court to assess whether it has subject-matter jurisdiction over plaintiffs' claims against HUD. In contrast, considering Rainwater's motion to transfer first would interfere both with "judicial economy and the consideration ordinarily afforded plaintiff's choice of forum." *Id.* Plaintiffs' decision to file this complaint in the District of Columbia was almost certainly prompted in part by the recognition that HUD's offices are in the District of Columbia and that all of the challenged HUD actions occurred here. If, however, HUD is not an appropriate party to this suit because subject-matter jurisdiction is lacking, then plaintiffs' interest in this court hearing the suit may be diminished. Therefore, a determination of subject-matter jurisdiction is a necessary precursor to an accurate evaluation of the motion to transfer.

Indeed, while Rainwater notes that in this district one court has ordered a transfer before assessing subject-matter jurisdiction, that court was prompted to do so by "adjudicative efficiency" concerns that are not present here. *See* Rainwater Mot. at 38 (citing *Aftab v. Gonzalez*, 597 F. Supp. 2d 76 (D.D.C. 2009)). In *Aftab*, the court found that venue in the District of Columbia was appropriate because federal officials had been named as defendants. However, unlike in the matter at hand, the alleged involvement of the officials located in the District of Columbia was so "attenuated and insignificant," that even if the officials were proper parties to

the suit, their presence presented no obstacle to a transfer to the alternate venue. *Id.* at 82. In the present case, by contrast, plaintiffs challenge HUD's consultation, approval, and continuing oversight of Louisiana's Road Home program. Compl. ¶¶ 49-51. To the extent plaintiffs' claims against HUD are cognizable, the official actions are not obviously "attenuated" or "insignificant" to the suit. Thus, the court must resolve whether HUD is an appropriate party before it can properly evaluate the motion to transfer.[7]

**2. If HUD is to Remain in this Suit, Transfer Is Not Appropriate**

Even if the court determines that it has jurisdiction over plaintiffs' claims against HUD, transfer to another venue is inappropriate. The statute authorizing motions to transfer permits a court to transfer a suit to another district where the action could have been brought if such a transfer accommodates "the convenience of parties and witnesses" and is "in the interest of justice." 28 U.S.C. §1404(a). The moving party has the burden of establishing that transfer is proper under this statute. *Trout Unlimited v. Dep't of Agric.*, 944 F. Supp. 13, 16 (D.D.C. 1996). Rainwater has not met this burden.

Before ordering transfer to another district in which venue is proper, a district court "must weigh several private and public interest factors to determine whether transfer would, indeed, be 'in the interest of justice.'" *Elemary v. Holzmann*, 533 F. Supp. 2d 144, 149 (D.D.C. 2008). The private interest factors that must be weighed include:

> (1) the plaintiffs choice of forum, unless the balance of convenience is strongly in favor of the defendants; (2) the defendants' choice of forum; (3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses, but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and (6) the ease of access to sources of proof.

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[7] If, however, this court determines that subject-matter jurisdiction with respect to HUD is improper and dismisses HUD from the suit, HUD takes no position on whether the transfer motion should be approved.

*Otay Mesa Property, L.P. v. U.S. Dep't of Interior*, 584 F. Supp. 2d 122, 124-25 (D.D.C. 2008). In the present case, none of these factors weigh in favor of transfer.

The first factor, the plaintiffs' choice of forum, strongly supports retaining this suit in the District of Columbia. The D.C. Circuit has expressed a "strong presumption against disturbing plaintiffs' initial forum choice." *Pain v. United Techs. Corp*, 637 F.2d 775, 784 (D.C. Cir. 1980). Rainwater errs in his contention that in this case, plaintiffs' "choice of forum deserves little deference" because plaintiffs supposedly lack sufficient connection to the District of Columbia. Rainwater ignores that the National Fair Housing Alliance, one of the the associational plaintiffs who brings this action, is headquartered in Washington, D.C. Rainwater also errs in his contention that the plaintiffs' choice of forum is entitled to less deference because "most of the relevant events occurred elsewhere." Rainwater Mot. at 42. To the extent plaintiffs' claims against HUD are cognizable, the events relevant to those claims occurred almost exclusively within the District of Columbia. HUD's "consultation," "approval," and "continuing oversight" occurred and occurs in Washington, D.C. HUD Mot. to Dismiss at 13-14.

For the same reason, Rainwater errs in his suggestion that the D.C. Circuit's warnings in *Cameron v. Thornburgh*, 983 F.2d 253, 256 (D.C. Cir. 1993), apply here. In that case, the court cautioned that district courts should "guard against the danger that . . . . [b]y naming high government officials as defendants, a plaintiff could bring suit here that properly should be pursued elsewhere." *Id.* But in *Cameron*, the court demonstrated that its true concern was frivolous suits against high officials: it not only transferred the case, but dismissed the action against the federal officials whose presence in the action had justified venue in the District of Columbia. *Id.* at 257. As HUD's motion to dismiss demonstrated, dismissal of plaintiffs' claims against HUD in the proper course of action here. *See* HUD Mot. to Dismiss *passim*. But to the

extent the Court determines that it has subject matter jurisdiction over plaintiffs' claims against HUD, the events material to those claims occurred in the District of Columbia and the plaintiffs' choice to lodge suit here deserves "considerable . . . weight."[8] *Pain*, 637 F.2d at 783. Indeed, another court in this district has found that even when "the nexus between the present controversy and the [proposed alternate venue] is marginally stronger than the nexus between the controversy and the District of Columbia," and even when plaintiff's choice is accorded diminished deference, this decreased deference is still enough to "tip[] the balance in [the plaintiffs'] favor." *Otay Mesa*, 584 F. Supp. 2d at 125. When, as in this case, the nexus between the controversy and the District of Columbia is itself strong, and and the deference is undiminished, the balance should be decidedly in favor of respecting plaintiffs' chosen venue.

The other private factors do not serve to shift this balance. It is true that Rainwater supports a motion to transfer, but HUD opposes such a motion. Thus, the second factor – the defendants' choice of forum – does not favor Rainwater's motion. The third factor – the location where the claims arose – similarly fails to support a transfer. Although Rainwater argues that claims against him arose in the Middle District of Louisiana, the claims against HUD, to the extent they are even cognizable, arose in the District of Columbia. And while Rainwater has claimed that the fourth factor, the convenience of the parties, weighs in his favor, Rainwater Mot. at 42-43, the plaintiffs clearly view Washington, D.C. as the more convenient forum. HUD would also be inconvenienced by a transfer to Louisiana because HUD's record of decision making is located in the District of Columbia.

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[8] Rainwater's citation to *Al-Ahmed v. Chertoff*, 564 F. Supp. 2d 16 (D.D.C. 2008), a recent district case approving a transfer motion in part because of the heightened scrutiny of venue suggested by *Cameron*, is inapposite. The *Al-Ahmed* Court specifically found that the challenged federal actions – the adjudications of the plaintiff's immigration applications – would occur in the local immigration offices, not, as in the matter at hand, in the agency headquarters located in the District of Columbia. *Id.* at 18.

The last two private factors, the "convenience to the witnesses" and the "ease of access to sources of proof," also weigh against transferring this case to the Middle District of Louisiana. Plaintiffs have suggested that their case against HUD is not one to be judged solely on the administrative record, a contention HUD strongly disputes. But if this were the case, all key HUD witnesses and documents are located in the District of Columbia. To the extent, though, that this matter will be tried solely on the administrative record, that record is located in Washington, D.C. Courts have found that in a case involving review of an agency action "the location of the administrative record . . . . carries some weight." *Sierra Club v. Flowers*, 276 F. Supp. 2d 62, 68 (D.D.C. 2003). Thus, none of the private interest factors act to displace the "considerable . . . weight" given to the plaintiffs' choice of venue. *Pain*, 637 F.2d at 783.

Nor do the public interest factors favor a transfer. Two of the public interest factors that courts typically consider – the familiarity of each district with the relevant laws, and the relative congestion of the districts' calendars, *Trout Unlimited*, 944 F. Supp. at 16 – are irrelevant here. All federal courts are presumed to have familiarity with federal laws, *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175 (D.C. Cir. 1987), and the relative congestion of the courts' dockets is not decisive. Rainwater therefore relies primarily on the third public interest factor: the interest in deciding local controversies at home. Rainwater Mot. at 43-44. But many of the considerations courts have identified as significant in determining whether a controversy is local in nature counsel against such a determination in this case. These factors include:

> where the challenged decision was made; whether the decision directly affected the citizens of the transferee state; the location of the controversy; whether the controversy involved issues of state law, whether the controversy has some national significance; and whether there was personal involvement by a District of Columbia official.

*Otay Mesa*, 584 F. Supp. 2d at 126. While it is true that the decisions in the matter at hand will

directly affect the citizens of Louisiana, the challenged HUD decisions were made in the District of Columbia, and the claims all charge violations of federal, rather than state, law. Moreover, if HUD remains a defendant, the controversy – involving what constitutes discriminatory oversight and administration of federal housing grant programs – could significantly affect HUD's administration of the CDBG program in the future. The local interests in this case, then, are not strong enough to outweigh the private interests and the customary deference afforded to the plaintiffs' choice of forum. *See id.* at 126-28 (finding that local interests did not support transferring a case concerning the protection of a San Diego endangered fairy shrimp habitat from the District of Columbia because federal government actors, federal law, and national interests were involved).

In sum, Rainwater has not met his burden of proving that a transfer of this case to the Middle or Eastern District of Louisiana will accommodate "the convenience of parties and witnesses." 28 U.S.C. § 1404(a). Nor has he demonstrated that such a transfer is "in the interest of justice." *Id*. If the HUD remains a party to the suit, then both convenience and justice are best served by hearing the case in the District of Columbia.

## III. CONCLUSION

For the reasons set forth above, this Court should deny the Motion to Dismiss and Motion to Transfer of defendant Rainwater.

Dated: June 5, 2009

Respectfully submitted,

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[9] Colleen Roh, a Summer Legal Intern at the Department of Justice, contributed substantially to the drafting of this brief.

**CERTIFICATE OF SERVICE**

I hereby certify that on June 5, 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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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| 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. | ) | |

**ORDER DENYING MOTION TO DISMISS AND MOTION TO TRANSFER BY DEFENDANT PAUL RAINWATER, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR, LOUISIANA RECOVERY AUTHORITY**

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 and motion to transfer of defendant, Paul Rainwater, in his official capacity as Executive Director of the Louisiana Recovery Authority. For the reasons set forth in opposition by defendant U.S. Department of Housing and Urban Development to Rainwater's motion to dismiss and motion to transfer, and the entire record herein, it is hereby ORDERED that Rainwater's Motion to Dismiss and Motion to Transfer are DENIED.

Dated: _____

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