UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

LEGISLATIVE HISTORY

I. PRELIMINARY STATEMENT

Plaintiffs' attempt to invoke this Court's jurisdiction to review the "approval" and oversee the "oversight" by the U.S. Department of Housing and Urban Development ("HUD") of the Louisiana Recovery Authority's ("LRA") Road Home compensation and incentive grant program is not justiciable. First, neither the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.*, nor the Housing and Community Development Act of 1974 ("HCDA"), 42 U.S.C. § 5301 *et seq.*, provide a cause of action for plaintiffs to bring their claims against HUD. Nor can plaintiffs demonstrate a waiver of sovereign immunity by the United States under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, that is applicable to their claims because suit against defendant Paul Rainwater, Executive Director of the LRA, or the LRA itself, would provide an adequate remedy to their claims pursuant to § 704 of that Act.

Second, plaintiffs fail to satisfy the redress prong of Article III's standing requirement. Plaintiffs' claimed injuries are that they unable to complete repairs on and return to their homes. Such injuries are redressable only by the LRA, the only entity capable of implementing the specific changes to the homeowners program upon which plaintiffs' requested relief depends. Nevertheless, plaintiffs seek redress through HUD, but do not challenge the HCDA, the three special appropriations authorizing the disaster recovery CDBG program at issue in this case, or HUD's regulations implementing the disaster recovery program. Because these legal restraints governing HUD's interactions with the LRA will remain in place regardless of the outcome of this suit, the prospect of redress is far too speculative. And because review under the APA would only permit the Court to set aside HUD's approval of the LRA's program, it would not permit the Court to order HUD to compel the specific relief plaintiffs need to redress their injuries.

Third, plaintiffs' challenge to HUD's approval of the Road Home Program is moot. HUD has fully obligated the first two special appropriations, meaning that the LRA is now in full control of those

funds. Moreover, if this Court were to set aside HUD's approval of the Road Home program, neither the Court, nor HUD, nor the LRA could reach the funds of the third special appropriation because Congress has directed that they may be used only for "otherwise uncompensated but eligible claims . . . under the Road Home program." Pub. L. No. 110-116. Further, plaintiffs concede that this Court could not reach the more than $8.2 billion in funds that the LRA has already awarded under the Road Home program. Because the challenge to HUD's approval is moot, the only live controversy before this Court is plaintiffs' challenge to HUD's enforcement failures in its "oversight and continuing approval" of the Road Home program. However, this claimed failure to act would be unreviewable under § 706(1) of the APA as construed in *Norton v. So. Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55 (2004).

Finally, plaintiffs' claims against HUD should be dismissed because plaintiffs have failed to state a claim for relief under §§3604(a), 3605(a), 3608(d) or (e)(5) of the FHA, or under § 5304(b)(2) of the HCDA. Plaintiffs have not alleged facts sufficient to sustain any of their claims against HUD. Moreover, plaintiffs cannot show that §§ 3604 or 3605 of the FHA apply to HUD's actions, and they have not alleged a pattern of behavior by HUD that would be reviewable under §§ 3608(d) or (e)(5) of the FHA.

Accordingly, this Court should grant HUD's motion to dismiss.

II. PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE AGAINST HUD

A. Neither the FHA Nor the HCDA Provide Plaintiffs With a Private Right of Action Against HUD, and Plaintiffs Cannot Proceed Against HUD under the APA Because Plaintiffs Have An Adequate Remedy in Suit Directly Against the LRA

Contrary to plaintiffs' contention, they cannot avail themselves of the limited waiver of sovereign immunity found in 5 U.S.C. § 702. Pl. Opp'n at 16-19. Because neither the FHA nor the HCDA supply a private right of action against HUD, the only cause of action plaintiffs can invoke to proceed against HUD is the APA. However, the APA's limited waiver of sovereign immunity does

not apply when an adequate alternate remedy to suit under the APA exists. 5 U.S.C. § 704. Plaintiffs have alleged no claims against HUD that they have not (or could not have) also alleged against Rainwater and the LRA. Thus, the APA's limited waiver of sovereign immunity does not apply in this instance, and the suit against HUD should be dismissed.

1. There is no private right of action against HUD under the FHA or the HCDA

Plaintiffs assert that they may avail themselves of the waiver of sovereign immunity found in 5 U.S.C. § 702 without proceeding under the APA. Pl. Opp'n at 37 (citing *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981)). However, plaintiffs concede that they can only proceed under alternate statutes if those statutes provide for a private right of action *against HUD*. Pl. Opp'n at 37 ("because both [the FHA] and the HCDA provide Plaintiffs with a direct right of action to challenge HUD's discriminatory conduct, Plaintiffs need not proceed under the APA."). The only case plaintiffs cite for the proposition that they may bring claims under alternate statutes using the waiver in 5 U.S.C. § 702 held that, despite this waiver of sovereign immunity, suit against the FCC could *not* proceed under the Public Broadcasting Act because it "provides no private right of action" against that agency. *Schnapper*, 667 F.2d at 107, 116. In this case, contrary to plaintiffs' assertions, neither the FHA nor the HCDA supplies the requisite private right of action for plaintiffs to pursue their claims against HUD.

Plaintiffs cite no precedent for their claim that the private right of action found in § 3613 of the FHA allows them to bring this suit against HUD for violations of §§ 3604 or 3605. Pl. Opp'n at 36-37. Nor is this surprising as §§ 3604 nor 3605 do not apply to HUD's challenged actions in this case. Plaintiffs cannot sustain their claim that HUD has "otherwise ma[d]e [housing] unavailable," 42 U.S.C. § 3604(a), because they do not allege, nor could they allege, that HUD "has provided . . . housing []or housing-related services to consumers." *Jones v. Ofc. of Comptroller of the Currency*, 983 F. Supp. 197, 202 (D.D.C. 1997)*, aff'd*, 1998 WL 315581 (D.C. Cir. 1998). Accordingly, as in *Jones*, this Court

should find that HUD "could not have denied housing or made it unavailable to anyone. The impact of alleged discriminatory practices by the institutions [a federal agency] supervises cannot be attributed to [the agency] itself. The [the agency]'s activities thus cannot fall within the strictures of Section 3604." *Id.* For the same reason, this Court should find that § 3605 does not apply to HUD's actions here because plaintiffs have not alleged, nor could they allege, that HUD has "engag[ed] in residential real estate-related transactions," with consumers. 42 U.S.C. § 3605. Indeed, the HUD action plaintiffs challenge–oversight of a state government's grant program–is explicitly regulated by § 3608, which requires the Secretary to "administer the programs and activities relating to housing . . . in a manner to affirmatively further fair housing." *Id.* at § 3608(e)(5). Therefore, if, as plaintiffs urge, §§ 3604 and 3605 are interpreted to apply to HUD's actions here, such an interpretation would impermissibly render § 3608 superfluous. *See, e.g., NEA v. Finley,* 524 U.S. 569, 609 (1998) ("Statutory interpretations that render superfluous other provisions in the same enactment are strongly disfavored.") (citation omitted). Moreover, as demonstrated below, Congress chose *not* to create a private cause of action to enforce § 3608, and plaintiffs should not be permitted to override this congressional choice by extending §§ 3604 and 3605 beyond their boundaries. Thus, this Court should follow *Jones* and hold that neither §§ 3604 nor 3605 applies to HUD's supervision of the LRA's Road Home program, and so the private right of action in § 3613 cannot be used to bring this suit against HUD.

Plaintiffs' remaining assertions that they have an implied right of action under the FHA and the HCDA to pursue violations of §§ 3608(d) or (e)(5) and 5304(b)(2) against HUD are similarly unfounded. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court held that there is a high bar that must be surmounted before a judge can find an implied right of action within a statute. *Id.* at 286. "[P]rivate rights of action to enforce federal law *must* be created by Congress . . . . Statutory intent . . . is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87

(emphasis added). *Sandoval* thereby clarified that statutory intent was the true lynchpin of the multi-factor "implied private-cause-of-action" inquiry that the Court had earlier articulated in *Cort v. Ash*, 422 U.S. 66 (1975). Plaintiffs ignore this important clarification: in attempting to prove the HCDA supplies an implied right of action against HUD, they review the *Cort* factors without even mentioning *Sandoval*. Pl. Opp'n at 30-33. Further, in their parallel discussion concerning an implied right of action in the FHA, plaintiffs do not even reference *Cort*, let alone the more recent *Sandoval*. Pl. Opp'n at 38. As neither the FHA nor the HCDA demonstrates the requisite statutory intent to create an implied right of action against HUD, plaintiffs may proceed with claims against HUD, if at all, only under the APA.

Plaintiffs' attempt to demonstrate that the FHA supplies an implied right of action against HUD is unconvincing. HUD does not contest that § 3608(d) and (e)(5), unlike §§ 3604 or 3605, apply to HUD, but while Congress created a cause of action to enforce other FHA provisions, *see, e.g.*, § 3613, it did not create a private cause of action to enforce § 3608. Nor is there any other evidence that Congress intended a private right of action for the enforcement of § 3608. *Jones*, 983 F. Supp. at 203. For this reason, even prior to the Supreme Court's holding in *Sandoval*, "[t]he majority of courts that . . . considered this issue . . . concluded that there is no implied private right of action under [§ 3608], and that an aggrieved person . . . must seek relief not under the FHA, but under the APA." *Id.* at 202 (citing *NAACP v. HUD*, 817 F. 2d 149, 154 (1st Cir. 1987); *Latinos Unidos de Chelsea En Accion v. HUD*, 799 F.2d 774 (1st Cir. 1986); *Lee v. Pierce*, 698 F. Supp. 332, 334 (D.D.C. 1988)). *See also Marinoff v. HUD*, 78 F.3d 64 (2nd Cir. 1996), *aff'ing* 892 F. Supp. 493, 495 (S.D.N.Y 1995) ("the FHA provides no express or implied right of action against HUD"); *PR Pub. Hsg. Admin. v. HUD*, 59 F. Supp. 2d 310 (D.P.R 1999) ("In view of [other provisions crafting remedies under the FHA], it is unlikely that Congress absentmindedly forgot to mention an intended private action against HUD under section 3608(d)."). *But see Young v. Pierce*, 544 F. Supp. 1010 (E.D. Tex. 1982) (failing

to apply *Cort v. Ash* factors but finding an implied private right of action to enforce § 3608(e)(5)).

Similarly, while plaintiffs suggest the existence of an implied cause of action under § 5304, courts that have considered the issue have reached exactly the opposite conclusion. *See, e.g., Latinos Unidos*, 799 F.2d 774, at 795 ("we hold that Congress did not intend to create a private right of action under the HCDA"); *Payne v. HUD*, 551 F. Supp. 1113 (S.D. Ohio 1982); *Nabke v. HUD*, 520 F. Supp. 5 (W.D. Mich 1981); *People's Hsg. Devel. Corp. v. City of Poughkeepsie*, 425 F. Supp. 482 (S.D.N.Y. 1976). *Cf. Montgomery Improvement Ass'n v. HUD*, 645 F.2d 291, 295 (5th Cir. 1981) (finding a private right of action to enforce § 5309, the HCDA's nondiscrimination provision). It is again notable that each court reached its conclusion before the *Sandoval* Court's holding that "private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286. In light of the Supreme Court's holding in *Sandoval* and the weight of precedent finding no private right of action to enforce §§ 3608(d) or (e)(5), 5304(b)(2), this court should find that no private right of action is available against HUD under these statutes.[1]

2. The APA waiver of sovereign immunity does not apply to HUD because other adequate remedies exist for plaintiffs' grievances

Plaintiffs only potential cause of action against HUD would be under the APA, but the limited waiver of sovereign immunity found in § 702 applies only if "there is no other adequate remedy in a court." 5 U.S.C. § 704. HUD's motion to dismiss demonstrated that plaintiffs' ability to bring claims against Rainwater (or the LRA) provides them an adequate remedy. HUD Mot. to Dismiss at 32-35. Plaintiffs allege, however, that remedies against Rainwater are not sufficient because they do not redress "*HUD's* violation of the unique obligation that it is required to fulfill under federal fair housing

[1] HUD reiterates that it takes no position as to whether the HCDA contains a private right of action against Rainwater or the LRA. Because plaintiffs may vindicate their HCDA claims against the state through other means, HUD Opp'n to Rainwater Mot. to Dismiss at 8-9, the availability of an HCDA claim against state defendants does not bear upon the existence of adequate alternate remedies through which plaintiffs can find relief.

law." Pl. Opp'n at 40 (emphasis in original). Yet plaintiffs never articulate what HUD's unique obligation is.

Plaintiffs fail to allege any discriminatory behavior on the part of HUD that is separate or distinct from the behavior of Rainwater and the LRA. 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." Compl. ¶¶ 49-51. Each of these actions can only be considered discriminatory if, in fact, Rainwater (or the LRA) has discriminated in the design and implementation of the Road Home Program. Any remedy that would relieve the alleged harm caused by Rainwater's actions would therefore be an "adequate remedy" for plaintiffs' claims against HUD.[2]

Moreover, plaintiffs concede that D.C. Circuit precedent establishes § 704 as a bar to suit against a federal agency when the claim is for "fail[ure] to enforce compliance by federal-funding recipients with nondiscrimination requirements." Pl. Opp'n at 43 (citing *Wash. Legal Found. v. Alexander*, 984 F.2d 483 (D.C. Cir. 1993), and *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990)). Indeed, the D.C. Circuit has recently reaffirmed that "a plaintiff [can]not maintain an action under the APA directly against a federal agency for failure to investigate and rectify

---

[2] Further, plaintiffs' Complaint fails to make any allegation that HUD approved the Road Home Program *despite* actual knowledge – or even constructive knowledge – of its alleged discriminatory impact. Compl. *passim*. Both the FHA and HUD's regulations implementing the disaster recovery CDBG program at issue in this case provide ample opportunities for members of the public, including plaintiffs, to comment on the grant programs and to lodge administrative complaints with the LRA and HUD. *See, e.g.*, 42 U.S.C. § 3610; 24 C.F.R. § 6.10 *et seq*. Despite these opportunities for public involvement, plaintiffs make no allegation that they, or anyone else, put HUD on notice of the alleged discrimination by filing any comments or complaints about the design of LRA's Road Home program. Compl. *passim*. Nor do they make any allegation that HUD otherwise had constructive notice that the Road Home program might impose a disparate impact. *See id.*

the wrongdoing of a third party where Congress ha[s] provided the plaintiff with a private right of action against the third party." *Garcia v. Vilsack*, 563 F.3d 519, 524-25 (D.C. Cir. 2009) (citing *Council for the Blind v. Regan*, 709 F.2d 1521, 1531-33 (1983) (en banc); *Coker v. Sullivan*, 902 F.2d 84, 89-90 (D.C. Cir. 1990); *Women's Equity*, 906 F.2d at 750-51). *See also Am. Disabled for Attendant Programs Today v. HUD*, 170 F.3d 381 (3rd Cir. 1999); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180 (4th Cir. 1999). The *Garcia* court further emphasized that "a direct action against a regulated private party [is] an adequate remedy at law for whatever additional injury a plaintiff suffer[s] as a result of a federal agency's failure to remedy that violation administratively." *Id.* at 525. This understanding arises in part from the D.C. Circuit's reading of Supreme Court precedent in *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979). As the court has explained, "*Cannon* suggests that Congress considered private suits to end discrimination not merely adequate but in fact the proper means for individuals to enforce Title VI [of the Civil Right Act of 1964, as amended 42 U.S.C. § 2000d] and its sister antidiscrimination statutes." *Women's Equity*, 906 F.2d at 751 (citing *Canon*, 441 U.S. at 704). Thus, because "other remedies are adequate, federal courts will not oversee the overseer." *Coker*, 902 F.2d at 89.

In attempting to explain why redress against Rainwater is insufficient in this case, plaintiffs point exclusively to HUD's oversight role, noting its "expertise and obligation to monitor grant recipients for compliance with civil rights and other program requirements." Pl. Opp'n at 41. Similarly, in arguing that their claims against HUD are not moot despite the overwhelming majority of the CDBG funds having already been obligated to the state, plaintiffs suggest that "HUD has the authority to require Rainwater to use the funds that HUD has already disbursed and obligated to LRA." Pl. Opp'n at 13. Thus, by their own concessions, plaintiffs are lodging suit "against a federal agency for failure to investigate and rectify the wrongdoing of a third party," which is exactly the sort of claim that the D.C. Circuit has foreclosed. *Garcia*, 563 F.3d at 524-25.

Plaintiffs argue, however, that the suit against HUD should be allowed because several district courts in other circuits have permitted claims against HUD to proceed in suits in which allegedly discriminating parties were also defendants. Pl. Opp'n at 41 (citing *Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2005); *Dean v. Martinez*, 337 F. Supp. 2d 477 (D. Md. 2004)). However, *Thompson* itself acknowledged that its holding would be foreclosed if it were bound by D.C. Circuit precedent. *See Thompson*, 348 F. Supp. 2d at 422 (citing *Women's Equity, supra*, 906 F.2d 742, as contrary precedent for the court's contention that "tenants may present APA claims against HUD for discrimination grievances"). Moreover, both *Thompson* and *Dean* are distinguishable because plaintiffs in those cases alleged injuries against federal defendants that could not be remedied through claims against non-federal parties. In *Thompson*, plaintiffs claimed that HUD violated § 3608(e)(5) through its "failure adequately to consider a regional approach to desegregation of public housing." 348 F. Supp. 2d at 408. Such a claim could not, by its very nature, be brought against the allegedly discriminating local government: it was HUD's responsibility, the court opined, to consider a regional remedy. Similarly, in *Dean*, the plaintiffs challenged HUD's sale of an apartment building, also a claim that could only be remedied directly by HUD. *Dean*, 336 F. Supp. 2d at 487 (finding that APA review is permissible because the suit against HUD "addresse[d] a different harm"). In the present case, by contrast, plaintiffs allege no distinct claims against HUD that they do not allege against Rainwater. Compl. ¶¶ 74-77 (alleging that *all* defendants have violated §§ 3604, 3605, 3608, and 5304).

Plaintiffs' analogies to two, out-of-circuit, district court opinions, *Henry Horner Mothers Guild v. Chi. Hsg. Auth.*, 824 F. Supp. 808, 819-20 (N.D. Ill. 1993), and *Tinsley v. Kemp*, 750 F. Supp. 1001, 1009 (W.D. Mo. 1990), get them nowhere because in both cases a complete remedy was impossible without new allocations of funds from HUD. Pl. Opp'n at 42. The plaintiffs in those cases alleged that housing authorities and HUD allowed residential units to deteriorate to the point that they were

effectively illegally demolished. The claims against HUD were permitted because without HUD cooperation and funding, the housing authorities "*could not correct* alleged problems to any significant degree." *Tinsley*, 750 F. Supp. at 1009 (emphasis added); *Henry Horner*, 824 F. Supp at 819 (quoting same). The housing authorities were so constrained in part because HUD provided the annual operating subsidies for the housing units, which are "determined by the difference between the housing authorities projected expenses and projected operating income." *Id.* at 811. Thus, to resolve the complaints in *Tinsley* and *Henry Horner,* HUD would have had to provide *new* funding for any court-ordered remedy. In this regard, these cases are similar to *Lattimore v. NW Coop.*, 1992 WL 118383 (D.D.C. 1992), a case in which another court in this district permitted claims against HUD to go forward because, to bring about the relief plaintiffs sought, private defendants would have to "seek reimbursement from HUD." *Id.* at *7. Here, plaintiffs do not allege that any new funds or reimbursements from HUD would be necessary to effectuate their desired remedy. Compl. *passim*. Thus, the analogy to these cases is unpersuasive, and they do not stand in the way of the dismissal of HUD from this suit.

Plaintiffs nevertheless attempt to align their claims with these decisions by contending that "a complete remedy would require both that Rainwater develop a nondiscriminatory formula, and that HUD approve and oversee the administration of the formula." Pl. Opp'n at 41. But if this court orders Rainwater to develop a new homeowners compensation and incentives program that satisfies the requirements of the CDBG grant program, then HUD would already be obligated to approve and oversee the administration of that formula. *See, e.g.*, 24 C.F.R. § 91.500(b) (allowing HUD to 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). No separate court order would be required. *Cf. Crutchfield v. U.S. Army Corps. of Eng'rs*, 230 F. Supp. 2d 687, 700 (E.D. Va. 2002) (holding that, because "the Corp is obligated to

apply all of its regulations in considering the County's revised permit application . . . whether or not this Court revokes [the] permit," the court did not have power to order the agency to simply follow the law). And plaintiffs certainly have not made any allegation that HUD would flaunt its regulatory obligations by refusing to approve or oversee any revised compensation and incentives program. Compl. *passim*.

Thus, while plaintiffs put forth a range of non-precedential and inapposite district court opinions in an attempt to cloud the issue, they have not, because they cannot, overcome the clear mandate of § 704: the waiver of sovereign immunity in § 702 is available only if "there is no other adequate remedy." In this case, plaintiffs' complaint repeatedly emphasizes that the remedy they seek is recalculation of the Road Home grant awards. Such a remedy can only be effectuated by Rainwater and the LRA. Applying § 704 and the D.C. Circuit's own clearly established precedent prohibiting APA claims against a federal agency when direct suit against a discriminating party is possible, this court should dismiss plaintiffs' claims against HUD.

B. Plaintiffs Cannot Satisfy the Redress Prong of Article III's Standing Requirement

Plaintiffs' claims against HUD concerning the LRA's Road Home program are not redressable against HUD because plaintiffs cannot demonstrate a likelihood that an order "setting aside HUD's approval of the [Road Home program] and requiring HUD to oversee the development of a new, nondiscriminatory," program would likely remedy their claimed injuries. Pl. Opp'n at 8.

Plaintiffs do not contest that an "adequate examination" of redressability requires that the court "identify the components of [plaintiffs'] alleged harm." *Freedom Republicans, Inc. v. Fed. Election Com'n*, 13 F.3d 412, 416 (D.C. Cir. 1994). Here, the precise harm alleged by the individual plaintiffs is that they were "unable to complete repairs" to their homes because the "amount received from . . . the Road Home grants . . . fell short" of their homes' "*cost of damage*." Compl. ¶ 61 (emphasis added). *See also id.* ¶¶ 62-65 (same). Moreover, the individual plaintiffs allege that "[h]ad [their]

Road Home grant[s] been calculated based on the cost of damage" to their homes, they would have received grants up to $150,000. *See id.* ¶¶ 61-65. Similarly, the precise harm alleged by organizational plaintiffs is that, "because of the Road Home program's rule that grants *may not exceed the pre-storm value of the home*," they have diverted resources "to ensure that homeowners could *remain in their homes*" or "*rebuild their homes*." *Id.* ¶¶ 68, 70 (emphasis added). Indeed, the only conceivable basis to plaintiffs' allegations that HUD has violated the Fair Housing Act by making housing "unavailable" to plaintiffs, that HUD has discriminated"in the terms and conditions of real estate-related transactions," or that it did not "affirmatively further[] fair housing," is that plaintiffs did not obtain compensation and incentive grants based on the cost of damage to their homes. *See id.* ¶¶ 74-77 (citing 42 U.S.C. §§ 3604(a), 3605(a), 3608(d), (e)(5), 5304(b)(2)). Thus, while plaintiffs contend that they can obtain relief merely through the replacement of the Road Home program with any non-discriminatory alternative, the only remedy that would redress plaintiffs' alleged harms would be for the LRA to develop a compensation and incentive grant "based on the cost of damage to the home." *Id.* ¶ 60.

However, the prospect of such relief is far too speculative to support standing against HUD. Plaintiffs do not challenge the constitutionality of the HCDA or the special appropriations authorizing the disaster recovery CDBG programs. Compl. *passim*. Nor do they challenge HUD's implementing regulations for the regular CDBG program or the disaster recovery CDBG program. *See id*. Thus, the legal regime governing the roles of HUD and the LRA in designing and administering the disaster recovery CDBG programs will remain in place regardless of the outcome of this litigation. Contrary to plaintiffs' contention that "HUD and the state of Louisiana are *jointly* responsible for the [Road Home] program's implementation," Pl. Opp'n at 39-40 (emphasis added), this governing regime not only gives the LRA, as the CDBG grant recipient, the choice and the duties to design and administer the disaster recovery CDBG programs, but, more to the point, constrains the remedies that this Court could

order against HUD.[3] Thus, this Court would not be empowered to order HUD to dictate the terms of the LRA's use of disaster recovery CDBG to remedy plaintiffs' alleged inability to rebuild their homes.

Contrary to plaintiffs claims, they cannot satisfy the redress requirement simply by obtaining an order "vacating" HUD's approval of the LRA's program so that they can be afforded "'the opportunity to participate in'" the development of a new program, "'the results of which *might* be more favorable to [them].'" Pl. Opp'n at 8 (quoting *dicta* about the redress standard for procedural rights cases from *Am. Cmty. Bankers v. FDIC*, 200 F.3d 822, 828-29 (D.C. Cir. 2007) (emphasis added)).[4] Rather, where, as here, a remedy to a plaintiffs' injuries would depend not only on setting aside the current rule, but on

---

[3] Congress made clear more than 30 years ago that the purpose of the HCDA is "to *expand* the *role and responsibility of local governments* in implementing community development programs," and that HUD's "review should be limited in its scope." S. Rep. No. 93-693, *reprinted in* 1974 U.S.C.C.A.N. 4273, 4324, 4325 (emphasis added). *See also id.* at 4318 (purpose of the Act is "to *expand State and local responsibility for planning and executing* development activities.") (emphasis added). Accordingly, the HCDA sets out more than 25 categories of eligible uses of funds by grantees. 42 U.S.C. § 5305(a). And the special appropriations providing disaster relief did not upset that balance. Pub. L. No. 109-148 (providing "[t]hat funds provided under this heading *shall be administered* through an entity or entities designated *by* the Governor of *each State*.") (emphasis added); *id.* (providing that "*each State shall 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.') (emphasis added); Pub. L. No. 109-234 (same).

In turn, HUD regulations provide that "[t]he choice of activities on which block grant funds are expended *represents the determination by state and local participants*, developed in accordance with the state's program design and procedures, *as to which approach or approaches will best serve these interests*." 24 C.F.R. § 570.482(a) (emphasis added). The regulations further make the state "*responsible for the administration* of all CDBG funds." *Id.* § 570.489(a)(1) (emphasis added). 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." *Id.* § 570.480(c). To ensure the state's role remains the primary one, HUD regulations give "*maximum feasible deference*" to the state's interpretation of these requirements. *Id*. (emphasis added). Further, HUD may disapprove a state's plan to use CDBG funds 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). However, as noted in the text, HUD regulations provide that "the certifications required therein *are satisfactory* to [HUD] . . . unless [HUD] has determined pursuant to [HUD's review and audit functions set out in] § 570.493 that the State has not complied with the requirements of this subpart." *Id.* § 570.485(c) (emphasis added).

[4] *See also id.* (citing *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 457-58 (D.C. Cir. 1998); *Ctr. for Auto Safety v. Nat'l Hwy. Trans. Safety Admin.*, 793 F.2d 1322, 1334 (D.C. Cir. 1986)).

the selection of a particular course of action based on an unchallenged legal regime, the D.C. Circuit has held that "a quest for ill-defined 'better odds'" in hopefully obtaining that result, "is not close to what is required to satisfy the redressability prong of Article III." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 939 (D.C. Cir. 2004). In *National Wrestling Coaches*, the plaintiffs challenged the federal agency's policy interpretations of Title IX of the Education Act Amendments of 1972, *see* 20 U.S.C. § 1681 *et seq.*, and its implementing regulations. *Id*. The court held that even if the plaintiffs prevailed in setting aside the policy interpretation, the underlying statute and regulations would still be in place and would still define the grant recipients' behavior. *Id.* at. 940. Accordingly, the court held that plaintiffs failed to demonstrate that a favorable ruling against the federal agency would alter the grant recipient's conduct in a way that would redress plaintiffs' injuries. *Id*. at 944.

Moreover, in light of the limited nature of plaintiffs' challenge, plaintiffs' request that this Court issue an order "requiring HUD to oversee the development of Road Home grants," Pl. Opp'n at 8, that actually remedy plaintiffs' claimed injury would fall well beyond the scope of the Court's authority in this action. As demonstrated in HUD's motion to dismiss and above, *supra* at 3-6, the only cause of action against HUD and the only possible waiver of sovereign immunity by the United States potentially available to plaintiffs is found in the APA. Under the APA, even if the Court were to find in favor of plaintiffs, it would be empowered only to set aside the agency's action, or to order the agency to act, and leave to the agency the determination of appropriate action to take; the Court would not be empowered to compel specific remedial or affirmative action, or even to prohibit other future action by the agency. Thus, as the D.C. Circuit has explained, "when 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." *Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999) (quoting *PPG Indus., Inc. v. U.S.*, 52 F.3d 363, 365 (D.C. Cir. 1995)). *See also Crutchfield,* 230 F. Supp. 2d at 699 ("This limited scope of

judicial review [under the APA] bears directly on the issue of redressability."). Moreover, the D.C. Circuit has held that it is reversible error for a district court to attempt to retain jurisdiction to devise a specific remedy for the agency to follow. *See Cty. of Los Angeles*, 192 F.3d at 1011–12. Thus, contrary to plaintiffs' contention, it is entirely speculative that an order setting aside HUD's approval of the LRA's Road Home program or requiring it to oversee the program would force HUD to force the LRA to develop a program that provides plaintiffs with grants based on the cost of damage to their home.[5]

Additionally, there is no basis to plaintiffs' claim that HUD is a "necessary" party to obtain relief. Pl. Opp'n at 9. As demonstrated above, *supra*, if the Court were to order the LRA to propose a revised program to remedy plaintiffs' injuries, the existing implementing regulations would require HUD to approve it, so long as it was for disaster recovery, "not plainly inconsistent with the Act," and otherwise in keeping with the requirements of the CDBG program. 24 C.F.R. § 91.500. Plaintiffs have made no allegations that HUD would evade these requirements. Compl. *passim*. In such a

---

[5] Plaintiffs' cite a number of cases for the proposition that a court can force HUD to use its power to impose fair housing conditions on grant recipients. Pl. Opp'n at 10-11 (citing *U.S. v. Gautreaux*, 425 U.S. 284 (1976); *NAACP v. HUD*, 817 F.2d 149 (1st Cir. 1987); *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970); *NAACP v. Kemp*, 721 F. Supp. 361 (D. Mass. 1989)). However, none of these cases are redress cases, and none advances plaintiffs' claim. First, *Gautreaux* concerned only the physical scope of the remedy that a court could impose once HUD was found to have violated the Constitution. 425 U.S. at 296 ("The question presented in this case concerns only the authority of the District Court to order HUD to take remedial action outside the city limits of Chicago. HUD does not dispute the Court of Appeals' determination that it violated the Fifth Amendment."). Second, *NAACP v. HUD* found only that HUD's alleged *pattern*, as opposed to a single instance (which is all that is alleged here), of alleged failure to affirmatively further fair housing, was reviewable under the APA. 817 F.2d at 158 (expressly distinguishing *Heckler v. Chaney*, 470 U.S. 821, (1985), and noting that *Heckler* held unreviewable an FDA decision not to investigate a *particular* alleged violation). Third, *Shannon* stands only for the non-controversial proposition that "[w]hen an administrative decision is made without consideration of relevant factors[,] it must be set aside." 436 F.2d at 819. Plaintiffs makes no such allegation against HUD in this case. Compl. *passim*. Finally, *NAACP v. Kemp* merely applied, on remand, the holding of *NAACP v. Boston* concerning an alleged *pattern* of a failure by HUD to affirmatively further fair housing, which, again, is not an allegation that plaintiffs make here. 721 F. Supp. at 367. Moreover, apart from *Gatreaux*, each of these cases has been called into doubt by *Norton v. South Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55 (2004). *See infra*, at 23-26.

situation, plaintiffs cannot demonstrate that their claims are redressable against HUD. *See Crutchfield*, 230 F. Supp. 2d 687. In *Crutchfield*, the plaintiffs sought to enjoin the Corps from issuing a Clean Water Act permit for a sewer line. *Id*. at 689. The court held that "the Corp is obligated to apply all of its regulations in considering the County's revised permit application . . . whether or not this Court revokes [the] permit." *Id*. at 700. Accordingly, the court found that plaintiffs' claim was not redressable against the Corps. *Id.* Thus when, as here, a court order would merely require an agency to do that which its own regulations already mandate, the claim cannot properly be considered redressable.

None of the cases cited by plaintiffs undermine the conclusion that plaintiffs' claims are not redressable, as none are relevant to the case at hand. In *America's Community Bankers,* plaintiffs challenged a rulemaking that assessed a fee on the plaintiffs' member banks. 200 F.3d at 828. The court held the claim was redresssable because setting the rule aside "would redress the alleged injury by giving Bankers's members their money back." *Id*. Similarly, in *Motor & Equipment Mfrs. Ass'n*, the plaintiffs sought to set aside the EPA's approval of the State of California's anti-tampering regulations in violation the Clean Air Act. 142 F.3d at 457. The court held that plaintiffs' claim was redressable because finding a Clean Air Act violation would make it unlikely that the EPA could re-enact the same rule. *Id*. In the present case, by contrast, plaintiffs cannot show that an order setting aside HUD's approval of the LRA's Road Home program would likely result in the LRA creating a new program that provided compensation and incentive grants to plaintiffs based on the cost of damage to their homes. In *Center for Auto Safety*, the plaintiffs claimed the agency's rule lowering fuel-efficiency standards for certain model years of vehicles violated the Energy, Policy, and Conservation Act and lowered plaintiffs' options for purchasing fuel-efficient vehicles. 793 F.2d at 1323. The court found plaintiffs' claims redressable because the agency could make use of the statute's system of penalties and credits to force the vehicle manufacturers to make improvements in the future if they failed to

make them in the present. *Id*. at 1334. Unlike the present dispute, however, in none of these cases did the remedy to the plaintiffs' injuries depend on the replacement of a challenged rule with a particular new rule that would require a specific outcome.[6] *Cf. Am. Cmty. Bankers*, 200 F.3d at 828-29; *Motor & Equip. Mfrs. Assn'n*, 142 F.3d at 457-58; *Ctr. for Auto Safety Hwy. v. Nat'l Hwy. Safety Traffic Admin.*, 793 F.2d at 1334.

Plaintiffs' attempt to distinguish *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 256 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), and myriad circuit court cases applying the redress standard is similarly unavailing. Pl. Opp'n at 9. Plaintiffs claim that the sole basis for finding that plaintiffs in those cases could not establish the redress-prong of Article III's standing requirement was the fact that the claimed harms arose from "third parties not before the court." *Id.* However, the Ninth Circuit's application of this line of cases in *Rubin v. City of Santa Monica*, 308 F.3d 1008 (9th Cir. 2002), demonstrates the lack of merit in plaintiffs' claim. In *Rubin*, plaintiff brought suit against both the California Secretary of State and the City of Santa Monica challenging the city's interpretation of the state's election regulations. *Id.* at 1011-12. The Ninth Circuit affirmed the district court's dismissal of the California Secretary of State, holding 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." *Id.* at 1019. Similarly, in *National Wrestling Coaches*, *supra*, the D.C. Circuit focused its inquiry not on the fact that the third parties were not before the court, but on the fact that even if plaintiffs prevailed on the merits in their challenge to the federal agency decision at issue in the litigation, the underlying statute and regulations "would still be in place," and under that statute and regulations, neither the federally funded entities, nor the federal

---

[6] For the same reason, plaintiffs' reliance on *Action Alliance of Senior Citizens of Greater Phila. ("AASC") v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986), *see* Pl. Opp'n at 20, is also without merit. The plaintiffs in *AASC* simply sought an order vacating the agency's rule, and did not require a particular outcome to redress their injuries. *See* 789 F.2d at 938.

agency, would be required to provide any remedy to plaintiffs' claimed injuries. 366 F.3d at 939-40. The same is true in the present dispute.

Similarly unpersuasive is plaintiffs' reliance on the "unequal footing" line of cases. Pl. Opp'n at 12 (citing *CC Distribs., Inc. v. U.S.,* 883 F.2d 146 (D.C. Cir. 1989); *W Va. Ass'n of Cmty. Health Ctrs. v. Heckler*, 734 F.2d 1570 (D.C. Cir. 1984)). Under the holdings of these decisions, when a plaintiff challenges a competitive process, such as contract bidding, on the grounds that discrimination in the process prevents the plaintiff from competing on equal footing, the plaintiff need not demonstrate that, but for the discrimination, he would have won the contract. Rather, because the harm to the plaintiff is the exclusion from the initial decision process, mere inclusion in the new process is sufficient redress. *See CC Distribs., Inc.,* 883 F.3d at 151. But these "unequal footing" cases are inapposite here. *Cf. National Wrestling Coaches Ass'n*, 366 F.3d at 944. Plaintiffs are not alleging an unequal ability to participate in the initial grant formula development process, and so they cannot claim that a mere opportunity to participate in the development of the new process is sufficient redress. Rather, they allege a disparate impact in the LRA's *administration* of its Road Home program, and the only remedy that would redress their claimed injuries is not, as plaintiffs' unconvincingly and belatedly suggest in their opposition, the chance that the LRA might come up with a new program, Pl. Opp'n at 11, but rather that the LRA specifically creates a program that provides a compensation grant "based on the cost of damage" to their homes. Compl. ¶ 60; *see also id.* ¶¶ 61-65, 68, 70.

In an effort to disclaim the overly speculative nature of the relief sought, plaintiffs suggest that they would be satisfied with any "nondiscriminatory" assistance program. Pl. Opp'n at 11. However, plaintiffs cannot maintain standing to pursue their claims against HUD by seeking anything less than a remedy to their claimed injuries. *See Steel Co. v. Citizens Concerned for a Better Envt.*, 523 U.S. 83,107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."). Rather, such a request would not be

sufficiently targeted to remedy the plaintiffs' personal injuries. *See James v. City of Dallas, Tex.*, 254 F.3d 551, 568 (5th Cir. 2001). In *James*, plaintiffs alleged that they were injured because the City of Dallas and HUD had engaged in a practice of housing demolition in their neighborhood without proper notice that was allegedly racially discriminatory. *Id*. at 565. As in the suit at hand, plaintiffs requested that HUD be ordered "to remedy 'the loss of housing . . . as well as the resulting blight.'" *Id.* at 568 (citation omitted). The court held plaintiffs could not meet the redress prong because of "the narrowness of the named [p]laintiffs' claimed . . . [notice] injury, and the broad relief requested that does not address the particular injury suffered by these . . . [p]laintiffs." *Id.* at 567. The Fifth Circuit found this claim amounted to nothing more than "'a generalized grievance shared in substantially equal measure by all or most citizens,'" and, as such, "c[ould]not provide standing to request injunctive relief." *Id.* at 568 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). As in *James* plaintiffs, if plaintiffs' request here is read to seek anything less than a remedy to their claimed injuries, and is construed instead solely as a request to eliminate racial disparities in the administration of the LRA's disaster recovery CDBG program, it would become nothing more than a generalized grievance, which is insufficient to confer standing. *See Steel Co.*, 523 U.S. at 107. *See also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974) ("standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share.").

C. HUD's Approval of Louisiana's Road Home Program is Moot

Plaintiffs challenge to HUD's approval of the LRA's Road Home compensation and incentive program is moot, and the only live part of this controversy concerns HUD's alleged "continued approval and oversight" of the state's disaster recovery program.

First, *City of Houston, Tex. v. HUD*, 24 F.3d 1421 (D.C. Cir. 1994), disposes of plaintiffs' challenge to HUD's approval of Louisiana's Road Home program because HUD has fully obligated the

disaster recovery CDBG funds provided by the first and second special appropriations at issue in this case. HUD has *fully* obligated the $6,210,000,000 that HUD allocated to Louisiana pursuant to Pub. L. No. 109-148. *See* 71 Fed. Reg. 7666, 7666 (Feb. 13, 2006); Decl. of Jessie Kome in Support of HUD's Mot. to Dismiss ("Kome Decl.") ¶ 25 (noting that as of March 6, 2009, HUD has obligated $12,400,000,000 to Louisiana). Similarly, HUD has *fully* obligated the $4,200,000,000 allocated to Louisiana pursuant to Pub. L. No. 109-234. *See* 71 Fed. Reg. 63337, 63337 (Oct. 30, 2006); Kome Decl. ¶ 25. Accordingly, resolution of plaintiffs' challenge to the first two special appropriations is controlled by the D.C. Circuit's "unequivocal[]" holding that "once the relevant funds have been obligated, a court cannot reach them in order to award relief." *City of Houston,* 24 F.3d at 1426.

Contrary to plaintiffs' claims, Pl. Opp'n at 12-14, the principles of *City of Houston* are fully applicable in regard to the obligated funds in this case: the obligated funds are no longer available to redress plaintiffs claims because they have already been distributed or allocated elsewhere. *Cf. City of Houston,* 24 F.3d at 1425 (noting that HUD allocated the funds at issue "to hundreds of other cities across the nation"). Plaintiffs challenge Option 1 of the Road Home program, but this is not the only approved Hurricane Katrina disaster recovery CDBG program administered by the LRA for which HUD has obligated funds. The LRA also administers infrastructure, economic development, and other housing programs, including Small Rental Property, Low-Income Housing Tax Credit Piggyback, Supportive Housing, and First Time Home Buyer programs, among others. *See* HUD Mot. to Dismiss at 14. HUD has *fully obligated* funds to each of these programs from the first two appropriations, and the state has made significant expenditures in administering them. *See* Disaster CDBG Program Appropriations, Allocations and Expenditures - May 2009 (available at: www.doa.louisiana.gov/cdbg/drreports.htm). And while there are significant balances in several of the programs to date, the state still has major obligations it must pay for, such as reimbursing the State Land Trust for the more than 9,200 properties acquired under Options 2 and 3 of the Road Home

program, as well as significant compliance and assurance programs. *See* Road Home Updates 2009 (available at: www.doa.louisiana.gov/cdbg/drreports.htm). Thus, the funds from the first two special appropriations are obligated and unavailable to HUD to satisfy plaintiffs' claims.

Citing two cases from outside this Circuit, plaintiffs claim that *City of Houston* should not control in this case. Pl. Opp'n at 12-14 (citing *Davis v. HUD*, 627 F.2d 942 (9th Cir. 1980), and *NAACP, Boston Ch. v. Kemp*, 721 F. Supp. 361 (D. Mass. 1989)). Neither the facts of *Davis* nor *Kemp* are like those at issue here. In *Davis*, the plaintiffs challenged a community's failure to meet the requirements of its *annual* housing assistance plan. 627 F.2d at 943. The court held that the case was not moot because HUD regulations applicable to the community's grant expressly provided that "the community's failure to meet past obligations could result in conditioning of 'approval of a *succeeding* year's application.'" *Id.* at 945 (quoting 24 C.F.R. §§ 570.909(e)(2), (f)(2), 570.910(b)(9), & (b)(10)) (emphasis added). Plaintiffs cannot dispute that the funds at issue in this case are the product of special appropriations and that, absent additional congressional action, there will be no further appropriations. In *Kemp*, moreover, the court expressly distinguished the situation it faced from the issue before this Court, finding that "this is *not* a case involving a *single* improper funding decision, for which there is no longer a viable remedy." 721 F. Supp. at 367 (emphasis added) (citing *SE Lake View Neighbors v. HUD*, 685 F.2d 1027 (7th Cir. 1982)). Thus, *Kemp*, by its own terms does not apply to this case. Accordingly, *City of Houston*, rather than *Davis* and *Kemp*, control resolution of plaintiffs' challenge to HUD's approval of Louisiana's use of the funds from the first two appropriations.

Further, if this Court were to set aside HUD's approval of the LRA's Road Home program, neither this Court, nor HUD nor the LRA, could reach the funds from the third special appropriation. The third special appropriation expressly provided an additional $3,000,000,000 solely for the LRA's Road Home program. Pub. L. No. 110-116 (appropriating "$3,000,000,000 for [HUD] . . . to enable [it] to make . . . grants to the State of Louisiana 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."). Because Congress has specifically directed that these funds only be used for the Road Home program, if the Court were to set aside HUD's approval of the program, the funds could not be used for any other purpose.

Likewise, and contrary to plaintiffs' assertion that "no part of this action is moot," Pl. Opp'n at 12, plaintiffs themselves effectively concede that part of their challenge *is* moot. Plaintiffs admit that the Court would not be empowered to order the return of the disaster recovery CDBG funds already "awarded to particular homeowners" to date. Pl. Opp'n at 13. To date, funds already "awarded to particular homeowners" represent more than $7.95 billion. *See* www.road2la.org/newsroom/stats.htm. In light of their concession that the Court would not be empowered to seek return of these funds, plaintiffs effectively admit that is too late to maintain their challenge to HUD's approval of Louisiana's Road Home program. In addition, the program itself is nearing completion. *See* www.road2la.org/homeowner/default.htm (indicating that the last day to apply to the Road Home program was July 31, 2007, and the last day to complete an initial appointment to review the application was December 15, 2007); www.road2la.org/newsroom/stats.htm (indicating that, as of June 23, 2009, the LRA has considered 151,695 applicants, and has completed processing for 131,831 for a total of $8.2 billion). Therefore, plaintiffs' challenge to HUD's approval of Louisiana's Road Home program is almost identical to the situation in *SE Lake View Neighbors v. HUD*, 685 F.2d 1027 (7th Cir. 1982). In that case, the Seventh Circuit held that plaintiffs could not enjoin federal funding of a disputed project because the project at issue was so far along that the relief requested by plaintiffs had become "valueless at this late stage of the proceedings." 685 F.2d at 1037. Similarly, the Road Home program is so far along that it is no longer practical to set it aside and return the funds to HUD, even if the Court could reach the already obligated funds.

In light of the Court's inability to reach the first and second appropriations, and because Congress specifically directed that funds in the third appropriation be used only for the Road Home program, it would be "impossible for the court to grant 'any effectual relief,'" for plaintiffs' challenge to HUD's approval of Louisiana's Road Home Program. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (citation omitted). Thus, "any opinion as to the legality of the challenged action would be [impermissibly] advisory." *Id*. For this reason, plaintiffs' challenge to HUD's approval of the Road Home program is moot, and, the only live controversy before this Court concerns HUD's "continuing approval and oversight" of Louisiana's Road Home Program. Compl. ¶ 51.

D. Plaintiffs' Claims Under 42 U.S.C. §§ 3608(d), (e)5), 5304(b)(2) Are Unreviewable

Plaintiffs' remaining claim concerning HUD's "continuing approval and oversight" of Louisiana's Road Home Program, Compl. ¶ 51, is unreviewable under § 706(1) of the APA because it is exactly the sort of vague agency action the Supreme Court held unreviewable in *Norton v. So. Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55 (2004).

Contrary to plaintiffs' contention, HUD does not claim that *SUWA* would–if plaintiffs' were even proceeding under the APA–bar review under 5 U.S.C. § 706(2) of plaintiffs' allegations that HUD's initial approval of the Road Home program violated 42 U.S.C. §§ 3608(d), (e)(5) and 5304(b)(2). Rather, as demonstrated in HUD's motion to dismiss and above, *supra*, plaintiffs' claim that HUD violated these provisions is unreviewable for two other reasons. First, plaintiffs lack standing to challenge, among other things, HUD's approval of the Road Home program and, second, their challenge to HUD's approval is moot.

Having established that HUD's approval of the Road Home program is not reviewable for other reasons, HUD's motion to dismiss demonstrated that this Court would not be able to review plaintiffs' remaining claim that HUD's "continuing oversight and approval," Compl.¶ 51, violates §§ 3608(d), (e)(5) and 5304(b)(2) under § 706(1) of the APA. HUD's alleged failure in "ongoing

oversight and continuing approval" could not, as plaintiffs suggest, constitute final agency action reviewable under § 706(2). Rather, such a claim could not reasonably be construed as anything other than an alleged "failure to act," which is reviewable only under § 706(1). Accordingly, plaintiffs' §§ 3608(d), (e)(5) and 5304(b)(2) claims should be dismissed because of the Supreme Court's controlling precedent in *SUWA*.

Plaintiffs' effort to distinguish §§ 3608(d), (e)(5) and 5304(b)(2) from the statute at issue in *SUWA* is without merit, because the statutes are demonstrably similar in their lack of specificity, the precise attribute that the Court found determinative in *SUWA*. In the statute at issue in *SUWA*, Congress had declared that the policy of the United States is that "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values" and "that, where appropriate, will preserve and protect certain public lands in their natural condition." 43 U.S.C. § 1701(a)(8). The policies of the FHA are at least as non-specific. *Cf.* 42 U.S.C. § 3601 (declaring that "[i]t is the policy of the United States to provide . . . fair housing throughout the United States."). Likewise, the specific statutory provision allegedly violated in *SUWA* provided that "the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). Again, §§ 3608(d), (e)(5) and 5304(b)(2) are at least as non-specific. *Cf.* 42 U.S.C. § 3608(d) ("All executive departments and agencies shall administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of this subchapter."); *id.* § 3608(e)(5) (requiring HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter."); *id.* § 5304(b)(2) (providing that "any grant shall be made only if the grantee certifies to the satisfaction of [HUD] that . . . the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 and the Fair Housing Act,

and the grantee will affirmatively further fair housing."). Thus, plaintiffs cannot convincingly distinguish the statute at issue in *SUWA* from that at issue here.

Moreover, none of the cases cited by plaintiffs advance their claims that HUD's alleged violations of §§ 3608(d), (e)(5) and 5304(b)(2) are reviewable even without consideration of *SUWA*. In *NAACP v. HUD*, 817 F.2d 149 (1st Cir. 1987), the court addressed HUD's "pattern . . . over time" of grant activity in Boston. *Id.* at 157. In such a situation, the court held that it "can compel an official to exercise his discretion where he has obviously failed or refused to do so." 817 F.2d at 160 (citing *Mastrapasqua v. Shaughnessy*, 180 F.2d 999, 1002 (2d Cir.1950)). But plaintiffs here make no such allegation of a "pattern" of violations against HUD. Compl. *passim*. Indeed, the *NAACP* court expressly distinguished the situation before it from that in *Heckler v. Chaney*, 470 U.S. 821, (1985), where, as here, the plaintiffs challenged a single instance of a failure to act, and the Supreme Court found such a failure unreviewable. *Id.* at 838.

Plaintiffs also fail to acknowledge that *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hsg. Auth.*, 417 F.3d 898, 909 (8th Cir. 2005), is *sui generis* and therefore does not have persuasive value. As HUD's motion to dismiss demonstrated, 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 . . . assess[ed] those aspects of [the] proposed course of action that would increase that supply.'" *Id.* at 907 (citation omitted). 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.* Again, to the extent *Darst-Webbe* is in any way inconsistent with *SUWA*, this Court should simply disregard the decision. However, even if this Court found *Darst-Webbe* persuasive, that court's holding does not advance plaintiffs' claim here, as plaintiffs do not allege that HUD failed to consider, or to make an effort to

achieve, fair housing. Compl. *passim*.

Finally, *Thompson v. HUD*, 2006 WL 581260 (D. Md.), addressed the scope of the Court's remedial powers after finding a constitutional violation. Plaintiffs do not allege any intentional discrimination here. Compl. *passim*. In any event, the court did not review the *Thompson* plaintiffs' claims under § 706(1), but only under § 706(2). *See id.*, at * 4. Thus, plaintiffs' efforts to use inapposite precedent to distinguish the case at hand from *SUWA* are unavailing. Accordingly, plaintiffs' claims are unreviewable under § 706(1).

III. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiffs fail to allege a claim upon which relief can be granted. HUD Mot. to Dismiss at 40-44. As plaintiffs concede, a complaint must "'raise a right to relief above the speculative level.'" Pl. Opp'n at 51 (quoting *Bell Atlantic v. Twombly*, 550 U.S. at 555 (2007)). None of plaintiffs' claims meet this requirement, however. Plaintiffs have failed to allege a claim under §§ 3604, 3605 and 3608 because they have not alleged that the Road Home Program, in its entirety, has a disparate impact on the African American community. Moreover, plaintiffs offer no cases in support of their contention that §§ 3604 and 3605 *can* be applied to HUD's actions in this case. Similarly, plaintiffs have failed to allege that a single failure to administer a housing related program in furtherance of fair housing can constitute a violation of § 3608's mandate that HUD "administer [its] programs and activities . . . *in a manner* affirmatively to further" fair housing. Finally, plaintiffs have conceded that they have failed to allege the elements of a violation under § 5304(b)(2) against HUD. Pl. Opp'n *passim*.

A. Plaintiffs Have Failed to State a Claim Under 42 U.S.C. §§ 3604, 3605 and 3608 Against HUD

As plaintiffs note, the Supreme Court recently held that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Pl. Opp'n at 53 (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)

(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiffs' claim of disparate impact discrimination under §§ 3604, 3605, and 3608 against HUD fails to meet this standard. First, plaintiffs cannot meet the requirement, which the court set out in *Iqbal*, that a complaint contain sufficient facts to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. Plaintiffs' complaint alleges that a funding formula that constitutes one part of the Road Home program has caused a disproportionate impact on African Americans, but it is an uncontested fact that the LRA and *not* HUD developed this formula – a point plaintiffs attempt to obscure by referring to it as "HUD's formula" in the defense of their claim against HUD. Pl. Opp'n at 54. In explaining why, despite the LRA's authorship of the formula, HUD might be "liable for the misconduct alleged," plaintiffs point only to "HUD's approval of the formula (and *other* actions)." *Id.* Yet, plaintiffs have alleged *no* facts that indicate HUD had a reason–or even the ability under existing regulations–to deny approval of the program. *Supra* at 7 n.2. The *Twombly* Court specifically rejected the validity of a claim supported by "'no set of facts.'" *Twombly*, 550 U.S. at 561-63 (citation omitted). *See also Aktieselskabet v. Fame Jeans Inc.*, 525 F.3d. 8, 15, 17 (D.C. Cir. 2008) (finding that "it has never been literally true, as *Twombly* noted, that a complaint is adequate unless "no set of facts" consistent with the complaint could support a claim . . . a complaint needs some information about the circumstances giving rise to the claims."). As to the alleged "other actions," such a vague assertion of wrongdoing has never been an acceptable allegation as it fails to provide "the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Plaintiffs' Complaint gives no explanation of what specific actions HUD took or failed to take to cause the alleged disparate impact of the Road Home program, instead gesturing vaguely towards HUD's "ongoing oversight and continuing approval" of the program. Compl. ¶ 51. HUD has not, therefore, had "fair notice" as to the misconduct alleged against it.

Even if plaintiffs had alleged facts to create a reasonable inference that HUD would be liable

for alleged defects in the Road Home formula, plaintiffs' §§ 3604, 3605, and 3608 claims should still be dismissed because the alleged defects are not sufficient to raise a claim of disparate impact discrimination. As the *Twombly* Court explained, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Twombly*, 550 U.S. at 558 (quoting 5 Wright & Miller § 1216, at 233-34). Here, while plaintiffs have alleged facts that, if taken as true, *might* allow a reasonable inference that one part of the grant "formula" in the Road Home program–examined in isolation–has a disparate impact on African Americans, they have alleged *no* facts that indicate that the program *in its entirety* imposes a statistically significant disparate impact on African Americans. Thus, their allegations, "however true, could not raise a claim of entitlement to relief." *Id.* The LRA's Road Home program does not simply distribute funds based solely on the value of a home. The program also provides up to $50,000 in Additional Compensation Grants for homeowners with household incomes no more than 80 percent of the median income in the parish where the house was located. HUD Mot. to Dismiss at 12-13. In addition, it provides Individual Mitigation Measures and Elevation Incentives to eligible homeowners, without reference to the property value of the homes. *Id.* The statistics and facts that plaintiffs present to demonstrate that African-American home values are lower than those of whites are not, therefore, sufficient to create a "reasonable inference" that the Road Home program imposes a disparate impact on African Americans. *See id.* at 41-42. To survive this motion to dismiss, plaintiffs would need to allege some set of facts that would support the contention that, even with the potentially mitigating measures of the Additional Compensation Grants and the availability of other funds untethered to home values, the Road Home program still disparately impacts African Americans. *See id.* at 43. Plaintiffs have alleged no facts at all regarding the effects of the Individual Mitigation Measures and the Elevation Incentives, Compl. *passim*, and have simply put forth the conclusory statement in the Complaint that "[t]he

Additional Compensation Grant . . . does not eliminate the discriminatory disparities in grant amounts." Compl ¶ 59. But the *Iqbal* and *Twombly* Courts specifically found that if "allegations are conclusory," they are "not entitled to be assumed true." *Iqbal*, 129 S. Ct. at 1951 (citing *Twombly*, 550 U.S. at 554-55).

Finally, as demonstrated above, *supra* at 4, plaintiffs have not even shown that §§ 3604(a) and 3605(a) are applicable to HUD's actions in this case. They have failed to cite a single case supporting their contention that §§ 3604(a) and 3605(a) are meant to govern HUD's supervision of the LRA programs. Plaintiffs have also put forth no case law in support of their contention that HUD's actions in connection with the development and administration of a single grant formula can constitute a violation of § 3608(d) or (e)(5). Plaintiffs only cite cases in which § 3608(d) and (e)(5) violations are claimed on the strength of allegations of a constitutional violation or a pattern and practice of discriminatory agency behavior. Pl. Opp'n at 56 (citing *Otero v. NYC Hsg. Auth.*, 484 F. 2d 1122, 1134 (2d Cir. 1973), *Darst-Webbe*, 417 F. 3d at 907; *NAACP*, 817 F. 2d at 155; *Lee v. Pierce*, 698 F. Supp at 342). The *Otero* court looked to § 3608 to find further evidence of a *constitutional* mandate to "act affirmatively to achieve integration," in the face of a constitutional violation. *Otero*, 484 F. 2d at 1133. Plaintiffs have alleged no such constitutional violation on the part of HUD in this case. Similarly, *NAACP v. HUD* found only that HUD's alleged "pattern" of failure to affirmatively further fair housing was reviewable under the APA. 817 F.2d at 158. *See also Darst-Webbe*, 417 F. 3d. at 907 (finding HUD met its obligation to affirmatively further fair housing in its approval of a *series* of loans and housing plans over the course of "long history" of a revitalization project); *Lee v. Pierce*, 698 F. Supp at 342 (challenging a *pattern* of sales of homes to non-homeless individuals). Thus, plaintiffs have not demonstrated that the allegedly disparate impact of HUD's actions in connection with a single grant constitutes a violation of § 3608(d) or (e)(5). As a result of this failure, and plaintiffs' failure to allege facts sufficient to support a "reasonable inference" that HUD is liable for the disparate impact of

the Road Home program, or even a "reasonable inference" that the program in its entirety *has* a disparate impact, this Court should dismiss the §§ 3604, 3605, and 3608(d) and (e)(5) claims against HUD. *Iqbal*, 129 S. Ct. at 1949.

B. Plaintiffs Have Failed to Allege the Elements of a Violation of 42 U.S.C. § 5304(b)(2) Against HUD

As HUD demonstrated in its motion to dismiss, plaintiffs have failed to state a claim under § 5304(b)(2) against HUD. HUD Mot. to Dismiss at 43-44. Section 5304(b)(2) states that a grant "shall be made only if the grantee certifies to the satisfaction of [HUD] that . . . the grantee will affirmatively further fair housing." Plaintiffs do not allege that grantees failed to submit such certification. Compl. *passim*. HUD's implementing regulations state that such "certification[s] . . . *are satisfactory* to [HUD] . . . unless [HUD] has determined pursuant to [its review and audit functions set out in] § 570.493 that the State has not complied with the requirements of this subpart." 24 C.F.R. § 570.485(c). Plaintiffs do not allege that there was any evidence of past defects in Louisiana's grant administration, nor any evidence of a defect in Louisiana's certification. Compl. *passim*. Indeed, plaintiffs do not allege that HUD would have had *any* reason to know that the LRA certifications might be unsatisfactory or that the Road Home Program might have a disparate impact on African-Americans. Compl. *passim*.

IV. CONCLUSION

For the foregoing reasons, this Court should grant HUD's motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim.

Dated: July 8, 2009

Respectfully submitted,

MICHAEL F. HERTZ
Acting Assistant Attorney General, Civil Division

CHANNING D. PHILLIPS
Acting U.S. Attorney for the District of Columbia

/s/ James D. Todd, Jr.
MICHAEL SITCOV
Assistant Branch Director
JAMES D. TODD, JR.
Senior Counsel
U.S. DEPARTMENT OF JUSTICE[7]
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W.
Washington, DC 20001
(202) 514-3378
(202) 616-8470 (fax)
james.todd@usdoj.gov
Attorneys for Defendant
U.S. Department of Housing and Urban Development

[7] 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 July 8, 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:

Joseph Marc Sellers, Esq.
Llezlie Lloren Green, Esq.
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, NW, Suite 500
Washington , DC 20005-3934
(202) 408-4600
jsellers@cohenmilstein.com
lgreen@cohenmilstein.com

Damon T. Hewitt, Esq.
Debo P. Adegbile, Esq.
Matthew Colangelo, Esq.
ReNika C. Moore, Esq.
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York , NY 10013
(212) 965-2200
dhewitt@naacpldf.org
dadegbile@naacpldf.org
mcolangelo@naacpldf.org
rmoore@naacpldf.org

M. Lucia Blacksher, Esq.
GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER
228 St. Charles Avenue, Suite 1035
New Orleans , LA 70130
(504) 208-5050
lblacksher@gnofairhousing.org

Attorneys for Plaintiffs

Timothy E. Heffernan, Esq.
WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.
8405 Greensboro Drive, Suite 100
McLean, Virginia 22102
(703) 749-1000
theffern@WTHF.com

A.J. Krouse, Esq.
Renee Culotta, Esq.
Suzanne M. Risey, Esq.
FRILOT L.L.C.
1100 Poydras St., 36th Floor
New Orleans, LA 70163
(504) 599-8016
akrouse@frilot.com
rculotta@frilot.com
srisey@frilot.com

Attorneys for Defendant, Paul Rainwater, Executive Director of the Louisiana Recovery Authority

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