UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' SECOND MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

Plaintiffs Greater New Orleans Fair Housing Action Center, *et al.*, respectfully file this Second Motion for a Temporary Restraining Order and a Preliminary Injunction against Defendant Robin Keegan – the former Executive Director of the Louisiana Recovery Authority ("LRA") and current Executive Director of the LRA's successor agency, the Louisiana Office of Community Development ("OCD").

Plaintiffs seek relief on behalf of the subset of Plaintiffs who have not yet received their initial grant awards under the Road Home Program and who are in imminent danger of receiving initial grant awards based upon a formula that this Court concluded "may well be a discriminatory." Dkt. No. 61, at 17. Specifically, Plaintiffs seek an immediate temporary restraining order and a preliminary injunction enjoining Keegan from using a formula that takes into account pre-storm home values (which this Court has already found is likely a discriminatory criterion) to calculate and disburse any future grants until the case is adjudicated on the merits. As of the date of this filing, Keegan has refused to alter the formula for

calculating and disbursing future grant awards. At any point, Keegan may (as she has in the past) use the discriminatory formula to calculate and disburse initial grant awards to Plaintiffs who have yet to have their first closings under the Road Home Program. By virtue of the Court's prior rulings in this case, such action may forever preclude Plaintiffs from obtaining recalculated awards.

For the reasons stated above and in Plaintiffs' attached memorandum, they satisfy all of the requirements for this Court to issue temporary and preliminary injunctive relief. Without a temporary and preliminary injunction, Plaintiffs will suffer irreparable harm by forever losing their opportunity to obtain equitable relief for violations of federal anti-discrimination laws.

Plaintiffs respectfully request the Court to enter immediately the proposed order granting their request for temporary injunctive relief to preserve the status quo, and to schedule a hearing on Plaintiffs' Motion for a Preliminary Injunction at the earliest possible date convenient to the Court and the parties. As Keegan may take action at any time to calculate and disburse initial grant awards by using a discriminatory formula, it is necessary for a temporary restraining order to be in place until the Court is able to rule on Plaintiffs' Motion for a Preliminary Injunction.

Dated: July 21, 2010

Respectfully submitted,

/s/ Damon T. Hewitt
John Payton, Director-Counsel
(D.C. Bar No. 282699)
Damon T. Hewitt
ReNika C. Moore
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, NY 10013
(p) 212-965-2200 / (fax) 212-226-7592
rmoore@naacpldf.org

/s/ Joseph M. Sellers
Joseph M. Sellers (D.C. Bar No. 318410)
Jenny R. Yang (D.C. Bar No. 484874)
Peter Romer-Friedman (D.C. Bar No. 993376)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, NW, Suite 500
Washington, D.C. 20005
(p) 202-408-4600 / (fax) 202-408-4699
jsellers@cohenmilstein.com

/s/ Danielle Conley
Craig Goldblatt (D.C. Bar No. 449229)
Danielle Conley (D.C. Bar No. 503345)
WILMER HALE
1875 Pennsylvania Avenue, NW
Washington DC 20006
(p) 202-663-6006/ (fax) 202-663-6363
danielle.conley@wilmerhale.com

/s/ Morgan Whitney Williams
Morgan Whitney Williams
GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER
404 S. Jefferson Davis Pkwy.
New Orleans, LA 70119
(o) 504-596-2100 ext. 104/ (fax) 504-708-2476
mwilliams@gnofairhousing.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2010, the foregoing document was filed electronically via the Court's ECF system, through which a copy was served on:

Allen J. Krouse, III
Renee G. Culotta
Suzanne M. Risey
FRILOT L.L.C.
1100 Poydras Street, Suite 3600
New Orleans, LA 70163
Telephone: 504-599-8004
Facsimile: 504-599-8104
Email: akrouse@frilot.com
Email: rculotta@frilot.com
Email: srisey@frilot.com

Attorneys for Defendant Robin Keegan

James D. Todd
U.S. DEPARTMENT OF JUSTICE
20 Massachusetts Avenue, N.W.
Washington, DC 20001
Telephone: 202-514-3378
Facsimile: 202- 616-8470
Email: james.todd@usdoj.gov

Attorney for Defendant United States Dept. of Housing and Urban Development

/s/ Damon T. Hewitt

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' SECOND MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

Plaintiffs Greater New Orleans Fair Housing Action Center, *et al.*, respectfully submit this memorandum of law in support of their Second Motion for a Temporary Restraining Order and a Preliminary Injunction against Defendant Robin Keegan – the former Executive Director of the Louisiana Recovery Authority ("LRA") and current Executive Director of the LRA's successor agency, the Louisiana Office of Community Development ("OCD").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

INTRODUCTION

This lawsuit challenges racial discrimination in the design and operation of the Road Home Program, an $11 billion recovery program designed to help homeowners affected by Hurricanes Katrina and Rita – the single largest housing recovery program in United States history. Defendants Keegan and the U.S. Department of Housing and Urban Development ("HUD") are in violation of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3604, 3605, and 3608 (the "Fair Housing Act" or "Title VIII"),[1] and the Housing and Community Development Act of 1974, 42 U.S.C. § 5304 (the "HCDA"), by developing and implementing a grant formula that has a disparate impact on African American homeowners in New Orleans.[2] The formula adversely affects African-American homeowners, as it ties rebuilding grants to pre-storm home values, which are much lower in predominantly African-American communities than predominantly white communities, leaving African-American families with more frequent and larger gaps between their rebuilding grants and the cost to rebuild their homes, and harming their efforts to return to their homes in New Orleans. Compl., Dkt. No. 1, ¶¶ 52-60.

The Greater New Orleans Fair Housing Action Center, National Fair Housing Alliance, and five African-American homeowners from New Orleans (collectively, "Plaintiffs"), filed this lawsuit on behalf of all African-American homeowners in New Orleans who have participated in

[1] Section 3604(a) makes it unlawful to "make unavailable or deny" housing to any person because of race. 42 U.S.C. § 3604(a). Section 3605(a) makes it unlawful to discriminate on the basis of race in the availability, terms, or conditions of residential real estate-related transactions. *Id.* § 3605(a). And § 3608(e)(5) of Title VIII requires HUD and recipients of federal funds to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further" fair housing. *Id.* § 3608(e)(5). Finally, § 5304(b)(2) of the HCDA requires that the use of all CDBG funds be conducted in a manner that "affirmatively further[s] fair housing." *Id.* § 5304(b)(2).

[2] The City of New Orleans and the political subdivision Orleans Parish are coterminous. Plaintiffs refer throughout this brief to New Orleans and Orleans Parish interchangeably.

the Road Home Program whose initial grant awards were calculated, *or will be calculated*, based upon the pre-storm value of their homes. Compl., Dkt. No. 1, ¶ 21.[3]

In denying Plaintiffs' first Motion for a Temporary Restraining Order and a Preliminary Injunction, Dkt. Nos. 59 and 61, this Court previously ruled that it was barred by the Eleventh Amendment from ordering an ultimate remedy that would require the recalculation of initial grant awards that had already been received by beneficiaries of the Road Home Program, even though those awards were likely based upon a formula that had a discriminatory impact on African-American homeowners. It was primarily on this basis that the prior request for preliminary relief (freezing of assets in the form of surplus funds) was denied.[4]

Plaintiffs now seek relief on behalf of individuals who have not yet received their initial grant awards under the Road Home Program and who are in imminent danger of receiving initial grant awards based upon what this Court concluded "may well be a discriminatory formula." Dkt. No. 61, at 17. Specifically, Plaintiffs seek a temporary restraining order and a preliminary injunction enjoining Keegan from using a formula that takes into account pre-storm home values (which this Court has already found is likely a discriminatory criterion, *see id.* at 7-8) to calculate and disburse any future grants until the case is adjudicated on the merits. Insofar as this second

[3] The Court noted in its July 7, 2010, Memorandum Opinion that Plaintiffs did not seek to circumscribe their first motion such that it would be limited to Road Home beneficiaries who had yet to receive initial grant awards, Dkt. No. 61, at 14, n. 12, and also suggested that Plaintiffs did not wish to represent those individuals, *id*. at 15, n. 13. However, the Complaint in this action clearly indicates that Plaintiffs seek relief on behalf of all current and future beneficiaries who had, or will have, their grants based upon the discriminatory formula. And while the first motion sought relief for all of these Plaintiffs, the instant motion seeks relief only on behalf of the subset of Plaintiffs who have not yet received their initial grant awards.

[4] Plaintiffs dispute the denial of their Motion for a Temporary Restraining Order and a Preliminary Injunction (Order, Dkt. No. 59 and Memorandum Opinion, Dkt. No. 61) and reserve their right to appeal.

motion pertains only to *future* grant awards, the requested relief does not disturb this Court's ruling that any order "mandating that LRA make payments to Road Home beneficiaries who have *already received* funds" would violate the Eleventh Amendment. *Id*. at 10 (emphasis added).

Without temporary and preliminary injunctive relief, this subset of Plaintiffs may *forever* lose their right to obtain a remedy in this action, which seeks to vindicate the civil rights of African-American homeowners. Accordingly, Plaintiffs respectfully request an order from this Court to prevent further discrimination, thus preserving the status quo until it issues a decision on the merits.

PROCEDURAL BACKGROUND

On November 12, 2008, Plaintiffs filed their Complaint, alleging that Defendants developed, implemented, and oversaw the Road Home Program in violation of the nondiscrimination and affirmative fair housing provisions of the Fair Housing Act and the HCDA, because the program has a disparate impact on African American homeowners as compared to whites. Plaintiffs sought declaratory and injunctive relief to end the discriminatory operation of the Road Home Program and to direct the Defendants to develop and apply a new, non-discriminatory grant formula. Compl., Dkt. No. 1, at 17.

On March 6, 2009, HUD moved to dismiss for lack of jurisdiction and for failure to state a claim on which relief can be granted. Dkt. No. 22. On May 5, 2009, Keegan moved to dismiss based on a lack of jurisdiction, failure to state a claim, and a sovereign immunity defense. Dkt. No. 28. Keegan also moved for a transfer of venue to the Middle District of Louisiana. *Id.* On June 5, 2009, Plaintiffs opposed the Defendants' motions to dismiss and transfer venue. Dkt.

No. 34. The same day, HUD responded to Keegan's motions, arguing that the Plaintiffs have a right to sue Keegan under the doctrine of *Ex parte Young*; Keegan's sovereign immunity defense is meritless and that the action should not be transferred. Dkt. No. 33. On July 8, 2009, Keegan and HUD filed reply briefs in support of their respective motions. Dkt. Nos. 38-40.

On May 24, 2010, the Court scheduled a hearing on the motions to dismiss and directed the parties to address (1) whether *Ex parte Young* permits an order precluding a state officer from using funds that have not yet been released in a manner that violates federal law, and (2) how much money is available to the Road Home Program but has not yet been disbursed to Louisiana for that use, and how much money Louisiana and/or the LRA have that has not yet been disbursed to Road Home recipients. Dkt. No. 45. After conferring with HUD and Keegan, Plaintiffs filed their first Motion for Temporary Restraining Order and Preliminary Injunction. Dkt. No. 50. On June 4, 2010, the Court issued a clarification of its May 24, 2010 Order. Dkt. No. 52. After responsive briefing by the parties, Dkt. Nos. 57 and 58, the Court set a hearing on Plaintiffs' first motion for June 25, 2010. After hearing oral argument on that date, the Court denied Plaintiffs' motion for injunctive relief in an Order dated June 29, 2010, Dkt. No. 59, and issued a Memorandum Opinion setting forth its reasons for denying the motion on July 7, 2010, Dkt. No. 61 ("July 7 Opinion").

FACTUAL BACKGROUND

In the interest of brevity, Plaintiffs incorporate by reference the factual recitations set forth in their previous pleadings: Compl., Dkt. No. 1, ¶¶ 1-73; Plaintiffs' Memorandum and Points of Authorities in Support of Their [First] Motion for a Temporary Restraining Order and

A Preliminary Injunction, Dkt. No. 50-1, at 10-28; and Plaintiffs' Supplemental Memorandum in Response to the Court's June 4, 2010 Clarification Order, Dkt. No. 53, at 2-7. However, Plaintiffs highlight the following facts that are particularly relevant to the instant motion:

Source of funds

In the aftermath of Hurricanes Katrina and Rita in 2005, Congress established a $19.7 billion Disaster Recovery Grant program. Through three separate allocations of Community Development Block Grant ("CDBG") funds in 2005, 2006, and 2007, Congress provided funds for necessary expenses related to disaster relief, long-term recovery, and rebuilding in the most affected areas in the Gulf of Mexico.[5] The first two statutes appropriated a combined $16.7 billion to five affected states—Louisiana, Mississippi, Texas, Florida, and Alabama—for activities authorized under the CDBG statute. *See* 2005 Act, 119 Stat. at 2779-81 ($11.5 billion appropriation); 2006 Act, 120 Stat. at 472-73 ($5.2 billion appropriation). But the final appropriation authorized an additional $3 billion of supplemental CDBG grants "solely for the purpose of covering costs associated with otherwise compensated but eligible claims that were filed on or before July 31, 2007, under the Road Home program," which operates solely in Louisiana. 2007 Act, 121 Stat. at 1343-44. The funds that remain for this program all come from the third supplemental appropriation, as the funds for the first two appropriations have already been exhausted. Congress required that all funds be disbursed in compliance with the

[5] *See* Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680, 2779-81 (Dec. 30, 2005) (the "2005 Act"); Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006, Pub. L. No. 109-234, 120 Stat. 418, 472-73 (June 15, 2006) (the "2006 Act"); Department of Defense Appropriations Act, 2008, Pub. L. No. 110-116, 121 Stat. 1295, 1343-44 (Nov. 13, 2007) (the "2007 Act").

Fair Housing Act. 71 Fed. Reg. 7,666, 7,671 (Feb. 13, 2006); 71 Fed. Reg. 63,337, 63,339 (October 30, 2006); 72 Fed. Reg. 70,472, 70,473 (Dec. 11, 2007).

Ongoing Discrimination

The formula for computing the grants, which was adopted by LRA and approved by HUD, provides that the grant amount is based chiefly upon the *lower* of two values: (1) the home's pre-storm value (minus any other compensation the applicant received for loss to the structure, such as insurance proceeds), or (2) the cost of repairing damage to the home (minus any other compensation the applicant received for loss to the structure). Dkt. No. 61, at 3. As this Court has noted, because homes in predominantly African-American communities have lower pre-storm values than comparable homes in predominantly white communities, and because the Road Home Program provides grants based on the lesser of the pre-storm value or the cost of repairing damage, African Americans are more likely than whites to receive a Road Home grant based on the pre-storm value of their home rather than on the much higher cost of repairing damage. *Id.* at 8. As a result, African-American homeowners are more likely than white homeowners to have a gap between their rebuilding resources and the cost to rebuild and, on average, their gaps are larger. *Id.*

As of the filing of this motion, a number of Road Home Program applicants have yet to receive initial grant awards. And Keegan has thus far failed to alter the discriminatory formula for those remaining Road Home beneficiaries who have yet to receive initial grant awards. Therefore, many of them face the immediate prospect of receiving insufficient initial grant awards based upon a discriminatory formula. Plaintiffs are not able to ascertain the precise number of individuals in this situation. However, Defendant Keegan estimates that as of June

11, 2010, 179 African-American homeowners in Orleans Parish fell into this category, *see* Dkt. No. 57, at 17-18.

Importantly, any of these individuals may receive initial grants at any moment, locking in discrimination in a manner that the Court has indicated may not be undone.

STANDARD OF REVIEW

"To warrant preliminary injunctive relief, the moving party must show (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) ("*CFGC*") (citations omitted).

"These factors should be balanced against one another and '[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.'" *Jasperson v. Fed. Bureau of Prisons*, 460 F. Supp. 2d 76, 88 (D.D.C. 2006) (Kennedy, J.) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)). Thus, "[t]he Court evaluates the four factors on a 'sliding scale.'" *Fraternal Order of Police Library of Cong. Labor Comm. v. Library of Cong*., 639 F. Supp. 2d 20, 24 (D.D.C. 2009) (Kennedy, J.) (quoting *Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 360-61 (D.C. Cir. 1999)). "For example, if plaintiffs make[] a strong showing of irreparable harm and there is no substantial harm to defendants, the Court applies a correspondingly lower standard for likelihood of success." *Id.* (citing *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

Plaintiffs need not show that irreparable harm is certain; they must only demonstrate "some likelihood of irreparable harm in the absence of an injunction." *Leitner v. United States*, 679 F. Supp. 2d 37, 42 (D.D.C. 2010) ("Both the United States Supreme Court and the Court of Appeals for the D.C. Circuit have also emphasized that a plaintiff must show at least some likelihood of irreparable harm in the absence of an injunction." (citing *Winter v. Natural Res. Def. Council, Inc*., 129 S. Ct. 365, 375 (2008) (holding that a plaintiff must "demonstrate that irreparable injury is likely in the absence of an injunction," and not a mere "possibility"); *CityFed*, 58 F.3d at 747 (holding that a plaintiff must demonstrate at least some injury for a preliminary injunction to issue) (citation and internal quotation marks omitted))). Moreover, when a plaintiff has demonstrated a substantial likelihood that a defendant has violated specific fair housing statutes and regulations, the violation alone creates a rebuttable presumption of irreparable injury. *See Gresham v. Windrush Partners, Ltd*., 730 F.2d 1417, 1423-24 (11th Cir. 1984), *cert. denied*, *Windrush Partners, Ltd. v. Metro Fair Hous. Servs*, 469 U.S. 882 (1984) (upholding district court's ruling that "once a plaintiff has demonstrated the likelihood of success on the merits of a claim of housing discrimination, irreparable injury must be presumed"); *see also Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) (same); *Rogers v. Windmill Pointe Village Club Ass'n, Inc.*, 967 F.2d 525, 528-29 (11th Cir. 1992) (same); *Mical Commc'ns, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1035-36 (10th Cir. 1993) (holding that irreparable injury is presumed "[w]hen the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute

which provides for injunctive relief to prevent such violations") (collecting cases from the 6th, 7th, and 8th Circuits).[6]

ARGUMENT

Plaintiffs can easily satisfy each part of the four-part balancing test to obtain a preliminary injunction.

First, this Court has already found that Plaintiffs have shown a likelihood of making out a prima facie case that using the pre-storm value criterion constitutes unlawful racial discrimination under the Fair Housing Act. Dkt. No. 61, at 7-8. Under the Court's reasoning, relief on behalf of homeowners who have yet to receive grant awards is prospective, not retrospective, relief, thereby falling within the exception to Eleventh Amendment sovereign immunity recognized by the U.S. Supreme Court in *Ex parte Young*, 209 U.S. 123 (1908).

Second, the harm will be irreparable because this Court has ruled that once initial grant awards are calculate and disbursed, requiring the recalculation of those grants constitutes impermissible retrospective relief. *See* Dkt. No. 61, at 13-15. Thus, Plaintiffs will lack an adequate remedy to the discrimination they will suffer if Keegan is permitted to issue discriminatory grant awards.

---

[6] *See also Cousins v. Bray*, 297 F. Supp. 2d 1027, 1041 (S.D. Ohio 2003) ("[B]ecause of the strong national policy against race discrimination in housing, once a plaintiff has demonstrated a likelihood of success on the merits of a claim of housing discrimination, irreparable harm will be presumed."); *Remed Recovery Care Centers v. Township of Willistown*, 36 F. Supp. 2d 676, 688 (E.D. Pa. 1999) ("[A] violation of the [FHA] creates a presumption of irreparable harm that a defendant must rebut in order for a preliminary injunction not to issue."); *Stewart B. McKinney Found., Inc. v. Town Plan and Zoning Comm'n of the Town of Fairfield*, 790 F. Supp. 1197, 1208 (D. Conn. 1992) ("[I]rreparable harm may be presumed in this case because . . . the plaintiff has presented sufficient evidence to establish that its rights under the [FHA] have been violated.").

Third, the proposed relief—prohibiting Keegan from using the pre-storm value criterion for future grant awards—will not harm Defendants or any other interested parties.

Finally, the public interest strongly supports the issuance of the requested relief and an injunction will stop any further discrimination in the nation's largest federal emergency housing program—a program to which Congress specifically attached fair housing and non-discrimination protections.

A. Plaintiffs Have a Substantial Likelihood of Success on the Merits

1. The pre-storm value criterion violates the Fair Housing Act.

Though federal courts have alternately applied two possible standards to assess disparate impact claims under the Fair Housing Act, this Court adopted the burden-shifting framework favored by most courts. *See* Dkt. No. 61, at 7-8. Under this framework "once the plaintiff demonstrates that the challenged practice has a disproportionate impact, the burden shifts to the defendant to 'prove and that no alternative would serve that interest with less discriminatory effect.'" Dkt. No. 61, at 7-8 (quoting *2922 Sherman Avenue Tenants' Ass'n v. Dist. of Columbia*, 444 F.3d 673, 680 (D.C. Cir. 2006)).

Plaintiffs have marshaled a considerable amount of statistical, documentary, and testimonial evidence demonstrating how and why the Road Home Program grant formula has a disparate impact on African-American homeowners.

This evidence included statistics from the U.S. Census showing that homes owned by African Americans in New Orleans have lower values, on average, than homes owned by whites, Dkt. No. 50-1, at 8-9, Ex. P; a published report from the organization Policy Link, which concludes that, on average, African-American applicants to the Road Home Program received

funds in amounts further below the costs to rebuild their homes than white applicants, Dkt. No. 50-1, at 12-15, Ex. S; supporting declarations, Dkt. No 50-1, Ex. T; and admissions from Keegan's predecessor, Paul Rainwater, that home values in African-American neighborhoods tend to be lower than in white neighborhoods and that he was "sure" that African-American homeowners were more likely than whites to receive awards based on the value of their homes than the cost of repairs, Dkt. No. 50-1, at 15-16, Ex. N, at 23-24.

Even in light of this overwhelming evidence, Keegan failed to articulate any bona fide interest in using the pre-storm value criterion for some, but not all, homeowners; nor could she point to the absence of a non-discriminatory alternative.

Based upon Plaintiffs' unrebutted evidence, this Court applied the burden shifting framework that the majority of Circuits have adopted to adjudicate FHA disparate impact claims and concluded that Plaintiffs have a high likelihood of succeeding in their disparate impact claim:

> Plaintiffs have demonstrated that they would likely be able to make out this prima facie case after discovery. The statistical and anecdotal evidence they submit to the Court leads to a strong inference that, on average, African-American homeowners received awards that fell farther short of the cost of repairing their homes than did white recipients. Keegan's attacks on that evidence are unpersuasive. Plaintiffs need not make a showing at this stage of the proceedings, before discovery and when briefing is necessarily rushed, sufficient to prove the merits of their case. Keegan neither demonstrates that plaintiffs' statistics or logic is flawed nor provides data about the administration of the Program that would show what effect the Option 1 formula has had. *Cf. Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1412 (D.C. Cir. 1988) ("Defendants may also attempt to undermine plaintiffs' prima facie case by attacking the validity of plaintiffs' statistical evidence, or by introducing statistical evidence of their own showing that the challenged practice did not have racially disproportionate results." (citation omitted)). She has also offered no legitimate reason for taking pre-storm home values into account in calculating Program awards.

Mem. Op., Dkt. No. 61, at 8. This finding constitutes the law of the case for purposes of the present motion. *Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999) ("[T]he *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*.") (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996)); *Does I through III v. District of Columbia*, 593 F.Supp.2d 115, 122 (D.D.C. 2009) (Kennedy, J.) ("The [l]aw-of-the-case doctrine refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as the law of the case) by that court or a higher one in earlier phases.") (internal quotes omitted).

2. The proposed injunctive relief does not implicate sovereign immunity concerns.

The Eleventh Amendment generally bars suits against states absent the relevant state's consent to be sued or some abrogation of the state's immunity by Congress, *Papasan v. Allain*, 478 U.S. 265, 276 (1986). However, in *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court announced an exception to that immunity that allows federal courts to enjoin state officials like Keegan from acting contrary to federal law, "either because their action is alleged to violate the Constitution directly or because it is contrary to a federal statute or regulation that is the supreme law of the land." *Vann v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008) (quoting CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4232 (3d ed. 2007)).

"In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as

prospective.'" *Verizon Md. Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring)). This analysis typically precludes the payment of damages from the state treasury to correct a prior unlawful act by a state official. *Edelman v. Jordan*, 415 U.S. 651, 663-64 (1974) (holding that federal courts lack jurisdiction to require a state to spend money that "should have been paid, but was not").

The Court denied Plaintiffs' first request for a temporary restraining order and preliminary injunction based primarily upon its finding that part of the ultimate remedy would require the recalculation of initial grant awards of Road Home Program beneficiaries who had already received awards under a discriminatory formula—relief that the court found was retrospective relief akin to money damages paid out of the state treasury. Dkt. No. 61, at 14-15. However, the Court also indicated that it would have jurisdiction to provide a remedy for those Road Home Program beneficiaries who had not yet received initial grant awards, as any order as to those individuals would constitute forward-looking *prospective* relief:

> [I]t seems to the Court that if the Road Home Program has not been completed, ***the Court may***—if plaintiff's arguments that Option 1 of the Road Home Program violates federal law are correct—***enjoin Keegan from continuing to administer it in an unlawful manner***. Were the Court to grant injunctive relief of that nature, it would not be ordering the payment of money. Instead, it would be ordering that, going forward, Keegan may not use the existing formula to disburse funds to Program beneficiaries. Such relief is the sort permitted under the doctrine of *Ex parte Young*. *See Edelman*, 415 U.S. at 664 (holding that prospective injunctive relief, such as the order issued in Ex parte Young itself in which "the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment," is not barred by the Eleventh Amendment).

Dkt. No. 52, at 4-5 (emphasis added).

As the Court made clear, the type of relief Plaintiffs' seek in the instant motion fits squarely within the *Ex parte Young* exception because Plaintiffs only seek to "enjoin Keegan from continuing to administer [the Road Home Program] in an unlawful manner." *Id*. The injunction sought only bars Keegan from using a discriminatory formula to calculate and distribute *future* grant awards until the case is adjudicated on the merits. Such relief does not run afoul of the Eleventh Amendment because it affects only future grants and prevents discrimination against beneficiaries who have not yet received initial grant awards. *See Verizon*, U.S. 535 at 645. This type of forward-looking injunction involves purely prospective relief.

In addition, even though compliance with the requested preliminary relief may require Keegan to issue future grants based upon the estimated cost of damage or some other non-discriminatory alternative to pre-storm value (a change that could result in Keegan spending more money in order to comply), the relief is still properly characterized as prospective and injunctive.[7] *See Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (holding that a court-ordered school desegregation plan that required some incidental expenditure of state funds came within the *Ex parte Young* exception because it "enjoin[ed] state officials to conform their conduct to requirements of federal law" in the future); *United States v. Yonkers Bd. of Educ.*, 893 F.2d 498, 503 (2d Cir. 1990) ("[E]ven where the relief requested will require the expenditure of state funds, if it is ancillary to such a prospective injunction it is not barred by the Eleventh Amendment."). As such, the *Ex parte Young* exception is plainly applicable and the Eleventh Amendment poses no bar to the requested relief.

[7] In making this argument, Plaintiffs note that the Court determined that the surplus Road Home funds are state funds. Dkt. No. 61, at 11-12. However, while respectful of the law of the case, Plaintiffs do not concede this point and wish to preserve their argument that these funds are federal funds.

B. Plaintiffs Will Be Irreparably Harmed If This Court Does Not Issue a Temporary Restraining Order and a Preliminary Injunction.

For an injury to constitute irreparable harm, it "must be 'certain and great,' 'actual and not theoretical,' and 'of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.'" *Fraternal Order of Police Library of Cong. Labor Comm.*, 639 F. Supp. 2d at 24 (quoting *CFGC*, 454 F.3d at 297). In addition, it "must be 'beyond remediation," which means that "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Id.* (quoting *CFGC*, 454 F.3d at 297-98 (citation omitted)); *see also* 11A WRIGHT, MILLER AND KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2d ed. 1995) ("Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief.")).

In its July 7, 2010 Memorandum Opinion, this Court concluded that any individual who has already received an initial Road Home grant may not obtain court-ordered relief in the form of a recalculated grant, as this would be retrospective relief akin to money damages from the state. *See* Dkt. No. 61, at 14-15. Consequently, Road Home Program beneficiaries who have yet to receive initial grant awards face immediate peril. If these Plaintiffs receive an initial grant award based upon the pre-storm value of their homes today, pursuant to the Court's previous Order, the Court will be powerless to rectify the situation and order recalculation of those grants, no matter how damning the evidence of the discriminatory effect. These Plaintiffs would be locked into the same type of discrimination that now traps thousands of other African-American homeowners in New Orleans. Under these circumstances, preliminary injunctive relief is clearly appropriate in order to protect African American homeowners from discrimination *before* it

happens. *See Gresham,* 730 F.2d at 1423 (holding that "when a plaintiff who has standing to bring suit shows a substantial likelihood that a defendant has violated specific fair housing statutes and regulations, that alone, if unrebutted, is sufficient to support an injunction remedying those violations.").

C. A Preliminary Injunction Will Not Harm Defendants or Other Interested Parties.

Neither the Defendants nor any other interested third parties will suffer harm, let alone "*substantial* harm," if this Court enjoins Keegan from using the discriminatory pre-storm value criterion to issue future grants to Road Home beneficiaries. *See Jasperson*, 460 F. Supp. 2d at 88 ("The court must consider . . . whether the issuance of injunctive relief would 'substantially harm' other parties."). Keegan has already made clear in her prior court filings that she has sufficient funds to provide non-discriminatory grants to the remaining beneficiaries who have yet to receive initial grant awards:

> The LRA has determined that under the existing formula, the amount of potential disbursements calculated for [eligible members of the Plaintiff class] is $9.224 million. . . However, the LRA has set aside and reserved a total of $126.6 million to pay pending applications for [grants for] eligible Road [H]ome applicants who have not yet had their first closing.

Dkt. No. 57, at 18.

> This figure does not account for funds set aside in reserve by the LRA for other possible payments under the Road Home Program, including payments for appeals, second disbursements, additional compensation grants, individual mitigation measures, contaminated drywall and sold homes. The total about of funds in reserve is $554.5 million

Id. at 18, n.10.

> [T]here is [sic] sufficient funds in reserve and set-aside to pay eligible pending grant applications. . . . This Court should find that these funds are more than sufficient to cover any future grant calculations covered by this suit.

Id. at 31.

As such, Keegan would not be injured by the proposed relief. Moreover, no other interested parties will face harm, let alone substantial harm. Notably, the proposed injunction would neither stop, nor slow, the flow of funds to Louisiana homeowners who are in need. Under the terms of the proposed relief, Keegan may still offer grants to all individuals who have yet to receive an initial grant award. However, those awards simply may not be based upon pre-storm value; instead, they must be based upon some other, non-discriminatory alternative, such as the estimated cost-of-damage criterion that Keegan has already used for the majority of white home owners. Moreover, the relief sought would make it more likely that Keegan would finally address the Road Home Program's failures and discriminatory effect, at least as to some beneficiaries. And, as the passages above demonstrate, the surplus Road Home funds are ample enough to permit Keegan to continue the Road Home Program while also providing appropriate, non-discriminatory grants to Plaintiffs in the future.

In evaluating the impact of an injunction on existing Road Home recipients, the Court should note that allowing Keegan to continue using the pre-storm value criterion will actually *further perpetuate* discrimination against African-American homeowners. The balance of harms, therefore, decidedly tips in favor of granting preliminary relief, as the Plaintiffs risk the loss of any means to redress the harm giving rise to this action, whereas Defendants and other parties faces no danger at all.

D. Granting the Proposed Injunctive Relief is in the Public Interest.

The public interest plainly favors enjoining Keegan from using the discriminatory formula to issue any further Road Home grants until the case is adjudicated on the merits. First,

"[t]here can be no doubt that the public interest lies in terminating" such discrimination. *Cook v. Billington*, No. 82-0400, 1988 WL 35364, at *2 (D.D.C. Mar. 31, 1988). Indeed, the Supreme Court has recognized that the eradication of housing discrimination serves "an overriding societal priority." *United States v. Edward Rose & Sons*, 384 F.3d 258, 264 (6th Cir. 2004) (quoting *Meyer v. Holley*, 537 U.S. 280, 290 (2003)). Moreover, eliminating housing discrimination and affirmatively promoting fair housing were the very purposes of enacting the Fair Housing Act. *See* 42 U.S.C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."); *see also Price v. Pelka*, 690 F.2d 98, 101 (6th Cir. 1982) ("The eradication of housing discrimination is a policy that Congress considered to be of the highest priority.") (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972)). And, "[i]n deciding what issues are imbued with 'public interest,' courts have given considerable weight to the policies of Congress[.]" 13 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 65.22[3], at 65-58 (3d ed. 2009).

The importance of remedying housing discrimination is well established. Several courts, including those within this Circuit, have routinely emphasized that remedying discrimination is an important public interest in cases involving violations of the Fair Housing Act. *See, e.g.*, *Brown v. Artery Org., Inc.*, 691 F. Supp. 1459, 1461 (D.D.C. 1987) (concluding that "the public interest would be better served by remedying any possible racial injustice" and denying defendants' motion to stay); *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106, 1119 (D.D.C. 1987) (concluding that "the public interest will most readily be served if prevention of the spread of racial discrimination in housing is given priority weight."); *Price*, 690 F.2d at 101 ("Private enforcement of the Fair Housing Act and 42 U.S.C. §§ 1981 and 1982 not only vindicates the

civil rights of the individual victim of discrimination, but promotes the public interest by eradicating housing discrimination."); *United States v. Edward Rose & Sons*, 246 F. Supp .2d 744, 755 (E.D. Mich. 2003) ("[W]here there has been a showing of housing discrimination, preliminary injunctive relief serves the public interest by carrying out the stated policy of the United States in 42 U.S.C. § 3601"); *United States v. Puerto Rico*, 764 F. Supp. 220, 225 (D.P.R. 1991) (granting injunction and emphasizing "the public interest that all citizens have in seeing vigorous enforcement of civil rights legislation like the Fair Housing Act.").[8]

Furthermore, "[t]he public has an interest in assuring that public funds are appropriated and distributed pursuant to Congressional directives." *Population Inst. v. McPherson*, 797 F.2d 1062, 1082 (D.D.C. 1986). As Congress specifically directed that the Road Home funds be spent pursuant to federal fair housing and anti-discrimination standards, 2005 Act, 119 Stat. at 2780; 2006 Act, 120 Stat. at 472-73, "the public interest will be frustrated" if the LRA is permitted to "distribute the funds" in direct contravention of the civil rights standards "dictated by Congress." *Population Inst.*, 797 F.2d at 1082; *see also* Letter from Rep. Maxine Waters to HUD Secretary Shaun Donovan (Apr. 14, 2010), Dkt. No. 50-1, Ex. gg, at 1-2 (stating that the Road Home Program "appears to contravene the fair housing protections enshrined in federal law—protections that were explicitly mandated by Congress when it funded the Road Home [P]rogram."). Issuing the proposed preliminary injunction would further the stated purposes of the Road Home Program and Congress' intent, as well.

[8] Likewise, outside the fair housing context, courts have found that the public interest favors granting injunctive relief in the face of a discriminatory formula promulgated by a state agency. *See South Camden Citizens in Action v. N.J. Dep't of Env. Prot.*, 145 F. Supp. 2d 446, 502 (D.N.J. 2001) (concluding the public interest favored plaintiff, in part because "requiring the [state agency] to comply with the EPA's Title VI implementing regulations is inherently in the public interest, insofar as it ensures the protection of civil rights").

Finally, if the Court preserves the status quo by preventing Keegan from discriminating against the prescribed subset of Plaintiffs, nearly 200 African-American homeowners in New Orleans will likely receive first-time Road Home grants that will help them finish repairing their homes. *Cf. id.* at 2 (stating that the Road Home Program's "discrimination . . . poses a major obstacle to rebuilding the great city of New Orleans and enabling its people to return home," and that many African American families "impacted by this discriminatory policy . . . still face insurmountable barriers to rebuilding."). Undoubtedly, completing these rebuilding efforts, especially in predominantly African-American neighborhoods, will improve the lives of residents, homeowners, and communities in New Orleans in so many tangible and intangible ways.

As this court has expressly recognized, rehabilitating communities is in the public interest. *Brown*, 654 F. Supp. at 1119 (noting that the argument that rehabilitating apartment complexes is in the public interest has "obvious merit"). Surely the same logic applies to rebuilding thousands of homes in a historic American city that was devastated by Hurricane Katrina.

In short, overwhelming legal authority and evidence demonstrates that a preliminary injunction will further the public interest by remedying costly discrimination, ensuring that the nation's largest federal housing program is administered according to the express fair housing mandates of Congress, and assisting thousands of homeowners to complete their repairs.

CONCLUSION

As the fifth anniversary of Hurricanes Katrina and Rita approaches, New Orleanians are still struggling to recover. Many plaintiffs in this action have already had their dreams undermined by having their initial Road Home grant awards based not on a realistic factor such as the actual cost to repair the damage to their homes, but rather on the pre-storm market value of their homes—a criterion that clearly leads to rank discrimination. But some have yet to receive initial grant awards at all. Ironically, as this subset of Plaintiffs clamors for funds that they desperately need to rebuild their homes five years after the storms, Keegan proposes to continue a pattern of discrimination by offering them insufficient grants based upon the discriminatory pre-storm value criterion. At any moment, Keegan may issue these initial grant awards. Under this court's previous rulings, if these plaintiffs receive even a portion of these funds they will be forever denied an opportunity to obtain a recalculation of their grant awards on a non-discriminatory basis. Under these circumstances, preliminary injunctive relief is clearly appropriate in order to address an ongoing violation of the law and to prevent further discrimination.

For the foregoing reasons, pending this Court's consideration of Plaintiffs' claims on the merits, the Court should temporarily restrain and preliminarily enjoin Keegan from using the pre-storm value criterion to calculate and disburse further Road Home Homeowner Assistance Program grants.

Dated: July 21, 2010

Respectfully submitted,

/s/ Damon T. Hewitt
John Payton, Director-Counsel
(D.C. Bar No. 282699)
Damon T. Hewitt
ReNika C. Moore
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, NY 10013
(p) 212-965-2200 / (fax) 212-226-7592
rmoore@naacpldf.org

/s/ Joseph M. Sellers
Joseph M. Sellers (D.C. Bar No. 318410)
Jenny R. Yang (D.C. Bar No. 484874)
Peter Romer-Friedman (D.C. Bar No. 993376)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, NW, Suite 500
Washington, D.C. 20005
(p) 202-408-4600 / (fax) 202-408-4699
jsellers@cohenmilstein.com

/s/ Danielle Conley
Craig Goldblatt (D.C. Bar No. 449229)
Danielle Conley (D.C. Bar No. 503345)
WILMER HALE
1875 Pennsylvania Avenue, NW
Washington DC 20006
(p) 202-663-6006/ (fax) 202-663-6363
danielle.conley@wilmerhale.com

/s/ Morgan Whitney Williams
Morgan Whitney Williams
GREATER NEW ORLEANS FAIR HOUSING
ACTION CENTER
404 S. Jefferson Davis Pkwy.
New Orleans, LA 70119
(o) 504-596-2100 ext. 104/ (fax) 504-708-2476
mwilliams@gnofairhousing.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2010, the foregoing document was filed electronically via the Court's ECF system, through which a copy was served on:

Allen J. Krouse, III
Renee G. Culotta
Suzanne M. Risey
FRILOT L.L.C.
1100 Poydras Street, Suite 3600
New Orleans, LA 70163
Telephone: 504-599-8004
Facsimile: 504-599-8104
Email: akrouse@frilot.com
Email: rculotta@frilot.com
Email: srisey@frilot.com

Attorneys for Defendant Robin Keegan

James D. Todd
U.S. DEPARTMENT OF JUSTICE
20 Massachusetts Avenue, N.W.
Washington, DC 20001
Telephone: 202-514-3378
Facsimile: 202- 616-8470
Email: james.todd@usdoj.gov

Attorney for Defendant United States Dept. of Housing and Urban Development

/s/ Damon T. Hewitt

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Upon consideration of Plaintiffs' Second Motion for a Temporary Restraining Order and a Preliminary Injunction, and the entire record herein, it is, this ____ day of _____, hereby **ORDERED** that Plaintiffs' Motion is **GRANTED**, and it is hereby **FURTHER ORDERD** that until such time as the Court issues a decision on the merits or provides otherwise, Defendant Robin Keegan – former Executive Director of the Louisiana Recovery Authority ("LRA") and current Executive Director of the LRA's successor agency, the Louisiana Office of Community Development ("OCD") – and/or or any successor entity, are enjoined from using the pre-storm value of a beneficiary's home as a criterion to calculate or disburse any further initial grant awards to beneficiaries of the Road Home Program, which Defendant administers. Under the terms of this Order, Defendant Keegan may continue to calculate and disburse grant awards in a manner that does not utilize the pre-storm value of the beneficiary's home as a criterion.

_____
Henry H. Kennedy
United States District Judge