UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MISSISSIPPI STATE CONFERENCE NAACP, *et al.*,	)	
Plaintiffs,	)	
	)	No. 1:08-cv-2140-JR
v.	)	
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *and*	)	
SHAUN DONOVAN, in his official capacity and Secretary, U.S. Department of Housing and Urban Development,[1/]	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Dated: May 29, 2009

[1] The acting HUD Secretary, Shaun Donovan, has been substituted in his official capacity as the individual defendant in this case. *See* Defendants' March 27, 2009 Motion to Dismiss.

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I. INTRODUCTION

The plaintiffs in this lawsuit are (1) low-income residents of Mississippi's Gulf Coast who were displaced from and/or suffered severe damage to their homes as a result of Hurricane Katrina (the "Individual Plaintiffs"), and (2) organizational plaintiffs -- the Gulf Coast Fair Housing Center ("GCFHC") and the Mississippi Conference of the NAACP ("NAACP"). The GCFHC sues on its own behalf, and the NAACP sues both on its own behalf and on behalf of its many low-income members (such as James Johnson, Lubertha Haskin, Ethel James and Ya-sin Shabazz, who submit declarations in conjunction with this Opposition) who still have critical, unmet housing needs as a result of Hurricane Katrina. The defendants are the Department of Housing and Urban Development ("HUD") and its Secretary.

The plaintiffs seek declaratory and injunctive relief to remedy the harm they have suffered, and continue to suffer, because of HUD's abdication of its statutory duties. Specifically, plaintiffs challenge HUD's passive acceptance of a "plan" by the state of Mississippi to spend up to $570 million in Community Development Block Grant ("CDBG") funds that Congress appropriated to address the critical unmet housing needs in areas impacted by Hurricane Katrina. Mississippi's "plan" is to divert these funds from their proper purpose, and to spend them instead to finance the expansion and redevelopment of a commercial port in Gulfport (the "Port Project"). The Port Project has been a gleam in the eye of Mississippi's development authorities for years prior to Katrina, but they had previously been unable to obtain funding for it. This Port Project will do nothing to address the severe low-income housing crisis caused by the storm.

The "plan" that Mississippi submitted to HUD, therefore, was manifestly inadequate. Mississippi did not certify to HUD, with supporting evidence to back up that certification, that its proposed use of the money would further the CDBG statute's mandate that the funds be used to

affirmatively further fair housing, and that at least 50% of the funds be used for activities that benefit low-to-moderate income ("LMI") households. Mississippi did not make a fair housing certification at all, and as to the 50% LMI requirement, Mississippi purported to make the certification but provided no evidence to support its desultory promise that the Port Project "will qualify" under the LMI benefit requirement. HUD had a statutory duty to obtain such certifications, to inspect the evidence supporting the certifications, and to reject the plan if such evidence "tends to challenge in a substantial manner the State's certification of future performance."

HUD ignored its statutory duty. Although the statute and its own regulations gave the agency clear authority to review and disapprove the Port Plan, HUD took the position that it had no discretion in the matter, and thus had no choice but to rubber-stamp the Port Plan. It took this position notwithstanding: (i) the absence of any fair housing certification; (ii) the lack of any evidence to support the purported LMI certification; (iii) the HUD Secretary's stated concerns that the expenditure of these CDBG funds on the Port Project "does indeed divert funding from other more pressing recovery needs, most notably affordable housing";[2] and (iv) the concerns of Congressman Barney Frank, the Chairman of the House Appropriations Committee that oversees HUD appropriations, "that this [Port Project] is not what CDBG was meant to do, and we don't want to set the precedent that this is an appropriate use of Community Development Block Grant funds."[3] HUD refused to exercise its statutory authority in the first place, and it has since refused to reconsider its acceptance of Mississippi's plan to divert the more than a half-billion dollars in CDBG funds away from desperately needed affordable housing programs and to the

[2] Declaration of Amanda B. Carozza ("Carozza Decl."), Ex. F.
[3] Carozza Decl., Ex. G, at 9.

Port Project. HUD's obstinate, unjustified passivity compelled plaintiffs to bring this action seeking declaratory and injunctive relief.

The Court should deny HUD's present motion to dismiss this action for an alleged lack of standing. As set forth in detail below, HUD's conduct in improperly accepting the Port Plan caused each plaintiff's cognizable injury, and those injuries are redressable through the present lawsuit. This is all that Article III requires.

There is no question that plaintiffs have suffered an injury. Hurricane Katrina ripped apart the lives, not to mention the homes, of the Individual Plaintiffs, as well as NAACP members such as those who now submit declarations in support of their organization's standing. Today, nearly four years after Katrina, their living situations remain in varying degrees of shambles. Meanwhile, HUD ignores its statutory duty to ensure that the state utilizes CDBG funds to further fair housing and rubber-stamps Mississippi's callous diversion of funds that Congress appropriated for their benefit and for the benefit of thousands of other low-income citizens like them. For example:

- James Johnson is a 74-year old member of the Mississippi chapter of the NAACP with severe health problems. He worked at a lumberyard for over 50 years, and now lives on $1,350 per month in Social Security. He left school at nine years old to work and help his family buy the land in Gulfport where he still lives, and which he inherited from his father in 1946. The storm completely destroyed his house on that property. Since wind did the damage (as opposed to storm surge), he was told he was ineligible for the state's CDBG-funded homeowner assistance program. FEMA provided him with a trailer and $2,000 for the contents of his house. Mr. Johnson still resides in that trailer today, and FEMA has told him that it will remove his trailer in the near future. Mr. Johnson has nowhere else to go. He says he will have to pitch a tent in his yard. *See* Exhibits A and B to the Declaration of James Johnson ("Johnson Decl.") for photographs depicting his current living situation.

- Individual Plaintiff Dorothy McClendon owns a home in a predominantly African-American neighborhood of Gulfport ("Soria City") that was severely damaged by wind from the hurricane. Her neighborhood, like many other low income, predominantly African American neighborhoods along the Gulf Coast, is located north of the CSX railroad tracks that run parallel to the coast (and whose railbed functioned as a

levy against the surge), and south of which are many of the more affluent, coastal residential areas. She, like many others in her neighborhood, had to live in a FEMA trailer on her property while trying to come up with funds to make repairs. Though Ms. McClendon applied for federal assistance through the state's CDBG-funded homeowner assistance programs, she was told she was ineligible for any monetary assistance because the wind, and not the storm surge, damaged her home. Ms. McClendon was not given a handicap-accessible FEMA trailer (which she required), so she was forced to switch back and forth between the trailer and her damaged home, which had no working heat. Ms. McClendon completely lost her roof in the storm, and because the foundation of her home shifted off its base, she has serious gas, electrical and plumbing issues. Because it took over a year and a half to get her roof repaired, her home also has severe water, mold and mildew problems. Though private charitable organizations were able to provide her with assistance to make some of the necessary repairs, she received nothing from the government and therefore much of Ms. McClendon's home remains to this day in dire need of restoration. *See* Declaration of Dorothy McClendon ("McClendon Decl.").

- Lubertha Haskin and Ethel James, both also members of the Mississippi chapter of the NAACP, have moved back into their damaged homes in North Gulfport, Mississippi because they have nowhere else to live. Both are retired, low-income homeowners who applied for CDBG-funded federal assistance after the hurricane. Mississippi denied their requests because it had decided not to give "Phase I" housing assistance to homeowners who suffered wind damage (among other criteria). Nothing was offered to homeowners like Ms. Haskin and Ms. James who -- because they lived literally on the wrong (north) side of the railroad tracks -- had been spared the effects of the storm surge, but were devastated by the wind and rain. As a result, neither Ms. Haskin nor Ms. James has been able to repair the massive damage to their homes. Both are living in their unrepaired homes with broken windows, severe interior water damage, and major structural damage caused by foundations shifting. Ms. Haskin entirely lost two rooms off the back of her house (which her children were living in) and the storm blew Ms. James's front porch away. Neither can afford to make the substantial repairs necessary on their income derived from social security. *See* Declarations of Lubertha Haskin and Ethel James ("Haskin Decl." and "James Decl.").

Similarly, and as detailed in the accompanying declarations James Crowell and Charmel Gaulden, the organizational plaintiffs have been required to, and continue to, expend substantial retime and resources to address housing issues for these Katrina victims that continue unabated because of HUD's improper acceptance of the diversion of funds.

Although HUD refers to an "*alleged* lack of affordable housing" for Katrina victims on the Gulf Coast, it does not (and cannot) dispute that the Individual Plaintiffs' and NAACP members' housing situations, and those of innumerable other Mississippi citizens on the Gulf

Coast, are still seriously disrupted if not completely destroyed, as a result of Hurricane Katrina. Nonetheless, in its memorandum and declaration, HUD does purport to dispute, at length, the merits of the case: whether it complied with its own regulations and the CDBG statute when it pleaded "no discretion" and supinely accepted Mississippi's brazen plan to divert badly needed federal assistance from its poor citizens to a high-end economic development plan. This tactic is procedurally inappropriate and, in any event, irrelevant. This is *not* a Rule 12(b)(6) motion to dismiss challenging the sufficiency of plaintiff's claims. Accordingly, at this phase of the litigation, the Court must presume that HUD violated its obligations as alleged in the Complaint. The only issue for the Court to determine now is whether these particular plaintiffs have standing to challenge HUD's putative violations. As to that issue, HUD passes the buck. It contends that even though the plaintiffs have suffered serious injuries because of CDBG relief funds failing to reach them, HUD's acceptance of the diversion of funds to the Port Project did not cause those injuries. Instead, HUD asserts that their injuries are the result of the plaintiffs' ineligibility for Mississippi's "Phase I Homeowner's Assistance program" ("Phase I"), from which the funds were reallocated.

This argument completely misses the point, and casts plaintiffs' claims far too narrowly. Plaintiffs do not object to the mere fact that the funds were taken out of the Phase I program (which, thanks to its far too narrowly crafted eligibility requirements, had $600 million in excess funds). They object, rather, to the manner in which HUD stood by and allowed Mississippi to take those excess funds and put them into a Port Project that will do nothing to advance fair housing or benefit LMI residents, in complete disregard of HUD's statutory duty as the gatekeeper of the CDBG funds to ensure that such funds are expended only in accordance with the requirements of applicable statutes. HUD's inaction was contrary to the statutory intent,

acknowledged by HUD itself, that these CDBG disaster relief funds be "used toward meeting unmet housing needs in areas of concentrated distress."[4]

If HUD had done its job, exercised its authority, and rejected the plan to divert the funds to the broad expansion of the commercial port, these "excess" funds would now be available for proper allocation to other badly needed programs that *do* further fair housing and would assist LMI residents like the Individual Plaintiffs and NAACP members. Just as one example: As noted, eligibility for the Phase I program was limited to those whose homes the storm surge damaged, and thus excluded the many, mostly poorer homeowners on the wrong side of the railroad tracks whose homes were ravaged by wind and rain. Before his administration decided to divert the "excess" Phase I money to its pet commercial development project, Governor Barbour's office told wind-damaged, low-income homeowners (such as Pamela Landry) that the state was considering a "Phase III homeowners assistance program" that would use CDBG funds to provide assistance to people like them. Had HUD exercised its authority, Phase III would have had the opportunity to become a reality. Instead of watching the state plan its grand port development project, people like the plaintiffs and individual NAACP members would be looking forward to the repair and reconstruction of their lost or severely damaged homes.

Contrary to HUD's assertions, in the context of a government agency's violation of its own procedures, the causation element of the standing analysis does not require the plaintiffs to prove what would have happened had HUD performed its statutory oversight function properly. Instead, plaintiffs need only allege that the improper agency action or omission "demonstrably increased the risk" that they would be harmed. The Complaint, buttressed by the declarations submitted with this opposition, passes that test: the plaintiffs have shown that HUD's approval

[4] *See* Allocations, Waivers and Alternative Requirements for CDBG Disaster Recovery Grantees, 71 Fed. Reg. 7666 (Feb. 13, 2006).

of the $570 million diversion "demonstrably increased the risk" that their affordable housing needs will not be remedied, leaving them no possibility (absent relief from this Court) of receiving CDBG funds to address their critical housing needs. Further, the Court can see, from HUD's own words, what the agency would have done had it properly discharged its oversight function. The HUD Secretary put it in writing, and then testified before Congress, that if he thought he had the authority to disapprove the diversion of CDBG funds to the Port Project, he would have rejected that diversion because it does not do enough to further affordable housing. Accordingly, plaintiffs have more than satisfied their burden on causation.

As to the last element of standing, redressability, HUD misstates the law in suggesting that plaintiffs must allege that a favorable ruling will *necessarily* relieve their suffering. Rather, plaintiffs need only allege that there is a "significant increase in the likelihood," or that it is "likely," that a favorable ruling would be a "necessary first step" in addressing their injuries. Because of HUD's inaction, the current likelihood that the plaintiffs will benefit from the diverted $570,000,000 is *zero*. Accordingly, a "significant increase" in that likelihood is not a steep mountain to climb, and there is no question that requiring HUD to exercise its statutorily-mandated oversight function is a "necessary first step" toward remedying a satisfactory resolution of the problem that HUD has created by lying down in the face of Mississippi's planned misallocation of CDBG funds.

Finally, HUD's sovereign immunity argument also fails as a matter of law. In the Administrative Procedure Act ("APA"), the Government waived sovereign immunity for final agency actions for which plaintiff has no other adequate remedy. Here, plaintiffs have no other adequate remedy against HUD for the harm they continue to suffer because of HUD's abdication of its statutory duties. Accordingly, HUD's Motion to Dismiss should be denied.

II. BACKGROUND

HUD has set forth a lengthy argument on the facts in its brief and declaration, putting the merits of the case front and center. This is inappropriate because this Court must presume a violation by HUD at this stage of the litigation. Nevertheless, because HUD has given a distorted version of the facts, by way of background, set forth below is a summary of (1) the statutory and regulatory provisions at work, and (2) the history of Mississippi's plans and HUD's treatment of them. Descriptions of the injuries suffered by each plaintiff are contained not only in the Complaint and the attached declarations, but also in Section IV(A)(1) of the argument section, which concerns the injury-in-fact prong of the standing analysis.

A. The Post-Katrina CDBG Appropriations

At the end of 2005, Congress passed, as part of P.L. 109-148,[5] an emergency supplemental appropriation of $11.5 billion "for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of hurricanes in the Gulf of Mexico in 2005," to be administered by HUD through the CDBG program.

The CDBG program was established by Congress as part of the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 (the "HCDA"). The statute states that the "primary objective of . . . the community development program . . . is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." *See* 42 U.S.C. § 5301(c). To ensure that CDBG money is spent in pursuit of this objective, Congress directed

[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, Ch. 9, 119 Stat. 2680, 2779-81 (Dec. 30, 2005) (hereinafter "P.L. 109-148"), relevant portions attached to Carozza Decl., Ex. A.

HUD to make grants of the CDBG funds "only if the grantee certifies" to HUD, among other things, that: (1) the grant will be conducted and administered in conformity with the federal Fair Housing Act and that the grantee will "affirmatively further fair housing," and (2) the aggregate use of the grant money "shall principally benefit persons of low and moderate income in a manner that ensures that not less than 70 percent of such funds are used for activities that benefit such persons." *See* 42 U.S.C. § 5304(b)(1) and (3). In the 2005 post-hurricane emergency appropriations bill, Congress reduced the LMI benefit requirement to 50% for the disaster relief CDBG appropriations. P.L. 109-148.

The HCDA charges HUD with overseeing the expenditure of CDBG funds, and provides that no funds may be disbursed to a grantee unless the grantee has submitted to HUD the required certifications (including the fair housing and LMI certifications), and even then, HUD can make the grant only if the certifications are "to the satisfaction of the Secretary." *See* 42 U.S.C. § 5304(b). HUD concedes this, that "action plans" requesting CDBG funds "must include specific certifications that the applicants will comply with the requirements of the program." (HUD Mem. 4.) Over the years, HUD has promulgated extensive regulations that govern every phase of the CDBG grant process. In particular, the regulations have given content and clarity to HUD's statutorily mandated oversight role in the following ways:

> (1) Codification. The regulations codify the statutory requirements, reiterating that an applicant must certify compliance with, among other things, the fair housing and LMI benefit requirements. *See* 24 C.F.R. § 91.325(a) and 24 C.F.R. § 91.325(b)(4)(ii).[6]

[6] HUD's regulations also define the activities that may qualify as beneficial to LMI persons. Generally speaking, four types of expenditure by a CDBG grantee may count toward the LMI requirement:

(1) those that fund "area benefit activities," by providing a benefit to a particular geographical area where at least 51 percent of the residents are low and moderate income persons, 24 C.F.R. § 570.483(b)(1);

(2) those that fund "limited clientele activities," by providing a benefit to a limited clientele, at least 51 percent of whom are low and moderate income persons, *id.* at § 570.483(b)(2);

(3) those that fund qualified "housing activities," by providing or improving permanent residential structures that, on completion, will be occupied by low and moderate income households, *id.* § 570.483(b)(3); and,

(2) Supporting Evidence. The regulations require that a "certification" must be an assertion "based on supporting evidence." *See* 24 C.F.R. § 91.5.

(3) Review and Inspection. The regulations provide that HUD "will review" the "consolidated plan" in which the required certifications must appear, 24 C.F.R. § 91.500(a), and give HUD authority to "inspect" the evidence on which the certifications must be based. *See* 24 C.F.R. § 91.5.

(4) Satisfaction. If there is evidence "that tends to challenge in a substantial manner the State's certification of future performance," HUD may determine that the certification is *not* "satisfactory to the Secretary." *See* 24 C.F.R. § 570.485(c).

(5) Disapproval. HUD may "disapprove" any plan (or portion of a plan) that is substantially incomplete, 24 C.F.R. § 91.500(b), or that contains a certification that is not "satisfactory to the Secretary" within the meaning of 24 C.F.R. § 570.485(c). *See id.*[7]

(6) Supplementation. The regulations provide that if HUD determines that a certification is not satisfactory, "the State may be required to submit further assurances as the Secretary may deem warranted or necessary to find the grantee's certification satisfactory." 24 C.F.R. § 570.485(c).

Even in cases of disaster relief, the enabling CDBG statute, 42 U.S.C. § 5321, prohibits suspension of requirements related to, *inter alia*, public notice of funding availability, nondiscrimination, labor standards, environmental standards, fair housing and "the requirement that activities benefit persons of low-and moderate-income." The post-Katrina emergency appropriations bill addressed the issue of suspension (or what it called "waiver") even more specifically:

(1) Like 42 U.S.C. § 5321, the appropriations bill said that HUD could not waive the fair housing, nondiscrimination, labor standards or environmental requirements at all. *See* P.L. 109-148, attached to the accompanying Carozza Decl. as Exhibit A.

(2) With respect to the LMI benefit requirement, as noted, P.L. 109-148 gave the agency more flexibility than 42 U.S.C. § 5321 would have: it said (a) that HUD could *generally* modify the requirement by requiring grantees to use their grants so that at least 50% of the money (rather than 70%) funded activities for the benefit of LMI persons, and (b) that HUD could in *specific* cases waive the LMI benefit requirement entirely, but only upon "a finding of compelling need." *Id.*

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(4) those that fund qualified "job creation or retention activities," by creating permanent jobs where at least 51 percent of the jobs involve the employment of persons of low and moderate income. *Id.* § 570.483(b)(4).

[7] 24 C.F.R. § 91.500(b) also authorizes HUD to disapprove a grantee's plan "if it is inconsistent with the purposes of the Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. § 12703."

(3) Finally, Congress said that HUD "shall waive, or specify alternative requirements for," any other statutory or regulatory requirement associated with the CDBG program, but only upon (1) a request by the state that the waiver is required, (2) a finding by HUD that the waiver would not be inconsistent with the CDBG statute's overall purposes, and (3) advance publication of the waiver in the Federal Register. *Id.*[8]

B. HUD's Waivers And Alternative Specifications

Less than six weeks after P.L. 109-148 became law, HUD published an extensive "Notice of allocations, waivers and alternative requirements" in the Federal Register. *See* 71 Fed. Reg. 7666. In the Notice, HUD initially addressed the "Allocations" of the $11.5 billion CDBG appropriation among the five states affected by the storm, and emphasized the language of the bill's Committee Report: "Funds allocated are intended by HUD to be used toward meeting unmet housing needs in areas of concentrated distress." Mississippi received $5,058,185,000. *Id.*[9] Then, under the waiver provisos discussed above, the agency announced a number of "application and reporting waivers and alternative requirements," made "in response to requests from each of the States receiving an allocation under this Notice," *id.*, including the reduction of the overall LMI benefit requirement from 70% to 50%. *Id.* at 7667.

HUD *did not*, however, waive its standard certification requirements. Moreover, HUD did not, and could not, surrender its statutory review obligation and disapproval authority that it had exercised over the certification process under the pre-Katrina regulatory regime. To the contrary, HUD explicitly left intact its obligations to certify compliance with both the fair

[8] In June 2006, Congress passed a second bill appropriating an additional $5.2 billion in CDBG funds for hurricane relief, under nearly identical conditions for "waiving" the normal statutory and regulatory requirements. *See* 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). HUD quickly announced that it would in fact administer the second appropriation identically to the first, in order to "eliminate[ ] unnecessary inconsistencies" and "reduce[ ] the opportunities for technical errors." *See* Allocations, Waivers and Alternative Requirements for CDBG Disaster Recovery Grantees, 71 Fed. Reg. 63337, 63339 (Oct. 30, 2006).

[9] HUD later allocated only $423,036,059 to Mississippi from the second, $5.2 billion appropriation made by Congress in June 2006. *See* 71 Fed. Reg. at 63338. This brought Mississippi's total share of the storm-related CDBG appropriations to just over $5.481 billion, where it remains today.

housing requirement and the modified LMI benefit requirement. *Id.* at 7671, ¶¶ 20(a), 20(i)(3).[10] And nothing in the new regulations modified the prior rules that had (a) defined a certification as an evidence-backed assertion, (b) obligated HUD to review certifications and their supporting evidence, and (c) authorized HUD to disapprove a grant or to seek additional evidence to support an unsatisfactory certification.[11]

C. The Piecemeal Plans and HUD's Waivers of the LMI Benefit Requirement

All of the other States that received CDBG fund allocations for hurricane relief submitted comprehensive plans for spending their grants. Mississippi, which designated the Mississippi Development Authority ("MDA") to administer the CDBG grant money, did not. Instead, it adopted a piecemeal approach that included numerous partial action plans, followed by amendments to these plans and reallocation of funds back and forth to the various programs.[12]

Either because it knew it would not be able to certify compliance with the 50% LMI

[10] Paragraph 20(a) states that "prior to receiving a CDBG disaster recovery grant, recipient State must "certif[y] that it will affirmatively further fair housing"; ¶ 20(i)(3) states that "prior to receiving CDBG disaster recovery grant, recipient must certify that "[t]he aggregate use of CDBG disaster recovery funds shall principally benefit low-and moderate-income families in a manner that ensures that at least 50 percent of the amount is expended for activities that benefit such persons."

[11] The February 13, 2006 Waiver and Alternative Requirements was very precise with respect to waivers. The operative section (entitled Applicable Rules, Statutes, Waivers and Alternative Requirements) first made clear that any regulation not expressly waived remained in operation: "Except as described in this Notice, statutory and regulatory provisions governing the Community Development Block Grant program for states, including those at 42 U.S.C. § 5301 et seq. and 24 C.F.R. pt. 570, *shall apply* to the use of these funds." *See* 71 Fed. Reg. 7666. Then, insofar as it waived certain statutory and regulatory requirements, the Notice *specified* each waived provision, right down to the paragraph or even the sub-paragraph. HUD made no wholesale waivers, *e.g.*, by Part or sub-Part. *Id.*

[12] These plans included, first and foremost, $3.26 billion for the September 11, 2006 "Phase I Homeowner Assistance Program," *available at* http://www.msdisasterrecovery.com/action/documents/hap3606%20final.pdf. The various programs and amendments that followed included: (1) $700 million on a "Phase II Homeowner Assistance Program," (which was reprogrammed from Phase I); (2) $105 million on a "Public Housing Program;" (3) $641 million on a "Regional Infrastructure Program;" (4) $440 million on a "Ratepayer and Wind Pool Mitigation Program;" (5) $650 million on an "Economic Development Program," (of which $150 million was reprogrammed from Phase I); (6) $262.5 million for the "Small Rental Assistance Program;" (7) $350 million for the "Long Term Workforce Housing Program" (of which $241 million was reprogrammed from Phase II); (8) $600 million for the Port Project (which was reprogrammed from Phase I); (9) $200 million for the Hancock County Long Term Recovery Program (which were non-housing expenditures and which was reprogrammed from Phase I, Phase II and Elevation Grant programs); and, (10) $171 million for Phase II (reprogrammed from three non-housing programs -- infrastructure, community revitalization and the port), but $52 million of which was, on May 12, 2009, reprogrammed again *out* of Phase II and back to non-housing programs.

benefit requirement for the substantial majority of its partial action plans, or because it did not want to have to so comply, in 2006 Mississippi first asked HUD to waive prospectively the LMI benefit requirement for its entire CDBG allocation of more than $5 billion.[13] HUD expressly refused this request, noting that such "overall benefit waivers" were rare, and that one was unjustified in this case where Mississippi put forth only partial action plans, leaving HUD unable "to conclude that the state has a compelling need for a waiver of the overall benefit for the entire grant." October 24, 2006 Additional Waivers, 71 Fed. Reg. at 62374.

Notwithstanding HUD's refusal to grant a blanket waiver to Mississippi of the 50% LMI requirement, HUD proceeded to grant every piecemeal waiver of the 50% LMI requirement sought by the state, which included the substantial majority of the partial action plans the state submitted. To date, Mississippi has been able to certify compliance with the 50% LMI requirement with respect to only three of its CDBG-funded programs: Phase II of the Homeowners' Assistance Program; the Public Housing Program; and, the Small Rental Assistance Program. These programs only account for 21% of Mississippi's total $5.481 billion allocation. However, each time HUD approved a waiver request regarding one of Mississippi's "partial plans," the agency stated that it expected the State to "give reasonable priority for the *balance* of its funds to activities that will primarily benefit persons of low and moderate income."[14]

In addition, HUD told Mississippi that the program-specific waivers were *functionally*

[13] *See* Additional Waivers Granted to and Alternative Requirements for the State of Mississippi Under Public Law 109-148, 71 Fed. Reg. 62372, 62373 (Oct. 24, 2006) ("October 24, 2006 Additional Waivers"); Additional Waivers Granted to and Alternative Requirements for the State of Mississippi Under Public Laws 109-148 and 109-234, 72 Fed. Reg. 10020, 10021 (Mar. 6, 2007) ("March 6, 2007 Additional Waivers").

[14] *See, e.g.*, Waivers and Alternative Requirements for the State of Mississippi's CDBG Disaster Recovery Grant, 71 Fed. Reg. 34457, 34459 (June 14, 2006) ("June 14, 2006 Waivers"); Additional Waivers and Alternative Requirements for the State of Mississippi Under Public Law 109-148, 72 Fed. Reg. 48808, 48810 (Aug. 24, 2007) ("August 24, 2007 Additional Waivers").

program-specific: they did "not cover activities that may be added or modified under a substantial amendment to the activities mentioned" in the "partial action plan." *See* October 24, 2006 Additional Waivers, 71 Fed. Reg. at 62374. Thus, if HUD waived the LMI benefit requirement for purposes of, say, the MDA's Phase I Homeowner Assistance Program, and Mississippi later decided to reallocated money from that program to some other activity -- as it did in this instance to the Port Project -- *the waiver would not travel with it. The new program would have to satisfy the LMI benefit requirement, or else qualify for its own compelling-need waiver.*

Significantly, until the Port Proposal at issue here, with respect to each partial action plan, Mississippi submitted the plan to HUD, and HUD scrutinized the plan according to its regulatory requirements, reviewing it to see whether it met with the Secretary's satisfaction. When Mississippi could not certify compliance with the LMI benefit requirement, it asked HUD to waive the requirement, and HUD exercised its authority in that regard. HUD did not plead lack of discretion or assume a passive role. It treated the waiver requests *as requests*, not as demands that it had no discretion to approve or disapprove, rejecting them insofar as they asked for an "overall benefit waiver" and approving a pared-down waiver only on stated conditions. As set forth below, HUD's behavior with regard to the Port Plan is totally inconsistent with this pattern, and HUD has failed to provide any legitimate justification for its departure.

Even with conditions attached and admonitions issued, HUD's series of "partial" waivers of the LMI benefit requirement raised serious questions. The waivers may have allowed Mississippi to bite off only one piece of its CDBG grant at a time, but over a period of years this approach enabled Mississippi to swallow almost the entire loaf. (*See* Compl. ¶ 13.) This state of affairs generated concerns not only in the affected communities, but also within HUD itself. In a

memorandum dated June 13, 2007, the Acting Director of HUD's Office of Policy Legislative Initiatives and Outreach (the "Acting Director") complained that HUD's directive to spend the CDBG funds on the "compelling needs of the homeless, special needs and low-income populations as a first priority . . . still has not been addressed fully." (*See* Carozza Decl. Ex. B.) Given the continued "neglect of resources directed to members of the protected class," the Acting Director warned, HUD's repeated waivers of "the 50% rule for low-moderate income beneficiaries" could "result in violation of HUD's civil rights requirements." *Id.* And, "[g]iven the correlation between income and race in the Katrina affected areas, failure to follow the alternative [50%] requirement could result in non-compliance with civil rights and fair housing laws, which under Public Law 109-148, cannot be waived." *Id.*

D. The Port Restoration Program Proposal

By the fall of 2007, Mississippi had determined that it had $600 million of "excess funds" that had previously been allocated to the Phase I Housing Assistance Program but that would not be used up because an insufficient number of residents met the restrictive eligibility requirements for the program (*e.g.*, those with wind damage only, those without insurance, and those *within* the flood plane need not apply).[15] This presented HUD with an opportunity to fulfill its statutory obligations and live up to its prior determinations that it would require Mississippi, in any further action plans for the expenditure of CDBG funds, to give "reasonable priority" to "activities that will primarily benefit persons of low and moderate income" -- such as the Individual Plaintiffs and NAACP members -- who to date have been left out in the cold.

But it didn't happen that way. When in September 2007, Mississippi announced that it planned to again bypass the very low income citizens whom Congress intended to benefit from

[15] Phase I eligibility criteria are at page 6 of the MDA Homeowner Assistance Program Partial Action Plan, September 11, 2006, *available at* http://www.msdisasterrecovery.com/action/documents/hap3606%20final.pdf.

the CDBG funds, and instead reallocate $600 million to the Port Project,[16] HUD abdicated its statutory oversight obligations, and without proper review, rubber-stamped Mississippi's plan even though it plainly did not satisfy the applicable statutory requirements.

The Port of Gulfport, it is true, had been affected by Hurricane Katrina, but the damage amounted to only about $50 million (in the estimation of a committee of the Mississippi Legislature) and the Mississippi State Port Authority ("MSPA") had been able to find money to fix most of the damage from other sources.[17] Indeed, the entire assessed value of the port at the time of the storm was only $127.6 million.[18]

Even before Hurricane Katrina, however, the MSPA had developed a more ambitious agenda for the port. In 2003, two years before the hurricane, it had unveiled a "Master Plan" for developing the port into both a shipping terminal and a tourist destination. (*See* Carozza Decl. Ex. C.) Soon after the hurricane, Mississippi tried but failed to obtain federal funding for the "Master Plan." In March 2006, while Congress was considering its second hurricane appropriation, Mississippi's Governor Barbour suggested in testimony to Congress that the port's "redevelopment" was an "integral transportation project." (*See* Carozza Decl. Ex. D at 3.) Congress didn't bite, and nearly all of its second CDBG recovery grant was apportioned to Louisiana.

The "Master Plan" did not die, however. In June 2007, the MSPA adopted an update of the 2003 Plan that called for an ambitious commercial expansion of the Port, at a price tag of over a half-billion dollars. (*See* Carozza Decl. Ex. E at 34, 126.) The Port Proposal submitted to

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[16] September 7, 2007 MDA Port of Gulfport Restoration Program - Amendment 5, *available at* http://www.mda.state.ms.us/UserFiles/File/PortPlans/MDAPortOfGulfport%20Plan.pdf. In late 2008 Mississippi made minor modifications to this plan, resubmitted it, and HUD reaffirmed its acceptance. *See supra* at 22.
[17] *See* June 20, 2006 Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER Report #487) at 23, *available at* http://www.peer.state.ms.us/reports/rpt487.pdf.
[18] *Id.*

HUD three months after the MSPA published its updated plan was simply Mississippi's next stab at federal money -- this time by snagging the low-hanging fruit of the "excess" CDBG funds created by its restrictive Phase I eligibility criteria.

Mississippi's September 2006 proposal to divert $600 million, later modified to $570 million, to the Port Project plainly did not comply with the statutory requirements for CDBG expenditures. Like several of Mississippi's previous "partial" action plans, this one couldn't satisfy the 50% LMI benefit requirement. The program didn't provide a "limited clientele benefit," an "area benefit activity," it contained only a minor housing element, which envisioned the construction of luxury condominiums, and it couldn't qualify as a "job creation or retention activity" because only about 10% of the Port's jobs had ever been held by LMI persons and the MDA made no assertion, evidence-backed or otherwise, to indicate that the "restored" Port would drastically change that proportion. In its brief here, HUD does not even try to claim that it ever received a certification that the port will create the requisite LMI jobs. Rather, HUD parrots Mississippi "projection" for how many jobs will be created in general -- an analysis irrelevant to the question of whether the program adheres to CDBG requirements. (HUD Mem. 14.) Furthermore, Ms. Kome lays out a complex set of conditions concerning employment of LMI individuals, but her explanation is devoid of any projection, much less certification, concerning how many jobs created at the port might fall within those parameters.

In defending its acceptance of the Port Proposal, HUD also meekly states in its brief that Mississippi "projects" that "there will be more affordable housing in the state's counties in 2011 than before Katrina struck." (HUD Mem. 13.) But even if this "projection," which is the subject of significant dispute, comes true, it falls far short of the certification requirements, and provides no information about whether that increase even comes close to meeting post-Katrina need.

Given these circumstances, one might have expected Mississippi to seek yet another waiver of the 50% LMI requirement. But it didn't, because the Port Project was different from its predecessors in an important way: it couldn't conceivably qualify for a *waiver* of the LMI benefit requirement. By no stretch of the imagination could HUD plausibly conclude that there was a "compelling need" to spend more than a half-billion dollars of federal taxpayer money earmarked for disaster relief -- the only significant, unallocated portion of its $5.481 billion CDBG grant -- on an ambitious economic development plan for which the state had been in search of funding for at least two years before Hurricane Katrina loomed over the horizon, especially given that the port had only sustained $50 million in damage from Hurricane Katrina. Consequently, Mississippi *didn't even ask HUD for a waiver of the LMI benefit requirement*. And, other than stating -- without any supporting evidence -- that "MDA will qualify this program under the low to moderate national objective," the Port Proposal did nothing to *certify* the program's compliance with the LMI benefit requirement, or to excuse its non-compliance. That bald prediction of eventual "qualification" was a manifestly inadequate certification under the CDBG regulations; indeed, the evidence strongly tended to "challenge in a substantial manner" Mississippi's ability for future compliance. For this reason alone, the Port Project did not satisfy the CDBG statutory requirements, and HUD should not have approved the disbursement of CDBG funds for this purpose.

The statutory problems with the Port Project did not end there, however. As deficient as the LMI certification was for the Plan, it was more than Mississippi could muster regarding the fair housing certification; on that front, the MDA said *absolutely nothing* about that unwaivable statutory obligation. *Id.*

In its papers, HUD asks the Court to infer ongoing compliance with its own regulations concerning the fair housing certification requirement. In her declaration, Mr. Kome states in the abstract that:

> HUD still required the state to certify that it will affirmatively further fair housing, "which means that it will conduct an analysis to identify impediments to fair housing choice within the state, take appropriate actions to overcome effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard."

(Kome Decl. ¶ 13) (citing 71 Fed. Reg. at 7671). Ms. Kome fails to mention, however, that the MDA *made no such certification* in its Port Plan. Moreover, on the few occasions that MDA did make such a certification with respect to other partial action plans, (*see* Compl. ¶¶ 115, 119, 122, 125), it promised to update a pre-hurricane, 2004 Analysis of Impediments ("AI"). Yet, as of today the only AI conducted and submitted by Mississippi is from the year *prior* to Hurricane Katrina, making it entirely useless in this context. Even at the time of the filing of its Motion to Dismiss, all that HUD can say with regard to the AI is that it has advised Mississippi to make revisions, (HUD Mem. 8), and that it "is working with Mississippi to update the AI." (Kome Decl. ¶ 14.) Without any fair housing certification whatsoever and no post-Katrina AI, HUD had absolutely no basis upon which it could properly conclude that the Port Proposal satisfied the statutory requirement that it would affirmatively further fair housing.

E. HUD's Passive Response To The Port Restoration Proposal

HUD told Mississippi, when it approved each prior plan, that if the money were moved to a new program by amendment, the waiver given to the initial program would not follow. *See* 71 Fed. Reg. 62372, 62374. HUD would require, therefore, that Mississippi justify the Port Proposal on its own merits.

And the Port Restoration Program was *not* justifiable. The Port Plan did nothing to address what a top HUD official had recently warned was an incipient violation of the agency's

legal obligations. HUD did *express* its dissatisfaction with the Port Proposal. In his letter to Governor Barbour dated January 25, 2008, then-HUD Secretary Alphonso Jackson said that, "[a]lthough economic development is important and the Port expansion will create jobs and serve as a significant regional economic driver, I remain concerned that this expansion does indeed divert emergency federal funding from other more pressing recovery needs, most notably affordable housing." (*See* Carozza Decl. Ex. F at 1.) A few weeks later, on March 11, 2008, Secretary Jackson was even more emphatic, telling the House Committee on Financial Services that, "If I had the authority or the flexibility, I probably would have said no" to the Port Restoration Program proposal. (*See* Carozza Decl. Ex. G at 46.)

In fact, HUD not only had the flexibility, it had the statutory *obligation* to review the proposal for compliance with the fair housing and LMI certification requirements. But HUD ignored this duty and instead took a position that it had never expressed anywhere before, with respect to any action plan submitted by Mississippi or by any of the other Gulf Coast states that had been allocated emergency CDBG grants: that HUD simply had no power to act.

According to Secretary Jackson, HUD believed "[t]he Congressional language associated with these CDBG funds allows me little discretion" to do anything but passively "accept" the Port Plan. The Secretary claimed that "as designed by Congress, the statute relegates decision-making for setting priorities and specific program design for these CDBG dollars to the States themselves." (*See* Carozza Decl. Ex. F at 1.) HUD's sudden claim that it was powerless to review for approval or disapproval a grantee's plan to ensure that it contained satisfactory certifications of compliance with the fair housing and LMI benefit requirements was directly contrary to its own prior conduct and interpretation of the applicable statutes.

In his letter to Governor Barbour, HUD Secretary Jackson made a point of noting that the Port Plan *had* been reviewed "in accordance with our regulations" (that is, 24 C.F.R. § 91.500) "for completeness and consistency with the purposes of the Cranston-Gonzalez National Affordable Housing Act." *Id.* The letter omitted, however, any mention of a review to accomplish the second and third purposes specified by the *same regulation*: determining whether the plan was "substantially complete," and contained *satisfactory* certifications of compliance with the fair housing and LMI benefit requirements mandated by statute.

HUD recently exercised its oversight of CDBG recipients in just the manner it claimed it could not in connection with the Port Proposal. On May 7, 2009, HUD rejected a fair housing certification from Westchester County as insufficient, thereby holding up more than $15 million meant to benefit LMI residents.[19] In that case, Westchester County's certification included an AI and other evidence, but HUD determined such certifications to be unsatisfactory. For the Port Project, Mississippi *still hasn't even submitted* such a certification, much less supporting evidence such as an AI, but HUD nevertheless rubber-stamped the plan.

In its Memorandum and Ms. Kome's affidavit, for the first time, HUD now changes its tune as to why it "accepted" the Port Proposal. HUD now shifts away from its prior contention that it had so "little discretion" that it was constrained from saying "no" to Governor Barbour. It's new position is that senior HUD staff reviewed the proposed diversion and told then-secretary Jackson that it "appeared to be complete and was not inconsistent with the purposes of the Act . . . ." (Kome Decl. ¶ 29.) Even so, oddly, Ms. Kome recalls that Secretary Jackson then asked his staff to "re-examine" the Port Proposal. (Kome Decl. ¶ 29.) During its "reexamination" HUD must have again found no required AI, no fair housing certification, no

[19] *See* Gerald McKinstry, *HUD blocks funding for Westchester*, THE JOURNAL NEWS (Westchester Co., New York), May 7, 2009, *available at* http://www.lohud.com/article/2009905070407.

evidence to support the purported LMI benefit certification, and, as noted in the Acting Director's memo, that the "compelling needs of the homeless, special needs and low-income populations as a first priority . . . still has not been addressed fully [in Mississippi]." Nevertheless, HUD and its Secretary, according to Ms. Kome, finally "determined that Mississippi's Port of Gulfport Restoration Project complied with the requirements of the CDBG program as modified by HUD pursuant to the special appropriations." *Id.*[20]

In short, Congress did not bite in 2006 on the Governor's proposal to fund a pre-hurricane port expansion project which had little if any relation to disaster recovery, but HUD did bite in 2007. In so doing, HUD abdicated its statutory duties to ensure that CDBG funds are expended only on programs that comply with the statutory fair housing and LMI benefit requirements, to the substantial and ongoing detriment of low-income residents of the Gulf Coast with critical unmet housing needs.

III. LEGAL STANDARD

On a motion to dismiss for want of standing, "courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Further, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts will] 'presume that general allegations embrace those specific facts that are

[20] At the end of October 2008, the MDA published a "Modification" that promised to eliminate various obstacles to the progression of the Port Project. *See* Mississippi Development Authority, Port of Gulfport Restoration Program Action Plan, Amendment 5, Modification 1, *available at* http://www.msdisasterrecovery.com/action/documents/Port_Amendment_Public_Amendment_102408.pdf. As later described by the project's new program manager, a company called CH2M HILL, the revised "Port of the Future" plan jettisoned the proposed casinos, condominiums and retail boutiques. (*See* Carozza Decl. Ex. H.) The revised plan still envisioned a massive expansion and redevelopment of the port; it still failed to make any provision for funding any activity that might satisfy either the fair housing or LMI benefit requirement; and it still did not certify Mississippi's compliance with either fundamental statutory obligation. *Id*. Maintaining its passive approach to the project, HUD quickly "accepted" the Modification on November 21, 2008, again ignoring its statutory obligations to ensure compliance with the fair housing and LMI benefit requirements. *See HUD Approves Port Restoration Plan*,

necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

Under Rule 12(b)(1), the Court may grant a motion to dismiss only if it finds plaintiffs' claims to be "wholly insubstantial and frivolous." *E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 623 (D.C. Cir. 1997); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely"). In evaluating Defendants' arguments for dismissal, "the court must accept as true all well-pleaded factual allegations and draw all reasonable inferences from those allegations in the plaintiff's favor." *Pitney Bowes, Inc. v. U.S. Postal Serv.*, 27 F. Supp. 2d 15, 19 (D.D.C. 1998).

Plaintiffs bring this claim under the APA, alleging that HUD violated its statutory and regulatory obligations when it accepted the Port Plan. In the present motion, HUD has not moved to dismiss this APA claim for failure to state a claim, but rather, contends that plaintiffs lack standing to pursue relief. While a court may look closely at the plaintiffs' allegations in order to determine jurisdiction under Rule 12(b)(1), *see Jones v. Executive Office of President*, 167 F. Supp. 2d 10, 13 (D.D.C. 2001), such an examination does not extend to a determination of the merits of the case. *See Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 198 (D.C. Cir. 1992) (citing *Land v. Dollar*, 330 U.S. 731 (1947)) ("though the trial court may rule on disputed jurisdictional facts at any time, if they are inextricably intertwined with the merits of the case it should usually defer its jurisdictional decision until the merits are heard"). Accordingly, for purposes of this motion, the court must presume that HUD violated its statutory obligations and failed to adhere to the legally mandated procedures in approving the Port Plan, and the sole question before this Court is whether the plaintiffs have standing to press these violations. In

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WLOX (South Mississippi), Nov. 21, 2008, *available at* http://www.wlox.com/Global/story.asp?S=9394674&nav=menu40_2_10.

determining the standing issue, the Court is free to consider both the complaint and declarations submitted on behalf of the plaintiffs. *See Tooley v. Bush*, 2006 WL 3783142, at *21 (D.D.C. Dec. 21, 2006) *rev'd in part sub nom. Tooley v. Napolitano*, 556 F.3d 836 (D.C. Cir. 2009) ("As such, in reviewing Defendants' motion to dismiss, the Court may consider both Plaintiff's Complaint and his Affidavit submitted in support of his Opposition") (overturned on unrelated grounds); *Communities for a Great Nw., Ltd. v. Clinton*, 112 F. Supp. 2d 29, 33-34 (D.D.C. 2000) ("the trial court may allow plaintiffs the opportunity to supply by affidavits further particularized allegations of fact in support of standing . . .").

IV. ARGUMENT

A. Plaintiffs Have Standing to Bring This Action.

Article III standing requires a plaintiff to show: (1) that she has suffered an injury in fact; (2) that the injury is fairly traceable to the defendant's conduct; and (3) that a favorable decision on the merits likely will redress the injury. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan*, 504 U.S. at 560-61). In a suit under the APA, the plaintiff must also show that the alleged injury falls within the "zone of interests" protected by the statute on which the plaintiff has based her complaint. *Lujan*, 497 U.S. at 883; *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998) (A plaintiff satisfies the zone of interests test if it "in practice can be expected to police the interests that the statute protects"). An organization has standing if it can establish "standing in its own right" (organizational standing) or "standing on behalf of its members" (representational standing). *Humane Soc'y of U.S. v. U.S. Postal Serv.*, 2009 WL 1097413, at *2 (D.D.C. Apr. 23, 2009).

In this case, each plaintiff has fully satisfied the requirements for standing. First, they have suffered injuries in fact -- an invasion of a judicially cognizable interest which is (a) concrete, (b) actual or imminent, not conjectural or hypothetical, and (c) within the statute's

"zone of interest." Second, there is a sufficient causal connection between their injuries and HUD's conduct. And finally, it is likely that their injuries will be redressed by a favorable decision. *See Bennett v. Spear*, 520 U.S. 154, 167 (1997) (citing *Lujan*, 504 U.S. at 560-61). The NAACP also has standing on behalf of its members: the NAACP's "members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires members' participation in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

1. <u>All Plaintiffs Have Suffered Injury That Is Concrete, Actual and Continuing.</u>

a. The Individual Plaintiffs Have Suffered a Particularized Injury.

Standing requires plaintiffs to establish an "injury in fact" that is concrete, particularized and actual or imminent. *See Friends of the Earth, Inc.*, 528 U.S. at 180-81. In other words, the party seeking relief must have a current "personal stake" in the matter to be adjudicated. *Id.* In a case brought under the APA, the plaintiffs must show that the Government's alleged violation of the required procedures threatens some "concrete interest" of theirs. *Lujan*, 504 U.S. at 572, 573. Plaintiffs here assert that HUD failed to discharge its statutory and regulatory duties to properly oversee Mississippi's planned expenditure of $570 million in CDBG funds. As a consequence, Mississippi will spend more than a half-billion in the federal taxpayers dollars on a commercial development program instead of using it to address the unmet housing needs of Hurricane Katrina's poorest and neediest victims. The plaintiffs are among those poor and needy victims, and so they have a significant personal stake in HUD's proper exercise of its authority over these funds. Thus, they have "been accorded a procedural right to protect [their] concrete interests," *id.* at 572 n.7, and they have suffered a cognizable injury as a result of HUD's procedural default. *See Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 509 F.3d

562, 567 (D.C. Cir. 2007); *City of Waukesha v. E.P.A.*, 320 F.3d 228, 234 (D.C. Cir. 2003) (finding that a statute's procedural requirement that a cost-benefit analysis be conducted was directly related to the plaintiffs' interests in avoiding increased and unjustified costs).

Defendants also argue that plaintiffs' request to enjoin HUD's approval of Mississippi's diversion of disaster recovery CDBG funds to the Port Project is nothing more than a generalized grievance, which is insufficient to confer standing. (*See* HUD Mem. 26.) However, just because the "*alleged* housing crisis," as HUD refers to it, has injured many Gulf Coast residents who still desperately require adequate housing and would stand to benefit from the appropriate expenditure of CDBG funds in accordance with the statute, it does not follow that the plaintiffs are merely asserting a "generalized grievance." *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973) ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody"). The plaintiffs allege not only that the Defendants committed procedural default, but also that the procedural breach caused substantial injury to the plaintiffs' own concrete interests.

b. Both Organizational Plaintiffs Have Suffered Particularized Injuries.

1. Plaintiff NAACP Suffered Injury Because Its Members Have Been Injured.

When an association files suit, it may demonstrate representational standing as long as "its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires members' participation in the lawsuit." *Consumer Fed'n of Am. v. F.C.C.*, 348 F.3d 1009, 1011 (D.C. Cir. 2003) (quoting *Hunt*, 432 U.S. at 343).

The germaneness requirement is a lenient standard requiring only a "mere pertinence" between the subject of the litigation and an organization's purpose." *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 111 (D.C. Cir. 1990). The Declaration of James Crowell ("Crowell Decl.") ¶¶ 3-8 and 13, 17 and 21-30 establishes that the NAACP more than satisfies that burden here. Further, because the claims asserted here pursuant to the APA seek only injunctive and declaratory relief, "it can be reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured" without any requirement that those members participate in the lawsuit. *Warth*, 422 U.S. at 515. Accordingly, to establish representational standing, the NAACP need only demonstrate that at least one of its members has suffered injury in fact that would confer standing to sue in his or her own right. *Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency*, 373 F.3d 1251, 1265 (D.C. Cir. 2004).

Several members of the NAACP have met this burden. The attached declarations of James Johnson, Ethel James, and Lubertha Haskin, and Ya-sin Shabazz -- all members of the Mississippi State Conference NAACP -- describe in detail the housing conditions they are currently forced to endure. Some are living in houses with destroyed foundations, significant mold problems, broken windows, damaged roofs, and plumbing problems. *See, e.g.*, James Decl. ¶ 5; Haskin Decl. ¶¶ 5, 15. Others are paying over 50% of their paycheck in order to rent a small apartment, because there is not enough available affordable rental housing stock and demand for such rental apartments far outweighs the supply since Hurricane Katrina. *See* Declaration of Ya-sin Shabazz ("Shabazz Decl.") ¶ 11. One Plaintiff NAACP member, Mr. Johnson, still resides in a FEMA trailer, as his home (which he did not have the money to insure, disqualifying him from receiving Phase I funds) was completely destroyed and blown away during the Hurricane. (*See*

Johnson Decl. ¶¶ 1, 5, 10.) When FEMA comes to remove his trailer, which it had indicated it plans to do imminently, Mr. Johnson will have nowhere to turn. *Id.* ¶ 12.

The injury suffered by the NAACP members is the lost opportunity to obtain adequate housing, which has long been deemed a concrete and specific injury. For example, in *Philadelphia Welfare Rights Org. v. Embry*, 438 F. Supp. 434 (E.D. Pa. 1977), an association representing the interests of low-income residents of Philadelphia brought an action against the city and HUD alleging that the city and federal officials violated the HCDA by failing to allocate sufficient funds to the benefit of low-income families pursuant to the CDBG program. There, the district court held that the welfare rights association had clearly alleged a concrete injury to its members: "the inability to have the opportunity to obtain adequate housing." *Id.* at 437. Further, the court noted that "the reallocation of [CDBG] funds to benefit low-income people will directly result in an increase in the availability of housing units for low-income people." *Id.* at 438. The "inability to have the opportunity to obtain adequate housing" is exactly the injury suffered by various NAACP members, and it is the wrong that the NAACP seeks to redress through this lawsuit. *See also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) (standing requirements were satisfied by plaintiff's showing that a favorable judicial decision was likely to provide him with a housing opportunity); *Allen v. Pierce*, 689 F.2d 593, 595 (5th Cir. 1982); *see also Keith v. Volpe*, 858 F.2d 467, 477 (9th Cir. 1988) (tenants had standing where defendant city's housing plans caused injury by making affordable housing unavailable to tenants).

2. Both The NAACP And GCFHC Have Been Injured Because They Have Been Forced To Divert Resources Away From Their Core Missions To Counteract HUD's Illegal Action.

Both the NAACP and GCFHC have organizational standing, that is, standing to sue in their own right. As established by the declarations of the NAACP's Biloxi chapter head, James

Crowell, and GCFHC's Executive Director, Charmel Gaulden, both of these organizational plaintiffs have satisfied the criteria for organizational standing -- namely that they have been injured because they have been required to shift significant resources as a result of HUD's failure to properly review and act upon the Port Proposal. *See* Crowell Decl. ¶¶ 3-8 and 13, 17 and 21-30; Declaration of Charmel Gaulden ("Gaulden Decl.") ¶¶ 4-6 and 9-15.

The discrete, measurable harms to the NAACP and GCFHC attested to in the attached declarations more than suffice to demonstrate cognizable injury-in-fact. In *Havens Realty Corp. v. Coleman*, the plaintiff organization alleged that its mission "has been frustrated by defendants' [unlawful] practices" and that it "has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory [ ] practices." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Finding that this allegation sufficed for Article III standing, the Supreme Court held that a "drain on an organization's resources . . . constitutes far more than simply a setback to the organization's abstract social interests" and is therefore a "concrete and demonstrable injury to the organization's activities." *Id.*; *see also Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 53 (D.D.C. 2002) (standing of fair housing organization upheld where complaint alleged that organization's counseling and referral services, as well as educational programs, were burdened by the defendants' conduct, noting "[t]his is not a case where the only activity undertaken by the plaintiffs is the pursuit of Fair Housing Act litigation").

The D.C. Circuit Court of Appeals has "applied *Havens Realty* to justify organizational standing in a wide range of circumstances." *See Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006); *see also Humane Soc'y of U.S.*, 2009 WL 1097413, at *1. In *Abigail Alliance*, the Court of Appeals found

organizational standing where the plaintiff had alleged that "[d]efendant's conduct has frustrated [plaintiff organization's] efforts to assist its members and the public . . . and its other activities, including counseling, referral, advocacy, and educational services." 469 F.3d at 132-33 (citing *Havens Realty Corp.*, 455 U.S. at 378-79). The court also found that the defendant's actions had "caused a drain on [plaintiff organization's] resources *and time* because the organization has had to divert significant time and resources from these activities toward helping its members and the public address" harm caused by the defendant. *Id.* (emphasis added).

Both the NAACP and GCFHC meet that test here. Both organizations have suffered setbacks in pursuing their missions because of HUD's actions. Furthermore, they have suffered, and will continue to suffer (absent relief from this Court) palpable injuries in the form of actual financial loss, diverted resources and manpower, a burden on their respective educational counseling services. (*See* Crowell Decl. ¶¶ 13, 17 and 21-30; Gaulden Decl. ¶¶ 9-15.) Like the plaintiff in *Havens Realty Corp.*, the GCFHC and NAACP, have had to shift their focuses to advocating for those who have been left out and now do not have access to the more than a half-billion dollars being misallocated to the Port Project and, as a result, "ha[ve] had to devote significant resources to identify and counteract" HUD's improper actions. *Id.*; *cf. N.A.A.C.P. v. Acusport Corp.*, 210 F.R.D. 446, 459-60 (E.D.N.Y. 2002) (finding that the NAACP suffered an injury as a result of gun dealers' improper sale of guns because "the NAACP ha[d] sought not economic damages, but solely injunctive relief. There is a real and immediate likelihood that the injury to the NAACP's interests as an organization and the financial injury to the organization will continue indefinitely if steps are not taken to curb widespread criminal access to firearms in New York").

c. Each Of The Plaintiffs Falls Within The Operable Statute's "Zone of Interests."

The "zone-of-interests" analysis is a prudential, as opposed to constitutional, test. When a plaintiff invokes the APA as its cause of action, the Supreme Court has applied the APA's "generous review provisions" to this prudential standing consideration. *Bennett*, 520 U.S. at 163 (citing *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 (1987)). Thus, a plaintiff suing under the APA does not have to show that the purpose of the statute of issue is to benefit him. *See Shays v. Fed. Election Comm'n*, 414 F.3d 76, 83 (D.C. Cir. 2005). The inquiry is simply "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected . . . by the statute." *Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 489 (1998).

There is no doubt that these plaintiffs' injuries fall within the zone of interests the CDBG program's enabling legislation had in mind. Indeed, HUD does not contend otherwise. When it enacted the enabling legislation in 1974, Congress said that "[t]he primary objective of this chapter and of the community development program of each grantee under this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. § 5301(c). These plaintiffs either are individuals of low and moderate income who are in need of housing, or are organizations that serve such individuals. Therefore, they each fall within the requisite "zone-of-interests" and satisfy this prudential prong of the standing analysis. *See Philadelphia Welfare Rights Org.*, 438 F. Supp. at 437 (citing *City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032 (2d Cir. 1976) (*en banc*) and *Nat'l Ass'n for Advancement of Colored Persons (NAACP) Santa Rosa Sonoma County Branch v. Hills*, 412 F. Supp. 102, 106 (N.D. Cal. 1976)).

2. Plaintiffs' Injuries Were Directly Caused by HUD, And Are Capable of Being Redressed By A Favorable Decision.

As to the question of causation, the D.C. Circuit has held that to support standing in a procedural rights case, the plaintiff must show that the omission or insufficiency of the procedure has "demonstrably increased [the] risk of serious . . . harm" that "actually threatens the plaintiff's particular interests." *Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 667 (D.C. Cir. 1996); *see also Massachusetts v. E.P.A.*, 415 F.3d 50, 60 (D.C. Cir. 2005) (Sentelle, J., concurring) (applying "demonstrably increased risk" standard in cases outside of NEPA). In other words, "a procedural-rights plaintiff must show . . . that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest." *Florida Audubon Soc.*, 94 F.3d at 664-65.

By passively allowing Mississippi to divert more than a half-billion dollars from its proper statutory purpose, HUD has "demonstrably increased the risk" that the Individual Plaintiffs and NAACP members will never obtain the government assistance they need and deserve, and that the Organizational Plaintiffs will have to continue to fill the void left by this massive deficit. Absent relief from this Court, it is more than "substantially probable" -- it is absolutely certain -- that the plaintiffs will not receive a penny of this assistance because HUD's inaction has enabled the state to "reprogram" it all to the Port Project, which provides no housing relief whatsoever, and which will do virtually nothing to address any other needs of the Gulf Coast's low- and moderate-income population. Meanwhile, neither HUD nor Mississippi has identified *any other* source of funding available to address meet the critical unmet housing needs of residents like the plaintiffs and the NAACP members.

The matter of redressability, while related to the question of causation, is a separate analysis. To establish redressability, a plaintiff need not prove that further review or procedures

by the agency will necessarily result in the outcome the plaintiff desires. Rather, it only requires a "significant increase in the likelihood" that the plaintiff will ultimately obtain relief. *See Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 5 (D.C. Cir. 2005); *see also Friends of Hamilton Grange v. Salazar*, 2009 WL 650262 at *13-14 (S.D.N.Y. Mar. 12, 2009) ("When asserting a procedural right, a party need not definitively establish that further review or consultation would result in the outcome it desires in order to demonstrate redressability. When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant") (internal quotations omitted). In this instance, if HUD is required to properly exercise its oversight authority, it is substantially more likely that the plaintiffs will at least have an opportunity to benefit from the money that has been diverted to the Port Project.

a. HUD's Decision Caused The Plaintiffs' Injuries.

HUD's effort to blame Mississippi as the actual cause of the plaintiffs' injuries fail as a matter of law. Mississippi *could not have* redirected the CDBG funds if the agency had not abdicated its role as overseer of their proper allocation and expenditure. In layman's terms, HUD may not pass the buck because the buck stopped with Secretary Jackson. It was his failure to follow the law that caused the plaintiffs' injuries. *See Ne. Energy Associates v. F.E.R.C.*, 158 F.3d 150, 153-54 (D.C. Cir. 1998) (rate payers had standing to challenge FERC's action allowing a regulated third party to charge plaintiffs a certain rate for the transportation of natural gas where the relevant statute required FERC to approve the rates charged; therefore, FERC exercised complete control over the conduct of the third party). Secretary Jackson *knew* that Mississippi was planning to spend the federal taxpayer money for the wrong purpose -- he said as much both in writing and in his testimony to Congress -- but he nonetheless took the legally erroneous position that he was powerless to stop the inappropriate expenditure. It was his action,

therefore, in rubber-stamping the Port Proposal that has deprived the plaintiffs of an opportunity to benefit from the funds.

In *Humane Society*, this Court addressed the question of whether the Humane Society had standing to challenge the Postal Service's Decision to circulate a magazine that promoted cock-fighting. In finding that the Humane Society could bring such a suit, the court stated,

> Standing to challenge government conduct that allegedly causes a third party to injure the plaintiff can exist *either* 'where the challenged government action authorized conduct that would otherwise have been illegal,' *or* 'where the record presented substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress.' The Humane Society arguably meets both tests. Under the first one, the Humane Society challenges government action that authorizes what it alleges is the illegal acceptance of mail matter. Under the second, the record does present 'substantial evidence of a causal relationship' between the continued mailing of *The Feathered Warrior* and illegal animal fighting.

Humane Soc'y, 2009 WL 1097413, at *4 (citing *Renal Physicians Ass'n v. U.S. Dept. of Health & Human Services*, 489 F.3d 1267, 1272 (D.C. Cir. 2007)) (internal citation and quotations omitted).

The plaintiffs here, like the Humane Society, challenge government conduct (*i.e.,* HUD's decision to allow the diversion of CDBG funds) that enables a third party (*i.e.,* the State of Mississippi, by not being required to dispense the CDBG funds according to the law) to injure the plaintiffs. As in *Humane Society*, moreover, the challenged government action here enabled conduct that would otherwise have been unlawful (*i.e.,* the use of CDBG money outside the bounds of what that statute and its regulations allow). The causal link is clear: were it not for HUD's abdication of its oversight authority, Mississippi could not have followed through on its plan to divert money that could and should be used to address the continuing affordable housing crisis on the Mississippi Gulf Coast.

This is more than sufficient to establish standing. In *City of Waukesha*, 320 F.3d 228, water utility companies, a utility customer, trade associations and a consumer advocacy group petitioned for review of a new EPA rule that set standards -- but did not require a cost-benefit analysis -- for radionuclide levels in public water systems. The EPA argued that even if it had performed the cost-benefit analysis, the harm suffered by the plaintiffs would not have been alleviated. The D.C. Circuit noted that: "Although *some sort of connection* between the procedural requirement at issue and the substantive action of the agency must be shown, the Supreme Court has held that this requirement is not very stringent." *City of Waukesha*, 320 F.3d at 235 (emphasis added) (citations and internal quotations omitted). The court continued: "In fact, all that is necessary is to show that the procedural step was connected to the substantive result." *Id.*; *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 14 (1998) (despite the fact that an agency might never enforce a particular provision, "those affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground").

In this case, there is clearly much more than "some sort of connection" between HUD's procedural default and the diversion of more than a half-billion in CDBG housing funds to the Port Project. The Individual Plaintiffs and NAACP members have been injured by their inability to find adequate housing, such inability is the consequence of Mississippi's failure to adequately fund affordable housing recovery programs, and Mississippi's delinquency is the direct consequence of HUD's failure to properly oversee the state's distribution of CDBG funds that Congress appropriated to it for just such a purpose. The same combination of federal inaction and state action has imposed upon the GCFHC and NAACP a substantial burden that they would not otherwise bear, and has required them to shift significant staffing and program resources

away from traditional housing advocacy and toward advocacy focused solely on obtaining government housing assistance for those they serve. (*See* Crowell Decl. ¶¶ 13, 17 and 21-30; Gaulden Decl. ¶¶ 9-15.)

b. Plaintiffs Meet Their Requirements As To Redressability.

To establish redressability, a plaintiff need not prove that further review or procedures by the agency will *necessarily* result in the outcome the plaintiff desires -- the *mere possibility* is sufficient. *See Friends of Hamilton Grange*, 2009 WL 650262, *13-14 ("When asserting a procedural right, a party need not definitively establish that further review or consultation would result in the outcome it desires in order to demonstrate redressability. When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant") (internal quotations omitted); *see also Nat'l Parks Conservation Ass'n*, 414 F.3d at 5.

As the U.S. Supreme Court held in *Lujan*:

> The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, *even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered*, and even though the dam will not be completed for many years.

Lujan, 504 U.S. at 573 (emphasis added).

Defendants argue that to establish standing in this case "the individual plaintiffs would have to allege, and ultimately prove that they were eligible for and qualified for homeowner grants available under Mississippi's Homeowners Assistance Program and that HUD's approval of Mississippi's decision to reprogram funds away from the homeowner program prevented

plaintiffs from receiving those grants." (*See* HUD Mem. 24.)[21] This argument, again, completely misses the point. Mississippi's *existing* assistance programs are not the be-all-and-end-all. Once Mississippi chose to "reprogram" the funds at issue, HUD had an obligation to assure that the money was properly spent. Had it done so, Mississippi would have been obligated to design a program that meets the CDBG statute's purpose and requirements -- *i.e.*, the statutory intent, acknowledged in HUD's regulation governing this program, that these CDBG funds be "used toward meeting unmet housing needs in areas of concentrated distress," 71 Fed. Reg. 7666, and the requirement that 50% of the funds go to the benefit of LMI persons. If HUD had done its job it is far more than likely -- if not obviously certain -- that the funds would have been spent to assist the plaintiffs and others like them. This is all that *Lujan* requires.

In short, HUD's connivance at Mississippi's diversion of the more than a half-billion dollars in CDBG funds at issue constitutes an *absolute barrier* to its proper expenditure, and neither HUD nor Mississippi has identified an alternative source for this funding. If this Court grants relief, that barrier will have been removed. *See Vill. of Arlington Heights*, 429 U.S. at 261-62. The plaintiffs' injuries are therefore redressable.

To say that the plaintiffs injuries are not redressable because the plaintiffs were not eligible for Phase I assistance, therefore, is to get the matter exactly backwards. It is clear that Mississippi and HUD consider the $570 million diverted from the Phase I program as "excess" money not needed for that program. The money was not permanently locked into Phase I by

[21] Defendants assert that the Individual Plaintiffs could alternatively establish standing by demonstrating that the Port of Gulfport itself personally injures them, and that even then, the plaintiffs would have to allege that but for HUD's approval of Mississippi's use of CDBG funds, Mississippi would not be able to find and use another source of funds for the project. (*See* HUD Mem. 24 n.8.) The Individual Plaintiffs do not allege that the Port itself causes them injury. In fact, the Plaintiffs would not challenge the Port being built using another source of funds. The plaintiffs' grievance is rather that the Port should not be expanded using federal CDBG funds that were meant to address the housing needs of low-to-moderate income individuals.

virtue of its initial allocation. Indeed, the State has repeatedly reprogrammed funds from Phase I to other programs. *See supra* at 12. Moreover, before it diverted these funds to the Port Project, Mississippi *was* evidently planning a "Phase III" housing assistance program that *would* have benefited the plaintiffs and others like them. (Landry Decl. ¶11). The apparent purpose of Phase III, as described by Governor Barbour's office, would have been to assist exactly those residents of the region, mostly poor, who were *not* eligible for existing programs, but who remained in dire need of housing assistance. HUD did not breach its statutory duties when it allowed *any* reprogramming of the Phase I excess, but rather when it allowed the state to preprogram the excess for an improper purpose when the statutorily-recognized needs of the region had not yet been met.

Courts have repeatedly found the redressability requirement met in analogous circumstances. In *Lee v. Pierce*, 698 F. Supp. 332 (D.D.C. 1988), for example, homeless individuals brought suit to enjoin HUD from selling or disposing of homes in its single-family inventory other than for the benefit of the homeless. The court found that plaintiffs had standing to sue despite HUD's arguments that the plaintiffs' prospects for redress were too attenuated because the relief requested would not *compel* HUD to provide any of its inventory to the plaintiffs. The court noted that "the relief requested, HUD's compliance with the statutes, is the 'necessary first step' for the plaintiffs to reap any benefit from the statutes." *Id.* at 337 (citations omitted). The same is true here; unless and until HUD complies with its oversight obligations, there is no hope that the plaintiffs will ever benefit from the proper allocation and expenditure of CDBG funds.

It is true that even with proper HUD oversight, Mississippi would retain discretion to spend the CDBG money for *any* appropriate purpose under the statute and regulations. It *might*

not implement Phase III, for example, and even if it did, the plaintiffs *might* not benefit. But this possibility does not defeat standing. *See Lujan*, 504 U.S. at 573. For example, in *W. Va. Ass'n of Cmty. Health Centers, Inc. v. Heckler*, 734 F.2d 1570 (D.C. Cir. 1984), an association of community health centers had standing to seek injunctive relief regarding the Secretary of Health and Human Services' calculation of how much funding West Virginia was entitled to under a primary care block grant statute. *W. Virginia Ass'n of Cmty. Health Centers, Inc. v. Heckler*, 734 F.2d 1570 (D.C. Cir. 1984). The Secretary of HHS argued that the plaintiffs failed to demonstrate any redressability because, despite the statute at issue, West Virginia would have had complete discretion to award any additional funding it might receive to other health centers that were not parties to the lawsuit. *Id.* at 1574. The D.C. Circuit disagreed: "[O]nce appellants demonstrated that they would *qualify* to receive these [federal] funds [under the statute], they need not shoulder the additional burden of demonstrating that they are *certain* to receive funding." *Id.* at 1575 (emphasis added); *see also Friends of Hamilton Grange*, 2009 WL 650262, at *13-14 ("When asserting a procedural right, a party need not definitively establish that further review or consultation would result in the outcome it desires in order to demonstrate redressability. When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant") (internal quotations omitted); *N.A.A.C.P.*, 210 F.R.D. 446, 460 (gun dealers' improper sale of guns caused a redressable injury to the NAACP because "[i]njunctive relief would arguably have a remedial effect in that it would likely reduce criminal access to firearms manufactured and distributed by the defendants").

This means, of course, that in assessing redressability, a court should not pre-judge the outcome of the regulatory process or analyze the merits of the case. *See Beno v. Shalala*, 30 F.3d

1057, 1065 (9th Cir. 1994) ("[T]he mere fact that, on remand, the Secretary might again issue a waiver does not defeat plaintiffs' standing"). In *Beno*, recipients of Aid to Families With Dependent Children ("AFDC") benefits sought a preliminary injunction enjoining California from reducing the aid they received. *Id.* at 1064-67. The Defendant, the Secretary of Health and Human Services, argued that the plaintiffs had not shown redressability because the APA gave the court jurisdiction only to remand the decision to the Secretary for further review. Since the benefit cuts were not illegal under federal law, the Secretary might again grant the state's request for a waiver. Id. at 1064. The appellate court ruled, however, that the mere fact that the Secretary might again issue a waiver on remand did not defeat plaintiffs' standing. *See also Seattle Audubon Soc. v. Espy*, 998 F.2d 699, 702 (9th Cir. 1993) (in a suit challenging an Environmental Impact Statement ("EIS"), the fact that "redrafting the EIS might not change the Secretary's decision . . . is not relevant to standing").

The plaintiffs have more than satisfied the redressability standard here. They ask this Court to enjoin HUD from abdicating its statutory oversight authority. If HUD exercises that authority, there is every reason to think (based on, among other things, Secretary Jackson's own statements to Congress and the Acting Director's June 13, 2007 memorandum) that HUD will require Mississippi to allocate the money at issue to a more appropriate program or programs that will increase the stock of affordable housing in the region. Thus, there is a *substantial probability* that at least some of the CDBG funds set aside for the Port Project will go to programs for which the plaintiffs will be eligible, resulting in at least a "first step" toward ensuring that the plaintiffs obtain concrete relief. In contrast, absent relief from this Court, there is *zero* possibility of the plaintiffs benefiting from these funds. Accordingly, plaintiffs have

satisfied all of the requirements for Article III standing, and HUD's motion to dismiss on that basis must be denied.

B. HUD's Sovereign Immunity Defense Fails As a Matter of Law

HUD's alternative argument -- that plaintiffs' claims against HUD pursuant to the APA are barred by sovereign immunity -- also fails as a matter of law. In the APA, the United States expressly waived its sovereign immunity to allow judicial review of final agency actions, consenting to be sued by any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a statute." 5 U.S.C. § 702. That is precisely the case here. Plaintiffs allege that they have been harmed by, and seek injunctive and declaratory relief to remedy, HUD's failure to comply with its statutory duties to ensure that CDBG funds are expended only in accordance with the requirements of the applicable enabling statutes, including the HCDA, 42 U.S.C. § 5301.

The APA excludes from its waiver of sovereign immunity those claims for which some "other adequate remedy [is available] in a court." 5 U.S.C. § 704. The Supreme Court has construed this exception narrowly, and applies it only where Congress has separately provided "special and adequate remedies" for the violation alleged. *Bowen v. Massachusetts*, 487 U.S. 879, 903-4 (1988) ("adequate remedy" exception "should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action"). Congress intended this exception "simply to avoid duplicating previously established special statutory procedures for review of agency actions." *Darby v. Cisneros*, 509 U.S. 137, 146 (1993). "The Supreme Court has long instructed that the 'generous review provisions' of the APA must be given 'a hospitable interpretation' such that 'only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review.'" *El Rio Santa*

Cruz Neighborhood Health Ctr., Inc. v. U.S. Dept. of Health & Human Services, 396 F.3d 1265, 1270 (D.C. Cir. 2005) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 141 (1967)).

Applying this standard here, HUD's attempt to invoke the "adequate remedy" exception to the APA's waiver of sovereign immunity must be rejected. HUD does not, and cannot, demonstrate, let alone by clear and convincing evidence, that Congress has established (outside of the APA) a special statutory remedy that plaintiffs may invoke to challenge the improper expenditure of CDBG funds that HUD has approved in connection with the Port Project.

In its brief, HUD feebly suggests that plaintiffs have an "adequate remedy" other than a suit against HUD because plaintiffs supposedly could instead bring a claim against the state of Mississippi to challenge the disbursement of the CDBG funds in violation of the requirements of the HCDA. This is incorrect for two reasons.

First, it is well settled that no private right of action exists under the HCDA for the alleged improper expenditure of CDBG funds, as the HCDA empowers only the Attorney General of the United States to bring such an action. 42 U.S.C. § 5311; *see, e.g.*, *Latinos Unidos De Chelsea En Accion (Lucha) v. Sec'y of Hous. & Urban Dev.*, 799 F.2d 774, 795 (1st Cir. 1986) ("Congress did not intend to create a . . . private right of action within the HCDA"); *Pleune v. Pierce*, 697 F. Supp. 113, 119-20 (E.D.N.Y. 1988) (no private right of action exists under the HCDA, so "a challenge to HUD action under these sections can be made only pursuant to the Administrative Procedure Act"); *Dotson v. Pac. Gas & Elec. Co.*, 1993 WL 248644, *1-2 (N.D. Cal. June 25, 1993), *aff'd*, 46 F.3d 1140 (9th Cir. 1995) (citing *Montgomery Improvement Ass'n v. Dep't of Housing & Urban Dev.*, 645. F.2d 291, 294 (5th Cir. 1993)) (although the Fifth Circuit has departed from the otherwise universal view that the HCDA does not confer a private right of action under any circumstances and held that it does confer such a right for

discrimination-based claims, even under the Fifth Circuit standard, when (as here) the plaintiff's claim is based not on discrimination, but an "alleged break-down in [HUD's] administration of [] funds" under the statute, no private right of action is available). Accordingly, and contrary to HUD's assertions, plaintiffs do not have a remedy against Mississippi (or anyone else) under the HCDA.

Second, even if the HCDA did confer a private right of action, plaintiffs' only viable claim here is against HUD, and not the state of Mississippi. Under the HCDA, it is *HUD* (and not Mississippi) that is charged with ensuring compliance with the applicable statutory mandates so that the CDBG funds are expended only as Congress intended. Mississippi did not breach any statutory duty under the HCDA; rather, it was *HUD* that was obligated to serve as the gatekeeper, and to disapprove any planned expenditure of the funds that did not comply with the requirements of the statute. Indeed, if plaintiffs could sue Mississippi under the HCDA (which they cannot given the absence of a private right of action), Mississippi would have an airtight defense: it could not have done anything wrong because HUD was charged with administering these funds in accordance with the statute, and since HUD approved the expenditure on the Port Project, that was all that was required. For this reason as well, plaintiffs do not have an adequate remedy in court to challenge the expenditure of the CDBG funds in violation of the HCDA statute, other than this suit against HUD under the APA. *See Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) ("alternative remedy will not be adequate under 5 U.S.C. § 704 if the remedy offers only 'doubtful and limited relief'") (quotations and citations omitted). Here, any attempt by plaintiffs to sue Mississippi under the HCDA would offer no relief at all.

Equally specious is HUD's argument that plaintiff's have an adequate remedy other than a suit against HUD because, according to HUD, plaintiffs could conceivably sue Mississippi

under a discrimination theory, either pursuant to the Fair Housing Act or Title VI of the Civil Rights Act. The fatal flaw in this argument is that plaintiffs' Complaint here is *not* based on alleged discrimination but rather, on HUD's utter failure to comply with the statutory mandates of the HCDA statute regarding the expenditure of CDBG funds. HUD itself concedes this point. In footnote 13 of its memorandum, HUD acknowledges that plaintiffs have not alleged any violations of civil rights laws or the Fair Housing Act. In short, because plaintiffs' claim here is *not* a discrimination claim, but rather a claim seeking to prevent the improper expenditure of CDBG funds in violation of the statutory requirements of the HCDA, a discrimination claim cannot possibly provide an adequate remedy for the wrong complained of.

Because of this distinction, the cases relied upon by HUD are inapposite. In each of those instances, plaintiffs had a clearly established private right of action under a statutory provision other than the APA to seek relief from the same wrong as would be remedied by their lawsuit under the APA. For example, in *Washington Legal Found. v. Alexander*, 984 F.2d 483 (D.C. Cir. 1993), the plaintiffs claimed that the Department of Education had abdicated its responsibility under Title VI to protect them from racial discrimination in the distribution of college scholarships. The D.C. Circuit ruled that they could not sue under the APA because "they have an implied right of action under Title VI against the individual colleges and law schools to redress any discrimination they have allegedly suffered." *Id.* at 486; *see also Women's Equity Action League v. Cavazos*, 906 F.2d 742, 750 (D.C. Cir. 1990) (plaintiffs could not sue federal agencies responsible for monitoring and enforcing compliance with discrimination proscriptions where they had implied and express rights of action directly against

the discriminating parties).[22]

This case is different. The FHA and Title VI do, as HUD suggests, authorize private suits -- but only to redress violations of the anti-discrimination provisions of those statutes. *See* 42 U.S.C. § 3613 and 42 U.S.C. § 2000d. The plaintiffs in this case, however, are not complaining that HUD has failed to protect them from discrimination of a sort that is remediable under those statutes, and therefore could be adequately remedied by a lawsuit directly against the discriminating parties. Any claims that might be available to the plaintiffs under the suggested alternative statutes, therefore, are *not* "of the same genre" as the claim plaintiffs have asserted here under the APA, *see El Rio Santa Cruz Neighborhood Health Ctr., Inc.*, 396 F.3d at 1271, and do not provide an "adequate remedy" within the meaning of 5 U.S.C. § 704. Accordingly, HUD's sovereign immunity argument fails as a matter of law.

V. CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss. Pursuant to Local Rule 7(f), plaintiffs further respectfully request an oral hearing on this Opposition to Defendants' Motion to Dismiss.

[22] The other case relied on by the Government, *Coker v. Sullivan*, 902 F.2d 84 (D.C. Cir. 1990), is equally inapposite. In *Coker*, homeless families and advocacy organizations brought suit under the APA against the Department of Health and Human Services to require the agency to monitor and enforce state compliance with state Emergency Assistance plans. *Id.* at 85. Unlike the plaintiffs in *Coker*, the plaintiffs here are *not* asking HUD to remedy state-created injuries, but rather to require HUD to discharge its statutorily required oversight function.

Respectfully submitted,

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