ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5055

MISSISSIPPI STATE CONFERENCE NAACP, GULF COAST FAIR HOUSING CENTER, DOROTHY MCCLENDON, ZELDA WILLIAMS, RANGISMA DILWORTH AND PAMELA LANDRY,
Appellants,
v.
UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT AND SHAUN DONOVAN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLANTS

Andrew N. Nathanson
Laurence A. Schoen
MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO, PC
One Financial Center
Boston, MA 02111
Telephone (617) 542-6000
Facsimile (617) 542-2241

Robert G. Kidwell
MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO, PC
701 Pennsylvania Ave., NW
Suite 900
Washington, DC 20004
Telephone (202) 434-7300
Facsimile (202) 434-7400

June 28, 2010
(List of Counsel continued on inside cover)

(List of Counsel continued)

Of Counsel:

Joseph D. Rich
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Ave. NW, Suite 400
Washington, DC 20005
Telephone (202) 662-8331

Reilly Morse
MISSISSIPPI CENTER FOR JUSTICE
974 Division Street
Biloxi, MS 39530
Telephone (228) 435-7284

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici:

The Mississippi State Conference NAACP, the Gulf Coast Fair Housing Center, Dorothy McClendon, Zelda Williams, Rangisma Dilworth and Pamela Landry were Plaintiffs in the District Court and are Appellants in this Court. The United States Department of Housing & Urban Development and Shuan Donovan, in his official capacity as Secretary of the United States Department of Housing & Urban Development, were Defendants in the District Court and are Appellees in this Court.

B. Ruling Under Review:

Appellants seek review of Judge James Robertson's January 8, 2010 Memorandum and Order dismissing Civil Action No. 1:08-cv-02140 (Docket Nos. 29 and 30), originally filed in the United States District Court for the District of Columbia ("Memorandum and Order"). The Memorandum and Order appear in the Joint Appendix ("JA") at 345-52. In that Memorandum and Order, the District Court granted Appellees' motion to dismiss for lack of jurisdiction based on Appellants' alleged lack of Article III standing.

C. Related Cases:

The undersigned counsel is not aware of any related cases currently pending in this or any other court.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rules of Appellate Procedure Rule 26.1 and D.C. Circuit Rule 26.1, Appellants state as follows:

The Mississippi State Conference of the National Association for the Advancement of Colored People ("Mississippi State Conference NAACP") is a private, non-profit membership organization chartered in 1945 under the laws of the state of Mississippi. The Mississippi State Conference NAACP has a revolving membership of over 11,000 members across the state, with at least one member in 74 of the 82 counties in Mississippi. There are no parent companies, subsidiaries or affiliates of Mississippi State Conference NAACP which have any outstanding securities in the hands of the public.

The Gulf Coast Fair Housing Center ("GCFHC") is a private, non-profit fair housing organization incorporated in 2003 under the laws of the state of Mississippi. GCFHC's purpose is to eliminate housing discrimination and secure equal housing opportunities for persons of low and moderate income throughout the Gulf Coast by engaging in education, outreach, advocacy, and enforcement activities with respect to fair housing laws. The GCFHC is active in five Mississippi Gulf Coast counties: George, Hancock, Harrison, Jackson, and Stone. There are no parent companies, subsidiaries or affiliates of Gulf Coast Fair Housing Center which have any outstanding securities in the hands of the public.

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GLOSSARY OF ABBREVIATIONS

Pursuant to D.C. Circuit Rule 28(a)(3), the following is a glossary of abbreviations and acronyms used in this Brief:

CDBG	Community Development Block Grants
FEMA	Federal Emergency Management Agency
FHEO	United States Department of Housing and Urban Development's Office of Fair Housing and Economic Opportunity
GCFHC	Gulf Coast Fair Housing Center
HAP	Homeowners Assistance Program
HCDA	Housing and Community Development Act of 1974
HUD	United States Department of Housing and Urban Development
JA	Joint Appendix
LMI	Low-and-Moderate Income
MDA	Mississippi Development Authority
NAACP	National Association for the Advancement of Colored People

STATEMENT REGARDING JURISDICTION

This is an appeal from a District Court decision allowing Appellees' motion to dismiss Appellants' claims for lack of Article III standing. The District Court had jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C § 701 *et seq*. The District Court's Memorandum and Order, dated January 8, 2010, disposed of all of Appellants' claims. (JA 345-52). Appellants filed a timely notice of appeal on February 23, 2010. (JA 353-55). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Did the District Court err in dismissing this case for lack of standing, without even affording Plaintiffs a hearing, where: (a) Plaintiffs are low-income victims of Hurricane Katrina who lost their homes or are left living in severely damaged housing as a result of Hurricane Katrina, (b) Plaintiffs allege that they have been injured by HUD's failure to fulfill its statutory duty to ensure that the disaster relief money appropriated by Congress for the benefit of Hurricane Katrina victims was utilized for its intended purpose, and instead has improperly allowed the state of Mississippi to allocate $570 million of this money to a port expansion project that has nothing to do with disaster relief and that Mississippi was seeking to finance well before Hurricane Katrina; and (c) Plaintiffs allege that judicial

relief will significantly increase the likelihood that Plaintiffs will obtain relief that directly redresses their injuries?

STATUTES AND AUTHORITIES

Relevant statutes and regulations are reprinted in an Addendum bound with this brief.

STATEMENT OF THE CASE

After Hurricane Katrina devastated the Gulf Coast, Congress acted quickly to provide assistance to the thousands of residents whose homes were destroyed or severely damaged. (JA 17). In the ten months after the storm, Congress appropriated $16.7 billion to the five affected states as Community Development Block Grants ("CDBG") under the Housing and Community Development Act of 1974 ("HCDA"). (JA 26-27). Overseeing grants under this law - - and ensuring that recipient states allocate and spend the funds appropriately - - is the responsibility of the United States Department of Housing and Urban Development ("HUD"). (JA 29).

The HCDA's primary objective is to provide "decent housing and a suitable living environment for persons of low and moderate income." (JA 25). First Congress, and then HUD in its Federal Register Notice, identified critical unmet housing needs in the Gulf Coast area as the intended use of the funds. (JA 26). This purpose was especially significant for Mississippi, where a substantial portion

of the 65,000 housing units made uninhabitable by the storm had been occupied by persons of low-and-moderate income ("LMI"). (JA 4, 16).

This purpose was also critically important to people like Plaintiff Dorothy McClendon, a disabled LMI resident of a predominately African-American neighborhood of Gulfport. (JA 199). The roof of her house blew off in the storm and the entire foundation shifted, resulting in serious water damage, gas, plumbing and electrical issues as well as severe mold and mildew problems. (JA 199-200). She applied for Mississippi's CDBG-funded Homeowners Assistance Program ("HAP") but was told she was ineligible because her home was damaged by wind, not storm surge and she had no insurance. (JA 200-01). Because she was not given a handicapped-accessible Federal Emergency Management Agency ("FEMA") trailer, she was forced to switch back from the trailer to her damaged house for bathing and tasks requiring mobility. (JA 200). She has received nothing from the CDBG grant money. (JA 201-02). Other of the individual Plaintiffs and low-income members of the two organizational Plaintiffs were also left in dire straits by the hurricane but despite damaged or destroyed housing, have received no CDBG-funded support and, due to HUD's passive acceptance of the Port Plan -- in abdication of its statutory duties -- have lost the opportunity to benefit from such funds. (JA 204-45).

Under the HCDA, the Secretary of HUD is obligated to examine the recipient state's plans for spending the funds and to review its required assurances, including the certifications that the state will use the money to further the goal of fair housing and that at least 50% of the funds will be used for activities primarily benefitting LMI individuals. (JA 25-26). The latter certification could be waived by HUD only upon a demonstration of "compelling need." (JA 28-29). The former could not be waived. (JA 28).

Despite these provisions and the clear Congressional intent that block grants be used primarily to address the housing needs of LMI individuals, Mississippi, with the approval of HUD, has allotted close to 80% of its $5.4 billion in post-Katrina grants to projects that provide no housing assistance to most of its many LMI residents displaced by the storm. (JA 31-39). Instead, Mississippi has allocated the funds to an exclusionary program benefitting a limited, less needy class of homeowners ("Phase 1 of HAP"), and to infrastructure, economic development projects and the like. *Id.* Not one of these projects met the 50% LMI requirement, but HUD waived that required certification for each. *Id.*

When its restricted HAP program ended up with $570 in unspent funds, Mississippi saw an opportunity to fund the long-planned commercial development of the Port of Gulfport ("Port Expansion Plan" or "Port Project"). (JA 39). Mississippi proposed to divert block grant money to this project, instead of using it

for the still unserved needs of its LMI residents. *Id.* Although the Port Project could not qualify for a waiver of the LMI requirement -- and Mississippi didn't even ask for one -- and although the state also ignored the required fair housing certification, HUD "accepted" the plan to fund the Port Project. (JA 44-47). HUD's Secretary later told Congress that he disagreed with the use of the funds but believed that HUD had no discretion to disapprove it. (JA 49).

Plaintiffs brought this case because he was wrong and because HUD's failure to meet its statutory obligations cost them the opportunity to receive the benefit that Congress intended for them. They asked the District Court to require HUD to review Mississippi's proposal as the law mandates. The District Court's decision dismissing their Complaint for lack of standing is in error. Plaintiffs have a concrete interest; the denial of their chance to obtain affordable housing is an actual injury that is traceable to HUD's failure to perform its statutory duties. Judicial action will significantly increase the likelihood of Plaintiffs getting their acute housing needs addressed.

STATEMENT OF FACTS

A. Hurricane Katrina's Devastation Of Affordable Housing In Mississippi

On August 29, 2005, Hurricane Katrina, the worst natural disaster in United States history, overran a broad swath of the Gulf Coast region, its wind and storm surge wreaking widespread devastation. (JA 24). In the wake of the storm, six

coastal counties in Mississippi were in ruin, with much of their housing stock, 240,000 units, destroyed or damaged and 100,000 residents left homeless. (JA 15-16). The brunt of the damage and displacement fell on Mississippi's poorest residents – those classified as persons of low-and-moderate income. (JA 16).

More than half of the rental stock damaged by the storm had been occupied by low income households. *Id.* But because the region has historically had relatively high levels of home ownership even among its lower income inhabitants, the group of poorer residents displaced by Katrina also included homeowners. (JA 24-25). Many of these homeowners had been unable to afford any private insurance, and after the storm were entirely dependent on public assistance for their recovery. (JA 27-28).

The hurricane had a particularly profound effect on lower income residents and minorities in Mississippi. (JA 24-25). Not only was the damage to this group's housing disproportionately large, the nature of the damage incurred was also different. *Id.* Because of historical housing patterns in the region, people of color (who were disproportionately represented among the LMI population) had been segregated onto the proverbial "other side of the tracks." *Id.* In coastal Mississippi, the other side of the tracks is the north side, along an elevated railbed, which provided the poorer neighborhoods with some protection from the storm surge but left them open to devastation by the winds. *Id.* That the homes of low-

and-moderate income persons were largely affected by Katrina's intense winds and not by its storm surge was critical since the first and major phase of Mississippi's Homeowners Assistance Program was limited to homes damaged by the storm surge. (JA 36).

Before Katrina, housing was at a premium in Mississippi's Gulf Coast. (JA 16). Afterward, at least 65,000 housing units, a substantial portion of which were owned by or rented to persons of low-and-moderate income had been destroyed or made uninhabitable, including 2,534 out of 2,695 units of public housing in southern Mississippi. *Id.* The crisis in affordable housing after the storm was recognized by, among others, FEMA, the Rand Corporation's Gulf States Policy Institute and the Mississippi Governor's Commission on Recovery, Rebuilding and Renewal. *Id.*

B. Congressional Response To The Post-Katrina Housing Crisis And HUD's Role In Overseeing Block Grants

Congress responded promptly to the needs of the Gulf Coast states following Hurricane Katrina. (JA 25-26). Among other provisions it made to assist recovery, in December 2005 Congress passed P.L. 109-148, which appropriated $11.5 billion in block grants to the affected states of Mississippi, Louisiana, Alabama, Texas and Florida. (JA 26). A few months later, in June 2006, Congress passed P.L. 109-234, which appropriated an additional $5.2 billion in block grants

to the five states. (JA 27). Of these combined appropriations, $5.4 billion was allocated to Mississippi. *Id.*

Congress appropriated this money in the form of CDBG funds under the authority of the HCDA, to be administered by HUD. (JA 25-29). The HCDA's "primary objective" is to provide "decent housing and a suitable living environment . . . for persons of low and moderate income." (JA 25). Congress chose the HCDA as its vehicle in late 2005 and 2006 because the primary purpose of the emergency appropriations "was to address the critical unmet housing needs in the impacted areas." (JA 26). Thus, when it published its first formal Notice in the Federal Register describing how it expected the recipient states to spend their emergency block grants, HUD emphasized that it intended the funds "to be used toward meeting unmet housing needs in areas of concentrated distress." *Id.* HUD's Notice drew specific attention to the area's affordable housing crisis by defining "unmet housing needs" to include the needs of "uninsured homeowners whose homes had major or severe damage." *Id.*

HUD has a statutory duty to ensure that the recipients of community development block grants under the HCDA allocate and spend their grants in compliance with the CDBG requirements. (JA 25-26). To carry out this responsibility, the agency has issued extensive regulations. (JA 29-31). The regulations implement HUD's statutory obligation to ensure that CDBG funds are

disbursed only after the recipient state has made certain required certifications. *Id.* Thus, the regulations require prospective grantees to certify, to HUD's satisfaction, that they will (1) comply with the HDCA requirement to spend their grants in a manner that will affirmatively further the goal of fair housing, and (2) comply with the HDCA requirement to spend at least 70% of the grant money on activities that will primarily benefit persons of low- and-moderate incomes (the "LMI benefit requirement"). (JA 25-26).

The regulations empower HUD not only to demand such certifications, but to scrutinize them, to insist that the applicant submit supporting evidence for its certifications, to inspect such evidence, and to disapprove the recipient's plans for spending its block grant if HUD determines that any of these certifications are not supported by the evidence or are otherwise inaccurate or insufficient. (JA 28-31). HUD modified the regulations somewhat to facilitate the disposition of the emergency CDBG grants at issue here. (JA 29). Congress authorized HUD to reduce the LMI benefit requirement from 70% to 50%, and HUD did so. (JA 28). HUD was also empowered to waive the LMI benefit requirement entirely, but only in limited circumstances, when the applicant could demonstrate a "compelling need" for the waiver, and could demonstrate as well that the waiver would not "be inconsistent with the overall purpose of the statute." (JA 28-29). The emergency appropriation statutes also authorized HUD to waive other regulatory

requirements, but they explicitly *forbade* the agency from waiving the statutory obligation to "affirmatively further fair housing." (JA 28). The procedural certification rules for the fair housing and LMI benefit requirements, and for HUD's oversight therefore, largely remained in place. (JA 29-31).

C. Mississippi's "Plan" For Use Of CDBG Emergency Funds

States receiving emergency CDBG funds for hurricane disaster relief were required to submit a plan to HUD detailing the proposed use of the funds. (JA 29). Unlike the other states that received these appropriations, Mississippi never submitted a comprehensive plan for spending its grant. (JA 31). It opted instead for a piecemeal approach, in which it asked HUD for permission to allocate some of the money to one program, then submitted over time a series of proposed plans for use for the remaining funds. (JA 31-34).

Mississippi first used its block grant (initially, some $3.2 billion of the $5.4 billion total) to create a Homeowners Assistance Program. But, rather than address the needs of its many displaced low-and-moderate income residents, Mississippi created, in what became known as "Phase 1" of the HAP, a highly exclusionary program. (JA 36). First, under Mississippi's Phase 1 criteria, only homeowners were eligible. *Id.* Second, only those whose homes had been damaged by the storm surge could receive assistance. *Id.* Finally, only those with surge-damaged homes covered by homeowner's insurance qualified for Phase 1. *Id.* Renters,

those with wind-damages homes and uninsured homeowners were left out in the cold. (JA 36-37).

Given the historical housing patterns described above, and the cost of owning and insuring a home, the effect of these criteria was to exclude most of the LMI population from eligibility for Phase 1. *Id.* Phase 1 assistance was almost exclusively directed to more affluent residents of the region because they were more likely to: (1) own, rather than rent, (2) have homeowner's insurance, and (3) have homes located below the rail bed, where they were exposed to the storm surge, rather than damaged by the hurricane winds. *Id.*

Because Phase 1 largely excluded the LMI population, Mississippi could not certify that the program would comply with the LMI-benefit requirement. (JA 34). Instead, Mississippi asked HUD to waive the requirement for the Phase 1 program on the basis of "compelling need." (JA 36-37). This proposed waiver generated considerable opposition from concerned parties, who pointed out (1) that the *most* "compelling needs" in the area were those of the residents who had been excluded from Phase 1, and (2) that it was incongruous to make relatively affluent homeowners the primary beneficiaries of a grant that had been issued under a statute enacted for the purpose of helping the *less* affluent members of society to obtain decent, affordable housing. (JA 64-83).

HUD nevertheless granted the waiver for the funds allocated to Phase 1. (JA 36). It did so, however, on explicit assurances by Mississippi, which "agreed to examine other housing needs and to pursue other sources of funding for other compelling housing needs, such as for homeless and special needs populations, for low income renters, and for uninsured low-income homeowners. . . ." (JA 37). HUD also stipulated "that the state must give reasonable priority for the balance of its funds to activities which will primarily benefit persons of low and moderate income." *Id.*

As Mississippi allocated additional pieces of its grant, however, it did not live up to this condition. (JA 37-38). It continued to favor programs that did not address any of the needs of the LMI population. *Id.* Instead, Mississippi allocated its emergency hurricane disaster relief funds to a regional infrastructure program, assistance to insurance companies and their policy-holders, an economic development program, and to projects such as the construction of a marina in Hancock County. *Id.*

Like Phase 1, none of these programs (which ate up nearly $2 billion, or 40% of the overall grant) could be certified as compliant with the LMI-benefit requirement, so for each of these programs Mississippi asked for, and HUD granted, yet another "compelling need" waiver. (JA 38). None of these programs could be certified as compliant with the fair housing requirement, either, but that

certification could **not** be waived. (JA 28). That clear non-compliance with the law was apparently ignored by HUD, with only Phase 1, part of the Regional Infrastructure Plan, and the Long-Term Workforce Housing Program receiving even a nominal certification. (JA 51).

The desperate housing needs of the region's LMI population, meanwhile, were ignored. (JA 38-39). By August 2007 – at which time virtually all of the $5.4 billion grant had been at least initially allocated to one program or another – only about 20% of the money was slated to be spent (and far less of it had actually been spent) on programs that might provide some form of affordable housing assistance; these included public housing, assistance to small rental properties, a Long-Term Workforce Housing Program, and a "Phase 2" HAP with relaxed eligibility requirements. (JA 37-39).

The low priority and relatively meager amounts that Mississippi devoted to affordable housing raised serious concerns within HUD, specifically in the agency's Office of Fair Housing and Economic Opportunity ("FHEO"). (JA 52-53). In June 2007, FHEO noted that in 2006 it had recommended that, instead of asking for a waiver of the LMI-benefit requirement in order to spend money on infrastructure repairs, Mississippi ought to "use the CDBG funds for the compelling needs of the homeless, special needs, and low income populations as a first priority." (JA 52). A year later, that recommendation had not yet been

addressed, leading to a situation which, FHEO said, "could result in a violation of HUD's civil rights requirements" – *i.e.*, the non-waivable obligation to affirmatively further fair housing. (JA 53).

Because Phase 1 had so restricted eligible beneficiaries, the money set aside for it far exceeded the program. (JA 151). That was because Mississippi had grossly "overestimated" the needs of the more affluent, insured, surge-damaged homeowners whom it had rushed to assist with Phase I. *Id.* As it turned out, Phase 1-eligible homeowners did not require anything like the $3.26 billion that the State had initially allocated to their benefit. *Id.* In fact, even after the State had reprogrammed hundreds of millions of dollars from Phase 1 to the other projects described above, Mississippi *still* found itself with nearly $600 million of "excess funds" not needed for Phase 1. *Id.* In September 2007, Mississippi announced its intention to divert this money to a major expansion of the Port of Gulfport. (JA 43).

D. The Port Expansion Plan

The proposed expansion of the Port of Gulfport was a purely-commercial economic development project. (JA 40-43). It had essentially nothing to do with Hurricane Katrina. *Id.* To be sure, Katrina had damaged the Port, but the costs of recovery were nowhere near $570 million, and those costs had already been covered by other sources of funds. (JA 44).

The Port Expansion Plan in fact predated Katrina by several years. (JA 43). The State, working with private developers, had originally planned for casinos, hotels and cruise-ship terminals, but the planners had not been able to obtain the necessary financing. (JA 41). Now the State proposed to use federal taxpayer money, granted to Mississippi for hurricane recovery in accordance with the dictates of the Housing and Community Development Act, for this high-end commercial project. (JA 43).

The Port Project could not be certified as compliant with either the unwaivable "affirmatively further fair housing" requirement, or the 50% LMI-benefit requirement, which could be waived only in cases of "compelling need." (JA 44). It would create *no* housing, affordable or otherwise. (JA 84-96). It would provide no other qualifying benefit to the LMI population. *Id.* It might create jobs, and the creation of jobs for poor people can satisfy the LMI-benefit requirement, but jobs at the Port had always been highly-skilled and high-paying. (JA 45). Only a tiny minority of them had ever been filled by LMI persons, and there was nothing in Mississippi's Port Expansion Plan to suggest that it would alter this historical pattern. *Id.* Nor did the Port Expansion Plan otherwise address any "compelling need" engendered by Hurricane Katrina, so it could not qualify for a waiver of the LMI-benefit requirement on that basis. *Id.* This time, therefore, Mississippi did not even ask for a waiver. (JA 44). It simply submitted its plan to

HUD, without any certification of the fair-housing requirement, and with only a bare, unsupported assertion that the Mississippi Development Authority "will qualify this program under the low to moderate national objective" at some unspecified time and in some unspecified manner. (JA 93).

E. HUD's Failure To Perform Its Statutory Duties

HUD had the obligation, under the enabling statute and its own regulations, to require that Mississippi provide the missing certification of compliance with the fair housing requirement, and to insist that Mississippi provide evidence to support its bald prediction of future "qualif[ication]" with the LMI benefit requirement. (JA 54-56). In the absence of adequate certifications and supporting evidence, moreover, HUD had a statutory duty to disapprove the Port Expansion Plan. (JA 57).

But HUD did not do its job. (JA 47). It required neither the missing certification nor any evidence to support Mississippi's vague prediction of future compliance with the LMI-benefit requirement. (JA 50-56). It did not disapprove the Plan on the basis of its patent inadequacies. *Id.* Nor, however, did HUD formally "approve" the Plan. (JA 47). Instead, in a letter which claimed – incorrectly, as a matter of law – that the agency had "little discretion" in the matter, Secretary Jackson expressed only HUD's "acceptance" of the Port Plan, not its affirmative approval. (JA 97-99).

There was a curious logic to this passive locution, because in the same letter Secretary Jackson made it clear that, in his and HUD's opinion, the Port Expansion Plan was surpassingly unwise: The Plan, he said, "does indeed divert emergency federal funding from other more pressing recovery needs, most notably affordable housing." *Id.* Asked later to explain this concern to Congress, Secretary Jackson readily agreed that Mississippi had not done what it was supposed to do (and what its citizens needed it to do) with its federal grant: "Well, I don't think that everything has been provided to low- and-moderate income people that should be provided for housing or infrastructure." (JA 49).

Secretary Jackson further testified that if he had "[his] d'ruthers," he "probably would have said [to the Governor of Mississippi], sir, I don't think we should be using this money [for the Port], and I would not approve it." *Id.* But, the Secretary contended (again incorrectly, as a matter of law) that HUD had "[b]asically, no discretion" to disapprove the Port Expansion Plan. (JA 48). Thus, Secretary Jackson claimed he didn't have the "kind of authority" that was needed to stop the improper diversion of hundreds of millions of dollars of taxpayer money that Congress had appropriated through a grant program within his agency's purview. (JA 49).

To the contrary, HUD had ample discretion and authority to stop the illegal Port Plan. (JA 57-58). By failing to do so, HUD abdicated its statutory

responsibilities, unlawfully withheld proper action, and acted in an arbitrary and capricious manner. (JA 58).

F. This Lawsuit

HUD's failure to perform its statutory duties engendered this lawsuit. Plaintiffs are individual LMI residents of the Mississippi Gulf Coast region whose homes were lost or damaged by Hurricane Katrina, as well as two organizations. (JA 21-23). The Mississippi State Conference NAACP has among its members LMI residents of the area affected by Katrina. (JA 183). The Gulf Coast Fair Housing Center is a fair housing organization whose mission is to represent the interests of the area's low-and-moderate income residents in obtaining affordable housing. (JA 189).

The individual Plaintiffs[1] – along with many individual members of the NAACP and constituents of GCFHC – all lost their homes, or had their homes severely damaged by the storm. (JA 199-245). All were either renters or homeowners who lacked insurance and/or had suffered only wind damage, and therefore were ineligible for Mississippi's purposefully highly-restrictive Phase I program. *Id.* Some are living in houses with destroyed foundations, significant mold problems, broken windows, damaged roofs, and plumbing problems. (JA 209-15). Others are paying over 50% of their paycheck in order to rent a small

[1] Dorothy McClendon, Zelda Williams, Rangisma ("Ann") Dilworth, and Pamela Landry.

apartment, because there is not enough available affordable rental housing stock and demand for such rental apartments far outweighs the supply since Hurricane Katrina. (JA 243). One Plaintiff NAACP member, Mr. Johnson, still resides in a trailer, as his home (which he did not have the money to insure, disqualifying him from receiving Phase 1 funds) was completely destroyed and blown away during the Hurricane. (JA 216-40).

None of the Plaintiffs has been able to obtain assistance to replace or repair their lost homes through the relatively meager funding that the State has given to its CDBG-funded affordable housing programs. (JA 199-245). All of the individual Plaintiffs need housing assistance and would have a good opportunity to qualify for housing assistance under any CDBG-funded program that might be designed in good faith to affirmatively further the goal of fair housing and to address the unmet housing needs of the region's LMI population. *Id.*

HUD and its Secretary are the defendants. (JA 24).

G. HUD's Motion to Dismiss

HUD moved to dismiss Plaintiffs' suit for lack of standing. In support of their opposition to HUD's motion, Plaintiffs submitted affidavits detailing how individual plaintiffs as well as members of the Plaintiff NAACP have been injured by HUD's conduct, and how those injuries would be redressed through judicial relief in this action. (JA 199-245). The Plaintiffs also requested oral hearing on

HUD's motion to dismiss, pursuant to Local Rule 7(f). *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 45.

The District Court declined to hold a hearing, never affording Plaintiffs even a single day to be heard in court. On January 8, 2010, the District Court dismissed this action for lack of standing, concluding that "[p]laintiffs' principled objection to the diversion of $570 million to Port Expansion project when post-Katrina housing needs in Mississippi are still unmet may indeed be well-founded as a policy matter," but that Plaintiffs lacked standing to assert such an objection. (JA 351).

Specifically, the District Court held that Plaintiffs could not establish an injury to themselves because they did not allege that the individual Plaintiffs or any member of the Plaintiff NAACP was eligible for the Homeowners Assistance Program "in the first place," such that they were injured when the funds were allocated to the Port Expansion Project out of that program. (JA 350). This holding evinces the District Court's fundamental misunderstanding of the claims asserted by plaintiffs in this action. Plaintiffs have never asserted that the funds allocated to the Port Expansion Project need to be returned to the Homeowners Assistance Program. To the contrary it is undisputed that because its eligibility requirements were drawn so narrowly, the Homeowners Assistance Program has $570 million in leftover funds that it cannot use. (JA 151). Rather, Plaintiffs claim

in this case is that HUD may approve the reallocation of those leftover funds only if they are directed to a program that satisfies the requirements under the CDBG statute – that the funds further fair housing and benefit LMI residents – and not to a Port Expansion Project which does not satisfy those statutory requirements and that has nothing to do with disaster relief.

The District Court also held that Plaintiffs did not satisfy the causation and redressability requirements for standing. (JA 350-51). Perplexingly, the District Court stated that "Plaintiffs might argue, but have not, that an injunction prohibiting HUD from releasing the funds for use in the Port Expansion project would force Mississippi to make better use of the money." (JA 351). In fact, Plaintiffs did argue precisely that – specifically, that if HUD had fulfilled its statutory obligation to disapprove Mississippi's improper use of the $570 million on a Port Expansion Project, then Mississippi's most likely response would have been to devote at least some of these funds to affordable housing programs from which plaintiffs would stand to benefit. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 36-40.

On February 23, 2010, plaintiffs timely noticed the present appeal. (JA 353-55).

SUMMARY OF ARGUMENT

Plaintiffs have fully satisfied the three Article III standing requirements sufficient to survive a motion to dismiss. First, they have suffered injuries in fact that are concrete, particularized and actual or imminent. 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 of federal taxpayer dollars on a commercial development program instead of using it to address the unmet housing needs of Hurricane Katrina's poorest and neediest victims. 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, and they have suffered a cognizable injury as a result of HUD's failure to do so. The concrete, particularized and actual injury suffered by Plaintiffs is the lost opportunity to obtain adequate housing, which has long been deemed a concrete and specific injury.

Second, there is a sufficient causal connection between Plaintiffs' injuries and HUD's conduct. 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 to a Port Expansion Project that could and should be used to address the continuing affordable housing crisis on the Mississippi Gulf Coast.

Finally, Plaintiffs have met the third standing requirement, redressability, because it is likely that their injuries will be redressed by a favorable decision requiring HUD to properly exercise its statutory and regulatory duties. 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. Plaintiffs here have sufficiently demonstrated that HUD appropriately exercising its oversight authority and forcing Mississippi to make some better use of the emergency appropriation will significantly increase the likelihood that at least some of the funding will be allocated to programs designed to provide affordable housing to individuals like the Plaintiffs.

The District Court held that "Plaintiffs might argue (but have not) that an injunction prohibiting HUD from releasing the funds for use in the Port Expansion Project would force Mississippi to make better use of the money." (JA 351). But that is precisely the argument Plaintiffs made in the Complaint, and the District Court committed reversible error when it failed to construe Plaintiffs' allegations liberally and dismissed the Complaint based on Plaintiffs lack of standing.

STATEMENT OF STANDING

On January 25, 2008, then-HUD Secretary Alfonso Jackson wrote a letter to Mississippi Governor Haley Barbour, stating that the state of Mississippi's Port Proposal had been reviewed and accepted by HUD as required under the HCDA

and CDBG regulations, allowing CDBG funds to be "reprogrammed" away from housing assistance and toward the Port Restoration. (JA 97-99). No further agency action was taken, and $570 million in emergency CDBG funds remain allotted to Mississippi's Port Restoration Project. Appellants filed suit against HUD in the District Court on December 10, 2008. (JA 13-63). Appellants are each aggrieved by HUD's action, in which HUD abrogated its oversight responsibilities pursuant to the HCDA, the Fair Housing Act and the Administrative Procedure Act, and deprived Appellants of the opportunity to obtain affordable housing. The District Court's January 8, 2010 Memorandum and Order dismissed Appellants' claims for lack of Article III standing. (JA 345-52). Therefore, this brief consists of arguments and evidence establishing Appellants' claim of standing.

ARGUMENT

I. THE PLEADING BURDEN AND THE STANDARD OF REVIEW

The District Court's Memorandum and Order dismissing Plaintiffs' claims for lack of standing is subject to *de novo* review by this Court. *Renal Physicians Ass'n v. United States Department of Health and Human Services*, 489 F.3d 1267, 1273 (D.C. Cir. 2007). Standing exists when a federal court has the capacity to "redress" an "injury" that the defendant allegedly "caused" the plaintiff. *Utah v. Evans*, 536 U.S. 452, 459 (2002). "[T]he burden of production a plaintiff must

bear in order to show it has standing to invoke the jurisdiction of the district court varies with the procedural context of the case. At the pleading stage, 'general factual allegations of injury resulting from the defendant's conduct may suffice,' and the court 'presum[es] that general allegations embrace the specific facts that are necessary to support the claim.'" *Renal Physicians*, 489 F.3d at 1273 (citations omitted).

II. THE PLAINTIFFS ALLEGED A SUFFICIENT INJURY

When a plaintiff challenges the procedural adequacy of governmental action, the "injury" element of the formula requires that he have "such a 'personal stake in the outcome of the controversy as to assure' concrete adverseness." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 60 (1976) (citations omitted); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992) (individual can enforce procedural rights so long as procedures in question "are designed to protect some threatened concrete interest of his").

Here, the individual Plaintiffs – along with many individual members and clients of the organizational Plaintiffs[2] – share three characteristics: (1) they have only "low" or "moderate" incomes, (2) they lost their homes (in whole or in part)

[2] 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). Here, the Mississippi State Conference NAACP alleges standing on behalf of its members, while the GCFHC alleges standing in its own right as an organization.

to Hurricane Katrina, and (3) they have obtained no assistance in replacing or repairing their homes from any of the programs to which Mississippi has allocated its emergency CDBG appropriation. (JA 199-245). Consequently, all of these Plaintiffs have a personal stake in the outcome of this lawsuit, which centers on the oversight procedures that HUD failed to perform, procedures designed to ensure that Mississippi spends its CDBG appropriation as required by law, and thus to protect Plaintiffs' interest in having an opportunity to obtain affordable, CDBG-financed replacement housing.

What Plaintiffs here were denied - - the opportunity to obtain affordable housing - - is well recognized as a "concrete" interest, the deprivation of which will confer standing on a frustrated aspirant. For example, the members of a welfare rights organization "clearly alleged concrete injury" when they claimed to have been denied "the opportunity to obtain adequate housing" because of the defendants' failure to allocate sufficient funds to the benefit of low-income families in Philadelphia under the same Community Development Block Grant program at issue here. *Philadelphia Welfare Rights Organization v. Embry*, 438 F. Supp. 434, 437 (E.D. Pa. 1977). Plaintiffs in similar circumstances and several jurisdictions have likewise "been 'allowed to bring lawsuits challenging actions which affect their future opportunity to obtain housing.'" *DBSI/TRI IV Limited Partnership v. United States*, 465 F.3d 1031, 1038 (9th Cir. 2006) (citations

omitted).[3] These opportunity-to-obtain-housing cases are specific applications of the more general rule, employed by this Court in other contexts: "a plaintiff suffers a constitutionally cognizable injury by the loss of an *opportunity to pursue a benefit*. . . even though the plaintiff may not be able to show that it was *certain to receive* that benefit had it been accorded the lost opportunity." *CC Distributors, Inc. v. United States*, 883 F.2d 146, 150 (D.C. Cir. 1989) (emphasis in original).[4]

The opportunity to obtain housing is precisely what Plaintiffs here allege they have lost as a consequence of HUD's inaction and Mississippi's consequent illegal conduct. (JA 199-245). The District Court nevertheless ruled that the plaintiffs "have not alleged or offered to show that HUD's diversion of excess funds to the Port Expansion Project has injured or would injure them." (JA 350).

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[3] *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 (1977) (opportunity to obtain home in affordable housing development "is not a generalized grievance"); *Keith v. Volpe*, 858 F.2d 467, 477 (9th Cir. 1988) (plaintiffs displaced by construction of freeway had standing to challenge failure to construct affordable replacement housing); *Allen v. Pierce*, 689 F.2d 593, 595 n.5 (5th Cir. 1982) (plaintiff had standing based on allegation that she would apply for housing if HUD were to comply with obligation to implement rent subsidy or tenant supplement programs).

[4] Some of the cases suggest that an interest in obtaining affordable housing becomes more "concrete" when the plaintiff can point to a "particular" project or development in which he or she would like to reside. *See, e.g. Village of Arlington Heights*, 429 U.S. at 264; *Keith v. Volpe*, 858 F.2d at 477. *But cf. Philadelphia Welfare Rights Organization v. Embry*, 438 F. Supp. at 437 (plaintiffs alleged concrete injury where defendants had failed to allocate sufficient CDBG funds, not to any particular project, but for the benefit of low-income families in Philadelphia). If there is a "particularity" requirement, Plaintiffs here have satisfied it. In the cases cited above, the plaintiffs hoped at best to find a residence somewhere in a proposed development. Many of the Plaintiffs here, on the other hand, want the State to use federal money to help them obtain affordable housing *in their own homes* – that is, in the very same houses and rental units that they lost to the storm, and that adequate CDBG financing will enable them to replace or repair. (JA 183, 202, 210, 214, 218, 243).

According to the District Court, this is because "[t]he individual plaintiffs were not eligible… in the first place" for the Phase 1 Homeowners Assistance Program to which the money at issue had originally been allocated (and from which it was diverted to the Port Project) and "because" the Mississippi NAACP does not allege that any of its members were eligible for the Homeowners Assistance Program" either. *Id.*

The District Court did not explain this rationale, but it appears to be based on the notion, proffered by HUD in support of its motion to dismiss, that there could be only one class of "injured" plaintiffs here: eligible applicants for Phase 1 assistance who were disappointed by Mississippi's diversion, *away* from the Phase 1 program, of money that would otherwise be used to their benefit *in* the Phase 1 program. *See* Defendant's Memorandum In Support Of Its Motion To Dismiss at 24 (arguing that to establish standing, plaintiffs would have to plead and prove "that they were eligible for and qualified for homeowner grants available under Mississippi's Homeowners Assistance Program but that HUD's approval of Mississippi's decision to reprogram funds away from the homeowner program prevented plaintiffs from receiving those grants.").

But this assumption is incorrect: The District Court's focus was backwards. Plaintiffs' injury in this case has to do with where the money will be going, not where it came from. Nobody was injured by Mississippi's decision to reprogram

the leftover $570 million away from the Phase 1 program because the narrowly drawn class of eligible recipients had received its funds. Mississippi did not disappoint any willing, Phase 1-eligible homeowners. As both HUD and the District Court acknowledged rather, the State had "overestimated" the number of people who would be eligible for Phase 1. (JA 151-348). Once Mississippi discovered that it had already assisted all the insured, surge-damaged homeowners who wanted government assistance, the money at issue became "excess" with respect to the limited Phase 1 program, without regard to the many displaced residents still in need. *Id.*

Plaintiffs, therefore, do not seek return of the excess funds to Phase 1 (which has no use for the funds), but rather to have HUD discharge its statutory duty to ensure the excess funds are reallocated to a program that complies with the CDBG requirements. If the Court requires HUD to do its job and the agency disapproves Mississippi's plan to divert CDBG funds to the Port Project, the money at issue will not be returned to the Phase 1 program but will instead become available for allocation to some *other* program that complies with the statutes and HUD's regulations. Assuming Mississippi is a rational, good-faith actor -- and assuming HUD does its job of assuring Mississippi's compliance -- at least some of the money will be allocated to programs that benefit Plaintiffs. Such programs will comply with the law by (1) providing affordable housing – which is the State's

most urgent unmet need, as affirmed by former Secretary Jackson, interested members of Congress, and many other knowledgeable observers – and (2) making good on Mississippi's commitment to HUD "to pursue other sources of funding to provide assistance for other compelling housing needs, such as . . . for low-income renters, and for uninsured low-income homeowners. . . ." (JA 37).

The District Court may have been technically correct, then, when it said that Plaintiffs were not injured because HUD allowed Mississippi to take "excess" money away from the Phase 1 Housing Assistance Program. (JA 350). But this observation was beside the point. Plaintiffs may not have been injured by where the money came from, but they *were* injured by where it went - - and where it didn't go, which is the basis for their claims here. They were injured, that is, because HUD abdicated its responsibilities and allowed Mississippi to divert the money to the Port Project, instead of requiring it to allocate the excess funds to the sort of programs that would meet Mississippi's legal obligations, the region's compelling needs, and the State's promise to pursue funding to address those needs. Because some or all of the Plaintiffs would qualify for virtually any kind of CDBG-financed affordable housing assistance, the District Court's logic, when applied to the relevant facts, actually shows that the plaintiffs *have* satisfied the injury requirement: the illegal diversion of excess funds to the Port Project has

injured them because they would be eligible for the purposes to which the law directs that the money should be put.

III. THE PLAINTIFFS' INJURY IS TRACEABLE TO HUD'S CONDUCT

The District Court cited a single decision of this Court, *Renal Physicians Ass'n v. Dep't of Health and Human Services*, 489 F.3d 1267 (D.C. Cir. 2007), for its conclusion that the plaintiffs had failed to satisfy both the causation and the redressability elements of standing. (JA 351). The citation is inapposite insofar as it purports to justify the District Court's decision about the causation (or "traceability") requirement, because *Renal Physicians* was not a causation case. It was decided on redressability grounds. *See Renal Physicians*, 489 F.3d at 1278 ("RPA has not satisfied the redressability prong of the standing requirement"). As to causation, the panel in *Renal Physicians* said only that "causation remains uncertain" on the factual record presented to it. *Id*. at 1277.

The District Court's confusion may have something to do with the fact that *Renal Physicians* applied – though only to redressability – an "independent actor" principle that could also be used to analyze causation. *Id.* HUD argued here in support of its motion to dismiss that a plaintiff's injury may not be "fairly traceable" to a federal agency's procedural dereliction where the injury is actually "the result of the independent action" of a third party such as Mississippi. *See* Defendants' Reply In Support Of Their Motion To Dismiss at 10, quoting *Center*

for Law and Education v. Department of Education, 396 F.3d 1152, 1161 (D.C. Cir. 2005).

Indeed, the presence of a potentially "independent" actor may therefore make the causation and redressability inquiries "appear to merge," *Center for Law and Education*, 396 F.3d at 1160, n.2, but in fact they do not. "In such cases, both prongs of standing analysis can be said to focus on principals of causation," yet "each inquiry has its own emphasis." *Id.*, quoting *Freedom Republicans v. FEC*, 13 F.3d 412, 418 (D.C. Cir. 1994). Redressability is "quintessentially predictive;" it "centers on the causal connection between the asserted injury and judicial relief." *Id.* Causation, on the other hand, remains "inherently historical," and "turns on the causal nexus between the agency action and the asserted injury." *Id.*

The case law makes it clear, moreover, that the intervening actions of a third party will sever the causal nexus *only* when that party and its actions were, as a historical matter, "truly independent." *National Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 13 (D.C. Cir. 2005). For example, in *Center for Law and Education*, the alleged procedural lapse occurred when the Department of Education failed to include representatives of parents and students on a committee it formed to recommend regulations implementing the No Child Left Behind statute. *Center for Law and Education*, 396 F.3d at 1155. One plaintiff claimed that the skewed composition of the committee had produced unduly lax federal

regulations, which had enabled the Illinois educational authorities to adopt inadequate policies, increasing the risk that the Illinois schools would improperly classify (and inadequately educate) her daughter. *Id.* at 1160-61. This Court found no causation on those facts, lacking an "actual demonstration" that the Department's selection of committee members had affected the state's policies, or that it had even created a "demonstrably increased risk" of injury to the plaintiff's interest in her daughter's education. *Id.* at 1161.

The burden of alleging causation, however, is far from insuperable. This Court has "never applied a 'tort' standard of causation to the question of traceability." *Tozzi v. Department of Health and Human Services*, 271 F.3d 301 (D.C. Cir. 2001). At the pleading stage, moreover, it has manifested a reluctance to dismiss for lack of standing on causation grounds where the plaintiff has made some showing of a link. To be sure, this Court has rejected claims where causation was based on "purely speculative" assertions of a connection between the defendant's error and the third-party's actions. *Center for Law and Education*, 396 F.3d at 1161; *see also National Wrestling Coaches Ass'n v. Department of Education*, 366 F.3d 930, 944 (D.C. Cir. 2004) ("[a]bstract theory and conjecture are not enough to support standing"). But it has declined to dismiss "independent actor" cases on causation grounds even where the plaintiff's allegations of linkage were "uncertain," *Renal Physicians Ass'n*, 489 F.3d at 1277 (noting that "causation

remains uncertain" but dismissing only on redressability grounds), and even where they were "far from persuasive." *National Wrestling Coaches Ass'n*, 366 F.3d at 944 (dismissing on redressability grounds, and noting that although allegations of causation were "far from persuasive," they nevertheless "might be adequate to survive a motion to dismiss").

The decisions, meanwhile, recognize two categories of allegations that will suffice to show causation in cases like this, where a federal defendant's procedural delinquency has affected the actions of a third party which has injured the plaintiff. First, "a federal court may find that a party has standing to challenge government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action." *National Wrestling Coaches Ass'n*, 366 F.3d at 940. This is precisely the issue here. Mississippi could not allocate the funds to the Port Expansion Program in contravention of the HCDA statute and CDBG regulations without HUD's approval. Causation is satisfied here "because the intervening choices of third parties are not truly independent of government policy." *Id.* at 941.

Second, this Court has accepted allegations which suggest *any* kind of "'substantial probability' that the defendant-agency's action 'created a demonstrable risk, or caused a demonstrable increase in an existing risk, of injury to the particularized interests of'" the plaintiffs. *National Parks Conservation*

Ass'n v. Manson, 414 F.3d at 11. In *Manson*, for example, the Clean Air Act authorized the Department of Interior (DOI) to give an opinion about whether building a power plant in Montana would have an adverse environmental impact on nearby federal lands. The Montana Department of Environmental Quality, however, had the final say; it retained discretion to grant or deny the permit no matter what the federal agency thought. *Id.* at 3. After DOI issued, then precipitously withdrew, an adverse-impact opinion about a proposed development near Yellowstone Park, Montana granted a permit for construction of a power plant. *Id.* at 4-5.

This Court determined that the plaintiffs – all conservation organizations with claims that DOI had failed to discharge its procedural obligation to consider the potential impact on air quality in the Park – had sufficiently alleged causation. DOI's opinion might not have been dispositive, but it was influential, and that was enough: an adverse-impact opinion from DOI would at least have required Montana to consider it and to justify its disagreement in writing before granting the permit. *Id.* at 12. The existence of "this formal legal relationship" between the federal agency and the state actor, far more attenuated than the required HUD action in the present case, was sufficient to establish causation. *Id.* Because DOI "expects and intends its decision to influence the permitting authority," the Montana DEQ, like Mississippi here, "is therefore not the sort of truly independent

actor who could destroy the causation required for standing." *Id.* at 13; *see also Tozzi v. Department of Health and Human Services*, 271 F.3d at 309 (causation adequately alleged where it was "not at all 'speculative' to expect" that agency action would cause some "non-trivial number" of third parties to take actions adverse to plaintiff's interests).

Plaintiffs' allegations here fit comfortably into either of these categories held sufficient to establish standing. The act that injured them was the decision to allocate CDBG money to the Port Project, where its expenditure would *not* further the goal of fair housing, would *not* provide an adequate benefit to the low-and-moderate income residents of the Gulf Coast, and would *not* in any way address the region's (and the plaintiffs') critical need for affordable housing. (JA 84-96).

To be sure, Mississippi made this decision, not HUD. But the State did not accomplish its diversion of $570 million in federal money to the Port as a "truly independent" actor. To the contrary, Mississippi could not have committed the act that injured the plaintiffs without HUD's "acceptance" of the Port Plan. (JA 97-99). Plaintiffs have alleged – and this Court must assume – that the diversion of CDBG money to the Port Project was contrary to the requirements of the enabling statutes and implementing regulations. (JA 56-62). The act that caused the injury could not and would not have been accomplished if HUD had properly exercised

its authority and ensured that Mississippi used the grant money as required by HCDA and the emergency appropriations. *Id.*

HUD's inaction in this case, therefore, permitted conduct that would otherwise have been illegal – and impossible. This is all the causation element requires. *National Wrestling Coaches Ass'n*, 366 F.3d at 940. Put another way, the HCDA and HUD's regulations create a formal legal relationship between the agency and Mississippi, as a block-grant recipient, in which HUD has complete control over how a particular grant *cannot* be spent, and considerable influence over how it *can* be spent. (JA 29-31). This creates a 'demonstrable risk' that HUD's action will injure Plaintiffs' interest, thereby also satisfying the causation requirement. *Manson*, 414 F.3d at 11.

The link between HUD's inaction and Mississippi's action is so clear under these circumstances that causation would in fact be established even if the law were more stringent than it is, and the District Court had been obligated to apply a full "tort standard" to the question of traceability. *Cf. Tozzi*, 271 F.3d at 308. The tort standard was satisfied here: "but for" HUD's passive acceptance of the Port Expansion Plan, the State could not have misallocated the money at issue and Plaintiffs' injury would not have occurred. The District Court therefore erred when it found that the alleged injury was not "fairly traceable" to HUD's procedural delinquency.

IV. JUDICIAL RELIEF WILL SIGNIFICANTLY INCREASE THE LIKELIHOOD THAT PLAINTIFFS WILL OBTAIN RELIEF THAT DIRECTLY REDRESSES THEIR INJURY

With respect to the final element, redressability, the District Court once again cited only *Renal Physicians*, and reasoned that Plaintiffs had not met their burden because "the possibility that Mississippi might redesign its affordable housing programs and expand eligibility to include the plaintiffs will not suffice to show redressability." (JA 351). The District Court's reliance on *Renal Physicians* was misplaced here as well. *Renal Physicians* may have been a redressability case, but it was one that involved a *substantive* lapse by the defendant-agency: the plaintiffs had challenged the content of the federal regulation at issue, not any procedure that the Department of Health and Human Services (HHS) had followed (or failed to follow) in applying it. *Renal Physicians*, 489 F.3d at 435-36. This lawsuit, on the other hand, concerns a *procedural* error by the defendant: HUD failed to exercise its oversight authority under its own regulations – the substance of which have not been challenged – and this enabled Mississippi to commit the acts that caused Plaintiffs' injury. *See Lee v. Pierce*, 698 F. Supp. 332, 337 (D. D.C. 1988) (plaintiffs had standing to sue HUD where "the relief requested, HUD's compliance with the statutes, is the 'necessary first step' for the plaintiffs to reap any benefit from the statutes.").

Moreover, there is a different redressability standard for procedural cases. Procedural rights "are special: 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. . . ." *Defenders of Wildlife*, 504 U.S. at 572 n.7. Therefore, a "plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered." *Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002). When conducting both the traceability analysis and the redressability analysis, rather, "this Court assumes the causal relationship between the procedural defect and the final agency action." *Center for Law and Education*, 396 F.3d at 1160. Plaintiffs here, in other words, do not have to allege or prove that, if the federal courts order HUD to do its job, the agency will disapprove Mississippi's plan to divert CDBG money to the Port. Favorable agency action is assumed.

To be sure, this is not a *purely* procedural case, in which "the same actor was responsible for the procedural defect and the injurious" behavior, *Manson*, 414 F.3d at 5, and in which correcting the agency-defendant's procedural delinquency will cause the agency itself to redress the injury to Plaintiff's interests. Here, the direct cause of injury was an act allowed by the federal agency, but committed by

the State of Mississippi, and so the "independent actor" principle once again comes into play.

In this situation, "[t]he relaxation of procedural standing requirements" will continue to "excuse [the plaintiffs] from having to prove the causal relationship regarding the [federal agency's] action," *i.e.*, the Court will assume the "intra-federal link" between HUD's procedural failure and its own decision to accept the diversion of CDBG money to the Port. *Id.* at 5. However, with respect to the "federal-state link" between HUD's decision and Mississippi's injurious behavior, the question of redressability remains, and will turn on the strength of the connection between the former and the latter. *Id.* Thus, redressability in these circumstances exists where (1) "the courts would have ordered a change in legal status" (by, for example, ordering HUD to exercise its oversight responsibilities), and (2) "the practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered," as opposed to "a significantly more speculative method of obtaining ultimate relief." *Utah v. Evans*, 536 U.S. at 464. That is precisely the posture of this case.

As the Supreme Court pointed out in *Utah v. Evans*, the inquiry here is "practical." *Id.* The courts ask whether it is likely (as opposed to speculative) that judicially-ordered, plaintiff-favorable action by the federal agency-defendant will

cause the regulated third party to act in a different, non-injurious (or less injurious) manner. Thus, this Circuit has denied standing where the "quintessentially predictive . . . causal connection between the asserted injury and judicial relief" is so factually conjectural, or the supporting record is so thin, that the Court:

- "cannot begin to predict . . . what impact" the agency's decision might have on the third party's behavior without "venturing into the realm of pure speculation," *Freedom Republicans, Inc. v. Federal Election Commission*, 13 F.3d 412, 419 (D.C. Cir 1994),

- finds that the plaintiff has "not alleged any facts" at all to show that a favorable agency decision would cause the non-party to behave differently, *Renal Physicians Ass'n*, 489 F.3d at 1278, or

- determines that "nothing but speculation suggests" that the third parties would act any differently in the face of plaintiff-favorable action by the defendant-agency. *National Wrestling Coaches Ass'n*, 366 F.3d at 939-40, 944.

On the other hand, this Court has found the requisite redressability in many cases like this where, even if the state would not be compelled to change the outcome, the altered federal action would be an important influence and have a significant impact on state behavior. For example:

- even though Montana would remain free to issue a permit for a power plant near federal land, the "influence" exerted by a plaintiff-favorable opinion from the Department of Interior "doubtless would significantly affect [the] ongoing proceedings" before the State permitting authority and in a concurrent lawsuit in state court, *National Parks Conservation Ass'n*, 414 F.3d at 7,

- if the Department of Health and Human Service were to remove dioxin from a list of "known" carcinogens, local governments would be "less likely" to regulate dioxin and potential customers "would in

turn be less likely" to stop using materials manufactured by the plaintiff that contained dioxin, such that reclassifying dioxin would redress "at least some" of the plaintiff's injury, *Tozzi v. Department of Health and Human Services*, 271 F.3d at 310,

- even though the courts in Massachusetts would remain free to reject plaintiff's challenge to a governmental taking of property on which he hoped to build a hydropower plant, restoration of his license to operate such a plant by the Federal Energy Regulatory Commission would "have a significant impact" on the eminent-domain lawsuits; *Lichoulas v. Federal Energy Regulatory Commission*, 2010 WL 2134283 at *4 (D.C. Cir. May 28, 2010), and

- changing the methods by which the Department of Health and Human Services monitored hospitals' compliance with bedside-availability requirements would give the regulated hospitals "a greater incentive" to hire more nurses, thus relieving the inadequate staffing levels that constituted the plaintiffs' injury. *American Nurses Ass'n v. Leavitt*, 593 F. Supp. 2d 126, 133 (D. D.C. 2009).

The "quintessentially predictive" redressability analysis is necessarily fact-intensive. What the third party is likely or unlikely to do in response to plaintiff-favorable agency action depends on the particular circumstances. For example, in *Renal Physicians*, a statute prohibited health-care providers (such as the dialysis facilities which employed the plaintiffs) from paying doctors for referrals of Medicare patients. *Renal Physicians*, 489 F.3d at 1269. However, in some situations, the providers still had to pay the doctors for medical services rendered. *Id.* To deter kickbacks to these doctors, HHS regulations permitted only the payment of reasonable compensation at "market value," and the safe harbor provisions at issue gave the regulated employers two specific metrics that were

presumptively reasonable. *Id.* at 1270-71. The plaintiffs claimed that the safe harbor provisions were invalid because they actually induced their employers to pay them *less* than market value compensation. *Id.* at 1271.

This Court decided that the doctors lacked standing because they couldn't allege a "significant likelihood" of redressability; even if judicial action eliminated the safe harbor provisions, the employers would be free to pay commercially reasonable compensation (or less) to their doctors, and might plausibly do so in a market that will bear the lower wage. *Id.* at 1277. Thus, the Court decided, "it is 'speculative,' rather than 'likely,' that invalidating the safe harbor will somehow cause these facilities to pay more." *Id.* The decision in *Renal Physicians* turned, therefore, not on abstract legal principles but on a record-specific factual determination that the "undoing of the governmental action will not undo the harm, because the new status quo is held in place by other forces," namely, the likelihood that the dialysis facilities, to keep costs down, will keep the rates allowed by the safe harbor even if it were invalidated. *Id.*

The District Court thought that this case resembled *Renal Physicians* because it concluded that "the possibility that Mississippi might redesign its affordable housing programs and expand eligibility to include the plaintiffs will not suffice to show redressability." (JA 351). This was error because it ignored the

distinctly different factual context of this case, as well as the specificity of the record which described that context.

At the most basic level, the District Court missed the difference between the case before it and the decision on which it relied when it found that Plaintiffs here had not argued "that an injunction prohibiting HUD from releasing the funds for use in the Port Expansion project would force Mississippi to make better use of the money." (JA 351). This was incorrect. The plaintiffs had made exactly that argument. *See, e.g.*, Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss at 40 ("[T]here 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 . . .") (emphasis in original).

Plaintiffs' argument, moreover, was anything but abstract. Unlike the plaintiffs in *Renal Physicians*, who had "not alleged any facts" to show redressability, Plaintiffs here had supported their position with allegations showing specifically how a favorable decision from the District Court, followed by a favorable decision from HUD, would increase the likelihood that Mississippi will "make better use of the money" (JA 351), by spending "at least some" of it, *cf. Tozzi*, 271 F.3d at 310, on exactly the type of affordable housing programs that will redress Plaintiffs' injuries.

The allegations established two essential points that the District Court missed. First, this case is unlike *Renal Physicians* (and the other redressability cases on which HUD relied) in that a decision favorable to Plaintiffs will make it impossible for Mississippi to maintain "the new status quo." Second, the possibility that Mississippi will respond to a favorable agency decision by spending some or all of the excess CDBG money on affordable housing programs is not a matter of speculation. Unlike the plaintiffs in *Renal Physicians* (and the other cases on which HUD relies), the plaintiffs here can point to a number of specific circumstances which make "relief that directly addresses the injury suffered" significantly more likely. Indeed, when it comes to predicting the probability of favorable or unfavorable outcomes, it is HUD, not Plaintiffs, that must rely entirely on conjecture.

A. Judicial Action Will Make It Impossible For Mississippi To Maintain The "New Status Quo."

This Court's decision in *Renal Physicians* followed from its observation that "[t]here might be some circumstances in which governmental action is a substantial contributing factor in bringing about a specific harm, but the undoing of the governmental action will not undo the harm, because the new status quo is held in place by other forces." *Renal Physicians*, 489 F.3d at 1278. In other words, undoing the governmental action will not by itself destroy the "new status quo." Thus, in *Renal Physicians*, it was possible that "other forces" would hold the new

compensation levels in place, even if the safe harbor provisions were eliminated. *Id.* Similarly, in *National Wrestling Coaches Ass'n*, the erasure of certain Title IX policies by the Department of Education would have left the regulated colleges "free to eliminate or cap men's wrestling teams" in favor of athletic programs for women, 366 F.3d at 940, and in *Freedom Republicans, Inc.*, an agency decision to withhold federal funding for the Republican National Convention would have left the Republican Party free to maintain its discriminatory delegate-selection policies. 13 F.3d at 418-19.

This case is different. The "new status quo" here is the diversion of excess, effectively-unallocated CDBG money to the Port Project. If HUD withdraws its acceptance, exercises its oversight authority, and disapproves Mississippi's plan (as this Court, at this stage of the lawsuit, must assume it will), then the State will not be able to go on doing what it has done. Mississippi will not be able to allocate its emergency CDBG appropriation to the Port, and will necessarily have to reprogram the remainder of its grant in a way that *will* "make better use of the money." This is, in short, a case in which standing exists even though the direct cause of injury is the action of a third party because, "if the [improper federal] authorization is removed, the [injurious state] conduct will become illegal and therefore very likely cease." *Renal Physicians*, 489 F.3d at 1275.

B. Mississippi's Most Likely Response To A Favorable Judicial Decision Will Be To Devote At Least Some Of The Money At Issue To Affordable Housing Programs.

Thus, if HUD disapproves the Port Plan and requires Mississippi to find another use for the excess CDBG money at issue, Mississippi will have to make *some* "better use" of the money: that is, it will have no option but to use it for purposes that comply with the relevant statutes and regulations. HUD's response to this certainty came down to its assertion that – because the statute and regulations permit the expenditure of CDBG funds for purposes other than affordable housing – such a "better use" *still* might not redress Plaintiffs' injury. For example, HUD pointed out, Mississippi could satisfy its regulatory obligation to use the majority of its grant for the benefit of low-and-moderate income persons in the region by allocating it to an activity that is designed to create permanent jobs for such persons. *See* Defendants' Reply In Support Of Their Motion To Dismiss at 13, citing 24 C.F.R. §570.483(b).

But even if Mississippi could allocate its grant money to a non-housing program (unlike the Port Project) that promises to create adequate numbers of jobs for low-and-moderate income persons, this possibility is no more than conjecture. Indeed, here the speculative shoe is firmly on the other foot. In its motion papers, HUD offers only the bare legal possibility that, if commanded to reprogram the remainder of its grant to activities that comply with the statute and regulations,

Mississippi *might* continue to ignore its affordable housing crisis. *See* Defendants' Reply In Support Of Their Motion To Dismiss at 10-14, 21. The record, however, did not contain a shred of information to suggest that Mississippi *would* do so to any discernible measure of certainty or probability. HUD couldn't and didn't point to any facts suggesting that Mississippi would be at all likely to reprogram its "excess" grant money to any particular non-housing program or programs, to the complete exclusion of programs that will address the State's ongoing need for affordable housing in the Gulf Coast region. HUD's response to the "quintessentially predictive" inquiry into redressability, in other words, was (and could only have been) "abstract theory and conjecture." *National Wrestling Coaches Ass'n*, 366 F.3d at 944.

Plaintiffs, on the other hand, had facts on their side. They presented the District Court with numerous specific allegations to support their contention that forcing Mississippi to make "better use" of the money at issue *will* significantly increase the likelihood that the State will allocate at least some of it to programs that provide affordable housing to low-income renters and uninsured low-income homeowners like the plaintiffs. Among other things, the Complaint alleged that:

- The devastation wrought by Hurricane Katrina "had a substantial and disproportionate impact on Mississippi's affordable housing" stock, with 52% of all damaged rental units occupied by low-income households and 2.534 out of 2,695 units of public housing in southern Mississippi affected. (JA 16). More than 13,000 rental units received severe or major damage. *Id.* Even the Mississippi Governor's

Commission on Recovery, Rebuilding and Renewal agreed that Mississippi's low-income renters had been particularly hard hit. *Id.*

- Mississippi must use the funds in a way that complies with the Housing and Community Development Act of 1974, under which all Community Development Block Grant appropriations are made. "Providing decent housing and a suitable living environment . . . for persons of low and moderate income" is the "primary objective" of the law. (JA 25). In the wake of Hurricane Katrina, Congress instructed that at least $1 billion of its supplemental appropriation was to be used to repair and reconstruct affordable housing stock. (JA 17, 27).

- HUD, in its first written notice describing how it expected the emergency appropriation to be allocated and spent, emphasized that "[t]he funds allocated are intended by HUD to be used toward meeting unmet housing needs in areas of concentrated distress," and defined "unmet housing needs" explicitly to include "those of uninsured homeowners whose homes had major or severe damage." (JA 26).

- Mississippi – when it obtained a waiver from HUD that allowed the State to focus Phase 1 of its Housing Assistance Program on more affluent homeowners – had "agreed to examine other housing needs and to pursue other sources of funding to provide assistance for other compelling housing needs, such as for homeless and special needs populations, for low income renters, and for uninsured low-income homeowners." (JA 37).

- Mississippi allocated large portions of its grant, such as economic development and assistance to utilities and insurance companies, provided no benefit to unhoused and underhoused low-and-moderate income residents. As a consequence, by the time Mississippi proposed the diversion of CDBG money to the Port, less than 20% of its $5.4 billion grant had been allocated to programs designed to meet *any* needs of low-and-moderate income persons (JA 39), only about 6.6% of the grant had been allocated to programs that would assist the displaced residents of rental units in the Gulf Coast region, and *none* of the rental-assistance allocation had been spent. *Id.*

- As a consequence of Mississippi's decisions, "a substantial need for affordable housing remains" in the region. (JA 18-19). The vast majority of damaged rental housing units has not been repaired and will not be repaired under current levels of funding. (JA 18-19, 56). Rents have meanwhile skyrocketed, while many of the displaced residents among the area's poor have for years been housed "temporarily" in inadequate conditions. *Id.*

- The region's continuing unmet need for affordable housing has been noted by virtually every interested observer. Mississippi's inability or unwillingness to solve the problem has received considerable attention in the media (JA 19, 46-47), and has drawn formal objections from members of the public. (JA 36, 64-83). Members of Congress have repeatedly condemned the Port Project as a diversion of federal money from its intended purposes in circumstances where "the State has not met all of its unmet housing needs." (JA 36, 48-50). Staffers in HUD's own Office of Fair Housing and Equal Opportunity have implored Mississippi "to use the CDBG funds for the compelling needs of the homeless, special needs, and low income populations as a first priority," and have warned that the State's continuing failure to address these priorities "could result in a violation of HUD's civil rights requirements." (JA 40-41).

- Finally, Secretary Jackson himself, when he gave his passive "acceptance" to the Port Plan, expressed his continuing concern "that this expansion does indeed divert emergency federal funding from other more pressing recovery needs, most notably affordable housing" (JA 47), and soon thereafter told Congress that he did not "think that everything has been provided to low-and-moderate income people that should be provided for housing or infrastructure." (JA 48-49).

This litany describes a situation in which it would be anything but "speculative" to conclude that judicial action will significantly increase the likelihood of concrete relief, in the form of increased State assistance for affordable housing and increased opportunities for Plaintiffs to obtain such assistance to replace or repair their lost homes. All of the numerous factual

indicators point in that direction; none points the other way. If denied permission to spend its "excess" grant money on the Port, Mississippi will have every incentive to "make better use" of its CDBG funds by devoting at least some of the money at issue to programs that benefit low-and-moderate income renters and homeowners. Spending the money on affordable housing will enable Mississippi to address the Gulf Coast region's most critical unmet needs; to attend to the continuing plight of thousands of its neediest citizens; to respond positively to public opinion; to gain the approbation of influential members of Congress, and of the regulators at HUD with whom it must deal on an ongoing basis; and to honor its agreement to "pursue other sources of funding" (such as "excess" grant money) to provide assistance "for low-income renters, and for uninsured low-income homeowners" like Plaintiffs here.

CONCLUSION

This case is about a benefit – a crucially-needed opportunity to obtain affordable housing – that HUD denied Plaintiffs by refusing to perform its statutory duties. As this Court recognized in *CC Distributors, Inc. v. U.S.*, a plaintiff suffers "a constitutionally cognizable injury by the loss of an *opportunity to pursue a benefit*…even though the plaintiff may not be able to show that it was *certain to receive* that benefit had it been accorded the lost opportunity." 883 F.2d at 150. These Plaintiffs suffered just such an injury.

When Congress set aside $16.7 billion in emergency appropriations to the affected Gulf Coast states after the ravages of Hurricane Katrina, its primary objective was to address critical unmet housing needs. (JA 25-26). But HUD failed to discharge its statutory duty to oversee the use of these funds properly and thereby allowed Mississippi to allot the great majority of its $5.4 billion in grants – including the $570 million at issue here -- to projects that gave no assistance to storm-ravaged low-and-moderate income residents like Plaintiffs. Because Plaintiffs (1) have a concrete interest in the proper expenditure of these funds, (2) were injured by HUD's dereliction and (3) will likely receive relief by judicial action, their standing has been clearly established and the District Court's Memorandum and Order of dismissal should be reversed.

Respectfully submitted,

/s/ Robert G. Kidwell
Robert G. Kidwell, Esq.
Mintz, Levin, Cohn, Ferris
Glovsky & Popeo, P.C.
701 Pennsylvania Avenue N.W.
Suite 900
Washington, D.C. 20004
Tel: (202) 434-7300
Fax: (202) 434-7400
RGKidwell@mintz.com

Andrew N. Nathanson
Laurence A. Schoen
Mintz, Levin, Cohn, Ferris
Glovsky & Popeo, P.C.
One Financial Center
Boston, MA 02111
Tel: (617) 542-6000
Fax: (617) 542-2241
ANNathanson@mintz.com

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 13,546 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and D.C. Cir. Rule 32(a)(1) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2010, a copy of the foregoing document was filed electronically with the Clerk of the Court using the appellate CM/ECF system. The following counsel of record in the case have been served by first-class mail and, if they are registered CM/ECF users, will be sent notification of the filing by the CM/ECF system:

Mark B. Stern
Daniel J. Lenerz
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm: 7228
Washington, D.C. 20530-0001
Tel: (202) 514-5089
Fax: (202) 307-2551

/s/ Robert G. Kidwell
Robert G. Kidwell, Esq.

STATUTORY APPENDIX

The Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et. seq.*, provides as follows:

Housing and Community Development Act of 1974, 42 U.S.C. §5301 *et. seq.*

A. 42 U.S.C. §5301(c) - Congressional Findings And Declaration Of Purpose

The 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. Consistent with this primary objective, not less than 70 percent of the aggregate of the Federal assistance provided to States and units of general local government . . . shall be used for the support of activities that benefit persons of low and moderate income. . . .

B. 42 U.S.C. §5304(b) - Statement of Activities and Review/Certification of enumerated criteria by grantee to Secretary

Any grant under section 5306 of this title [which governs "Allocation and Distribution of Funds"] shall be made only if the grantee certifies to the satisfaction of the Secretary that --

> (3) the projected use of the funds has been developed so as to give maximum feasible priority to activities which will benefit low- and moderate-income families or aid in the prevention of elimination of slums or blight, and the projected use of funds may also include activities which the grantee certifies are designed to meet other community development needs having a particular urgency because existing conditions pose a serious and immediate threat to the health or welfare of the community where other financial resources are not available to meet such needs, except that (A) the aggregate use of funds received under section 5306 of this title and, if applicable, as a result of a guarantee or grant under section 5308 of this title [covering loan guarantees for acquisition of property], during a period specified by the grantee of not more than 3 years, shall principally benefit persons of low and moderate income in a manner that insures that not

> less than 70 percent of such funds are used for activities that benefit such persons during such period. . .

C. 42 U.S.C. §5321 - Suspension of requirements for disaster areas

> For funds designated under this chapter by a recipient to address the damage in an area for which the President has declared a disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. §5170 et seq.], the Secretary may suspend all requirements for purposes of assistance under section 5306 of this title for that area, except for those related to public notice of funding availability, nondiscrimination, fair housing, labor standards, environmental standards, and requirements that activities benefit persons of low- and moderate-income.

Regulations implemented pursuant to the Housing and Community Development Act of 1974, provide as follows:

Regulations Implemented Under 1974 Act, 24 C.F.R. parts 5 and 570

24 C.F.R. §570.484 - Overall benefit to low and moderate income persons.

> (a) General. The State must certify that, in the aggregate, not less than 70 percent of the CDBG funds received by the state during a period specified by the state, not to exceed three years, will be used for activities that benefit persons of low and moderate income. . . .
>
> (b) Computation of 70 percent benefit. Determination that a state has carried out its certification under paragraph (a) of this section requires evidence that not less than 70 percent of the aggregate of the designated annual grant[s] . . . have been expended for activities meeting criteria as provided in §570.483(b) for activities benefiting low and moderate income persons. . . .

24 C.F.R. §5.110 - Waivers.

> Upon determination of good cause, the Secretary may, subject to statutory limitations, waive any provision of this title and delegate this authority in accordance with section 106 of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3535(q)).