UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CARMEN THOMPSON, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*, Defendants.	Civil Action No. MJG-95-309

PLAINTIFFS' POST-TRIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

MISCELLANEOUS AND OTHER AUTHORITIES

OVERVIEW

HUD's own witnesses confirmed that Baltimore's public housing is, and always has been, racially segregated and has never offered poor African-Americans any meaningful opportunity to live in predominantly white areas of the Baltimore Region. Those witnesses confirmed that, far from fulfilling HUD's constitutional obligation to disestablish the vestiges of past intentional segregation and its statutory obligation to affirmatively further fair housing, "not a penny" of the billions of dollars spent by HUD in the Baltimore Region in the Open Period has gone to help African-American public housing residents move to desegregative neighborhoods. Plaintiffs' fact witnesses recounted the consequences of that segregation – their life in the "hell" of Baltimore's public and assisted housing and their inability (until assisted by the Partial Consent Decree's mobility counselors and locationally targeted vouchers) to gain access for their families to neighborhoods with good schools, decent jobs, and safe streets.

To remedy HUD's violations of the Fifth Amendment and the Fair Housing Act, this Court should require that HUD develop a housing desegregation plan and require it to create 9,000 desegregative housing opportunities (less those created under the Partial Consent Decree) – the minimum number necessary to balance the segregated units previously created. To make the opportunities a reality, that housing should be targeted to communities of opportunity and coupled with mobility counseling. The housing should consist of an appropriate mix of hard units (necessary for large families and as a buffer against tight markets) and regionally administered vouchers. To get from here to there, the Court should set a ten-year timetable, require necessary alterations to HUD's decisionmaking process, and require community input.

ARGUMENT

I. HUD Has Violated the Fifth Amendment by Failing to Disestablish the Vestiges of Prior Intentional Segregation and Discrimination.

In its January 2005 Liability Order, this Court reserved judgment on Plaintiffs' constitutional claims, deferring until the present remedial phase a decision on the question whether Federal Defendants[1] violated Plaintiffs' constitutional rights under the Fifth Amendment. *Thompson v. HUD*, 348 F. Supp. 2d 398, 451 (D. Md. 2005). In light of the evidence presented at both the 2006 remedial-phase trial and the 2003 liability-phase trial, this Court should now hold that Federal Defendants have violated the Fifth Amendment by failing to remove the vestiges of prior intentional discrimination in Baltimore public housing. The constitutional analysis is straightforward:

- HUD, in the past, intentionally discriminated against African-American public housing residents by confining them to segregated, impoverished areas of Baltimore City, and excluding them from white areas throughout the Baltimore Region.[2]

- The public housing available to African-American public housing residents is *still* confined to segregated areas of Baltimore City and excluded from other parts of the Region. This present segregation represents the most direct and obvious effect of HUD's intentional discrimination.

- The segregation of African-American public housing residents has continued uninterrupted from the commencement of intentionally segregated public housing in 1937 to the present, having never once been broken by intervening causal factors.

- HUD has never dismantled the segregation of public housing. By failing to do so, HUD

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[1]This Brief uses both "Federal Defendants" and "HUD" to refer to the United States Department of Housing and Urban Development and the Secretary of HUD, sued in his official capacity.

[2]Plaintiffs use the definition of "Baltimore Region" that this Court has previously identified in this case, which includes Baltimore City and the five contiguous suburban counties: Anne Arundel County, Baltimore County, Carroll County, Harford County, and Howard County. *See Thompson*, 348 F. Supp. 2d at 458. Queen Anne's County, which is part of the census-defined Baltimore Metropolitan Statistical Area ("MSA"), is excluded from the discussion and from statistical data, unless otherwise noted, because of its geographic location.

has violated the Fifth Amendment.

A. HUD Has a Duty to Remedy Its Past Wrongs.

The equal protection guarantee of the Fifth Amendment prohibits racial segregation and discrimination by the federal government. *See Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954) (citing *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) ("*Brown I*")) (holding that the equal protection of the laws is a critical element of the Fifth Amendment's Due Process Clause). Where prior purposeful segregation has occurred, the Constitution imposes an affirmative duty on government entities that participated in the segregation to remedy past wrongs. *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 299-301 (1955) ("*Brown II*"); *Hills v. Gautreaux*, 425 U.S. 284, 296-97 (1976); *see also Freeman v. Pitts*, 503 U.S. 467, 485-86 (1991); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458-61 (1979); *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 437-38 (1968).

Plaintiffs bear the initial burden of proving that Federal Defendants previously participated in the operation of an intentionally segregated system and that the system remains segregated. *See Penick*, 443 U.S. at 458-59; *Green*, 391 U.S. at 437-38. Such a showing establishes a presumption of causation – that is, a presumption that any continuing racial imbalances are proximately caused by the past intentional discrimination. *See Freeman*, 503 U.S. at 494 (1991); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 200, 211 (1973); *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 15, 26 (1971); *Sch. Bd. of City of Richmond v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987) ("It is well established that once a court has found an unlawful dual school system, the plaintiffs are entitled to the presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests on

the defendants.").[3]

A showing of prior segregation gives rise to "a *continuous* constitutional obligation to disestablish" the segregated system. *Penick*, 443 U.S. at 458 (emphasis added); *see also Freeman*, 503 U.S. at 485 ("The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system."). Plaintiffs need not prove intentional discrimination during the Open Period;[4] rather, past intentional segregation creates the affirmative constitutional duty to disestablish, regardless of present intent. *See, e.g.*, *United States v. Fordice*, 505 U.S. 717, 729-32 (1992); *Green*, 391 U.S. at 437-42.[5]

Once the duty to disestablish arises, HUD bears the burden of proving that it has fulfilled that duty. *Fordice*, 505 U.S. at 739 ("*Brown* and its progeny . . . established that the burden of proof falls on the *State*, and not the aggrieved plaintiffs, to establish that it has dismantled its prior *de jure* segregated system."). HUD cannot meet this burden merely by showing that it abandoned intentionally discriminatory policies – rather, HUD must "take affirmative steps to

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[3]Although much of the Supreme Court's jurisprudence regarding a state actor's affirmative duty to dismantle prior intentional segregation has arisen in the school desegregation context, there is no reason to limit this doctrine to the context of public schools. *See, e.g.*, *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1534 (S.D.N.Y. 1985); *Thompson v. HUD*, Civ. No. MJG-95-309, 2006 WL 581260, at *7 n.12 (D. Md. Jan. 10, 2006) [hereinafter *Thompson* Summary Judgment Order]; *Thompson*, 348 F. Supp. 2d at 413-14.

[4]For purposes of liability, the relevant Open Period begins on January 31, 1989 (six years before the case was filed), and continues to the present.

[5]This Court explicitly has acknowledged in prior orders that a showing of intent during the Open Period is not necessary to establish constitutional liability. *See Thompson*, 348 F. Supp. 2d at 413 ("While an affirmative discriminatory act must be purposeful, there is no similar 'intent' element concerning the abdication of duties stemming from past discriminatory acts."); *id.* at 451 ("The Plaintiffs could establish an Equal Protection claim if circumstances warranted holding that, even without proof of a contemporaneous discriminatory intent, Defendants failed to meet their obligation to remove vestiges of prior *de jure* segregation in public housing."); *see also Thompson* Summary Judgment Order, 2006 WL 581260, at *7.

dismantle its prior *de jure* system." *Id.* at 743; *see also id.* at 731-32. Good intentions or token efforts toward desegregation are insufficient; HUD must demonstrate that its actions effectively dismantled the segregated system. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979) ("[T]he measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the *effectiveness*, not the purpose, of [its] actions in decreasing or increasing the segregation . . . ." (emphasis added)).

In addition to the requirement that HUD take effective steps to desegregate, part of the duty to disestablish is the obligation not to take any action that would perpetuate or increase segregation. *Id.* at 538 ("Part of the affirmative duty imposed by our cases . . . is the obligation not to take any action that would impede the process of disestablishing the dual system and its effects."). Any actions that continue segregative effects or impede desegregation will give rise to constitutional liability (again, without regard to intent) unless HUD meets the "heavy burden" of showing that such actions serve "important and legitimate ends." *Brinkman*, 443 U.S. at 538.

B. HUD Participated in the Creation of Segregated Public Housing in Baltimore, and the Vestiges of that Segregation Persist.

HUD participated in the creation of racially segregated public housing in Baltimore, and HUD continued to approve and fund new public housing projects, after the end of *de jure* discrimination, that perpetuated racial segregation. As a result of this decades-long pattern of conduct, African-American public housing residents in the Baltimore Region have almost no opportunity to live outside of Baltimore City, or outside areas of concentrated African-American poverty.

1. HUD Intentionally Established Segregated Public Housing in Baltimore, and HUD's Actions After 1954 Perpetuated that Segregation.

It is undisputed that HUD and its predecessor agencies participated in the intentionally

discriminatory creation and operation of racially segregated public housing in Baltimore. This Court previously found that HUD operated, and supported the operation of, a *de jure* system of segregated public housing in the Baltimore Region:

> There is no doubt that, prior to 1954, African-Americans in Baltimore City were subjected unconstitutionally to second-class status by virtue of being separated from their neighbors on the basis of their race. This segregation was effected by, among other things, a public housing system (administered by Local Defendants, with Federal Defendants' support) that, *de jure*, housed Blacks and Whites in different and separated developments.

Thompson, 348 F. Supp. 2d at 443. This Court made voluminous additional findings of fact in its 2005 Liability Order with regard to HUD's intentional discrimination prior to 1954.[6]

HUD not only facilitated the creation of segregated public housing in Baltimore through *de jure* discrimination before 1954, it also perpetuated and expanded that segregation through several more decades of intentional discrimination in the Baltimore Region. This Court previously described in detail HUD's approval and funding, from the 1960s to the 1980s, of

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[6]In the interest of efficiency, Plaintiffs will not restate all of these findings in detail, and instead incorporate by reference this Court's relevant findings of fact. *See Thompson*, 348 F. Supp. 2d at 405 (noting the pervasiveness of *de jure* racial segregation in Baltimore prior to 1954); *id.* at 408 ("It is undisputed that prior to the 1954 *Brown I* decision Federal and City administrations had intentionally discriminated against African-American residents of public housing due to their race."); *id.* at 443 ("Plaintiffs have demonstrated past affirmative and purposeful segregatory actions by Defendants in the administration of housing policy . . . ."); *id.* at 459 ("Through 1954, Baltimore City was a majority White, *de jure* racially segregated city."); *id.* at 466-68, 472 (citing admissions by HUD officials – including, *inter alia*, Secretary George Romney, General Counsel John Knapp, and Secretary Henry Cisneros – of HUD's intentional, discriminatory policies that created and perpetuated racial segregation in public housing); *id.* at 470 (finding that from up to 1954, seven public housing projects were opened and operated for black occupancy only, that six were sited in areas of minority concentration, and that the seventh was sited on a vacant site); *id.* at 471-72 (describing intentional discrimination by HUD in insurance underwriting, red-lining, and restrictive covenants); *id.* at 472-78 (detailing the construction and operation, by HABC with HUD support, of *de jure* segregated public housing projects in Baltimore, with the intent and effect of restricting public housing for African-Americans to minority-concentrated areas within Baltimore City).

thousands of additional units of family public housing in Baltimore that were sited adjacent to existing segregated housing projects, that were occupied exclusively or almost exclusively by African-Americans, and that HUD knew to be in areas of minority concentration.[7] *Id.* at 480-86 (detailing the development of family public housing projects, all but one of which were adjacent to prior segregated housing, and the remaining one of which (Hollander Ridge) was in an "extremely isolated" location). In approving the sites for these projects, HUD did not consider whether sites in the suburban counties would be more suitable than the minority-concentrated sites in Baltimore City, despite the fact that the suburban jurisdictions were experiencing far greater growth in housing development and employment opportunities during this time period. *See* SOF ¶¶ 3-4.[8] This Court made extensive additional findings of fact regarding HUD policies and HUD-approved local policies that continued intentional discrimination in public housing well past 1954 and into the 1980s.[9]

The record before this Court is replete with undisputed evidence of HUD's involvement in the creation of *de jure* segregated public housing in Baltimore before 1954 and the perpetuation and expansion of that racial segregation for decades following 1954, such that Baltimore's African-American public housing residents have never had an opportunity to live

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[7]This Court also found that during the same time period, sixteen housing projects were built for the elderly and disabled, and these projects were *not* sited in minority-concentrated or isolated parts of Baltimore City. *Thompson*, 348 F. Supp. 2d at 470.

[8]All references in this Brief to "SOF ¶¶ __" are to Plaintiffs' Post-Trial Statement of Facts filed concurrently with this Brief.

[9]*See Thompson*, 348 F. Supp. 2d at 469 (discussing HUD's tenant selection and assignment policies for public housing, and citing evidence showing that both "freedom of choice" and "first-come, first-served" plans perpetuated – well into the 1980s – the effects of segregatory site selection); *id.* at 471, 487-502 (describing the development of 2,800 units of scattered site housing from 1970 to 1995, the vast majority of which were sited in minority-concentrated areas, often accomplished with HUD waivers of site and neighborhood standards that were intended to prevent the concentration of public housing in segregated areas).

anywhere in the Region other segregated areas of concentrated poverty.[10] This history of discrimination imposes on HUD an affirmative duty to remedy past wrongs. *See Freeman*, 503 U.S. at 485-86; *Swann*, 402 U.S. at 15; *Green*, 391 U.S. at 437-38.

2. Vestiges of HUD's Prior Discrimination Persist, Such That the Baltimore Region's Public Housing Remains Racially Segregated.

The record shows not only prior intentional segregation, but also that the vestiges of HUD's prior intentional segregation persist. Plaintiffs presented uncontested evidence at trial that the Baltimore Region's public housing continues to be overwhelmingly concentrated in the poorest, blackest ghettos of East and West Baltimore. Moreover, HUD's own witnesses conceded in their trial testimony that public housing in Baltimore is currently segregated. And the local jurisdictions in the Baltimore Region have themselves acknowledged the *de facto* segregation of public and assisted housing in the Region.

This Court already has found, on the basis of evidence presented at the liability trial, that the vestiges of HUD's prior intentional segregation of public housing persist to this day. *See Thompson*, 348 F. Supp. 2d at 461 ("The statistical evidence demonstrates that HUD's various housing programs, as implemented, failed to achieve significant desegregation in Baltimore City.

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[10]Plaintiffs cite this Court's findings of fact regarding the continuation of intentional discrimination into the 1980s not as an independent basis for constitutional liability, but rather to show that HUD's *present* constitutional obligation stems from prior *de jure* segregation *as well as* the uninterrupted decades of segregated public housing that followed. *See Penick*, 443 U.S. at 458-59 ("[S]ince the decision in [*Brown II*], the [school board] has been under a *continuous constitutional obligation* to disestablish its dual school system. . . . Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." (emphasis added)); *Green*, 391 U.S. at 438 ("Th[e] deliberate perpetuation of the unconstitutional dual system [after *Brown I* and *Brown II*] can only have compounded the harm of such a system."). Although *de jure* segregation may have ended in 1954, HUD's perpetuation and expansion of that segregation continued for many decades, as this Court's prior findings of fact (cited above) demonstrate. HUD's employees acknowledged as much, admitting that "the Baltimore region's public housing is de facto segregated" and that it has always been so. Trial Tr. 2056, 2061 (Halm).

This is true during the Open Period as it had been in the preceding decades.");[11] *see also* *Thompson* Summary Judgment Order, 2006 WL 581260, at *11 ("A system in 'unitary status' means that vestiges of past discrimination have been eliminated to the extent practicable. This is by no means the situation in what HUD itself defines as the Baltimore Region." (internal citation omitted)).

The uncontested evidence presented at trial showed that public housing is both far more highly concentrated in Baltimore City and far more highly concentrated in areas of the Baltimore Region that have above-average percentages of African-American residents than is the case with the private housing market overall. *See* Trial Tr. 793, 810-11 (Webster). Nearly 92% of family public housing (including public housing projects and scattered site units) was concentrated in Baltimore City as of 1995, with a mere 8% located in the five suburban counties that make up the remainder of the Baltimore Region.[12] *See* SOF ¶ 6; *see also* Trial Tr. 809-11 (Webster). By contrast, only 41% of occupied rental housing units in the Baltimore Region (and about 29% of all housing units) were in Baltimore City as of 2000 Census figures. *See* SOF ¶ 7. Similarly, nearly 94% of family public housing (including projects and scattered site units) was concentrated in census tracts with above-average percentages of African-American residents, compared to just 49% of the Region's occupied rental housing (and 34.5% of all housing units).

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[11]The Court also found as follows: "Only 32 per cent of the metropolitan area's households live in Baltimore City. However, HUD has concentrated 89 per cent of the area's public housing in Baltimore City, and has concentrated 50 per cent of the housing area's Section 8 housing in Baltimore City. In total, almost 72 per cent of the subsidized rental units in the metropolitan area are in Baltimore City." *Thompson*, 348 F. Supp. 2d at 503 (internal citations omitted).

[12]One result of the concentration of the Region's public housing in Baltimore City is that poor families from the surrounding counties have long been forced to look for public housing in Baltimore City. *See* SOF ¶ 5; *see also Thompson*, 348 F. Supp. 2d at 408 ("Baltimore City should not be viewed as an island reservation for use as a container for all of the poor of a contiguous region . . . .").

See id. ¶ 8.

HUD has presented no evidence to contradict or undermine the Court's prior factual finding or the evidence presented at the recent trial; to the contrary, HUD's own witnesses *agreed* that Baltimore's public housing is presently segregated. For example, Charles Halm – a lifelong Baltimore resident and Director of the Community Planning and Development Division in HUD's Baltimore field office, *see* Trial Tr. 2055, 2068 (Halm) – testified as follows:

> Q. [J]ust a minute ago you agreed that public housing in the Baltimore region is located in overwhelmingly black and overwhelmingly poor neighborhoods, correct?
> A. That's true.
> Q. You'd agree to that?
> A. That is true.
> Q. That in practice the Baltimore region's public housing is de facto segregated?
> A. Yes.
> Q. And would you agree that, from the point of view of a public housing family or African American family that wants to live in public housing, in the Baltimore region, the fact that the region's public housing is de facto segregated is an impediment to fair housing?
> . . .
> A. I think your logic is correct. It would be. It would be. All the public housing is in areas that are impacted. There's not very much choice that people have.

Id. at 2061 (Halm). Several other HUD witnesses similarly testified that Baltimore's public housing is presently segregated. *See id.* at 624 (Clark); *id.* at 2207-08 (Walsh).

Finally, the 1996 Analysis of Impediments, jointly prepared by the Baltimore Region's local jurisdictions, identifies "[d]e facto racial segregation in public and assisted housing" as a "significant impediment[] to fair housing choice . . . in the Region." SOF ¶ 10.

The uncontested evidence that the Region's public housing is presently segregated establishes that vestiges persist of HUD's intentional ghettoization of public housing residents. The concentration of black public housing residents in predominantly black urban areas, to the

exclusion of less segregated and suburban neighborhoods, is recognized as one of the present effects of past racial discrimination in public housing in metropolitan areas across the country.[13] *See, e.g.*, *Gautreaux*, 425 U.S. at 286-92, 296 (citing evidence of overwhelming segregation in the Chicago public housing system that resulted from past and present racially discriminatory housing practices); *United States v. City of Parma, Ohio*, 661 F.2d 562, 566 (6th Cir. 1991) (finding that suburban city's discriminatory practices contributed to the current "extreme condition of racial segregation" in the Cleveland metropolitan area); *Walker v. HUD*, No. 3:85-CV-1210-R, slip op. at 1 (N.D. Tex. Dec. 5, 1997) (Modified Remedial Order Affecting HUD) [hereinafter *Walker* 1997 Remedial Order] (finding that one vestige of prior discrimination was that 92% of black households in non-elderly public housing projects "reside in predominantly black or minority concentrated projects in predominantly black or minority concentrated areas"); *cf. Walker v. City of Mesquite*, 169 F.3d 973, 976 & nn.4-5 (5th Cir. 1999) (describing an almost identical concentration of public housing in Dallas (in which 95% of public housing units were located in predominantly minority areas in 1994) as characteristic of a "sordid" history of "overt and covert racial discrimination and segregation").

The evidence thus proves not only that HUD was complicit in and facilitated the operation of racially segregated public housing in Baltimore, but also that the vestiges of that prior intentional segregation persist to the present. Accordingly, Plaintiffs are entitled to a

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[13]That this condition is a vestige of segregation is also consistent with school desegregation cases holding that the persistence of racially-identifiable student enrollment patterns are the vestige of prior segregation. *See, e.g.*, *Green*, 391 U.S. at 435-38, 441-42. In both the housing desegregation and the school desegregation contexts, the government's affirmative duty to undo the patterns it created – which in both contexts were intended to cabin blacks in separate settings away from whites – is a continuing one. *See Penick*, 443 U.S. at 458 (holding that government actors are under a "*continuous* constitutional obligation to disestablish" segregated systems (emphasis added)).

presumption of causation – a presumption that HUD's prior intentional segregation caused the present concentration of black public housing residents in black urban areas – which HUD has the heavy burden of rebutting. *Freeman*, 503 U.S. at 494-95; *Baliles*, 829 F.2d at 1311.

3. The Present Segregation of African-American Public Housing Residents is a Vestige of Prior Intentional Segregation and Not an Imbalance Caused by Neutral Demographic Factors.

HUD presented no evidence at trial in an attempt to meet its heavy burden of rebutting the presumption of causation with regard to the present segregation of Baltimore's African-American public housing residents.[14] As discussed in Part I.A above, where prior intentional segregation has been shown, there is an affirmative obligation to dismantle the effects of that system, and the persistence of public housing segregation warrants a presumption that dismantling has not taken place. *See, e.g.*, *Keyes*, 413 U.S. at 200, 211. That presumption can only be rebutted by a careful, fact-intensive demonstration that HUD made a good faith and effective effort to eliminate the racially identifiable patterns, *and* that later-occurring patterns were produced not by any governmental action but by other factors such as demographic change. *See Freeman*, 503 U.S. at 494.

The first part of this showing – that there was a conscious and effective effort to dismantle – is critical to this analysis and is wholly lacking here. In *Freeman*, for example, the Supreme Court held that racial imbalance in school attendance zones did not create an actionable constitutional violation where the imbalance arose *subsequent* to the enactment of an effective desegregation plan. *Id.* at 493-97. Likewise, in *Pasadena City Board of Education v. Spangler*,

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[14]In fact, at the present stage of the proceedings, HUD has not even raised any such argument, either in its pretrial briefs or during the two-week remedial trial. Plaintiffs address this argument here because HUD has, in the past, argued that present imbalances in public housing were caused by demographic changes in the Baltimore Region over time. *See* Fed. Defs.' Trial Br. 10-13, 28 (Nov. 17, 2003) (Paper 558).

the Supreme Court held that once the defendant school board had achieved compliance with a prior court order requiring it to remedy the vestiges of prior school segregation, racial imbalances in school attendance zones that were caused by demographic changes did not amount to a constitutional violation. 427 U.S. 424, 436-37 (1976); *see also Swann*, 402 U.S. at 31-32 ("Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies *once the affirmative duty to desegregate has been accomplished* and racial discrimination through official action is eliminated from the system." (emphasis added)).

Unlike *Freeman* and *Spangler* this Court has not found – and HUD has presented no evidence that even arguably could support a finding – that HUD ever remedied the racial imbalance caused by its intentional segregation of public housing in the Baltimore Region. *See Jenkins v. Missouri*, 122 F.3d 588, 599 (8th Cir. 1997) ("The key distinction between this case, on the one hand, and *Spangler* and *Freeman*, on the other, is that there is no finding in this case that the [school district] ever eliminated the student assignment vestige.").

Nor can HUD meet the second requirement for rebutting the presumption of causation that arises from the persistence of racial segregation in public housing. To show that it is not liable for present harms incurred as a result of its prior segregation, HUD also would have to show that population change in Baltimore City has *substantially caused* the present situation in which black public housing residents are isolated in segregated black areas of the City. *See Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1338-39 (11th Cir. 2005) ("If the school district can demonstrate that demographic factors have 'substantially caused' the racial imbalances in its schools, 'it overcomes the presumption that segregative intent is the cause, and there is no constitutional violation.'" (quoting *NAACP, Jacksonville Branch v. Duval County*

Sch., 273 F.3d 960, 966 (11th Cir. 2001))); *see also Freeman*, 503 U.S. at 494. Although it is true that the African-American proportion of Baltimore City's population has increased over time, this population trend has *not* "substantially caused," or even partially caused, the present segregation of black public housing residents. The evidence presented at trial (in addition to other evidence presented to this Court during the 2003 liability trial) proves that African-American public housing residents in Baltimore *always* have been confined to areas of the City with disproportionate African-American population concentrations.

This Court's 2005 Liability Order credited the testimony of Plaintiffs' expert witnesses during the 2003 liability trial (including Karl Taeuber, Arnold Hirsch, and Rolf Pendall), along with the additional facts Plaintiffs presented at that trial, in making extensive findings of fact that HUD and its predecessors had a policy – both as a matter of national practice and as specifically implemented in Baltimore – of building segregated public housing for blacks in areas that were *already* areas of black population concentration; and that HUD carried out this policy for decades after the end of official, *de jure* segregation.[15] *See Thompson*, 348 F. Supp. 2d at 465-86; *see also* PX-2, Expert Report of Karl Taeuber 1-5, 17-23, 35-49, 72-83 (regarding the racial composition of census tracts of each public housing project as of the date each project opened).

Moreover, Dr. Webster testified during this trial that in 1960, the average census tract in Baltimore City was 34% African-American, but the average census tract in which a family

[15]The Court also cited the testimony of HUD's own expert, Shelley Lapkoff, in support of the finding that public housing units were sited in areas of black population concentration at the time of siting. *See Thompson*, 348 F. Supp. 2d at 461 & n.121 ("The statistical evidence demonstrates that HUD's various housing programs, as implemented, failed to achieve significant desegregation in Baltimore City. This is true during the Open Period *as it had been in the preceding decades*." (emphasis added)) (citing the Written Direct Testimony of Shelley Lapkoff to show that in each decade from the 1950s to the 1980s, public housing activity in Baltimore City was concentrated in areas with above-average black population concentration).

public housing project was located was more than 60% African-American. This pattern continued in every decade from 1960 to the present, such that in 2000 the average census tract in Baltimore City was 63.5% African-American, but the average census tract with family public housing was 88.4% African-American. *See* Trial Tr. 797-803 (Webster); SOF ¶ 12. The pattern was also the same when looking at public housing in the counties surrounding Baltimore City (to the limited extent that public housing was created in those counties, as noted in Part I.B.2 above). *See* SOF ¶ C-13.

HUD did not contest Dr. Webster's factual showing, and HUD has never challenged this Court's relevant findings of fact from the 2005 Liability Order. To the contrary, HUD's own witnesses agreed at trial that African-American public housing residents in Baltimore *always* have been overwhelmingly isolated in neighborhoods that were and are disproportionately African-American and poor. *See* SOF ¶¶ 14-15.

Nothing in the demographic history of the Baltimore Region has prevented public housing from being located in any of the Region's many primarily-white areas. Rather, the absence of desegregated housing opportunities for low-income African-American families has been the product of HUD's failure to take a regional approach to promoting desegregation. It is this conscious, consistent failure to create public housing in areas that are predominantly white that has led to the near-complete absence of opportunities for black public housing families to live in neighborhoods that are anything other than overwhelmingly black and poor.

If anything, the increasing concentration of African-Americans within Baltimore City *heightens*, not lessens, HUD's culpability in failing to pursue and create desegregative housing opportunities throughout the rest of the Baltimore Region. The Supreme Court's decision thirty years ago in *Hills v. Gautreaux* established the principle that the geographic area that is relevant

in the housing desegregation context, unlike the school desegregation context, is the housing market as a whole, and not just the area within the city limits:

> Here the wrong committed by HUD confined the respondents to segregated public housing. The relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits. That HUD recognizes this reality is evident in its administration of federal housing assistance programs through "housing market areas" encompassing "the geographic area within which all dwelling units . . . are in competition with one another as alternatives for the users of housing."

Gautreaux, 425 U.S. at 299 (quoting HUD, Techniques of Housing Market Analysis 8 (Jan. 1970)). This Court already has found the relevant housing market in the instant case to be the Baltimore Region as a whole.[16] *See Thompson* Summary Judgment Order, 2006 WL 581260, at *11 & nn.24-25. Given the steady increase in the African-American proportion of the Baltimore City population over time, HUD's failure to pursue desegregative housing opportunities in the suburban counties outside Baltimore City – which were the areas of the housing market where desegregative opportunities were increasingly likely to be found – is further evidence of HUD's abdication of its constitutional duty.

Nor does the mere passage of time since the end of *de jure* housing segregation in 1954, or since HUD's conscious accommodation of segregated siting decisions for decades thereafter, mitigate HUD's constitutional duty to disestablish. Under certain circumstances, where effective desegregation efforts already have been undertaken, the passage of time can lessen the harmful effects of prior intentional discrimination. *See Freeman*, 503 U.S. at 496; *Thompson*, 348 F.

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[16]HUD's own regulations establishing Fair Market Rent levels define the Baltimore housing market as encompassing the entire Baltimore MSA (which includes Baltimore City plus the six surrounding counties). *See* 70 Fed. Reg. 57,653, 57,659, 57,680 (Oct. 3, 2005). In addition, a number of witnesses testified at trial that housing markets are regional. *See, e.g.*, Trial Tr. 164 (Turner); Trial Tr. 310 (powell); Trial Tr. 1026, 1048 (Briggs).

Supp. 2d at 446-47. But in most circumstances the passage of time *exacerbates* constitutional liability. The Supreme Court has held explicitly that where *de jure* segregation was once in place, every failure to make amends perpetuates the original violation:

> "*Brown II* was a call for the dismantling of well-entrenched dual systems," and school boards operating such systems were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment.

Penick, 443 U.S. at 458-59 (quoting *Green*, 391 U.S. at 437-38) (internal citation omitted).

HUD has failed to rebut the presumption that the current segregation in Baltimore public housing is caused by HUD's prior intentional segregation. Because Plaintiffs have met their burden of showing both prior intentional segregation and the present vestiges of that segregation, and because the present segregation of African-American public housing residents is not caused by demographic factors, HUD's failure to prove that it has dismantled the prior segregated system bars its escape from constitutional liability. *See Fordice*, 505 U.S. at 739.

C. HUD Has Failed to Eliminate the Vestiges of Segregation and Instead Has Perpetuated and Expanded Segregation.

The present racial segregation of public housing in Baltimore, and its unrebutted causal connection to HUD's prior intentional segregation, requires a finding that HUD has violated the Fifth Amendment by failing to disestablish the vestiges of segregation. *See Brinkman*, 443 U.S. at 538 ("[T]he measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the *effectiveness*, not the purpose, of [its] actions in decreasing or increasing the segregation . . . ." (emphasis added)). Because HUD's policies and actions during the Open Period have not eliminated the vestiges of prior segregation – as evidenced by the current concentration of public housing in overwhelmingly black and poor areas of Baltimore

City to the exclusion of non-impacted areas in the Region – HUD has violated the Fifth Amendment, and remains in violation as long as the segregated condition persists. *See Penick*, 443 U.S. at 458.

In addition to the requirement that HUD effectively desegregate public housing, the Fifth Amendment duty to disestablish includes an obligation not to take any action that perpetuates or increases segregation. *See Brinkman*, 443 U.S. at 538. Not only did HUD fail to eliminate segregation, as demonstrated, but HUD's actions and inaction with regard to the Baltimore Region's public housing, prior to and during the Open Period, also had the impermissible effect of perpetuating segregation. Through the years after 1954, HUD continued to approve and finance additional units adjacent to the formerly *de jure* and still *de facto* segregated public housing developments, thus enlarging and entrenching these concentrations of segregated public housing within areas of Baltimore City that were predominantly black.

This Court found in its 2005 Liability Order that HUD's public housing development activity during the Open Period continued to focus overwhelmingly on Baltimore City, and on areas within the City with above-average black population concentrations. *Thompson*, 348 F. Supp. 2d at 460-61 ("During the 1990s, 89% of public housing units developed with HUD's support in the Baltimore Region were in Baltimore City. . . . All told, some 86% of all hardscape public housing units sited in Baltimore City during the 1990s were [s]ited in Census tracts with African-American percentages above the citywide average in 1990."). The Court also found that nearly 5,000 family public housing units were demolished during the 1990s, only to be replaced by lower density public housing on "virtually the same sites" as the demolished units. *Id.* at 461. The continuation during the Open Period of the practice of focusing public housing development in Baltimore City and in areas of black population concentration had the

unconstitutional effect of perpetuating segregation and demonstrates HUD's failure to make any regional effort at developing public housing opportunities in the Baltimore Region as a whole.[17]

That the Court has held that the Housing Authority of Baltimore City ("HABC") is not liable for a constitutional failure-to-disestablish violation does not exonerate HUD from its own constitutional duty to disestablish. As this Court has explained, "[a] finding that the Local Defendants may have done all that they could to effect desegregation is not a finding that HUD has met the same standard." *Thompson* Summary Judgment Order, 2006 WL 581260, at *11; *see also Thompson*, 348 F. Supp. 2d at 462 ("[O]f course, it was HUD and not Local Defendants, that could have meaningfully acted upon a regional approach.").

Because the evidence shows that HUD participated in the creation of intentionally segregated public housing in Baltimore; because that segregation manifested itself in the concentration of black public housing residents in Baltimore City and in areas of overwhelming poverty and black population concentration; because that segregation persists to the present day, having never been interrupted by demographic or other factors; and because HUD has never made any successful efforts to eliminate that segregation, but instead took actions that perpetuated and exacerbated that segregation; HUD has failed to meet its Fifth Amendment obligation to provide for equal protection of the laws to African-American public housing families. This Court therefore should hold that HUD has violated the Fifth Amendment, and hold that the remedy discussed below in Part III is necessary and appropriate to redress HUD's long-standing and pervasive constitutional violation.

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[17]Many of the actions and failures to act discussed in Part II.B below, with regard to HUD's failure to live up to its obligations under the Fair Housing Act, provide further evidence of impermissible conduct that increased or perpetuated segregation – or at the least failed to eliminate segregation – during the Open Period.

II. HUD Has Violated the Fair Housing Act's Requirement That It Further Fair Housing.

In its Order denying HUD's Motion for Summary Judgment, this Court rejected HUD's argument that it did not receive sufficient notice of the § 3608(e)(5) claim on which the Court based its liability holding. *Thompson* Summary Judgment Order, 2006 WL 581260, at *2-3. The Court nonetheless permitted Federal Defendants to present supplemental evidence regarding Plaintiffs' § 3608(e)(5) claim. *Id.* at *3. The supplemental evidence that HUD presented at trial reinforces rather than undermines this Court's original conclusion that HUD violated § 3608(e)(5) by failing to affirmatively further fair housing.

A. The Duty to Further Fair Housing.

Section 3608(e)(5) of the Fair Housing Act ("the Act" or "Title VIII") requires the Secretary of HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter." 42 U.S.C. § 3608(e)(5). The policies of the Act are "to provide, within constitutional limitations, for fair housing throughout the United States," 42 U.S.C. § 3601; to replace concentrated African-American ghettos with "truly integrated and balanced living patterns," 114 Cong. Rec. 3422 (statement of Sen. Mondale); and to "remove the walls of discrimination which enclose minority groups," 114 Cong. Rec. 9563 (statement of Rep. Celler). The Supreme Court has held that assuring fair housing is "a policy that Congress considered to be of the highest priority." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972). Section 3608(e)(5) thus imposes on HUD an affirmative obligation, of the highest priority, to act to promote fair housing and desegregation in its programs and activities. *See NAACP v. HUD*, 817 F.2d 149, 155 (1st Cir. 1987) (holding that the Act embodies "[Congress's] desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely

open housing increases") (opinion of then-Judge Breyer); *see also Thompson* Summary Judgment Order, 2006 WL 581260, at *1; *Thompson*, 348 F. Supp. 2d at 416, 457.

Mere *consideration* of actions that may promote fair housing is insufficient to meet HUD's affirmative statutory duty under § 3608(e)(5). In one of the first decisions interpreting HUD's obligation under § 3608(e)(5), the Third Circuit ordered a remand of HUD's approval of an urban renewal plan in order for HUD to evaluate whether the project would increase ghettoization rather than alleviating it. *Shannon v. HUD*, 436 F.2d 809, 821-23 (3d Cir. 1970). The Third Circuit made clear that HUD's obligation under § 3608(e)(5), when read as part of the overall statutory context in which the Fair Housing Act was passed, involved taking active steps to achieve fair housing:

> Read together, the Housing Act of 1949 and the Civil Rights Acts of 1964 and 1968 show a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend . . . . In 1949, the Secretary [of HUD] . . . could not act unconstitutionally, but possibly could act neutrally on the issue of racial segregation. By 1964 he was directed . . . to look at the effects of local planning action and to prevent discrimination in housing resulting from such action. In 1968 he was directed to *act affirmatively to achieve fair housing*.

Id. at 816 (emphasis added); *see also id.* at 821 ("Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy.").

Other Courts of Appeals similarly have held that § 3608(e)(5) requires effective actions to desegregate. The Second Circuit has held that "[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (describing the

§ 3608(e)(5) obligation as an "affirmative duty to consider the impact of publicly assisted housing programs on racial concentration *and to act affirmatively* to promote the policy of fair, integrated housing" (emphasis added)). And the First Circuit, reviewing the applicable case law in *NAACP*, concluded that a reading of § 3608(e)(5) that requires HUD to take affirmative action to promote fair housing and achieve desegregation is the "consensus opinion set out in these many cases."[18] *NAACP*, 817 F.2d at 155.

This interpretation of § 3608(e)(5) is consistent with the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 646 (6th Cir. 1991) ("Courts have given a broad reading to the [Fair Housing Act] in order to fulfill its remedial purpose."); *cf. City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) ("We also note precedent recognizing the [Fair Housing

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[18]Many other courts have concurred that § 3608(e)(5) imposes more than a mere procedural obligation on HUD – that is, HUD may not meet its duty under § 3608(e)(5) simply by giving "consideration" to the effect of its decisions on fair housing, but rather must take affirmative steps toward the achievement of fair housing. *See, e.g.*, *Dean v. Martinez*, 336 F. Supp. 2d 477, 487 (D. Md. 2004) (holding that § 3608(e)(5) "obligates HUD to do more than simply refrain from discriminating; HUD must take *active steps* to ensure fair housing" (emphasis added)); *Project B.A.S.I.C. v. Kemp*, 776 F. Supp. 637, 643 (D.R.I. 1991) ("[T]he obligation [to further fair housing] does not end with a mere consideration of the proper factors."); *Young v. Pierce*, 628 F. Supp. 1037, 1054 (E.D. Tex. 1985) ("It has been clear at least since the passage of Title VIII . . . that HUD has had an affirmative duty to eradicate segregation."); *NAACP v. Harris*, 567 F. Supp. 637, 644 (D. Mass. 1983) (holding that the measure of HUD's satisfaction of its § 3608(e)(5) obligation is the *effectiveness* of HUD's actions, and concluding that "[HUD]'s efforts to ensure fair housing have been ineffective. . . . It has not used any of its immense leverage under [certain grant-making authority] to provide adequate desegregated housing . . . ."); *Banks v. Perk*, 341 F. Supp. 1175, 1182 (N.D. Ohio 1972) ("The Fair Housing Act of 1968, in establishing a national policy of fair housing throughout the United States, carried with it the clear implication that local housing authorities in conjunction with Federal agencies responsible for housing programs are to *affirmatively institute action* the direct result of which was to be the implementation of the dual and mutual goals of fair housing and the elimination of discrimination in that housing." (emphasis added) (internal citation omitted)), *rev'd in part on other grounds*, 473 F.2d 910 (6th Cir. 1973).

Act's] 'broad and inclusive' compass, and therefore according a 'generous construction' to the Act's complaint-filing provision." (quoting *Trafficante*, 409 U.S. at 209, 212)).

And as the First Circuit has further explained, even if HUD's statutory mandate is limited to mere consideration of the impact of its decisions on racial demographics, such consideration – if undertaken seriously – would itself bring about integrative results over time:

> [T]he need for such consideration itself implies, at a minimum, an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply. If HUD is doing so in any meaningful way, one would expect to see, over time, if not in any individual case, HUD activity that tends to increase, or at least, that does not significantly diminish, the supply of open housing.

NAACP, 817 F.2d at 156; *see also Jaimes v. Toledo Metro. Hous. Auth.*, 715 F. Supp. 835, 842 (N.D. Ohio 1989) ("If HUD is properly fulfilling its duties, over time one would expect to find HUD's activity increasing the supply of open, integrated housing. In this case, however, one finds that segregation in housing continued and the supply of open, integrated housing did not increase."). In other words, lack of integrative results over time demonstrates a failure to meet the statutory mandate, even if that mandate is construed narrowly to require only consideration of the impact of HUD decisions on fair housing.[19]

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[19]The Eighth Circuit's recent decision in *Darst-Webbe Tenant Ass'n Board v. St. Louis Housing Authority*, 417 F.3d 898 (8th Cir. 2005), is consistent with the interpretation of § 3608(e)(5) articulated by the First, Second, and Third Circuits. Interpreting HUD's obligations under § 3608(e)(5), *Darst-Webbe* held that HUD must "demonstrate[] consideration of, *and an effort to achieve*," results in the form of furthering opportunities for fair housing. *Id.* at 907 (emphasis added).

The *Darst-Webbe* court separately considered the reviewability of HUD's actions under the APA in light of *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004), and held that HUD's action was reviewable but that the court was not to "determine whether HUD has, in fact, achieved tangible results." *Darst-Webbe*, 417 F.3d at 907. This holding does not undermine the § 3608(e)(5) standard that Plaintiffs have asserted applies in the instant case. The

(continued...)

HUD is thus under an affirmative statutory obligation to take active steps toward the goal of open and integrated housing for African-American public housing residents throughout the Baltimore Region. As discussed below, HUD's pattern of activity in the Baltimore Region during the Open Period falls far short of its affirmative statutory duty to take steps toward the achievement of fair housing.

B. None of HUD's Arguments Warrant a Reversal of this Court's Prior Finding of Liability for Failure to Affirmatively Further Fair Housing.

HUD attempted to prove during trial that it has met its duty to promote fair housing throughout the Baltimore Region in accord with the Fair Housing Act. As discussed below, however, HUD's presentation amounts to little more than a grab-bag of vague, misleading, and ultimately meritless assertions that fall far short of establishing a viable defense.

1. HUD's Administration of the Section 8 Voucher Program Has Failed to Promote Regional Fair Housing and Has in Fact Perpetuated Segregation.

Federal Defendants argue that certain aspects of the Section 8 voucher program present a defense to § 3608(e)(5) liability, but because the voucher program has not created anything more than a small number of desegregative housing opportunities and in some respects has worsened the segregation of assisted housing, all of these arguments are without merit.

a. Voucher Portability Has Not Resulted in the Deconcentration of Public Housing.

HUD first notes that vouchers are "portable," meaning that they can be used in any

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[19](...continued)
Darst-Webbe court was considering a challenge to a single decision by HUD in light of *Norton*'s concern for measurable agency standards to guide APA review. The instant case, by contrast, involves Plaintiffs' challenge to a pattern of actions and failures to act over time that perpetuated Region-wide segregation. As then-Judge Breyer explained, the § 3608(e)(5) standard is one that *can* properly be measured by evaluating the result of HUD's actions over time, even if applying that standard to individual decisions is more difficult to do. *NAACP*, 817 F.2d at 158.

jurisdiction with a Section 8 administering agency, and asserts that "HUD has enabled thousands of families to choose where they wanted to live in the Baltimore area." Trial Tr. 37 (HUD opening statement). In fact, however, as Plaintiffs' unrebutted evidence at trial showed, the Section 8 voucher program has replicated existing patterns of racial segregation in public and assisted housing, and has not offered meaningful desegregative choices.

The voucher program as currently operated has resulted in the concentration of African-American voucher users within Baltimore City, and in extremely segregated, high-poverty census tracts. According to 2005 data, approximately 63% of all African-American voucher users in the Region live in Baltimore City. *See* SOF ¶ 17. By contrast, a mere 9% of white voucher users in the Region live in Baltimore City, with the remaining 91% able to find housing in the surrounding counties. *See id.* In addition to being much more likely to live in Baltimore City, African-American voucher users are also many times more likely to live in high-black, low-income census tracts: African-American voucher users are over eleven times more likely than whites to live in census tracts with greater than 80% black population concentration, and are over nine times more likely to live in census tracts with less than 50% of the median state income.[20] *See id.* ¶¶ 18-19; *see also Thompson*, 348 F. Supp. 2d at 460 (finding as fact that "the majority – more than 67 percent – of the City's Section 8 voucher holders live in census tracts that are 70 to 100 percent Black").

These statistics regarding the geographic distribution of white and black voucher users in the Baltimore Region, which HUD did not attempt to rebut at trial, reveal the speciousness of

[20]Plaintiffs presented additional expert testimony that African-Americans voucher users are not able to gain access to communities of opportunity, but white voucher users are able to do so. *See* SOF ¶¶ 20-21; *see also Thompson*, 348 F. Supp. 2d at 522 ("African-American voucher holders encounter barriers to choice not faced by Whites in competing for the affordable units that exist in the mainstream market.").

HUD's assertion that voucher portability has effectively furthered fair housing in any meaningful way.[21] In practice, the voucher program as currently operated has resulted in the segregation of black and white voucher users along lines that parallel the segregation of public housing residents – black voucher users are overwhelmingly concentrated in Baltimore City, and in high-poverty, segregated census tracts.[22]

This outcome has occurred because, as the following sections discuss (and as HUD elsewhere has acknowledged), voucher portability alone does not and cannot provide unfettered choice to public housing residents to move to opportunity areas. HUD has created obstacles to voucher portability, has refused to provide what it recognizes as critical mobility counseling resources, and has failed to use its authority to facilitate voucher use in areas of the Baltimore Region with higher rent and lower affordability than Baltimore City.

b. HUD's Policies Have Failed to Overcome Obstacles to Voucher Portability and Have in Fact Exacerbated Those Obstacles.

As HUD has acknowledged, there are significant administrative and other obstacles to voucher portability that contribute to the segregated outcome described above. Providing low-income African-American families with a voucher, and then leaving them on their own to find

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[21]In fact, notwithstanding the litigation position HUD adopted before this Court, HUD has elsewhere acknowledged that voucher portability alone does not permit unhindered housing choice: "One of the advantages [of] tenant-based rental assistance . . . is that it allows the recipient to choose [where to live]. However, many households receiving Section 8 rental assistance are confronted by an array of barriers – market conditions, discrimination, lack of information and/or transportation, among others – that force them to rent housing in neighborhoods of intense poverty." PX-815, HUD, Moving to Opportunity for Fair Housing, at HUDBAL 38186 (Dec. 5, 2000).

[22]It is for this reason that this Court has already concluded, in its 2005 Liability Order, that Section 8 vouchers are inadequate to desegregate public housing. *Thompson*, 348 F. Supp. 2d at 460 ("Just as rearranging the siting of public housing units within Baltimore City is insufficient to advance the cause of desegregation, *Section 8 vouchers are inadequate to achieve this end*." (emphasis added)).

housing in better neighborhoods, compete in tight housing markets, deal with rental discrimination, and navigate complicated bureaucratic obstacles simply replicates the existing patterns of residential segregation in the housing market. HUD's obligations under the Fair Housing Act and the Constitution require more of HUD than leaving African-American families to desegregate themselves.

The procedures a voucher family must follow to "port" its voucher from the issuing jurisdiction to a receiving jurisdiction are confusing, time-consuming, and increase the difficulty for public housing families to move to suburban jurisdictions. *See* SOF ¶¶ 24-28. Public Housing Authorities ("PHAs") have similarly reported that there are numerous administrative obstacles to portability that combine to discourage PHAs from promoting portability moves to voucher recipients. *See id.* ¶¶ 30-31. HUD's own expert witness, Prof. Robert Fishman, stated that "merely providing region-wide vouchers [is] not enough to provide real 'freedom of choice' for those households who wish[] to use their vouchers to move to a suburban location." FDR-2, Fishman Written Test. 6; *see also* Trial Tr. 1366 (Fishman).

Although HUD claims that it has implemented policies to minimize these administrative obstacles and encourage portability, the evidence shows that HUD's policies in fact accomplish the opposite – making portability more difficult and less worthwhile for administering agencies.

For example, HUD argued at trial that the Section 8 Management Assessment Program ("SEMAP") contains a "deconcentration" factor that gives PHAs an incentive to encourage portability and thereby helps to promote fair housing. *See* Trial Tr. 41 (HUD opening statement). The SEMAP program is a scoring system for PHAs, established by agency rule, through which HUD measures PHA performance in Section 8 voucher administration. *See* SOF ¶ 32; 24 C.F.R. § 985.1(a). As Plaintiffs' experts testified, SEMAP is "primarily designed to

remedy management failures in the most dysfunctional agencies, not to accomplish affirmative objectives in the fair housing area. That is, SEMAP's main function is to ensure that PHAs meet *basic* program requirements." PX-764, Briggs Written Test. 12 (citation omitted).

The "deconcentration" factor is an optional, and minimal, bonus toward a housing authority's SEMAP score if certain poverty deconcentration standards are met.[23] *See* SOF ¶¶ 34-36; 24 C.F.R. § 985.3(h)(1), (3)(i). Plaintiffs' expert Dr. Khadduri testified that the deconcentration factor "provides a very limited number of points and only on a bonus basis," which in practical terms means that it does not affect whether a housing authority is rated a high- or adequately-performing housing authority. SOF ¶ 37. William Tamburrino similarly testified at the 2003 liability trial that it would be possible for a housing authority to obtain a high SEMAP score but still have an overwhelming percentage of voucher holders living in minority concentrated areas. *See id.* ¶ 38. For these reasons, the deconcentration bonus is "not an effective policy tool with regard to achieving deconcentration of poverty." Trial Tr. 138 (Khadduri).

Worse, other elements of the SEMAP scoring process actually *discourage* PHAs from helping voucher users move to communities of opportunity in another jurisdiction. A key component of a PHA's SEMAP score is the PHA's "utilization" rate, which is essentially a measure of whether the PHA is making use of all available vouchers. *See* SOF ¶ 41-42; 24 C.F.R. § 985.3(n). Because of the way HUD measures utilization, a PHA is *penalized* for voucher users who move to another jurisdiction. For example, in measuring HABC's utilization

[23]The optional deconcentration bonus sets a very lax standard: A housing authority obtains the bonus if half of Section 8 families with vouchers live in low-poverty areas, or if Section 8 movers choose low-poverty neighborhoods at a slightly higher rate than all Section 8 families. *See* SOF ¶ 35. Even under this lax standard, HABC has never qualified for the deconcentration bonus. *Id.* ¶ 40.

rate, HUD does not count voucher users who move out of Baltimore City toward HABC's utilization. As a result, HABC's utilization rate goes down with every voucher holder who moves from the City to a suburban neighborhood. *See* SOF ¶ 43. This policy creates strong disincentives for HABC to assist tenants in moving out of Baltimore City, as this Court has already found. *See id.*; *see also Thompson*, 348 F. Supp. 2d at 523 (finding that HUD's utilization score discourages HABC from facilitating portability moves).

In addition to administrative obstacles that discourage PHAs and voucher users alike from taking advantage of voucher portability, there are significant informational obstacles as well. Voucher users often lack knowledge of voucher portability, of the availability of suitable rental units in good neighborhoods, or even of the existence of such neighborhoods. *See* SOF ¶¶ 44, 270-72. Plaintiffs presented a number of witnesses, including Isaac Neal and Mary Leighton, who described the difficulty they and others faced trying to find adequate housing with a voucher.[24] *See id.* ¶¶ 273-74, 279.

A final obstacle to voucher portability, as this Court already has concluded, is that "the relative expense and lack of affordability of housing outside of Baltimore City may present a

[24]HUD argued at trial that it has printed and distributed a pamphlet called "The Locator" that supposedly resulted in a "significant knowledge transfer" regarding the availability of affordable housing resources in the Baltimore Region. Trial Tr. 41 (HUD opening statement); *see also* SOF ¶ 45. But HUD's witness admitted that HUD has notdistributed The Locator to residents of Baltimore City public housing; that HUD does not require HABC to make copies of The Locator available in the management offices of Baltimore City public housing projects; that HUD does not require that The Locator be provided to families that are issued a voucher; and that HUD does not require HABC to have copies of The Locator available in its housing application office to distribute to applicants for public housing. *See id.* ¶¶ 46-49. Several of Plaintiffs' witnesses – former residents of Baltimore City public housing who subsequently received vouchers through the PCD in this lawsuit – testified that they had never heard of or seen The Locator. *See id.* ¶¶ 50-51. HUD has presented no evidence, aside from its own conclusory assertion, that this pamphlet had any value in promoting fair housing. The Locator can thus hardly be asserted as a credible step in furtherance of HUD's statutory obligations.

significant barrier to Section 8 voucher-holders who might wish to pursue private housing in the Baltimore Region but outside the city." *Thompson*, 348 F. Supp. 2d at 460. HUD has the ability to address this obstacle both by setting appropriate Fair Market Rents ("FMRs") and by authorizing departures known as "exception payment standards" from the voucher subsidy level in particular areas.[25] *See* SOF ¶¶ 52-56. However, HUD's decisions in setting FMRs have decreased the value of Section 8 vouchers as a desegregative option. In 1995, HUD *reduced* FMRs nationwide by changing its method of calculation from the 45th percentile of the rental distribution to the 40th percentile. *See* 60 Fed. Reg. 48,278 (Sept. 18, 1995). By 2000, HUD had recognized that this FMR calculation was too low to provide meaningful housing opportunities to many voucher holders, and raised the calculation to the 50th percentile for a number of metropolitan areas, but Baltimore was not among the included areas – *despite* HUD's knowledge, through repeated audits of HABC's program, of the serious difficulty faced by Baltimore voucher holders in finding affordable housing.[26] *See* 65 Fed. Reg. 58,870 (Oct. 2, 2000); *see also* SOF ¶¶ 57-59, 66-77. Meanwhile, from 2003 to 2006, HUD refused to approve Exception Payment Standards that would have allowed HABC to pay up to 120% of FMRs in suburban areas with higher rents. *See* SOF ¶¶ 60-61. These decisions have effectively rendered

[25]The voucher program provides a rental subsidy to low-income families who secure housing in the private rental market – tenants pay 30% of household income in rent and utilities, and the voucher pays for the rest, up to a maximum based on HUD's determination of Fair Market Rents for each metropolitan area. The FMR for an area is the amount that would be needed to pay rent and utilities for "privately owned, existing, decent, safe and sanitary rental housing of modest (non-luxury) nature with suitable amenities." 24 C.F.R. § 888.111(b). A PHA may set a payment standard for its vouchers of between 90% and 110% of the published FMR for its area. *See* 24 C.F.R. § 982.503(b). A PHA may request that HUD approve an exception payment standard that is greater than 110% of the published FMR for particular portions of the metropolitan area. *See* 24 C.F.R. § 982.503(c)(2).

[26]It was not until October 2005 – months after this Court's liability ruling – that HUD authorized a 50th percentile FMR for the Baltimore area. *See* 70 Fed. Reg. 57,653, 57,658 (Oct. 3, 2005).

entire portions of the suburban counties unaffordable to voucher users (were those voucher users even able to overcome the other tremendous obstacles to portability discussed above). *See* SOF ¶¶ 62-65.

Far from using its leverage to promote the portability and desegregative potential of Section 8 vouchers, HUD has consistently acquiesced in HABC's mismanagement of its Section 8 voucher program. This Court has already found that HUD acquiesced in HABC's gross mismanagement of the program throughout the entire decade of the 1990s; that HUD had but did not use oversight authority to compel compliance with program regulations; and that HUD's acquiescence in HABC's mismanagement resulted in tens of millions of dollars of unspent voucher funds that could have been used to provide desegregative housing opportunities. *See Thompson*, 348 F. Supp. 2d at 521-24. In the wake of this disaster, instead of following the recommendation of its own Inspector General that HUD take control of HABC's Section 8 program, HUD moved in 2005 to *reduce* its level of oversight of HABC by permitting HABC to enter the Moving to Work demonstration. *See* SOF ¶¶ 67-75. Rather than using its leverage to bring HABC into compliance, HUD has responded to HABC's ongoing mismanagement by reducing the total number of Section 8 vouchers available in Baltimore. *See* SOF ¶¶ 71-77.

c. HUD's Minimal Mobility Counseling Efforts Have Not Provided Meaningful Opportunities for Baltimore City Voucher Holders to Relocate to the Counties.

One way to overcome the administrative, informational, and other obstacles to voucher portability is to undertake vigorous mobility counseling – that is, assistance to voucher recipients that informs them of housing opportunities, helps them to navigate the apartment search, and facilitates administrative processes. Mobility counseling is a critical element of any effort to promote fair housing or to achieve the desegregation of public housing, and the broad support

for this proposition is discussed in more detail below. *See* Part II.B.2.a; SOF ¶¶ 269-79.

HUD claimed at trial that it *had* undertaken two distinct mobility counseling programs – the Regional Opportunities Counseling program and the Moving to Opportunity demonstration – and that these programs have helped it to meet its statutory obligations to promote fair housing. But the evidence shows that both of these programs were extremely limited in scope and impact. As a result, neither program accomplished measurable desegregation of public housing residents.

d. The Regional Opportunities Counseling Program.

HUD argued that the Regional Opportunities Counseling ("ROC") program, implemented in Baltimore as the Baltimore Regional Housing Opportunities Program ("BRHOP"), is evidence that HUD met its duty to promote fair housing under § 3608(e)(5). *See* Trial Tr. 43-44 (HUD opening statement). But the BRHOP program was far too small and short-lived to have had any meaningful effect on improving housing opportunities for Baltimore City public housing residents. A midpoint review of the program reported that 362 families received counseling and 167 families moved, with a mere 89 of those families moving to opportunity areas as defined by the program.[27] *See* SOF ¶ 84. Nor was the program even aimed at providing desegregative opportunities for African-American residents of Baltimore City public housing. As the midpoint review reported, only about half of the program participants originated from Baltimore City; moreover, there was no indication as to how many (if any) of the families who

[27]The only documentary evidence that HUD submitted at trial as to the impact of the BRHOP program was included in the program's midpoint review, prepared for HUD by Quadel Consulting. *See* FDR-31, Assessment of Technical Assistance Needs of the Regional Opportunity Counseling (ROC) Program Sites, at II-1 to II-2 (Apr. 2000). LaVerne Brooks testified as to what she thought the final figures may have been, but her testimony on cross-examination made clear that she had no first-hand knowledge of program outcomes, that she had no documentary support for her recollection, and that she was confused about the program results. *See* Trial Tr. 2501-05 (Brooks). William Tamburrino testified that he had no recollection of a final report for the program being prepared. *See* Trial Tr. 1294 (Tamburrino).

moved to opportunity areas came from Baltimore City public housing. *See* SOF ¶ 85.

In addition to the *de minimis* number of potential beneficiaries it served, the ROC program was extremely limited in duration. ROC operated for only five years and no longer exists – HUD chose not to extend the program after its original five-year time period was met, and no substitute program was adopted after ROC was cancelled. *See* SOF ¶¶ 78-83. As Dr. Khadduri testified, "the ROC program was of extremely limited duration, and cannot be considered to be ongoing HUD policy, or even ongoing HUD policy in the Baltimore Region." Trial Tr. 85 (Khadduri).

HUD presented testimony purporting to show that one benefit from BRHOP was to streamline portability administration across voucher administering agencies in the Baltimore Region. *See* Trial Tr. 1243 (Tamburrino). The midpoint review found, however, that the program did little to eliminate administrative barriers to portability, and that "a greater degree of HUD involvement will be required for any significant regionalization . . . to occur." *See* SOF ¶¶ 86-87. As discussed in Part II.B.1.b above, administrative obstacles remain a significant barrier to voucher portability.

Given the small number of families assisted by the program, its limited duration, and its failure to address administrative obstacles to voucher portability, the ROC program cannot be considered an effort by HUD in the Baltimore Region to "use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases." *NAACP*, 817 F.2d at 155 (describing HUD's obligation under § 3608(e)(5)).

e. The Moving to Opportunity Demonstration.

HUD cited the Moving to Opportunity ("MTO") demonstration study as another defense to statutory liability. *See* Trial Tr. 43-45 (HUD opening statement). The MTO study has yielded

useful data illustrating the benefits of moving out of areas of concentrated poverty. But the demonstration was far too small and short-lived to have any impact on the problem of segregation in Baltimore public housing – a problem that MTO was never intended to address.

The MTO demonstration, which Congress initiated in 1992, was a scientific study intended to measure the effects of providing families in public housing with vouchers and mobility counseling that would enable them to move to low-poverty neighborhoods. *See* SOF ¶¶ 88-89. Study participants in five cities, including Baltimore, were randomly assigned to three groups: a treatment group, a comparison group, and a control group. *See* SOF ¶¶ 90-92. The treatment group received mobility counseling through a local nonprofit agency and received special vouchers that could be used only to move to low-poverty neighborhoods (defined as census tracts with less than 10% poverty). *See* SOF ¶¶ 93-94. The comparison group received regular, unrestricted Section 8 vouchers and no mobility counseling, and the control group received no vouchers or counseling. *See* SOF ¶ 95.

Although the MTO study yielded evidence that supports the importance of mobility counseling (discussed in Part III.B.2.a below in support of Plaintiffs' remedy proposal), it was far too small to have any impact on the problem of segregation in Baltimore public housing. In Baltimore, only 252 families were selected to receive the special vouchers and mobility counseling. *See* SOF ¶¶ 96-97. Of these 252 families, only 146 actually "leased up," or used the vouchers to relocate to a low-poverty neighborhood.[28] *See* SOF ¶ 98. Moreover, the study only

[28]At trial, two of HUD's witnesses testified that "182" or "about 180" participants in the treatment group leased up. Trial Tr. 1369 (Fishman); Trial Tr. 1295 (Tamburrino). But another HUD witness, Dr. Mark Shroder, testified that 146 families leased up, Trial Tr. 2119 (Shroder), and HUD's own documents consistently put the figure at 146. *See* SOF ¶ 99. Regardless whether the number was 146 or 182, it was far too small to make any significant impact on segregation in Baltimore public housing.

lasted for three years in Baltimore, from 1994 to 1997. *See* SOF ¶¶ 100-03. The brief time frame and very small scale of MTO are consistent with the intent, since MTO's inception, that it serve as an empirical study to inform future policy making, and *not* as a policy initiative in its own right. *See* SOF ¶¶ 104-06.

Finally, MTO cannot serve as a defense to HUD liability because it was never intended to address racial desegregation: The program was exclusively aimed at deconcentrating poverty.[29] *See* SOF ¶¶ 107-10. Thus, although the MTO program provided useful data, lessons, and a model of mobility counseling that could be adapted, it did not make any significant impact on the problem of segregation in Baltimore public housing – nor was it ever intended to do so.

2. HUD's Block Grant Funding Programs Have Not Been Used to Promote Regional Fair Housing.

HUD also argued at trial that a number of block grants administered through its Office of Community Planning and Development ("CPD") have promoted fair housing on a regional basis. These block grant programs – HOME Investment Partnerships ("HOME") and the Community Development Block Grant ("CDBG") – provide funds to local jurisdictions to be used for development activities directed toward housing and housing-related facilities and services. As discussed below, the evidence shows that "not a penny" of the millions of dollars provided by these block grant programs in the Baltimore Region has gone to help African-American public housing residents move to desegregative areas. Trial Tr. 2086 (Halm)

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[29]This Court recognized, during the trial examination of HUD's expert witness Prof. William A.V. Clark, that poverty programs do not accomplish the same thing as desegregation programs: "If part of this case is for the purpose of racial integration, the kinds of solutions that you [Clark] talk about are solutions to poverty, which are wonderful, *but they're not doing anything for integration*." Trial Tr. 618 (Judge Garbis) (emphasis added). Prof. Clark responded in agreement: "Well, you're right. In the analysis I did a whole segment whether or not the Section 8 and MTO were helping integration. And in fact MTO is an even bigger failure when you look at its attempts on integration." Trial Tr. 618-19 (Clark); *see also* ¶¶ 111-13.

a. HOME Program Funds Have Not Been Used to Promote Fair Housing in the Baltimore Region.

HUD argued that the HOME Program has furthered fair housing throughout the Baltimore Region. Trial Tr. 37-38 (HUD opening statement). Although Plaintiffs agree that the HOME program has the *potential* to promote fair housing for public housing residents in Baltimore City, HUD has presented no evidence whatsoever that HOME program funds have actually been used to increase housing opportunities for Baltimore City public housing residents, or that HUD has even considered the use of HOME program funds in this way.

The HOME program is a block grant program that provides annual grants to qualifying local jurisdictions (called "participating jurisdictions,"[30] *see* 42 U.S.C. § 12704(4)) for the purpose of creating affordable housing. *See* SOF ¶¶ 115-16. HOME-funded housing opportunities must generally be made available to families with incomes below 80% (or for some uses, below 50%) of the area median income.[31] *See id.* ¶ 118; 42 U.S.C. § 12704(9), (10). But public housing families in Baltimore are even poorer than that, and there is no requirement that even a portion of HOME funds be targeted at these extremely poor families. *See* SOF ¶¶ 119-20. HUD's witness for the HOME program, Virginia Sardone, agreed that for this reason, the income-targeting requirements of the HOME program do not necessarily help public housing residents. *See id.* ¶ 121. Thus, although HOME funds *can* be used to benefit public housing residents, there is no requirement that participating jurisdictions use the funds in this way. *See id.* ¶¶ 119-21.

Strikingly, even though HOME funds could theoretically be used for the benefit of public

[30]All of the jurisdictions in the Baltimore Region are participating jurisdictions for HOME funds except for Carroll County. *See* SOF ¶ 117.

[31]The median family income for the Baltimore Region in fiscal year 2006 is $72,800. Trial Tr. 1613 (Sardone).

housing residents, HUD produced no evidence to show that the HOME program has ever actually assisted any African-American public housing residents in Baltimore. Ms. Sardone testified that HUD has no idea whether even a *single* African-American public housing family from Baltimore City has *ever* been assisted by the HOME program. *See id.* ¶ 122. Nor does her office monitor whether HOME funds are being used to affirmatively further fair housing.[32] *Id.* ¶ 123.

Despite conceding this lack of evidence, HUD made a number of assertions at trial regarding the purported value of HOME funds in meeting HUD's obligation to further fair housing. Even this limited presentation does not withstand scrutiny, and shows on examination that the HOME program to date has had a negligible impact on low-income African-Americans in the Baltimore Region.

For example, Ms. Sardone testified that HOME funds have been used to develop 3,450 rental units in the Baltimore Region from 1992 to 2005, and she stressed that 2,660 of these rental units were initially occupied by African-Americans. *See id.* ¶¶ 125-27. On cross-examination, however, Ms. Sardone admitted that of the 2,660 rental units originally occupied by African-Americans in the Baltimore Region, 2,538 were in Baltimore City – or more than 95% of the total. *See id.* ¶ 128. This means that HOME funds created only 122 rental units occupied by African-Americans outside of Baltimore City over a 14-year time period – fewer than nine rental units per year on average for African-Americans in suburban jurisdictions.[33] *See*

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[32]HUD's basic overview document for the HOME Program – a program guide that HUD distributes to participating jurisdictions, community groups, and housing developers – includes no reference whatsoever to using HOME funds to further fair housing. *See* SOF ¶ 124.

[33]These *de minimis* figures must be discounted even further, because some portion of these 122 rental units over 14 years – HUD is unable to say what portion – were provided to disabled and elderly recipients, and not to families. *See* SOF ¶ 130.

id. ¶ 129. Moreover, HUD does not know where these 122 rental units are located, so HUD cannot say whether they were in communities of opportunity or instead in impacted areas. *See id.* ¶ 131. A program that resulted in the concentration of more than 95% of African-American beneficiaries in Baltimore City; that provided a mere nine rental units per year to African-American recipients outside of Baltimore City; and that cannot even demonstrate whether any of those nine units per year were used for public housing residents or were located in opportunity areas, can hardly be said to fulfill HUD's obligations to further fair housing.

Ms. Sardone also testified that HOME funds have been used for tenant-based rental assistance ("TBRA"), in which participating jurisdictions provide a rental subsidy directly to the tenant, who then uses it to rent a unit. *See id.* ¶ 132; *see also* 42 U.S.C. § 12742(a)(1), (3). From 1992 to 2005, HOME funds were used to provide tenant-based rental assistance to 460 recipients in Baltimore County. *See* SOF ¶ 133. On cross-examination, however, Ms. Sardone agreed that of the 460 recipients, only 150 were African-American – an average of just over ten units of tenant-based rental assistance per year to African-American recipients outside of Baltimore City.[34] *See id.* ¶ 134-35. Moreover, HUD has no idea where the 150 African-American beneficiaries used their tenant-based rental assistance, so HUD is unable to say whether they were used in impacted areas or communities of opportunity. *See id.* ¶ 136. In addition, HUD does not know whether any public housing families benefited from these funds. *See id.* ¶¶ 137-38. So although HUD touts the fact that the HOME program funded 460 TBRA units over 14 years, the facts show that this benefit accrued to only 150 African-American recipients, a paltry

[34]As with funds used to acquire or rehabilitate rental units, TBRA funds are provided to elderly and disabled tenants in addition to families. *See* SOF ¶ 134. Some number of the 150 African-American beneficiaries of TBRA funds are therefore likely to be elderly or disabled tenants, and not families.

ten recipients per year; that HUD has no knowledge whether any recipients were public housing residents; and that HUD cannot say whether these recipients used the funds in areas that would have promoted fair housing or not.[35]

HUD finally noted at trial that participating jurisdictions must undertake affirmative marketing procedures for a subset of their HOME-funded housing activities, and that these procedures must include practices to inform persons from the housing market area who are "not likely to apply for the housing without special outreach." 24 C.F.R. § 92.351(a)(1), (a)(2)(iii); *see also* SOF ¶¶ 141-42. Yet despite this mandate, HUD has never recommended that outreach be made to public housing residents – even though HUD agrees that lack of information about suburban housing opportunities is a serious impediment to fair housing for Baltimore City public housing families. *See* SOF ¶¶ 143, 147. HUD presented no evidence that HUD ever has undertaken steps to inform Baltimore City public housing residents about HOME-funded housing opportunities in suburban areas. *See id.* ¶¶ 143-47. In short, there is no evidence that the HOME program has furthered fair housing.

b. CDBG Program Funds Have Not Been Used to Promote Fair Housing for African-American Public Housing Residents in the Baltimore Region.

HUD also argued that the Community Development Block Grant program ("CDBG") promotes fair housing. *See* Trial Tr. 38-39, 42 (HUD opening statement). Plaintiffs agree that the CDBG program, like the HOME program, has the *potential* to promote fair housing for African-American families in Baltimore City public housing. HUD has presented no evidence,

[35]HUD additionally presented testimony regarding HOME-funded homebuyer assistance, which funds the acquisition or new construction of affordable homes to be made available for purchase. *See* SOF ¶ 139. But HUD's witness agreed that homebuyer assistance is unlikely to benefit extremely low-income public housing families, because they are not generally in a position to purchase homes. *See id.* ¶ 140.

however, that CDBG funds actually have been used in this way.

The CDBG program provides funds to local jurisdictions called "entitlement communities"[36] for several purposes. *See* SOF ¶¶ 148-49. CDBG funds can be used to address the needs of low and moderate income persons, to address slum and blight, or to address a particularly urgent need. *See* SOF ¶ 151. The funds pay for a wide range of activities, from child care to code enforcement. *See* SOF ¶ 152.

By statute, 70% of CDBG funds must be used "for the support of activities that benefit persons of low and moderate income," a category that includes all individuals and families earning up to 80% of the area median income. 42 U.S.C. § 5301(c). In the Baltimore Region, this means a family of four earning up to $58,250. *See* Trial Tr. 1611 (Sardone). Public housing families in Baltimore City are much poorer than most families in this "low and moderate income" category. *See* Trial Tr. 1611 (Sardone). There is no statutory requirement that any portion of CDBG funds be targeted at these extremely poor families. *See* SOF ¶ 154. Richard Kennedy, the director of HUD's Office of Block Grant Assistance, which administers the CDBG program, testified that he did not know whether any CDBG funds had been used to benefit Baltimore City public housing families. *See* SOF ¶ 155. Thus, although CDBG funds *can* be used to benefit Baltimore City public housing families, there is no statutory requirement that they be used in this way, and HUD is unable to provide evidence that the funds actually have been used to help this population. *See* SOF ¶¶ 151-55.

HUD presented evidence regarding the overall benefits that the CDBG program provides to the Baltimore Region. *See* Trial Tr. 1737-65 (Kennedy). However, Charles Halm, the

[36]All of the local jurisdictions in the Baltimore Region are participating jurisdictions for CDBG funds except Carroll County. *See* SOF ¶ 150.

director of the CPD Division in HUD's Baltimore field office, testified that "not a penny" of CDBG funds has ever been used to help African-American families move out of Baltimore City public housing to any white area. Trial Tr. 2086 (Halm). Only a tiny sliver of CDBG funds in Baltimore City (less than 1%) is spent on fair housing activities of any kind. *See* SOF ¶ 157. Although HUD argued that CDBG funds have been used to benefit African-Americans in the Baltimore Region outside Baltimore City, the specific projects that Charles Halm cited were improvements in neighborhoods that are already predominantly African-American, rather than efforts to help any African-American public housing families move. *See* Trial Tr. 2087 (Halm).

c. The AFFH Certification and Analysis of Impediments.

HUD argued at trial that it imposes fair housing reporting requirements on recipients of block grant funds, and that by doing so HUD has met its obligation to promote fair housing throughout the Baltimore Region. *See* Trial Tr. 42 (HUD opening statement). The evidence shows, however, that HUD's procedures for reviewing grantees' fair housing planning and performance are inadequate to ensure that HUD meets its obligations under the Fair Housing Act and that HUD has not used its leverage to ensure that block grant funding promotes a regional approach to fair housing.

To receive HOME or CDBG grants, each grantee must develop and submit to HUD a planning document and funding application called the Consolidated Plan, or "Con Plan."[37] *See* SOF ¶ 158. The Con Plan is submitted every five years, with certain components re-submitted annually. *See id.* ¶¶ 159-61. Among the annual requirements is a certification that the grantee will affirmatively further fair housing. *Id.* ¶ 161. This certification (the "AFFH Certification")

[37]The Con Plan also serves as the application and planning document for other formula grant programs administered by the CPD Office at HUD. *See* 24 C.F.R. § 91.2(a), (b).

is defined to mean that the grantee "will conduct an analysis to identify impediments to fair housing choice within the jurisdiction,[38] take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard." 24 C.F.R. § 91.225(a)(1); *see* SOF ¶ 162.

Although HUD's role in reviewing the AFFH Certification gives HUD the *potential* to ensure that fair housing and desegregative goals are met through the use of block grant funds, HUD in practice has reduced the AFFH Certification and the fair housing planning process to mere exercises in paper submission. HUD field staff review Con Plan submissions in a perfunctory manner, simply using a checklist to ensure that the required contents are present, but conduct no substantive review of a grantee's plan. *See* SOF ¶ 163. A grantee's AFFH Certification is considered presumptively correct and is automatically approved in forty-five days. *Id.* ¶ 164. The AFFH Certification requires grantees to state that they have conducted an Analysis of Impediments, but HUD approves the Certification as long as the AI has been conducted at some point in the past – HUD currently takes the position that there is no requirement that grantees update their AI.[39] *Id.* ¶ 165. Remarkably, HUD does not review the Analysis of Impediments for sufficiency or even completeness – in fact, the Analysis of Impediments is not even submitted to HUD. *Id.* ¶¶ 166. And although the AFFH Certification requires the grantee to state that it will take appropriate actions to overcome impediments to fair housing, HUD sets no timelines for progress or performance in removing identified

[38]This analysis is referred to as the "Analysis of Impediments," or "AI."

[39]Not a single grantee within the Baltimore Region has submitted an updated Analysis of Impediments for nearly ten years – each grantee bases its annual AFFH Certification on the Analysis of Impediments jointly submitted in 1996. *See* SOF ¶ 171.

impediments.[40] *Id.* ¶ 167.

In the Baltimore Region, HUD's application of these procedures has allowed persistent noncompliance by grantees with fair housing requirements, with the result that the AFFH Certification process has *not* facilitated regional desegregation in Baltimore. All of the jurisdictions in the Baltimore Region that receive block grant funds collectively completed an Analysis of Impediments in 1996. *Id.* ¶ 170. The 1996 AI (which has not been updated, and therefore remains the operative Analysis of Impediments), specifically identified the problem of *de facto* racial segregation in public and assisted housing as an impediment to fair housing in the Baltimore Region. *See* SOF ¶¶ 171-72. Since that point, HUD officials have written dozens of intra-agency memos and letters to each of the Baltimore-area grantees, consistently noting that the Baltimore grantees have not taken adequate actions to address the impediment of public housing segregation (or to address any of the other impediments to fair housing).[41] *See* SOF ¶¶ 173-86 (identifying an extensive pattern of noncompliance by Baltimore Region grantees with fair housing requirements).[42] Nonetheless, and in the face of the Baltimore grantees' well-

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[40]HUD itself has repeatedly recognized that its guidance regarding fair housing reporting for block grant recipients is minimal and inadequate. *See* SOF ¶¶ 168-69.

[41]LaVerne Brooks, Director of the Fair Housing and Equal Opportunity Program Center in HUD's Baltimore field office, testified that the *only* action taken by any of the Baltimore grantees to address impediments identified in the 1996 AI as regional impediments to fair housing was to hold a symposium (last month, in April 2006) on discrimination in underwriting guidelines for homeowners' insurance. *See* SOF ¶ 187.

[42]To give just one egregious (but not unusual) example, HUD's recent review (in 2005) of Baltimore County's use of its CDBG funds listed a number of concerns with regard to whether Baltimore County was affirmatively furthering fair housing, including that the County did not identify *any* actions it took to remove identified impediments to fair housing; that the County did not describe actions taken to remove barriers to affordable housing for African-Americans; that the County was not keeping records on investments in minority areas; and that African-Americans and other minorities appeared to be excluded from the benefits of certain program activities. *See* SOF ¶ 185. Despite all of these findings, the review rates Baltimore

(continued...)

documented disregard for even the most basic of fair housing requirements, HUD has continued year after year to approve these grantees' Con Plan submissions, AFFH Certifications, and performance reports. *See* SOF ¶¶ 192-94.

HUD has available to it the authority to suspend or terminate payments to grantees, or to impose a range of graduated, intermediate sanctions, as a remedy for noncompliance with program requirements such as the AFFH Certification.[43] *See id.* ¶¶ 188-91. But HUD's witnesses testified that HUD has never sanctioned a jurisdiction for failure to affirmatively further fair housing, and has never disapproved a Certification for the grantee's failure to take actions to overcome impediments to fair housing. *See id.* ¶¶ 192-94. And although HUD has repeatedly found that the 1996 AI is out of date and should be replaced or revised, it has never required that the Baltimore Region grantees do so. *See id.* ¶¶ 195-97.

HUD recently stated that its leverage over local jurisdictions that receive block grant funds is a "powerful tool for fair housing." PX-691, HUD 2005 Budget Submission for CPD 3 ("The failure . . . to develop an analysis of impediments to fair housing or to take reasonable action to address such impediments may result in the denial or loss of . . . formula funds until compliance is secured. This is a powerful tool for fair housing."); Trial Tr. 1768-69 (Kennedy). Plaintiffs agree that in theory HUD has strong leverage to promote desegregation through the HOME and CDBG grants, but in practice HUD has failed ever to use that leverage. As a result (and as the preceding sections discussing the use of HOME and CDBG funds in the Baltimore

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[42](...continued)
County's annual performance "satisfactory." *Id.* The accompanying Statement of Facts identifies extensive additional evidence in the same vein. *See* SOF ¶¶ 173-86.

[43]This authority entails not HUD's discretion but its *obligation* to suspend grant payments for noncompliance. *See* 42 U.S.C. § 5311(a) (providing that if the Secretary of HUD finds a grantee in substantial noncompliance with any part of the CDBG program requirements, the Secretary "*shall*" terminate or reduce grant payments until the noncompliance is remedied).

Region confirm), the expenditure of HOME and CDBG funds in the Baltimore Region has failed to promote fair housing or provide desegregative housing opportunities for African-American public housing residents.

3. Project-Based Section 8 Housing.

HUD argued at trial that its funding of project-based Section 8 housing has promoted fair housing opportunities in the Baltimore Region.[44] *See* Trial Tr. 39 (HUD opening statement). This argument is without merit. HUD has confined its funding of new units to those that are wholly unavailable to African-American public housing families, while at the same time permitting the elimination of potentially desegregative housing from the assisted housing inventory.

HUD notes that during the Open Period, it funded 2,630 new project-based Section 8 units, of which 1,491 were located outside of Baltimore City. *See* SOF ¶ 199. As HUD's witness conceded at trial, however, *none* of these units were available for African-American public housing families – every single one was limited to elderly and disabled occupancy. *See id.* ¶¶ 200-01. HUD's actions with regard to funding new project-based Section 8 properties therefore have provided no desegregative opportunities for African-American residents of family public housing projects in Baltimore City.

In addition, the stock of project-based Section 8 units is declining steadily, at the rate of nearly 10,000 units nationally per year, with the loss of units most likely to occur in low-poverty neighborhoods. *Id.* ¶¶ 202-07. One cause of the decline is the expiration of long-term Section 8 contracts, after which the owner can "opt out" of the assisted housing inventory. *Id.* ¶ 204.

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[44]Through the project-based Section 8 program, HUD "contracts directly with private owners to provide housing at rents set at 30% of the actual incomes of the low-income households the owner promises to select as tenants." SOF ¶ 198.

HUD has the ability to affect opt-out decisions, but it gives no consideration to the fair housing impact when deciding whether to do so. *Id.* ¶¶ 208-09.

The process through which HUD influences whether project-based Section 8 housing units leave the assisted housing inventory is the Mark-to-Market Program ("M2M"), which enables HUD to adjust rents and restructure mortgages to preserve Section 8 properties as part of the affordable housing stock. *Id.* ¶ 210. But none of HUD's decisions with regard to the M2M process includes *any* assessment of the fair housing implications of preserving a property as affordable housing or retiring it from the housing stock. *Id.* ¶¶ 210-13.

Thus, during the Open Period, HUD has permitted family-eligible project-based Section 8 housing to be retired from the assisted housing stock in communities of opportunity in the Baltimore Region with no consideration for the negative effect on desegregation, while at the same time HUD has approved new project-based Section 8 developments that are wholly unavailable to be used as a desegregative resource. HUD's actions through the project-based Section 8 program, therefore, provide no basis for any claim that HUD has fulfilled its duty to further fair housing pursuant to § 3608(e)(5).

4. FHA Multi-Family Mortgage Insurance Programs.

HUD also argued at trial that its operation of the FHA mortgage insurance program has helped it meet the duty to further fair housing for Baltimore City public housing residents. But the evidence unequivocally shows that the FHA-insurance program has not been operated in the Baltimore Region with any consideration for the potential regional desegregation of Baltimore City public housing.

HUD's Office of Housing operates several programs that insure mortgages made by private lenders to help finance the construction, acquisition, or rehabilitation of multifamily

housing (that is, properties with more than five units). *See* SOF ¶ 214. HUD argued that during the Open Period, FHA mortgage insurance facilitated the development of approximately 8,400 housing units in the Baltimore Region. *See id.* ¶ 215. In fact, however, *none* of these units are affordable to public housing residents, or to other extremely low-income families, without a voucher. *Id.* ¶ 216. HUD does not require the owners of FHA-insured properties to accept vouchers, and HUD presented no evidence showing how many voucher users, if any, live in FHA-insured properties in the Baltimore Region. *Id.* ¶ 217.

In addition, there is no evidence – and HUD does not even assert – that FHA insurance was used as part of a strategy to provide desegregative housing opportunities to Baltimore City public housing residents. HUD's witness testified that the location of FHA-insured properties is determined by market demand, not by any consideration of desegregative potential or fair housing maximization. *Id.* ¶ 218. Testimony also confirms that HUD never has provided the Baltimore field office with any guidance or recommendations concerning the use of FHA mortgage insurance programs with the goal of providing housing opportunities for public housing residents outside areas of minority concentration. *Id.* ¶ 219.

Moreover, as with project-based Section 8 housing, the stock of FHA-insured properties in the Baltimore Region has been declining steadily over time. *See id.* ¶ 220. If an FHA-insured property defaults on its mortgage, HUD becomes the owner of that mortgage and makes decisions regarding the "disposition" of the property that can have fair housing impacts. *Id.* ¶¶ 221-22. The evidence shows that HUD does not consider the effect of its disposition decisions on the availability of potentially desegregative housing opportunities for public housing residents. *Id.* ¶ 223.

For these reasons, the FHA insurance program has failed to further the desegregation of

public housing in the Baltimore Region from 1989 to the present, and HUD's operation of the program has not involved even the merest consideration of desegregative approaches.

C. The Court's Finding of § 3608(e)(5) Liability Should Stand.

After the 2003 trial, this Court properly concluded that HUD had violated the Fair Housing Act. HUD returned for the remedy trial with the apparent strategy of presenting evidence of a number of unrelated, *ad hoc*, discontinued, or *de minimis* programs in the hope that the accumulation of this evidence somehow would persuade the Court that HUD took adequate steps to desegregate public housing pursuant to its § 3608(e)(5) obligation. For the reasons articulated above, none of the new arguments that HUD has raised should give this Court any pause in reaffirming its finding of § 3608(e)(5) liability.

III. Plaintiffs' Proposed Remedial Order Provides Appropriate Relief for Both a Statutory and Constitutional Violation.

A. Having Found Unlawful Activity, the Court Has Broad Remedial Power to Undo the Legacy of HUD's Statutory and Constitutional Violations.

This Court has very broad authority to order such relief as may be necessary to remedy a constitutional violation. *See Swann*, 402 U.S. at 15. As the Supreme Court has held:

> Our prior decisions counsel that in the event of a constitutional violation "all reasonable methods be available to formulate an effective remedy," and that every effort should be made by a federal court to employ those methods "to achieve the greatest possible degree of [relief], taking into account the practicalities of the situation."

Hills v. Gautreaux, 425 U.S. 284, 297 (quoting *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971), and *Davis v. Sch. Comm'rs of Mobile County*, 402 U.S. 33, 37 (1971)) (alteration in original); *see also Thompson* Summary Judgment Order, 2006 WL 581260, at *9-10.

Central to these remedial principles is the rule that the Court should make the victims of discrimination whole from the harm caused by the unlawful and unconstitutional conduct:

"[T]he remedy [for a constitutional wrong] is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley,* 418 U.S. 717, 746 (1974); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975) ("Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)) (alteration in original)).

This Court similarly has broad authority under the APA to remedy HUD's violation of the Fair Housing Act. Under § 706(2) of the APA, this Court can "hold unlawful and set aside" agency action or inaction that is arbitrary, capricious, or in excess of statutory authority. 5 U.S.C. § 706(2). As the Court has recognized, "in devising an appropriate remedy, the words 'set aside' need not be interpreted narrowly." *Thompson* Summary Judgment Order, 2006 WL 581260, at *9 (quoting *NAACP*, 817 F.2d at 160) (internal quotation marks omitted). Thus, although this Court may not intrude excessively upon HUD's administrative province, the Court retains its traditional equitable powers to "adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939); *see also, e.g.*, *Darst-Webbe Tenant Assoc. Bd. v. St. Louis Hous. Auth.*, 339 F.3d 702, 713-14 (8th Cir. 2003) ("If the district court determines that HUD abused its discretion, the district court has the authority to enjoin the use of HOPE VI grant funds or Section 108 loan guarantees until HUD satisfies the court that it has taken appropriate steps to affirmatively further fair housing."); *Thompson* Summary Judgment Order, 2006 WL 581260, at *10 & n.21 (citing cases).

In considering Plaintiffs' proposed remedies, described below and set out in detail in the

Proposed Remedial Order filed concurrently with this Brief, this Court should bear in mind the scope of the violations that the proposed remedy is intended to correct. *See, e.g.*, *Thompson*, 348 F. Supp. 2d at 408 ("Baltimore City should not be viewed as an island reservation for use as a container for all of the poor of a contiguous region . . . ."). Especially given this Court's previous finding that "absent judicial compulsion, [HUD] appears most unlikely [to meet its desegregative obligations] in the foreseeable future," *id.* at 464, this Court should do more than merely "order[] HUD to perform acts which would be required of it even absent a finding of past culpability." *NAACP v. Kemp*, 721 F. Supp. 361, 367 (D. Mass. 1989). Nor should this Court merely order HUD to use its own discretion to fashion a remedy. The D.C. Circuit, similarly faced with an agency that refused to live up to its legal duties, explained its obligation in fashioning a remedy as follows: "At some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough." *Pub. Citizen Health Research Group v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987).

Accordingly, to address the conditions created and perpetuated by HUD's course of conduct, this Court should order HUD to take specific steps and achieve specific outcomes necessary to remedy HUD's statutory and constitutional violations in the Baltimore Region. *See, e.g.*, *Ala. Ctr. for the Env't v. Browner,* 20 F.3d 981, 986 (9th Cir. 1994) ("In tailoring the relief granted, the district court correctly recognized that in order to bring about any progress toward achieving the congressional objectives of the [Clean Water Act], the EPA would have to be directed to take *specific steps*." (emphasis added)); *Santillan v. Gonzales*, 388 F. Supp. 2d 1065, 1085 (N.D. Cal. 2005) (requiring the agency to develop a specific process for providing relief to class members). This Court has recognized that "if HUD had, in fact, fulfilled its duty [to affirmatively further fair housing], HUD's actions would have tended to increase, or at least not

significantly decrease, the supply of open housing." *Thompson*, 348 F. Supp. 2d at 460. The Court therefore can and should order HUD to take specific actions necessary to undo the concentration of public housing in the Region's poorest, most racially segregated areas. *See Shannon*, 436 F.2d at 820-21. As described below, the provisions set forth in the Proposed Remedial Order are necessary for full relief from HUD's failure to desegregate public housing, and do not intrude unnecessarily upon HUD's province or require HUD to act outside its authority.

B. The Court Should Use its Broad Remedial Power to Order the Relief Contained in Plaintiffs' Proposed Remedial Order.

Plaintiffs have filed a Proposed Remedial Order that sets out the relief necessary and proper to remedy HUD's constitutional and statutory violations. The Proposed Remedial Order is tied to the facts of this case and the particular harm Plaintiffs have suffered. It also draws on the experience of prior housing desegregation remedies and the knowledge of the nation's foremost housing policy experts.

The Proposed Remedial Order contains the same principal elements as were included in the *Gautreaux* remedial order, but builds on lessons learned from that case. *See Gautreaux v. Landrieu*, 523 F. Supp. 665, 672-83 (N.D. Ill. 1981). Those principal elements include that HUD provide a fixed number of desegregative housing opportunities; that HUD use vouchers with effective mobility counseling and locational targets as one of the primary mechanisms for creating those housing opportunities; that HUD provide that a single entity administer the remedial voucher program regionally; and that HUD facilitate the expansion of housing opportunities through the use of federal program funds for the construction or rehabilitation of a certain number of hard units. *See id.* at 673-76 (Order ¶¶ 2.3, 2.4, 5.1, 5.4, 5.5).

The experts for both parties in this case are in substantial agreement that, of all the

available models of relief on which this Court might rely, *Gautreaux* offers the best model of success in effectively providing desegregative housing opportunities. Not only do Plaintiffs' experts rely upon lessons drawn from *Gautreaux*, but a number of HUD's experts – most particularly Profs. William Rohe and Peter Schuck – acknowledge that *Gautreaux* is a positive model. Prof. Rohe pointed to *Gautreaux* as a successful model for moving families out of segregated public housing. *See* FDR-5, Rohe Written Test. 4-5. Prof. Schuck described the *Gautreaux* results as "encouraging," and he has written that *Gautreaux* "improved housing opportunities for thousands of low income minority families . . . [w]ho now enjoy some of the hoped-for social, economic and educational benefits of integration." Trial Tr. 1926 (Schuck). In a recent book chapter that examines housing desegregation remedies, Prof. Schuck discusses problems with the remedy from the *Yonkers* litigation and writes: "We must go on to ask whether . . . Judge Sand could have fashioned a more promising remedy. *Gautreaux* suggests an affirmative answer." Peter H. Schuck, *Diversity in America* 259 (2003); *see also id.* at 227 ("Of our three case studies, the only one that seems to have succeeded in moving a significant number of blacks to previously white suburbs is *Gautreaux* . . . [which] employed a very different approach to integrating minorities into white suburbs than did *Mount Laurel* or *Yonkers*. In doing so, it seems to have succeeded where the others failed."); *see also* SOF ¶¶ 306-08.

In addition to the remedial provisions just noted, Plaintiffs' Proposed Remedial Order also includes changes to HUD's decisionmaking processes to ensure that HUD's constitutional and statutory fair housing obligations are properly considered. These proposals draw on this Court's request for evidence regarding process-related remedies, on the examples of other housing desegregation remedies that have successfully included such changes, and on the experiences of Plaintiffs' expert witnesses.

1. The Court Should Order HUD to Provide 9,000 Desegregative Housing Opportunities to Remedy its Unlawful Conduct.

Plaintiffs' Proposed Remedial Order includes the requirement that HUD provide 9,000 desegregative housing opportunities – the number necessary to make whole the victims of its unlawful and unconstitutional discrimination. *See* Proposed Remedial Order § IV.A.

The requirement that HUD provide remedial housing opportunities is directly tied to the nature and scope of HUD's liability in this case. By failing to implement its various housing programs in a way that achieved desegregation of public housing in the Baltimore Region, HUD violated its constitutional obligation to disestablish the vestiges of past intentional discrimination and its statutory obligation to take a regional approach to affirmatively furthering fair housing. The result of these violations is that African-American public housing residents have been restricted to impoverished black neighborhoods and deprived of the opportunity to live in non-segregated areas. The extensive and serious harms to African-American public housing residents that have resulted from that segregation include deprivation of the opportunity to seek better living environments by selecting neighborhoods that were not racially segregated and that offered better opportunities for education, employment, and safety for themselves and their families.

Compliance with the Fifth Amendment requires *effective* dismantling of the vestiges of the prior system. *Brinkman*, 443 U.S. at 538. Compliance with the Fair Housing Act similarly requires that HUD take actions that increase the supply of genuinely open, integrated housing. *Thompson*, 348 F. Supp. 2d at 458 (citing *NAACP*, 817 F.2d at 156). The only effective remedy to the unconstitutional segregation of African-American public housing residents in Baltimore City ghettos is the creation of desegregative housing opportunities for those residents, in communities of opportunity throughout the Baltimore Region, in numbers equivalent to what

would have been created in the absence of racial discrimination.

Housing desegregation case law supports Plaintiffs' proposal for outcome-based remedies through the creation of desegregative housing opportunities. The *Gautreaux* remedy in Chicago included the requirement that HUD provide to class members a fixed number of assisted housing units (in that case, 7,100 units) in desegregative areas as a way of eliminating the vestiges of HUD's discrimination. *See Gautreaux*, 523 F. Supp. at 669, 674 (Order ¶ 5.1). The remedial order in *Young v. Cisneros*, regarding housing segregation in a thirty-six county area in East Texas, included the same requirement: "Within seven years from the date of this judgment and decree, HUD shall create a total of 5,134 desegregated housing opportunities for . . . class members in non-minority census blocks in the class action area." *Young v. Cisneros*, No. P-80-8-CA, at 7 (¶ II.1) (E.D. Tex. Mar. 30, 1995) (Final Judgment and Decree) [hereinafter *Young* 1995 Final Judgment]. And the remedial order in *Walker v. HUD*, regarding housing segregation in Dallas, required HUD to create a number of units in desegregative areas as would be comparable to the number of units of segregated public housing then being demolished. *Walker* 1997 Remedial Order, at 2 (¶ A.2). The *Walker* order further required HUD to request that suburban jurisdictions enter into cooperation agreements for the development of additional suburban public housing units. *Id.* at 2-3 (¶¶ A.3-.5).

The requirement that HUD create desegregative housing opportunities is supported not only by Plaintiffs' expert witnesses, *see* Trial Tr. 90-94 (Khadduri); Trial Tr. 170 (Turner); Trial Tr. 291 (powell); SOF ¶¶ 257-58; but by Federal Defendants' expert witnesses as well. Prof. Schuck testified that outcome measures are an appropriate part of remedies for this type of harm, and stated that "[o]ther things being equal, one would prefer to assess a program on the basis of outcomes rather than on the basis of processes." Trial Tr. 1915 (Schuck) (agreeing that possible

outcome remedies might include the creation of housing opportunities through vouchers or hard units). Prof. Rohe, though proposing a smaller number than Plaintiffs believe appropriate, nonetheless presented a specific figure of desegregative opportunities that he suggests the Court should consider. SOF ¶ 257.

In determining the number of desegregative housing opportunities necessary to remedy HUD's discrimination in this case, Plaintiffs relied on the bedrock remedial principle that victims of discrimination must be restored to the position they would have occupied absent discrimination (discussed in Part III.A above). As Dr. Khadduri explained in detail in her expert report and trial testimony, it is reasonable to assume that, but for HUD's discrimination, housing opportunities for public housing residents in the Baltimore Region would have mirrored rental opportunities for families of limited means on the private rental market. *See* PX-765, Khadduri Written Test., at rebuttal 1-2 ("Instead of building (and retaining) public housing in high-poverty, high-minority locations, HUD policies, *at the very least*, should have created housing opportunities in the suburbs to the same extent that unassisted low-income renter families live there."); Trial Tr. 90-94 (Khadduri). HUD's own documents support this approach, referring to the "principle that assisted families should have the same ability to choose the neighborhood . . . in which they will live that non-assisted families have." PX-35, Kaplan Memorandum 1 (Sept. 16, 1991).

Comparing the City-to-suburb distribution of public housing units to that of unassisted rental units occupied by families of limited means, Dr. Khadduri calculated that it would require the creation of approximately 9,000 desegregative units for public housing residents to have the same ability to choose their neighborhood that unassisted families have always had. PX-765, Khadduri Written Test., at rebuttal 1-2. By looking only at the distribution of unassisted renter

families with incomes below 80% of the area median income, Dr. Khadduri's analysis avoids making the unrealistic assumption that public housing families could have chosen to live in extremely-high-cost neighborhoods. And, Plaintiffs' proposal provides ten years for HUD to accomplish this requirement, which takes account of HUD's capacity to create these units and results in a final figure of 900 desegregative units per year.[45]

As discussed below, these units should be created through a combination of remedial vouchers and hard units, with mobility counseling and locational targets to ensure desegregative value.

2. The Court Should Order HUD to Provide Remedial Vouchers as One Component of the Desegregative Housing Opportunities.

Plaintiffs propose that HUD be ordered to provide remedial vouchers for the Baltimore Region in partial fulfillment of the 9,000-unit requirement discussed above. Plaintiffs further propose that HUD be required to provide effective mobility counseling to help class members locate housing in, and move to, communities of opportunity. *See* Proposed Remedial Order §§ IV.D, IV.E.

Vouchers are a common element of similar remedial decrees. *See Gautreaux*, 523 F. Supp. at 675 (Order ¶ 5.4); *see also Walker* 1997 Remedial Order 3-5 (¶ A.6); *Young* 1995 Final Judgment 7-12. The experts testifying in this case agree that vouchers are a potentially powerful

[45]The testimony presented at trial generally referred to the provision of 675 units per year over ten years, for a total of 6,750 desegregative units. The difference between the 6,750 units referred to at trial and the 9,000 units referred to here comes from subtracting the 2,253 non-impacted units required by the Partial Consent Decree in this case. The Decree provides that in any future remedial order, HUD is to get credit for desegregative units successfully created under the Decree. *See* PCD § 10.7. Assuming full compliance with the Decree, HUD's obligation under the Proposed Remedial Order would be reduced from 9,000 desegregative units to 6,750 desegregative units. To date, approximately 800 units have been leased in non-impacted areas pursuant to the Decree.

tool for expanding regional housing opportunities. *See* SOF ¶¶ 262. In addition, as discussed in Part III.E.2 below, ongoing activity in HUD's public and assisted housing programs will result in the conversion of hundreds, if not thousands, of hard units to vouchers over the next decade, *see* SOF ¶¶ 335-40; meaning that a voucher-based remedy can take advantage of this resource that will already be coming available.

As presently operated, however, the Section 8 voucher program does not include the elements necessary to make vouchers an effective desegregative tool. The evidence discussed in detail in Part II.B.1 above shows that there are serious administrative, informational, and other obstacles to effective desegregative voucher use. For these reasons, the Proposed Remedial Order requires that the remedial vouchers (a) be combined with effective mobility counseling, (b) be targeted to "communities of opportunity," and (c) be administered Region-wide by a single entity. These requirements are discussed in turn below.

a. Vouchers Must Be Combined With Mobility Counseling In Order to Serve as an Effective Desegregation Tool.

Competent mobility counseling is necessary for a voucher program effectively to provide desegregative opportunities. *See* SOF ¶¶ 264-73. Dr. Khadduri testified that mobility counseling programs can be extremely effective in helping public-housing families know what their opportunities are for renting housing in good neighborhoods, and to make those opportunities effective by actually persuading owners of rental housing in good neighborhoods to rent to such families. Trial Tr. 86 (Khadduri). She further testified that without mobility counseling, "the usual administration of the voucher system tends to result in families taking, and in housing authorities taking, the line of least resistance as far as where people go and use their vouchers." Trial Tr. 2687 (Khadduri).

HUD's experts are in general agreement on this point. *See* SOF ¶¶ 272. For example,

Prof. Rohe testified that "families need counseling in order to help them find units," that mobility counseling "should educate and expose families to the available housing options while helping families realize where they want to live," and that "the quality of the counseling has a big impact on families' ability to move." Trial Tr. 2542-43 (Rohe). Prof. Schuck agreed that "effective mobility counseling is a good thing." Trial Tr. 1915 (Schuck). And HUD's own documents note the need for intensive mobility counseling to enable inner-city families to pursue opportunities outside their own neighborhoods. SOF ¶ 265.

In addition, a number of fact witnesses testified powerfully to the difficulty they experienced in trying to find suitable housing with a voucher but without any mobility assistance. Isaac Neal explained that when he first received a Section 8 certificate, he was not given any information about where he could use it, and that he found a rental unit by walking up Fayette Street East until he found an available apartment on Montford Avenue. *See* Trial Tr. 2664-65 (Neal). Asked to describe what living on Montford Avenue was like, Mr. Neal answered: "Hell. It was a lot of drugs. There were shootings in front of my house . . . . Drugs, prostitution, fights." *Id.* at 2655. Mary Leighton, a class member who testified at the liability trial in 2003, explained how it felt to search for housing on a voucher by saying, "I was like homeless with a voucher. I had a voucher but I couldn't find a place to go." Liability Trial Tr. 640 (Leighton).

Those witnesses and others also testified to the opportunities that mobility counseling opened up to them. Mr. Neal testified that he had never heard of the Mt. Washington neighborhood until taken there by his mobility counselor. Trial Tr. 2657 (Neal). Doreen Brooks testified that she had not planned to move out of Baltimore City until the idea was suggested by a mobility counselor and that "I didn't believe places like [her new apartment in Baltimore

County] existed." Trial Tr. 444 (Brooks). Michelle Robinson testified that, after searching unsuccessfully on her own, her mobility counselor took her on a tour that led, within three or four weeks, to a "beautiful" apartment complex in Columbia. Trial Tr. 892-95 (Robinson); *see also* SOF ¶ 273.

Case law supports the use of mobility counseling as part of the remedy. Numerous housing desegregation cases have required HUD to provide specific mobility counseling services while preserving HUD's discretion in the selection of the mobility counseling agency. *See Walker* 1997 Remedial Order 14 (¶ C.1) (requiring HUD to fund mobility counseling services to be provided by local PHA or nonprofit organization); *Young* 1995 Final Judgment 17 (requiring HUD to issue a request for proposals for nonprofit organizations to provide specified mobility counseling services).

Housing experts, courts, and even HUD agree that mobility counseling is integral to furthering open housing. Plaintiffs' Proposed Remedial Order requires HUD to fulfill this key part of its statutory and constitutional duty while retaining HUD's discretion over the process to the fullest extent possible.

b. The Court Should Order that Vouchers be Targeted to Communities of Opportunity.

The Proposed Remedial Order also requires that HUD satisfy its remedial obligations through the placement of voucher holders in communities of opportunity.[46] *See* Proposed Remedial Order § IV.D.4.

Substantial evidence supports the Court including locational targets as part of the

[46] The Proposed Remedial Order uses the definition of communities of opportunity created by Prof. john powell, and based on economic opportunity, educational opportunity, and neighborhood stability. *See* Proposed Remedial Order § I.D; PX-766, powell Written Test. 3, 50-52.

remedy. For example, Dr. Briggs testified that locational targets are a choice-enhancing component to a voucher program, and explained that providing remedial vouchers in opportunity areas "should be understood as expanding people's choices . . . and enabling them . . . to exercise the choices in meaningful ways that actually deliver opportunity-rich communities, not just the promise of those opportunities." Trial Tr. 1024 (Briggs). Others of Plaintiffs' experts testified to the importance of locational targets.[47] *See* SOF ¶ 274.

Several of HUD's experts acknowledged the effectiveness of locational targets. Prof. Rohe testified that the use of vouchers under the current system, without locational targets and without mobility counseling, has resulted in the clustering of voucher holders in low income, high minority census tracts in Baltimore. *See* Trial Tr. 2545 (Rohe). Prof. Olsen similarly testified that the voucher program, as currently configured, "do[es] not greatly desegregate," *see* Trial Tr. 1804-05 (Olsen), and that locational targets would increase the number of blacks living in desegregated areas, *see id.* at 1845, 1850. Dr. Shroder testified that "the path of least resistance" is for African-American families to end up in highly segregated neighborhoods. Trial Tr. 2135 (Shroder). And Prof. Schuck acknowledged that *Gautreaux* "improved housing

[47]The record is replete with evidence that neighborhoods matter for life chances and that living in neighborhoods of concentrated poverty undermines people's well-being. *See* SOF ¶¶ 274-78, 291, 306-13. Plaintiffs' expert Prof. Stefanie DeLuca testified that the *Gautreaux* results show that moving low-income minority families to better neighborhoods has a powerful effect on life chances. *See id.* ¶ 307. The personal experiences of Plaintiffs' fact witnesses bear out this conclusion: Witnesses who received a voucher under the Partial Consent Decree testified to the positive impact of moving from poor neighborhoods in inner-city Baltimore to suburban communities. *See, e.g.*, Trial Tr. 450 (D. Brooks) ("I love what's going on in, where I live . . . . It's a wonderful place . . . . I feel good about myself. I feel good about the community I call home."); Trial Tr. 901-02 (Robinson) ("I feel more freer and more relaxed here in Columbia. It's given me a whole different way of looking at life . . . . [I]t gives me a sign of hope."); Trial Tr. 566 (Dickey) ("It's just a whole another experience, the neighbors, living in the nice apartment, I mean, I have – I love my apartment, compared to where I was living. The people and it motivates me to want more, you know. I'm currently working, I have two jobs, and I have a car. It's like things is just working out.").

opportunities for thousands of low income families" and that one of the mechanisms used was targeted voucher use in predominantly white neighborhoods. Trial Tr. 1913, 1926 (Schuck); *see also* SOF ¶¶ 279-85.

As noted above, the result of HUD's unlawful and unconstitutional conduct is that African-American public housing residents have been restricted to impoverished black neighborhoods and deprived of the opportunity to live in non-segregated areas, with the concomitant deprivation of the opportunity to live in racially integrated neighborhoods with better educational and employment opportunities and lower crime. One way to remedy HUD's violations is to create opportunities for Plaintiffs to live in white, non-poor neighborhoods, with the incidental benefit of giving them access to better schools, jobs, and safety. The Supreme Court has stated that race-neutral remedies are preferred where possible, even as redress for race-based discrimination, and that the "efficacy of alternative remedies" is one of the factors to be considered in determining whether race-conscious remedies are appropriate. *United States v. Paradise*, 480 U.S. 149, 171 (1987).

Plaintiffs believe that such an alternative remedy can be effective here, and have therefore not defined opportunity neighborhoods based on race. By using Prof. powell's "communities of opportunity" approach, a race-neutral means can be used to cure the segregation of Baltimore City public housing. Professor powell's communities of opportunity approach uses sophisticated spatial mapping to define race-neutral opportunity areas based on educational and employment opportunities, public safety, and other factors that correspond with the benefits Plaintiffs have been denied.[48] At the same time, although opportunity

[48]Although Prof. powell testified at trial that the remedy should be race-conscious, he did not mean by this that his identification of communities of opportunity was based on race. *See* (continued...)

neighborhoods are not defined based on race, the vast majority of such neighborhoods are in fact located in predominantly white census tracts – which means that the proposed locational targets will serve the necessary and desired desegregative effect. A recent decision from the Fifth Circuit has affirmed this approach to crafting race-neutral remedies for housing segregation. *See Walker v. City of Mesquite*, 402 F.3d 532, 534-36 (5th Cir. 2005).

Failure to target opportunity neighborhoods will result in moves that do not desegregate public housing, but rather re-create pockets of segregation in other communities.[49] A remedy should not move public housing families out of ghettos and into older, vulnerable suburbs that are already under stress, because doing so might well result in new concentrations of poverty, thus negating the remedy altogether. A sensible, preventative approach, as proposed by the Plaintiffs, will result in the distribution of public housing families throughout the Baltimore Region in strong neighborhoods – neighborhoods that will not be harmed by the small number of public housing families moving in and that can offer resources to benefit those families.

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[48](...continued)
Trial Tr. 354 (powell) (stating that race was not one of the fourteen factors he considered in identifying opportunity areas); *see also* PX-766, powell Written Test. 29-33. Prof. powell's testimony makes clear that his use of the term "race-conscious" to describe the remedy referred to the necessity of being able to assess the effectiveness of the remedy, and to the importance of ensuring that the remedy did not result in resegregation. *See id.* at i-ii; Trial Tr. 309-12. This Court recognized at trial that although the remedy can be race-neutral in its definition of opportunity neighborhoods, it is not and cannot be race-neutral in a broader sense. Trial Tr. 349 ("[I]n this case, how can anything be race-neutral? The class is defined with regard to race.") (Judge Garbis).

[49]Permitting HUD to satisfy its obligations by providing vouchers to African-American families who then move to neighborhoods with a high concentration of African-Americans would be analogous to permitting an employer who has discriminated against African-American employees in promotional opportunities to satisfy its obligations to remedy past discrimination by offering lateral transfers, rather than promotions, to affected class members. Lateral transfers do not remedy discrimination in promotions, just as moving from one segregated neighborhood to another does not remedy housing segregation. Both frustrate the remedial purposes of the civil rights laws and the Constitution by failing to remedy the wrong.

The proposed locational targets are consistent with the underlying purposes of the Fifth Amendment, Fair Housing Act, and national housing policy, and will provide class members with what should have been theirs all along.[50] The evidence discussed above in Part II.B.1.a shows that white voucher holders typically obtain rental units in low-poverty neighborhoods scattered throughout the metropolitan area, in contrast to the experience of African-American voucher holders, who are currently concentrated in high-poverty neighborhoods in Baltimore City. The creation of housing opportunities for class members in communities of opportunity would balance out the existing, segregated locations, thereby effectuating the goals established for HUD by Congress and effectively remedying HUD's constitutional and statutory violations in this case.[51]

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[50]Federal housing policy directly supports the creation of housing in communities of opportunity, although that policy frequently has not delivered on its goal. Federal public housing law requires the deconcentration of poverty in public and assisted housing. The "primary objective" of the CDBG 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." 42 U.S.C. § 5301(c). The goals of the HOME program are "to increase the Nation's supply of decent housing that is affordable to low-income and moderate-income families and accessible to job opportunities" and "to improve housing opportunities for . . . members of disadvantaged minorities. *Id.* § 12702. The purposes of HOPE VI are to "provid[e] housing that will avoid or decrease the concentration of very low-income families" and "build[] sustainable communities." *Id.* § 1437v(a).

HUD's own regulations recognize the importance of the principles that inform Prof. powell's communities of opportunity approach. Numerous regulations recognize that the development of assisted housing must promote greater choice of housing opportunities; avoid concentration of assisted persons; provide access to social, recreational, educational, commercial, and health facilities that are at least equivalent to those typically found in neighborhoods consisting of unassisted housing; and be located where a range of jobs are accessible to residents. *See, e.g.*, 24 C.F.R. § 941.202 (public housing); *id.* § 983.57 (project-based vouchers).

[51]The locational targets Plaintiffs propose do not render participation involuntary, or otherwise limit class members' choice. Under Plaintiffs' proposal, remedial vouchers would be distinct from other vouchers, and a class member could choose whether or not to participate in the remedial voucher program. And, although remedial vouchers could only be used in communities of opportunity, a class member would not lose his or her place on a waiting list by

(continued...)

Beyond its importance in providing an effective remedy, there are a number of reasons to support the use of locational targeting in this case. First, interest in moving to targeted communities of opportunity remains high. In both the *Gautreaux* and MTO programs, demand far exceeded the availability of locationally targeted vouchers for participant families. *See* SOF ¶¶ 288-94. Second, locational targeting would permit HUD to monitor the desegregative moves that take place under the decree to assure that voucher reconcentration does not occur. In addition to Plaintiffs' experts, Prof. Rohe acknowledged both the risk of voucher reconcentration (whether in predominantly African-American neighborhoods or elsewhere) and the fact that locational targeting is a means of limiting that risk. *See* Trial Tr. 2545 (Rohe); *see also* SOF ¶¶ 279-85. Finally, receiving communities are best served by locational targets and monitoring to avoid reconcentration. Prof. Briggs cited a number of studies, including HUD-sponsored research, showing that the presence of voucher users in healthy neighborhoods does not undermine property values as long as voucher use is not overly clustered. *See* PX-764, Briggs Written Test. 26-27.

c. The Court Should Order Regional Administration of the Remedial Vouchers.

Plaintiffs have also asked this Court to order HUD to provide for the regional administration of vouchers through the selection of a single entity to administer the vouchers on a regional basis. *See* Proposed Remedial Order §§ IV.D, IV.E; *see also* Trial Tr. 82-83 (Khadduri). The vouchers would be administered regionally to facilitate their use across jurisdictional boundaries, avoiding the cumbersome portability procedures described in detail in Part II.B.1.b above.

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[51](...continued)
applying for a remedial voucher. *See* Proposed Remedial Order § IV.D.9.

Because vouchers are a key source of federal housing assistance, the regional administration of the vouchers is an essential part of requiring HUD to remedy segregation in a way that effectively increases the supply of open housing. In its 2005 Liability Order, the Court recognized that Section 8 vouchers as currently administered are inadequate to advance the cause of desegregation. *See Thompson*, 348 F. Supp. 2d at 460. Because of mismanaged voucher administration, procedural and informational constraints on voucher portability, and the Baltimore Region's tight housing market, African-American voucher-holders are currently denied access to housing in communities of opportunity outside Baltimore City. *See* Part II.B.1 above. This perpetuation of the vestiges of segregation is exacerbated by the fact that vouchers have been HUD's primary new source of federal housing assistance. *See Thompson*, 348 F. Supp. 2d at 460 (noting that "any increase in federally-assisted housing opportunities during the 1990s came as a result of the Section 8 voucher/certificate program"). The Proposed Remedial Order requires HUD to exercise its control over vouchers in a way that fulfills its statutory and constitutional duty to further open, integrated housing.

As noted above, significant practical barriers frustrate the portability policy contained within the current voucher program. The multiplicity of jurisdictions adds layers of decisionmaking and processing that limit opportunities of voucher holders to lease up successfully. *See* Part II.B.1.b above.

A number of experts called both by Plaintiffs and HUD testified that a regionally administered housing voucher program can more effectively help families move to opportunity-rich neighborhoods. Plaintiffs' experts testified that regional administration would eliminate some of the administrative obstacles that impede voucher portability. *See* SOF ¶¶ 297, 299. HUD's expert Dr. Rohe similarly testified that any voucher components to a remedial order

should be administered by a regional agency. *See* Trial Tr. 2542 (Rohe). And Dr. Shroder agreed that, given HABC's history with respect to voucher management, selection of a regional administrator for a remedial voucher plan would be reasonable. *See* Trial Tr. 2166 (Shroder).

Regional administration of vouchers is well-established elsewhere. Some states administer vouchers across entire states or regions. *See* Trial Tr. 165-66 (Turner). Some central city public housing authorities have expanded their voucher administration to encompass all or much of their metropolitan regions. *See* SOF ¶¶ 301-05. In Massachusetts, for example, nine regional subcontractors administer a statewide Section 8 program. *See* SOF ¶ 303.

This Court has the legal authority to order such relief, and administration of vouchers by an alternate entity is fully consistent with precedent in similar housing desegregation orders. The *Gautreaux* voucher program was regionally administered by a Chicago nonprofit, the Leadership Council for Metropolitan Open Communities. *See Gautreaux*, 523 F. Supp. at 669, 673, 675 (Order ¶¶ 2.6, 5.4). The remedial order in the *Young* housing litigation also ordered HUD to establish and fund a "Fair Housing Services Center" to administer desegregative Section 8 housing vouchers. *See Young* 1995 Final Judgment 16-17. And in Baltimore, the settlement vouchers and mobility program operated pursuant to the PCD in the instant case are regionally administered by Metropolitan Baltimore Quadel. *See* PX-764, Briggs Written Test. 29.

In addition to being supported by judicial precedent, regional voucher administration is well within HUD's statutory authority. Under applicable federal statutes and regulations, where HUD determines a PHA is unwilling to implement a voucher program or where a PHA is unable to perform effectively, HUD itself can administer the voucher program or contract with another

entity to do so.[52] In this case, the findings by this Court, and by HUD itself, demonstrate that HABC is unable to implement or effectively administer a Section 8 voucher program. Any voucher remedy administered by HABC would inevitably be undermined by the poor reputation and credibility of HABC's Section 8 program, as well as the reality that HABC is barely able to operate a functional local program, much less one that is regional in scope.

This Court should direct HUD to select, through open competition, a nonprofit contractor (such as Quadel) to administer the regional vouchers – either directly or as a contractor of one of the Region's PHAs. Under state law, housing authorities in Maryland have statewide "areas of operation" respecting administration of voucher programs. *See* Md. Code art. 44A, § 1-103(b).[53] These provisions allow PHAs in Maryland to operate a regional voucher program outside their own boundaries. *See* PX-723, Letter from Maryland Office of the Attorney General to HABC (interpreting the definition of a PHA's "area of operation" under the State Housing Authorities Law).

3. The Court Should Order HUD to Provide a Minimum Number of Hard Units as a Component of the Desegregative Housing Opportunities.

As part of the requirement that HUD create remedial desegregative units in communities

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[52] *See* 42 U.S.C. §§ 1437a(b)(6)(B)(iii), 1437f(b)(1); *see also* 24 C.F.R. § 982.160. Where a PHA does not comply with the federal laws and regulations that are conditions of its funding contract, HUD may solicit proposals and select an entity to administer the programs operated by the PHA. *Id.* § 1437d(j)(3)(A)(i); 24 C.F.R. §§ 901.215, 902.83. In addition, HUD has the authority to place a mismanaged PHA under administrative receivership and hire a contractor to administer the PHA's program. *Id.* § 1437d(j)(3)(A)(iv); 24 C.F.R. §§ 901.230, 902.77; *see also* PX-445, GAO Report, Information on Receiverships at Public Housing Authorities (Feb. 2003).

[53] Those statewide areas are created by statutory provisions that create exceptions to the usual city or county limits on a PHA's areas of operation for "[t]he administration of rent subsidy payments and housing assistance programs for both eligible landlords and tenants." Md. Code art. 44A, § 1-103(b).

of opportunity, Plaintiffs' Proposed Remedial Order includes the requirement that at least a certain portion of the total be hard units. *See* Proposed Remedial Order § IV.B. Because they provide access to areas where vouchers are less effective due to high rents, lack of rental housing, or discrimination, hard units are an important part of fair housing remedies. *See* SOF ¶¶ 314-15.

Undisputed evidence establishes that it is difficult for some households, particularly larger families, to find rental units with owners willing to rent to voucher holders. *See* SOF ¶ 316. HUD's own research has shown the lack of sufficient rental units for larger families. That research shows that "more than half of the . . . extremely-low-income families who needed three or more bedrooms had fewer bedrooms than they needed. And even fewer of the extremely-low-income families needing large units had ones that were both affordable and large enough." PX-898, HUD, Trends in Worst-Case Needs for Housing, 1978-1999, at 53 (Dec. 2003); *see also* Trial Tr. 2147-48 (Shroder); 69 Fed. Reg. 48,040, 48,042 (Aug. 6, 2004) (noting that families who need three or more bedrooms have the most difficulty leasing).

The evidence is undisputed that there are, and will continue to be, existing resources available for construction or rehabilitation of hard units under federal housing programs, including the HOME and Low Income Housing Tax Credit ("LIHTC") programs. *See* SOF ¶¶ 321-32. The HOME Program is funded with ongoing congressional support at almost two billion dollars (nationally) a year, and provides a major potential resource to expand regional opportunities in Baltimore through the creation of hard units. *See* Trial Tr. 70 (Khadduri). The LIHTC program also can be used to create hard units in the Baltimore region accessible to voucher holders. *See id.* at 66 (Khadduri). HUD data shows that three- and four-bedroom units have been constructed under the LIHTC program in communities of opportunity in the Baltimore

Region. *See* SOF ¶ 323. Although the number of three and four-bedroom units created has been relatively low, the fact that some have been constructed even without HUD's encouragement shows the feasibility of such construction. *See id.*

Creating hard units is consistent with the finding, made by this Court, HUD, and the experts, that vouchers alone are inadequate to achieve desegregation in the Baltimore Region. *See Thompson*, 348 F. Supp. 2d at 460 ("HUD itself recognized that one of the 'lessons learned' from its HOPE VI program is that housing vouchers are not viable replacement housing options in tight housing markets like Baltimore," and noting that Section 8 vouchers alone are inadequate to advance desegregation); *Replacement Housing Factor in Modernization Funding*, 63 Fed. Reg. 46,104 (Aug. 28, 1998) ("With respect to the creation of 'hard replacement units' as opposed to tenant based assistance, [HUD] believes both approaches should be used.").

Plaintiffs' proposal that one-third of the annual desegregative housing opportunities be created in the form of hard units is modest and reasonable in light of resources available to HUD and its grantees in the Baltimore Region. HUD has not contested the availability of funds. Instead, HUD claims that exclusionary zoning and NIMBY-ism make it difficult to develop affordable housing in communities of opportunity. To the extent there are barriers to construction of these units, they are barriers that HUD itself recognizes should be eliminated as part of a jurisdiction's obligation to affirmatively further fair housing. *See* FDR-171, Fair Housing Planning Guide, at 5-6 to 5-8 (setting out a menu of actions that local jurisdictions can and should undertake to address zoning barriers that make it difficult to develop affordable housing). Moreover, hard units need not be developed through new construction. Acquisition and rehabilitation of existing apartments or homes is not subject to zoning approval. Finally, it is precisely in those situations where affordable rental units are scarce or have been excluded

altogether that federal incentives and fair housing enforcement are needed to assure that discriminatory barriers to the production of affordable rental housing can be overcome.

No evidence in the record would justify relieving HUD of its obligations to ensure that a reasonable portion of the hard units developed in the Baltimore Region with federal funds are sited in communities of opportunity and that Baltimore's African-American public housing families are afforded access to them. If HUD encounters insurmountable problems after good faith efforts to develop the required number of hard units in any given year, it may present specific evidence to the Court of those difficulties and request appropriate relief.

4. The Court Should Also Require Development of a Housing Desegregation Plan and Changes to HUD Decisionmaking.

Plaintiffs have also proposed changes to HUD processes and decisionmaking as they relate to programs that have the potential to enhance regional housing opportunities. Plaintiffs have done so by (1) proposing that HUD develop an Affordable Housing Desegregation Plan ("Plan") for the Baltimore Region and (2) proposing specific changes in HUD's decisionmaking with respect to those programs. *See* Proposed Remedial Order §§ II.A, III.

a. The Affordable Housing Desegregation Plan.

In the proposed Plan, HUD would set out its goals for increasing the supply of desegregative public and assisted housing in the Region, the points in its decisionmaking processes at which these goals will be considered, the actions HUD will take to achieve these goals, and the performance standards and outcome measures that will be used to track HUD's progress. This part of the remedy flows directly from HUD's liability in this case. In its decision in the liability phase, the Court found:

> HUD must take an approach to its obligation to promote fair housing that adequately considers the entire Baltimore Region. The need for such consideration requires, at a minimum, that HUD

> "assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase the supply."

Thompson, 348 F. Supp. 2d at 458 (quoting *NAACP*, 817 F.2d at 156). The Plan requires HUD to explain how it will assess its decisionmaking processes and use its control of federal resources to increase the supply of genuinely open housing throughout the entire Baltimore Region. *See* SOF ¶¶ 345-79. The requirement that HUD develop the Plan incorporates the benefit of HUD's expertise and retains HUD's discretion wherever possible.

The evidence overwhelmingly supports the need for such a planning requirement: As discussed at length in Part II.B above (and in the accompanying facts), HUD's witnesses revealed a litany of key decisions, with profound impacts on low-income African-Americans, in which HUD systematically failed to consider whether its decisions would have adverse fair housing implications. And this type of annual planning process is certainly familiar to HUD, in that it is similar to the requirements that HUD itself imposes on recipients of HUD funds. *See, e.g.*, 24 C.F.R. § 91.225(a)(1) (Con Plan requirements for CDBG and HOME grantees); 24 C.F.R. § 903.7(o) (Annual Plan requirements for PHAs).

Experts for both Plaintiffs and Federal Defendants have recognized the need for revamped procedures in addition to the outcome remedies discussed above. Dr. Khadduri testified at length regarding the extent to which HUD fails to consider the consequences of its own or its grantees' decisions on opportunities to desegregate or affirmatively further fair housing. *See* PX-765, Khadduri Written Test. 9-14, 29-40. Other experts agreed that there should be a process component to the remedy. PX-764, Briggs Written Test. 10-16; Trial Tr. 306 (powell) ("[T]he remedy should be both process and goal-oriented.").

Similar planning requirements have been included in remedial orders in numerous

housing desegregation cases. *See, e.g.*, *Young* 1995 Final Judgment 2, 19 (incorporating HUD's East Texas Comprehensive Desegregation Plan and requiring HUD to develop supplemental desegregation plans for any area deemed to be racially hostile); *Walker* 1997 Remedial Order 10 (requiring HUD to prepare and submit for court approval a schedule for funding and achieving parity between conditions at predominantly-black and predominantly-white projects).

b. HUD Review of Regional Actions to Affirmatively Further Fair Housing.

Plaintiffs have also proposed that the Court order changes in HUD decisionmaking processes to assure that HUD considers regional desegregation and how to affirmatively further fair housing at significant points in those decisionmaking processes that affect the availability of housing opportunities in the Baltimore region. *See* Proposed Remedial Order § III. As part of HUD's assessment of grantees' Con Plan and Action Plans as well as PHAs' Five-Year and Annual Plans, the Proposed Remedial Order requires HUD to consider whether local jurisdictions and PHAs use federal resources to create regional housing opportunities. HUD should also be required to consider how federal housing development funds can be used to increase the supply of housing accessible to class members and to safeguard against the use of federal funds to reduce the supply of that housing through demolition and redevelopment.

This component of the remedy is again based directly on HUD's liability in this case. As the Court noted in denying HUD's motion for summary judgment, liability is based on HUD's failure to consider regionalization despite its control over vast federal housing resources in the Baltimore Region, its authority over the development of housing, and its supervision of federal housing and community development programs. *See Thompson* Summary Judgment Order, 2006 WL 581260, at *2. The Proposed Remedial Order requires HUD to consider regional approaches to desegregation in exercising its considerable leverage and control over these

processes. Again, HUD's discretion is retained by allowing HUD to develop the specific performance standards and guidelines for evaluating funding applications and housing planning submissions.

HUD's decisionmaking is key to an effective remedy because, as this Court has noted, HUD's authority over local jurisdictions' use of federal resources gives it the power and leverage to accomplish desegregation by acting regionally, which no single jurisdiction can do on its own. *Thompson*, 348 F. Supp. 2d at 462. Trial testimony confirmed HUD's leverage over local jurisdictions. *See* Trial Tr. 70-78 (Khadduri); Trial Tr. 1605-06 (Sardone); Trial Tr. 1768-72, 1784-85 (Kennedy); Trial Tr. 2064-66 (Halm). Statutes and regulations give HUD tremendous authority over the use of federal housing resources. Statutes governing the CDBG program require grantees to submit to HUD, prior to receiving any federal funds, a statement of objectives and projected uses. 42 U.S.C. § 5304(a). No CDBG grant may be made unless a potential grantee certifies to the satisfaction of the Secretary of HUD that it will use federal funds to affirmatively further fair housing. *Id.* § 5304(b)(2). HOME program participating jurisdictions must submit to HUD a comprehensive housing affordability strategy that includes a certification that the jurisdiction will affirmatively further fair housing. *Id.* § 12705(b). PHAs must submit Five-Year and Annual Plans, setting out their objectives and certifying that they will affirmatively further fair housing. *Id.* § 1437c-1. All demolitions and dispositions of public housing must be undertaken pursuant to a plan approved by HUD, *id.* § 1437p, and HUD must approve all sites selected for the development of public housing, 24 C.F.R. § 941.202. To obtain replacement vouchers, a PHA must show how it plans to affirmatively further fair housing by promoting fair housing choice and expanding housing opportunities. *See* PX-686, HUD, Notice PIH 2004-4, at 2-3, 5-6 (Mar. 29, 2004) (reinstated by HUD, Notice PIH 2005-15 (Apr. 26,

2005)).

As this Court found in the liability phase, "[c]ompliance with Federal law, including Federal Civil Rights laws, is a condition of receiving federal funds . . . [and] HUD has a wide range of sanctions it can impose . . . to carry out this task." *Thompson*, 348 F. Supp. 2d at 506; *see also* SOF ¶¶ 364-67. HUD has the discretion to reject the Con Plan for HOME and CDBG grantees if the Secretary finds the AFFH Certification unsatisfactory, *see* 24 C.F.R. § 91.500(b); or if the Con Plan is inconsistent with the purposes of the Cranston-Gonzalez Act (which include improving housing opportunities for minorities and expanding federal rental assistance to low-income families). *See* 42 U.S.C. §§ 12702(3), 12703(4), 12705(c). HUD may disapprove a PHA's plan if it is inconsistent with law, including federal civil rights laws. *See* 42 U.S.C. § 1437c-1(i)(3). HUD regulations state that HUD will challenge a PHA's plan where the PHA does not reduce racial segregation or creates new segregation in housing. 24 C.F.R. § 903.2(d)(3). HUD may reject an application for demolition if reasonable modifications would make the project useful and may reject an application for disposition if it is not in the best interests of the residents. 42 U.S.C. § 1437p(b). HUD can disapprove proposed sites for the development of public housing for a host of reasons, including because the site is in an area of minority concentration, because the site does not promote greater choice of housing opportunities and avoid concentration of low-income residents, or because the travel time from the site to places of employment for low-income workers is too high. 24 C.F.R. § 941.202.

The requirement that HUD consider desegregation and fair housing in its decisions about the use of federal resources has also been part of the remedy in other housing desegregation cases. *See, e.g.*, *Kemp*, 721 F. Supp. at 370 ("In enforcing this Decree, HUD shall use any power it possesses to impose conditions on grantees, recipients, or beneficiaries, pursuant to any grant

or any other program"); *Young v. Pierce*, 685 F. Supp. 986, 988 (E.D. Tex. 1988) (Interim Injunction) (requiring that HUD "exercise its discretion under its various housing programs" to create desegregative housing alternatives). The Third Circuit's decision in *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970), required HUD to take active steps to promote fair housing in fulfillment of its § 3608(e)(5) duty, *see id.* at 816, 821-23; and HUD responded to that court ruling by adopting public housing site and neighborhood standards (now codified at 24 C.F.R. § 941.202).

The Proposed Remedial Order requires HUD to consider regional desegregation in making a number of significant decisions, including those regarding the Section 8 voucher program. *See* Proposed Remedial Order § IV.G. The Order requires HUD to maintain FMRs for the Baltimore housing market at the 50th percentile, to approve requests for exception payment standards in Baltimore unless good cause exists for denial, and to review the effect of local residency preferences on desegregative housing opportunities. *See id.* These requirements are consistent with HUD's statutory and regulatory authority, *see* 24 C.F.R. §§ 888.113(c) (FMRs); 982.503(c) (exception payment standards); and similar requirements have been a part of other housing desegregation remedies. *See, e.g.*, *Young*, 685 F. Supp. at 990 (requiring HUD to consider the effect of rent levels on desegregative housing opportunities for class members); *Walker* 1997 Remedial Order 18-19 (requiring HUD to authorize exception payment standards to promote desegregative housing opportunities unless inconsistent with statutory requirements).

5. The Court Should Order Creation of a Community Advisory Board.

Plaintiffs propose that this Court require community input into HUD's consideration of regional desegregation. The Proposed Remedial Order includes an Advisory Group that will present to HUD suggestions and observations regarding regional approaches to fair housing at

appropriate points in the decisionmaking process. *See* Proposed Remedial Order § V.

This component of Plaintiffs' proposed remedy reflects the importance of effective and appropriate community participation in the remedy. The Proposed Remedial Order encourages the participation of receiving communities in the implementation of the remedy, but does not allow these communities to prevent the integration of public housing residents. The Advisory Group should include landlords and developers to ensure the effective creation of desegregative housing opportunities. *See* PX-764, Briggs Written Test., at rebuttal 9. The Advisory Group also should include representatives of state and local governments, local businesses, and community organizations to provide a constructive outlet for viewpoints regarding policy-level decisions, to facilitate coordination between HUD and affected entities, and to reduce resistance to desegregative moves. *Id.* at rebuttal 9-10.

Substantial evidence supports the creation of such an Advisory Group. Dr. Briggs, an expert in successful democratic processes, testified that a participatory design framework is most appropriate for bringing a variety of community viewpoints into the process of implementing an effective remedy. In such a framework, an Advisory Group comprised of key stakeholders would provide information to improve the implementation process rather than serving as a decisionmaking body with veto power. Trial Tr. 1040, 1043-46 (Briggs); *see also* SOF ¶ 370.

There are a number of business organizations, community groups, and religious congregations in the Baltimore Region that support the creation of expanded housing opportunities for Baltimore City public housing residents, and that would welcome the chance to participate in an Advisory Group process. These include the Greater Baltimore Committee, *see* Trial Tr. 1563-80 (Joseph); Northeast Good Neighbors, *see* Trial Tr. 996-98, 1010 (Queale); and

the Baltimore Regional Housing Campaign,[54] *see* Trial Tr. 456-65 (Sarbanes).

Proper consideration of community input can assist both equitable remedies and HUD housing programs. As proposed, the Advisory Group would serve as a source of community input and ensure that the input received is advice about how, and not whether, to comply with this Court's remedy.

6. This Court Should Order Performance Measures to Monitor HUD's Remedial Progress.

Finally, Plaintiffs' Proposed Order contains a number of provisions establishing performance measures to enable Plaintiffs and this Court to monitor and assess HUD's compliance. *See* Proposed Remedial Order § III.A.4 (requiring HUD to monitor the performance of PHAs and grant recipients in the Baltimore Region); § IV.F (requiring HUD to adopt performance standards for the agencies that undertake regional voucher administration and mobility counseling); § VI.A (requiring HUD to prepare an annual report of various housing conditions in the Baltimore Region); § VI.B (requiring HUD to report its annual progress regarding the provision of remedial vouchers and the creation of desegregative hard units).

Expert witnesses for both parties testified that performance measures are a central component of remedial design. Dr. Briggs testified that performance measures are necessary to create accountability and to ensure that compliance does not "fall far short of what the remedy

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[54]The Baltimore Regional Housing Campaign is an umbrella organization consisting of the Citizens Planning and Housing Association (a 65-year-old organization devoted to improving quality of life and government operation in the Baltimore Region), BRIDGE (a coalition of approximately 25 religious congregations in the Baltimore Region), the Greater Baltimore Urban League, the Faith Fund (a community development finance institution), the Poverty and Race Research Action Council (a national organization that studies questions of housing mobility and segregation of opportunity), the Innovative Housing Institute (a national group with expertise on inclusionary housing policies), and the Maryland ACLU. *See* SOF ¶ 375. This coalition has taken a number of steps in the past 18 months to support the development of assisted housing on a regional basis, and the Advisory Group could build on the experience of that campaign.

actually intends." Trial Tr. 1028-29 (Briggs). And Prof. Schuck testified that "the Court can reduce [the problematics of remedial design] by prescribing clear performance goals for the defendant, and providing for periodic monitoring of the defendant's success . . . . The value of such an approach is obvious – I believe that all of the expert reports agree on this point – and the approach has been institutionalized . . . by many governmental and private organizations."[55] FDR-6, Schuck Written Test. 16.

The concept of performance measures is not new to HUD. Under the Government Performance and Results Act, HUD is obligated to use a performance management framework and develop performance plans for all of its programs. *See* SOF ¶ 383. HUD has in fact begun to develop an outcomes-measurement system to track the use of CPD block grant funds by grantees. *See id.* ¶ 384.

C. HUD's Objections to Plaintiffs' Proposed Remedy Are Without Merit.

1. The Possibility that a Remedy Will Cost Money to Implement is not a Barrier to Ordering Such Relief.

HUD presented testimony at trial aimed at objecting to the Proposed Remedial Order on the ground that Plaintiffs did not identify adequate sources of funds for the remedy. (For example, David Vargas testified regarding voucher funding formulas and other budget issues.)

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[55]Magistrate Judge Grimm previously described the importance of performance monitoring and enforcement as follows: "[W]hen, as here, a housing discrimination lawsuit results in a consent decree requiring specific remedial action, the promises contained in the decree . . . amount to nothing more than a dream for the residents of the affected communities if there is not effective monitoring and enforcement of the agreement to insure compliance. The monitoring and enforcement activities become the very *sine qua non* of the obligations to remedy past discriminatory activity, without which the residents may come to view the decree as just one more unfulfilled dream, or worse." *Thompson v. HUD*, 2001 WL 1636517, at *16-17 (D. Md. Dec. 12, 2001) (Grimm, M.J.) (adopted by this Court at Paper 318). Although Judge Grimm was discussing performance measures for the consent decree in this action, his logic applies with equal if not greater strength to performance measures with regard to a court-imposed remedial order.

HUD has also argued that the Proposed Remedial Order is impermissible because portions of it may require money to implement. *See* Fed. Defs.' Pretrial Resp. Br. 19-22 (Paper 786). These objections have no support in the law.

Upon being found liable for Fifth Amendment and Fair Housing Act violations, HUD's obligation is to implement *effective* remedies that make the victims of discrimination whole. *Brinkman*, 443 U.S. at 538; *see also Milliken*, 418 U.S. at 746. This Court's remedial power includes the authority to order relief that may require the expenditure of funds, and HUD is neither guaranteed nor entitled to a cost-free remedy for its unlawful conduct. *See, e.g.*, *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir. 1979) (holding that the plaintiff's requested remedy against the federal government was permissible equitable relief even though it would cost the government money to implement); *White v. Mathews*, 559 F.2d 852, 858-60 (2d Cir. 1977) (requiring the federal government to bear the costs incurred in bringing its practices into compliance with due process). Indeed, the principle HUD asks this Court to accept – that no equitable or injunctive relief may be ordered if compliance would cost money – would effectively bar equitable and injunctive relief in all cases, since compliance with injunctive commands is almost never cost-free. *See NAACP v. A.A. Arms, Inc.*, 2003 WL 1049011, at * 25 (E.D.N.Y. Feb. 24, 2003) ("Almost all injunctive relief will require some expenditure of funds by a defendant in order to comply with the terms of the injunction . . . ."). Such a result would be inconsistent with the law regarding remedies for constitutional and statutory violations discussed above.

In the event that this Court orders a remedy that does require the expenditure of funds, HUD has a number of ways to comply with the ruling. First, the evidence Plaintiffs presented at trial demonstrates existing sources of funds and vouchers through ongoing activities and current

budget allocations that could be used to implement HUD's remedial obligations. As just one example, many "tenant protection vouchers" are becoming available each year as public and assisted housing units are demolished, disposed of, or otherwise retired from the assisted housing stock. *See* SOF ¶¶ 339-40. These vouchers can provide a potential source for *Thompson* remedial vouchers without requiring HUD to commit additional funding sources.

Second, HUD could use its authority to direct existing allocations of competitive-grant funding to Baltimore by awarding bonus points to Baltimore-area jurisdictions in competitive grant applications. This approach has recent precedent – in 2000, HUD awarded bonus points to Dallas for competitive-grant applications as a way to help implement a remedy in the *Walker* housing desegregation litigation. *See* SOF ¶ 344.

Third, HUD through the executive could request a budget allocation from Congress for implementation of a *Thompson* remedy. Not only did numerous witnesses testify at trial that HUD could make such a request, *see* Trial Tr. 2348-51 (Vargas); Trial Tr. 84-85 (Khadduri); but HUD has in fact made such requests in the recent past, and Congress has granted those requests. For example, a budget allocation was included at the executive's request in the 2006 Appropriations Act to fund HUD's commitments arising from the *Walker* desegregation litigation in Texas. *See* Trial Tr. 2349-51 (Vargas); Trial Tr. 85 (Khadduri). Thus, while Plaintiffs do not purport to dictate how HUD will pay any costs associated with implementing a *Thompson* remedy, instead leaving the matter to HUD's discretion, the examples discussed above demonstrate that HUD has numerous options in considering how to comply – at long last – with its constitutional and statutory obligations.

2. The Proposed Remedial Order Does Not Require Impermissible Trade-Offs.

HUD also presented testimony at trial to the effect that any remedy that costs money to

implement, or that provides housing in more costly neighborhoods than the ghettos where Plaintiffs currently live, should not be ordered because it will come at the expense of other poor people.[56] Trial Tr. 1792 (Olsen). This is an argument for the status quo – that HUD should not take steps to ameliorate segregation because doing so might be more expensive than not doing so. But because the status quo is the segregation of the Region's African-American public housing residents in poor, minority neighborhoods (as a parade of HUD witnesses agreed at trial, *see* Trial Tr. 624 (Clark); Trial Tr. 1837 (Olsen); Trial Tr. 2061 (Halm); Trial Tr. 2207-08 (Walsh)), the status quo is unacceptable.

If taking the steps necessary to move beyond the status quo and into compliance with the Constitution and Fair Housing Act costs money – as, for example, through including the mobility counseling necessary to make vouchers a viable desegregative option, or through requiring increased monitoring of local recipients of HUD funds to ensure proper desegregative use – such is the inescapable mandate of the Constitution and Fair Housing Act. The law does not permit HUD to focus only on maximization of benefits and say it would rather fund *segregated* housing for six needy families instead of *desegregated* housing for five. The law requires desegregation.

In addition, HUD's asserted interest at trial in maximization of benefits does not square with current HUD policy. HUD does not, and cannot, assist every poor family with housing needs. *See, e.g.*, Trial Tr. 2679-80 (Khadduri) ("[R]ental housing assistance does not help

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[56]It is not clear that such a trade-off is necessary – under several of the funding options discussed above (including the use of vouchers that will become available in the future anyway, or a request for a congressional appropriation), this objection would be moot. Moreover, the extent of any possible trade-off is far less than HUD insinuated at trial. As to one component of the Proposed Remedial Order, Dr. Khadduri testified that providing the resources necessary to use vouchers in communities of opportunity would add 20% or less to the costs of a regular voucher. *See* Trial Tr. 2681-82 (Khadduri).

everybody that it could help, or ought to help, because of budget constraints. . . . [I]n any use of housing assistance for any purpose . . . there is a trade-off in an essentially unfair situation in which there aren't enough resources to go around for everybody."). HUD provides housing opportunities for some, at costs that are dictated by other choices, such as quality standards. When lines must be drawn as to who is to benefit from this resource, the victims of long-standing, pervasive, and unconstitutional housing segregation should be given the opportunities that the Constitution and federal civil rights laws mandate as theirs.

Finally, HUD's arguments all rest on an unduly narrow understanding of costs and benefits. Whatever the costs of effectively desegregating Baltimore City public housing, the costs associated with continuing the generations-old segregated system are far greater. Some of these costs are financial while others, though not directly quantifiable, are no less weighty. As Magistrate Judge Grimm wrote in an earlier proceeding in this case:

> How can large numbers of public housing residents, geographically, educationally and economically segregated for generations because of their race, and denied the benefits afforded to non-minority citizens, be expected perpetually to ignore what they know is both unfair and illegal before they irreparably lose faith in the ability or will of those who govern to do what is right and legally mandated? . . . The success achieved by the Plaintiffs that is embodied in the [Decree] . . . will, if implemented, make tangible progress in realizing the[] shared goals [of equal treatment]. When that occurs, the benefits that will inure to the City of Baltimore will, without question, be worth the cost . . . .

Thompson, 2001 WL 1636517, at *16-17. When HUD, through this Court's remedial order, effectively desegregates Baltimore City public housing, HUD will finally provide to Plaintiffs and Federal Defendants alike the benefits that come from fair treatment and equal opportunity.

CONCLUSION

For the foregoing reasons, this Court should hold that Federal Defendants violated the Fifth Amendment by failing to disestablish segregated public housing; reaffirm its earlier holding that Federal Defendants violated the Fair Housing Act by failing to meet their obligation to affirmatively further fair housing; and order the relief requested in Plaintiffs' Proposed Remedial Order.

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Respectfully submitted,

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