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

GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, *et al.*, Plaintiffs-Appellants, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*, Defendants-Appellees.	No. 10-5257

PLAINTIFFS-APPELLANTS' MOTION FOR EMERGENCY RELIEF OR IN THE ALTERNATIVE TO EXPEDITE APPEAL

Pursuant to Federal Rule of Appellate Procedure 8 and D.C. Circuit Rule 8, Plaintiffs-Appellants Greater New Orleans Fair Housing Action Center, National Fair Housing Alliance, Gloria Burns, Rhonda Dents, Almarie Ford, Daphne Jones, and Edward Randolph move this Court for emergency injunctive relief pending Plaintiffs' appeal of the district court's order denying Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs request that this Court grant emergency injunctive relief enjoining Defendant-Appellee Robin Keegan, Executive Director

of the Office of Community Development ("OCD"),[1] from depleting the remaining federal funds appropriated by Congress for the Road Home Program—an $11 billion recovery program intended to help homeowners affected by Hurricanes Katrina and Rita.

In conjunction with this request, and in light of the critical issues involved, Plaintiffs also request that the Court expedite consideration of this appeal. If this Court were to deny Plaintiffs' request for emergency injunctive relief, Plaintiffs respectfully request that, in the alternative, the Court nevertheless expedite consideration of this appeal in accordance with D.C. Circuit Rule 47.2 and the schedule proposed in Exhibit A.[2]

PRELIMINARY STATEMENT

This case involves unlawful racial discrimination against African-American homeowners in Louisiana's "Road Home" Program—the single largest housing recovery program in United States history. The formula used to determine homeowner grants under this program bases those grants upon the *lower* of two values: the pre-storm market value of one's home, or the estimated cost of

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[1] The Complaint named Paul Rainwater, then Executive Director of the Louisiana Recovery Authority, as a Defendant. On June 2, 2010, Plaintiffs substituted his successor, Robin Keegan, pursuant to Fed. R. Civ. P. 25(d). The LRA was dissolved on June 30, 2010, and the OCD oversees its continuing programs. *See* Louisiana Recovery Authority, www.lra.louisiana.gov (last visited Aug. 9, 2010). Keegan now serves as Director of the OCD's Disaster Recovery Unit.

[2] Keegan did not consent to this proposed schedule.

repairing the home. The maximum grant award under either criterion is $150,000, so no beneficiary is guaranteed to be made whole. However, those whose pre-storm values are lower than the cost to repair or rebuild are guaranteed to have significant shortfalls—by definition, they will have insufficient funds to rebuild.

Because pre-storm home values in predominantly African-American communities are far lower than the values of comparable homes in predominantly white communities, and because repair costs often far exceed a home's pre-storm value, African-American homeowners are significantly more likely than whites to receive awards based on the pre-storm value of their homes. In fact, the record below shows that African-American homeowners have disproportionately received grants based upon the pre-storm value of their homes, and are thus less likely to be able to afford to repair or rebuild their storm-damaged homes.

The district court acknowledged that the Road Home formula likely has a discriminatory impact on African Americans. *See* slip op. at 8. But the court denied Plaintiffs' motion to preliminarily enjoin Keegan from depleting the remaining Road Home funds needed to provide Plaintiffs with a prospective, equitable remedy to stop that discrimination. Specifically, the court concluded that the Eleventh Amendment bars a remedy that would address the impact of initial grant awards already received by Road Home Program beneficiaries under the discriminatory formula. *See id.* at 14-15.

As explained below, the district court abused its discretion in reaching this holding. Absent immediate injunctive relief, Plaintiffs risk imminently losing their opportunity to obtain any meaningful remedy.[3] Plaintiffs can wait no longer. They respectfully move this Court to enjoin Defendants from depleting the remaining Road Home Program funds during the pendency of this appeal or, in the alternative, to decide the appeal on an expedited basis.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Road Home Program

In the aftermath of Hurricanes Katrina and Rita in 2005, Congress established a $19.7 billion Disaster Recovery Grant program. Through three separate allocations of Community Development Block Grant ("CDBG") funds, Congress provided funds for necessary expenses related to disaster relief, long-term recovery, and rebuilding in the most affected areas.[4] The first two statutes appropriated a combined $16.7 billion to five affected states, Louisiana, Mississippi, Texas, Florida, and Alabama. *See* 2005 Act, 119 Stat. at 2779-81;

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[3] Plaintiffs have attempted, unsuccessfully, to resolve this dispute outside of court—including in the days since the district court denied its request for temporary relief.

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

2006 Act, 120 Stat. at 472-73. The final appropriation authorized an additional $3 billion of supplemental CDBG funds "solely for the purpose of covering costs associated with otherwise uncompensated but eligible claims that were filed on or before July 31, 2007, under the Road Home program," which operates only in Louisiana. 2007 Act, 121 Stat. at 1343-44.[5] Congress specifically required that all funds be disbursed in compliance with the Fair Housing Act. 71 Fed. Reg. 7666, 7671 (Feb. 13, 2006); 71 Fed. Reg. 63,337, 63,339 (Oct. 20,2006); 72 Fed. Reg. 70,472 (Dec. 11, 2007).

With Defendant HUD's consultation and approval, LRA—the state agency Louisiana created to administer CDBG funds and other funds appropriated to it—developed and implemented a formula for calculating homeowner grants under Option 1 of the Road Home Program.[6] Pursuant to the formula, homeowners whose homes were damaged or destroyed may receive grants of up to $150,000 (minus any other compensation received for loss to the structure, such as insurance proceeds). The grant amount is based on the *lesser* of two figures: (i) the pre-

[5] The funds that remain for the Road Home Program all come from this third supplemental appropriation, as the funds for the first two appropriations have been exhausted.

[6] Under Option 1 of the Road Home Program, homeowners who agree to use Road Home funds to rebuild or repair their homes are eligible for grants of up to $150,000. Road Home Program Policies at 12 (Ex. B). Plaintiffs do not challenge the $150,000 cap or the administration of funds under other Options.

storm market value of the home, or (ii) the estimated cost to repair the damage (as determined by Keegan). *See* Road Home Program Policies at 12 (Ex. B).

Road Home funds are rapidly dwindling. HUD now holds only $500 million in unobligated funds earmarked for the Road Home Program. *See* Romer-Friedman Aff. ¶ 5 (Ex. C). And while OCD estimates what is essentially a surplus of $148 million in Road Home funds (accounting for the $500 million HUD still holds), on July 1, 2010 it submitted a plan to HUD to repurpose at least $100 million of the surplus funds for a construction *loan* program, separate and apart from the Road Home Program's Option 1. *See generally* Proposed Action Plan Amendment No. 43 (Ex. D); Dkt No. 69 at 28-29.

B. Plaintiffs' Claims

Plaintiffs are two fair housing organizations, five African-American homeowners, and a proposed class of approximately 20,000 African-American homeowners who have received—or will receive—grant awards based upon the discriminatory pre-storm value criterion. Plaintiffs' Complaint alleges Defendants are violating Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3604, 3605, and 3608 (the "Fair Housing Act" or "Title VIII"), and the Housing and Community Development Act of 1974, 42 U.S.C. § 5304 (the "HCDA"), by developing and implementing the Road Home Program grant formula. The formula adversely affects African-American homeowners by tying grant amounts

to pre-storm home values, which are far lower in predominantly African-American communities than they are in predominantly white communities. As a result, African-American families are far less likely than white families to receive sufficient funds to repair or rebuild their homes.

In their Complaint, Dkt. No. 1, Plaintiffs seek declaratory and injunctive relief to halt the discriminatory operation of the Road Home Program and to direct Defendants to cease using the discriminatory pre-storm value criterion and adopt an alternative, non-discriminatory grant formula to disburse the surplus funds under Road Home Program.

C. Procedural History

On November 12, 2008, Plaintiffs filed their Complaint. Motions to dismiss filed by the Defendants are fully briefed and pending before the district court. On June 2, 2010, after discovering LRA intended to distribute the majority of the surplus funds it held, Plaintiffs moved for a temporary restraining order and a preliminary injunction, seeking to temporarily enjoin LRA from depleting the remaining federal Road Home funds needed to provide the ultimate prospective equitable relief Plaintiffs seek—namely, an order requiring Keegan to use remaining Road Home funds to address the impact of prior grants distributed under the discriminatory formula and issue new Road Home grants based on a non-discriminatory formula. Dkt. No. 50. By order dated June 29, 2010, the district

court denied Plaintiffs' motion. Dkt. No. 59.[7] The court concluded that while Plaintiffs "would likely be able to make out [a] prima facie case" of discrimination under the Fair Housing Act, *see* slip op. 8, the Eleventh Amendment "bars the Court from providing the relief plaintiffs seek," *id*. at 9.[8] Plaintiffs filed a timely notice of the instant interlocutory appeal.

ARGUMENT

I. THIS COURT SHOULD ENJOIN KEEGAN FROM UNLAWFULLY DISTRIBUTING THE REMAINING ROAD HOME FUNDS DURING THE PENDENCY OF THIS APPEAL

To succeed on a motion for emergency injunctive relief pending appeal, the moving party must satisfy the same factors necessary to prevail on a motion for preliminary injunctive relief before a district court: "(1) a substantial likelihood of success on the merits, (2) that [the movant] would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) ("*CFGC*") (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)); *see* D.C. Cir. R. 8(a). Under the first factor, however, the movant must

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[7] The district court followed with a memorandum opinion, dated July 6, 2010, setting forth its reasoning. Dkt. No. 61.

[8] On July 21, 2010, Plaintiffs filed a second motion for a temporary restraining order and a preliminary injunction to enjoin LRA from using the pre-storm home value to calculate or disburse grant awards to those who have not received initial grant awards. *See* Dkt. No. 62. That motion is not fully briefed.

show it will likely succeed on the merits of its *appeal*. *See Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam).

This Court "'review[s] a district court's weighing of the four preliminary injunction factors and its ultimate decision to issue or deny such relief for abuse of discretion.'" *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009) (quoting *CFGC*, 454 F.3d at 297). "Legal conclusions—including whether the movant has established irreparable harm—are reviewed *de novo*." *Id.*

A. Plaintiffs Are Likely to Succeed on the Merits of their Appeal

Plaintiffs are likely to succeed on the merits of their appeal because: (1) as the district court correctly determined, due to the disparate impact of the Road Home formula, Plaintiffs "would likely be able to make out [a] prima facie case" of discrimination under the Fair Housing Act after discovery, *see* slip op. 8; and (2) the district court was flatly wrong in concluding that the Eleventh Amendment barred it from providing Plaintiffs with their requested remedy.

1. Plaintiffs have made a strong and un-rebutted showing of unlawful housing discrimination.

As the district court properly concluded, Plaintiffs are likely to succeed in showing that the LRA's use of a grant formula basing the grant amount on the pre-storm value of an applicant's home has a severe disproportionate impact on African-American homeowners in New Orleans. The court explained, "[t]he statistical and anecdotal evidence [Plaintiffs] submit[ted] to the Court leads to a

strong inference that, on average, African-American homeowners received awards that fell farther short of the cost of repairing their homes than did white recipients." Slip op. 8. Indeed, Plaintiffs cited the following record evidence—evidence that Defendants *did not rebut* and that the district court accepted—which demonstrates that homes in African-American neighborhoods in New Orleans have lower values than homes in predominantly white neighborhoods, even when the homes are otherwise comparable:

- Census data indicating that African-American homeowners in New Orleans are likely to own homes of lower value than homes owned by whites. Owner-Occupied Housing Values from 2000 Census (Ex. E) (showing higher percentage of African-American than white homeowners in New Orleans owned homes worth less than $100,000 and $150,000); *see also* African-American Home Values by Census Tract (Ex. F); African-American Percentage of Owner Occupied Homes and Home Values in Orleans Parish (Ex. G).

- The testimony of former LRA Executive Director Rainwater that it is "true that home values in predominantly African-American neighborhoods tend to be lower than values in similar houses in predominantly white neighborhoods." Field Hearing on Implementation of Road Home Program at 23 (Ex. H).

- The affidavit of an experienced New Orleans real estate professional, who stated that, "[b]ased on [her] experience, [she has] observed that pre-Katrina homes in predominantly African American neighborhoods were valued less than comparably-sized homes in predominantly White neighborhoods." Johnson Aff. ¶ 6 (Ex. I).

Furthermore, the court found that Keegan "offered no legitimate reason for taking pre-storm home values into account in calculating Program awards." Slip. op. at 8. Because Defendants provided no evidence that their actions furthered a

legitimate governmental interest, and cannot demonstrate that no alternative would serve such an interest with less discriminatory effect, they cannot meet their burden to rebut Plaintiffs' showing of disparate impact. *See 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673 (D.C. Cir. 2006).[9]

[9] The district court correctly adopted the burden-shifting framework other courts of appeals have applied in connection with FHA disparate impact claims. *See* slip op. 7-8; *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935-36 (2d Cir. 1988) (adopting the burden shifting framework); *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 901-02 (8th Cir. 2005) (same); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 51 (1st Cir. 2000) (same); *Gamble v. City of Escondido*, 104 F.3d 300, 305-306 (9th Cir. 1997) (same); *see also Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 60 (D.D.C. 2002) ("Courts have applied the basic burden-shifting scheme used to review disparate impact claims brought under Title VII . . . to disparate impact claims brought pursuant to FHA.") (citation omitted). The district court explained, "[u]nder this framework, 'once the plaintiff demonstrates that the challenged practice has a disproportionate impact, the burden shifts to the defendant to prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect.'" Slip. op. at 7-8 (quoting *2922 Sherman Ave. Tenants' Ass'n*, 444 F.3d at 680 (internal quotation marks omitted)).

2. The Eleventh Amendment does not bar relief in this case.

The district court simply erred in holding the Eleventh Amendment prohibits the court from awarding the relief Plaintiffs have requested.[10] Because the relief Plaintiffs seek would only require Defendants to spend *federal* dollars in compliance with *federal* law, the Eleventh Amendment is not implicated by this lawsuit. However, regardless of whether the funds are labeled "state" or "federal" funds, or whether the relief is characterized as "prospective" or "retroactive", Eleventh Amendment immunity poses no bar to relief where, as here, a plaintiff's request for relief implicates only funds *separate from the state treasury* or where the relief "will not affect the state's budgetary decisions."[11] *Conrad v. Perales*, 92 F. Supp. 2d 175, 185 (W.D.N.Y. 2000) (quoting *Fernandez v. Chardon*, 681 F.2d 42, 59 (1st Cir. 1982)); *see id.* at 180 ("[T]he Eleventh Amendment does not bar a

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[10] Plaintiffs-Appellants maintain that the *ultimate remedy* sought is more nuanced than may have been clear to the district court. For individuals who did not receive initial Road Home grant awards, Plaintiffs seek disbursement of funds using a non-discriminatory formula. For those who have received initial grant awards, Plaintiffs seek recalculation of those grant amounts under a non-discriminatory formula. The proposed preliminary injunction would preserve the possibility of a remedy for both subsets of Plaintiffs-Appellants. The district court focused on the hurdles for relief for those who already received grant awards, finding that such relief would be impermissible retroactive relief in violation of the Eleventh Amendment. *See* slip op. at 13-15. The Court did not address the part of the relief that would benefit those who have yet to receive grant awards; a second motion for preliminary injunction, now pending before the district court, addresses relief for these individuals.

[11] Plaintiffs maintain their requested relief derives from federal, not state, funds. The lack of any impact on the state treasury is, however, dispositive.

claim for retroactive damages against a state when the federal government will ultimately reimburse all or part of a money judgment against the state.") (citing, in part, *Bermudez v. Dep't of Agric.*, 490 F.2d 718 (D.C. Cir. 1973)); *Schiff v. Williams*, 519 F.2d 257, 262 (5th Cir. 1975) (Eleventh Amendment is no obstacle where source of relief was private funds held outside the state treasury where granting relief would have "no true impact on the state treasury").[12]

Here, *HUD*—not the state of Louisiana—currently holds $500 million of the funds Plaintiffs target for relief. It is from these funds that Keegan will realize a surplus of at least $150 million once all Road Home claims are paid under the current, discriminatory formula. These funds have nothing to do with the Louisiana treasury.[13] Rather, they exist "*solely* for the purpose of covering costs associated with otherwise uncompensated, but eligible claims that were filed …

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[12] *See also Vaqueria Tres Monjitas, Inc. v. Irizarry*, 600 F.3d 1, 4 (1st Cir. 2010) (Tourrella, J., concurring) (noting panel properly found Eleventh Amendment immunity did not apply because plaintiffs sought only special funds segregated from general funds and resources); *Foggs v. Block*, 722 F.2d 933, 941 n.6 (1st Cir. 1983), *rev'd on other grounds*, 472 U.S. 115 (1985) ("Since the cost of the food stamp program … is borne by the federal government, we see no Eleventh Amendment bar to ordering the restoration of benefits."); *Dyson v. Lavery*, 417 F. Supp. 103, 109 (E.D. Va. 1976) ("the Eleventh Amendment … [did] not shield defendant … in his official capacity" because a university had "a substantial fund available that is wholly separate from the state treasury"); *Bowen v. Hackett*, 387 F. Supp. 1212, 1220-21 (D.R.I. 1975) (money in State's Employment Security Fund and Temporary Disability Insurance Fund was not money in the State treasury subject to the Eleventh Amendment).

[13] Indeed, Congress recently considered using $400 million of these funds for another purpose, something it plainly could not have done if the money belonged to the state. *See* President Signs Emergency Appropriations Bill (Ex. L).

under the Road Home homeowner compensation program." 72 Fed. Reg. 70,472 (Dec. 11, 2007) (emphasis added). Because Louisiana may not use these federal funds for any purpose other than covering costs associated with the Road Home Program, and because Keegan must demonstrate that any relevant state funds have already been spent as a prerequisite to securing funds from the third congressional appropriation, 72 Fed. Reg. 70,472, 70,473 (Dec. 11, 2007), the state treasury will be "unaffected" by any award in this case. The Eleventh Amendment thus poses no bar to the remedy Plaintiffs seek. *See Fernandez*, 681 F.2d at 59 (no Eleventh Amendment immunity when "state funds are held in a separate account … and an award limited to those funds will not affect the state's budgetary decisions").

In addition, contrary to the district court's determination, the *Ex Parte Young* exception to a state's sovereign immunity from suit in federal court applies here because Plaintiffs seek only *prospective* relief to remedy Keegan's ongoing violations of federal law. *See* 209 U.S. 123, 159-160 (1908). "[R]elief that serves directly to bring about an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." *Papasan v. Allain*, 478 U.S. 265, 278 (1986).

LRA awarded (and OCD continues to award) Plaintiffs' proposed class members grants based on a discriminatory formula—grants which are continually supplemented, recalculated, and modified based on the original discriminatory

awards.[14] Plaintiffs' request for injunctive relief seeks only to enjoin Keegan from spending the remaining Road Home funds based on this discriminatory grant formula. Thus, Plaintiffs' claims "fall squarely within the *Ex parte Young* doctrine." *Cardenas v. Anzai*, 311 F.3d 929, 937-938 (9th Cir. 2002) (no Eleventh Amendment bar to enjoining state officials from violating federal law "on an ongoing basis" by accepting tobacco settlement funds but not disbursing those funds according to federal law, because plaintiffs' request to require them to do so was prospective, not a request for "a recovery of funds previously paid to the state").[15] As the Second Circuit explained, "[t]he relief sought cannot be deemed retroactive simply because it costs money." *Kostok v. Thomas*, 105 F.3d 65, 69 (2d Cir. 1997).[16]

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[14] *See* Action Plan Amendment 14 (Ex. J) (LRA supplementing grants for mitigation measures, elevation measures, and Additional Compensation Grants to low income homeowners); *see also* Action Plan Amendment 39 (Ex. K) (removing $50,000 cap on Additional Compensation Grants and allowing low income homeowners to receive up to their estimated cost of damages).

[15] *See also Ass'n of Surrogates & Sup. Ct. Reporters Within the City of N.Y. v. New York*, 940 F.2d 766, 774 (2d Cir. 1991) (requirement that state officials pay improperly withheld wages was prospective relief having only an ancillary effect on the state treasury).

[16] *See also Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1042 (8th Cir. 2002) (challenge to reimbursement formula for foster care facilities not barred by Eleventh Amendment even if "as a practical matter [the] suit may result in an order requiring [the state] to change the method it employs … and thus going forward to access funds in its treasury").

B. Plaintiffs Face Irreparable Harm in the Absence of an Injunction

Because Plaintiffs confront the continuing and imminent risk that Defendants' actions will essentially render their claims moot, they face irreparable injury that can only be prevented by emergency injunctive relief pending appeal. To constitute irreparable harm, an injury "must be 'certain and great,' 'actual and not theoretical,' and 'of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.'" *FOP Library of Cong. Labor Comm. v. Library of Congress*, 639 F. Supp. 2d 20, 24 (D.D.C. 2009) (quoting *CFGC*, 454 F.3d at 297). "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Id.* (quoting *CFGC*, 454 F.3d at 297-98).[17]

Without injunctive relief pending appeal, the risk is great and imminent that most or all of the remaining Road Home funds will be expended, thereby depriving Plaintiffs of a remedy. "[T]his circuit's case law unequivocally provides that once the relevant funds have been obligated, a court cannot reach them in order to award relief." *City of Hous. v. HUD*, 24 F.3d 1421, 1426 (D.C. Cir. 1994). Because the district court declined to grant preliminary injunctive relief, Defendants may

[17] *See also* 11A Wright, Miller & Kane, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995) ("Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief.").

obligate and distribute the remaining Road Home funds *at any time*. And once OCD or HUD obligates the remaining Road Home funds for other purposes, Plaintiffs will suffer irreparable injury. "It will be impossible … to award the plaintiffs the relief they request if they should eventually prevail on the merits." *Ambach v. Bell*, 686 F.2d 974, 986 (D.C. Cir. 1982).

Thus, a direct and immediate threat exists that in the time it would take for this Court to consider this appeal in the ordinary course, the remaining $500 million will be irretrievably dispersed, depriving the Court of the ability to provide the Plaintiffs with any remedy. *See Population Inst. v. McPherson*, 797 F.2d 1062, 1081 (D.C. Cir. 1986) (granting injunction pending appeal because "this court will be unable to grant effective relief" if the agency distributes to other groups the funds plaintiff sought to enjoin the agency from withholding).

C. Injunctive Relief Will Not Harm Third Parties and the Public Interest Favors the Requested Emergency Injunctive Relief.

The district court erred in finding that injunctive relief would harm Road Home beneficiaries. In fact, emergency injunctive relief pending appeal will harm neither beneficiaries nor third parties. *First*, such relief will not impair OCD's ability to continue to distribute Road Home funds to New Orleans homeowners in need because the emergency injunction only reaches *surplus* Road Home funds that have not been obligated for a specific purpose. Plaintiffs aim only to preserve *unobligated* funds to ensure these funds are awarded in a non-discriminatory

manner, the manner in which Congress intended—indeed, required[18]—such funds be disbursed.

Second, and contrary to the district court's conclusion, the relatively brief delay associated with enjoining the distribution of funds—*only during the pendency of the appeal on an expedited basis*—does not justify denying the requested injunctive relief. *See Monument Realty LLC v. Wash. Metro. Area Transit Auth.*, 540 F. Supp. 2d 66, 80-81 (D. D.C. 2008); *George Wash. Univ. v. District of Columbia*, 148 F. Supp. 2d 15, 18-19 (D.D.C. 2001); *see also PCTV Gold, Inc. v. Speednet, LLC*, 508 F.3d 1137, 1145 (8th Cir. 2007).

Moreover, the public will undoubtedly benefit from the issuance of an emergency injunction pending an expedited appeal. "[O]n the public interest factor, the Supreme Court has found the FHA serves an 'overriding societal priority.'" *United States v. Edward Rose & Sons*, 384 F.3d 258, 264 (6th Cir. 2004) (quoting *Meyer v. Holley*, 537 U.S. 280, 290 (2003)). Indeed, courts have repeatedly recognized the public importance of eradicating housing discrimination. *See, e.g., Cmty Servs., Inc. v. Heidelberg Twp.*, 439 F. Supp. 2d 380, 399-400 (M.D. Pa. 2006); *Glendale Neighborhood Ass'n v. Greensboro Hous. Auth.*, 901 F. Supp. 996, 1009 (M.D.N.C. 1995); *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106,

[18] Congress, for example, explicitly retained fair housing protections in the emergency CDBG appropriations it provided. *See* 71 Fed. Reg. at 7671; 71 Fed. Reg. at 63,337, 63,339; 72 Fed. Reg. at 70,472.

1119 (D.D.C. 1987). Here, in light of the district court's conclusion that the Road Home formula likely has an unlawful discriminatory impact on African-American homeowners, *see* slip op. 8, an emergency injunction best serves the public interest. *See Brown*, 654 F. Supp. at 1119 ("[T]he public interest will most readily be served if prevention of the spread of racial discrimination in housing is given priority weight."). This is especially true because the Road Home Program is the largest federal housing program in U.S. history, and Congress specifically retained fair housing protections in its emergency CDBG appropriations. *See* 71 Fed. Reg. at 7671; 71 Fed. Reg. at 63,337, 63,339; 72 Fed. Reg. at 70,472.

II. ALTERNATIVELY, THIS APPEAL SHOULD BE CONSIDERED ON AN EXPEDITED BASIS.

Even if this Court declines to grant emergency injunctive relief pending consideration of this appeal, Plaintiffs nevertheless seek to have the appeal expedited. *See* D.C. Cir. R. 47.2 ("Pursuant to 28 U.S.C. § 1657, … [appeals will be expedited] in an action seeking temporary or preliminary injunctive relief.").[19] Such expedited treatment is mandatory. *In re Sealed Case*, 829 F.2d 189, 190 (D.C. Cir. 1987). Moreover, under D.C. Circuit Rule 27(f), the Court may expedite consideration of an appeal where, as here, "delay will cause irreparable injury" and "the decision under review is subject to substantial challenge." D.C.

[19] *See also Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 n.8 (D.C. Cir. 2001) ("[U]nder 28 U.S.C. § 1657(a), the granting or denying of a preliminary injunction is the basis for an expedited appeal.").

Circuit Handbook, § VIII.B at 34. Accordingly, Plaintiffs respectfully request that this Court adopt the schedule proposed in Exhibit A and set oral argument for the earliest possible date consistent with this schedule.

CONCLUSION

For the foregoing reasons, the Court should enjoin the Defendants from dispersing the Road Home funds during the pendency of this appeal. Alternatively, the Court should expedite consideration of this appeal.

Respectfully submitted,

/s/ Craig Goldblatt

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Dated: August 10, 2010

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing PLAINTIFFS-APPELLANTS' MOTION FOR EMERGENCY RELIEF OR IN THE ALTERNATIVE TO EXPEDITE APPEAL was served on August 10, 2010, via e-mail, first class U.S. mail, postage prepaid, and hand delivery on the following:

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