IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

FEDERAL DEFENDANTS' POST-TRIAL BRIEF

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PRELIMINARY STATEMENT

This much is clear after the most recent trial in this matter. First, the United States Department of Housing and Urban Development ("HUD") has done a tremendous amount with its limited resources to further the cause of fair housing throughout the Baltimore area. Second, HUD's resources are, truly, limited; sufficient fiscal and programmatic authority is simply not available for the agency to do much more than it has done. Third, in light of the complexity of housing markets, the intricacy of the economy of the Baltimore area, and the inscrutable sensitivity of those markets and that economy to all sorts of pressures large and small, the risk of a misstep is too great to warrant a remedial order anything like what plaintiffs seek in this case, even if a finding of liability is ultimately made.

In light of these considerations, and on the basis of the entire record, this case should be resolved in favor of the federal defendants. To begin, the one statutory liability finding made earlier in this case should not stand. That finding was based on the flawed assumption that HUD had no excuse for failing to further fair housing on a regional basis. Now that the Court has

reopened the record on that issue, and heard from both scholars and senior program personnel at HUD, there can be no question but that HUD took every bit as much action as it should have to meet whatever regional obligation it might have had to affirmatively further fair housing.

Further, the record does not support any finding in favor of plaintiffs on the open constitutional question: whether HUD provided sufficient housing support outside of Baltimore City for members of the plaintiff class so as to eliminate extra-City vestiges of historical intra-City de jure segregation. Plaintiffs cannot prevail on that issue in the absence of a current remnant of a HUD policy that hearkens back to a policy of purposeful discrimination. Even then, no liability is in order if HUD did what it could to eliminate any such vestige. The record in this case reveals the existence of no regional vestige of any purposeful segregation on HUD's part whatsoever. Besides, because of HUD's efforts in support of fair housing throughout the Baltimore area, no finding of constitutional liability against HUD would be justifiable.

Even if HUD could somehow be found liable, the remedy that plaintiffs have suggested to the Court not only is unworkable, but also would be entirely inappropriate under applicable law. In addition to declaratory relief, plaintiffs demand a sweeping and intrusive injunctive decree. Equitable relief is available, though, only if plaintiffs sustain a significant multi-part burden. They have not met the requisite tests. To the contrary, the record developed during the most recent trial in this action reveals that the relief sought by plaintiffs could well undermine the very interests that they purport to champion. The Court could have no assurance that the proposed remedy would either serve the public interest or that it could realistically even be put into place. It would require the expenditure of money that HUD does not have. It would depend, for its success, on the decisions of a host of people over whom neither HUD nor the Court has any

meaningful control. And it would effectively place this Court in the center of a policy-making arena for which it is institutionally ill-suited, and in which, should it choose to operate, it will face an unacceptably high risk of causing serious, negative consequences to entities and individuals that have no reason to be affected by this litigation at all. Rather than counseling in favor of plaintiffs' unwarranted remedial proposal, the factual record in this case as well as applicable case law support entry of no relief other than a declaratory judgment.

Accordingly, the Court should enter judgment against plaintiffs on each of the two claims that remain pending. Alternatively, the Court should award plaintiffs nothing more than declaratory relief.

ARGUMENT

I. HUD ACTED ON A REGIONAL BASIS TO AFFIRMATIVELY FURTHER FAIR HOUSING TO THE EXTENT REQUIRED BY STATUTE

The Fair Housing Act provision that imposes on HUD a duty to affirmatively further fair housing, 42 U.S.C. § 3608(e)(5), is a broad and generalized statute that neither imposes an obligation on the agency to achieve any level of tangible fair housing results, nor provides an opportunity for a court "to micro-manage agency actions." Darst-Webbe Tenant Ass'n Bd. v. St. Louis Housing Authority,417 F.3d 898, 907 (8th Cir. 2005).[1] The statute certainly does not

[1] In their pre-trial papers, plaintiffs attempt to argue that this aspect of the Darst-Webbe opinion does not apply here, because in Darst-Webbe, the plaintiffs were challenging a particular instance of agency action, unlike here, where the plaintiffs are merely challenging HUD's approach to decision-making as it played out over time. One would think that that characterization of their own case would, itself, doom their chances, given that lawsuits are supposed to be about specific ways in which a defendant wronged a plaintiff. DaimlerChrysler Corp. v. Cuno, – U.S. –, 2006 WL 1310731, *8 (May 15, 2006) (standing to sue in federal court requires injury). In any event, the relevant point made in Darst-Webbe is that the statute in question means much less than what plaintiffs wish it meant. Regardless of how that statute might be applied in different contexts, it means what it means. Therefore, plaintiffs' attempt to

require HUD to create housing opportunities in the suburbs of a given city. Rather, the only question under that statute is, at most, whether HUD "considered, and made an effort to achieve," the policies of the statutory subchapter in which it is found. Id. That subchapter, in turn, identifies its policy underpinnings as including congressional interest in protecting low income individuals from discrimination on the basis of such diverse considerations as race, sex, familial status, and handicap. 42 U.S.C. §§ 3601, 3604.

In its 2005 liability decision, the Court did not – and could not – find that HUD had engaged in any purposeful discrimination during the Open Period to which this case relates. Rather, the Court rejected all of plaintiffs' statutory claims except one. Although the Court recognized that section 3608(e)(5) "does not mandate specific actions or remedial plans," Thompson v. HUD, 348 F. Supp. 2d 398, 417 (D. Md. 2005) (internal quotation marks and citation omitted), the Court framed the one remaining question relating to HUD's statutory liability as being whether the agency adequately considered the creation of affordable housing opportunities in the Baltimore region outside the City for the benefit of public housing residents in the City. 348 F.Supp.2d at 408. The Court found against HUD on this narrow issue, saying that

> in administering its housing policies during the Open Period, HUD failed adequately to consider policy options whereby low-income African-American families might be afforded housing opportunities beyond city limits.

348 F. Supp. 2d at 443. Notwithstanding that finding, the Court recognized the appropriateness of reopening the record on this point. Thompson v. HUD, slip op. at 9 (January 10, 2006). In

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avoid the Eighth Circuit's construction of the statute by trying to distinguish the facts of Darst-Webbe from those of this case cannot succeed.

light of the record now created, given the narrow reach of the statute, and the fact that HUD never creates any public housing itself, Tr. at 1113-14 (Tamburrino),[2] the statutory liability question currently before the Court must be resolved in favor of the federal government.

As an initial, general matter, HUD clearly has given a considerable amount of focused attention to matters encompassed within the concept of regional fair housing. Margery Turner, who supervised the Department's research agenda as Deputy Assistant Secretary for Research Evaluation at HUD for a significant time during the Open Period, testified at trial that HUD placed a high priority on correcting past wrongs by considering regional approaches:

> Q: [W]hile you were at HUD, you focused the department's research agenda on problems such as racial discrimination, correct?
>
> A: Racial discrimination, segregation, the concentration of poverty, were all priority policy issues at HUD, and therefore issues that I wanted to focus the department's research agenda on.
>
> * * *
>
> Q: Same holds true with poverty concentration [it was] a very high priority issue for the department?
>
> A: The department at that time saw these two issues, racial segregation, poverty concentration, and the role that HUD policy has historically played in contributing to those problems as very serious policy concerns.
>
> Q: And the department worked by [sic], and did research about how to fix those problems, correct?
>
> A: Yes.
>
> * * *
>
> Q: And so from your interactions with the HUD staff and employees you

[2] Citations to the trial transcript will be in the form "Tr. at __," followed by a parenthetical containing the name of the witness whose testimony is cited.

knew that HUD remained concerned with the issue of regional approaches to deconcentrating poverty and race, correct?

A: Yes. I think in the first few years after I left HUD, there was pretty clear sort of active engagement by senior HUD staff including the subsequent Deputy Assistant Secretary on these issues.

Tr. at 173-75, 179-80 (Turner).

Similar testimony came from Xavier de Souza Briggs, a former Deputy Assistant Secretary for Research Evaluation Monitoring and acting Assistant Secretary for Policy Development and Research. According to Professor Briggs, HUD considered the issues of regional racial deconcentration and launched a number of policy innovations to achieve that goal:

Q: But if we turn to the late '90s, at least when you were at HUD and when you had knowledge as an insider of [what] was going on at HUD, deconcentration of poverty and race were very important objectives of HUD, correct?

A: I would agree with that. I felt that at the time, yes.

Q: And you – in fact the Secretary, Secretary Cisneros and Cuomo, launched a number of policy innovations that were friendly to the goal of deconcentration, correct?

A: Yes.

* * *

Q: And it's fair to say amidst your response, [that PDR] was continually considering solutions to fair housing during your tenure at HUD?

A: I think that's fair.

* * *

Q: Still talking about HUD, but maybe asking about a current program, you testified a little to these, but HUD has current programs in place that seek to remedy patterns of racial segregation and poverty concentration, doesn't it?

A: It does.

Tr. at 1081-82, 1085 (Briggs). As this testimony demonstrates, HUD has been highly attentive to the identification of ways to achieve racial deconcentration and, correspondingly, to developing regional solutions to that problem.

Thus, the very words of the former HUD leaders called as experts by plaintiffs make clear that HUD gave sustained focus to finding regional approaches to racial deconcentration during the Open Period that is encompassed by plaintiffs' claims. As described below, this testimony is complemented by the showing made at trial regarding the actions that HUD has taken in the context of a broad number of programs that have furthered the interests of fair housing in and around Baltimore.

HUD's decisions about how to allocate its resources to further fair housing in the Baltimore area, through programs, policies, and day-to-day operations, should not be second-guessed. That kind of agency activity is entitled to significant deference if supported by a rational basis in the record. See Fort Mill Tel. Co. v. FCC, 719 F.2d 89, 91 (4th Cir.1983); Thompson v. HUD, 348 F. Supp. at 418. And, it is well established that a court should not substitute its own policy choices for that of the agency when reviewing an agency's actions. See Fort Mill Tel. Co., 719 F.2d at 91 (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947). But even without the deference that the law demands, HUD's commitment to regional solutions to the challenges of fair housing for all persons, including African Americans who live in Baltimore public housing, must be seen as being solidly supported by the record created at trial, as we now explain.

A. Providing Hard Units Throughout the Baltimore Area

HUD does not develop public housing. The creation of public housing is a function of local governmental entities. A locality seeking public housing funds from HUD must first create a public housing authority ("PHA"), to build and administer the public housing projects. Tr. at 1113-14 (Tamburrino). And, Congress has set up the public housing system so that HUD responds to applications for funds from PHAs, rather than imposing public housing funds on localities. 42 U.S.C. § 1439. Therefore, in the absence of a PHA, HUD cannot fund traditional public housing. As explained by Professor Robert Fishman, a leading urban historian:

> [When] the '68 act was passed, there was clearly in people's minds this idea that to affirmatively further fair housing meant to deal with this regional issue.
>
> The problem, as I see it, and I think again this is clear from the record, [is] that HUD had very limited powers to deal especially with the issue in suburban jurisdictions.
>
> HUD could not desegregate public housing there, because almost all of those jurisdictions had never had a public housing authority.

Tr. at 1317-18 (Fishman).

Nevertheless, HUD has, in fact, provided funding for a significant number of housing units in the Baltimore area. HUD has funded the construction of over one thousand traditional public housing units in Annapolis and in Havre de Grace. Tr. at 1110 (Tamburrino). Further, HUD subsidizes approximately 9600 hard units scattered throughout the Baltimore region, with approximately 3600 of those being located outside of Baltimore City. Tr. at 2374-75 (Henderson); FDR Exs. 61-62.[3] In addition, block grants from the HOME Program have

[3] Furthermore, through its section 202 and 811 programs, HUD has added approximately 2600 Project-Based Section 8 units to the housing stock since 1989 to provide for persons with

provided funding and financing for approximately 3500 rental units in the Baltimore Region since 1992. Tr. at 1558 (Sardone). Thus, HUD has provided support for the creation of over 14,000 hard rental units throughout the Baltimore area.

B. Vouchers, and Other Programs That Supplement the Hard Units

HUD's efforts to promote fair housing extend beyond simply providing hard units on a regional basis. HUD also funds housing vouchers, provides home ownership opportunities, and supports the efforts of communities to revitalize themselves.

1. The Regional Reach of Section 8

Central to HUD's efforts to provide families a maximum amount of free choice about where to live is the Section 8 voucher program. Under that program, HUD provides financial support to local administering agencies, which then disperse the vouchers to eligible applicants for use on the open rental market. Tr. at 1113 (Tamburrino). As explained by Professor Fishman, the rationale behind providing housing vouchers is that "you don't subsidize bricks, you subsidize households, people, to make up the difference between what they can afford and the fair market rent in the region." Tr. at 1320 (Fishman). When first pursued by HUD in 1970, the notion of giving people vouchers was "very simple, but, in a way, a very radical idea, given HUD's supply side background." Tr. at 1321 (Fishman). Since then, the program has been refined to simplify its administration and increase the portability of vouchers. Tr. at 1221-25 (Tamburrino). As a result, that very simple, but very radical, idea has had a significant impact on

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disabilities and the elderly. Tr. at 2376 (Henderson); FDR Ex. 63. While these units directly assist persons with disabilities and the elderly, they indirectly create housing opportunities for families, because many units that families now occupy throughout the Baltimore region would otherwise be occupied by the elderly and the disabled.

the lives of poor African-Americans in the Baltimore region. HUD has provided the funding for local Section 8 administering agencies to provide to eligible households so that voucher holders, in turn, can choose the most suitable housing for themselves anywhere in the region – or nation – where a landlord will accept the voucher. Tr. at 1109, 1224 (Tamburrino).

One way in which HUD has promoted this freedom of choice has been to set the subsidy amount of Section 8 vouchers to encourage mobility among voucher families, while maximizing the number of families which can participate in the program. Tr. at 2386-88 (Riley). The retention of some federal control over the level of voucher subsidies – rather than the delegation of all such authority to individual PHAs – represents an effort to achieve these two objectives. Joseph Riley, testifying as Director of HUD's Economic and Market Analysis Division within the Office of Policy Development and Research, explained that the fundamental policy concern represented by the tension between these objectives is reflected in HUD's calculation of Fair Market Rents ("FMRs"), which controls the value of the subsidy:

> The fair market rent is used as a basis for subsidy calculations. And there was a concern by Congress that the standards might be set too low or too high if left to the discretion of individual public housing agencies.
>
> If they were set too low, it might limit people to low quality impacted areas. If they were set too high, the program would cost more than it need to, and it would result in a reduction of the number of families being assisted.

Tr. at 2386-87 (Riley).

Balancing the goal of providing maximum choice for voucher families against the need to set the subsidy level low enough to assist the maximum number of families is an extraordinarily challenging task that has provoked significant scholarly debate. For example, at least one expert who has engaged in intensive study of the economic aspects of FMRs and voucher use, Professor

Edgar Olsen, believes that HUD has provided too generous a subsidy to voucher holders based on a comparison of subsidy and rent levels nationwide, thus providing too much neighborhood choice. Tr. at 1792-84, 1819-20 (Olsen). Irrespective of whether Professor Olsen is correct in this respect, HUD's constant analyses and modifications of the FMRs for the Baltimore Region represents a major factor in its ongoing efforts to encourage mobility among voucher holders throughout the region.

More directly, the methodologies HUD employs to calculate FMRs are designed to encourage mobility among voucher holders. For example, Mr. Riley testified that HUD focuses its rental market research upon persons who have moved into new units within the previous eighteen months when conducting periodic surveys to update FMR levels. Tr. at 2388 (Riley). This focus is significant because such "recent movers" tend to pay higher rents than "in-place renters," that is, persons who have occupied their units for longer than eighteen months. It also allows HUD to incorporate any upward trends in rents in new FMR calculations:

> The Congress and HUD wanted to use the [Section 8] program as a means of encouraging mobility. So, therefore, it set the standard as a recent mover standard, which is virtually always higher than the in place rent standard. And when it isn't, we use the in-place rent standard.

Id. Similarly, HUD attempts to control against the inclusion of substandard rental units when it analyzes rent levels for new FMR calculations. Tr. at 2388-2391 (Riley).[4] By excluding substandard units from the calculation, HUD ensures that subsidy levels will be increased, thereby furthering the goal of neighborhood choice and mobility, and making voucher portability an even more realistic option.

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[4] The exclusion of substandard units is addressed regulatorily. 24 C.F.R. § 888.113(a).

Proof that voucher program does foster mobility and portability was provided by plaintiffs' witnesses. Community leaders testified about the efficacy and desirability of the Section 8 Voucher Program. Reverend Kwame Abayomi explained that the Section 8 Voucher Program was attractive to landlords, and explained that in some cases landlords will accept a Section 8 voucher application before they will accept a standard credit application. Tr. at 684 (Abayomi). He also expressed his view that virtually all persons receiving vouchers wanted to obtain better housing and did so. Tr. at 686 (Abayomi). Similarly, Reverend Johnny Golden testified that Section 8 vouchers provided by the Housing Authority of Baltimore City ("HABC") enabled members of his congregation to find housing outside Baltimore City limits. Tr. at 704-05 (Golden). Another of plaintiffs' witnesses, Doreen Brooks, is a Section 8 voucher holder who, after having "vouchered-out" of Cherry Hill, is now pursuing the prospect of moving to Tennessee with a voucher. Tr. at 450-51 (Doreen Brooks).

The opportunities to live outside of a central city made available by the Section 8 voucher program are remarkable. At trial, Professor Fishman explained that the Section 8 voucher program has opened so many regional opportunities to voucher holders because it builds off the ingrained American value of freedom to choose where to live:

> HUD's real achievement here was to craft a system that was built on the really deep values in our society. And one very deep value is freedom of choice.
>
> This idea of putting freedom of choice at the heart of a housing subsidy program [corrects] one real problem with the supply side. The project kind of public housing, is that you know the authority with a capital A, makes that basic decision, where people are going to live [, n]ecessarily by their siting decisions.
>
> Whereas what . . . resonates with the American people is this deep experience of the right and responsibilities of going out into the market and finding your best location and so on.

> So this idea of freedom of choice, putting that conception at the heart of the housing subsidy system, I think it was an important achievement by HUD.

Tr. at 1335 (Fishman). Thus, HUD's deliberate and careful consideration of regional solutions has borne significant fruit through the development and administration of the voucher program.

2. Block Grants and Other Programs

In addition to the voucher program, HUD provides block grants to local municipalities for use in developing housing and infrastructure, promote home ownership, or provide rent subsidies to poor families. Beyond the approximately 3500 rental units that the HOME Program subsidizes in the region, HOME has also funded direct rent assistance to 460 families in Baltimore County through Tenant-Based Rental Assistance. Tr. at 1556 (Sardone); FDR Ex. 156. HOME funding has also made home ownership a reality for approximately 3300 poor families in the Baltimore region. Tr. at 1558 (Sardone); FDR Ex. 152. These efforts are particularly notable because HUD has worked to inform public housing residents of these home-ownership opportunities. Tr. at 1648 (Sardone). HOME funds also were used to rehabilitate housing for an additional 415 families in the Baltimore area. (FDR Ex. 152.) All told, HUD has allocated over $175 million in funding through the HOME program in the Baltimore region to fund approximately 7300 housing opportunities in that area, almost half of which were located outside of Baltimore City.[5] Tr. at 1545, 1551, 1559, 1647 (Sardone); FDR Exs. 151-53, 155. The success of the HOME Program was confirmed when it was recognized as a Top-50 Finalist for Harvard's Innovations in Government award. Tr. at 1530 (Sardone).

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[5] The $175 million in federal funds are all subject to the match requirement, which under normal conditions requires the municipality receiving the HOME funds to contribute an amount equal to 25% of the funds received from HUD. Tr. at 1537 (Sardone). See 42 U.S.C. § 12750.

The CDBG program has similarly improved the quality of housing choice and living environment for poor persons throughout the Baltimore region. Tr. at 1743 (Kennedy). At least 70% of CDBG funds over a three-year period must be made available for activities that principally benefit low and moderate income persons. 42 U.S.C. § 5304(b)(3)(A); Tr. at 1657 (Kennedy). Often, those CDBG funds are used directly to improve housing conditions by rehabilitating single family homes or by assisting in bringing a community's housing up to building codes. Tr. at 1746-48 (Kennedy). CDBG may also be used to acquire property, or for economic development (to attract businesses to blighted areas), public improvements (such as streets, parks, and sewers), child care services, and public services (such as counseling, and crime prevention programs). 42 U.S.C. § 5305(a); Tr. at 1745-53 (Kennedy). Since 1989, HUD has provided approximately $600 million in CDBG funds to municipalities in the Baltimore region since 1989. Tr. at 2086 (Halm).

These CDBG funds have contributed to neighborhood revitalization, especially in Baltimore City, the core of the region. For instance, HUD funding for the redevelopment of thirty acres of the most blighted property in the city, in East Baltimore just north of Johns Hopkins Hospital, has led to proposals for three large science research buildings, one office building, several structured parking garages, park land, and about 850 units of housing, a third of which are to be affordable to people under fifty percent of median, and another third of which are to constitute relatively low cost "work-force housing." Tr. at 2050-51 (Halm). CDBG funds played a similar role in West Baltimore where the biotech redevelopment in the Poppleton neighborhood is spurring a much broader redevelopment that includes a wide range of residential housing opportunities. Tr. at 2052 (Halm). By bringing jobs and residential developments to

parts of the city like these, HUD works to anchor the housing for the entire region, an essential component of modern regionalism. Tr. at 1382-84 (Fishman) (testifying as to the significance of the urban core for a regional plan in the context of HOPE VI Grants).)

By improving housing and neighborhoods as well as providing access to housing vouchers, HUD has unmistakably furthered fair housing interests throughout the Baltimore area.

C. Promoting Regional Fair Housing Choice By Use of HUD's Many Programs

The work that HUD does to promote fair housing throughout the Baltimore area extends well beyond the provision of funds to build or rent housing. A host of other affirmative undertakings round out HUD's efforts in this regard.

1. Non-Monetary Efforts of HUD's Program Offices

HUD provides a considerable amount of non-financial support for its funding beneficiaries to assist them in providing housing to those in need. For instance, HUD programs, such as HOME, FHA Mortgage Insurance, and Project-Based Section 8, all require the use of affirmative marketing strategies. Tr. at 1599-1602 (Sardone); Tr. at 2365-66 (Henderson). These affirmative marketing plans are specifically directed to persons least likely to apply for these housing opportunities, thereby ensuring that all persons are reasonably likely to learn of those tremendous housing opportunities. Tr. at 1600 (Sardone); Tr. at 2365-66 (Henderson). Also, in connection with the multifamily rental properties, HUD is active in meeting with landlords and property managers to encourage them to participate in other HUD programs and to advise the public that units are available. Tr. at 2377-79 (Henderson).

HUD also educates local governmental entities about how the agency's programs work, and the ways in which they can be made to accomplish results, as part of HUD's effort to support

the "deliver[y of] housing to low income families." Tr. at 1132 (Tamburrino). That sort of effort, known as "technical assistance," is viewed as a crucial element of HUD's work. See Tr. at 1129-31 (Tamburrino). Technical assistance in this regard involves proactively meeting with representatives of local governments to provide them with training and direction, and making sure that those authorities share information with one another. Tr. at 1130 (Tamburrino). These interactions occur both formally and informally. Tr. at 1215-17 (Tamburrino). HUD's information-sharing efforts have borne fruit across a wide array of issues that affect low-income populations, such as matters relating to rent reasonableness determinations made by local Section 8 administrators, Tr. at 1230-31 (Tamburrino), helping local authorities in their efforts to increase Section 8 landlord participation,[6] Tr. at 1227-28 (Tamburrino), and increasing Section 8 portability by encouraging local agencies to conduct more frequent briefing sessions. Tr. at 1228-29 (Tamburrino).

HUD also works hard to emphasize to local governments the need to promote fair housing in all its programs and across geo-political boundaries. In letters sent in 1989 and 1991 by HUD's Assistant Secretary for Community Planning and Development, writing with the Assistant Secretary for Fair Housing and Equal Opportunity, HUD instructed all municipalities receiving HUD block grant funding on the importance of promoting fair housing. Tr. at 2185-89 (Walsh); FDR Exs. 176-77. And, HUD left no doubt about the need to expand housing opportunities for all persons:

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[6] This particular effort was undertaken to help local entities address challenges identified in a regional Analysis of Impediments to Fair Housing. Tr. at 1229 (Tamburrino). Although that Analysis of Impediments was issued in 1996, it formed the basis for attempts to deal with the issue even years after its issuance. Id.

> In affirmatively furthering fair housing, CDBG communities need to actively promote wider housing opportunities for all racial and ethnic groups while maintaining a nondiscriminatory environment in all aspects of the public and private housing market within the jurisdiction.

Tr. at 2186 (Walsh); FDR Ex. 176 at HUD 042445 (emphasis added).

Similarly, to further promote the housing opportunities made possible through the HOME Program, HUD has developed 21 different training courses that it offers throughout the country. Tr. at 1588 (Sardone). These efforts have dramatically increased regional coordination and dialogue on housing policy, as explained by Virginia Sardone:

> Certainly since the HOME program was passed in law 15 years ago, we've seen much more cooperation among the entities that are involved in affordable housing in a community, starting with the federal, state, and local governments, but also the lending institutions, we have a lot of interest among realtors in the HOME program. And for profit and nonprofit developers.

Tr. at 1592 (Sardone).

Although HUD provides support for affordable housing most directly to local governments, it also interacts on a constant basis with individuals looking for low-cost housing. For example, the agency fields requests for information about the availability for such housing all the time. Tr. at 1249 (Tamburrino). To assist in this regard, HUD's Baltimore Field Office publishes *The Locator*, a compendium of valuable information relating to housing opportunities. Tr. at 1250-51 (Tamburrino); FDR Ex. 51. *The Locator* is a user's resource that provides information about the breadth of the assistance programs offered by HUD. The agency estimates that it has distributed approximately 20,000 copies of *The Locator* in the past 10 years. Tr. at 1250-51 (Tamburrino); FDR Ex. 51.

2. HUD's Office of Fair Housing and Equal Opportunity

While HUD's program offices have done much to affirmatively further fair housing, HUD's Office of Fair Housing and Equal Opportunity ("FHEO") also contributes significantly to that effort. At the national level, FHEO has published literature explaining the obligation that participants in HUD's programs have to meet fair housing requirements. See Tr. at 2175 (Walsh); Tr. at 1590-1601 (Sardone); FDR. Exs. 144, 165-170. For example, in 1995, FHEO published a two-volume Fair Housing Planning Guide, which advises block grant recipients on ways to promote fair housing on a regional basis. Tr. at 2175-85 (Walsh); FDR Exs. 171-72. That Fair Housing Planning Guide provides a clear message of support to recipients of HUD funding to create metro-wide approaches to fair housing. Tr. at 2176-85 (Walsh); FDR Ex. 171 at HUD 042500, 042574, 042590, 042594. For example, the Guide explains that with respect to the construction of assisted housing:

> For jurisdictions located in metropolitan areas, serious consideration shall be given to ways they can participate in cooperative, interjurisdictional planning for construction of assisted housing.

Tr. at 2179 (Walsh); FDR Ex. 171 at HUD 042590. After publishing and distributing the Guide nationally, HUD followed up with a nationwide tour by FHEO Staff emphasizing the importance of fair housing. Tr. at 2181 (Walsh).

In the Baltimore area, FHEO has been extremely active over the years in promoting housing choice – a result that benefits all persons, including those who are members of the plaintiff class. The Director of the Baltimore FHEO Center, LaVerne Brooks, has devoted her career to promoting fair housing, starting in 1967 as a community organizer with the Baltimore City Department of Housing and Community Development. Tr. at 2434 (Brooks). Under her

guidance, the Baltimore FHEO Center works to eradicate housing discrimination in the private market by enforcing fair housing laws. That office is responsible for processing scores of fair housing complaints annually, either by directly investigating them or by reviewing investigations done by the Maryland Human Relations Commission, a state entity that receives financial assistance from HUD. Tr. at 2438-40 (Brooks).

The Baltimore FHEO Center's efforts extend beyond combating private-market discrimination. That office also conducts compliance reviews of recipients of HUD funds in the Baltimore region to ensure that they are using the HUD funds in accordance with the law. Tr. at 2441 (Brooks). HUD investigates public housing authorities as well as multifamily housing projects receiving federal aid. HUD's reviews are thorough; they involve reviewing data off-site as well as engaging in an on-site inspection, and can last between a month and a month and a half, yet HUD conducts on average three compliance reviews a year. Tr. at 2441 (Brooks).

The Baltimore FHEO Center also reviews internal HUD documents in an effort to ensure that they are consistent with fair housing laws, including the duty to affirmatively further fair housing. Tr. at 2442 (Brooks). As part of that undertaking, that Center reviews on average 300 documents annually from HUD's Baltimore offices of Public Housing, Community Planning and Development, and Housing, and then provides recommendations as to how to promote fair housing. Tr. at 2442 (Brooks).

By means of these review processes, HUD has continually pushed to expand the housing choices of families, including those in public housing. For instance, in 1991, HUD advised HABC that it "should try to utilize the Section 8 [certificates] to move tenants out of the public housing and into other areas that are non minority areas in the city and without the city, if they

were non minority areas." Tr. at 2444 (Brooks). As part of its effort to promote regional fair housing, in 1997 the FHEO Center reviewed every block-grant entitlement community in the state of Maryland "to see where they were in terms of completing the Analysis of Impediments and where they were in terms of developing actions to remove the impediments to fair housing choice." (Brooks at 2453.) Thus, HUD went beyond mere consideration of regional approaches to fair housing – it actively promoted them through its fair housing reviews.

HUD's Baltimore FHEO Center also promoted regional approaches to fair housing through its education and outreach efforts. FHEO employees spread the message of regional housing choice by going to the locations of the families in need of this message. As LaVerne Brooks explained:

> Q: And what does your office do for education [and] outreach?
>
> A: We do a lot of work in that area. It's an ongoing mission that hasn't stopped even though we're doing primarily enforcement and compliance.
>
> We work with schools. We've gone to churches. We've gone to libraries. We've talked to sororities, fraternities, other groups [on] how to file discrimination complaints.
>
> We go into grocery stores, malls, talked about Title VIII. And we've passed out literature on HUD's programs.
>
> We've also passed out literature on where HUD's subsidized projects are while we're out there. And we are speakers at organizational meetings.
>
> One place that I did speak was the Mid-Atlantic Housing Management Association. And these are representatives of major management companies throughout Maryland that have between 10 and 20,000 units, and we talked about the importance of making sure they're not discriminating, and the need for them to make sure they include tenants who have Section 8 certificates.

Tr. at 2459-60 (Brooks).

The FHEO Center reaches out to educate tenant groups, management companies, realtors, and private nonprofit housing organizations, as well as state and local governments, on the importance of making all housing fair housing. Tr. at 2462-63 (Brooks). HUD also funds other organizations under the Fair Housing Initiative Program ("FHIP"). These FHIP organizations, are committed to fair housing training and the dissemination of the fair housing message through various media. Tr. at 2459 (Brooks). The Baltimore FHEO Center also took the fair housing campaign "on the road," meeting with local government officials in their home jurisdictions, including Anne Arundel, Baltimore, and Howard Counties to advise them on fair housing laws and to propose fair housing policies. Tr. at 2467 (Brooks).

In making these regional efforts, HUD did not overlook the current residents of Baltimore public housing. FHEO Center branch chiefs have provided training for the executives of public housing authorities in the Baltimore region. Tr. at 2467 (Brooks). And, public housing residents are encouraged to participate in fair housing month activities; one year they were even provided with transportation to attend the free fair housing month conference. Tr. at 2464 (Brooks).

D. Building Regional Capacity

HUD has also undertaken innovative approaches to building regional capacity for fair housing in Baltimore, by engaging in such activities as its Moving to Opportunity ("MTO") experiment, the Regional Opportunity Counseling ("ROC") Program, and other efforts to build regional capacity. See Expert Report of Robert Fishman, FDR 2, at 34.

The MTO experimental study has been a highly important aspect of HUD's work with regard to regional housing issues over the past decade. In fact, a former HUD Secretary referred

to the project as "Section 8 on steroids." Expert Report of Robert Fishman, FDR 2, at 24. The project has been able to accomplish two parallel types of results: building regional capacity for affordable and subsidized housing, and increasing HUD's understanding of the reasons that goal is elusive. By comparing the housing results of program participants who were given different types of housing assistance, the MTO study sought to learn the best ways to help the urban poor find housing in "the more affluent suburbs, suburbs furthest from the core," Tr. at 1329 (Fishman), while simultaneously providing families with housing vouchers enabling them to find affordable housing in the various regions in which the project was conducted. The Baltimore area was one of those regions. FDR 32.

The MTO demonstration project was authorized and funded by Congress, but it was HUD that originally devised the plan that became MTO. Tr. at 2109-11 (Shroder). "[O]ne of the purposes of MTO was to examine how a particular kind of program might serve to ameliorate the effects of economic and racial concentrations." Tr. at 105 (Khadduri). Under the program, HUD provided regular Section 8 vouchers to one group of public housing residents, Section 8 vouchers with locational constraints and mobility counseling opportunities to a second group, and no vouchers at all to a control group. Then, HUD studied the housing patterns over time of members of the various groups. FDR 32; FDR 33.

Several hundred Baltimore families that participated in the MTO project received Section 8 vouchers, with about half of them – those receiving special, locationally constrained vouchers – receiving mobility counseling as well. Expert Report of Robert Fishman, FDR 2, at 30-31. By providing these vouchers, "regional capacity" was built. That is, affordable housing was acquired for people in need, and new understandings of housing dynamics in Baltimore became

"part of the regional infrastructure." Tr. at 1331-32 (Fishman).

Beyond providing housing assistance to eligible families, MTO has enabled HUD to acquire valuable knowledge about the problems of poverty concentration and residential segregation. Tr. at 178 (Turner). The MTO results make clear, among other things, that policy-makers cannot assume the existence of a positive linear relationship between mobility counseling and the living situation of the urban poor. See FDR 32; FDR 33; Tr. at 2120-21, 2132-33 (Shroder). But MTO's study results have not been finalized. FDR 33; Tr. at 2138-39. By continuing to mine the results from MTO, researchers will continue to learn which approaches are most effective in helping families move out of distressed neighborhoods. Tr. at 177 (Turner); Tr. at 1077-78 (Briggs).

Another program that built regional capacity was the ROC program. ROC was a program operated in a number of locations around the country; its Baltimore iteration became known as the Baltimore Regional Housing Opportunity Program ("BRHOP"). Under BRHOP, HUD provided $2.1 million from 1997 to 2002 to the HABC to provide regional mobility counseling for Section 8 voucher holders. Tr. at 1239 (Tamburrino); Tr. at 2193 (Walsh). Ultimately, the other Section 8 administering agencies throughout the Baltimore region participated in the promotion and administration of this program. Tr. at 1237-39 (Tamburrino). "[T]he mobility counseling provided through BRHOP offered the voucher or certificate holder the information about a wide variety of rental housing options, metropolitan-wide [, b]ut did not require that the voucher be used in any particular area." Tr. at 1238 (Tamburrino).

The counseling provided through ROC was intensive, and designed to best ensure that poor families could transition to living in low poverty rental housing opportunities throughout

the region. In addition to providing information on housing opportunities, ROC counseled families on how to adjust their credit ratings and how to talk to a private landlord. Tr. at 2191-92 (Walsh). ROC counselors also accompanied some of the participating families to meetings with landlords, to explain and finalize the leases. Id.

Finally, beyond mobility counseling for program participants, the ROC program had the broader goal of landlord outreach, "trying to recruit landlords into the [Section 8] program that had never participated before, especially recruiting landlords that have propert[ies] that are located in low poverty areas." Tr. at 2190-91 (Walsh). Consequently, even though Congress no longer funds the ROC program, Tr. at 2195-96 (Walsh), these regional capacity building effects of ROC extend beyond the life of the program. Tr. at 1331-32 (Fishman); Tr. at 1243 (Tamburrino).

Another significant effort undertaken by HUD to develop capacity for affordable housing in the region around Baltimore involves the preparation of a regional Analysis of Impediments to Fair Housing. Expert Report of Robert Fishman, FDR 2, at 34. The Analysis, published in 1996, was prepared on a regional basis as a direct result of HUD support for regional planning in this regard. Id. The regional Analysis was so thorough a treatment of regional issues that the contractor that prepared it received numerous anonymous threats after its publication. Id. at 34-35.

Plaintiffs suggest that HUD should be faulted for not requiring the jurisdictions that prepared the Regional Analysis to update it since 1996. This criticism falls wide of its mark. Aside from the fact that the jurisdictions that prepared the Analysis were under no obligation to do so, the Analysis positively influenced HUD's views about the region, and its oversight of

local jurisdictions, well past its publication. More particularly, the Analysis helps HUD discuss with local jurisdictions the elimination of impediments to fair housing, and it allows those jurisdictions to recognize that overcoming some of those impediments requires purely local action that the federal government cannot facilitate. Tr. at 1229-30 (Tamburrino). Further, HUD provided funding for the jurisdictions involved in the Analysis to prepare an updated Baltimore Regional Fair Housing Action Plan. That plan, published in 2002, "is now the basis for fair housing strategies in the Baltimore region emphasizing the areas of affordable housing, equitable mortgage lending practices, homeowners' insurance, and sales and rental practices." Expert Report of Robert Fishman, FDR 2, at 35.

In sum, HUD has used focused but intensive programs like MTO and ROC, and support for planning strategies like the Analysis of Impediments and the Fair Housing Action Plan, to complement its other programs in building regional capacity and creating housing opportunities for poor African-Americans throughout the Baltimore region. The efforts that HUD has undertaken should easily be enough to defeat the claim that the government did not affirmatively further fair housing on a regional basis.

II. HUD BEARS NO CONSTITUTIONAL LIABILITY IN THIS CASE

For the Court to find an equal protection violation by federal defendants, it must find either that defendants intentionally discriminated against plaintiffs or that they failed to remedy a vestige of intentional discrimination. United States v. Fordice, 505 U.S. 717, 733 n.8 (1992). Plaintiffs do not contend that there was intentional discrimination by HUD during the Open Period. In the earlier phase of this case, the Court found that there was none. 348 F. Supp. 2d at 450 ("Plaintiffs have not shown, however, that they were intentionally treated unfairly or

wronged by Defendants during the Open Period because of their race."). Plaintiffs' equal protection case therefore hinges upon a finding that federal defendants failed to remedy a vestige of intentional discrimination to sustain a constitutional violation.

Plaintiffs have not established any constitutional violation. They have suggested, of course, that it is HUD that bears a burden of disproving constitutional liability. They are wrong. To begin with, the Court must recognize as nonsensical the prospect of assigning a burden to defendants to disprove a link between prior de jure segregation and current vestiges, without a clear articulation as to what vestiges even form the focus of plaintiffs' claims. It is plaintiffs who must identify which current vestiges they believe defendants should have remedied. See United States v. Yonkers, 197 F.3d 41, 53 (2d Cir. 1999), citing Bd. of Educ. of Oklahoma City Pub. Schls v. Dowell, 498 U.S. 237, 246 (1991) ("vestiges must be described with sufficient precision so that defendants can have 'a rather precise statement of [their] obligations'."). Without a clear description of those vestiges, defendants would be forced to prove a negative that lacks definition, a truly impossible feat. Plaintiffs have not really even identified the vestiges about which they are concerned, let alone described them with anything close to the sort of clarity required to meet their burden.

Plaintiffs face a burden to do more than to articulate clearly the vestiges they claim continue to exist. In a desegregation case in which a government entity that at one time was involved in purposeful discrimination has done what it can to eliminate that discrimination, that entity has achieved "unitary status." Thompson v. HUD. slip op. at 33 (D. Md. January 10, 2006). Once that status has been achieved, the burden lies with the plaintiff to demonstrate that the current inequalities are linked to previous intentional discrimination by the state. Jenkins by

Jenkins v. State of Missouri, 122 F.3d 588, 593 (8th Cir., 1997); Schl. Bd. of the City of Richmond v. Baliles, 829 F.2d 1308, 1314 (4th Cir., 1987); Riddick v. Schl. Bd. of the City of Norfolk, 784 F.2d 521, 534 (4th Cir., 1986).

There can be no question but that unitary status has been achieved insofar as the de jure segregation of the first half of the last century relates to any part of this case not yet resolved against plaintiffs. The affordable housing system of today is not that of pre-1954 Baltimore. The demography of the Baltimore region has changed dramatically since 1954. Thompson v. HUD, 348 F.Supp.2d at 407. As Robert Fishman explains, HUD's "combination of Section 8 region-wide vouchers with regional fair housing action strategies defines HUD's 'regional approach' at the beginning of the 21st century." Expert Report of Robert Fishman, FDR 2, at 28. That approach, he demonstrates, "seeks a definitive break" from earlier problematic housing patterns. Id. To the extent those patterns remained in place after the policies of purposeful discrimination were abandoned half a century ago, that state of affairs was the result of pressure from the private housing market. Id. at 28-29. Even those private pressures began to weaken in the face of HUD action, so that by the 1970s – well before the Open Period to which this case relates – the suburbs began to open up to those African American Baltimore residents needing help with affordable housing. Id.

Plaintiffs have not shown how they can contend that in the wake of the significant societal and policy shifts of the second half of the 20th century, the remnants of the pre-1954 de jure system have continued uninterrupted – particularly on a regional basis. Nor have they established a causal link between the de jure system of decades ago, and the present pattern of affordable housing in the Baltimore region. They certainly have not suggested how the pre-1954

system somehow caused public housing projects not to be built in the suburbs. Given that public housing is developed or not within any particular local jurisdiction by virtue of a variety of decisions made by local and state governments, see Tr. at 1113-14, 1137-38 (Tamburrino), they cannot make such a showing.

As discussed above, HUD has shown that it did what it could do to create an environment where those who build public and assisted housing in the region surrounding Baltimore – private developers and non-federal government entities – would develop housing to which plaintiff class members could move to the extent they decide to do so. Plaintiffs have not pointed to, and cannot point to, anything that HUD could actually have accomplished that would have eliminated whatever remnants of pre-1954 discrimination might continue to linger. Consequently, plaintiffs have not met the burden articulated in cases such as City of Richmond.

When the Court issued its liability decision in this case, it described the sort of evidence it thought it might be offered in the following terms:

> It remains to be seen, in further proceedings, whether HUD's failure adequately to consider regionalization[7] policies was motivated by an intent to discriminate based upon race, a willingness to bow to political pressure, oversight, neglect, and/or other causes.

348 F.Supp.2d at 408-09. Not only have plaintiffs failed to show a link between historical de jure segregation and whatever current inequalities they believe exist, they certainly have not

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[7] The Court provided a precise definition for the term "regionalization." Thus,

> [b]y the term "regionalization," the Court refers to policies whereby the effects of past segregation in Baltimore City public housing may be ameliorated by providing housing opportunities to the Plaintiff class beyond the boundaries of Baltimore City.

348 F.Supp.2d at 408 (emphasis added).

demonstrated any untoward motivation on HUD's part during the course of the Open Period. More to the point, HUD itself has now demonstrated that it did, indeed, consider what the Court has termed "regionalization policies." Therefore, whichever party bears whatever burden, plaintiffs' constitutional claim must be rejected.

III. NO BROAD-RANGING INJUNCTIVE REMEDY SHOULD BE ENTERED IN THIS CASE EVEN IF A LIABILITY FINDING IS MADE

No liability finding should be made against the federal defendants. If, however, the Court does determine either of the two unresolved liability issues in plaintiffs' favor, neither applicable law nor the factual record in this case would permit the entry of an equitable order along the lines requested by plaintiffs. Instead, in keeping with binding precedent, the Court should issue nothing by way of relief beyond a declaratory judgment.

A. The Law Is Settled That Permanent Injunctive Relief Should Be Awarded Sparingly, and Only When a Proper Showing Is Made

The Supreme Court recently reiterated the rule that a settled set of tests must be met before permanent injunctive relief may issue.

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., – U.S.–, 2006 WL 1310670 (May 15, 2006). In providing this formulation of the relevant rule, the Court was simply restating what has long been the law. "It goes without saying that an injunction is an equitable remedy," and therefore "[i]t 'is not a remedy which issues as of course[.]' Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334,

337-338 (1933)." Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982). Indeed, even "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." Id. at 305. Thus, "[i]n granting injunctive relief, a court must also 'pay particular regard for the public consequences of employing the extraordinary remedy of injunction.' Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). Where the harms of a particular injunctive remedy outweigh the benefits, a court may decline to adopt it. Id. at 312-13." National Audubon Society v. Department of Navy, 422 F.3d 174, 200 (4th Cir. 2005).

At play in this case are not only the usual factors that must be taken into account in balancing the equities among the interests of the parties and of the public, but also considerations related to the respective authority and responsibilities of the different branches of the federal government as well as those of state and local governments. The Fourth Circuit recently emphasized the need for restraint when courts consider the prospect of permanent injunctive relief in a case which involved some tension between plaintiffs' ability to demonstrate a violation of their rights and the interest of the federal courts in avoiding unnecessary entanglement in matters of state and local policy. The court expressed its understanding of the state of the law as follows:

> The Supreme Court has rejected the "expansive view" that equity jurisdiction vests federal courts with "a general power to grant relief whenever legal remedies are not practical and efficient." Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 119 S.Ct. 1961, 1969, (1999). Indeed, the unbounded exercise of equitable powers would be "the most formidable instrument of arbitrary power[ ] that could well be devised." Id. at 1974 (internal quotation marks omitted)."

Johnson v. Collins Entertainment Co., Inc., 199 F.3d 710, 727 (4th Cir. 1999).

The question in Johnson had to do with the scope of the "Burford abstention doctrine," so-called in light of the decision in Burford v. Sun Oil Co., 319 U.S. 315 (1943). The thinking underlying that doctrine makes clear that this Court should not take action that would interfere with state and local policy interests, which plaintiffs' proposed remedy would surely do.[8] Under Burford abstention,

> the federal judiciary should [] abstain from deciding cases (1) that present "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar" or (2) whose adjudication in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) (NOPSI) (internal quotation marks omitted).

Johnson, 199 F.3d at 719. In Johnson, the Fourth Circuit considered whether a federal court properly declined to apply Burford abstention in a case brought by habitual gamblers who claimed that video poker operators were violating a variety of state and federal statutes. The court discussed the importance of state policy considerations in determining issues related to the regulation of gambling, and the state's interest in uniformity with regard to the implementation of that policy.

Given those considerations, and the limitations on the exercise by federal courts of their equitable powers, the Fourth Circuit held that "[t]he district court should [] have treaded far more lightly than it did. Without a solid foundation in statute for its remedy and with the substantial

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[8] As made clear on the face of the proposal that plaintiffs submitted before trial, and as addressed both at trial and in the discussion that follows, plaintiffs are asking the Court to require HUD to impose decisions about how non-federal governments should use budgetary authority on those state and local jurisdictions, even though those entities are supposed to be able to exercise their own discretion in that regard.

risk of compromising the independence of state regulatory policy and efforts, the case was a classic one for the exercise of Burford abstention." 199 F.3d at 727. The court directed the lower court to dismiss plaintiffs' equitable claims,[9] or to remand them to a state court, noting that "[i]t takes little imagination to understand that the sweeping equitable authority asserted by the district court could easily be expanded to establish federal judicial sway over many significant state policies, functions, and institutions. We do not believe that the Supreme Court would stand for that." Id. at 729.

The considerations at work in Johnson are not, of course, limited only to cases raising statutory claims. In Pomponio v. Fauquier County Bd. of Sup'rs, 21 F.3d 1319 (4th Cir. 1994) (en banc), the court affirmed the application of Burford abstention to a claim asserting that a municipality had violated the plaintiffs' rights to due process and equal protection under the United States Constitution when it applied its zoning regulations in such a way as to prohibit the plaintiff, a real estate developer, from developing housing where he wanted to do so. The Fourth Circuit relied, in significant part, on the fact that among the key issues presented by the case involved application of zoning rules. Particularly important to the court's conclusion that it should abstain from deciding the case was the fact that "state and local zoning and land use law is particularly the province of the State and [] federal courts should be wary of intervening in that area in the ordinary case." 21 F.3d at 1327.[10]

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[9] The Court of Appeals directed the district court to stay plaintiffs' request for damages, in light of case law requiring that result. That consideration does not, of course, apply here, where plaintiffs neither seek, nor could seek, money damages.

[10] While the Fourth Circuit has suggested that Pomponio was overruled in part by the Supreme Court's opinion in Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996), that appears to be just with regard to the question of the dismissability of a claim for money damages on

As reticent as the case law requires federal courts to be about awarding injunctive relief in cases in which equitable principles do not support the granting of such relief, and in instances involving question of state and local policy, they should be particularly careful about awarding such relief where a plaintiff seeks injunctive relief running against the Executive Branch of the federal government. Not long ago, the Fourth Circuit described the need for the three branches of the federal government to be wary of overstepping their bounds in the following terms.

> Compromises of this sort are critical to a government of separated powers. They permit all three branches to participate in striking a balance between individual rights on the one hand and public interests on the other. The judicial branch identifies a constitutional right (as in Riley [v. Nat'l Fed. of the Blind, 487 U.S. 781 (1988)]), and then the executive and legislative branches reconcile respect for that right with a measured protection of the public interest. We should be wary of upsetting such a delicate dance in which all three partners of government play their distinctive roles."

National Federation of the Blind v. F.T.C., 420 F.3d 331, 350 (4th 2005), cert. denied, – U.S. – (May 15, 2006). Particularly given the long-settled principle that decisions arrived at by federal agencies are presumed to be regular, United States Postal Service v. Gregory, 534 U.S. 1, 10 (2001), the Court should not lightly instruct an agency to run its business in a particular way, even to resolve a lawsuit.[11]

Burford grounds. Front Royal and Warren County Indus. Park Corp.Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, Va., 135 F.3d 275, 282 (4th Cir. 1998). Because this case does not involve a damages claim, and because the Fourth Circuit discusses and applies the aspects of Pomponio that are relevant here in Johnson, which postdates Quackenbush, whatever impact the latter case had on Pomponio is of no moment here. Indeed, as one court of appeals expressly said, "Quackenbush does not affect Pomponio 's reasoning that federal courts should abstain under Burford from adjudicating equitable actions involving questions of land use." MacDonald v. Village of Northport, Mich., 164 F.3d 964, 969 n.4 (6th Cir. 1999).

[11] Additional considerations related to the limited nature of the sort of relief available to a plaintiff suing a federal agency, and particularly in the context of claims brought under the Administrative Procedure Act, are addressed in papers filed earlier in this case, to which the

These various factors operate together in the present situation as follows. As described in previous filings, as shown at trial, and as discussed below, the Court has no workable and affordable remedial approach available to it that would not unfairly undermine the interests of third-parties that have been shown to have done nothing wrong. Consequently, the Court has no basis on which to craft and order injunctive relief. This is particularly so in light of the impact that the decree that plaintiffs champion would have on policy choices that are within the province of state and local governments. And given that an Executive Branch agency's policy discretion is at stake here as well, the Court should be especially wary about ordering relief by way of injunction. In any event, whatever remedy is ordered must fit a liability finding, and, no finding of liability in this case could possibly warrant the sort of remedy requested by plaintiffs.

On several occasions during the course of the recent trial, the Court noted that the denial of injunctive relief could be an uncomfortable result. But as Professor Peter Schuck testified, "the whole point is not to feel good about what we've done with the law. The point is to solve a problem, a complicated problem." Tr. at 1894 (Schuck). And as the Court expressly recognized at trial, the law recognizes situations in which the violation of a right does not necessarily entail entitlement to a remedy. Tr. at 1891.

If plaintiffs prevail on the open liability questions, they might well be entitled to a declaratory judgment. Tr. at 1892 (Schuck). Without separately demonstrating that their case warrants entry of an injunctive order, however, declaratory relief is the most they should get. Particularly because the decree that plaintiffs have proffered to the Court raises especially

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Court is respectfully referred. See especially Memorandum of Law Filed in Support of Federal Defendants' Motion for Summary Judgment, filed on or about June 8, 2005.

challenging issues, the Court should reject their request for injunctive relief.

B. Plaintiffs Have Shown No Entitlement to Injunctive Relief

Just as the law is clear that plaintiffs must demonstrate that they should obtain injunctive relief before it is granted, so, too, the factual record is unassailably deficient in supporting that kind of remedy in this case. Indeed, the record makes clear that plaintiffs' proposed remedy would likely create more obstacles to fair housing than it would eliminate. This is so for the many reasons addressed in the government's pre-trial papers, to which the Court is respectfully referred, as well as in light of the factors discussed below.

1. Considerations of Public Policy Do Not Weigh in Favor of an Injunction

a. A Decree Cannot Be Primarily Driven By Public Policy Factors Unrelated to This Case

As discussed above, considerations of public policy are important factors for the Court to take into account in deciding whether an equitable decree should be awarded. Those considerations, however, must not be generalized notions as to how to help society, but must be tied to this case being litigated, because here, as in any litigation, the remedy must fit whatever liability might be found. See Rizzo v. Goode, 423 U.S. 362, 378 (1976) (referring to "the settled rule that in federal equity cases the nature of the violation determines the scope of the remedy" (internal quotation marks and citation omitted)). Yet plaintiffs' experts, in developing remedial recommendations for the Court, transparently address broad policy objectives rather than trying to craft a focused remedy to fit plaintiffs' theory of liability.

Thus, even though this is a case about race discrimination in federally funded housing, Professor john powell acknowledged that he understood his charge to be to work on ways of

addressing economic segregation. Tr. at 335 (powell). And although the class in this case consists only of African Americans, and only people who either have lived, or will live, in Baltimore City public housing, when Professor powell developed his remedial report he understood the class to include non-African American people of color, and people eligible for all sorts of subsidized housing. Tr. at 336-37 (Schuck).[12] Further, while a remedial order in a complex case creates a risk of nonadherence to the law, Tr. at 1867 (Schuck), Dr. Briggs understands the ordering of a remedy as constituting policymaking of a kind. Tr. at 1042 (Briggs). And Dr. Jill Khadduri's entire report consists of little more than statements as to her policy preferences. Pls. Ex. 765, passim. Indeed, at least several of plaintiffs' experts in this case viewed their task as being the improvement of the life outcomes of class members in all dimensions, rather than as being to remedy the specific liability that plaintiffs set out to prove in this case. Tr. at 304 (powell), 867 (DeLuca).

b. Even If They Were Dispositive, the Public Policy Arguments Made By Plaintiffs In Support of Their Proposed Remedy Would Not Work

Even if plaintiffs' proposals are viewed as bearing a sufficient relationship to some liability finding in this case, the policy-based arguments made on behalf of plaintiffs do not support their case. Plaintiffs attempt to justify their proposed remedial approach by contending

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[12] From the perspective of analyzing housing markets and the public interest in dealing with poverty concentration, it may well be more appropriate to focus on questions of opportunity than on issues of race. Indeed, as Michael Sarbanes testified, the problems of concentrated poverty have changed over time from having a primarily racial dimension to being focused on opportunity. Tr. at 466 (Sarbanes). Whatever impact that might have as a matter of general public policy development on Professor powell's opportunity analysis, or Dr. Khadduri's remedial proposals, or the plaintiffs' other experts' views, what it means for this case is that those opinions are not particularly germane.

that it would be beneficial to members of the plaintiff class, and, presumably, to the public at large, for reasons that go far beyond their interest in living in integrated housing. They base this contention largely on research related to the Gautreaux case. They are wrong to do so.

As discussed at length in the expert report of Mark Shroder, the nature of Gautreaux-related research renders it an inappropriate basis on which to conclude that a remedy that has as its goal the relocation of poor African American families from central city areas of low opportunity to suburban areas of high opportunity is appropriate. FDR 7, at 20-25. As Dr. Shroder described Gautreaux, it was not an experiment, because it was not put together or run as a careful research project. Tr. at 2108 (Shroder). Dr. Shroder described the significant levels of attrition bias and selection bias that infected the Gautreaux results. Tr. at 2103-09 (Shroder). Dr. DeLuca acknowledged the presence of this sort of bias, as well. Tr. at 878-79; 885-86 (DeLuca).

In contrast to Gautreaux, the studies done as part of the MTO project were designed in accordance with rigorous experimental design requirements. Tr. at 2109 (Shroder). Those studies demonstrate just how uncertain this Court must be that a remedy with a design such as that recommended by plaintiffs would have the results for which plaintiffs hope. As the Court was informed at trial, see FDR 33, passim; Tr. at 2131-39 (Shroder), MTO-based studies do not demonstrate that manipulations of housing policy along the lines of what plaintiffs advocate will have anything like uniformly positive results for members of the plaintiff class. Thus, although moving to the suburbs might provide low income former city dwellers with access to better schools, it is hardly clear that their educational performance, employment, earnings, food security and self-sufficiency are improved. Tr. at 2131-32 (Shroder). And, those studies provide some evidence that such moves can have some negative effects, as demonstrated by a finding that

moving from a high poverty to a low poverty area can actually increase levels of delinquency and risky behavior among teenage boys. Tr. at 2132-33 (Shroder). Indeed, as scholars have tentatively concluded, it could well be that the best way to develop policies that will have a positive influence on the lives of the inner-city poor is by focusing on education- and employment-related issues, rather than on housing. Tr. at 2138-39 (Shroder).

Because the Court is obligated to factor considerations of public policy into its decision as to whether to award any sort of injunction at all, and because plaintiffs have hardly shown the likelihood that the public interest would be well served by an injunction, the Court should be reluctant in the extreme to grant injunctive relief.

c. This Case Presents a Situation Far Too Complex For a Detailed Decree to Serve the Public Interest

In order to develop a workable injunctive order in this case, the Court would have to unravel a situation beset with all sorts of intricacies that were identified throughout trial, but as to which the record reveals no sustainable solution. The parties are in agreement that this case requires the resolution of issues that are beyond simply challenging. In testifying for plaintiffs, Professor powell emphasized the complexity of housing markets. Tr. at 307, 316 (powell). Dr. Khadduri did so, as well. Specifically, she noted that "analyzing the impact of anything on a housing market is complex." Tr .at 2699 (Khadduri). And while Professor Peter Schuck testified about the implications of the fact that "the world is very intricate" for purposes of remedial decrees in complex cases generally, Tr. at 1874 (Schuck), he explained why it is that housing markets have to be understood as particularly complex. As he demonstrated, the non-race-based classism that causes individuals to make housing decisions that could run counter to

integrationist tendencies; the relationship between housing mobility and individuals' interest in protecting their housing investments; and the different levels of racial and ethnic homogeneity preferred by different racial and ethnic groups, operate together to create a roiling market that is difficult, if not impossible, to control by court order. Expert Report of Peter Schuck, FDR 6, at 7-11.

According to Dr. Khadduri, one challenge presented in coming to grips with the realities of housing markets is the constantly changing levels of supply and demand within a market. Tr. at 2699 (Khadduri). Indeed, Dr. Khadduri believes that knowledge about the degree to which supply and demand change relative to each other over time is very important in deciding where affordable housing might be produced. Tr. at 2701-02 (Khadduri). One difficulty in this regard, however, is that these changes are so difficult to understand and to measure that different scholars have come to all sorts of different conclusions in this regard. Id.

The complexity of the various systems that the Court would be attempting to alter by entering a remedial injunction would not merely render the prospect of doing so difficult. It would inject into the decree-drafting process a large number of variables that are inherently inappropriate subjects of judicial decision-making.

The very nature of the judicial system does not lend itself to the sort of information gathering and digesting that is necessary to arrive at an appropriate remedial approach. As Professor Schuck explained, courts are fundamentally different from legislatures and administrative agencies when it comes to the manner in which they gather facts. Courts are constrained in their ability to gather data on the basis of which decide their cases. Litigants have their own interests to represent, and lack both obligations and incentives to provide courts with

information that is irrelevant to their own cases about what sort of remedial order might be in the interest of non-parties. In ordinary litigation, that does not matter, because those sorts of non-parties are few, and will be affected by relief granted in bilateral litigation only in tangential ways. In a complex case, however, particularly one that touches on interests arising in as intricate an area as housing, considerations relating to the impact of an injunction on non-parties are many and deeply important. Expert Report of Peter Schuck, FDR 6, passim.

In this particular case, those interests are huge in number. As Jill Khadduri testified in concluding the evidentiary phase of this proceeding, the people and entities involved in making decisions relative to the development and siting of housing include a vast array of state and local governmental organizations, as well as all sorts of private actors. Tr. at 2706-08 (Khadduri). And as Professor Schuck testified, "there are tens of thousands of people making independent decisions that can stymie what the Court is trying to do." Tr. at 1894 (Schuck).

The question of information is hardly just a matter of whether or not the Court has access to data that actually exist. The greater point is that the various entities and individuals that will be affected by a remedial order are likely to react to that order in ways that neither the parties nor the Court can possibly foresee. Because so many decisions would be made by so many people, with so many implications and so many possible outcomes, the Court could be assured of nothing with regard to the results that would flow from the entry of an injunctive decree in this case other than that the results are unknowable. As Professor Schuck articulated the point,

> [I]t is almost certain that there will be lots of behavioral adaptations and consequences that the Court, and any court, and the wisest person in the world would simply not be able to foresee.
>
> As you multiply those possibilities across a very large number of people, it's easy

> to understand why the outcome may be very different than what was intended and, in some cases, worse.

Tr. at 1875 (Schuck).

The Court heard evidence, of course, concerning the need to avoid entering a decree that could make matters worse for members of the plaintiff class, and the risk that that would happen. As Dr. Rohe testified, the very aspect of life in the Baltimore region on which a remedy should focus, if on anything – the growth of opportunities for low income African American families to live in the region surrounding Baltimore City – has gotten considerably better during the Open Period to which this case relates. Over the last decade or so, the concentration of both poverty and of minority population has decreased in central cities, while suburban areas have become more racially mixed. Tr. at 2509 (Rohe). William Tamburrino described the degree to which positive housing development is taking place in the City of Baltimore. Tr. at 1256 (Tamburrino). And even plaintiffs' experts acknowledge that minority populations are moving to the suburbs in considerably greater proportions than was the case in the past. Tr. at 310 (powell).[13]

Thus, on one hand, the Constitution has not given the federal judiciary the necessary tools to handle the myriad cross-cutting elements of the problems presented by this case. On the other hand, plaintiffs have not provided the Court with anything approaching an adequate factual basis for even an institutionally competent decision-maker to reach a solution to those problems.

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[13] To be sure, plaintiffs refer to the increasing minority populations found in the suburbs as a sign of distress, but the point is that the Court's earlier liability finding was based on the notion that HUD had improperly addressed the needs of public housing residents in Baltimore City without considering the area in the surrounding suburbs as a housing resource, while Professor powell says that although "we used to think about the city versus suburbs," that has changed, with "the housing market function[ing] as a region, which I think is one of the way[s] HUD thinks about it." Tr. at 310 (powell).

Under these circumstances, an injunctive decree in favor of plaintiffs cannot be crafted.

d. The Public Interest Demands That Plaintiffs Be Given Housing Choice, Which Would Be Denied By Plaintiffs' Proposed Remedy

Dominant among the criteria that should be considered in developing a remedial approach in this case is the plaintiff class members' interest in maintaining the ability to exercise choice as to where to live. Tr. at 1897 (Schuck), 1800 (Olsen), 2512 (Rohe). Indeed, as Dr. Khadduri testified, it is generally unfair to make certain areas of the Baltimore region off-limits to class members. Tr. at 2696 (Khadduri). Yet, plaintiffs' proposed remedy would actually limit the requisite choice in ways that the Court should recognize as unacceptable.

Plaintiffs make no bones about the fact that their proposed remedy would mean that class members' ability to choose where they would obtain assisted housing would be restricted. The proposal itself would require the siting of units created or assisted under its terms only in certain census tracts in the Baltimore region, presumably identified in accordance with Professor powell's "communities of opportunity" approach. Thus, in order to take advantage of a remedy along the lines of the one proposed by plaintiffs, a class member with a Section 8 voucher would have to forego his or her right to use that voucher anywhere. So, too, HUD would receive no credit under the proposed remedy for any units created by developers anywhere except those identified communities of opportunity.

Dr. Briggs appeared entirely dismissive, at trial, of the notion that this sort of restriction is a restriction at all. He testified that, in his view, a voucher holder who might want to use a voucher in an area that does qualify as a community of opportunity under a remedial order in this case could simply opt to use his or her voucher elsewhere. Tr. at 1061 (Briggs). His opinion in

this regard, however, is based on a perspective that is entirely too academic to be helpful. As explained by William Tamburrino – who has a lengthy background of real-world experience in the field – Dr. Briggs' belief does not take into consideration the fact that class members who might want to use a regular Section 8 voucher without restrictions imposed by a court order would have to contend with the lengthy waiting lists maintained by HABC. Tr. at 1126-27 (Tamburrino). In this regard, Mr. Tamburrino noted, Dr. Briggs' testimony was simply unrealistic. Tr. at 1128 (Tamburrino).

Not only would plaintiffs' proposed remedy impose restrictions on their own class members, those restrictions would fly in the face of constitutional principles, policy choices made by Congress that are embodied in statute, and the reality of racial housing preference patterns. The identification of communities of opportunity advocated by Professor powell would, in his terms, be "race conscious." Pls. Ex. 766 at 4. In other words, the remedy would be implemented in such as way as to avoid moving too many African Americans too quickly to low-minority, high-opportunity census tracts, to minimize the prospect of white flight from such areas. Tr. at 346 (powell).[14] But, as explained in HUD's pretrial papers, that kind of race-conscious approach is not permissible as a matter of constitutional law. Federal Defendants'

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[14] Professor powell explained that this implementation should be accomplished by means of counseling and the provision of incentives. Tr. at 346-47 (powell). While he later said that the considers it unlikely that there would be a need for much counseling of African Americans out of high opportunity areas, given the number of such areas, Tr. at 352 (powell), the fact remains that he advocates counseling to protect against what he considers to be the realistic prospect of a significant problem: white flight. Tr. at 344-45 (powell). Besides, what is at least as relevant as the shear number of high opportunity census tracts is the concentration of class members in them. As Dr. Rohe testified, the assumption that under plaintiffs' proposed remedy class members would be evenly distributed across the high opportunity census tracts is just not realistic. Tr. at 2526-27 (Rohe).

Pretrial Brief Submitted In Connection With March 2006 Trial, at 41-42. Indeed, plaintiffs themselves recognize that Supreme Court case law requires a race neutral approach. Pls.' Pretrial Reply Brief, at 20. Their papers expressly say that, because of that case law, they "rely on Professor powell's community of opportunity approach as a race neutral means of creating desegregative opportunities." Id. In an ironic twist that underscores just how untenable plaintiffs' position is, Professor powell expressly rejected plaintiffs' own characterization of his approach, in the following unequivocal terms:

Q. But it's not race neutral, your approach is not race neutral?

A. No, it's not race neutral.

Tr. at 350 (powell).

Nor is an approach, such as plaintiffs', that requires the development of hard units fit for class members in high opportunity areas by means of Low Income Housing Tax Credits ("LIHTC"), consistent with the policy made manifest in the LIHTC statute. As Dr. Khadduri explained, under the LIHTC program, as Congress created it, a relatively greater tax benefit is available to developers who create housing opportunities in Qualified Census Tracts. Tr. at 121-22 (Khadduri). Those tracts are defined as areas of greater poverty concentration, not less. 26 U.S.C. § 42(d)(5)(C)(ii). Therefore, by supporting the development of LIHTC units in lower poverty areas, plaintiffs' proposal would tend to result in the creation of housing options for plaintiffs in a manner directly contrary to the direction in which Congress pointed the LIHTC program.

Further, plaintiffs' approach would not provide a remedy for those class members who happen to want to remain in areas that plaintiffs consider to be less than ideal. This flaw in their

proposal must result in its rejection as a matter of law. While plaintiffs certainly recognize that sufficient resources might not be available to provide a remedy for all class members who are interested in their proposal, see, e.g., Tr. at 2679-80 (Khadduri), they provide no remedy at all for class members who happen to lack that interest. As explained by Dr. Rohe and by Margery Turner, many class members who might otherwise be entitled to alternative housing under plaintiffs' remedial plan could well choose to remain in their current housing, or to live in areas that do not qualify as areas of opportunity, for a variety of reasons. See Expert Report of William Rohe, FDR 5, at 21-22; Tr. at 182-83 (Turner). Aside from the sheer paternalism evident in the testimony of Dr. DeLuca that a neighborhood with a lower concentration of blacks is less segregated and therefore a "better" neighborhood, Tr. at 876 (DeLuca), or Professor powell's statement that "we [should not] leave [class member] families where they are," Tr. at 327 (powell), allowing this class action to proceed toward creation of a remedy only for those class members who decide to live where plaintiffs' experts think they should live, with no remedy at all for class members who have different ideas about where to live,[15] would simply be impermissible under established principles of class action litigation. Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) (class representatives with interest in one type of remedy may not represent single unified class which consisting of both members with interest in the same remedy and those with interest in a different remedy).

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[15] The federal defendants certainly do not discount the possibility that some class members would not understand what constitutes better housing than they have, or would not know how to access it, without help. That does not mean, however, that the Court should order HUD to provide specified types of assistance to people who might want to move to location that meet criteria specified by experts hired by plaintiffs, and should enter an injunctive order providing nothing to anyone else.

Aside from the legal difficulty inherent in a decree that only provides a remedy for some class members, the remedy would only work if enough class members wanted to move to areas of opportunity, and those areas retained their character as such after the influx of class members. The prospect of that occurring is minimal. As the Court heard at trial, it is a matter of general understanding among scholars that, while African Americans enjoy living in integrated neighborhoods, they prefer to live in areas with appreciable numbers of other African Americans. Expert Report of Peter Schuck, FDR 6, at 9. In general, their preference is to live in communities with about fifty percent like-race residents. Id. This is borne out by the fact that, in the Gautreaux program, class members who moved from high minority areas to lower minority areas under the program, tended, in subsequent moves, to regress to the mean with regard to race to a greater degree than they did in other respects. Tr. at 879-81 (DeLuca). Individuals such as the members of the plaintiff class in this case tend to cluster together in deciding where to live. Expert Report of Peter Schuck, FDR 6, at 9. Although whites are also certainly generally willing to live in integrated settings, they prefer to live in areas with a much higher proportion of same-race residents. Expert Report of William Clark, FDR 1, at 9. Further, an influx of low income African Americans to a low minority, low poverty neighborhood creates a risk that whites, and, in general, those who are economically better off than the in-movers, will tend to leave the neighborhood, and that other such relatively well-off non-minorities will not move into the neighborhood. Tr. at 344-45 (powell). As Professor Schuck described the problem that results from these realities,

> So long as the preference of blacks for the black composition of their ideal neighborhood differs from the whites' view of the racial composition of their ideal neighborhood, so long as those two estimates are different, then there is going to be a

> destabilizing effect that has come to be called white or middle class flight, in which both whites and blacks are going to end up with less integration than they would like.

Tr. at 1882 (Schuck). As even plaintiffs' expert, Dr. Briggs, testified,

> [T]here's a gravitational tug back toward segregated communities, as best we can tell, for several reasons. There are communities where there tend to be more landlords that accept Section 8. There's a reputation and grapevine that operates among residents that say they will accept a voucher there. People may have friends and relatives in communities. There are tendencies to resegregate for these reasons.

Tr. at 1022 (Briggs).

So, try as the Court might to impose a remedy that achieves a certain level of racial integration, that goal will be elusive, because of the dynamic nature of the housing market and the interplay of the choices that members of different racial groups make about where to live.

2. Plaintiffs' Proposed Injunction Is Not Likely to Work

Aside from the challenges inherent in locating enough support in the record for a finding that the equitable tests that must be met to justify a structural injunction have, in fact, been met, and the difficulty in crafting an order that makes sense, the Court can have no confidence that an injunctive decree along the lines of what plaintiffs want in this case would actually work. Central to plaintiffs' remedial plan is the proposition that the Court can identify those areas around the Baltimore region in which class members would have greater opportunities than elsewhere, and that housing opportunities could be developed there for their benefit. The various assumptions inherent in that proposition are far too problematic to support injunctive relief.

a. Plaintiffs' Opportunity Approach Is Flawed

First, plaintiffs' experts have not even been internally consistent in telling the Court how to go about locating opportunity areas. Professor powell, the primary proponent of the

opportunity approach, used certain specified criteria in defining areas of opportunity. Pls. Ex. 766, passim. But entirely absent from those criteria were a number of different factors that could have been used. For example, among the indicia of opportunity that Professor powell did not use, but that he agreed he could have, are the location of hospitals, child care facilities, fire departments, libraries, shopping opportunities, parks, public pools, and places of worship. Tr. at 342-43, 359-61 (powell). And, in Professor powell's own opinion, the development of an opportunity-based model "must be deliberately connected to" a number of the very factors that he did not take into account at all for purposes of this case. Tr. at 362 (powell).

The opportunity approach utilized by Professor powell is problematic, as well, because it is so heavily based on census data. Pls. Ex. 766, passim. As two of plaintiffs' experts testified, relying on census data presents difficulties. Dr. DeLuca testified that decennial census results are based in large part on individuals' reporting about themselves, Tr. at 871 (DeLuca), and that self-report data is not as reliable as information taken from administrative sources. Tr. at 869 (DeLuca). Dr. Khadduri explained that among the limitations of census data are the fact that it ages over the course of a decade; that neighborhoods as functional units do not always coincide with census tract borders, and that census tracts that look the same in terms of demographic data may provide markedly different opportunities for their residents. Tr. at 123-24 (Khadduri). Indeed, as the Court well knows from considering evidence presented during the first trial about the issues surrounding the placement of Hollander Ridge in a location that was non-impacted, it is exceedingly difficult to determine from a statistical description of a census tract alone whether the tract is a lovely, bucolic area with wonderful neighbors, or whether it adjoins a commercial or industrial location whose residents have no interest in welcoming any low-income residents into

their backyards.[16]

Nor have plaintiffs provided enough information on the basis of which the opportunity model could even be applied by the Court. Although Professor powell submitted a considerable number of maps that purport to identify parts of the Baltimore region as opportunity areas, they do not tell the Court what it would need to know to define the opportunity areas and non-opportunity locations. The maps are just not detailed enough to accomplish that sort of result.

b. HUD Lacks the Kind of Leverage Over State and Local Governments That Plaintiffs Ascribe to the Agency

Plaintiffs recognize that if their approach is going to work, some entity or another must have the power to require non-parties to this litigation to take certain action that they might not be inclined to take. The Court, of course, cannot require anyone who is not a party to a case pending before it, or who is not sufficiently identified with a party to come within the ambit of a Rule 65 order, to take any particular action or to refrain from acting. Therefore, plaintiffs claim that the Court should order HUD to require non-parties to act in certain specified ways. HUD, however, has no more power in this regard than does the Court.

Plaintiffs' most fundamental error with regard to its assertion that HUD has leverage in this regard stems from a misreading of relevant statutory provisions. Thus, they have argued that HUD has authority to disapprove a jurisdiction's comprehensive housing affordability strategy ("CHAS") – which is submitted as part of the consolidated planning process for purposes of both

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[16] Had Professor powell studied the location of open space and parks, the level of political participation, or the sales and property tax base, as he did in a similar study done in connection with housing in Chicago, Tr. at 343 (powell), the Court might actually have had better information on which to make a decision, although the record would still not be adequate to issue the sort of injunction that plaintiffs seek.

the HOME and Community Development Block Grant programs – if the strategy is inconsistent with certain purposes set out in 42 U.S.C. § 12702, among others. Plaintiffs' Pre-Trial Memorandum at 51. But the relevant statutory language neither provides HUD the sort of discretion that plaintiffs' argument suggests, nor even refers to the purposes set out in the statutory section on which they primarily rely. To the contrary, Congress has instructed HUD that a state or local jurisdiction's CHAS "shall be approved," unless within a set time frame the agency determines either that it is incomplete or that it is inconsistent with "the purposes of this Act." 42 U.S.C. § 12705(c)(1). Thus, the very language of the statute limits HUD's discretion. Further, the purposes of the statute in question – the Cranston-Gonzalez National Affordable Housing Act – are not set out in section 12702, which plaintiffs cite to support their view that a CHAS may be rejected if it is not sufficiently supportive of minority rights, but rather are found in 42 U.S.C. § 12703, which focuses on the affordability of housing and the housing challenges faced by the disabled. Therefore, for the Court to rely on the sort of leverage that plaintiffs say HUD has to press local entities to take various kinds of action would be inconsistent with the way Congress has set up the system.

Even beyond matters of statutory applicability, plaintiffs' "leverage" theory is wrong, because it is inconsistent with the real-world nature of the relevant HUD programs. Plaintiffs attempt to articulate the nature of HUD's power to exercise leverage over non-parties through the testimony of Dr. Khadduri. The very way in which she describes that leverage, however, underscores how weak it is. Central to her theory that HUD has meaningful leverage in this regard is the proposition that it is state, and to a lesser extent local, governmental entities that have the greatest authority to control relevant policy decisions relating to affordable housing, but

that HUD can see to it that those decisions favor plaintiff class members by dangling the possibility that those non-federal entities might lose funds to which they would otherwise be entitled under the HOME and Community Development Block Grant programs if they do not toe the line. As Dr. Khadduri acknowledged at trial, she believes that states have the most power and responsibility to affect rental housing policy of any governmental entities in the country, because of their authority over the Low Income Housing Tax Credit program. Tr. at 2708 (Khadduri). As she also acknowledged, the nature of the leverage that HUD has over state and local jurisdictions in this connection consists of its ability to engage in conversations with those jurisdictions about what they might do to encourage the creation of housing opportunities, and its ability to review the consolidated plans that those jurisdictions submit in connection with their block grant programs. Tr. at 2692-93 (Khadduri).

The primary problems with Dr. Khadduri's 'leverage' theory are as follows. First, the fact that HUD can engage in conversations does not give it any particular power that it will obtain whatever the Court might direct the agency to get local governments to do. Second, as discussed at some length in HUD's pre-trial papers, the block grant programs to which Dr. Khadduri refers are formulaic; the relevant statutes do not give HUD discretion to deny block grant funds simply on the ground that a state or municipality does not propose to take action that a court happens to have ordered in a case to which that state or municipality is not a party. This is certainly the case where that non-federal entity has not been shown to have done anything wrong. Nothing in the record of this case would allow HUD to take such action as to any jurisdiction in the Baltimore area.

During the course of the remedial trial, the Court heard HUD officials who hold key

positions relating to the administration of the CDBG and HOME programs explain how much discretion local recipients of grant money have to decide how to use that money. Virginia Sardone, who administers the HOME program, described the formulaic nature of the program, and the fact that block grant recipients have the authority to choose among many different ways in which grant funds can be used for the benefit of low income individuals. Tr. at 1525-30 (Sardone). As she testified, the HOME program "is a block grant program, and HUD has no authority to require the funds to be used for any particular activity, or to serve any particular group." Tr. at 1641 (Sardone). She reiterated the point, and underscored the fact that local jurisdictions rely on input from the residents of their communities, when she said:

> The HOME program is a block grant program, and the decision-making with respect to the use of funds is determined by the participating jurisdiction after preparation of their consolidated plan and the citizen participation and consultation that go on through that process.
>
> And HUD does not have the authority to absent a violation, such as site and neighborhood standards violation, to question site selection.

Tr. at 1650 (Sardone).

Likewise, Richard Kennedy, with responsibility for CDBG policy, explained at trial that the Community Development Block Grant program provides funds for local communities to undertake a wide variety of activities in addition to housing, with local governments having a great deal of flexibility to decide how to use that money. Tr. at 1661 (Kennedy). Thus, "the CDBG program essentially devolved decision-making along with the resources to local and state governments to undertake activities that they saw as the most important needs in their communities or in their states." Tr. at 1657 (Kennedy). As Mr. Kennedy also said, the block grant program involves a considerable amount of long range planning, that requires a community

to set its priorities based on its needs, and that entails "a lot of citizen participation." Tr. at 1744 (Kennedy). As he explained, before 1981 HUD had a bit of statutory discretion in connection with deciding how to use program funds; by amending the CDBG statute in 1981, however, Congress emphasized that non-federal jurisdictions are intended to be the primary decision-makers as to the use of program money. Tr. at 1755-56 (Kennedy).[17]

Beyond the fact that HUD simply does not have the ability to coerce local jurisdictions to take action consistent with something that the Court might order if those jurisdictions are not otherwise already obligated to take that action, that kind of coercion would not likely achieve the desired results. Dr. Khadduri herself recognizes that whatever pressure HUD exerts on non-parties cannot be coercive if it is to work. Tr. at 116 (Khadduri). She understands that the primary tool that HUD has available to it with which to try to exercise leverage – the prospect of losing block grant funds if a particular state or local jurisdiction defies HUD's wishes – cannot, in fact, be imposed in a coercive manner, for the simple reason that such jurisdictions may turn down grant money if they are not interested in complying with whatever conditions HUD imposes. Tr. at 118 (Khadduri). Indeed, non-federal governmental entities have, in the past, done just that – turned down grant money – in situations in which they did not want to participate in the remedy of a court order imposed in a housing desegregation case. Tr. at 2515 (Rohe).

Dr. Khadduri's concerns about the effectiveness of imposing conditions on local jurisdictions in a coercive manner are borne out by the practical experience of HUD personnel in

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[17] See Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, Title III, Subtitle A. See also House Conference Report No. 97-208, 1981-2 U.S.C.C. & A. N. 1010, 1032 ("changes made to the Community Development Block Grant program . . . are intended to reduce HUD's level of involvement in local affairs").

the field. As William Tamburrino testified, "[w]hat would be very foolish for me to do is to cut off any money [that HUD would otherwise provide to a local housing authority] without a specific requirement or authority to do so." Tr. at 1255 (Tamburrino). As Mr. Tamburrino explained, that sort of approach "would certainly create a very negative reaction from the recipient of federal funds." Id. Mr. Tamburrino has specific experience with just that kind of reaction. As he informed the Court, in 2004 his office took a significant step in the direction of taking over HABC's Section 8 program. In light of the fact that HUD did not have a codified basis for effecting a takeover at that particular point in time, the City's reaction to the takeover proposal was swift, strong, and negative. Tr. at 1133-36 (Tamburrino).

Various other witnesses agreed that coercive tactics, such as using the threat of funds cutoffs, are not likely to be effective. Thus, Dr. Rohe testified that developing an effective way to address any interest in accomplishing desegregation would require cooperative negotiation among all affected jurisdictions, which would be significantly undermined by the threat of the cutoff of block grant money. Tr. at 2517-18 (Rohe). Dr. Rohe also expressed his view that HUD simply does not have any "sticks" large enough to force suburban jurisdictions to accept the number of units that plaintiffs recommend be included in a remedy. Tr. at 2518 (Rohe). Mark Joseph, an experienced real estate developer, who knows the Baltimore area well, agrees. As he testified, a court order requiring something like the creation of an area-wide agency "would best be done with carrots as well as sticks," and that in the view of Baltimore County, at least, a court order would be viewed as a stick. Tr. at 1581-82 (Joseph).

HUD's ability to influence relevant decision-makers would be affected by other factors, as well. As discussed above in a slightly different context, a variety of political jurisdictions

constantly make an array of different sorts of decisions that are well beyond HUD's ability to influence, given their nature and their sheer volume. For example, as Dr. Khadduri testified, state agencies decide how to allocate low income housing tax credits; city, county, and state entities make decisions as to whether to use block grant money to fund housing projects, and if so, which ones to fund; state housing finance agencies decide whether to provide subsidies for housing projects; public housing authorities make decisions about the use of vouchers; and zoning boards and code enforcement agencies make decisions relating to construction. Tr. at 2706-07 (Khadduri). Those sorts of decisions, of course, are made not only by government entities, but also by all sorts of private actors. Thus, investors determine where they will use their assets, while developers decide whether to develop new properties, and, if so, where they will do so. Id. And when developers decide whether to get involved in any given project, they base those decisions on such factors as the availability of land, what kinds of projects they can afford, their expertise in particular types of projects, the local educational and transportation resources that a given locality has to offer, and a broad number of additional economic issues that are beyond the scope of a local government's ability to control. Tr. at 1585-86 (Joseph).

Given this multitude of considerations, granting an injunction that would require the cooperation of a host of entities that are not subject to this Court's control, on the theory that HUD is empowered legally and practically to force that cooperation, would make no sense.

c. Requiring HUD to See to the Development of Both Vouchers and Hard Units In Suburban Communities Would Be Problematic

Plaintiffs have proposed a remedy that would require HUD to provide for new housing opportunities, with some consisting of vouchers and some consisting of newly produced "hard"

units. But developing hard units is not a sensible approach to dealing with whatever liability this Court might find in this case.

For one thing, as Mark Shroder explained at trial, local governments would be highly unlikely to support the construction of new housing units for low income residents wanting to move into their jurisdictions. Tr. at 2097-99 (Shroder). This is so because local jurisdictions have both fiscal and political incentives to oppose the creation of such new hard units. On the fiscal side, a receiving jurisdiction would face the prospect of providing services to new residents without much chance of realizing any significant new tax revenue from them. Tr. at 2098 (Shroder). On the political side, residents of a receiving jurisdiction would probably urge their political leaders to oppose such new construction on the theory that new high density apartments would increase problems associated with population growth – such as congestion, and possibly crime – with no offsetting benefits. Tr. at 2099 (Shroder). Further, as a practical matter, a receiving jurisdiction might very well have good reasons to zone multifamily housing developments out of areas that would otherwise be viewed as communities of opportunity. Tr. at 2514-15 (Rohe).

Indeed, plaintiffs' own expert witness on the economics of the Baltimore area's housing market holds the view that the development of new rental housing in the region faces significant obstacles. Thus, Anirban Basu testified that a lack of available, buildable, residentially zoned land in Baltimore County, and concerns about such issues as traffic and school overcrowding in Howard, Anne Arundel, and Harford Counties, constitute real challenges to such development. Tr. at 408-11 (Basu). In light of these considerations, in Mr. Basu's view, it is "very, very difficult" to site rental housing in many jurisdictions throughout the Baltimore metropolitan area.

Tr. at 412 (Basu).

Nor would the construction of new units outside Baltimore for people from inside the City be likely to attract support from the City. As Dr. Shroder noted, the City leaders would be losing constituents, a result they would probably rather avoid. Tr. at 2099-2100 (Shroder). This factor would be particularly salient, given Dr. Rohe's testimony that the provision of new housing opportunities outside the City for people who currently live in public housing in the City would result in "creaming" – that is, a situation in which HABC-owned housing would lose those tenants who are least likely to create problems for their neighbors, for their housing projects, and for the City. Tr. at 2512-13 (Rohe); FDR 5 at 22.

A remedy would need the support and cooperation of all affected jurisdictions. Tr. at 2511-13 (Rohe); FDR 5 at 16-17, 28. But a remedy that requires the funding of voucher opportunities in suburban jurisdictions along with the construction of hard units there would, in all likelihood, not garner that necessary support. For that reason, ordering plaintiffs' proposed remedy would not provide class members with relief from whatever harm they might have suffered.

A requirement that hard units be a part of a remedy would be problematic for an even more basic reason. Hard units are simply more expensive to develop than vouchers are to provide. Expert Report of Mark Shroder, FDR 7 at 2-3; Tr. at 2168 (Shroder). Additionally, suburban projects developed with units dedicated for the use of low income households can create a variety of social problems. Tr. at 2100 (Shroder); FDR 7 at 17. Therefore, a remedy such as the one contained in plaintiffs' proposal, that would require both the funding of vouchers and the creation of hard units, would not be a realistic way to address whatever liability might be

found in this case.

d. HUD Has No Available Resources to Pay for the Remedy Proposed by Plaintiffs

The Court lacks the power to order any remedy that would require the expenditure of public funds the agency does not have, or any remedy that would contradict the requirements for the obligation of such funds set by Congress. That is because the Appropriations Clause of the Constitution vests the exclusive authority for the appropriation of public funds in Congress. See U.S. Const. Art., § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); Office of Personnel Management v. Richmond, 496 U.S. 414, 424-25 (1990). This bedrock principle is controlling, irrespective of whether or not a remedy is otherwise appropriate. As one court expressed the point:

> Equity empowers the courts to prevent the termination of budget authority which exists, but if it does not exist, either because it was never provided or because it has terminated, the Constitution prohibits the courts from creating it no matter how compelling the equities.

National Association of Regional Councils v. Costle, 564 F.2d 583, 589 (D.C. Cir. 1977). Thus, "unless a court can rely on a statutory authorization, it simply lacks the power to order the obligation of public funds, regardless of how appropriate a remedy that order would be." Id. at 590. Where a statutory authorization does exist but provides that the relevant budget authority must be allocated in a certain fashion, courts may not contradict such instruction: "[T]he touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.' Califano v. Westcott, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part); see also Dorchy v. Kansas, 264 U.S. 286, 289-90 (1924) (opinion for the Court by Brandeis, J.)." Ayotte v. Planned Parenthood of

Northen New England, 126 S.Ct. 961, 968 (2006).

As detailed infra, there simply is no budget authority available to HUD to fund any remedy the Court might seek to impose. The budget authority that exists is explicitly constrained by the mandate of Congress, whose legislative intent as to how HUD's housing programs should, and should not, be operated is made manifest in the statutes that created the programs and provide the budget authority to manage them.

i. Section 8 Rental Assistance

HUD's largest program office is its Office of Public and Indian Housing ("PIH"), with a total appropriated budget of approximately $27.46 billion in FY 2006. The majority of that total is allocated to Section 8 tenant- and project-based rental assistance, see 42 U.S.C. 1437f et seq., which comprise $20.66 billion in FY 2006. The majority of this amount – roughly $14.089 billion – represents direct rental assistance to certain very low- and low-income households in the form of vouchers which those households can employ to obtain rental housing in the private market. See 42 U.S.C. § 1437f(o)(4). The second-largest component of PIH's FY 2006 appropriation, $5.088 billion, represents project-based rental assistance in the form of subsidies that attach directly to specific units of rental housing. Both tenant-based vouchers and project-based rental units are administered by local Public Housing Authorities ("PHAs") which receive funding from HUD pursuant to statutory formulas, see infra, and in turn provide rental payments to the owners of units rented to Section 8 recipients.

HUD's ability to employ the budget authority allocated to PIH is circumscribed by statute in multiple ways. Perhaps the most significant of these limitations has to do with the permitted use of Section 8 voucher funds. Throughout FY 2006, HUD has disbursed and will

continue to disburse the approximately $14.089 billion provided under its Section 8 tenant-based rental assistance appropriation to PHAs pursuant to a pro rata formula specified by Congress in the FY 2006 appropriations bill. HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 45-46. The basic pro rata formula was instituted by Congress in Fiscal Year 2004 as one step in an ongoing effort to combat the rapidly increasing costs of the Section 8 program, which had grown approximately 38 percent between 2001 and 2004, as explained at trial by David Vargas, Director of HUD's Housing Choice Voucher Programs. Tr. at 2211-12, 2220, 2222-23 (Vargas). This statutory formula, embodied in the General Appropriations Act for FY 2004, fundamentally changed the way Section 8 funds are allocated among the approximately 2,400 PHAs nationwide. Tr. at 2231-32 (Vargas).

Under the previous system, HUD would reimburse each PHA dollar-for-dollar for the costs of all private units under contract within its jurisdiction. Id. Under the current system, by contrast, HUD receives a fixed amount of budget authority from Congress and then must allocate that budget authority among the PHAs. Id. Each PHA receives a fixed allocation calculated on the basis of the number of units under lease in May, June, and July of the previous fiscal year, adjusted to account for inflationary pressures, and prorated downward if total PHA costs would exceed the total appropriation. Id.; HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 45-46.

For the current fiscal year, FY 2006, HUD's total Section 8 appropriation is entirely obligated, and in fact fell short of meeting all of the PHA costs for the year. The baseline for this fiscal year's Section 8 voucher allocation formula was the 2005 annual budget for ACC renewal funding for each PHA. HUD then was required by statute to adjust that baseline by applying the 2006 "Annual Adjustment Factor" described supra, essentially a multiplier designed to track

inflation, to come up with each PHA's allocation. HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 45-46; Tr. at 2225-32, 2334 (Vargas); FDR 271. HUD is also required by statute to make certain additional adjustments. See Tr. at 2229-31, 2329-30 (Vargas); HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 45-46. However, because the total allocation among all PHAs under this formula exceeded the total FY 2006 appropriation for Section 8 tenant-based assistance, HUD has already been forced, as Mr. Vargas testified, to pro rate each PHA's allocation simply to stay within the appropriation, as required by the Appropriations Act. See HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 45-46; see also Tr. at 2228-29 (Vargas) (FY 2005 proration).

Virtually none of the budget authority made available to PIH provides HUD with any flexibility as to its allocation. For example, as a subset of the $14.089 billion tenant-based rental assistance allocation, Congress required that $45 million was to be made available as a reserve fund to correct PHA budgetary shortfalls caused by one of three factors: (1) potential inequities in PHA funding levels caused by the ACC renewal allocation formula; (2) increased PHA costs resulting from unforeseen circumstances;[18] and (3) increased costs resulting from high levels of Section 8 voucher holders moving into different, higher cost jurisdictions. See Tr. at 2334-35 (Vargas); HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 46. This amount, too, is already allocated and is no longer available. Mr. Vargas testified that as of April 2006 HUD had allocated approximately $38.4 million of this $45 million reserve fund to cover funding shortfalls that certain PHAs faced as a result of Congress' statutory allocation formula, based on the afore-

[18] Mr. Vargas testified that one example of this type of cost was the surge in the population of Baton Rouge, Louisiana, as a result of numerous refugees from Hurricane Katrina who fled their homes and relocated in Baton Rouge, doubling the city's population and putting "very large pressure" on the area's rental market. Tr. at 2335 (Vargas).

mentioned three-month "snapshot" of Section 8 units under lease in May, June, and July 2004. Tr. at 2335 (Vargas). The remaining $6.5 million is not sufficient to fully reimburse PHAs for shortfalls resulting from the second and third factors. As Mr. Vargas explained:

> Basically, we don't have enough money to cover all the requests that came in from housing authorities under portability and unforeseen circumstances. So we're going to have to prorate those two provisos.

Id. HUD's allocation of that remaining $6.5 million was expected to be finalized shortly after the time of trial. Tr. at 2335 (Vargas).

The remaining portion of PIH's tenant-based rental assistance budget has been allocated by Congress for FY 2006 as follows. First, $1.25 billion was to be provided for administrative and other expenses incurred by PHAs in administering the Section 8 tenant-based rental assistance program, of which $1.24 billion was to be allocated among PHAs on a statutory pro rata basis based on the amount each PHA was eligible to receive in calendar year 2005. HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 45-46; see also Tr. at 2327 (Vargas) (FY 2005 administrative expenses). In addition, $180 million for Section 8 rental assistance was to be available for the relocation and replacement of housing units demolished or disposed of pursuant to a number of statutory and other government programs, including HOPE VI. See HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 45-46. Congress instructed that this money be used to provide tenant-based rental assistance vouchers for families which had been living in assisted housing units that were demolished or otherwise disposed of on a one-for-one basis. HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 46; see also Tr. at 2233-35 (Vargas) (FY 2005 tenant protection vouchers). Finally, $48 million and $2.9 million was to be made available for family self-sufficiency coordinators under the Family Self-Sufficiency Program, 42 U.S.C. § 1437u et

seq.,[19] and the Working Capital Fund, respectively. See HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 46-47; see also Tr. at 2326 (Vargas) (FY 2005).

Two additional, smaller amounts of Section 8 budget authority were also to be made available under the FY 2006 appropriation, and have already been exhausted. The first amount, $10 million, was to be allocated to PHAs that needed additional administrative funds to manage their Section 8 programs. See HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 46-47; Tr. at 2327-28 (Vargas). Mr. Vargas testified that this $10 million represented "about the only amount of funds here that provide the secretary with any latitude as to how to spend those funds." Tr. at 2327 (Vargas). Unfortunately, any latitude inherent in that amount was essentially neutralized because Congress did not provide any budget authority to reimburse PHAs for administrative fees incurred in providing and managing tenant protection vouchers; as a result, approximately $8 million of the FY 2006 appropriation went to reimburse the PHAs for such fees (with the remaining $2 million allocated toward reimbursement of PHAs' Section 8 homeownership administrative fees). Tr. at 2327-28 (Vargas). This $10 million was exhausted by March 2006, approximately halfway through the current fiscal year. Tr. at 2328 (Vargas).

The second amount, a maximum of $12 million for "section 8 assistance to cover the costs of judgments and settlement agreements," see HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 46, has likewise been exhausted. See Tr. at 2349-50 (Vargas). That FY 2006 budget authority was used to complete obligations voluntarily undertaken by HUD as a signatory to a consent decree in a public housing lawsuit in Dallas, Texas, and is no longer available. See id.

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[19] Congress' FY 2006 appropriation for HUD also allocates $5.9 million from PIH's tenant-based rental assistance for transfer to the Working Capital Fund.

Plaintiffs proposed several potential sources of voucher funding that, in their belief, could be tapped to fund an obligation on the part of HUD to provide additional vouchers for Plaintiff class members. However, as Mr. Vargas testified, none of these potential sources represent viable options for both statutory and budgetary reasons.

The first potential source of vouchers proposed by Plaintiffs are tenant protection vouchers from past and future public housing demolitions and other disposition actions. See Pls.' Prop. Rem. Order at 15-16. This suggestion is not viable for at least three reasons. First, as Mr. Vargas testified, the amount of budget authority made available to HUD for tenant protection vouchers in a given year – for FY 2006, $180 million – is based on HUD's best estimates of the number of public housing units demolished, converted to another use, or otherwise disposed of (as well as the number of households relocated from public housing under some other provision of law) for that year. Tr. at 2340 (Vargas). The appropriation does not create vouchers; rather, it simply provides budget authority for HUD to rely upon in providing vouchers on a "one-for-one" basis for families who have been displaced from public housing units for one of the reasons specified in the appropriations language. See HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 46. Any of this budget authority appropriated for previous fiscal years has already been obligated. Tr. at 2340 (Vargas). Second, and more fundamentally, Congress specifically limited HUD's discretion in how this budget authority is to be allocated. See HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 46; Tr. at 2341-42 (Vargas). Most significantly, it is to be used only to assist families displaced for the specified reasons; other families are not eligible to receive this assistance. See HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 46; Tr. at 2341-42 (Vargas). Even assuming that vouchers could be carved out of this budget authority for members of the Plaintiff

class, any such vouchers would reduce the amount available to assist displaced families. Tr. at 2342 (Vargas). Finally, as to budget authority appropriated for tenant protection vouchers in future fiscal years – FY 2007 and beyond – HUD ultimately has no control over the amount that Congress will see fit to appropriate. Tr. at 2342-43 (Vargas).

As a second potential source of vouchers, Plaintiffs suggest that HUD may use 1,500 former "Regional Certificates" made available to the Baltimore Region under the former AHOP program to provide housing opportunities for Plaintiff class members. Pls.' Prop. Rem. Order at 16. However, as Mr. Vargas testified, there is no existing budget authority for the AHOP program and no Congressional authority to fund such vouchers or certificates. Tr. at 2343 (Vargas).

Finally, as a third potential source of vouchers, Plaintiffs suggest that HUD should be ordered to use its best efforts to make available "recaptured" vouchers for use by Plaintiff class members. Pls.' Prop. Rem. Order at 16. This suggestion by Plaintiffs betrays what appears to be a fundamental misunderstanding of how the Section 8 program is structured and funded by Congress, and is not viable for that reason. As Mr. Vargas testified, Congress recently ensured that there will be no excess funds left in HUD's Section 8 voucher budget, and certainly no funds left to HUD from the "recapture" of vouchers unused by PHAs. Tr. at 2343-44 (Vargas).

Plaintiffs' apparent misunderstanding of how HUD's Section 8 voucher program is structured and funded is significant. Not since FY 2003, as explained supra, has HUD possessed the ability to reimburse PHAs dollar-for-dollar each year for the costs of all Section 8 rental units under contract. Tr. at 2217-18, 2231-32 (Vargas). Prior to FY 2003, the former system allowed PHAs to accumulate sometimes significant budget surpluses when they did not have 100 percent

voucher utilization rates, that is, when the number of units they were able to subsidize (known as "units under lease") was lower than the number of units they were authorized to subsidize ("units under contract"). Tr. at 2218-19 (Vargas). The accumulation of PHA budget surpluses, which were maintained at HUD as program reserves, was among the factors that prompted Congress to completely overhaul the way in which Section 8 budget authority is allocated. Tr. at 2232-33 (Vargas). In addition, Congress targeted these reserves as sources from which HUD should meet rescission goals articulated in HUD's appropriations legislation. Tr. at 2331-32 (Vargas). Specifically, in the FY 2005 Appropriations Act, the conferees articulated their intention that HUD would meet a rescission target of approximately $1.5 billion (against a total budget of approximately $32 billion). Tr. at 2332 (Vargas). In the conference report for that year's appropriations statute, Congress directed HUD to meet this rescission goal in part by recapturing all Section 8 ACC reserves with the exception of a one-week reserve fund. Id. Similarly, for FY 2006, Congress mandated that HUD meet a $2.05 billion rescission target, see HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 47, and HUD must recapture the remaining one-week reserves to meet this target. Tr. at 2343 (Vargas).

Much like with regard to tenant-based rental assistance, HUD's ability to use the budget authority allocated for Section 8 project-based rental assistance is circumscribed by statute. The majority of the budget authority provided for project-based rental assistance, the second largest individual program in PIH, with an FY 2006 appropriation of $5.088 billion, must be obligated for a limited number of PHA uses including the renewal or amendment of Section 8 project-based subsidy contracts. See HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 47.

ii. Community Planning and Development

After PIH, the second-largest program office at HUD is the Office of Community Planning and Development ("CPD"), with an FY 2006 appropriated budget of $7.76 billion. Of that total, Congress appropriated $3.74 billion for the Community Development Block Grant ("CDBG") program for distribution to states, urban counties, and certain local governments. See HR 3058, Pub. L. 109-115 (Nov. 30, 2005) at 52-55. Separately, Congress allocated $1.75 billion for HOME Investment Partnerships grant assistance. See id. at 55.

The first of these two programs, CDBG, is a formula-based entitlement program that provides annual block grant assistance to states, urban counties, and local governments that meet the statutory criteria for eligibility. The primary statutory purpose of CDBG is to assist such entities in "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 program represents the recognition by Congress that these crucial urban policy goals can be best accomplished by simplifying and streamlining federal financial assistance to state, county, and local governments; providing such assistance on an annual basis in a predictable, reliable manner; and encouraging local and area-wide control over how such assistance is best employed. See 42 U.S.C. § 5301(d). As Richard Kennedy, Director of HUD's Office of Block Grant Assistance within CPD, testified:

> [T]he CDBG program essentially devolved decision-making along with the resources [provided by CDBG] to local and state governments to undertake activities that they saw as the most important needs in their communities or in their states through various strategies to address those needs.

Tr. at 1657 (Kennedy). Thus, state, county, and local governments that receive CDBG assistance

are generally entitled to use that assistance based on their own determination of how it can be most appropriately allocated. See id.; 42 U.S.C. § 5301(d).

HUD has no discretion as to the allocation of its CDBG budget authority.[20] Rather, CDBG assistance must be allocated by HUD pursuant to specific procedures and formulas set forth by statute. See 42 U.S.C. § 5306(a)(1) et seq.; Tr. at 1658-60 (Kennedy). As a first step, one percent of CDBG appropriations for a given year must be reserved for grants to Indian tribes. See 42 U.S.C. § 5306(a)(1). Next, $60 million must be set aside for U.S. territories, states and local governments, and certain other private and public entities, for activities described at 42 U.S.C. §§ 5307(b)(1) to (7). Finally, after these amounts have been deducted from CDBG's total appropriation for that year, HUD must allocate 70 percent of the remaining funds to metropolitan cities[21] and urban counties, respectively, and 30 percent among the fifty states for use in "nonentitlement areas," which are defined as any areas that are not cities or parts of urban counties and that do not include Indian tribes. See 42 U.S.C. §§ 5302, 5306, 5307; Tr. at 1658-60, 1756-57 (Kennedy).

HUD must calculate its allocation of CDBG assistance among metropolitan cities and urban counties on the basis of two formulas that are weighted to provide the most assistance to the neediest communities, as Mr. Kennedy testified. Tr. at 1658-60, 1758-59 (Kennedy). For

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[20] The only exception to this rule is when Congress provides supplemental CDBG appropriations, generally for circumstances such as natural disasters. Tr. at 1656 (Kennedy). As Mr. Kennedy testified, examples of such supplemental appropriations include an approximately $3.4 billion special appropriation for the recovery of lower Manhattan in the period following the attacks of Sept. 11, 2001, and an $11.5 billion special appropriation to aid recovery in five states affected by Hurricane Katrina in 2005. Id.

[21] "Metropolitan city" is a term of art defined by reference to the centrality of a city to its metropolitan area or by reference to its size. 42 U.S.C. § 5302(a)(4).

each recipient jurisdiction, HUD is statutorily required to employ the formula that yields the greater allocation. See 42 U.S.C. § 5306(b)(1), (2); Tr. at 1658-60 (Kennedy). The first formula alternative is a weighted average of the ratios between: (1) the population of the jurisdiction versus the overall population of all metropolitan areas; (2) the extent of poverty in the jurisdiction versus the extent of poverty in all metropolitan areas; and (3) the extent of housing overcrowding in the jurisdiction versus the extent of housing overcrowding in all metropolitan areas. 42 U.S.C. §§ 5306(b)(1)(A)(i) to (iii); (b)(2)(B)(i) to (iii). The second formula alternative is a weighted average of the ratios between: (1) the extent of growth lag in the jurisdiction versus the extent of growth lag in all metropolitan cities and/or urban counties; (2) the extent of poverty in the jurisdiction versus the extent of poverty in all metropolitan areas; and (3) the age of housing in the jurisdiction versus the age of housing in all metropolitan areas. 42 U.S.C. §§ 5306(b)(1)(B)(i) to (iii); (b)(2)(B)(i) to (iii).

Likewise, HUD is required to calculate its allocation of CDBG assistance among the states upon the basis of a pair of formulas similar to those applicable to metropolitan cities and urban counties. The first formula requires HUD to apply the average of the ratios between: (1) the population of the nonentitlement areas in the given state versus the population in the nonentitlement areas of all states; (2) the extent of poverty in the nonentitlement areas in the state versus the extent of poverty in the nonentitlement areas of all states; and (3) the extent of housing overcrowding in the nonentitlement areas of the state versus the extent of housing overcrowding in the nonentitlement areas of all states. 42 U.S.C. § 5306(d)(1)(A). Under the second formula, HUD applies the average of the ratios between: (1) the age of housing in the nonentitlement areas of the state versus the age of housing in the nonentitlement areas of all states; (2) the extent of

poverty in the nonentitlement areas in the state versus the extent of poverty in the nonentitlement areas of all states; and (3) the population of the nonentitlement areas in the state versus the population of the nonentitlement areas of all states. 42 U.S.C. § 5306(d)(1)(B). Here again, HUD is statutorily required to weight each factor differently depending upon which of the two methods is applied. Under the first method, the poverty ratio is counted twice while each of the other ratios is counted once. 42 U.S.C. § 5306(d)(1). Under the second method, the population ratio is counted once, the poverty ratio is counted one-and-a-half times, and the age-of-housing ratio is counted two-and-a-half times. Id.

In addition to the specific statutory constraints on the allocation of CDBG assistance among states and entitlement communities, HUD is faced with a long-term trend of declining Congressional appropriations for CDBG assistance. As Mr. Kennedy testified, appropriations have declined each year for the past five years. Tr. at 1759 (Kennedy). From FY 2005 to FY 2006, the CDBG appropriation dropped approximately 10 percent, from $4.1 billion to $3.7 billion. Tr. at 1759-60 (Kennedy). The president's proposed FY 2007 budget, submitted to Congress this spring, proposed a further 25% cut. Id. Thus, how much CDBG budget authority will be available to HUD for FY 2007 and beyond is a question over which HUD has no control.

As with CDBG, HUD has no discretion as to the allocation of its HOME budget authority. The funds appropriated by Congress for HOME must be allocated by HUD pursuant to procedures and formulas set forth at 42 U.S.C. § 12747(b)(1)(A). As an initial step, 40 percent of appropriated funds are allocated for division among the states, with the remaining 60 percent of appropriated funds allocated for division among metropolitan cities, urban counties, and consortia. See 42 U.S.C. § 12747(a)(1). As to all Participating Jurisdictions, the basic statutory

formula specifies allocation on the basis of six specific factors: (1) the relative inadequacy of the Participating Jurisdiction's housing supply; (2) the Participating Jurisdiction's supply of substandard rental housing; (3) the number of low income families in rental housing units in the Participating Jurisdiction that are likely to need substantial rehabilitation; (4) the Participating Jurisdiction's cost of producing housing; (5) the Participating Jurisdiction's incidence of poverty; and (6) the fiscal incapacity of the Participating Jurisdiction to carry out housing activities without federal assistance. 42 U.S.C. 12747(b)(1)(A). HUD has implemented that statutory formula by adopting a six-part allocation method found 24 C.F.R. § 92.50(c).

The foregoing testimony from Mr. Vargas, Mr. Kennedy, Ms. Sardone, and others, coupled with the express mandates of Congress dating from the FY 2004 Appropriations Act to the present, underscores the fact that the Court cannot order the demand- or supply-side remedy Plaintiffs seek for two fundamental, related reasons. First, there are no resources available to fund Plaintiffs' proposed remedy. HUD's budget authority for Section 8 tenant- and project-based rental assistance is either exhausted or obligated pursuant to statutory formula. Likewise, HUD's budget authority for HOME and CDBG are allocated pursuant to statutory formulas that leave HUD with no discretion as to allocation, and are likewise completely obligated. As the D.C. Circuit held in National Association of Regional Councils, where there is no appropriation available, a court lacks the authority to order the obligation of public funds, even where such a remedy might be appropriate. As that court recognized:

> If there is no such appropriation out of which a judgment can be paid, the courts still cannot order that it be satisfied, since "the matter of whether or not an appropriation will be made rests wholly upon the determination of Congress, and with that determination this court has nothing to do."

564 F.2d at 104-05, n.16 (quoting Hetfield v. United States, 78 Ct. Cl. 419, 422 (1933)). Second, because Congress has specifically directed HUD how to allocate its budget authority for these programs among their intended beneficiaries, the Court cannot intervene in a way that would alter the intended course of that assistance without violating the Constitution. Califano, 443 U.S. at 94.

3. Plaintiffs' Proposal Masquerades a Denial of Discretion to HUD in the Guise of a Grant of Discretion

As plaintiffs seem to realize, and as the Court certainly does, see Order dated April 14, 2005, whatever remedial order issues in this case would not be justifiable if it does not accord HUD the discretion to run its programs it is due as an agency of the Executive Branch. Plaintiffs' proposed decree would, in fact, be highly restrictive of HUD's ability to make decisions that it should have the latitude to decide.

To be sure, one of the central features of the decree would permit HUD to draft a desegregation plan, in the first instance. Plaintiffs' Proposed Order on Remedy at 3. But the proposed order would expressly subject to the scrutiny and review of both plaintiffs and the Court. Id. Changes to the plan proposed during the life of a remedy would, likewise, be subject to the review of both plaintiffs and an Advisory Group created by the order, and would be subject to the approval of the Court. Id. at 6-7. Further, the decree would regulate, in detailed fashion, HUD's relationship with each of the public housing authorities and other municipalities in the Baltimore region, as well as with the State of Maryland. Id. at 7-10.

A few examples illustrate just how restrictive of HUD's prerogatives the proposal actually would be. Plaintiffs demand that HUD be presumptively prohibited from allowing

existing Section 8 administering agencies to oversee the provision of vouchers under a remedial decree, but to hire a Regional Administrator in their place. Plaintiffs' Proposed Order on Remedy at 13. But the record contains no basis for restricting HUD's discretion in this regard.[22] Indeed, as Dr. Shroder explained, there is no reason to believe that a Regional Administrator would do any better job operating a voucher program than an already-existing local agency. FDR 7, at 31-32. Further, as Mr. Tamburrino testified, not only does he know of no basis in state law to create a regional administrator, Tr. at 1245 (Tamburrino), he knows of no funding source to pay for such an entity. Tr. at 1246 (Tamburrino). Perhaps even more to the point, he described the difficulty of determining who would decide whether a regional authority should be established, and how it should operate. Tr. at 1246 (Tamburrino). While plaintiffs have suggested that the creation of such an entity might be justified on the basis of poor past performance on the part of HABC's Section 8 program, the future appears to be much more hopeful in that regard. Tr. at 1137 (Tamburrino). Plaintiffs certainly have established no reason to eliminate the discretion of HUD and of local Section 8 agencies to make this sort of decision.

Likewise, plaintiffs have expressed a great deal of interest in having a remedial order require HUD to provide mobility counseling to class members. Aside from the anomaly inherent in plaintiffs' request that HUD itself provide mobility counseling – rather than have Section 8 administering agencies, which actually administer the Housing Choice Voucher program do so – plaintiffs' proposal is far too detailed and prescriptive. Plaintiffs' Proposed Order on Remedy at 17-18. As the Court heard during the course of trial, mobility counseling programs come in

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[22] Nor does the record support the proposition that any of the Section 8 administering entities in the Baltimore area has acted in such a way as to justify removing its authority to run the Section 8 program in its jurisdiction.

many forms. See, e.g., Tr. at 1236 (Tamburrino). In fact, the Court has before it some detailed descriptions of different models of mobility counseling that have been developed by a variety of providers and used in different locations in the context of the MTO project. FDR 32 at 23-24, 61; Tr. at 2116-17 (Shroder). Choices as to which model to use are not a matter of whim or of the availability of resources,[23] but rather are based on different counseling philosophies and different theories as to what is appropriate. Id. Presumably, still other modes of providing counseling could be used, differing significantly in their particulars. Plaintiffs' proposal, however, would tie HUD's hands in this regard, by requiring the agency to see to the creation of a counseling system meeting very specific, detailed criteria. Plaintiffs' Proposed Order on Remedy at 17-18.

4. The Case Put On By Plaintiffs Does Not In Any Other Way Justify The Entry of Injunctive Relief

As discussed in detail by Dr. Rohe, for a remedy to make sense in a case like this, it has to incorporate several basic features. It has to be designed so that it does not undermine the very goals of the parties and the Court. It must be not be overly aggressive in scope. It must be developed with respect for the interests of non-parties, and with adequate input from them. It must not interfere with HUD's administrative flexibility. Expert Report of William Rohe, FDR 5, passim.

The proposal made by plaintiffs is inconsistent with Dr. Rohe's sensible and well-considered remedial approach. It would create a large and highly prescriptive remedial structure,

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[23] This is hardly to say that the availability of resources is not an issue. Mobility counseling for purposes of MTO cost in the vicinity of $3,000 per household. FDR 32 at 29; Tr. at 2118-19 (Shroder).

strait-jacketing not only HUD with a variety of requirements that lack any statutory basis, but also restricting non-parties that have been shown to have done nothing wrong. It is unjustified. No remedy beyond a declaratory judgment should be entered.

CONCLUSION

Just as the Baltimore area has changed in dramatic ways over the last half century, so, too, is HUD hardly the agency that it was when it was created in 1965. So, certainly, is its operation now a world apart from the manner in which the federal government provided assisted housing in the days before the federal judiciary recognized the unconstitutional nature of de jure racial segregation. Today, HUD aggressively oversees the provision of funds for the benefit of all sorts of people – plaintiff class members in this case, and many others who need assistance – under a slew of programs that were not even imagined until the last few decades. As the record in this case demonstrates, there is every indication that the agency will continue to support the provision of affordable housing to those in need through state and local governments, and private developers – subject, of course, to both budgetary and programmatic constraints imposed by Congress. To whatever degree plaintiffs might believe that they would administer HUD's programs differently were they in charge, they have not shown why the Court should hold HUD liable on either of the two narrow bases of potential liability that remain open in this case. Even less so have plaintiffs shown why an injunctive order should issue if any liability is found. Therefore, judgment should be entered against plaintiffs and in favor of the federal defendants with regard to each and every claim that was not resolved by the Partial Consent Decree entered in this action. Alternatively, this Court should grant no remedy besides a declaratory judgment.

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