

**PROTECTING THE AMERICAN DREAM (PART III):
ADVANCING AND IMPROVING THE FAIR HOUS-
ING ACT ON THE 5-YEAR ANNIVERSARY OF
HURRICANE KATRINA**

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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CONTENTS

JULY 29, 2010

	Page
OPENING STATEMENTS	
The Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Chairman, Subcommittee on the Constitution, Civil Rights, and Civil Liberties	1
The Honorable F. James Sensenbrenner, Jr., a Representative in Congress from the State of Wisconsin, and Ranking Member, Subcommittee on the Constitution, Civil Rights, and Civil Liberties	3
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Chairman, Committee on the Judiciary, and Member, Subcommittee on the Constitution, Civil Rights, and Civil Liberties	4
WITNESSES	
Mr. James Perry, Executive Director, Greater New Orleans Fair Housing Action Center	
Oral Testimony	8
Prepared Statement	10
Mr. Daniel M. Rothschild, Managing Director, State and Local Policy Project, and Director, Gulf Coast Recovery Project, Mercatus Center, George Mason University	
Oral Testimony	23
Prepared Statement	26
Mr. Reilly Morse, Co-Director of Housing Policy, Mississippi Center for Justice	
Oral Testimony	91
Prepared Statement	93
Ms. Stacy E. Seicshnaydre, William K. Christovich Associate Professor of Law, Tulane Law School, New Orleans, LA	
Oral Testimony	105
Prepared Statement	108
APPENDIX	
MATERIAL SUBMITTED FOR THE HEARING RECORD	
Prepared Statement of the Honorable F. James Sensenbrenner, Jr., a Representative in Congress from the State of Wisconsin, and Ranking Member, Subcommittee on the Constitution, Civil Rights, and Civil Liberties	147
Prepared Statement of the Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Georgia, and Member, Subcommittee on the Constitution, Civil Rights, and Civil Liberties	150
Response to Post-Hearing Questions from James Perry, Executive Director, Greater New Orleans Fair Housing Action Center	152
Response to Post-Hearing Questions from Daniel M. Rothschild, Managing Director, State and Local Policy Project, and Director, Gulf Coast Recovery Project, Mercatus Center, George Mason University	156

IV

	Page
Response to Post-Hearing Questions from Reilly Morse, Co-Director of Housing Policy, Mississippi Center for Justice	159
Response to Post-Hearing Questions from Stacy E. Seicshnaydre, William K. Christovich Associate Professor of Law, Tulane Law School, New Orleans, LA	162

**PROTECTING THE AMERICAN DREAM (PART
III): ADVANCING AND IMPROVING THE FAIR
HOUSING ACT ON THE 5-YEAR ANNIVER-
SARY OF HURRICANE KATRINA**

THURSDAY, JULY 29, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:18 p.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Conyers, Sensenbrenner, King and Franks.

Staff Present: (Majority) David Lachmann, Subcommittee Chief of Staff; Kanya Bennett, Counsel; and Paul Taylor, Minority Counsel.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order.

I will begin by recognizing myself for a statement. Today the Subcommittee on the Constitution, Civil Rights, and Civil Liberties holds its third in a series of hearings examining the Fair Housing Act. The hearing today will examine current fair housing issues in the context of the aftermath of Hurricanes Katrina and Rita.

In the 5 years since the City of New Orleans was devastated by Hurricane Katrina, we have watched that city try to rebuild, and have had the opportunity to witness the struggles of its citizens as they try to rebuild their lives and communities. Some of the hardships were a result of a natural disaster of historic proportions. But as is often the case, the devastation wrought by natural forces was compounded by human activity.

One important area was housing. For the displaced, whether homeowners or renters, discrimination made it more difficult for them to return to their homes and get on with their lives. In St. Bernard Parish, the local government engaged in a variety of actions to prevent African Americans from taking up residence. One ordinance outlawed single-family home rentals to anyone other than blood relatives. The parish repealed the law when the Greater New Orleans Fair Housing Action Center brought suit.

In September 2008, the parish tried again, this time imposing a building moratorium on the construction of apartments with five or

more units in response to a developer's proposal to build new apartment complexes with 70 percent of the units set aside for low-income renters. In March of last year, the United States District Court for the Eastern District of Louisiana found that, "the parish and the council's intent in enacting and continuing the moratorium is and was racially discriminatory and, as such, defendants have violated the Fair Housing Act."

In other instances, websites with names like www.Katrinahousing.org allowed ads to be posted with messages like, "I would love to house a single mom with one child. Not racist, but White only," or, "Not to sound like a racist, but because we want to make things more understandable for our younger child, we would like to house White children," and "Prefer White Catholic family, children."

Had these ads appeared in the newspaper, the publisher, in addition to the advertiser would have been found to have violated the Fair Housing Act. Because of a provision in the Communications Decency Act, these Internet publishers were protected.

Post-Katrina reconstruction efforts have also used Federal funds in a discriminatory manner. For example the Road Home Program, run by the Louisiana Recovery Authority using funds appropriated by Congress through the Community Development Block Grant Disaster Recovery Grant funds and administered by HUD, devised a formula for determining the amount of assistance to homeowners that had the effect of providing smaller grants to homeowners in African American neighborhoods than to homeowners in White neighborhoods with similar homes. The formula devised by the Louisiana Recovery Authority in consultation with and with the approval of HUD provided homeowners with the lesser of the pre-storm value of the home or the cost of repairing a home. After controlling for conditions found in quality homes in African American communities were valued at much lower amounts than homes in White communities. The resulting disparity, especially when the value of the home is less than the repair costs, which do not vary from neighborhood to neighborhood, has had the effect of discriminating the allocation of the funds on the basis of race.

It would be unfair to single out Louisiana and that is not the purpose of this hearing. Discrimination exists, and our prior hearings have documented that it is still all too common in housing rentals, sales and financing around the country. While the aftermath of Katrina brings many of these issues into higher relief, none of what happened there is by any means unique to that part of the country. As a result of the information we have gathered at these hearings, I plan to introduce legislation when Congress returns in September—this is beginning to make real that we are going to be out of here next week—when Congress returns in September to update the Fair Housing Act to address emerging issues and to ensure that the act provides the tools necessary to protect the right of every American to a decent place to live, free from discrimination.

I want to note that the Fair Housing Act passed the same year that the distinguished Chairman of the full Committee joined the House of Representatives and joined the Committee. He has always been a vigorous champion of civil rights, and I look forward to

working with him as we continue the efforts to ensure fair housing rights for all.

I yield back the balance of my time.

I now recognize the distinguished Ranking Member of the Subcommittee.

Mr. SENSENBRENNER. Thank you, Mr. Chairman.

The purpose of this hearing is to explore potential gaps in the fair housing laws that some argue were exposed by events following the devastation caused by Hurricane Katrina in 2005.

Whatever Congress may decide about the merits of those arguments, it should make such a decision having more complete understanding of the role dysfunctional layers of bureaucracy had on the availability of housing and other resources.

Congress should also reject the use of litigation that relies on the Justice Department's assertion of legal theories but go beyond those that are authorized by statute.

As I have mentioned in previous hearings on similar topics, one such theory involves what are called disparate impact claims. The Obama Justice Department has made it clear that it intends to follow the Clinton administration and file more of such claims. Disparate impact lawsuits challenge practices that lead to statistically worse results for a particular group relative to other groups without alleging that the practice is actually discriminatory in its terms, design, or application. That is, disparate impact lawsuits claim there is discrimination when there often is no discrimination at all under any reasonable definition of that term.

The abuse of the disparate impact theory in courts has real-world consequences. There were many pressures on mortgage lenders to relax the standards under which loans were extended in the 1990's, but one factor was the Clinton administration Justice Department's aggressive pursuit of disparate impact claims in which it sought to prosecute entities whose mortgage lending practices did not intentionally discriminate but only had a disparate impact on one group or another.

In 1998, for example, Clinton administration Housing Secretary Andrew Cuomo announced the results of a Federal lawsuit settlement in which a bank was forced to extend \$2 billion in loans to people who posed a poor credit risk. Secretary Cuomo even admitted during a press conference televised on C-SPAN that the \$2.1 billion lending amount in the mortgages will be a higher risk, and I am sure there will be a higher default rate on these mortgages than on the rest of the portfolio, unquote.

A leading article published in the Banking Law Journal at the time made it clear that lenders relying on written standards and criteria in making decisions as to whether to grant a residential mortgage loan application run the risk of exposure to liability under the civil rights law doctrine known as disparate impact analysis. Several underwriting guidelines that are fairly common throughout the mortgage lending industry are at risk of disparate impact analysis, including creditworthiness standards.

These lawsuits pressured lenders to bend traditional and time-tested accounting rules and extend more mortgages to many who couldn't afford them. These relaxed lending standards are now

widely regarded as being a prime cause of the current financial crisis.

Even The Washington Post editorialized that the problem with the U.S. economy has been the government's failure to control systemic risk that the government itself helped to create. We are not witnesses to a crisis of the free market but a crisis of distorted markets. Government helped make mortgages a purportedly sure thing in the first place, unquote.

As one economist wrote recently in The Wall Street Journal in addressing housing policy, "political leaders must face up to the actual causes of the crisis, not fictitious causes that fit political agendas and election strategies."

In our efforts to enforce the Nation's housing laws, I hope we don't repeat past mistakes. And I look forward to all of our witnesses today and yield back the balance of my time.

Mr. NADLER. I thank the gentleman.

I now recognize for 5 minutes the distinguished Chairman of the full Committee.

Mr. CONYERS. Thank you, Chairman Nadler.

And thank you, too, Jim Sensenbrenner, the former Chairman of the Committee. We appreciate your concern about disparate impact lawsuits.

But I asked our counsel if the Chairman of the Committee had mentioned that, and he did not mention it one time. Unfortunately, I wasn't going to mention it either, until you mentioned it.

And so I'm going to take another look at the case you make for not bringing them. Unfortunately, the Department of Justice is bringing those cases. The question I asked the other counsel here on the Committee was, were any of these kinds of suits brought during the previous Administration? And they're researching it now. So I will be happy to—the answer is no, that they did not.

So in the spirit that moved our Committee yesterday to break the crack cocaine disparity problem, which I congratulate you on, I would like to join you in working on some resolution of this problem.

Mr. SENSENBRENNER. If the gentleman would yield?

Mr. CONYERS. Yes, sir, I will.

Mr. SENSENBRENNER. Well, I am certainly looking forward to what your proposal is, and we may have a counterproposal.

Mr. CONYERS. Well, I don't have any proposal. I am looking at it because you are complaining about it.

Mr. SENSENBRENNER. Maybe my complaint is legitimate.

Mr. CONYERS. So, returning, Mr. Chairman, and Committee, to my own statement, I regret that 5 years after Hurricane Katrina, we're still considering what went wrong. And not only what went wrong but what continues to go wrong.

This isn't a historical examination. Katrina is still very visible, its effects. And I am looking forward to the witnesses enlightening us on that particular area, not just what mistakes were made, but what needs to be done now.

Now we all knew that when the President told Federal Emergency Management Chief Michael Brown the classic phrase, "Brownie, you're doing a heck of a job," it was the biggest incorrect assessment of one of his people in the Administration of maybe all

time. The compliment would still be premature because 5 years later, we can't point to what's going right with the government's response to Katrina.

So I commend the Committee for getting to the bottom or still exploring this. This may not be the last hearing, as a matter of fact, the way things are going.

So the questions outstanding are, how did the government bungle this response to Katrina? And why does it take 5 years later still trying to get our acts together? There were 1,464 deaths officially reported as a result of Hurricane Katrina, 1,464; children left parentless, the sick without medical attention, the elderly without assistance, homes damaged and buildings destroyed.

We hope that we will hear about the pain of displacement, of how this displacement was made worse because of clearly discriminatory behavior in violation of the Fair Housing Act, not just by perpetrators, citizens, but by the government itself. Post-Katrina year four, when FEMA ended its temporary housing assistance program, 3,450 households were still in need of long-term housing. Today, New Orleans is missing approximately 92,000 of its pre-Katrina residents. So I have asked that a study be done—a summary study was put together just today a few hours ago of how our former colleague, the Governor of Louisiana, Governor Jindal, has been handling the matter.

And here's the background that I would like to lay before the Committee and the witnesses for their examination and disposition. First was his response to President Obama's Joint Session address to the Congress on February 24, 2009. He described being in the office of Sheriff Harry Lee during Katrina and hearing him yelling into the phone at a government bureaucrat who was refusing to let him send volunteer boats out to rescue stranded storm victims because they didn't have the necessary permits. Jindal said he told Lee, that's ridiculous, prompting Lee to tell the bureaucrat that the rescue effort would go ahead, and he or she could arrest both Lee and Jindal. But now a Jindal spokesman has admitted, in reality, Jindal was overheard talking about the episode to someone else by phone days later. Just when we were about to give him some credit, it turns out that it might not be deserved. I have got a Web site and documents for all of these examples.

Who doesn't know that it was the Governor of Louisiana that rejected Federal assistance for Katrina and in the same speech delivered for our conservative party, the response on February 24, 2009, to President Obama's address to a Joint Session of Congress? And then, as his response as spokesman, he called the President's economic stimulus plan irresponsible and argued against government intervention. He used Hurricane Katrina to warn against government solutions to the economic crisis. And here's what he said: Today in Washington, some are promising that government will rescue us from the economic storms raging about us. This is Jindal. Those of us who lived through Hurricane Katrina, we have our doubts.

I will now refer to how the Governor made clear, based on his rejection of Federal assistance for Katrina but the acceptance of Federal assistance for the British Petroleum oil spill. On April 29, 2010, the same Governor Bobby Jindal asked Federal authorities

to grant funding for Louisiana National Guard members joining the multi-agency response to the offshore oil spill. Here's what he said: The National Guard will provide security, medical capabilities, engineers and communication support in response to this threat.

I only have a few more comments about the Governor of this State, currently the Governor. Governor Jindal vetoed a bill that both Houses of Louisiana's legislature unanimously passed which would have created a statewide federally funded agency to address homelessness. Governor Jindal rejected a nearly \$100 million unemployment insurance funding from the Federal Government, ruining over 25,000 unemployed residents' lives and prevented them from receiving unemployment compensation insurance.

Governor Jindal claimed that the Federal Government is "the problem" and "cannot be trusted," which I think is totally unhelpful when the one time he's praising the Federal Government, another time he's not taking Federal funds, and another time he's telling us how untrustworthy the same Federal Government that is sending him money is.

And finally, one last point about the Governor of a State who knows the potential impacts of natural disasters as well as any, Governor Jindal mocked President Obama and his Administration for its funding of what he called "something called volcano monitoring," which he sees as a very bad and useless activity.

And now we come to the present Administration. Public confidence in the Obama administration's handling of the British Petroleum oil spill gets him very poor ratings.

The Obama administration enforced the July 1, 2009, deadline by which people were forced to leave FEMA temporary housing, even though it was clear that they could not afford to restore their homes or have the resources to find other housing.

After Katrina resulted in a shortage of drywall, the Federal Consumer Product Safety Commission failed to prevent the usage in Louisiana of Chinese drywall that is known to cause serious health problems.

The present Administration, in displacing these temporary housing residents, failed to implement the United Nations' guiding principles on internal displacement, namely a human rights policy that has for several years guided our government in providing temporary and permanent homes for people in foreign countries who become displaced by earthquakes, typhoons and flooding and implementing, instead, a far harsher and callous policy on those in his own country.

This Administration continues the previous Administration of breaking international law by demolishing public housing, thereby preventing displaced, low-income, largely minority residents from returning back to New Orleans.

And under the current Administration and during a time of extremely high unemployment, people who are jobless can't participate in the Administration's trial loan modification program. So there's a need for increased HUD accountability post-Katrina.

Louisiana's Road Home program is stifling African American New Orleans homeowners' rebuilding efforts, as the African American Road Home participants are finding their recovery is limited

to the depressed values of their pre-storm segregated housing instead of the actual cost of repair.

So the Chairman of the Committee has raised a number of issues that I join in with him in raising.

And I would like to point out that, with his approval, we called the Secretary of HUD, Mr. Donovan, to suggest that he come. He was unable to respond. His schedule wouldn't allow him to come. But he sent instead attorney Renae Campbell, who is here instead of the Secretary, and we appreciate her presence. She is a special assistant in his department, working on these kinds of matters. She is special assistant to the general deputy assistant secretary for the Office of Fair Housing and Equal Opportunity in HUD, Mr. Bryan Greene. She has been with HUD since 2002, and she has been in this position for a year and a half. I welcome her presence.

And I thank the Chairman for his generous relinquishing of time for me to make this statement.

Mr. NADLER. I thank the gentleman.

Without objection, all Members will have 5 legislative days to submit opening statements for the record.

And without objection, the Chair will be authorized to declare recesses of the hearing.

We will now turn to our panel of witnesses.

We have four witnesses. James Perry is the executive director of the Greater New Orleans Fair Housing Action Center. Mr. Perry also serves on The Board of Directors, National Fair Housing Alliance, the National Low-Income Housing Coalition, the Gulf Coast Fair Housing Center and chairs the Louisiana Housing Alliance's Board of Directors. He holds a bachelors degree in political science from the University of New Orleans and a J.D. from Loyola University School of Law.

Daniel Rothschild is the managing director of the Mercatus Center's State and Local Policy Project, where he coordinates Mercatus research on State and local economic policy and directs the Gulf Coast Recovery Project, previously managing international economic development programs at the Mercatus Center. He earned his BA in history from Grinnell, his M.A. in modern British history from the University of Manchester, and his master. in public policy from the Gerald Ford School of Public Policy at the University of Michigan.

Reilly Morse is the co-director of housing policy at the Mississippi Center for Justice Katrina Recovery Office in Biloxi. Mr. Morse is a former assistant municipal judge and prosecutor in the City of Gulfport. He is also a member of the Affordable Housing Committee of the Governor's Recovery Commission and the Harrison County Recovery Committee. He is a graduate of the University of Mississippi School of Law and Millsaps College.

Professor Stacy Seicshnaydre is the William Christovich Associate Professor of Law and director of the Civil Litigation Clinic at Tulane University Law School. Following law school, she clerked for the Honorable W. Eugene Davis of the U.S. Fifth Circuit Court of Appeals. In 1995, she served as the first executive director of the Greater New Orleans Fair Housing Action Center and became the organization's general counsel in 2001. She began teaching as an adjunct faculty member at Tulane Law School in 1998. Ms.

Seicshnaydre earned her B.A. from the University of Notre Dame and a law degree magna cum laude from Tulane.

I am pleased to welcome all of you. Your written statements in their entirety will be made a part of the record. I would ask you to try to summarize your testimony in 5 minutes. To help you stay within that time, there is a timing light at the table. When 1 minute remains, the light will switch from green to yellow, and then red when 5 minutes are up.

Before we begin, it's customary for the Committee to swear in its witnesses. If you would please stand and raise your right hand to take the oath.

[Witnesses sworn.]

Mr. NADLER. Let the record reflect that the witnesses answered in the affirmative. You may be seated.

Mr. NADLER. I will begin by recognizing for 5 minutes Mr. Perry.

**TESTIMONY OF JAMES PERRY, EXECUTIVE DIRECTOR,
GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER**

Mr. PERRY. Chairman, thank you for this opportunity.

And thank you, Representative Conyers.

My name is James Perry, and I serve as executive director of the Greater New Orleans Fair Housing Action Center. In 1 month, we will commemorate the fifth anniversary of Hurricane Katrina. Unfortunately, in the 5 years since Hurricane Katrina has hit, you will find that our recovery in New Orleans is not complete. And consistently, you will find that there are a few groups of people who have had a more difficult time in that process: People with disabilities, families with children, low-income families and people of color have had an extremely difficult time. Inconsistently, housing discrimination has been a factor, but regretfully the thing that's been different since Hurricane Katrina is that in addition to individual landlords and apartment complexes engaging in discrimination, it's been the acts of government entities and government bodies that's made it extremely difficult for people to recover.

One specific example is the action of the Louisiana Road Home program. It's a program that was established to assist people in their recovery. When insurance companies didn't pay enough money to folks trying to recover, the Road Home program was supposed to step in and bridge the gap. We found in examining the Road Home program that its formula was discriminatory. The program made payments based on the value of a person's home. And so based on the historic pattern of segregation in the City of New Orleans, if you had two identical homes, one in a White neighborhood and one in an African American neighborhood, that sustained the exact same damage, the home in the White neighborhood generally got more money because it was worth more than the African American home. And so the result has been that consistently thousands and thousands of African American homeowners have gotten less money under the Louisiana Road Home program. We estimate that it is as many as 20,000 homeowners who have been shorted by the program.

Now, of course, one of the problems is that this is a program that is a Louisiana State program. The State of Louisiana gets funding from the United States of America. In fact, it receives Community

Development Block Grant funding. Under that funding formula, it's required to affirmatively further fair housing in its efforts, and it has failed to do that.

In addition, the program is monitored and in some ways managed by the U.S. Department of HUD. So HUD plays a key role in what's happened in that program and its failure to citizens in the City of New Orleans.

In addition, many folks have read about litigation in St. Bernard Parish that my organization is engaged in. St. Bernard Parish passed an ordinance that made it almost impossible for African American residents to live in the parish. It passed what was called the blood-relative ordinance and said that in order to rent a single-family home in the parish, you had to be a relative by blood to the owner of the home. St. Bernard Parish is a parish that is a majority White; 93 percent of the homes in St. Bernard Parish are owned by White homeowners. The result has been that it was almost impossible for Black, Latino and Vietnamese homeowners to find housing in St. Bernard Parish.

My organization filed suit against the parish and forced them to overturn that ordinance. But shortly afterwards, St. Bernard Parish passed an additional ordinance that continued to make it very difficult. So over the course of the 5 years since Hurricane Katrina, we've been in litigation with St. Bernard Parish at almost every single point in an effort to ensure that there were equal housing opportunities. Again, this is a community that receives Federal funding. There's no way that this community should be allowed to engage in these discriminatory acts, particularly to make them part of the actual law.

You will find in my written testimony a number of examples of circumstances where government entities, where State and local government entities have engaged in actual discrimination, and you will even find circumstances where the U.S. Department of HUD was involved or played some very significant role in the discriminatory activities that happened.

As we approach the 5-year anniversary of Hurricane Katrina, there is one last opportunity for us to make sure that the Gulf Coast is rebuilt in an equitable fashion, but it requires a reconsideration of fair housing laws and a reconsideration of the government's commitment to the City of New Orleans.

And so I ask the Members of this Committee to reconsider the Federal Fair Housing Act and to reconsider regulations dealing with affirmatively furthering fair housing. The true teeth in the affirmatively furthering fair housing provisions and regulations would give a real opportunity to people attempting to recover in New Orleans and would also be key to lending, fair lending and fair housing practices across the Nation. Thank you very much.

[The prepared statement of Mr. Perry follows:]

PREPARED STATEMENT OF JAMES PERRY



Testimony of James Perry

Executive Director of the Greater New Orleans Fair Housing Action Center

**Presented to the Subcommittee on Constitution, Civil Rights, and Civil Liberties of the
House Committee on the Judiciary**

Thursday, July 29, 2010

Introduction

Chairman Nadler, Ranking Member Sensenbrenner, and members of the Committee, thank you for the opportunity to testify regarding fair housing and the 5th Anniversary of Hurricane Katrina. My name is James Perry. I serve as Executive Director of the Greater New Orleans Fair Housing Action Center (GNOFHAC). GNOFHAC is a private, non-profit civil rights organization established in 1995 to eradicate housing discrimination in the greater New Orleans area. Through education, investigation, and enforcement activities, GNOFHAC promotes equal opportunity in all housing transactions, including rental, sales, lending, and insurance. GNOFHAC is dedicated to fighting housing discrimination not only because it is illegal, but also because it is a divisive force that perpetuates poverty, segregation, ignorance, fear, and hatred. I also serve as President of the Louisiana Housing Alliance, a statewide coalition of housing advocates, non-profit housing providers, homeless service providers,

advocacy organizations and local housing coalitions. We work to insure adequate affordable and low-income housing opportunities in Louisiana.

August 29, 2010 will be the fifth anniversary of Hurricane Katrina. Five years ago, America's Gulf Coast was decimated by the Hurricane and hundreds of thousands of residents were displaced. Each day since August 29th, Gulf Coast residents have struggled to rebuild and reclaim their lives. Regretfully, people with disabilities, families with children, low-income families and people of color have been confronted with shocking barriers that have slowed and in some cases, completely thwarted their recovery.

Many of us are familiar with the typical stories of landlords, realtors and lenders engaging in individual acts of discrimination. While these problems certainly persist along America's Gulf Coast, a disconcerting trend has developed. The most egregious cases of discrimination have been perpetrated by government actors entrusted to serve the very communities that they have discriminated against. From Louisiana's HUD approved discriminatory Road Home program to St. Bernard Parish's rental ordinance essentially banning black renters and on to FEMA's disaster resource website featuring discriminatory housing advertisements; government policies and actions that have stunted recovery for scores of thousands of Gulf Coast residents.

Road Home Program

In the days and weeks after Hurricane Katrina, it became painfully obvious that the insurance industry was going to fall woefully short of its responsibility to homeowners. As a result, the Road Home program was created to assist Louisiana homeowners affected by Hurricanes Katrina or Rita in rebuilding their homes.¹ Congress allocated more than \$11 billion in Community Development Block Grant funding to the program.² Since the program's inception, nearly 230,000 people have applied for assistance.³ The CDBG program funding required that the Road Home Program not only refrain from discrimination, but go a step further by affirmatively furthering fair housing.

Regrettably, racial disparities in the Road Home program have caused the program to fail thousands of New Orleans African-American homeowners in their efforts to rebuild their homes. Rather than a Road Home, many black homeowners have found a road leading to despair, inequity and discrimination.

The program's failure relates to a fundamental flaw in its design: the United States Department of Housing and Urban Development (HUD) and the Louisiana Recovery Authority (LRA) created a recovery program that links housing assistance to the depressed values of black families' pre-storm segregated housing. Under the terms of the Road Home Program, rebuilding grants are calculated based on the *lower* of two figures: the pre-storm market value of the home,

¹ <http://www.road2la.org/about-us/default.htm>

² http://news.newamericamedia.org/news/view_article.html?article_id=0b4e1e46b8868c4509e51ca73f380cb7

³ <http://www.road2la.org/default.htm>

or the cost to repair the storm damage to the home.⁴ Homes in New Orleans' black neighborhoods are generally worth less than homes in white neighborhoods. This is largely due to decades of racial discrimination in the Louisiana housing market that has caused and reinforced segregation in residential housing.

In fact, in 2007, my office was able to locate two homes that were essentially identical. Both homes had 4 bedrooms and 2 baths. Both homes were brick construction and flooded with six feet of water in hurricane Katrina. The only substantial difference is that the home in the white neighborhood was worth approximately \$150,000 while the home in the black neighborhood was worth approximately \$90,000. The estimated repair cost for each of the homes was more than \$200,000 respectively. The home in the white neighborhood received \$150,000 in assistance while the assistance to the black homeowner was only \$90,000. Amazingly, even though these homeowners had identical homes and identical Katrina damage, the white homeowner received a full \$60,000 more than the black homeowner.

Unfortunately this fact pattern is not unique. We estimate that more than 20,000 black New Orleanians received inequitable grant payments under the flawed and discriminatory Road Home formula. Even the former Executive Director of the LRA, Paul Rainwater agreed that African-Americans were more likely to get payouts based on depressed home values. He attested so at an August 2009 field hearing of the Subcommittee on Housing and Community Opportunity of the House Committee on Financial Services. The data supports his conclusion. An analysis of Road Home grants from 2008 shows that homeowners in the Lower Ninth Ward, a predominantly black neighborhood, faced shortfalls of over \$75,000 between the available

⁴ Louisiana Recovery Authority, *Substantial Changes & Clarifications to Action Plan Amendment No. 1 for FY 2006 CDBG Disaster Recovery Funds 9-10, 17-20*, available at <http://www.dca.la.gov/cdbg/dr/plans/Amend1-RoadHomeClarification-Approved.pdf>.

rebuilding resources and the cost of rebuilding each home. At the same time, homeowners in Lakeview—a predominantly white neighborhood—faced shortfalls of only \$44,000 per home.⁵

The bottom-line is that the Road Home program relies on a discriminatory formula that leaves black homeowners with a mere fraction of the funds needed to rebuild their homes. The program, by design, fails New Orleans black homeowners. In 2008, after attempts at negotiating a solution to the discriminatory program failed, the Greater New Orleans Fair Housing Action Center, in partnership with the National Fair Housing Alliance and five named plaintiffs, filed a class action lawsuit against the LRA and HUD over the Road Home Program.⁶ We are represented by the Cohen, Milstein, Sellers and Toll law firm, the NAACP Legal Defense Fund and the Wilmer Hale law firm. The lawsuit alleges that the Road Home Program violates both the Fair Housing Act of 1968 and the Housing and Community Development Act of 1974 (HCDA). The Fair Housing Act requires housing programs to produce equitable results, regardless of their intent.⁷ And both the Fair Housing Act and the HCDA require HUD and the LRA to “affirmatively further fair housing.”⁸ This means much more than simply refraining from active discrimination in housing programs. HUD and the Louisiana Recovery Authority cannot use federal redevelopment funds to perpetuate existing inequalities, and they must affirmatively advance fair housing principles.

⁵ Kalima Rose, Annie Clark, & Dominique Duval-Diop, *A Long Way Home: The State of Housing Recovery in Louisiana 2008*, at 47, available at <http://www.policylink.info/threeyearslater/>

⁶ *Greater New Orleans Fair Hous. Action Ctr. v. HUD*, No. 08-cv-01938 (D.D.C. filed Nov. 12, 2008), available at http://www.naacpldf.org/content/pdf/housing_discrimination/road_home_complaint.pdf

⁷ 42 U.S.C. §§ 3604(a), 3605(a).

⁸ 42 U.S.C. §§ 3608(d), 3608(e)(5), 5304(b)(2).

As a result of the lawsuit, LRA created the Additional Compensation Grant program which provided more funding to low income homeowners. This helped to reduce inequities in the program. However, we estimate that 10,000 homeowners remain harmed by the discriminatory Road Home formula.

I am not at liberty to discuss our pending litigation in great detail. But, it is appropriate to note that in a recent opinion, United States District Court Judge, Henry Kennedy made the following comments:

[HUD and the State of Louisiana] offered no legitimate reason for taking pre-storm home values into account in calculating [...] awards. The Court does not take lightly that some African-American homeowners received lower awards than they would have if their homes were in predominantly white neighborhoods. [I]t is regrettable that this effort to [rebuild the city] appears to have proceeded in a manner that disadvantaged African-American homeowners who wish to repair their homes.

Despite the court's other reservations about case, Judge Kennedy determined the substantial statistical and anecdotal evidence showed that Plaintiffs would likely be able to prove that HUD and LRA have designed and implemented a racially discriminatory program. The court's ruling demonstrates that HUD's repeated assertions that the program is not discriminatory is wrong. In spite of this, HUD and LRA have refused to remedy the problem on their own.

Confronted with HUD's racially discriminatory actions, I respectfully request that the members of this committee intervene by contacting Secretary Donovan and urging him come up with a remedy that eliminates discrimination in the Road Home program. Until and unless this happens, the program will remain a road to nowhere.

Discrimination by municipalities and government agencies that receive CDBG and other federal funding

Consistent with the failures of the Road Home program, other government bodies have engaged in discrimination post-Katrina, in spite of their obligation to not merely refrain from discrimination, but to affirmatively further fair housing.

FEMA Allows Discriminatory Advertisements on Housing Website it Controls

In the Fall of 2005, the Greater New Orleans Fair Housing Action Center uncovered nearly 1,000 discriminatory internet advertisements on several websites established to assist Katrina evacuees. The most egregious advertisements were listed on Katrinahousing.org. The site featured ads with comments like, “not racist, but whites only,” “prefers 2 white females,” “prefer white Catholic family, children welcome,” and “not to sound racist but because we want to make things more understandable for our younger child we would like to house white children.”⁹

One of the sites featuring discriminatory advertisements was Dhronline.com. The site was established by FEMA in partnership with the University of Florida to provide housing assistance to evacuees. When notified about the advertisements, FEMA refused to remove them from the site and argued that it was immune from the Fair Housing Act. In fact, FEMA was likely in full violation of the Act.

Denham Springs Eviction of Residents with Mental Disabilities

In December of 2005, after public meetings where residents made negative racial comments and comments about people with disabilities, The City of Denham Springs, sought to evict New Orleans evacuees with mental illnesses from a group home established to serve the

⁹ <http://www.gnofairhousing.org/news.html>

evacuees.¹⁰ Relying on the federal Fair Housing Act and the Americans with disabilities Act, the Greater New Orleans Fair Housing Action Center filed suit on behalf of the Options Foundation, Inc. As a result of the lawsuit, Denham Springs was enjoined from evicting the evacuees.¹¹ Denham Springs' action not only violated the federal Fair Housing Act, but also demonstrated a failure to affirmatively further fair housing.

St. Bernard Parish Blood Relative Ordinance

In the Fall of 2006, St. Bernard Parish passed an ordinance making it illegal to rent single-family homes to people not related to the owner.¹² 93% of homeowners in St. Bernard are white.¹³ As a result, few if any minorities were able to rent housing in St. Bernard. The Greater New Orleans Fair Housing Action Center, sued the St. Bernard Parish Council to force them to overturn the ordinance.¹⁴ The litigation resulted in the successful reversal of the ordinance. The ordinance was illegal discrimination under the federal Fair Housing Act and certainly failed to affirmatively further fair housing.

Housing Authority of New Orleans Denies Residents

Since 2002, the Housing Authority of New Orleans (HANO) has been operating under HUD receivership. As a result, HUD manages and controls the Housing Authority. In 2006, the Greater New Orleans Fair Housing Action Center filed a complaint against HANO after learning that the few available public housing units in the City located at the redeveloped St. Thomas

¹⁰ <http://www.gnofairhousing.org/news.html>

¹¹ <http://www.gnofairhousing.org/news.html>

¹² <http://www.gnofairhousing.org/news.html>

¹³ <http://www.gnofairhousing.org/news.html>

¹⁴ <http://www.gnofairhousing.org/news.html#rescind>

housing development were actually occupied to the housing authority's employees, rather than returning mostly African-American St. Thomas residents.¹⁵ This is despite a conciliation agreement between the HUD, HANO, and former St. Thomas residents requiring that a preference be given to former residents of the development. In that case, HANO, essentially synonymous with HUD, was found liable for housing discrimination and forced to allow the residents to occupy St. Thomas.¹⁶

St. Bernard Parish Multi-Family Housing Ban

In 2008, St. Bernard Parish, after public meetings where officials and the citizenry vocalised racialized fears about affordable rental housing, passed an ordinance banning the construction of affordable rental housing in the Parish. After failed negotiation attempts, the Greater New Orleans Fair Housing Action Center and Provident housing (a reputable housing developer) filed suit against the Parish alleging a violation of the federal Fair Housing Act and a violation of the terms of a prior consent decree from the 2006 blood relative ordinance. The Parish fought the suit vigorously and was held in contempt of court four separate times. The Greater New Orleans Fair Housing Action Center was victorious and the Parish was forced to overturn the ordinance and grant a permit to Provident housing to begin construction an affordable housing development in the Parish's borders.

Jefferson Parish discriminatory zoning efforts

Jefferson Parish likely engaged in discriminatory zoning efforts when it made it impossible for the Volunteers of America to build a Low Income Housing Tax Credit financed apartment complex to replace an elderly living complex destroyed by Katrina. The would-be

¹⁵ <http://www.gnofairhousing.org/news.html>

¹⁶ <http://www.gnofairhousing.org/news.html>

occupants of the new complex were low-income elderly New Orleanians, most of whom were African-American. After public meetings where residents and elected officials raised racialized concerns about the development's future residents, the Parish passed a resolution expressly requesting that no LIHTC developments be constructed on the westbank of Jefferson Parish, the proposed Volunteers of America site location. The Parish subsequently engaged in a land-use study at the site of the proposed development, perfectly timed to kill the project. The project is now dead and the low-income elderly, mostly African-American residents, for whom the project was intended, have been left without an affordable housing option. During the same period, the Parish approved and championed a high-end, market rate, multi-family complex for elderly citizens. The actions taken by the Parish certainly demonstrate a failure to affirmatively further fair housing. In fact, they likely constitute illegal discrimination under the federal Fair Housing Act.

Kenner City Multi-family Housing Moratorium

In 2008, Kenner City, located in Jefferson Parish, passed a moratorium on the construction of any multi-family housing in the City.¹⁷ The ordinance prevented any LIHTC construction in the City. Conversation regarding the ordinance came up after residents raised concerns about a storm damaged apartment complex that housed mostly Latinos and families with children. The moratorium on multi-family housing was likely illegal discrimination under the federal Fair Housing Act.

Eastern New Orleans Proposed Multi-family Housing Moratorium

¹⁷ <http://www.gnofairhousing.org/news.html>

In 2007, New Orleans' District E City Council member sought to prohibit the construction or renovation of any multi-family housing with two or more units in her district.¹⁸ The District housed a large portion of the City's affordable rental housing. African-Americans, people with disabilities and families with children comprised a large portion of the people who relied on apartment housing in New Orleans East. After aggressive advocacy by numerous local organizations, the proposed ban was withdrawn prior to being voted on by the Orleans City Council. The proposal, however, demonstrates discriminatory intent by the Council member.

Louisiana Building Code

The State of Louisiana, post-Hurricane adopted a new building code but removed all provisions that would have forced developers to build multi-family units in a manner that was accessible for people with physical disabilities. Under the federal Fair Housing Act, all rental housing with four or more units built after March of 1991 must be physically accessible to people with disabilities. Many developers assume that by complying with state and local building codes, they have satisfied the Fair Housing Act requirements. Regretfully, the gutting of safe harbors from Louisiana's building codes led numerous developers to build inaccessible multi-family housing that violates the Fair Housing Act. A 2009 Study by the Greater New Orleans Fair Housing Action Center found that every one of the 22 complexes investigated failed to meet the accessibility standards of the Fair Housing Act.¹⁹ While the State's liability is unclear, it is clear that removing fair housing provisions from the State building code is a failure to affirmatively further fair housing.

¹⁸ <http://www.gnofairhousing.org/news.html>

¹⁹ <http://www.gnofairhousing.org/pdfs/AccessDenied2009.pdf>

Conclusion

These examples are a mere sampling of post-Hurricane discrimination by government entities that benefit from CDBG funding. When considered with the previously demonstrated racially discriminatory formula used by the State of Louisiana to determine Road Home homeownership grant amounts, it is clear that CDBG funding is not being used in a manner that affirmatively furthers fair housing. In fact, many entities have been found liable for violating federal fair housing laws.

This is exacerbated by the fact that the state of Louisiana, and nearly all municipalities have failed to engage in any fair housing related activities. None of the entities have supported any fair housing related activities, trainings, workshops, events, enforcement or fair housing organizations.

In 30 days, Americans will refocus their attention on America's Gulf Coast by commemorating the fifth anniversary of Hurricane Katrina. What will become painfully clear is that the rebuilding in New Orleans and surrounding Gulf Coast communities remains incomplete. And consistently the failures in rebuilding coalesce around families with children, low income residents, people with disabilities and people of color. Each of these groups has been systematically failed by government policies and rebuilding programs beset with racial disparities and discriminatory framework.

As Congress considers the future of Fair Housing in America, I urge members to look at the discriminatory housing failures of local, state and federal government and promulgate legislation that adds new protections to the federal Fair Housing Act and provides real penalties for government bodies that receive federal funding but fail to affirmatively further fair housing.

Recommendations

- *Congress should require HUD to recalculate Road Home grants so that funding is distributed in a non-discriminatory manner.*
- *Congress should require communities that receive federal funding to have building codes that are fair housing safe harbors.*
- *Congress should limit CDBG funding for communities that resist reasonable efforts to create affordable housing.*
- *Congress should provide \$50 million of funding to the Fair Housing Initiatives program at HUD.*
- *Congress should approve the Housing Fairness Act.*
- *Congress should better regulate HUD's management of local Housing Authority.*
- *Congress should immediately strengthen the affirmatively further fair housing regulations and laws so that municipalities can be penalized for failing to affirmatively further fair housing.*
- *Congress should immediately strengthen CDBG requirements so that municipalities found liable for illegal housing discrimination will be forced to forfeit CDBG and other federal funding.*
- *Congress should strengthen HUD's ability to enforce fair housing related CDBG regulations.*
- *Congress should require HUD to strengthen its enforcement of CDBG related fair housing laws.*
- *Congress should require HUD to strengthen its enforcement of fair housing laws against government agencies.*
- *Congress should require municipalities to engage in activities that further fair housing.*
- *Congress should require CDBG grantees to fund private fair housing enforcement non-profits.*
- *Congress should require all staff of all municipalities that will manage CDBG funding to participate in fair housing law trainings.*

Mr. NADLER. Thank you.
Before we go to Mr. Rothschild, let me ask you a question at this point. The program you referenced a moment ago giving those—where you said there was discrimination based on the worth of the homes, were those grants or loans?
Mr. PERRY. Those were grants.

Mr. NADLER. Those were grants. Now one might say, if it were a loan program, that prudence or standard lending practices would say you shouldn't lend to more than the value of the home, because the home is a collateral for the mortgage. So even though the repairs cost more, that's too bad because you are limited by the value of the home in order to recover the funds. But that's for a loan.

For a grant, that logic doesn't apply.

The question I have for you is, was any rationale ever offered by the State authority as to why they were doing this?

Mr. PERRY. Sure. Chairman, that's a great question. And I'd start by noting that you are absolutely right to note that this is very different from a loan program. In fact, it's more similar to an insurance program. And for anyone who has insured their own home, you know that you have a choice to get insurance based on the value of your home or the cost to repair your home, should damage happen.

Mr. NADLER. Obviously. But did they ever express a reason why they were doing this?

Mr. PERRY. We are in litigation over this issue right now, and Judge Kennedy, the gentleman who is considering the case, said in his ruling so far that there has been offered no reason—no reasonable reason for not—for engaging in this formula that had this discriminatory impact.

Mr. NADLER. Thank you. I'm sorry.

Mr. Rothschild is recognized.

TESTIMONY OF DANIEL M. ROTHSCHILD, MANAGING DIRECTOR, STATE AND LOCAL POLICY PROJECT, AND DIRECTOR, GULF COAST RECOVERY PROJECT, MERCATUS CENTER, GEORGE MASON UNIVERSITY

Mr. ROTHSCHILD. Chairman Nadler, Ranking Member Sensenbrenner, thank you for the opportunity to discuss the important issue of housing in the Gulf Coast area after Hurricane Katrina and lessons about how we can apply this to future disaster response. I commend the Subcommittee for keeping the spotlight on this issue almost 5 years after the hurricane.

Let me start off by explaining my background on the subject. I am not a legal scholar but rather a field researcher who has spent much of the past 5 years learning about the Gulf Coast's recovery after Hurricane Katrina. I serve as the director of the Gulf Coast Recovery Project at the Mercatus Center at George Mason University, a university-based research group focused on the economics of public policy issues.

I am part of a team that has conducted over 450 hours of interviews with nonprofit leaders, social and economic entrepreneurs, public officials, clergy, community leaders, and everyday citizens in Louisiana and Mississippi, who are working hard to rebuild their lives, businesses, schools and communities after Katrina.

The important questions to ask are, what worked after Hurricane Katrina? What didn't work? And what can public policy improve?

I would like to first address what did work with regard to housing and neighborhood redevelopment after Katrina and then dis-

cuss what failed. Our research is described in much greater depth in the written statement I have provided to the Subcommittee.

Virtually every success related to rebuilding housing has stemmed from the resilience and hard work of the communities affected by Katrina, each in a different way. To give just a few examples, the Broadmoor Improvement Association partnered with universities and businesses to bring expertise and funds to the community, leading to over two-thirds of the neighborhood's homes being rebuilt or under repair 2 years after Katrina.

In New Orleans East, the Mary Queen of a Vietnam Catholic Church, served as a rallying point for the Vietnamese American community, which rebounded quickly as a result.

Brad Pitt's Make It Right Foundation worked with the Lower Ninth Ward Neighborhood Empowerment Network Association to rebuild that devastated community.

Habitat for Humanity built a small neighborhood especially for musicians and artists, and the list goes on.

Community leaders, clergy, and social entrepreneurs have leveraged social capital and local knowledge to spur rebuilding, and over 1 million Americans have volunteered their time, some for weeks and some for years, to gut, fix, and rebuild houses one at a time.

In short, housing has been rebuilt from the ground up.

Public policy, however, has in many cases done more to impede than to promote the restoration of the Gulf Coast housing stock after Katrina. To take just one example, look at Louisiana's Road Home program. Though it was established and funded by the end of 2005, by January 2007, Road Home had written fewer than 1,000 checks to Louisiana homeowners. Two years after Katrina hit, only 23 percent of those who had successfully navigated a 57-step application process had received settlements. Because the program endeavored to operate not just as a disaster compensation program but also as a community development program, homeowners whose homes were damaged could not leave the State or become renters without significant penalties to their settlements.

Hazard mitigation grants, which provided funds to homeowners to elevate their homes, were abruptly stopped in March 2007, when FEMA informed Louisiana that the State's implementation of the program failed to comply with Federal regulations. The program did not resume for 7 months.

Also in March 2007, a HUD ruling made Road Home subject to a host of additional Federal regulations which shut down the program for a month so it could be redesigned.

In short, Federal and State policies designed to rebuild homes sowed confusion and uncertainty, making it difficult for people to make informed choices about how, when, and where to rebuild.

Local policy in some places aggravated this. The City of New Orleans undertook five different replanning processes, one of which suggested that whole neighborhoods, including Broadmoor and the Lower Ninth Ward, should not be allowed to rebuild. Put together, the confusion resulting from bureaucratic, politically-designed programs and the city planning mentality that viewed New Orleans as a blank slate contributed more than perhaps any other factors to slowing the rebuilding of homes and neighborhoods after Katrina.

Three key policy principles come out of our research and interviews. The importance of certainty by government; flexibility for citizens; and simplicity in execution.

Certainty, certainty about what economists call the rules of the game for rebuilding is the best way to get homeowners and landlords to revamp their properties, which in turn is the best way to increase the quantity and reduce the cost of housing. Unclear planning policies, confusing and contradictory programs and broken promises only serve to slow the process. Government must provide citizens with, for example, accurate flood maps and information about public services and not change these rules of the game.

My second point is flexibility. Flexibility means that citizens can adapt and make choices that work for them within a set of rules that do not change. Allowing people in communities to figure out their own solutions to both short-term and long-term housing problems will unleash creativity and create opportunity.

Finally, simplicity, policy goals and programs should be simple. Policymakers should avoid creating perverse incentives, such as Louisiana did when the Road Home program effectively penalized people for having carried homeowner and flood insurance. Establish concrete and simple policy goals and execute them to the simplest means possible.

To conclude, certainty, flexibility, and simplicity should be the bedrock principles of postdisaster housing policy. I thank you for your time and look forward to taking your questions.

[The prepared statement of Mr. Rothschild follows:]

PREPARED STATEMENT OF DANIEL M. ROTHSCHILD

MERCATUS CENTER
George Mason University

**HOUSING AFTER NATURAL DISASTERS:
LESSONS LEARNED FROM HURRICANE KATRINA**

Daniel M. Rothschild
Managing Director, State and Local Policy Project
Director, Gulf Coast Recovery Project
Mercatus Center at George Mason University*
703-993-4930
drothsch@gmu.edu

Testimony Presented to the
U.S. House of Representatives Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

July 29, 2010

Chairman Nadler, Ranking Member Sensenbrenner, thank you for the opportunity to discuss the important issue of housing in the Gulf Coast area after Hurricane Katrina and the lessons we can apply to disaster recovery in the future. I commend the subcommittee for keeping the spotlight on this issue almost five years after the hurricane.

Let me start off by explaining my background on the subject. I am not a legal scholar. As the director of the Gulf Coast Recovery Project at the Mercatus Center at George Mason University, a university-based research group focused on the economics of public policy issues, I have spent much of the past five years learning about the Gulf Coast's recovery after Hurricane Katrina from the people on the ground doing the heavy lifting.

* Please note that my testimony does not represent an official position of George Mason University.

I am part of a team over two dozen researchers that has conducted over 450 hours of interviews with nonprofit leaders, social and economic entrepreneurs, public officials, clergy, community leaders, and everyday citizens in Louisiana and Mississippi, as well as former Louisianans now living in Houston, Texas, who are working hard to rebuild their lives, businesses, schools, and communities after Hurricane Katrina. Our research focuses on the economic, political, and sociological aspects of disaster response and recovery and is rooted in learning from the people on the ground about what works and what does not work to prepare for, respond to, and recover after disasters.

During the course of the project, our researchers have published over 50 journal articles, working papers, and policy studies, two of which I have included as appendices to my testimony as they further expound upon the issues I will discuss. I hope that these studies will be helpful to the subcommittee, and I would be happy to provide you with any additional information or studies that may be of use.

Our research suggests that that the three most important characteristics of successful post-disaster public policy are credibility, flexibility, and simplicity. I will expand on these topics after first discussing some highlights of what worked and what did not work to rebuild housing after Katrina.

Private Actions and Public Success

Virtually every success related to rebuilding housing has stemmed from the resilience and hard work of the communities affected by Katrina, each in a different way. To highlight a few of hundreds of examples:

- The Broadmoor Improvement Association (BIA) is revitalizing the Broadmoor neighborhood. Located in the heart of New Orleans—or, as it also might be characterized, at the bottom of the New Orleans soup bowl—this neighborhood faced an immense challenge: a month after Katrina, most of the neighborhood still sat underneath up to ten feet of water. Our interviews with Broadmoor residents suggest that social capital

within the community, which the BIA leveraged, combined with partnerships with outside groups, were key to rebuilding the area's housing stock. The BIA rallied the neighborhood and partnered with universities and businesses to bring funds and expertise to the community. As a result, Broadmoor, one of the most diverse neighborhoods in New Orleans, both in terms of race and income, had a much higher level of rebuilding than the largely white, upper-class Lakeview area two years after Katrina. Over two-thirds of the neighborhood's homes were rebuilt or being rebuilt, an astounding record of accomplishment.

- In New Orleans East, members of the Vietnamese-American community rallied around the Mary Queen of Vietnam Catholic Church. With the church's three priests serving as a conduit for information, residents of the area rebuilt their homes and formed a community development corporation to revive local businesses. Three years after Katrina, their neighborhood was almost completely rebuilt while nearby neighborhoods languished.
- The late Pam Dashiell, then the co-director of the Lower Ninth Ward Center for Sustainable Engagement and Development, explained in 2008 the importance of locally managed rebuilding this way: "Because the community, we live here. We talk to the community. It's not us with the knowledge, it's the community with the knowledge. It's an interactive deal."¹ Other organizations and foundations, both large and small, have taken her observation to heart when it came to their efforts to help rebuild areas in more flood-resistant ways. Brad Pitt's Make It Right Foundation worked with the Lower Ninth Ward Neighborhood Empowerment Network Association to build architecturally creative homes in that

¹ Interview with Pam Dashiell, *Caring Communities: The Role of Nonprofits in Rebuilding the Gulf Coast*, Local Knowledge (2), Mercatus Center, at <http://localknowledge.mercatus.org/profiles/pam-dashiell>.

devastated community. Habitat for Humanity built a small neighborhood especially for musicians and artists in the Upper Ninth Ward.

Across Louisiana and Mississippi, community leaders, clergy, and social entrepreneurs have leveraged social capital and local knowledge to spur rebuilding. And over a million Americans have volunteered their time, some for a week and some for years, to gut, fix, and rebuild houses one at a time.

In short, housing has been rebuilt from the ground up.

Public Policies and Public Failures

Public policy, however, does not have such a record of success. Indeed, in many cases, it has done more to impede than promote the restoration of the Gulf Coast's housing stock after Katrina. To take one example, look at Louisiana's Road Home Program.

Though it was established and funded by the end of 2005, by January 2007 Road Home had written fewer than 1,000 checks to Louisiana homeowners. Two years after Katrina hit, only 23 percent of those who had successfully navigated the 57-step application process had received settlements. Because the program endeavored to operate not just as a disaster compensation program but also as a community development program, owners of damaged homes could not leave the state or become renters without significant penalties to their settlements.

Hazard Mitigation Grants, which provided funds for homeowners to elevate their homes, were abruptly stopped in March 2007 when FEMA informed Louisiana that the state's implementation of the program failed to comply with federal regulations. The program did not resume for seven months. Also in March 2007, a Department of Housing and Urban Development ruling made Road Home subject to a host of additional federal laws and regulations, which shut down the program while state and federal officials could reach an agreement about how to redesign the program.

In short, federal and state policies designed to rebuild homes and thereby promote stability instead sowed confusion and uncertainty, making it difficult for people to make informed decisions about how, where, and when to rebuild.

Local policy in some places aggravated this. The City of New Orleans undertook five different replanning programs, one of which suggested that whole neighborhoods—including Broadmoor and the Lower Ninth Ward, both of which I discussed earlier—should not be allowed to rebuild. Fewer than five months after Katrina—and just weeks after Lower Ninth Ward residents were first allowed to see (but not enter) their devastated homes—the plan suggested that nobody would be allowed to begin rebuilding for four months, until neighborhoods could, through as-yet unknown means, prove their “viability.” Former New Orleans mayor and National Urban League president Marc Morial called the plan a “massive red-lining plan wrapped around a giant land grab.”²

To say that this plan and related ones impeded the abilities of homeowners and landlords to restore their properties is an understatement. The confusion that resulted from bureaucratic, politically designed programs and a city planning mentality that viewed New Orleans as a blank slate contributed more than perhaps any other factor to slowing the rebuilding of homes and neighborhoods after Katrina.

Across the region, this uncertainty created what economist Emily Chamlee-Wright of Beloit College and I call “signal noise”: the persistent distortion of signals from the private and nonprofit sectors that does not self-correct, making the underlying signals—the signals critical to guiding sustainable recovery—more difficult for people on the ground to read and interpret.³ Signal noise is not simply the inevitable confusion that follows a disaster, but stems from public policy actions that create uncertainty about what

² Quoted in Gary Rivlin, “Anger Meets New Orleans Renewal Plan,” *New York Times*, January 12, 2006.

³ As economist Emily Chamlee-Wright and I write in our paper which appears in the appendix to this testimony, “The concept of signal noise comes from the natural sciences. ‘Signal to noise ratio’ in radio communications refers to the amount by which static and interference dilutes the signal of, for instance, a commercial radio station. As the noise surrounding a signal becomes stronger, radio listeners find it harder to follow the music. Other social scientists have used the concept of signal noise and discussed the effects of signal noise, most notably Robert E. Lucas, ‘Expectations and the Neutrality of Money,’ *Journal of Economic Theory* 4(2), 1972, pp. 103–24.”

economists call the “rules of the game” for rebuilding. By this I mean the rules that allow society to function by enabling trade, property rights, security of person, enforcement of contract, and the provision of public and quasi-public goods like roads, floodworks, schools, and police. Public policy creates signal noise when it distorts the signals sent through others rebuilding homes, reopening or establishing businesses, restarting schools, and resuming religious services. I discuss this in much more depth in an appendix to my testimony.

Indeed, respondents in our interviews directed their strongest critiques at the seeming inability of the federal, state, and local governments to coordinate on the most basic matters of policy. The broken promises and the finger pointing had not only deleterious effects on morale but also impeded the clear establishment and promulgation of the rules of the game, making it more difficult for citizens to make decisions. After Katrina, a perceived flood of bureaucratic incompetence and thumb-twiddling from all levels of government followed the literal flood and had a significant and conspicuous negative effect on recovery. The most obvious example of this—promising housing aid to communities struggling to rebuild and then failing to have that aid materialize on time—was a prime source of signal noise for several years after Katrina hit.

In the future, policy makers must avoid making promises that they will not fulfill. It is far better for policy makers to under-promise and over-deliver than to promise funds, technical assistance, or the resumption of public services and not then supply them. In order to help people to make decisions about how to best house their families after disasters and to accelerate the process of landlords bringing their rental properties back online, policy makers and the policies they create must focus on making and executing clear, credible commitments about how, where, and when government will act. In other words, the best way that public policy can improve access to housing after disasters is through making and fulfilling commitments to provide public goods that allow the provision by the private sector and nonprofit groups of private goods such as housing.

Three Key Principles for Policy

In order to do this, public policy should ground decision making in three key principles: certainty, flexibility, and simplicity.

Certainty

Certainty about rules for rebuilding is the best way to get landlords to revamp their properties, which in turn is the best way to increase the quantity and quality of housing and to reduce its cost. Unclear planning policies, confusing and contradictory social engineering programs disguised as compensation programs, and broken promises only slow the process. It is ultimately counterproductive for policy makers to make promises that are unlikely or impossible to come to fruition.

Flexibility

Another key to effective post-disaster housing policy is flexibility. The purpose of post-disaster housing policy should neither be to rebuild homes and neighborhoods exactly as they were before, nor should it be to replan neighborhoods and communities from the top-down. Rather, it should focus on providing households with assistance in the most flexible forms possible to rebuild their homes, purchase new ones, become renters, or even move to other cities and states if they prefer. After all, housing about is more than just a roof over a family's head; it incorporates a deeply emotional element as well. As Katie Mears, then the gutting and rebuilding coordinator for the Episcopal Diocese of Louisiana put in, "Gutting wasn't [only] about reconstruction. It was about closure for the pre-Katrina life."⁴

Allowing people and communities to figure out their own solutions to both short-term and long-term housing problems unleashes their creativity and allows for that closure. The public sector can support and affirm the ability of households to make their own best decisions in both the short and longer terms by providing public assistance in the form of vouchers that have as few strictures placed on them as possible.

⁴ Interview with Katie Mears, *Caring Communities: The Role of Nonprofits in Rebuilding the Gulf Coast*, Local Knowledge (2), Mercatus Center, at <http://localknowledge.mercatus.org/profiles/katie-mears>.

Simplicity

It is critical to keep both the policy goals and the programs simple. Complex programs that serve multiple goals frequently find that those goals compete for resources or contradict one another. Policy makers should also be attuned to the perverse incentives that some programs create. For instance, the Road Home Program effectively penalized people for having carried homeowner and flood insurance, deducting these settlements from these policies that Road Home settlement. This, in effect, rewarded people who failed to maintain insurance on their homes. Bear in mind that, above all, the resumption of normalcy is the goal of rebuilding. To the extent possible, housing policies should be established before a disaster to avoid the weeks and months lost to discussion and debate after an event.

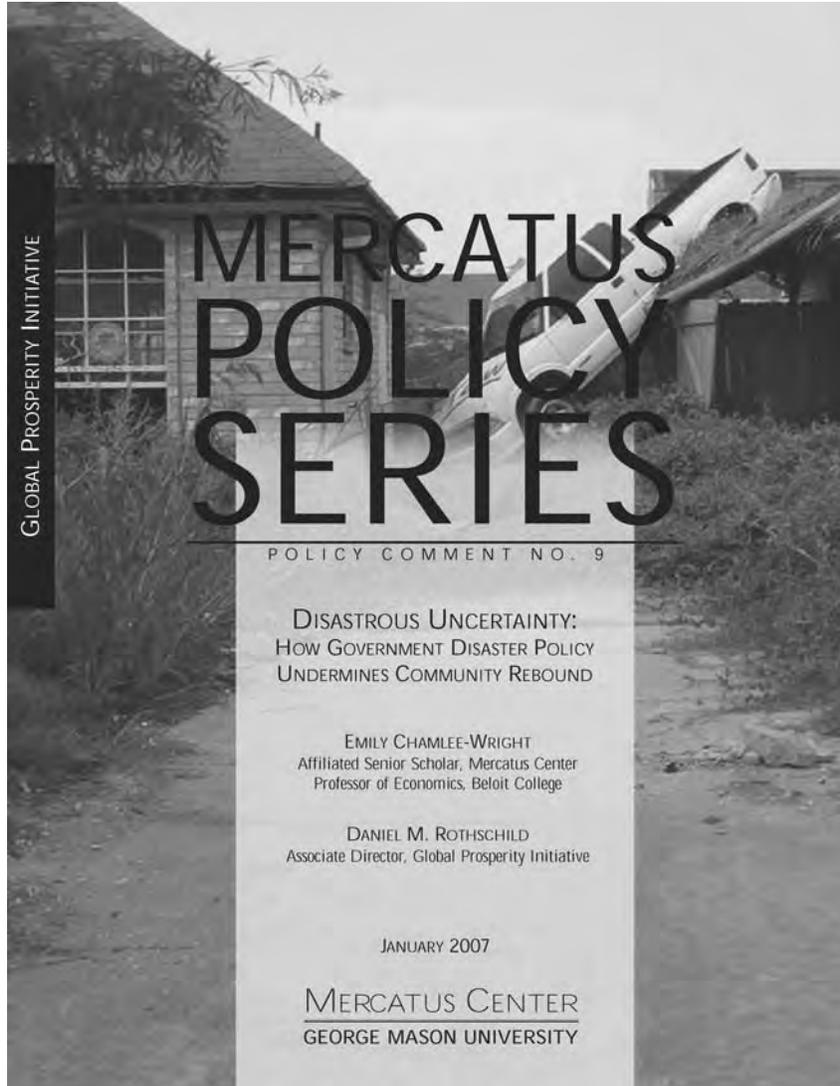
Simplicity, flexibility, and household control should be the bedrock principles of post-disaster housing policy. Much of the heartache and human suffering that residents of Louisiana and Mississippi experienced after Katrina was caused by programs at all levels of government that were too complex, too rigid, and insufficiently deferential to local knowledge and household control. These are mistakes that do not have to be repeated when the United States faces its next natural disaster.

Thank you again for the opportunity to present our research to the subcommittee, and I again commend the subcommittee for keeping attention on this important issue.

Appendices

Emily Chamlee-Wright and Daniel M. Rothschild, "Disastrous Uncertainty: How Government Policy Undermines Community Rebound," *Mercatus Policy Series Policy Comment 9*, 2007.

Eileen Norcross and Anthony Skriba, "The Road Home: Helping Homeowners in the Gulf After Katrina," *Mercatus Policy Series Policy Comment 19*, 2008.



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DISASTROUS UNCERTAINTY:
HOW GOVERNMENT DISASTER POLICY
UNDERMINES COMMUNITY REBOUND

EMILY CHAMLEE-WRIGHT
Affiliated Senior Scholar, Mercatus Center
Professor of Economics, Beloit College

DANIEL M. ROTHSCHILD
Associate Director, Global Prosperity Initiative

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MERCATUS CENTER
GEORGE MASON UNIVERSITY

ABOUT EMILY CHAMLEE-WRIGHT, CO-AUTHOR

A professor of economics at Beloit College, EMILY CHAMLEE-WRIGHT earned a PhD in economics from George Mason University. Her research investigates the confluence of cultural and economic processes. Much of her current research centers on Gulf Coast recovery efforts in the wake of Hurricane Katrina. She is currently working on her third book, *The Learning Society*, which examines how communities deploy social capital resources in the face of poverty and devastation. Professor Chamlee-Wright is a former W.K. Kellogg National Leadership Fellow and a recipient of the Underkoffler Award for Excellence in Teaching from Beloit College.

ABOUT DANIEL M. ROTHSCHILD, CO-AUTHOR

DANIEL M. ROTHSCHILD is the associate director of the Global Prosperity Initiative at the Mercatus Center. Daniel holds a master in public policy degree from the Gerald R. Ford School of Public Policy at the University of Michigan, a master of arts degree in modern British history from the University of Manchester, and a bachelors degree from Grinnell College. He is involved with international development policy at Mercatus.

ABOUT FREDERIC SAUTET, EDITOR

FREDERIC SAUTET is a senior research fellow at the Mercatus Center at George Mason University and a member of the graduate faculty at George Mason University. Prior to joining Mercatus, Frederic was a senior economist at the New Zealand Commerce Commission and a senior analyst at the New Zealand Treasury where he focused on economic transformation, entrepreneurship, utility development, and tax policy. Frederic holds a doctorate in economics from the Université de Paris Dauphine and did the course work for his doctorate at the Institut des Etudes Politiques in Paris. He also studied at New York University as a post-doc. Frederic's current work focuses on entrepreneurship, institutions, and social change.

For more information about the Mercatus Center's Global Prosperity Initiative, visit us online: www.mercatus.org/globalprosperity, or contact Claire Morgan, director of the Social Change Project, at (703) 993-4955 or cmorgan4@gmu.edu.

Cover photo: Daniel Rothschild—St. Bernard Parish, July 16, 2006.

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DISASTROUS UNCERTAINTY:

HOW GOVERNMENT DISASTER POLICY UNDERMINES COMMUNITY REBOUND

EMILY CHAMLEE-WRIGHT AND DANIEL M. ROTHSCHILD

EXECUTIVE SUMMARY

In the aftermath of large-scale disasters, policy makers frequently respond by developing and directing top-down recovery plans and launching a variety of expensive and complicated programs to rebuild cities and compensate victims. This was certainly the case after Hurricane Katrina.

However, these plans tend to ignore the innate abilities of individuals, communities, and businesses to use a variety of resources and sources of information to guide their decisions about whether and how to rebuild. These decisions are not made in isolation, but rather depend substantially on the signals sent by similarly situated people.

Recovery efforts guided by the signals that emerge from action on the ground produce faster, more robust, and more sustainable redevelopment than efforts stemming from a politically-produced and centrally-executed recovery plan. Moreover, large-scale redevelopment programs can overwhelm and obfuscate the signals created locally, stalling and distorting the organic recovery that is crucial to long-term sustainable development.

Public policy can foster an environment which encourages sustainable, organic recovery by:

1. Providing quick, clear, and credible commitments about what goods and services governments will provide and when.
2. Creating in advance alternative regulatory regimes specific for post-disaster environments, and
3. Avoiding policies that distort local economies and hamper civil society rebuilding.

Because policy mistakes can have serious retarding effects on post-disaster rebuilding efforts, policy makers must understand the systemic reasons why government help so often goes awry, why private citizens with a stake in the outcome are best situated to lead their own recovery, and how to craft policy responses in a way that keeps "signal noise" to a minimum.

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DISASTROUS UNCERTAINTY: HOW GOVERNMENT DISASTER POLICY UNDERMINES COMMUNITY REBOUND

INTRODUCTION

On August 29, 2005, the nation watched as Hurricane Katrina plumed the Gulf Coast, inflicting over \$100 billion of property damage across broad swaths of Louisiana, Mississippi, Texas, and Alabama—ultimately claiming over 1,600 lives.¹ The fury of nature seemed to cause the institutions on which our society is based—those of government, commerce, and civil society—to crumble. First responders appeared overwhelmed as accounts of widespread looting, vandalism, theft, assault, and murder headlined newspapers and as the images of our fellow citizens literally swimming for their lives appeared on television and computer screens. The slow and seemingly inept responses of government at all levels both in preparation for and recovery from the storm infuriated Americans.

On September 15, President Bush addressed the nation from Jackson Square in the New Orleans French Quarter, pledging the federal government to sponsor and manage a rebuilding program of historic proportions:

[T]he federal government will undertake a close partnership with the states of Louisiana and Mississippi, the city of New Orleans and other Gulf Coast cities so they can rebuild in a sensible, well planned way. Federal funds will cover the great majority of the costs of repairing public infrastructure in the disaster zone, from roads and bridges to schools and water systems.

Our goal is to get the work done quickly. And taxpayers expect this work to be done honestly and wisely. . . .²

Sixteen months after Katrina made landfall, communities along the Gulf Coast are in various states of repair. Some areas are almost rebuilt, while in others little progress has been made. Some communities have proven remarkably resilient, while others have been unable to “get the ball rolling” on recovery. Given the commitment of \$110 billion by the federal government³ (including \$7.5 billion through the Louisiana Road Home

¹ John McMillan, “Nation Just Doesn’t Understand Scale of Katrina, Official Says,” *The Baton Rouge Advocate*, November 10, 2006.

² Marcus Franklin, “Columbia Geophysicist Wants ‘Full’ Katrina Death Toll,” *Associated Press*, October 28, 2006.

³ “President Discusses Hurricane Relief in Address to Nation,” White House Press Release, September 15, 2005, <http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html>.

⁴ “Fact Sheet: A New Mississippi: Rebuilding in the Wake of Hurricane Katrina,” White House Press Release, August 28, 2006, <http://www.whitehouse.gov/news/releases/2006/08/20060828-2.html>.

Program),⁵ payments of over \$23 billion⁶ from the subsidized National Flood Insurance Program, and the subsidies offered under the Gulf Opportunity Zone and other tax credits, Gulf Coast residents affected by the storm, and Americans more broadly, are right to ask why the pace of recovery has been so slow.

Policy makers too remain concerned about the slow pace of recovery, and Americans of all political stripes believe that governments at all levels are not doing enough to help. A year after the storm, only 32 percent of Americans believed that federal agencies are doing "all that could be expected" of them.⁷ Two-thirds of Americans believed that the federal government's response has been "not so good" or "poor."⁸

However, the problem may not be that governments are not doing enough. In fact, the rebuilding effort is likely to be more rapid and sustainable if civil society, rather than government, takes the lead. But in order for civil society to fulfill its potential, governments must assume a relatively minor role in the redevelopment process so as not

to distort the signals generated by the discovery unfolding within civil society.

In the wake of Katrina, residents and business owners across the Gulf Coast are looking for signals—cues as to where they should devote their time and resources—regarding whether and when their communities and customer bases are going to return and in what form. A community is, after all, not just a political district or a tract of homes; it is a social system that connects individuals and their families to one another through formal and informal neighborhood groups and the services and social spaces created by schools, businesses, religious groups, and non-profit organizations. The futures of the victims of Katrina are tied to the decisions of others—their neighbors, their customers, their employees, and the commercial and non-commercial organizations serving their communities. In such a context, the signals coming out of civil and commercial society—signals about who is coming back and when and what services will be provided—play a critical role in the recovery process.⁹

⁵ Leslie Eaton, "Slow Home Grants Stall Progress in New Orleans," *New York Times*, November 11, 2006.

⁶ Donald B. Marron (Acting Director, Congressional Budget Office), Letter to Senator Judd Gregg, May 31, 2006. <http://www.cbo.gov/ftpdocs/72xx/doc7233/05-31-NFIPLetterGregg.pdf>.

⁷ CBS News/*New York Times* poll conducted August 17–21, 2006. Fifty-nine percent of respondents believed that the federal government should be doing more, and nine percent were unsure. <http://www.pollingreport.com/disasters.htm>.

⁸ ABC News poll conducted August 10–20, 2006. Four percent rate the response as "excellent," and twenty-five percent rate it as "good." <http://www.pollingreport.com/disasters.htm>.

⁹ For more detail on this, see Emily Chamlee-Wright, "After the Storm: Social Capital Regrouping in the Wake of Hurricane Katrina" (working paper, Mercatus Center at George Mason University, Arlington, VA, 2006).

"Well, there's a lot of uncertainties, you know? . . . [W]e don't know whether [the] levee system's going to hold, number 1. Number 2, a lot of people are still finding insurance issues that just haven't been corrected. And number 3—even people who've got the insurance and you want to come back home, you don't know how many people ever come back in the neighborhood. Who wants to live in the neighborhood with nobody there? So, there's just so many uncertainties right now, you know? Who knows?"

—Law Enforcement Officer, New Orleans

And yet, in the post-Katrina environment, many of the signals upon which people depend to make informed and responsible decisions have become difficult to read or have become so distorted that seemingly clear signals are sending the wrong message. We call this distortion "signal noise": the persistent distortion of signals that does not self-correct, making the underlying signal more difficult for people on the ground to read and interpret.¹⁰

To take but one example, New Orleans is currently in its second (some say third) discrete rebuilding planning process in less than a year. As each new planning process and the commensurate rebuilding plan appear, residents change their decisions about how and whether to rebuild.

When a previously-announced plan is scrapped in favor of a new plan with different rules for rebuilding, time is lost, progress made under the now-obsolete plan is rendered useless, and residents are left wondering whether the next plan will be "the one"—or just another aberration. These multiple and varied signals that the city has sent to its residents have left people making decisions about rebuilding without any consistent knowledge of what and when policy makers will allow them to rebuild. This in turn slows the rebuilding process and delays the recovery of key commercial and civil society organizations and institutions. When governments fail to establish the rules of the game for rebuilding, or worse yet change the rules in mid-course, it becomes diffi-

¹⁰ The concept of signal noise comes from the natural sciences. "Signal to noise ratio" in radio communications refers to the amount by which static and interference dilutes the signal of, for instance, a commercial radio station. As the noise surrounding a signal becomes stronger, radio listeners find it harder to follow the music. Other social scientists have used the concept of signal noise and discussed the effects of signal noise, most notably Robert E. Lucas. "Expectations and the Neutrality of Money," *Journal of Economic Theory* 4(2), 1972, pp. 103-24.

cult for victims to make vital decisions and get on with their lives.

To be clear, signal noise is not merely the confusion created by a major disaster; such confusion tends to subside relatively quickly after families reunite, supplies come in, and response shifts from emergency response to rebuilding. Nor is signal noise "natural." Signal noise is not an inevitable result of disaster; instead, it is often the unintended consequence of poorly conceived policy interventions. Whereas the signals generated by civil and commercial interactions, which possess built-in incentives that amplify the right signals and minimize the wrong ones, tend to sort out and reduce the confusion faced by individuals, government policy does not possess self-correcting properties. Indeed, signal noise generated through public policy tends to be stubbornly persistent.

In particular, federal, state, and local governments introduce signal noise through disaster relief efforts, management of flood protection and insurance systems, and redevelopment planning initiatives. We find that the distortions created by disaster policy often drown out the more nuanced, precise, and self-correcting signals generated by residents and businesspeople with a personal stake in how, when, and where rebuilding happens. Though it is possible for government to

foster an environment in which clear signals might emerge, current practices often undermine the efforts of private citizens trying to affect a swift and sustainable recovery.

The structure of this policy comment is as follows. In Section A, we describe specific strategies by which some Gulf Coast communities are successfully rebuilding. In Section B, we examine how civil and commercial society are generating signals necessary for a robust recovery. Section C discusses some of the ways in which government programs and policies undermine these community-based strategies by generating signal noise. Additionally, we examine the systemic reasons that make government-led recovery prone to such distortion. In the final two sections, we conclude by explaining the policy ramifications of this research and offering suggestions for how policy makers can reduce signal noise in dealing with future disasters.

Because public policy mistakes can have serious and broad retarding effects on rebuilding efforts after a disaster, it is important that policy makers understand the systemic reasons why government help so often goes awry, why private citizens are usually the best leaders of their own recovery, and the importance of crafting public policy in such a way that signal noise is kept to a minimum.¹¹

¹¹ The observations made in this policy comment are based on fieldwork conducted in the Gulf Coast region in February, March, April, June, and October 2006, including more than 100 in-depth interviews with people engaged in the rebuilding process.

A. COMMUNITY REBUILDING STRATEGIES

The problem of signal noise looms so large in rebuilding after Hurricane Katrina precisely because of the importance of the blocked signals. Were the signals sent by commercial and civil society unimportant to the rebuilding effort, public policy and the accompanying signal noise would have little negative effect on the recovery. However, communities in the Gulf Coast are relying upon the signals generated by their neighbors, friends, non-profit organizations, and commercial partners to make decisions about rebuilding. The reopening of schools and grocery stores, the resumption of church services, and calls for neighborhood association meetings are all seen by returning residents as signs of community rebirth. In the absence of policy-generated noise, these signals would be more easily read and thus speed the recovery process.

Communities that have demonstrated success in their redevelopment efforts have obviously had to deploy human, financial, and physical capital. Complementing these resources is another essential form of capital—social capital. Social capital resources are those resources embedded within networks of friends, neighbors, faith communities, clubs, crews, businesses, and so on.

Redeveloping and deploying the complex mix of resources that make up social capital has proven vital to successful recovery. In particular, communities rebuilding after Hurricane Katrina are employing a variety of different social capital-based strategies, each of which serves an important signaling function.¹⁴

The most prevalent of these strategies is mutual assistance, by which storm survivors support one another by exchanging labor, expertise, shelter, child care services, and tools and equipment. Mutual assistance serves as a source of material support, but more importantly, it sends signals that members of a community are committed to recovery and helps restore the fabric of communities torn asunder by disaster. Such assistance signals residents who are considering returning to the area that other people will share the burdens and the risks of returning with them. It signals the community's return. Governments could ostensibly provide some of the material support that mutual assistance provides, but such aid would drown out the signals that residents desperately need and that help reestablish community in the true, rich sense of the word.

A second strategy is charitable action. Unlike mutual assistance, which relies on reciprocity, charitable action consists of one-way offers of

¹⁴These strategies are discussed and explored in much greater depth in Emily Chamlee-Wright, "After the Storm: Social Capital Regrouping in the Wake of Hurricane Katrina" (working paper, Mercatus Center at George Mason University, Arlington, VA, 2006).

SOCIAL CAPITAL AT WORK: TWO STORIES

Frank⁴ owns a hardware store that took eight feet of water during Hurricane Katrina although his house suffered only minimal damage. His manager was not so fortunate. The two of them have employed a mutual support strategy, using the social capital that comes from their working relationship, to get their store back online.

Frank: My house survived pretty decently. . . . Meanwhile, we've been housing five other people that are living with us now, 'coz their houses didn't. But you know, my manager [and] another couple have been living with us with two small kids. . . . So they've been living with us basically for the last eight months, which is unique at first. But we'd do it all over again if we had to.

Interviewer: Were you able to pay [your manager during this time]?

Frank: No. . . . we haven't paid him a cent other than stuff that jobs we maybe did on the side to help pay cash so to speak, get money so to speak to survive.

For eight months Frank provided his manager a familiar (albeit a bit crowded), clean, proximate, and safe home, a particularly precious resource in the post-Katrina environment. On the other side of the coin, the opportunity for Frank to rely upon an experienced right-hand man, despite the inability to pay his usual salary, was surely just as valuable to Frank in his efforts to re-open his store.

Katrina devastated Marie's Mississippi home. But she and her neighbors banded together to work on one another's homes netting vital material benefits—and they reweave the social fabric in their communities by relaxing together as well.

Marie: And we worked together like, you know, at night. . . . I had a swimming pool above ground. My pool did not go down, and I felt like God left it there for a reason, because the whole neighborhood used it as a Jacuzzi. We would take the pump and. . . . It turned and cleaned the pool. So here there's no gas, and we're running the pool. We were like, "Don't tell anybody we're using the gas for that pool." But I mean, you'd look out and then you'd say, "Oh hey," you know? [Marie smiles.] And to this day, there's still a bar of soap sitting on the side of our pool. And I think I'm going to leave it there. I really do.

⁴ This is a pseudonym to protect the interviewee described here. All quotations are verbatim.

direct assistance from individuals and private philanthropies largely outside the affected areas. Because charitable action is decentralized and hence nimble, nuanced, and able to respond effectively to individual and small group needs, it helps provide signals of how interested third parties wish to “invest” their financial, labor, or physical resources in helping others rebuild.

A third strategy is commercial cooperation, whereby commercial activity positively impacts a community’s ability to rebound. Like mutual assistance, commercial cooperation provides material support and signals that businesses—and hence goods, services, and jobs—are returning to a community. Commercial cooperation is vital in an area that has suffered widespread physical devastation and thus needs cleaning and rebuilding materials for physical recovery. Like mutual assistance, a spirit of enlightened self-interest drives commercial cooperation and provides a crucial element of recovery. As the manager of a large national home improvement supply store stated, “This is not really about sales. . . . We need our community, you know.” Commercial relationships that are taken for granted in a normal setting, such as access to grocery stores, banks, barbers, and hospitals, send crucial signals about sustainability when they return to communities after disaster. Government provision of the goods and services they provide delays the reemergence of the signals they send, which in turn delays recovery.

Finally, a strategy we call “build it and they will come” occurs when private citizens, business own-

ers, and community leaders create or redevelop a key community resource that might serve as the tipping point for residents and other businesses and organizations to return. For instance, in New Orleans East, the resumption of church services at the Mary Queen of Vietnam Catholic Church soon after the storm stimulated a rapid return of the Vietnamese community. In St. Bernard Parish, the opening of a unified school drew thousands of students and their families back to the community. By casting an entrepreneurial gaze at the resources available for redevelopment, community leaders and ordinary citizens seek to solve one crucial piece of the redevelopment puzzle, making it possible for many more to return and sending a strong signal that the community is on the rebound. Noise emanating from government policies can muffle these signals—or squelch them altogether—by failing to provide and enforce the rules of the game for rebuilding or creating rules that forbid or delay such re-openings either through regulation, economic distortion, or disrespect for private property rights and contracts. Similarly, rigid adherence to regulatory structures ill-suited to the post-disaster context creates noise that affects these signals.

Through these and other patterns by which social capital is deployed, individuals in post-disaster contexts are able to use signals generated within markets and civil society to make intelligent decisions about how, where, and when to rebuild their communities and their lives. It is for this reason that policy makers must craft both pre- and post-disaster policy in a manner that allows

for these signals to emerge and not unintentionally create signal noise that drowns them out or distorts them to the point that they can no longer effectively guide people in their efforts to make informed and responsible decisions. The robustness of signals emanating from markets and civil society depends crucially upon the social rules we tend to take for granted—rules of private property, the rule of law, contract enforcement, and basic rights of self-determination. As crucial as these rules are for day-to-day interaction, they are all the more important to ensure in the wake of disaster.

Providing this assurance is a critical way government at all levels can reduce signal noise. It is not enough to quickly and credibly institute bad policies that undermine community rebuilding. Beyond this, policy makers must consider the ways in which their efforts to help disaster victims often unintentionally distort the signals people need to effect a successful recovery effort.

In the next section, we discuss some of the ways in which, and the reasons why, government-led recovery efforts tend to drown out the otherwise clear signals that individuals, families, and communities generate through their commercial and civil interactions.

B. HOW SIGNAL NOISE AFFECTS DISASTER RECOVERY

Clearly there are things that governments can do to foster an environment in which meaningful signals emerge. By enforcing property rights and contracts or restraining inflation, for example, governments help to clarify and enforce “the rules of the game” for our daily interactions with one another. When good rules such as these are clear and well-enforced, the signals that emerge in markets and other social interactions tend to be robust and allow the interactions between members of society to be more fruitful and peaceful. Citizens of liberal democracies tend to take these “rules of the game” for granted, but they are vital to our daily interactions and overall well-being.

While governments can help establish the context in which this signaling and discovery takes place, governments themselves are generally not good at learning what people want, how to address these wants, and the terms by which people work together to coordinate their often competing interests. For instance, the government is not good at discovering what restaurants people like to frequent, what types of jobs employers will require next year, or if homeowners prefer

Formica or granite countertops in their kitchens. Because of this, people operating within liberal democracies make these decisions in the marketplace and use prices as a means for discovering the best use of resources. This “discovery process”—determining what goods and services are needed and how best to provide them—spreads good ideas among individuals and their communities and is vital to overall social coordination.¹⁴

The rebuilding process after a natural disaster is a discovery process writ large. People whose homes have been damaged or destroyed need to find supplies and contractors to help them with repairs. Businesses in turn are searching for employees and materials. Non-profit and charitable groups seek opportunities to coordinate the assets of donors and volunteers with the needs of disaster victims. On a deeper level, families and businesses are trying to determine how and whether they should rebuild—or whether they should start anew elsewhere. Similar discovery occurs every day in every community in the country, but after a disaster, the process becomes more prominent as questions elevate from the quotidian (“Where should I get my car’s oil changed?”) to the more profound (“How do I rebuild my home?”). It is, however, fundamentally the same process that coordinates our daily lives.

Because the political process is not a good instrument for gathering this “on the ground” knowledge, its outcomes can negatively impact decision-making by people recovering from disaster. Public policy changes affect the signals that victims and people on the ground read and interpret, which in turn affects their ability to make good decisions.

Two key areas where public policies can create signal noise after a disaster are: (a) through the planning and regulatory processes and (b) through provision of goods and services that could otherwise be provided through the market. We now consider each of these in turn, examining specifically their implications on the rebuilding process in New Orleans and along the Gulf Coast.

B.1 NOISE IN THE RULES OF THE GAME:

PLANNING AND REGULATION

Planning

After a natural disaster, residents need assurance that policy makers will respect their property rights and rights of self-determination and quickly explain what changes to the institutional “rules of the game.” If any, residents will encounter as they put their lives, homes, and businesses back together. To the extent that a natural disaster presents an opportunity to get rid of the mistakes of the past and try new ideas, that opportunity

¹⁴ For more on the role of markets and entrepreneurship in the discovery process, see Israel M. Kirzner and Frederic Sautet, *The Nature and Role of Entrepreneurship in Markets: Implications for Policy*, Mercatus Policy Series, Policy Primer No. 4 (Arlington, VA: Mercatus Center at George Mason University, 2006).

must be based on the decisions of individuals in the affected communities.

Because of government's inability to discover information effectively, especially after a crisis, broad government re-planning after a disaster can drown out the signals generated through the real discoverers of knowledge—residents, their neighbors, civic organizations, and businesses operating within the market context. Attempts by governments to rebuild (or even re-engineer) communities after a disaster slow the recovery process and frustrate the people they are trying to assist by making it more difficult for residents and business owners to make informed and responsible decisions.

The political process is by its nature slow-moving. It takes months or years for relief funds to trickle down into the hands of those in need, and the policy making and execution process is arduous and complicated, as exemplified by FEMA's failure to quickly revise flood insurance rate maps (FIRMs), which has left people unsure whether they should rebuild homes as before, elevate them three feet, elevate them nine feet, or abandon rebuilding altogether. Information about flood risk and the implications these risks have for public policy and insurability are crucial to rebuilding efforts. Without clear information on flood risk, residents and business owners cannot assess the costs of rebuilding, and recovery will slow or halt altogether.

"FEMA, they still haven't come up with the maps that show certain areas. So you are going to place money on false hope. New Orleans is going to wind up flooding again."

—Volunteer leader,
Ninth Ward, New Orleans.

New Orleans provides an excellent example of how government planning can stall rebuilding and the discovery process it entails. In October 2005, Mayor Nagin created the Bring New Orleans Back Commission (BNOB) to create a plan for rebuilding the city. Though BNOB's Urban Planning Committee assured New Orleans residents that they would have representatives on the Committee, the driving paradigm was clear: redevelopment of the city could not rest in the hands of private citizens. Instead, the Crescent City Recovery Corporation (CCRC) would orchestrate it through a comprehensive plan. CCRC would have "the powers to receive and expend redevelopment funds, to implement the redevelopment plan, to buy and sell property including use, as a last resort, of the power of eminent domain."¹¹

¹¹ See <http://www.bringneworleansback.org> for more details about this planning process.

The wisdom of putting government "in charge" of the redevelopment effort and the assumption that it would take billions of federal dollars to do it were never questioned. The task before the BNOB was simply to figure out what and how to plan and what powers state and local policy makers must grant to the CCRC.¹⁶

The recommendations that came out of the process included reducing the city's "footprint" and transforming some neighborhoods into green space and industrial centers.¹⁷ In its \$18 billion plan, the Commission carved the city into thirteen planning districts. A committee would create a redevelopment plan for each district and determine the future viability of neighborhoods within the district. It was not clear that the planners even knew how to define a neighborhood, much less plan one, and residents frequently found the committee's definition of their neighborhood at odds with their own.

In order to be considered a "viable neighborhood," the planning committee had to demonstrate that fifty percent of the residents in a neighborhood had returned or were committed to returning. Neighborhoods that failed to meet the threshold of viability were candidates for forced

buyouts. During the four-month planning period, the Commission recommended a moratorium on rebuilding permits in neighborhoods that had at least two feet of flooding—approximately 80 percent of the city. Though the public outcry led Nagin to reject the building moratorium, the underlying paradigm of centralized redevelopment planning was not and still has not been rejected. In fact, in May 2006, Nagin announced that the basic blueprint that the BNOB devised would set the agenda for his second term.

Despite the best intentions of the BNOB Commission and elected officials, the shifting rules of the game created signal noise that proved deafening to the average New Orleanian. In New Orleans East, for instance, some communities were well into rebuilding when Nagin suggested that the city might not provide any municipal services, only to rescind that suggestion later. Nagin's remarks were extremely serious to the homeowner rebuilding her greatest investment or to the business owner deciding whether to remain in New Orleans or relocate. The only way to truly discover whether a neighborhood is a viable candidate for rebound is to make the rules of the game as clear as possible and let people try to rebuild. If they are unwilling to do so, at least

¹⁶ In order to ensure that the CCRC had the authority it required to carry out the redevelopment planning effort, the BNOB recommended "tak[ing] away from the City Council the ability to reverse decisions by the city Planning Commission and let appeals be handled by the court. Both moves would need voters to amend the city charter." Staff Reports, *New Orleans Times-Picayune*, January 12, 2006.

¹⁷ Martha Carr, "Rebuilding Should Begin on High Ground, Group Says," *New Orleans Times-Picayune*, November 19, 2005.

with flood maps in hand, property rights assured, and ideally a credible commitment to whatever level of flood protection will (or will not) be provided, property owners have the option of selling to those who are willing to try. Absent those stable rules of the game, any viability study will fail—and it will waste precious time in the process.

After the failure of the BNOB Committee, the Greater New Orleans Foundation (GNOF) launched a rebuilding planning process that makes greater use of local knowledge and empowers communities more than the previous planning process did. It remains to be seen whether this process will work. But the costs of the first failed process have been massive: nine wasted months, millions of wasted dollars, and unquantifiable but significant distortions to the local market as citizens navigate not just the damages of the storm, but also the vagaries of the political process.

Questions about the strength of the levees being rebuilt—and the failure of the government to give

a clear, consistent answer on this question—have further stymied rebuilding. Elected officials and bureaucrats have made contradictory and frequently uninformed statements about how, where, and when the U.S. Army Corps of Engineers would rebuild the levees, leaving residents in limbo when making decisions about rebuilding. The unknown future of the Mississippi River Gulf Outlet (MRGO or “Mister Go”) similarly exacerbates this uncertainty. Without knowledge about whether their homes and businesses will receive Category 2 or Category 5 levee protection, residents have been unable to make informed choices. The government’s previous failure to build levees that performed to their advertised standards has exacerbated this uncertainty. In short, government action has created and is continuing to create a noisy decision-making environment, leaving many businesspeople and residents in a state of indecision and slowing the pace of post-disaster recovery.

The signal noise that the rebuilding planning efforts generate is a key reason that rebuilding in

“I want to know that the levees are strong enough to withstand the next category five or three or four—whatever comes through—and I want to feel confident. I’m annoyed, but you’re hearing all these different stories. The Corps, they say one thing, and then other people say, ‘Oh, that’s not true’—you know it is all confusing. You’re really nervous because you don’t know who to believe and who is telling the truth. . . . I’d like to hear from the engineers. I don’t want to hear from politicians.”

—Elementary school principal, Mid-City, New Orleans

New Orleans has been so sluggish, especially compared with neighboring parishes and Mississippi counties that did not institute a forced political planning process. Rather, these communities generally allowed markets to re-emerge and permitted knowledge about the rebuilding process to flow from individual decisions.

Regulation

Government disaster relief is by its very nature bureaucratic and regulated. The sheer amount of money and number of people involved make it virtually impossible for policy makers to design it any other way; the alternative would be massive and widespread fraud and even fewer resources flowing to those who need them most. This regimented structure can stifle or, at the very least, frustrate local leadership driving community redevelopment, generating signal noise that hampers a community's ability to recover quickly.

The case of schools is particularly illustrative. Schools are a key resource for a community and their reopening—a “build it and they will come” strategy (see Section B)—sends a vital signal about the future of a community. Parents are unlikely to see their communities as viable places to rebuild in the absence of schools. Unfortunately, when social entrepreneurs and school administrators try to reopen schools after a disaster, they often face high bureaucratic hurdles, which retard the speed of recovery as parents await clear signals about the future of education.

Doris Voitier, superintendent of the St. Bernard

Parish Unified School District, pledged to reopen a school just eleven weeks after the storm. Initially, Voitier assumed that FEMA's newly created task force on education would lend support to her effort to redevelop the school district, but she soon learned that FEMA's role was not so much to lend support as it was to regulate the decisions coming out of her office, generating noise and uncertainty for Voitier and St. Bernard Parish parents. FEMA officials came to enforce requirements on historic preservation, environmental protection, and section 404 and 406 hazard mitigation. But none had any advice for how to reopen her schools.

Voitier reports, for example, that she has had to become an expert on the Stafford Act, the primary act detailing federal response to natural disasters, as it defines the narrow field within which she can act. Or as one Mississippi hospital administrator put it, after describing the differences between Category B, Category E, and Category H restoration and mitigation, “that's why administrators keep our jobs is because we are supposed to try and figure out the regulations [sic].”

Voitier's efforts to operate within the guidelines of the Stafford Act were not enough to keep her in FEMA's good graces. After registering many more students than she initially anticipated, Voitier ordered two additional trailers to use for classroom space. The trailers that were eventually delivered were deemed unsuitable for student use because two doors in each trailer were too close together to meet local fire code. While she went

through several layers of bureaucracy to have the door openings widened, she received permission from a FEMA official to put washers and dryers in one of the unused trailers so that the teachers living in the school's parking lot would have a place to wash their clothes. Soon after, FEMA rotated that representative out of the area. The new representative subsequently placed Voitier under investigation for "misuse of federal property."

The signal noise caused by bureaucratic rules that Voitier encountered—an effect of the wavering rules of the game—slowed her ability to expand the school's capacity to meet the needs of all returning children, which generated further signal noise to parents deciding whether to return to St. Bernard Parish, who needed to know whether they could enroll their children in school. In this way, the signal noise generated in the regulatory environment fed upon itself, multiplying exponentially and slowing recovery.

Similar to the bureaucratic rigidities embedded within federal relief agencies, state and local regulations can also have a stifling effect on civil society's ability to respond in the months following a crisis. After the storm, many parents faced the daunting task of navigating the system of relief services and beginning the demolition process while caring for young children. The temperatures

were high, stress levels were higher, and the lines were long. But professional childcare was in short supply. Some daycare providers did what they could to open their doors to disaster victims in the weeks and months that followed, but state regulators fined them for failure to comply with child-teacher ratios and other requirements.

The parents sent a clear signal—a demand for much needed, safe, and affordable childcare. Childcare professionals easily and correctly read their signal. But the regulatory environment, which was not crafted for a post-disaster context, caused signal noise that prevented childcare professionals from meeting this need.

Most regulations in a society are adopted in times of relative calm. Even under the calmest circumstances, it is often difficult to assess the benefits and costs of a regulation.²⁴ But in the aftermath of a disaster, however, the calculus of regulation changes dramatically, and assessments conducted during calmer times may be completely inappropriate guides for establishing sound regulatory policy. Rigid adherence to a regulatory code that applies under normal operating conditions can strangle the organic, grassroots recovery efforts that local leadership, voluntary organizations, and businesses undertake. For instance, a limit on the number of children that one childcare worker can

²⁴ For more on regulation, see Susan Dudley, *Primer on Regulation*, Mercatus Policy Series, Policy Resource No. 1 (Arlington, VA: Mercatus Center at George Mason University, 2005), http://www.mercatus.org/Publications/pubID.2331.cfilter.0/pub_detail.asp.

supervise may be sensible under normal conditions, but after a disaster, the demand for safe and affordable childcare can change dramatically. It may make sense, then, to change or temporarily suspend some regulations in order to speed recovery and a return to more normal conditions.

B.2 NOISE THROUGH THE "FEMA ECONOMY"

Throughout most of American history, local governments and private charitable associations provided care for victims of disaster.³⁰ Indeed, it was not until 1950 that Congress passed its first law dealing with federal disaster response, and response remained very limited (and mostly focused on responding to a nuclear war) until Congress created the Federal Disaster Assistance Administration in 1974 and then FEMA in 1979. The past thirty years have seen the federal government take an increasingly active role in providing emergency relief supplies to victims of disasters. Simultaneously, the amount of assistance—and critically, the length for which it is provided—has likewise increased.

In the wake of disaster, the government has a key role to play in re-establishing and enforcing the rules of the game that minimize signal noise and allow a robust response to the disaster by civil and commercial society. By ensuring private property rights and enforcing contracts, for example, the process by which property owners discover the

new value of their homes and businesses can unfold swiftly. To this end, it is important for governments to provide police protection and courts that help to enforce these rules of the game. But when the government gets in the business of providing the goods and services ordinarily provided through markets—such as trailers and direct sources of income through extended unemployment compensation to storm victims—well-intentioned policy interventions can create significant signal noise and thereby slow recovery. In this lies a paradox: government policies designed to help by providing recovery assistance may actually harm the intended beneficiaries.

The government's provision of goods and services long after immediate needs have passed creates what one New Orleanian referred to as a "FEMA economy," the expansive and distortionary effects of federal disaster relief on the local economy, including the labor and housing markets.

For example, many businesses trying to reopen have found it difficult to attract employees. In part, this is due to the fact that many people simply haven't returned to the affected region. But the repeated extension of unemployment benefits has exacerbated this problem: despite the availability of jobs and the need for employees, the federal government continues to pay people not to work. Further, the premium wage that government relief agencies pay

³⁰ Rutherford H. Platt, *Disasters and Democracy: The Politics of Extreme Natural Events* (Washington, DC: Island Press, 1999).

low-skilled workers crowds out private employers from the labor market, stunting the speed of recovery. Service-based companies find the labor shortages particularly daunting as they attempt to bring operations back on line. As one business owner noted, "You're competing with FEMA; you're competing with everybody. The contractors that are doing debris pick up and stuff, they are paying big bucks. They are paying \$12 [to \$15] an hour to stand behind a truck with a little [stop] sign."

According to a study released in February 2006, two thirds of firms in the affected region had trouble recruiting workers, and media accounts affirm the recruitment woes of employers.⁸ And yet in March 2006, Congress extended unemployment benefits for another 13 weeks beyond the 26 weeks of unemployment benefits authorized by the Stafford Act.

The FEMA economy also exacerbates the lack of affordable housing. FEMA workers allotted \$1,200 per month for housing effectively crowd out many low-income residents who receive \$550-\$650 in FEMA rental assistance. Rents in many affected areas of New Orleans have almost

doubled since before the storm.⁹ This is due largely to the decrease in the supply of housing—50.8 percent of rental housing in Orleans Parish suffered severe flood damage or total destruction¹⁰—but the thousands of federal and state relief employees in the city have exacerbated the problem and kept low-income New Orleanians out of their hometown.

To some extent, these consequences may be unavoidable. To the extent that swift debris removal and other key public services are deemed top priorities, wage premiums will certainly facilitate the process. But the longer FEMA workers stay, and the more relief work is treated as a public works project rather than the short-term provision of an essential service, the longer these distortions will persist. As one Mississippi resident observed,

There's no reason for a business to open up that provides any kind of food service if right down the street you get food [for free] It was necessary for [government] help to be scaled down so our businesses could come back in, start giving us a tax base, start giving these people an incentive to get a job, to work, to get back to normal. That was essential.

⁸ Ellen Wulthorst, "US Hurricane-Area Firms Face Labor Shortage," Reuters, April 5, 2006; "Survey of Compensation Practices in Area Affected by Hurricanes Dennis, Katrina, Rita, and Wilma," Salary.com, February 28, 2006; Brett Anderson, "Feast or Famine? Katrina takes a big bite out of business, but New Orleans restaurants are fighting back," New Orleans Times-Picayune, June 11, 2006.

⁹ Jeffrey Meltrodt, "Rising Rent," New Orleans Times-Picayune, October 15, 2006.

¹⁰ Authors' calculations based on data from U.S. Department of Housing and Urban Development, Current Housing Unit Damage Estimates: Hurricanes Katrina, Rita, and Wilma, February 12, 2006, as revised April 7, 2006, p. 23, http://www.huduser.org/publications/destruct/GulfCoast_HsgDmgEst.html

"We couldn't hire social workers because [FEMA] was using them all. We couldn't hire people, or our people would go to work for FEMA. But it's these ridiculous prices that weren't the going rate on the local level. But why they didn't come to us and say, 'Okay, you've been here for 40 years, you know all these people?' But, no, they didn't."

—State government official, Harrison County, Mississippi

The sooner federal agencies scale back their operations, the sooner local markets and civil society will step in. And the sooner this occurs, the more effectively a sustainable rebuilding process can begin. The longer policy makers extend unemployment benefits, the more difficulty communities will have attracting residents back to work in local businesses—and the longer the recovery process will take.

Large government rebuilding packages also create signal noise because of the length of time it takes to distribute funds and the haphazard manner in which distribution occurs. In its first four months, the Louisiana Road Home Program has awarded fewer than 1,400 grants, and officials are struggling with a backlog of about 79,000

applications.²¹ And as of November 11, only 22 awardees have actually received cash.²² Mississippi's rebuilding program, fully funded by Congress in December 2005, had issued only 41 checks as of the end of August 2006 to a pool of over 17,000 applicants; that is, less than 0.25% of claimants have received relief.²³ One Mississippi official explains, "Of course it's been eight months since Congress approved this money, but we haven't developed the systems and plans to actually administer the program."²⁴

Large aid packages invite corruption and incompetent management by public officials, which makes it more difficult still for civil society and market institutions to read accurate signals.²⁵ The inconsistent implementation of such programs

²¹ Bruce Nolan, "Blanco Tries to Light Fire Under Road Home Plan," *New Orleans Times-Picayune*, November 7, 2006.

²² Leslie Eaton, "Slow Home Grants Stall Progress in New Orleans," *New York Times*, November 11, 2006.

²³ John Ydstie, "Federal Money Trickles to Katrina Homeowners," *National Public Radio Morning Edition*, August 30, 2006.

²⁴ *Ibid.*, Scott Hamilton was the state official speaking.

²⁵ Peter Leeson and Russell Sobel, "Weathering Corruption," (working paper, Mercatus Center at George Mason University, Arlington, VA, 2006).

only adds more noise to a situation already steeped in uncertainty. For many residents, the initial announcement of large scale assistance signaled to them that they should hold off on their rebuilding plans until they received payment, continuing their state of limbo.

Once the immediate crisis point of a disaster has passed and charities, markets, and governments have ensured that basic human needs such as food and shelter are met, government provision of goods normally provided privately creates distortions that inhibit recovery.

In contrast to governments, markets are highly effective mechanisms for coordinating the provision of goods and services; market signals share information about what people need, want, know, have, like, and value. Through these signals people learn how to efficiently produce a variety of goods and services that others need or want. It is for this reason that markets provide the vast majority of goods and services that people want or need. Additionally, the rapid ability of markets to address changing circumstances helps make communities resilient, a key feature of recovery with which signal noise interferes. From daily needs, like food and childcare services, to large purchases, like cars or houses, market signals effectively share information and enable us to fill a variety of needs without any government plan. Markets are a vital part of daily life, and in the aftermath of a storm, their re-emergence is critical to community redevelopment. Indeed, no meaningful recovery can occur without them.

The signals emerging from commercial society provide two key indications to people engaged in the rebuilding effort: they demonstrate what goods and services will be available to returning residents, and more importantly, they serve as a barometer of the long-run prospects of the community. People may trust these signals more than the signals emanating from the political sphere because commercial signals emerge from actual reopenings and commercial transactions rather than from hints or promises from elected officials that may be reneged upon or take months or years to materialize. Concrete, material steps instill confidence, while vague suggestions and about-faces destroy it.

One Mississippi resident spoke of the importance the reopening of national retail stores and fast food restaurants had for community morale:

It was Wal-Mart under a tent. We were all thrilled. Oh, we can go buy pop, or we can get, you know, our essentials. So we were really happy about that. That was a forward motion. And then Sonic opened. We had the busiest Sonic in . . . the whole United States. It made more money in a shorter period of time than any Sonic did for a year in the United States. Amazing. It was like fine dining. Ooh, this is wonderful, you know, 'coz there was nothing else then. There was [sic] no stores. There was nothing that was even halfway resembling normal. I guess when businesses open up and they start being fully operational, it reminds us what normalcy used to be like. . . . Like Rite Aid [opened]

and it was a one hundred percent Rite Aid. . . . I didn't go in to buy anything. I just went to walk around and be normal.

Normality is a crucial concept—without the sense that the community is returning to normal, meaning that the basic conveniences of life are provided for in customary ways, rebuilding becomes a much more costly and risky proposition. One retail manager further explains this concept:

If you don't do something to help this community and give them a place to buy groceries and give them a place to buy the necessities of life to rebuild their lives . . . it probably would not be worth your while to [rebuild]. . . . Granted, you know, our customer base probably was cut more than in half. But it probably would be decreasing today had our store and other businesses not decided, you know, just take a stance and come home, you know, and build this thing, and get it back up and running as fast as they can. . . . You have to take a stance, because you have a vested interest in the community. You have a home.

The recovery of commercial and the recovery of civil institutions go hand-in-hand; employers are

lost without employees, and customers are in need of commercial services. Without stores, factories, services—and the jobs and products that they provide—no community can truly recover.

Because of the centrality of markets to meaningful recovery and functioning communities, it is vital that after a disaster, policy makers respect and enforce private property rights and the contracts that were in place before the disaster. If, in response to the disaster, governments deem it necessary to change building codes, elevation guidelines, or other regulations that impact how, where, and when rebuilding can take place, such changes must be made in ways that do not violate the basic freedoms of private property and the rule of law. Further, to the extent that they are necessary, such changes must be made clearly, quickly, and credibly.²⁸ Consistency and credibility of rebuilding codes are crucial. Start-and-stop decisions create signal noise, so it is vital that policy makers avoid changing the rules midstream. Finally, well-meaning government policies that attempt to substitute for the market economy and civil society create signal noise that confuses returning residents and business owners, thereby reducing the speed and increasing the cost of the recovery effort.

²⁸ In the context of post-Katrina New Orleans, the lack of either local leaders or the U.S. Army Corps of Engineers to state clearly and credibly how, when, and where levees will be rebuilt has been a major roadblock to rebuilding. This has been further compounded by the failure of the Corps of Engineers before the hurricane to provide accurate estimates of the quality of the levees and FEMA's reliance on incorrect information from the Corps in crafting flood insurance rate maps (FIRMs) that failed to appropriately assess the risk of flooding in many parts of Orleans and St. Bernard Parishes. Because of the history of incompetence and a general distrust of FEMA and the Corps of Engineers, a radical rethinking of flood protection programs may be in order over the coming years.

C. POLICY IMPLICATIONS

C.1 PROVIDE QUICK, CLEAR, AND CREDIBLE COMMITMENTS ABOUT WHAT THE GOVERNMENT WILL PROVIDE AND WHEN.

The best thing that policy makers can do to help communities respond to disaster is to ensure that policy makers respect property rights and the rule of law to allow individuals, communities, and civil society organizations to manage the rebuilding themselves. To the extent that the government deems it necessary to adjust rules pertinent to the rebuilding process, such rules must first respect the basic freedoms that private property and the rule of law provide. Further, such rule changes must be made quickly, clearly, and credibly. Government can support the rules of the game necessary for individuals and communities to recover by acting as an umpire—providing police for protection and courts of law for dispute settlement and, most importantly, not changing the rules in the middle of the game.

To be sure, some rules of the game, such as “should the government provide levee protection?” will be

fraught with controversy. The questions of whether the levees ought to be rebuilt, what level of protection ought to be provided if they are, and whether property owners ought to pay the full costs of insuring their homes and businesses deserve serious deliberation that we cannot render here. However, as long as government manages these systems, its failure to decide clearly and expeditiously what it will do and to carry through on its commitments will perpetuate the limbo in which so many storm victims find themselves.

With the rules of the game in place and property rights assured, the recovery process can begin in earnest as residents and business owners judge how and when to rebuild. If policy makers draw out the decision making process about key rules and policies, the signals generated by civil and commercial society are likely to become noisy and hence less clear and useful to those engaged in the rebuilding process. Rebuilding must be organic, stemming from the grassroots, in order to be sustainable, and only dispersed decision makers reading the signals generated by those around them can manage this process.

“They should have a decision from Congress as to what level of protection they’re going to authorize. . . . What do people have to do if they’re going to rebuild? You know, to what elevations and to what . . . because if there’s no flood protection, the levees aren’t going to be rebuilt, and you can’t get affordable insurance on your house, they’re not going to come back.”

—School administrator, St. Bernard Parish, Louisiana

C.2 CREATE IN ADVANCE AN ALTERNATIVE REGULATORY REGIME SPECIFIC FOR POST-DISASTER ENVIRONMENTS, AND DEVOLVE POWER OVER THE REBUILDING EFFORT.

One way to facilitate the production and execution of clear rules of the game is to have disaster-appropriate rules and regulations written before the onset of crisis with a clear trigger for execution. Such “regulatory preparedness” would reduce the uncertainty that stems from the slow-moving political process and would establish alternative regulations for the post-disaster context when, for instance, child-to-adult ratios in day care centers, normal debris disposal procedures, and pollution control gasoline formulations may not be appropriate.¹⁸ Ideally, these rules would include a clause for automatic execution after, for instance, a presidential or gubernatorial declaration of a major disaster. In many cases, bureaucrats in the Gulf Coast have had to bend or break the rules in order to make progress in recovery efforts. An alternative regulatory structure recognizing the different costs-benefit calculations in the post-disaster context would reduce non-compliance and help ease some of the bottlenecks that slow recovery. Most importantly, it would make it easier to provide the quick and clear signals that communities need to recover and reduce the signal noise associated with changing regulations on the fly or selective and unstable enforcement on the ground.

An automatic trigger for such a regime reduces the ability of special interests to attempt to alter the process or change individual rules. Implementing the alternative set of regulations automatically and as a complete package speeds enactment of the alternative regulatory regime and ensures that people know before a disaster what to expect in its aftermath. An automatic trigger would also be in line with existing policies; a presidential disaster declaration already triggers dozens of automatic responses under the Stafford Act and other legislation.

Local ownership of the rebuilding process is critical. Federal response should not erect roadblocks to competent local leadership, but should instead support and inform effective decision making on the ground. To the maximum extent possible, recovery efforts should be managed as locally as is feasible—as close to those with the needs and relevant knowledge as possible.

Congress should shift the primary responsibility of relief agencies from one of regulatory oversight to one of support and advice. The provisions articulated in the Stafford Act, and the narrowness with which FEMA representatives frequently interpret these provisions, unnecessarily tie the hands of local leadership. While policy makers may deem it necessary to enforce some general guidelines for safety and accountability, local

¹⁸ For more on gasoline regulations and the federal government’s successful response, see Alastair Walling, “The Katrina Success Story You Didn’t Hear,” *Regulation*, Spring 2006.

leadership also needs the flexibility and discretion to make marginal choices about how relief funds are spent.

C.3 AVOID POLICIES THAT DISTORT LOCAL ECONOMIES AND HAMPER CIVIL SOCIETY REBUILDING.

After a disaster, elected officials should not respond by attempting to make whole the victims of the storm through targeted and bureaucratic initiatives. The sentiment is noble, but the action is impossible. Because they lack the ability to discover knowledge of what people need, when they need it, and how it is best delivered, governments simply cannot provide the goods and services that are vital for rebuilding. When governments do try to intervene to provide these goods, they end up creating signal noise that slows the recovery process. Additionally, they introduce an element of uncertainty that makes it more difficult for individuals, families, and communities to rebuild.

Social capital and the signals provided by civil and commercial society, supported by property rights, freedom of contract, and the rule of law, are crucial to rapid and sustainable recovery efforts, so policy makers must evaluate policy interventions to ensure that they do as little harm as possible to organic response efforts. For this reason, providing any relief that policy makers deem necessary through quick and unrestrictive

means is vital. The more restrictions and tests placed on relief, the slower it will arrive and the more signal noise and economic distortion it will cause. In this vein, one-time cash payments are preferable to means-tested continual assistance.

Further, housing vouchers are preferable to FEMA trailers. Recipients could use voucher funds to rent an apartment, renovate a damaged property, serve as a down payment on a new home, or purchase a small modular home that they can later expand such as a "Katrina Cottage."²⁹ Such a policy would be vastly more efficient and humane than temporarily providing everyone with a FEMA trailer and would inspire a wide range of market responses to meet the housing needs of disaster victims. To further minimize bureaucracy, policy makers should not means-test vouchers. It should distribute them using simple and straightforward criteria—the fewer criteria the better.

Policy makers must recognize that it is not just atomistic individuals, but entire organic social structures, that recover after a disaster. Markets and civil society institutions are vital aspects of a functioning society, and policies must allow their expedient and thorough recovery. Communities are not sustainable without the recovery of retailers, factories, service providers, and the jobs that these businesses create. Policy makers should avoid the temptation to implement targeted pro-

²⁹ For more on Katrina Cottages, see Witold Rybczynski, *Slate*, March 31, 2006, <http://www.slate.com/id/2138981/>

grams designed to spur such redevelopment. By far the best course of action is simply to establish quickly rules of the game that will allow social structures to rebuild internally.

It is vital that elected officials avoid signaling any policy changes that have not been deliberately considered, particularly for their unintended negative consequences. If they bear even a hint of government sanction, cavalier proposals that suggest that policy makers may not honor individual property rights will create unnecessary and catastrophic uncertainty, not just among those most directly affected, but also among neighboring communities and potential investors. Just as an ill-considered comment from the Chairman of the Federal Reserve Bank can have massive effects on the stock market, a poorly considered utterance from a mayor or governor can cause people to radically rethink their plans in the wake of a disaster.

Finally, planning authorities must stay out of the business of picking winners and losers in the post-disaster economy and instead restrict their involvement in economic redevelopment to that of the neutral umpire. To the extent that local, state, and federal authorities are engaged in redevelopment planning (an engagement that should be minimal, clear, and credible), their plans should aim to produce as little signal distortion as

possible by offering, for example, general tax credits for all business, rather than targeting particular industries or businesses that existed before the disaster.

CONCLUSION

After a disaster, it is natural for people to clamor for quick action. Because elected officials respond to political pressure, they tend to do what is easiest: promise large sums of money to help fix the problem and develop radical new plans for affected areas. But while these policies may appeal to voters and to elected officials who want to "do something," they are not ultimately conducive to helping communities rebuild. Well-intentioned policies that appear at first glance to be helpful to those in need may have unseen costs that can have significant negative effects on recovery.

Individuals rebuild around one another. For this reason, it is vital that policy interventions free individuals to deploy their social capital as an asset in rebuilding.¹¹ Indeed, social capital functions best in a market setting backed by the rule of law and respect for property rights, as it allows civil society actors (including individuals, non-profits, churches and religious groups, community associations, and businesses) to generate the signals needed for recovery—signals that respond quickly to new information and oppor-

¹¹ Emily Chamlee-Wright, "After the Storm: Social Capital Regrouping in the Wake of Hurricane Katrina," (working paper, Mercatus Center at George Mason University, Arlington, VA, 2006).

tunities and that result in superior outcomes to top-down plans. Because of the importance of social capital in reconstruction efforts, governments must resist calls to impose order on the decentralized process of community, economic, and philanthropic discovery. Signal noise created when governments consistently shift the rules of the game impacts the ability of communities to utilize their social capital, which affects the sustainability of rebuilding.

After a disaster, public outcry places tremendous pressure on governments to act, but if policy mak-

ers authorize large expenditures and new programs without consideration of negative unintended consequences of their decisions, the effects may cause serious harm. After immediate human needs are met, governments must stand back and allow the rebuilding process to unfold organically. Communities are highly resilient in the face of disaster, and social capital is a vital asset to recovery. Success depends on the ability of individuals, families, and communities to read the appropriate signals about how to respond to best fit their particular needs. Cities are built organically. They must rebuild that way as well.

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GEORGE MASON UNIVERSITY

3301 North Fairfax Drive, Suite 450
Arlington, Virginia 22201
Tel: (703) 993-4930
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MERCATUS CENTER
GEORGE MASON UNIVERSITY
 3301 North Fairfax Drive, Suite 450
 Arlington, Virginia 22201
 Tel: (703) 993-4930
 Fax: (703) 993-4935

About Eden Herrera, author

Eden Herrera is a senior research fellow at the Mercatus Center at George Mason University, helping plan Mercatus. Eden was a Wilson-Brooker Fellow at the Competitive Enterprise Institute where she focused on trade and tax policies affecting the European Union and the United States. Eden worked as a consultant for APICS, a major trade organization in the United States, and worked for the U.S. Trade Representative at George Mason University. Her current research areas include economic development policy, urban economics, the U.S. budget, and tax and fiscal policy.

About Anthony Skiba, author

Anthony Skiba is a program associate with the Mercatus Center at George Mason University working with the Social Change Project. Mr. Skiba graduated from Tulane College in 2001 with a BA in economics and two Asian languages and is currently auditing part time in George Mason University's Department of Mathematical Sciences.

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**THE ROAD HOME:
Helping Homeowners in the Gulf After Katrina**

EILEEN NORCROSS
ANTHONY SKRIBA

EXECUTIVE SUMMARY

Following the destruction wrought by the 2005 Gulf Coast Hurricanes, Louisiana and Mississippi instituted disaster recovery programs for homeowners. Louisiana's disaster recovery program, the Road Home program, is "the largest single housing recovery project in U.S. history." It is also mired in controversy with a record of slow payouts, confusing and conflicting policies and goals, and extremely frustrated applicants.

This comment explores Road Home's policy goals and design, placing them in the context of the destruction wrought by the hurricanes and the role of insurance and government before and after a disaster. It then contrasts Road Home's goals and design with the policy goals and design of Mississippi's Homeowner Assistance Program.

Mississippi's clearer eligibility criteria and the prioritization of applicants allowed for faster progress than in Louisiana. Louisiana's decision to distribute funds widely (both geographically and temporally) and without regard to the severity of damage has contributed to a slower recovery in neighborhoods that experienced the full force of flooding. Furthermore, Louisiana's decision to use Road Home as a community development program by assigning exit penalties to those who do not return to their former homes has limited the personal autonomy of those most affected by the storms and may lock them into highly detrimental situations.

Clearly defining culpability and determining eligibility is vital in structuring disaster assistance. Road Home's failure to do this could be catastrophic for the long-term recovery of both Louisiana and the evacuees.

THE ROAD HOME: Helping Homeowners in the Gulf After Katrina

INTRODUCTION

THE 2005 GULF hurricanes destroyed or damaged more than 300,000 homes in five states.¹ Entire communities were abandoned, and the storms left many homes unsalvageable. Because damage in Louisiana was particularly acute, helping homeowners became an early recovery policy goal. Acting through the newly established Louisiana Recovery Authority (LRA),² the Office of the Governor directed \$6.9 of \$10.4 billion in federal Community Development Block Grant (CDBG) funds to create the Road Home program, “the largest single housing recovery program in U.S. history.”³

After the Department of Housing and Urban Development (HUD) and the Louisiana legislature approved Road Home, LRA awarded a private firm ICF International a \$756 million contract to manage the Road Home program. Road Home began accepting applications in August 2006, one year after Hurricane Katrina hit Louisiana.⁴ This amount was later increased to \$912 million in the final weeks of Governor Kathleen Blanco’s administration.⁵

Road Home was designed to serve as more than a disaster compensation program; it was designed to function as both planning and housing policy. The program aimed to simultaneously compensate victims, re-create existing neighborhoods by awarding larger sums to those choosing to stay in Louisiana, and develop affordable housing options. The program targeted a broad population, extending eligibility to those who suffered wind damage (an event typically covered by homeowners insurance).⁶

The program’s efficacy has been widely criticized. By August 2007, only 23 percent of applicants had received grants. Applicants have expressed frustration at the program’s complex application process, inequitable design, confusing policies, erroneous calculations, and slow payout rates. Recovery authorities and state legislators blame overly rigid federal regulations, insufficient congressional allocations, mismanagement by ICF International, and miscommunication with the federal government.

1. U.S. Government Accountability Office, *Preliminary Information on Gulf Coast Rebuilding*, GAO-07-505R (Washington, D.C.: GAO, June 29, 2007), <http://www.gao.gov/new.items/d07505r.pdf>.

2. The LRA comprises 33 (Louisiana) national leaders appointed by Governor Kathleen Blanco.

3. The Road Home program, “About Us,” <http://www.roadhome.org/about-us/default.htm> (accessed 12 November 2007).

4. Though the Road Home program operates through the LRA, the Office of Community Development—located in the Office of the Governor—is officially responsible for Road Home’s performance.

5. David Ramirez, “Blanco Administration Quietly Gave Size to Road Home Contract,” *The Times-Picayune*, March 13, 2008.

6. This Policy Comment focuses on the homeowner’s portion of the Road Home program. Of the \$10.4 billion in CDBG monies allocated to Louisiana, \$8.9 billion was put into the homeowner’s grant portion. The remainder of the grant was put into code enforcement (\$1.1 billion) and assembly (\$2 million), Small Rental Property Repair grants (\$568 million), low-income housing development incentives (\$581 million), and other planning and small grant programs.

1 The 2005 Gulf Coast Hurricanes and Their Consequences

IN THE EARLY morning of August 29, 2005, Hurricane Katrina made landfall in Buras-Triumph, Louisiana. As it moved over southeastern Louisiana, the eye of the storm headed directly for New Orleans, bringing with it record winds of 120 miles per hour and dropping as much as 13.6 inches of rain within 24 hours.⁷ These events alone were enough to bring property destruction and death to the communities in the path of the storm. However, it was not Katrina's wind or rain that delivered the most devastating consequences to New Orleans. The worst damage was wrought by Katrina's powerful storm surges, some of which rose as high as 12 feet above sea level in the canal entrances of Lake Pontchartrain.⁸ Storm surges coursed through New Orleans' low-lying parish neighborhoods of St. Bernard, St. Tammany, Jefferson, and Plaquemines, and in more than 50 locations water breached and overtopped the levees and floodwalls built to protect residents around Lake Pontchartrain and Lake Borgne.⁹ (See Map 1). The multiple levee failures during the day resulted in 80 percent of New Orleans being submerged in up to 10 feet of water. Storm surges pushed floodwaters into neighborhoods in surrounding parishes throughout the day. Pumping stations designed to remove rising waters failed to work, leaving communities submerged for days.¹⁰ It is estimated that the flood caused by levee and pumping station failures killed 800 of the 1,300 people who died during Hurricane Katrina.¹¹

Southeastern Louisiana was not the only region to sustain severe hurricane damage. Katrina's effects along Mississippi's Gulf Coast were total and devastating. The hurricane shoved barges, boats, and debris into neighborhoods, killing 236 people. Entire communities were leveled. Hancock, Harrison, and Jackson counties were most affected.

However, Katrina was only one of two major hurricanes to hit the Gulf Coast in fall 2005. On September 24, Hurricane Rita hit southwestern Louisiana and Texas, producing rainfall that breached Katrina-damaged levees in New Orleans; flooding Gentilly and the Lower Ninth Ward a second time; and destroying several communities in Cameron, Calcasieu, and Beauregard parishes. Indeed, Cameron Parish was nearly obliterated.

2 Who Pays?

TOTAL DAMAGE FROM Hurricane Katrina is estimated at over \$100 billion, making it the costliest Atlantic hurricane in history. Approximately 65 percent of the area's 147,000 residential properties were flooded, with 50 percent sustaining severe damage.¹²

When Katrina hit, many residents in Louisiana's hard-hit areas were either uninsured or underinsured against flooding. The disastrous consequences brought to the fore of public discourse the argument that people should not settle in areas located below sea level.¹³ Furthermore, should they choose to settle in these higher-risk areas and fail to insure, or to insure adequately, they should bear the cost of the decision to live in high-risk areas. However prevalent this argument may have been in the weeks and months following Katrina and Rita, a closer look at the situation indicates that incentives and information underlying residents' decisions—such as where to locate and whether or not to insure—were distorted not only by decades of federal intervention, but also by state and local policies. Thus many residents made location and insurance decisions using incomplete or inaccurate information. To the extent that such information provided the basis for decision-making, government—

7. Christine F. Aversano, Jürgen A. Bortje, David L. Daniels et al., "The New Orleans Hurricane Protection System: What Went Wrong and Why" (Reston, VA: American Society of Civil Engineers, 2007). <http://www.asce.org/files/pdf/118/9909.pdf>.

8. *Ibid.*, 10.

9. *Ibid.*, 25.

10. *Ibid.*, 80. Anderson et al. report that nearly all the pump stations in Jefferson and St. Bernard parishes were evacuated because they could not withstand hurricane forces and "without operation the pump stations only die." The loss of electricity rendered the pumps useless. The stations themselves flooded, causing damage and failure. Even if the stations had worked, they "would not have been able to pump the large amount of water that flooded into New Orleans because of overflowing and breaching."

11. Francis Brown and Robert Mutt-Wood, "Wreck: Flood Take in New Orleans: Implications for Future Management and Insurability" (Newark, CA: Risk Management Solutions, 2006), 9. http://www.rms.com/Publications/NO_FloodRisk.pdf.

12. Gross and Mull-Wood, "Flood Risk in New Orleans," 8. According to one estimate, the damage to residential structures is between \$8 and \$10 billion, with the National Flood Insurance Program providing between \$1 and \$5 billion. The remainder of the damage is uninsured.

13. Jack Shuler, "Don't Retreat: The Case Against Rebuilding the Sunk-in City of New Orleans," *Slate.com*, September 7, 2005. <http://www.slate.com/95-2125810/new-orleans/>

THE NEW ORLEANS LEVEES

The federal government assumed responsibility for levees and floodwall construction with the Flood Act of 1935 and the Flood Control Act of 1968. In partnership with state and local governments, the U.S. Army Corps of Engineers (USACE) designed and built most of the levees in New Orleans between the 1920s and the present day. Local levee boards own and operate the levees, retaining responsibility for maintenance.

In 1965, the effects of Hurricane Betsy prompted enhancements to the New Orleans levees. The enhancements were eventually abandoned, following a court ruling against USACE. In the mid-1980s, another levee improvement project, the High Level Plan, was started. However, execution of the plan was incomplete and, some argue, the plan itself was still inadequately designed at the time that Hurricane Katrina hit.¹⁴ In addition to protection offered by floodwalls and levees, New Orleans relied on a series of pumping stations located throughout the city. Installation of this system began in the early twentieth century as a means of removing floodwaters and reclaiming marshland. The development of flood protection systems and draining of marshlands encouraged developers to build near the levees. Paradoxically, those systems designed to prevent disaster also encouraged development in areas of high flood risk, a trend that invited disaster.

According to the American Society of Civil Engineers (ASCE), nearly 180 of 248 miles of federal levees and floodwalls were damaged as a result of Katrina.¹⁵ In some places, levees collapsed due to their design. Engineers had failed to account for the soft soil or the existence of a water-filled gap that developed behind the concrete walls. In other areas, levees were overtopped. They were not protected against soil erosion, "an engineering choice of catastrophic consequence," which allowed soil to be scoured and water to pour into the city. In hindsight, it is evident that New Orleans' hurricane protection system was piecemeal in design and relied on incorrect elevation data that neglected to take into account the fact that New Orleans is sinking as much as one inch per year. Government management decisions, congressional pork-barrel spending politics that plagued USACE funds,¹⁶ and local levee boards' diversion of millions of tax dollars from public infrastructure improvements toward "blasted contracts and political patronage" magnified poor engineering choices.¹⁷

Flooding in New Orleans was not inevitable, but rather the result of extensive infrastructure failure.¹⁸ This catastrophic failure of man-made systems—levees, floodwalls, and pumping stations—designed to protect the city actually contributed to two-thirds of its death toll and damage.¹⁹ The ASCE estimated that less than half the actual property losses in New Orleans would have occurred had the levees and pumping stations not failed.

No single entity is responsible for the engineering-related failures. The USACE began construction of New Orleans' levee system in the late 1800s, but four levee district boards, which included state and local appointees, maintained and operated the levees. The city's water and sewer boards operated the pumping stations. Many of the levee failures resulted from unclear lines of authority and insufficient coordination amongst the various agencies having jurisdiction over the levee system.²⁰ In this sense, Hurricane Katrina's impact on New Orleans was both an act of God (rain, high winds) and an act of man (failure of infrastructure designed to protect against such an event).

1. The three main USACE sites are also Fort Belvoir, Louisiana and Vicksburg Protection project; West Bank and Vandy River Channel, Louisiana; Hurricane Protection project; and New Orleans to Venice, Louisiana; Hurricane Protection project.
2. Federal and State Work Force for New Orleans. 6. The Flood Control Act of 1968 authorized improvements to the Lake Pontchartrain and Vandy project. Over the course of the 13 year project, arguments over design and environmental concerns led to a 1977 federal court decision that favored the USACE, thus increasing governmental power.
3. ASCE, 5-6. These reports did not use risk analysis techniques or methodologies, limited their water damage estimates to flooding, the "standard practice project" was unable to represent the most adverse meteorological conditions that can be expected. "In later events, the design was based on an engineer's judgment as to a reasonable level of protection, instead of being designed to provide protection to a specified level of probability."
4. Anderson et al., *The New Orleans Hurricane Protection System* 9-10.
5. ASCE.
6. Williams, Stephen G., "Risk Assessment: Environmental and Commercial Floods," *Public Choice* 117 (2004): 30.
7. ASCE, 10.
8. Anderson et al., *The New Orleans Hurricane Protection System*, 10.
9. ASCE, 30.
10. "Slaughter, Public Choice," 32.

not residents—bears responsibility for at least some of the storm-related damage.

In hindsight, it is clear that communities flooded by Katrina were located in floodplains and that residents there should have insured against flooding. Yet only 40 percent of residents in Orleans Parish, and 52.7 of those in St. Bernard Parish, for example, carried flood insurance.²¹ Several factors contributed to the relatively low

rate of residents carrying flood insurance in the Gulf—particularly in southeastern Louisiana.

Ideally, it is individuals who insure against disaster. Standard homeowners insurance covers wind-related damage, but generally excludes water-related damage that results from flooding.²² Because private insurance companies seldom offer flood insurance, the federal government developed the National Flood Insurance

14. Howard Kunreuther and Mark Pauly, "Rules Rather than Discretion: Lessons from Hurricane Katrina," *Journal of Risk and Uncertainty* 33 (2006): 103.

15. Rawle O. King, "Post-Katrina Insurance Issues Surrounding Water Damage Exclusions in Homeowners Insurance Policies," Order Code RL33892 (Washington, D.C., Congressional Research Service, 2007), 4. <http://www.crs.org/NLE/CRSreports/07March/RL33892.pdf>. A 1993 court decision forced insurance companies to pay flood-related claims for which they believed themselves not responsible. As a result, the industry revised policy language to include water-damage exclusions. Today almost all homeowners policies contain a water-damage exclusion, with language making it clear that insurance companies are not responsible for damage related to the failure of dams or levees.

Program (NFIP),¹⁶ which subsidizes flood insurance to homeowners located in special flood areas.¹⁷

The NFIP uses Flood Insurance Rate Maps (FIRMs) produced by the Federal Emergency Management Agency (FEMA) to price premiums. The coverage is then sold to eligible homeowners through private insurance companies in a policy separate from homeowners insurance. The 100-year flood, or a 1 percent annual chance that flooding will occur, is the standard used to map and manage flood hazards. (See "The National Flood Insurance Program.")¹⁸ FEMA's maps are based on the assumption that the levees could withstand the 1 percent chance of severe annual flood.

Neither the NFIP nor Louisiana's state and local policy makers distinguish between 100-year flood protection provided by an artificial levee and 100-year flood protection offered by natural topography. In fact, NFIP is structured around the implicit assumption that levees will hold. This assumption, one also held by many New Orleans residents, resulted in fewer homeowners purchasing flood insurance.¹⁹ Approximately 35,000 of the flooded homes in New Orleans were not covered by flood insurance,²⁰ often because lenders told owners that they did not need it.²¹ In particular, residents of the Lower Ninth Ward and St. Bernard Parish were told they were not located in a special flood hazard zone. However, the presence of levees does not eliminate risk; levees are always at risk of breaching.

The scope of flooding in these areas indicates that FEMA's flood maps did not correctly capture the actual chance of a flood occurring. This is true in Mississippi as well. Residents in both states were living in areas not designated as 100-year floodplains. Many in these areas decided not to insure based on inaccurate advice derived from government-generated maps, and thus they were

uninsured or underinsured against water-related damage caused by flooding.

Some floodplain residents, however, carried maximum coverage—homeowners policies through private insurers and flood insurance through NFIP. Though these individuals took every possible measure available to insure against hurricane-related damage, they were, in effect, not fully insured against levee failure because NFIP did not price this residual risk (i.e., the risk associated with the levees breaking). This oversight rendered the NFIP flood insurance policy an incomplete one.

Some who lived in designated flood plains were advised to carry flood insurance, but they chose not to. Those living in hazard-prone areas may have elected not to insure against flood because they erroneously believed that homeowners insurance would suffice, because they failed to fully appreciate the risk associated with their location, or because they believed that, should a disaster occur, government disaster relief would compensate them after the fact.²²

3 Program Intent and Design

AFTER KATRINA AND Rita hit the Gulf Coast, both Mississippi and Louisiana grappled with the question of how government should compensate homeowners for property losses in cases where the cost of repair exceeded what insurance would provide. Each state experienced unique recovery problems stemming from the different types of storm damage done to each state.

In Louisiana, much of the damage (in terms of population concentration) occurred in the southeastern portion

16. The NFIP is the only source of insurance that residents in the Gulf Coast can rely on for policies under property coverage of \$250,000 and contents coverage of \$125,000. In instances where coverage exceeds these amounts, insurance companies may write their own policies.

17. A homeowner may purchase an NFIP policy through FEMA or through a private insurance company. Part of the premium collected is retained by the private insurer to pay for administering the policy. The remainder is deposited in the U.S. Treasury. Claims paid by the insurer are primarily reimbursed by the federal government. When insurance is sold this way, it is routine for the insurance agent (acting as an agent of the federal government who markets NFIP to inform homeowners that they do not need flood protection because they live outside the flood plain).

18. Nicole T. Caruso, "Flood Risk Management: Federal Role in Infrastructure," Order Code RL31212R (Washington, D.C.: Congressional Research Service, 2005), 4. <http://ftp.crs.gov/documents/organization/5/0/05.pdf>.

19. *Ibid.*, 5.

20. Copeland and Mun-Who, "Flood Risk in New Orleans," 3.

21. Peter Whitensky, "Risk Estimate Led to Few Flood Policies," *Washington Post*, October 11, 2005, A01.

22. Howard Kunreuther, "Is the Time Come for Comprehensive Natural Disaster Insurance?" in *On Risk and Disaster: Lessons from Hurricanes Katrina*, ed. Robert J. Daniels and Dennis F. Sautel (Philadelphia: PA: University of Pennsylvania Press, 2006), 175.

THE NATIONAL FLOOD INSURANCE PROGRAM (NFIP)

In the mid-twentieth century, private insurance companies ceased to offer flood insurance in the United States, claiming they could not provide profitable coverage at an affordable price. The companies cited the inability to accurately calculate risk and a lack of adequate financial tools (e.g., portfolio diversification) to help replenish capital. Their reluctance to offer flood policies was also prompted by the high correlation of losses that follow a disaster. That is, damage sustained during natural disasters is generally geographically concentrated and results in a high number of claims, making it difficult to pool risk. Insurers face a greater risk of financial insolvency in disasters if that year's premiums are not sufficient to cover a sudden spike in claims.²³

After Hurricane Betsy flooded New Orleans in 1965, Congress created the National Flood Insurance Program (NFIP), administered by FEMA. To participate, a community must agree to under take flood mitigation measures based, at minimum, on federal flood construction standards. As part of the program, FEMA developed Flood Insurance Rate Maps (FIRMs) that established the boundaries of floodplains. To encourage communities to participate, NFIP initially offered subsidized rates to those who had established residences in floodplains prior to the issuance of the flood maps. In the intervening years, the number of subsidized residents has declined to 26 percent.²⁴

Several criticisms of NFIP have been raised, among them the accuracy of FIRMs used to define "Special Flood Hazard Areas." These hazard areas are places that have a 1 percent chance of being flooded each year (known as the 100-year flood). The 100-year flood is the standard used to determine whether a resident needs flood insurance. It is based on a judgment made by experts in the 1960s about what represented "a reasonable probability of (flood) occurrence and loss worth protecting against."²⁵ In this sense, the 100-year flood is a vulnerability, not a risk standard. When Katrina hit in 2005, the maps had not incorporated the latest information on regional risk, which included the finding that sea levels were rising. New Orleans was sinking—a process known as subsidence—at a rate of up to one inch a year, and hurricane activity in the 1950s was increasing.²⁶ Because this information had not been incorporated into the FIRMs, the 2005 hurricanes destroyed areas of the Gulf extending "well beyond" areas that the maps indicated were 100-year flood plains and that required residents to carry flood insurance.

In addition to relying on outdated FIRMs and assuming inaccurate levels of risk, NFIP did not account for the residual risk associated with possible infrastructure failure. NFIP implicitly assumed that levees would provide sufficient protection to those residing near them. This assumption led lenders to advise residents near the levees to not purchase flood coverage.

of the state. In greater New Orleans, damage was variable. Flood waters had washed away some units and left others intact. For example, in Central City New Orleans some buildings experienced ten feet or more of flooding, while several blocks away very little flooding occurred. This "jack-o-lantern" effect made designing a rebuilding policy based on traditional boundaries much more difficult and required Louisiana to establish policies for rebuilding "what was not totally destroyed."²⁸ In Mis-

issippi, damage caused by the storm surge was total, completely erasing many houses along the coast. The homogeneity of destruction provided a clearer starting point for identifying damage and structuring subsequent compensation policy.

Both states directed the majority of early allocations to programs designed to assist homeowners, and both received approval for their plans from the Department

Others criticize NFIP because the premiums (i) charges for insured homes in high-risk areas are kept low by subsidies and by a congressionally mandated annual limit on premium increases. Subsidized rates convey inaccurate information to policyholders about the real level of risk they face. Moreover, subsidies contribute to NFIP's insufficient cash reserves that preclude it from paying claims. Due to this shortage, it must borrow from the U.S. Treasury to pay claims and repay the borrowed amount with interest. In fact, the borrowing limit for NFIP, set at \$1 billion and unchanged since 1968, was raised to \$20 billion after Hurricane Katrina.

Observers also point out that repetitive loss properties, those reported multiple times with insurance dollars, account for almost 30 percent of NFIP claims. That is, the federal government subsidizes homeowners through NFIP to rebuild in high-risk areas. These homeowners, however, do not bear the true expense of their decision to do so, because insurance premiums remain artificially low.

From an actuarial standpoint, advances in risk analysis that permit more accurate pricing of policies, as well as progress in financial markets that allows insurers to quickly restock capital reserves have transformed floods and other catastrophes into insurable events.²⁹ Policy recommendations to improve NFIP include pricing policies at an actuarially fair level (based on the best available risk information) and ensuring the program has sufficient reserves. These recommendations imply "a well-designed public catastrophe insurance program mimics as far as possible the procedures of an equivalent competitive private market."³⁰ In other words, if risks can be priced to yield a profit, and financial markets can provide sufficient capital to fund losses, "there is no obvious reason why private insurance markets should not be able to provide catastrophe insurance."³¹

1. "Coast Flood Risk Management," 4.
2. "Coast and Near-Wood Flood Risk in New Orleans," 24.
3. "Coast and Near-Wood Flood Risk in New Orleans: State Insurance Regulations, Coastal Development, and Hurricane Mitigation Policy Status Policy Committee," 11. (Arlington, VA: Mercator Center, 2007), 1.
4. <http://www.fema.gov/pdfs/assessments/1339.pdf>, chart, page 14.
5. "Coast and Near-Wood Flood Risk in New Orleans," 16. (Arlington, VA: Mercator Center, 2007), 1.
6. "Coast and Near-Wood Flood Risk in New Orleans," 24.
7. "Coast and Near-Wood Flood Risk in New Orleans," 24.
8. "Height Levees and Travers Levees," "Shedding Uncertainty Through Catastrophe Insurance," Working Paper 206, Federal Center Working Paper, Federal Center for Urban & Regional Economics, University of California, Berkeley, 2007.
9. "Ibid.," 2.
10. "Ibid.," 2.

23. Michael Chivatt (Director of International and Regional Analysis, Federal Reserve Bank of Atlanta) speaking in the Southeastern Economic Perspective Podcast, "The Gulf Coast: Two Years After Katrina," July 2007. Transcript available at http://www.frbatlanta.org/povoke.cfm?objid=100&obj=77-5058-9F12-1227BF40415EF017&method=display_body.

of Housing and Urban Development.²⁴ However, Louisiana has experienced ongoing conflict with the federal government regarding the design of Road Home and the state's planned use of FEMA Hazard Mitigation dollars. Figure 2 shows how each state used its allocation.

Mississippi's Homeowner Assistance program was designed by the Mississippi Development Authority, located in the governor's office, to award compensation grants of up to \$150,000 to homeowners located outside the 100-year flood plain who experienced damage due to hurricane-related floods.

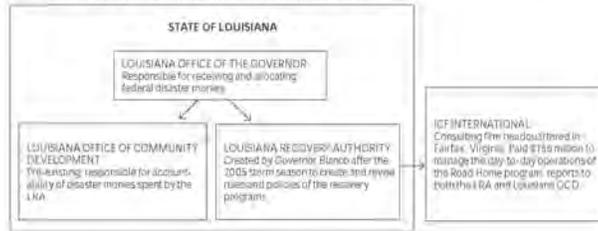
Louisiana's Road Home program was more ambitious in terms of eligibility and goals than was Mississippi's Homeowner Assistance program. After Katrina, more than 300,000 people evacuated to areas other than Louisiana cities. Alarmed by the rate of out-migration, the state wanted as many residents as possible to return, in order to "restore Louisiana's impacted communities." Program designers and federal officials feared that "devastated communities [would] be blighted by abandoned homes, clouded land titles, and disinvestments if a large portion of the financial assistance [was] not provided to homeowners as compensation for their losses and as incentive for homeowners to remain in affected areas."²⁵

Road Home was designed with two interrelated goals in mind. First, it would help residents return to Louisiana. Second, it would encourage them to repair their properties. Designers hoped that this approach would prompt the rebuilding of pre-existing communities and salvage damaged housing stock. In these ambitious aims, Road Home departed from Mississippi's more concrete compensation-for-losses approach.

While Mississippi's Homeowner Assistance program covered only flood-related damage, Louisiana's Road Home program extended eligibility to residents sustaining wind damage, an event typically covered by homeowners insurance. (As discussed earlier, residents subscribed at a much higher rate to homeowners insurance than to NFIP-provided flood insurance.) This decision contributed to a higher than anticipated number of Road Home applicants and the program's ensuing budget shortfall of \$3 to \$6 billion.

Why did the framers of Road Home choose such broad eligibility criteria? Difficulties in determining the exact source of damage (wind vs. water) have been cited. However, limiting eligibility based upon levee failures and previous flood maps would have greatly simplified and better targeted the program. The broad criteria might

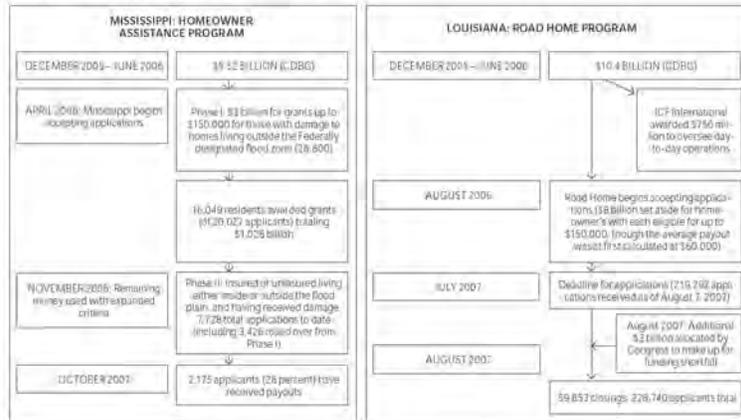
FIGURE 1: THE STATE OF LOUISIANA'S GOVERNANCE AND MANAGEMENT STRUCTURES FOR THE ADMINISTRATION OF THE ROAD HOME PROGRAM



24. The federal government provided assistance to Louisiana and Mississippi through the Community Development Block Grant (CDBG) under the Department of Housing and Urban Development (HUD) and through FEMA's Hazard Mitigation Loan Program (HMLP). These programs consist of different pieces of legislation, follow different funding models, and are governed by different negotiators.

25. U.S. Department of Housing and Urban Development, Disaster Recovery Initiative, Proposed Action Plan Amendment 14 (Time Allocation)—Road Home Homeowner's Compensation Plan, Docket No. FR-4051-14-01, Federal Register, Volume 71, Number 29 (Washington, D.C.: U.S. Department of Housing and Urban Development, April 16, 2007), 2. http://www.hud.louisiana.gov/cblog/wp-content/uploads/2007/04/Compensation_HUD-version_01-05-14.pdf

FIGURE 2: ROAD HOME'S DESIGN COMPARED TO THAT OF MISSISSIPPI'S HOMEOWNER ASSISTANCE PROGRAM



also be attributed to the best of intentions—helping as many people as possible. It is also possible that state and local policy makers may have acted to deflect responsibility from the state and local government infrastructure policies contributing to levee failure and onto “external events” (i.e., the overwhelming effects of an historic weather event). Had eligibility criteria been more tightly defined, the program may have drawn attention to the inadequacy of federal flood insurance.

Some of Road Home’s policies were designed to serve a larger development goal of rebuilding destroyed neighborhoods. However, on the program’s first anniversary, two years post-Katrina, only 23 percent of eligible grantees had received funds, delaying reconstruction plans and frustrating those residents who had based their decisions to stay in Louisiana on the expectation of timely Road Home payouts. Some of these individuals found themselves waiting up to a year for the first responses from the program.²⁸

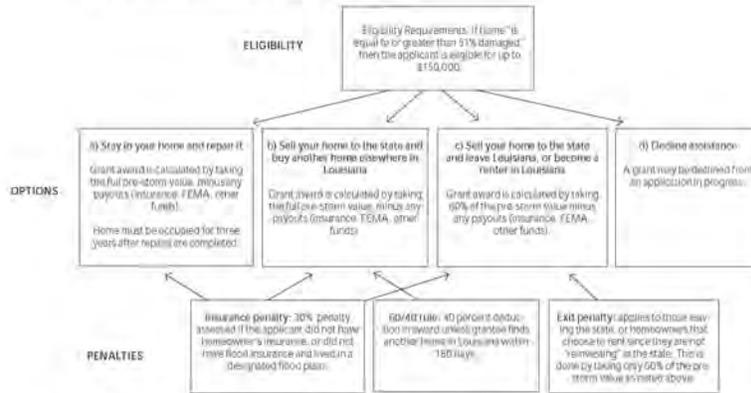
4 The Road Home: Design and Policy Features

ROAD HOME GENERATES an applicant’s preliminary grant figure by calculating the dollar value of damage incurred to the pre-storm value of the home. From this, Road Home subtracts any insurance payouts that the applicant has already received to yield the total. The grantee must then make one of four choices, detailed in figure 3, all of which affect the final amount of the Road Home grant.

The numerous penalties and adjustments to which the grant calculation may be subject make it difficult for an applicant to forecast the final payout. For example, though insurance payouts were subtracted from the initial calculation, an applicant without homeowner’s insurance (or flood insurance if located in a flood plain) is assessed a 30 percent penalty against the final award.

28. Residents interviewed by the author (e-mail) that wait periods of nearly a year before receiving the first acceptance letter was not uncommon and that most applications required more than two years to complete the process.

FIGURE 3: CHOICES AVAILABLE TO ROAD HOME GRANTEEES



This formula adheres to the program framers' intent to avoid awarding a Road Home grant on top of insurance payouts. It also avoids the moral hazard that may stem from "bailing out" property owners who choose not carry insurance but live in high-risk areas.²⁷

Applicant difficulty in forecasting the payout amount has been compounded by many of Road Home's other features, including broad eligibility criteria, an exit penalty applied to those leaving the state, and frequent administrative changes. We analyze below the program's most significant policy features for their potential impact on resident choices and rebuilding.

4.A: Broad Eligibility

EARLY IN NEGOTIATIONS the federal government advised Louisiana and all hurricane-affected states to compensate for water-related damage only. The Louisiana Recovery Authority ignored this advice and permitted Road Home to cover wind damage and to extend eligibility to residents who carried homeowners insurance as well as those who did not. (Program planners cited the difficulty of distin-

guishing between different types of home damage as the reason for broad eligibility criteria). As a consequence, grant eligibility was extended to residents in areas where flood damage was sporadic and minimal. It may be that policy makers and politicians, overwhelmed by the extent of the damage in New Orleans, acted impulsively, promising compensation to everyone affected. Andy Kopplin, the Louisiana Recovery Authority's executive director, defended the state's choice noting that, "When President Bush said he would do what it takes he didn't say, 'except if you had wind damage.'"²⁸

This decision to extend eligibility added approximately 43,000 homes to the list of those eligible for assistance and added \$2.6 billion to Road Home's budget and ensuing shortfall. It also created three other problems. First, it offered ex-post assistance to homeowners suffering wind-related damage regardless of the homeowner responsibility to insure against such a possibility. This provides residents an incentive to underinsure against future disaster and sends a signal to insurers that the state's generosity will pick up the tab for other wind-related claims. Additionally, this decision cast a wide geographic net, offering grants to residents located all

²⁷ Moral hazard is the incentive an individual has to assume more risk, because he is insured. In this case the presumption that a bailout will arrive may cause individuals not to make against disaster.
²⁸ Terry O'Connor, "Commentary: Andy Kopplin Emerges as Urging Recovery Champion," *New Orleans City Business*, June 4, 2007.

applied a year later [than I did]. I applied a year ahead. In six months, he got \$70,000 in damage that he thought cost about \$15,000 . . . he added on a room to his house, remodeled his house, with the extra money. They were giving out money on the outer outskirts. . . . You give it out here to people who had minor damage. . . . What about the people in the center who lost everything—the epicenter or whatever you want to call it. . . why aren't they getting any money to rebuild . . . that's why a lot of people were frustrated.³⁰

4.B: The Exit Penalty

ROAD HOME WAS designed to function as more than simply a compensation program. "It's not just about helping people—it's about restoring neighborhoods and cultures through the redevelopment of housing . . . entire parishes, entire cultures were devastated."³¹

Because one of Road Home's inherent goals is the restoration of preexisting communities, only those residents who return to their damaged homes and rebuild (or buy elsewhere in Louisiana) are eligible to receive a full Road Home grant. Program creators argue that assessing a penalty for out-migration rewards those "who make the effort and take the risks to move back and reoccupy housing in Louisiana."³² Those who opt to leave Louisiana or to move from owning to renting within the state are subject to a 40 percent reduction in grant amount.

This provision is critical to the rebirth of Louisiana. And since we provide all Road Home participants with a choice of all options—including ones that do provide full market value if they return home—we believe there is no inequity in the program. People can make choices on an equal basis.³³

Does the exit penalty provide the intended incentive? After Katrina, a high percentage of Louisianians expressed

a desire to rebuild their properties and neighborhoods. This is unsurprising, given the high nativity rates in Louisiana (80 percent) and particularly in New Orleans (77 percent).³⁴ It is possible that the bulk of returnees would have opted to return even without Road Home's incentives. It is also possible that a faster payout would have encouraged more residents to return to their homes or relocate within Louisiana. But faced with uncertainty, many may have committed to a job and invested in housing outside Louisiana. A much larger analysis is required to demonstrate the latter effect, a task that will be possible only when more data become available.

TABLE 1: OPTION SELECTIONS (AS OF DECEMBER 2007)³⁵

Option	Count	Percentage
Keep your home	108,511	24.3
Sell, but stay in Louisiana	9,733	7.4
Sell and move out of Louisiana	2,679	2.1
Declare benefits	1,056	3.1
Delay benefits	4,511	3.5
Unable to determine selection	490	<0.1
Total	126,979	100

Table 1 summarizes the statewide totals of Road Home applicants who have selected one of the four options the program offers as detailed in Figure 3. Those electing to sell their properties are concentrated in St. Bernard, Orleans, Jefferson, and St. Tammany parishes. Buyouts are particularly acute in St. Bernard Parish, where nearly 40 percent of applicants have decided to sell and another 21 percent remain undecided. In addition to the flooding caused by levee failures, St. Bernard was hit with a hurricane-related oil spill during the flooding, caused by a dislodged above-ground storage tank belonging to the Murphy Oil Company and affecting about 1,700 homes in Chalmette and Meraux.³⁶ A class action lawsuit with Murphy Oil was settled in September 2006 for \$330 million to be distributed among residents and homeowners whose properties were damaged.

30. Interview conducted in New Orleans, LA, November 28/29, 2007. Name withheld to protect confidentiality.

31. Wade C. Lege, Testimony, Subcommittee on Resilience and Recovery, 110th Cong., H. Comm. January 26, 2007, 9–10.

32. HUD Disaster Recovery Initiative, Proposal Action Plan Amendment 14 (First Allocation)—Road Home Homeowner + Compensation Plan, 1.

33. Wade C. Lege, Testimony, 9–10.

34. U.S. Census Bureau, Geographical Mobility/ Migration Website, <http://www.census.gov/ipeds/www/socdemo/migrate.html>, (accessed December 1, 2007).

35. Road Home Program, The Road Home/Week 77 Situation and Pipeline Report (New Orleans, LA, December 2007), 1, http://www.roadhome.org/docs/pipeline/Week_77_Combined_Report.pdf. Counts are cumulative totals as of December 20, 2007.

36. U.S. Environmental Protection Agency, Response to 2005 Hurricanes: Murphy Oil Spill, <http://www.epa.gov/pressrel/murphyoil/murphyoil/>

At 74 percent, Orleans Parish has the highest percentage of Road Home applicants who are avoiding the exit penalty by choosing to rebuild in pre-storm locations. Many of these homeowners are located near levees in areas that suffered significant levee-related flooding. Thus, Road Home's goal of encouraging people to return to their pre-storm neighborhoods may succeed, but it may also place residents of Orleans Parish and similar locations in harm's way, absent improved mitigation measures or accurately priced and mandatory flood insurance policies. While Road Home attempts to communicate the risk of living in a flood zone by conditioning grant approval on the purchase of flood insurance, the NFIP premiums remain subsidized and do not accurately reflect the level of risk.

Road Home, a disaster compensation program, endeavors to operate as a community development program even though new flood maps have not yet been generated nor public infrastructure improved. At the same time, the program precludes individuals from making community development choices by penalizing their Road Home payout should they choose to leave the state.

The program may function more efficiently, and thus encourage more applicants to choose to stay in the state, if it simply compensated individuals for losses suffered as a result of inaccurate government information or a dereliction of responsibility on the part of the government for maintaining flood protection systems.

Though the Road Home exit penalty aims to encourage community development, it fails to acknowledge that some people might be better off if they do not rebuild in their pre-storm locations, but instead pursue opportunities elsewhere. By penalizing applicants for choosing to leave the state, Road Home limits personal autonomy. Indeed, it may compel applicants to choose to stay in order to receive a higher payout, thereby locking them into a situation that is ultimately harder to change once their savings have been sunk into housing repairs in areas with dubious protection against future storms. The long-term consequences of this path are still unknown and will only become clear once a detailed analysis of recovery in the region is possible.

4.C: The Promise of Additional Money for Elevation and Mitigation

IN ADDITION TO the CDBG allocations to cover Road Home rebuilding grants, Louisiana was allocated \$1.2 billion in FEMA Hazard Mitigation Grant Program (HMGP) funds. Governments may use HMGP funds to purchase repetitive loss properties—properties that are repeatedly flooded—and convert them into green space. Alternately, local governments can use these funds for homeowner grants that will help homeowners elevate their properties or undertake measures to protect against future storm damage. In October 2006, shortly after the Road Home program began, Louisiana, through Road Home, offered eligible homeowners up to \$30,000 to undertake elevation work and up to \$7,500 for mitigation projects (such as installing storm windows).

In March 2007, FEMA informed Louisiana that its plan for HMGP funds conflicted with federal regulations—the most serious being FEMA's requirement for cost-benefit, environmental, engineering, and historical analyses before elevation or mitigation work commences.³⁷ Consequently, Road Home placed a hold on HMGP funds in April 2007. At that time, about 22 percent of Road Home grantees had accepted—and were anticipating—elevation grants.

In October 2007, FEMA agreed to release funds to homeowners who had not yet elevated their homes, but the agency could not guarantee awards for nearly 29,000 Road Home grantees who had already begun or completed elevation work. After several weeks of negotiation, FEMA agreed to release elevation money to these "rebuilding pioneers" after an inspection of completed work. The conflict between state and federal government over the appropriate use of HMGP funds was ultimately resolved nearly six months after the controversy halted disbursement of funds. In February 2008, FEMA agreed to change the rules of its program, permitting those who began elevating their homes to be eligible for HMGP dollars as long as work was undertaken after the disaster declaration date of August 29, 2005 and before March 16, 2008.³⁸ Work that commences after March 16, 2008 is subject to approval by FEMA inspectors. In addition to

³⁷ FEMA asserted that Road Home did not treat all applicants equally since it waived the 40 percent exit penalty for the elderly but applied a 30 percent penalty for failure to carry insurance. Moreover, in capping awards at \$100,000, Road Home operated under different criteria than the HUD2007 which has no cap on the amount of cost-effective repairs, not a strict cap. FEMA also said that it instructed Louisiana to identify properties it intended to convert into green space rather than buying them.

³⁸ Federal Emergency Management Agency, "Hazard Mitigation Grant Program Exception: Work in Progress Disbursement," http://www.fema.gov/collections/fed_2008/07_260108wmgp.htm.

the release of HMGP funds, Louisiana, through the Road Home program, is supporting elevation grants with its extra allocation of CDBG funds.

Though ultimately resolved, the months of red tape regarding appropriate use of HMGP funds penalized early rebuilders and, perhaps, discouraged other residents from undertaking mitigation and elevation work. The lingering conflict points to at least two possible systemic problems. Either the complex regulations associated with the HMGP program make it an unsuitable form of relief in certain types of disasters, or Louisiana's intent for HMGP funds indicates that the state made incorrect assumptions about how it could apply the funds. Regardless of the cause of the controversy, it resulted in confusion among homeowners attempting to decide whether and how to rebuild their homes. A better understanding of how and when to apply HMGP dollars on the part of policy makers, or regulatory reform of the program itself, should be considered before it is deployed in future disaster-relief settings.

4.D: Administrative Uncertainty

SOME VIEW THE rapid policy and rule changes within the Road Home program—only a few of which are detailed in this Policy Comment—as a sign of responsiveness and willingness to improve performance on the part of Road Home administration. However, frequent rule changes have also added to the massive confusion and uncertainty already facing program applicants. For example, The Louisiana State Auditor reviewed 83 of 124 recommended policy changes made since May 2007 and was unable to determine exactly which had been implemented.³⁸ Many such recommendations and administrative revisions stemmed from the program's complex design and broad scope.

One prevalent criticism among applicants was the difficulty of obtaining valid pre-storm home values. The nuances of New Orleans' real estate market prevented

typical appraisal systems from estimating pre-storm values, as home prices varied considerably—not only from neighborhood to neighborhood, but also from lot to lot—throughout much of the city. By the end of 2006, with disbursement of funds stalled at approximately 100 grant closings, Road Home allowed applicants to use post-storm appraisals and began to accept pre-storm appraisals from a much larger pool of potential sources. Even then, the acceptability of certain kinds of documents remained unclear.³⁹

These changes not only affected applicants, but also program administrators and file reviewers who, “do not always have time to check the Road Home portal for policy updates . . . policies change so frequently in the program that it is hard to comprehend and implement a policy before it changes again.”⁴⁰ Not only must employees be retrained each time policies change, but changes must also be made to forms and information systems and applicants must resubmit paperwork, further resulting in delays and lost time.⁴¹

4.E: The 60/40 rule

Many administrative uncertainties, among them rule and policy changes, were hidden even from the program designers. The most egregious example came when the first grantees came to the closing table in spring 2007, when grantees learned that they had only 90 days to buy a new house or else they would be assessed a 40 percent deduction in their overall grant award.⁴²

The LRA disowned the rule, though the governor's Office of Community Development claimed that the LRA had earlier signed off on it. For now the rule remains, though the deadline to purchase a new house has been extended to 180 days. The exact purpose of the rule is unclear. However, whether intended or not, it penalizes residents who are unable to quickly find and purchase another house in Louisiana.

38. Legislative Auditor, State of Louisiana, Road Home Program: Review of Policy Change Approval Process (Informal Audit) (Baton Rouge, LA: Legislative Auditor State of Louisiana, June 6, 2007). (<http://app1.louisiana.gov/PublicReports/nr/675/0237661600/A4880572FAD05816F773FILE0000117A.pdf>)

39. Wendie Piro, “Spending Federal Disaster Aid: Comparing the Rules and Procedures in Louisiana and Mississippi in the Wake of Hurricanes Katrina and Rita,” Gulf Gov Reports (Baton Rouge, LA and Albany, NY: Public Affairs Research Council of Louisiana and The Henry A. Wallace Institute of Government, September 2007), 11–12; (http://www.rockinstony.com/resources/draiser_houmland/gulfgov/default.aspx?i=41/)

40. *Ibid.*, 2.

41. David Hammer, “Road Home Throws a Curveball: Some Low-Cost Unmet, New Home Bought Fast,” *The Times-Picayune*, May 19, 2007.



4.F: The Escrow Account

INITIALLY, ROAD HOME grants were held in escrow for recipients. The intent was to ensure that grantees spent money on home repairs and to verify that they did not use the money to pay mortgages. Grantees cited the escrow account as the primary reason that repair progress had been so slow. The presence of escrow accounts also prompted HUD to classify Road Home as a "rebuilding" and not a "compensation" program (though the LRA claimed HUD had previously approved inclusion of the escrow policy in the program design). The March 2007 HUD ruling made Road Home subject to review under federal environmental, fair wage, and housing laws. The HUD ruling and its consequences prompted Road Home to eliminate the escrow account and shift the funding mechanism to a lump-sum payment model in April 2007. The switch to lump-sum payment amounts did prompt an increase in the rate of grant closings.

4.G: Funding Shortfalls

ROAD HOME DISCOVERED a budget shortfall of \$3 to \$6 billion soon after it began. This shortfall stemmed from

incorrect damage estimates and the expanded eligibility criteria that allowed more residents to apply than initially projected. The state of Louisiana petitioned Congress, which awarded an additional \$3 billion appropriation in November 2007.

The state and federal governments offer different reasons for Road Home's funding shortfall. Federal Gulf Coast Administrator Donald Powell claims that, in early negotiations, representatives from the LRA agreed to fund 106,000 homeowners who suffered only flood-related damage. The LRA estimated the average grant at \$72,000, for a total cost of \$7.6 billion. The federal government assumed responsibility for levee-related damage only. The state argued that Road Home's representatives never agreed to exclude claims that resulted only from wind damage. For its part, the LRA asserts that responsibility for the shortfall lies with FEMA's inaccurate damage estimates, homeowners' inadequate insurance coverage, and lower-than-expected insurance payouts.

In addition to detracting from the recovery effort, ongoing news of Road Home's large funding shortfall alarmed and confused applicants throughout 2007. During one-

on-one interviews with our research team, applicants said that this fear discouraged some from applying.

4.H: Buyouts

AS RECOVERY NEEDS in Louisiana evolve, Road Home faces emerging problems. For example, what should be done with the properties that thousands of homeowners elected to sell to the state rather than repair?⁴⁴ Currently, the Louisiana Land Trust owns 7,000 such properties. Some of the remaining 60,000 Road Home applicants who have not yet selected a Road Home option (see Figure 2) may also sell their homes to the state, so the number of state-owned properties is likely to rise.

The Louisiana Land Trust plans to put 240 units on the market, sell another 240 to affordable housing developers, turn 100 properties into green space, and put 75 lots into the Lot Next Door program (an initiative that allows residents to purchase vacant lots adjacent to their properties). Current estimates suggest that this process of unloading properties will take ten years and cost taxpayers \$15 million per year.⁴⁵

The *Times-Picayune* reports that the Louisiana Land Trust planning board wishes to avoid flooding the real estate market for fear that it will lead to a decline in property values.⁴⁶ However, one member of the same planning board argues that “soaring construction costs and homeowners insurance premiums have driven the price of housing so high that it has limited demand and hindered affordability.”⁴⁷

As housing costs and rents in New Orleans and across Louisiana rise, it may be wise to increase the supply of housing. Storm-damaged properties could be sold at a low price (e.g., the value of the land, a deeply reduced price, or a special “affordable housing” rate of \$1), leaving the new homeowner with the cost of building or repairing the residence, plus the cost of insuring the property. The precedent for such an option took place recently in December 2007 when New Orleans sponsored its second Internet tax sale of pre-Katrina delinquent properties. At this writing, nearly 2,000 properties had been sold to buyers who agreed to pay overdue taxes, penalties, and interest on the properties.⁴⁸

Placing Road Home buyouts in a similar sale would provide an opportunity for many lower-income individuals to buy a property and contribute significantly to Road Home’s goal of affordable housing development. Rapid implementation of such a process could speed redevelopment and permit housing to be reclaimed by New Orleans’ residents.

5 Mississippi in Contrast

CONGRESS ALLOCATED THE Mississippi Development Authority (MDA), an agency located in the Office of the Governor, \$5 billion in CDBG funds to assist with post-hurricane recovery. The MDA used \$3 billion to create the Homeowner Assistance program, an initiative that assists homeowners who “experienced flooding outside the flood plain, having relied to their detriment on the NFIP guidelines on the need to carry flood insurance.”⁴⁹ In the first phase of the program, the MDA identified roughly 31,000 homeowners living outside the flood zone who maintained property insurance—and in some cases flood insurance—but in insufficient amounts. It offered those homeowners a maximum of \$150,000 based on damage estimates and less insurance payouts or other government funding. In the second phase, the program extended eligibility to all homeowners in Hattieson, Hancock, Jackson, or Pearl River counties who suffered Katrina-related flood damage, regardless of whether they carried the appropriate amount of insurance. Second-phase grantees were offered a maximum of \$100,000, based on damage estimates minus payments from insurance or other government programs. Grantees were not required to spend the money on home repairs. But, if choosing to rebuild, owners were required to sign a covenant agreeing to carry the appropriate insurance on the property and adhere to building codes.

Though not without complications, the design of Mississippi’s Homeowner Assistance program differs sharply from that of Road Home. For example, though Mississippi used a similar formula to calculate payouts (ascertain the amount of damage based on pre-storm value and subtract insurance payouts from the grant total), the program’s

44. Road Home created the Louisiana Land Trust to handle the acquisition, maintenance, and management of properties.

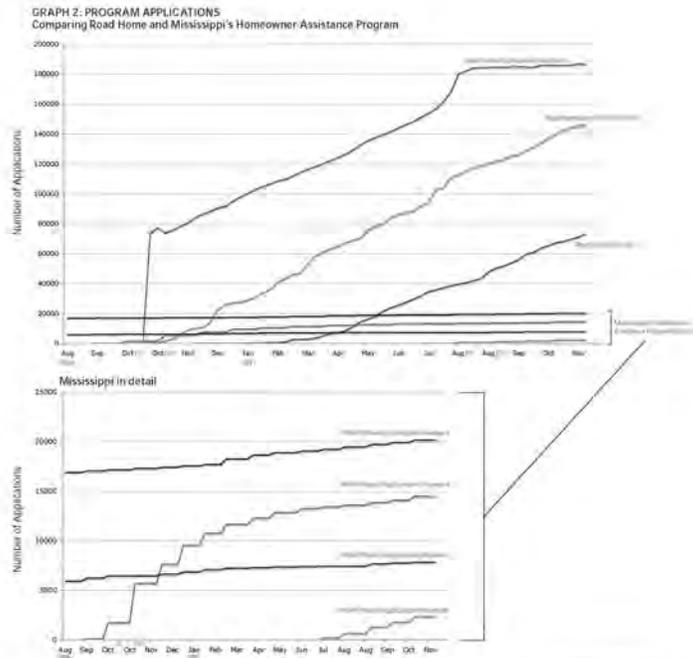
45. David I. Bremer, “N.O. Aims Plans for Roadhome Lots: 10-year Strategy May Cost Millions,” *The Times-Picayune*, November 26, 2007.

46. *Ibid.*

47. *Ibid.*

48. The *Times-Picayune* Update Online, “City’s second Internet tax sale in progress,” *The Times-Picayune*, December 14, 2007.

49. Mississippi Development Authority, Homeowner Assistance Program Partial Action Plan (Jackson: MDA, 2008).



eligibility requirements were far more stringent. As mentioned earlier, Mississippi initially limited eligibility to residents who experienced only flood damage and lived outside the flood plain, but later expanded eligibility for the program as resources became available.

Mississippi and Louisiana's programs were not only conceptually different; they also faced enormous variances in scale. As graph 2 indicates, Louisiana's Road Home program received nearly six times as many applicants as did Mississippi's Homeowner Assistance program. This was due in part to the broad eligibility criteria established by

Road Home, but also to the fact that densely populated parts of southeastern Louisiana received significant damage. When considering the hurricanes' impact, framers of Louisiana's Road Home program may have felt compelled to implement a broad program design. Regardless of intensity of storm damage, the disparity in program scale could have been avoided had Road Home framers opted for the strict eligibility established in the Mississippi program. This course of action might also have promoted Road Home payouts that matched the speed of the Homeowner Assistance payouts.

Mississippi's Homeowner Assistance program did not penalize applicants electing to leave the state or shift from owning to renting, thus avoiding any attempt to influence homeowners' decisions. (The program does require flood insurance to be held in perpetuity on rebuilt properties.) Mississippi also avoided the problems associated with Road Home's escrow account by awarding grants directly from the outset. Though the grant award practice, together with many other Road Home policies, was later simplified, Road Home's initial complex design nevertheless confused and discouraged early applicants—precisely the people Louisiana needed to return in order to assure effective long-term recovery.

Road Home's initial complex design never fully encouraged early applicants, especially the people Louisiana needed to return in order to assure effective long-term recovery.

To be sure, Mississippi's Homeowner Assistance program has faced its own set of complications. It has come under heavy criticism for awarding contracts to three state legislators. Road Home has been free of corruption allegations and appears to have effectively prevented egregious applicant fraud, though the program has achieved accuracy at the expense of speed, a tradeoff explored later in this Policy Comment.

Like applicants in Louisiana's Road Home program, applicants to Mississippi's Homeowner Assistance program have complained about low home value estimates. These complaints spurred policy changes, implemented in October 2006, that allow more appraisal methods to be used when determining award amounts. However, policy changes in the Mississippi program were neither as frequent nor as comprehensive as those within Road Home. Because Mississippi's intent and scope were concrete and measurable and clarified in the program's design stage, the MDA had less difficulty revising and dealing with vagaries as they arose. We acknowledge that conditions (both pre- and post-storm) were markedly different in Louisiana and Mississippi, but the short-term experi-

ence, at this writing, indicates that the benefits of Road Home's specificity are far outweighed by Mississippi's gains of simplicity and speed.

5 Case Study: Stay or Go

PRIOR TO HURRICANE Katrina, Roger Walker and his family lived in northern Gentilly, a neighborhood of New Orleans.⁵⁰ He worked at a used car dealership 15 minutes from his home. Two days before Katrina made landfall, he and his family evacuated to the home of relatives in Texas, packing only enough clothing and supplies for a week-end stay. In their absence, their home was flooded with nearly 10 feet of water, completely ruining the property and its contents. The Walker family now faces the same decision as thousands of other displaced residents across Louisiana, but especially in New Orleans: Is it more beneficial to return or to resettle? We explore below several factors that influence the deliberations of evacuees.

Thomas Schelling describes post-Katrina resettlement as an acute problem of coordinated expectations, asserting that for one household—such as the Walker family—to find it beneficial to return, other households must also return.⁵¹ The few early returnees bear the burden of rehabilitating the entire city, despite diminished access to everyday public infrastructure that does not yet function at pre-storm capacity.

Road Home framers attempted to address the threat of out-migration by penalizing the decision to leave and incentivizing the decision to return, thus attracting enough returnees to remove the strong disincentives for not returning. While this effort may have succeeded to some extent, the effect was muted by the slow payout rate and applicant confusion, counteracting any possible gains. Rather than attempting to shape evacuee decisions, program framers could have exchanged control for simplicity, a programmatic tradeoff that may have enabled residents to more easily coordinate with one another and perhaps more easily finalize decisions to return or relocate.

For evacuees from New Orleans living temporarily in another state and trying to determine whether to

50. The Walker family is fictional but is based on an interview conducted on November 29, 2007 by the authors in New Orleans with a family that returned to the city in July 2007.

51. Thomas Schelling interviewed in Glenn Feldman, "On Their Own in Distressed New Orleans," Los Angeles Times, December 4, 2005.

return, the choices available to them can be thought of as an investment whose reward is partially dependent on the choices of others. They must consider many factors simultaneously, among them neighborhood safety and access to quality employment, schools, and public services. Fundamentally, evacuees must use limited information to extrapolate what the neighborhood and city will be like long-term.

Schelling's assertion that for one household to benefit from returning other households must return as well is corroborated by empirical findings in New Orleans. An examination of block-level return patterns using postal data suggests a strong tendency for neighborhoods to become either clusters of activity or deserted ghost towns.⁵² This is unsurprising, since the sole returnee in an empty neighborhood faces not only the problems described above, but also confronts both the potential depreciation of property values as nearby homes fall into decay and the risk that their homes will be deemed "green-space" and subsequently bulldozed.

The Walkers face a great deal of uncertainty about the exact reward amount if they do return to New Orleans. Mr. Walker reasons that the eventual Road Home payout, the equity in his home, and income from a job comparable to what he had before the storm would all be worth \$50,000 to \$90,000—depending largely on the amount of the Road Home grant and his property's value (which depends, in part, on how many neighbors return).

If the Walkers return but are the sole family on the block, they risk rapid depreciation of their home as neighborhood blight increases. If this scenario develops, Mr. Walker estimates the monetary value of his property, income stream, and Road Home grant at \$30,000 to \$40,000, with the potential for further decrease over time. If the Walkers remain in Texas, they still risk rapid depreciation, but they are certain of being able to take a buyout from the state—albeit below market value—and of securing a job with an estimated value of \$60,000 a year. These values are constant regardless of what choices their neighbors make. Thus, while the Walkers would rather return to New Orleans, they recognize that leaving is the "safer" option since the neighbors' choices cannot be foreseen.

It is possible to examine the choices faced by evacuees such as the Walkers through the lens of game theory.

Table 2 describes the choices available to the Walker family, summarizing potential dollar amounts based upon the family's choices and the choices of their immediate neighbors. Each day that passes without a return-or-relocate decision costs the Walkers missed opportunity, regardless of whether they elect to return to New Orleans or stay in Texas.

TABLE 2: INCENTIVES FACING THE WALKER FAMILY

		Walker Family	
		Return	Leave
Other six families on their block	Return	\$50,000 - \$90,000	\$50,000
	Leave	\$30,000 - \$40,000	\$60,000

Further, the Walkers are not unusual in this regard. Many of their neighbors face approximately the same incentives. Most are unable to make reasonable guesses about the likelihood of more than a few others returning based upon extremely limited information as to the size of the Road Home payout. In the absence of perfect information and complete communication, achieving coordination in such a scenario is extremely difficult.⁵³

The best way to improve coordination in such a situation is to reduce the amount of uncertainty—or provide as much of a commitment to the payout figure as possible—across the entire community. This would allow residents to better extrapolate not only their own incentives, but also those of their neighbors. The main difficulty of achieving coordination arises when evacuees begin guessing—about the Road Home payout amount, the choices of close neighbors, and the long-term viability of the neighborhood. The earlier residents are made aware of the actual value of choices available to them, the less difficulty they will have in making life-altering decisions.

7 Policy Recommendations

LOUISIANA IS NEARLY TWO-and-a-half years into recovery, and while the state will recover, few people are certain of New Orleans' future. Drastically revising the Road Home program would be unwise, since many of the city's former residents have based plans and expectations

52. Amy Luard and Alison Piter, *The New Orleans Crisis: Tracking Recovery of New Orleans and the Metro Area* (Washington, D. C.: The Urban Institute, January 15, 2008), <http://www.urban.org/UploadedPDF/320214main.pdf>.
 53. See also Corbin and Eric van Damme, "Global Games and Equilibrium Selection," *Econometrica* 61, no. 3 (1993): 685-1016, in which further discussion of the difficulties of coordination in situations featuring complementarities and costly payoffs.

upon commitments made by the program. Restructuring might aid long-term recovery, but it would also heighten applicant confusion.

There are, however, small improvements that could be made to existing policies on both federal and state levels without introducing additional confusion.

7.A: Recommendations for Road Home: What Can Be Done Today

1. Release HMGP funding. FEMA should relax the regulatory requirements surrounding elevation grant dollars. Those Road Home grantees who began elevation work based on the promise of future funds should not be denied grants. Instead, regulatory bodies should inspect work to ensure that elevation projects are completed according to code and should suspend requirements for environmental, cost-benefit, engineering, and historical preservation rules governing the traditional HMGP program.

2. Put buyouts on the market. The Louisiana Land Trust should sell some currently held buyout properties on the open real estate market rather than maintaining them for an indeterminate period of time. These homes could be sold at auction or on a first-available basis. Rising home prices and rents in New Orleans are in part due to the reduction in decent housing stock available since Hurricane Katrina.⁵⁴ This upward pressure on home prices could be alleviated by placing selected properties on the market. However, the state may wish to maintain, with the intent of converting to green space, repetitive-loss properties or those located in high-risk areas.

7.B: Recommendations for the Future: Designing Ex-Post Disaster Policies

Ex-post disaster relief is not effective compensation policy. Such policies generally fail to distribute funds accurately and efficiently, and they may contribute to mar-

al hazard if they encourage homeowners not to insure against disaster.⁵⁵ In the case of Road Home, the state contributes to this hazard by subsidizing residents who relocate to high-risk areas before improvements to hurricane protection systems are made. Government at all levels could more efficiently invest in such *ex-ante* policies as mitigation measures (improved engineering, responsible maintenance) that may reduce the scope of disaster and accurately priced insurance policies that convey the risk facing residents choosing to live in a floodplain. Absent accurately priced NFIP premiums, which themselves hinge on accurate federal flood maps, individuals will operate under a clouded picture of risk and may thus fail to protect against future disaster.

The situation facing New Orleans stems from an institutional environment shaped by decades of government policy and social trends, as well as the interplay of federal and state regulations governing disaster relief. Because the institutional environment is not likely to change significantly, any future recovery program on a similar scale will operate in a similar environment. As such, we offer pragmatic recommendations for disaster recovery policy within such a context.

1. Establish a clear rationale for relief. Katrina's worst damage resulted from infrastructure failure. The levees' structural integrity was assumed, both by individuals and by the NFIP. The residual risk of living near these levees was not properly incorporated into insurance policies, which relied on FEMA maps. The U.S. Army Corps of Engineers, in partnership with state and local governments, was responsible for maintaining and assessing the ability of the levees to withstand a category three hurricane. Therefore, government, one can convincingly argue, is liable for the flood damage not adequately covered by insurance. In constructing a homeowner relief policy, policy makers should start from this point. Figure 4 summarizes funding priorities.

- a) Award grants to eligible homeowners who lived outside of the designated flood plains and were

⁵⁴ Another reason for higher home prices in New Orleans is that taxpayer provided disaster relief eliminates the downward pressure on housing prices by eliminating the risk of living in a dangerous area. Houses should be cheaper in New Orleans because it is a higher risk location relative to, for example, Memphis, Tennessee. But the government subsidies for housing replacement causes New Orleans' housing prices to rise as the financial risk of living there is eliminated. Memphis residents see their housing prices drop as people are no longer willing to pay a premium to live in a less risky location. The result, as housing prices in both cities, approach similar levels, is that commitment become acathetic regarding the difference between the locations. See Steven Landis, "No Relief? Still on," September 2, 2005.

⁵⁵ James Sullivan, "The Sorcerer's Elements," in *Abrams, Mortality and Immunity: Theory*, ed. J. P. Phipps (New York, NY: The Russell Sage Foundation, 1976), 11-25. Government provided disaster relief, which well intentioned, well-meaning persons incentives (because victims expect) and increased (or) counter take measures to protect themselves against future disaster.

located closest to the damage caused by infrastructure failure. These homeowners may have carried homeowners insurance, but they were advised either to carry no NFIP-provided flood insurance or an insufficient coverage thereof. Apply penalties to those who did not carry homeowners insurance. Award grants to compensate homeowners who were told not to carry flood insurance but rather to rely on the levees as protection.

b) Expand eligibility to those who were located in flood plains, whether insured or uninsured. Apply a penalty if they failed to carry homeowners and/or flood insurance. Exclude wind damage-only claims. Wind damage should be covered by homeowners policies. Penalize those not carrying homeowners insurance by not awarding them grants.

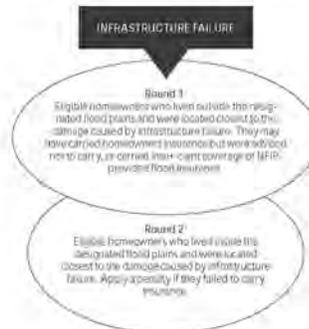
2. Determine whether accuracy or speed is more important.

Analysis provided in Sections 5 and 6 of this paper indicates that coordination of plans soon after a disaster is critical to long-term rebuilding. The earlier evacuees are aware of their own circumstances and can plan around the circumstances of others, the faster rebuilding will occur. This process resembles, in some ways, a "tipping point"—as soon as evacuees witness their neighborhood returning to a normal state, they are much more likely to return. Unfortunately, early returnees are faced with very high "first mover" costs. Allowing those who are willing to move back early to do so as soon as possible is extremely important and provides a justification for streamlining the speed of compensation programs, even if this reduces accuracy in awarding funds.

3. Adopt a "Homeowners Know Best" approach.

Do not reduce grants based on where residents decide to live or how they intend to use their grants. Road Home's attempt to engineer lives and recreate neighborhoods is one of the program's fundamental flaws. Post-disaster, it is an area's residents who best understand their financial and personal constraints. It may be that some are better off taking an opportunity elsewhere, or they may have planned an out-of-state move prior to the disaster. Such residents are, in effect, penalized for making autonomous decisions. Governments should focus on compensating individuals for property losses suffered as a result of government failure, and not on forcing individuals to repair their homes or return to their pre-disaster city or state.

FIGURE 4. POLICY RECOMMENDATION, PRIORITIZATION OF AVAILABLE FUNDS



4. Keep the policy goals simple. Disaster relief policies should remain policies that offer relief following a disaster. They should not address other issues, such as affordable housing and housing stock redevelopment. While these may be important goals, including them in a disaster relief program dilutes funds and confuses intents.

5. Keep the program simple. Road Home's complex rules, regulations, and application process were in part intended to minimize fraud. Program designers are to be commended for careful stewarding of federal dollars, though careful stewardship may also have been achieved by restricting program eligibility to a more carefully defined group. Limited eligibility would also reduce the number of applicants, thus freeing resources to police potential fraud.

6. Let markets provide flood insurance. The main justification for the National Flood Insurance Program (NFIP) is that it provides affordable insurance to those otherwise unable to afford it. However, one consequence of government provision of flood insurance is that no market alternatives have developed. This permits NFIP policies to continue relying on outdated flood maps and avoid pricing the residual risk associated with collapse of flood protection systems. Also, by subsidizing premiums, NFIP leaves its policyholders with an inaccurate picture of risk, which may encourage people to live in more risk-prone areas or fail to undertake flood mitigation measures.

Because advances in risk modeling enable insurers to more accurately price risk and financial instruments help restock post-disaster capital reserves, private provision of insurance is both feasible and profitable. Policy makers should eliminate public provision of insurance altogether or, failing that, price risk as accurately as possible by requiring state insurance programs to purchase reinsurance at actuarially sound rates.¹⁰

8 Conclusion

ROAD HOME HAS failed to promote rapid reconstruction of New Orleans neighborhoods because its goals exceed the scope of a disaster compensation program. The 2005 hurricanes caused as much damage as they did in part because government at all levels failed to accurately inform homeowners of the risk they faced and failed to properly manage levee infrastructure. In crafting a disaster compensation policy, the Louisiana Recovery Authority should have restricted program eligibility to those homeowners who suffered as a result of government failure. Expanding the program scope to include those who suffered wind-related damage and offering compensation to the entire state contributed to a fiscal shortfall and moral hazard.

Road Home's exit penalty has also proven extremely damaging to Louisiana's long-term recovery. A disaster compensation policy should not penalize residents for choosing to leave the state or become renters, options that may actually be in their best interests. In effect,

the exit penalty undermines autonomy and predicates receipt of aid on choices that may worsen residents' financial and personal situations.

The deepest irony of Road Home is that its policies have created multiple layers of uncertainty, precluding informed action. Program creators acknowledge that they are uncertain about how neighborhoods will recover. This inability to predict residents' actions hampers the state's ability to identify green space. The LRA's proposed ten-year process for unloading property buy-outs continues to distort the real estate market. This uncertainty makes it difficult for residents to make decisions about housing repairs and investments.

Road Home policies, which attempt to engineer lives and re-create the past, have been a primary cause of the uncertainty and instability that continues in Louisiana, particularly in New Orleans. Rather than launching the biggest housing recovery program in U.S. history, policy makers should work within the role and limits of government in disaster recovery, clearly identifying liability for losses; compensating individuals quickly without trying to influence choices; and establishing and enforcing ex-ante disaster prevention mechanisms—including mandatory flood insurance and homeowners insurance, elevation and mitigation measures, and adherence to building codes.

Road Home's broad goals of neighborhood recovery and affordable housing development dilute ex-post disaster assistance, confuse intents, and distort housing markets—all consequences that weaken and stall the recovery of Louisiana.

¹⁰ See *State Finance* (October 5,





About Eileen Herrera, author

Eileen Herrera is a senior research fellow at the Mercatus Center at George Mason University, before joining Mercatus. She was a Wilson Brookings Fellow at the Competitive Enterprise Institute where she focused on trade and tax policies affecting the European Union and the United States. Eileen worked as a consultant for APICS, a major trade organization in the United States, and as a senior advisor at the U.S. Trade Representative's Office at George Mason University. Her current research areas include economic development policy, global economics, the U.S. budget, and tax and fiscal policy.

About Anthony Skiba, author

Anthony Skiba is a program associate with the Mercatus Center at George Mason University working with the Social Change Project. Mr. Skiba graduated from Beloit College in 2001 with a BA in economics and East Asian languages and is currently studying part time in George Mason University's Department of Mathematical Sciences.

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 3301 North Fairfax Drive, Suite 450
 Arlington, Virginia 22201
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 Fax: (703) 993-4935

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Mr. NADLER. I thank you. And I will now recognize Mr. Morse.

**TESTIMONY OF REILLY MORSE, CO-DIRECTOR OF HOUSING
POLICY, MISSISSIPPI CENTER FOR JUSTICE**

Mr. MORSE. Thank you, Chairman Nadler, and Members of the Committee for inviting Mississippi Center for Justice to testify before your Committee.

While this Nation has made major strides toward greater residential racial integration, there remains stubborn pockets of segregation. My home community Biloxi/Gulfport, already historically segregated, became more racially segregated during the 1990's. So, in 2005, when Hurricane Katrina devastated tens of thousands of homes along the coast, Mississippi faced a crossroads. Would we build back better than before, as the Governor put it? Or in fair housing terms, more integrated than before? Or would we restore the status quo?

The Fair Housing Act expected HUD to use its grant-making power to reduce discrimination and segregation to the point where the supply of genuinely open housing would increase. Congress generously appropriated funds to Mississippi for disaster relief but prudently required that HUD ensure compliance with the Fair Housing Act, a nonwaivable requirement. HUD had the duty to ensure that the action plan submitted by Mississippi would rebuild communities in ways that would reduce or eliminate discrimination and segregation.

Unfortunately, with the blessing of a HUD led by the previous Administration, Mississippi set itself upon an unjust course. Among other things, the State spent over \$1 billion to benefit primarily wealthier insured homeowners. The State certified that this action met the Fair Housing Act using promises to update its 2004 Analysis of Impediments to Fair Housing and its promise to use the remaining funds to increase the supply of affordable housing.

Mississippi did not keep these promises and suffered no consequences as a result. Its analysis of impediments was not updated until after it diverted almost \$800 million away from housing programs and into business and economic development. It never provided required race data. And the State's record since the first and most generous program has been to spend less, later and more slowly on low-income housing.

The second homeowner grant program, for instance, Mr. Chairman, capped the grant at \$100,000, while the first one for wealthier homeowners was at \$150,000. No explanation for that was ever given.

Today the State is over 5,200 units short of the affordable housing unit forecasts it has set for itself.

Also, Mississippi obtained waivers from HUD for the requirement to spend funds on lower-income residents, covering \$4 billion out of the \$5.5 billion Mississippi received. Today our organization estimates that well over 5,000 households still require assistance to repair their existing homes or secure permanent safe housing, and that African Americans with unrepaired damage outnumber Whites by two to one.

One reason for this disparity was Mississippi's decision not to provide assistance to wind-damaged homeowners. Several con-

centrated areas of unrepaired damage lay north of the railroad tracks, with some homes only three blocks from the beach. The rail bed held back the tidal surge but not the hurricane-force winds.

Depending on which side of the tracks you lived, Mr. Chairman, you could get up to \$150,000 or nothing. One of our clients, Ms. Chamberlain, escaped the hurricane surge during the storm, crossed the tracks to take refuge in a Black family's home. Ms. Chamberlain received a grant but not the woman whose wind-damaged roof sheltered her in the storm.

South Mississippi's classic southern pattern of residential segregation meant that excluding wind-damaged households disproportionately burdened African American neighborhoods.

Meanwhile, displaced south Mississippi renters waited for 3 years for the State to start spending on rental programs and watched local government block private efforts to build subsidized multifamily apartments in whiter, more affluent neighborhoods. Others who occupied Mississippi cottages, small, sturdy, modular shotgun houses to replace the infamous FEMA trailers saw their hopes of obtaining affordable permanent housing thwarted by local government prohibitions, including veto power extended to anyone within 160 feet of the lot.

In both cases, HUD and State officials administering Federal block grant dollars had but failed to use the leverage of withholding other the Federal funds to municipalities for their refusal to affirmatively further Fair Housing, as was ultimately done in St. Bernard Parish, Louisiana.

Today, however, HUD has clearly taken more seriously its responsibilities to deeply assess the State's use of disaster block grants. When Texas proposed to use Hurricane Ike funds in ways that would have diverted resources away from the housing needs of the most vulnerable storm victims, HUD stepped up. Assistant Secretary For Community Planning and Development, Mercedes Marquez, turned down Texas's proposal, perhaps a first in HUD's history, because Texas did not have a current Analysis of Impediments and because the proposal as structured would likely stray too far from the core emergency disaster assistance objectives set by Congress.

Texas and HUD later reached an accord which, among other things, required an updated analysis of impediments to be prepared before, not after, funds were obligated and spending percentage targets for housing and lower-income residents.

This laudable strengthening of commitment under the current HUD administrator now should be turned to the difficult inherited problems remaining in my home State set forth in, "How Will Mississippi Turn the Corner," a report released today by my organization. Thank you very much.

[The prepared statement of Mr. Morse follows:]

PREPARED STATEMENT OF REILLY MORSE

JULY 29, 2010

**HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND CIVIL LIBERTIES****“PROTECTING THE AMERICAN DREAM: ADVANCING AND IMPROVING
THE FAIR HOUSING ACT ON THE 5 YEAR ANNIVERSARY OF
HURRICANE KATRINA”****TESTIMONY OF
REILLY MORSE, CO-DIRECTOR OF HOUSING POLICY
MISSISSIPPI CENTER FOR JUSTICE**

Good afternoon, I am Reilly Morse, co-director of housing policy in the Gulf Coast Office of the Mississippi Center for Justice. I thank Chairman Nadler, Ranking Member Sensenbrenner, and the members of the subcommittee for holding this hearing to examine the Fair Housing Act in the context of Hurricane Katrina.

The Mississippi Center for Justice (“MCJ”) is a nonpartisan, nonprofit, civil rights legal organization that was founded in 2003. It was formed to provide a home-grown means to advance racial and economic justice in Mississippi. In 2005, MCJ became the Deep South affiliate of the Lawyers’ Committee for Civil Rights Under Law (“Lawyer’s Committee”), a national civil rights legal organization formed in 1963 to remedy racial discrimination. Shortly after Hurricane Katrina, MCJ opened a Katrina Recovery office in Biloxi, where we joined forces with the Lawyers’ Committee and attorneys and law students from across the nation to provide free legal representation, impact litigation, and policy advocacy for storm victims, particularly low income and minority populations.¹

I am a third-generation Gulfport, Mississippi lawyer. After Katrina destroyed my office, and displaced innumerable relatives and friends, I joined MCJ to provide legal assistance for others to move towards recovery. Over the past five years, our organization, in collaboration with the Fair Housing Project of the Lawyers Committee, led by Joe Rich, has conducted scores of free legal clinics with hundreds of pro bono attorneys and law students to provide assistance to thousands of displaced residents in the aftermath of Hurricane Katrina. In addition, MCJ served as local counsel in federal class action litigation, including *Brou v. FEMA*, which resulted in a consent judgment that increased access to temporary housing such as FEMA trailers for persons with disabilities.

¹ MCJ’s early experience in partnership with the Lawyers’ Committee for Civil Rights Under Law, is described in Jonathan P. Hooks, Trisha B. Miller, *The Continuing Storm: How Disaster Recovery Excludes Those Most in Need*, 43 California Western Law Review 21 (Fall 2006).

Over the past two years I have testified five times before Congress on housing issues relating to the U. S. Department of Housing and Urban Development and the Federal Emergency Management Agency. I also have testified before the National Commission on Fair Housing and Equal Opportunity in the summer of 2008 in preparation for its major report in December 2008 entitled, *"The Future of Fair Housing."* Barbara Arnwine, Executive Director of the Lawyers' Committee and Dean Okianer Christian Dark have already provided testimony on this important study and its recommendations. I also authored an environmental justice report and several Katrina housing progress reports, including one released today, "Hurricane Katrina: How Will Mississippi Turn the Corner?"

BACKGROUND AND CONTEXT

Over 40 years ago, Congress passed Title VIII of the Civil Rights Act, the Fair Housing Act, which now prohibits discrimination in public and private housing markets based upon race, color, national origin, religion, sex, disability or familial status. "The Future of Fair Housing" report, which draws on extensive investigations of the current state of fair housing, concludes that "despite strong legislation, past and ongoing discriminatory practices in the nation's housing and lending markets continue to produce levels of residential segregation that result in significant disparities between minority and non-minority households, in access to good jobs, quality education, homeownership attainment and asset accumulation."

A 2001 report from the Brookings Institute suggested that, while there remain a large number of hyper-segregated metropolitan areas, residential racial segregation in 272 areas has declined over the decade between 1990 and 2000, primarily by the integration of formerly all white census tracts. However, segregation levels rose in 19 metropolitan areas, including the Biloxi - Gulfport area, my home region.

Coastal Mississippi's hurricane devastation unfolded across a landscape that reflects its classic Southern patterns of settlement. A 19th century railway connecting New Orleans to Mobile laid down a racial dividing line. To the south, white beach-front residential areas were established, while black communities arose to the north. The area is served by a federal highway, U.S. Highway 90, built during the Depression with bridges crossing St. Louis Bay and Back Bay of Biloxi. Highway 90 was reinforced against hurricane damage by a concrete seawall (1926-28) and a man-made sand beach, constructed with taxpayer dollars (1951). Segregation laws barring African Americans from using these beaches were overturned in 1968 after a nine-year campaign and litigation led by African American Biloxi physician Dr. Gilbert Mason for whom a portion of Highway 90 now is named.

Hurricane Katrina's tidal surge obliterated nearly all of Hancock County and the predominantly white 26-mile-long ribbon between the beach-front highway and the railroad tracks in Harrison County, including the building that housed my previous law office. The railroad track bed functioned as a levee in the middle part of the county, shielding older African American "back of town" communities from the surge but not the hurricane force winds. East

Biloxi, whose roots in the seafood industry produced an atypical racial and cultural combination, was attacked from two sides, however, as the surge encircled the peninsula from the beach front and the Back Bay of Biloxi. From there, the surge raced westward through a network of bayous, lakes, rivers, and canals where it collided with and overwhelmed hurricane rain-flows draining from African American communities like Forest Heights and Turkey Creek. Over in Jackson County, the city of Pascagoula, home to the Northrop Grumman shipyard, suffered widespread surge and wind damage, but the predominantly African American city of Moss Point, situated on relative high ground away from the shore, experienced heavy wind-storm damage.

“Hurricane Katrina was an equal opportunity destroyer” was a pet phrase used to deflect attention from the influence of racial discrimination upon the disparities in loss and recovery in the Gulf Region. While the winds, rain, and storm surge from Hurricanes Katrina and Rita may have attacked with random and blind fury, they struck a region where for generations whites attacked the housing and economic opportunities of African Americans through open and legally-sanctioned racism. After the passage of the Fair Housing Act, these embedded disparities were reinforced by less acute levels of discrimination in lending, insurance, and municipal services. If Hurricane Katrina was an equal opportunity destroyer, then we must ask ourselves whether our government has been an equal opportunity restorer? Or, to put it another way, has our federal disaster housing recovery effort “affirmatively furthered fair housing?”

In the case of Mississippi, the answer is no.

DISPARITIES IN DISASTER ASSISTANCE PROGRAM DESIGN

Hurricane Katrina “had a particularly devastating impact on low-wealth residents who lacked an economic safety net” but the disaster also “presented a unique opportunity to correct decades of inequitable development,” according to the Mississippi Governor’s Commission report, “Building Back Better Than Before.”² Sharing these concerns, Congress required the states to spend at least 50% of the \$11.5 billion in CDBG disaster recovery funds to benefit primarily persons of low and moderate income (LMI).³ The U. S. Department of Housing and Urban Development (HUD) adopted regulations implementing the LMI requirement.⁴ Yet Mississippi, with the nation’s largest per capita poverty population, was the only state to request and receive waivers from this requirement. Over the three years since the initial disaster aid was awarded, HUD carved \$4 billion out of the \$5.481 billion allocated to Mississippi for uses other

² Governor’s Commission on Recovery, Rebuilding, and Renewal, “After Katrina: Building Back Better Than Ever”, pp. 60-61.

³ Department of Defense Appropriations Act, 2006, Public Law 109-148, December 30, 2005, 119 Stat. 2680, 2780.

⁴ “[T]he aggregate use of CDBG Disaster Recovery funds shall principally benefit low and moderate income families in a manner that insures that at least 50% of the amount is expended for activities that benefit such persons.” U. S. Department of Housing and Urban Development, February 13, 2006, 71 FR at 7671.

than to assist LMI households.⁵ As a result, Mississippi now has turned its back on the opportunity to broadly uplift the housing conditions of its most vulnerable storm victims in favor of other priorities.⁶

Overall, 220,384 housing units received some damage from Hurricane Katrina, of which 101,893 dwellings (owner-occupied or rental) suffered major damage or were destroyed, and another 118,491 suffered lesser damage, according to inspections by FEMA in February, 2006.⁷ In its first application for CDBG funds, Mississippi Development Authority (“MDA”) wrote, “The sheer number of homes damaged or destroyed is one reason **the Governor considers the replacement of housing as a number one priority** in rebuilding the Mississippi Gulf Coast.”⁸ (emphasis added)

Public Law 109-148, the legislation which provided the bulk of Mississippi’s Katrina disaster assistance, prohibits the Secretary of HUD from waiving compliance with requirements relating to fair housing and non-discrimination.⁹ There are widely accepted correlations of lower income to race, sex, familial status and disability, some of which are mentioned in this testimony. By ignoring or underemphasizing the needs of low to moderate income individuals, Mississippi’s overall disaster recovery plan fails to affirmatively further fair housing.

When Mississippi designed its disaster assistance programs, it put insured homeowners with storm surge damage at the front of the line for the most generous grants, up to \$150,000. The criteria discriminated against black storm victims, who more likely than not were renters, or, if homeowners, more likely than not lacked insurance. Over \$1.4 billion in Phase I homeowners grants were paid to insured homeowners,¹⁰ but only \$387 million, or 27 percent, went to low and moderate income households.¹¹ Next in line for less generous grants, up to \$100,000, were surge-damaged lower-income homeowners who received about \$432 million. No funds were available for homeowners in segregated enclaves north of the railroad who received heavy wind damage but no storm surge. Today, nearly five years later, Mississippi Center for Justice has released a

⁵ In December, 2008, HUD rescinded waivers on economic development, infrastructure, and community revitalization programs totaling over \$1.2 billion, based upon the conclusion that the State’s performance on the remaining programs would enable it to meet the overall benefit requirement. 73 Federal Register 75733, December 12, 2008

⁶ “More Housing Woes for Mississippi.” New York Times editorial. September 27, 2007, http://www.nytimes.com/2007/09/27/opinion/27thur2.html?_r=1&ref=opinion&oref=slogin

⁷ Current Housing Unit Damage Estimates, February 12, 2006, FEMA and HUD.

⁸ Mississippi Development Authority Homeowner Assistance Program Partial Action Plan. September 11, 1006. p. 3.

⁹ Department of Defense Appropriations Act, 109 Public Law 148, 119 Stat. at 2780.

¹⁰ Mississippi Federal Disaster Recovery Grant Reporting Summary for Quarter ending March 31, 2010. p. 1.

¹¹ Mississippi Federal Disaster Recovery Grant Reporting for Quarter ending March 31, 2010. p. 17.

report on housing challenges with a map of clusters of unmet need for housing repair in predominantly African American communities in Gulfport and Moss Point.¹²

Figure 1: Clusters of Wind Damaged Households in Non-White Populations



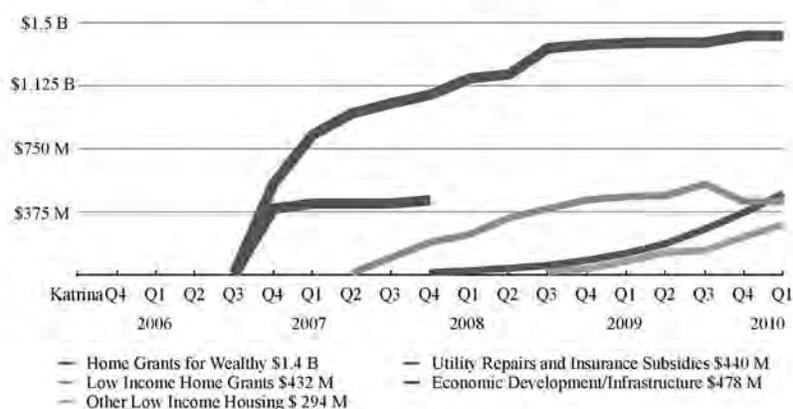
Source: GCCDS Maps derived from HRC data. See MCJ Report, pp. 4, 19.

From this information, it is estimated that, five years after Hurricane Katrina struck, there are twice as many non-white households in state case management programs with unmet repair needs as white households. This disparity exists uniquely in Mississippi which, alone among the Katrina-damaged states, chose to deny housing grant assistance to those with hurricane wind damage.

¹² "Hurricane Katrina: How Will Mississippi Turn the Corner?" Mississippi Center for Justice, July 29, 2010, p. 4; Appendix, Figure 2.

Mississippi's decision to spend less, later, and more slowly on rental housing meant that permanent rental housing solutions for displaced low-income renters, public housing tenants and former occupants of small rental housing were delayed for more than three years, even as close to \$2 billion was spent on homeowners and business interests, including utility repairs and insurance subsidies. See Figure 2.

Figure 2: Disparity and Delay in Spending



Source: Mississippi Disaster Recovery Grant Reports 2006-2010

African Americans in south Mississippi were twice as likely to be renters as whites, according to the 2000 census¹³ and had over twice as high a percentage of persons in poverty as whites.¹⁴ Taken together, lower-income renters, including public housing tenants were significantly more likely to be non-white than white in south Mississippi, and were disproportionately adversely affected by the three-year delays in restoring low-income and subsidized rental housing.

The 2000 Census population for persons with disabilities is 76,650 in the three coastal counties. In addition to being the state with the greatest poverty rate in the nation, Mississippi

¹³ U.S. Census 2000, H11A, B, Total Population in Occupied Housing Units By Tenure. For whites, the owner/renter ratio is 76% to 23%, while for blacks it is 51% to 49%.

¹⁴ U.S. Census 2000 P 159A, B, Census Summary File SF 3, Poverty Status in 1999 by Age. For whites the percentage in poverty was 10.3 percent, while for African Americans it was 27 percent.

has the largest per capita population of people with disabilities, the majority of whose incomes fall below the 80% area median income (AMI) category. Persons with disabilities tend to have less income because many are on fixed income, but most also have substantial disability-related expenses not borne by the non-disabled population on fixed income.¹⁵ These populations likewise were disproportionately adversely affected by the long delay in restoring low income and subsidized rental housing.

DIVERSION OF HOUSING RESOURCES TO OTHER USES USING INFLATED HOUSING PROGRAM FORECASTS

Two years after Katrina, despite Governor Barbour's assurance that replacement of housing would be the number one priority, Mississippi proposed to shift \$600 million out of its housing assistance program to fund a non-Katrina related expansion of the a state-owned port in Gulfport, Mississippi. Notably, this Port was worth only \$125 million at the time of the storm. It was insured for \$108 million, and had additional funds available from FEMA to cover uninsured losses. After this announcement, public pressure increased for the State to explain how much damage Mississippi's housing had experienced and how much housing would be rebuilt under the existing disaster programs.¹⁶ Before this could be resolved, Mississippi diverted another \$200 million in housing funds to Hancock County economic development and community revitalization.¹⁷

On January 25, 2008, Mississippi received approval from HUD Secretary Alphonso Jackson for the proposed diversion.¹⁸ Secretary Jackson took the unusual step of personally writing Governor Barbour about the approval to explain that he had "little discretion" in the matter, and to voice concerns that "this expansion does indeed divert emergency federal funding from other, more pressing recovery needs, most notably affordable housing."¹⁹

In testimony before the House Financial Services Committee on March 11, 2008, Secretary Jackson explained his position, stating "I don't think that everything has been provided to low and moderate income people that should be provided for housing or infrastructure, ... but

¹⁵ Statistical analysis supplied by Mississippi Coalition for Citizens With Disabilities and Living Independently For Everyone, two Mississippi non-profit disability rights organizations.

¹⁶ Editorial, Biloxi Sun Herald. "We Need Housing Numbers We Can Crunch With Confidence," December 19, 2007, p C-4.

¹⁷ MDA Hancock County Ground Zero Action Plan.

¹⁸ Mike Stuckey, "Feds OK Mississippi's Katrina Grant Diversion," January 25, 2008, <http://today.msnbc.msn.com/id/22805282/>

¹⁹ Letter from HUD Secretary Alphonso Jackson to Mississippi Governor Haley Barbour, January 25, 2008, attached as Exhibit "O."

had I had my druthers, I probably would have said, 'Sir, I don't think we should be using this money and I would not approve it, but I didn't have that kind of authority.'"²⁰

In May 2008, Rep. Maxine Waters chaired an oversight hearing on disaster CDBG spending in the House Financial Services Subcommittee on Housing. At that hearing, Jack Norris, Mississippi Office of Recovery and Renewal, justified the diversion of housing funds on the basis that existing housing programs would produce more housing than the Mississippi coast had before Katrina. He also announced that the state was commissioning a study of housing damage and recovery.²¹ The study, known as the Mississippi Housing Data Project, was carried out jointly by the Compass Group, a Washington, D.C.-based research organization and South Mississippi Planning and Development District.²² The MDA's 2008 forecasts to Congress for the affordable housing categories shown in Table 1 are more than double those of the MHDP. In other words, Mississippi overstated to Congress by over 15,700, or a factor of 2 how many housing units would be produced in aggregate by the state's programs.²³

Table 1 : State Inflated Affordable Housing Production

	MDA 2008	MHDP	MHDP-MDA	%
small rental	7,500	4,181	-3,319	179%
LTWF housing	12,850	2,041	-10,809	630%
LIHTC*	5,283	3,775	-1,508	140%
public housing	3,200	3,077	-123	104%
total	28,833	13,074	-15,759	221%

Source: Norris testimony, p. 3; MHDP December 2009, pp. 5, 11, 20, 49. *Note: MHDP's total of 5,059 LIHTC has been reduced by 1,284 units to eliminate double counting of public housing units partially financed by LIHTC. See MCJ Five Year Report, Appendix, Table 6.

This overstatement has direct adverse consequences for the protected populations still in need of permanent, decent, safe and affordable housing. The lowered housing production means fewer choices for these populations. It makes Mississippi's ability to deliver on the remaining housing programs all the more critical. Unfortunately, three of the state's key affordable housing programs are currently more than 2,500 housing units behind what MDHP forecast only six

²⁰ House Financial Services Committee, Oversight Hearing of the Department of Housing and Urban Development, March 11, 2008, examination by Rep. Capuano. http://www.house.gov/apps/list/hearing/financialsvcs_dem/ht031108.shtml

²¹ Testimony of Jack Norris, House Financial Services Subcommittee on Housing and Community Opportunity hearing, May 20, 2008, pp. 3-6. [http://financialservices.house.gov/hearing110/norris_-_ms_\(complete\).pdf](http://financialservices.house.gov/hearing110/norris_-_ms_(complete).pdf) A table with these predictions appears the Appendix to the MCJ Five Year housing report.

²² For the MHDP reports, see: <http://smpdd.com/data-center/mississippi-housing-data-project.html>

²³ See MCJ Five Year Report, pp. 10-11, Table 1.

months ago.²⁴ To meet its 2011 goal, the State's programs must produce over 5,200 more units in the next twelve months, which would be far higher than what the same programs produced in the past 21 months.²⁵

All told, well more than five thousand households continue to have unmet disaster housing needs of one type or another, using conservative estimates.²⁶ A significant portion of these families will not have their housing needs met, regardless of the programs that currently are behind schedule, because of Mississippi's diversion of homeowner assistance grant funds into non-Katrina port expansion. These households want their existing home repaired - they do not need what Mississippi's programs offer: a voucher, a cottage, or a new mortgage. This is particularly true for the clusters of unrepaired homeowners in predominantly African American neighborhoods in Gulfport and Moss Point, and similar communities. To solve this problem, Mississippi needs to redirect funds that were diverted into business development projects (many of which had alternative recovery and financing resources), back into finishing this homeowner population's recovery.

Mississippi Center for Justice and the Lawyers' Committee brought a legal challenge of HUD's decision to authorize the diversion of housing funds to Mississippi's non-Katrina related port expansion in December 2008. In January 2010, the District Court for the District of Columbia dismissed the action on threshold standing grounds, and it has been appealed to the Court of Appeals for the District of Columbia Circuit. In the order, Judge Robertson acknowledged that the Plaintiff's claims about the diversion may have merit as a matter of public policy.

"NIMBY"-ISM AND AFFIRMATIVELY FURTHERING FAIR HOUSING

Mississippi pinned significant hopes for recovery and expansion of the subsidized and public rental housing market upon the ability of developers to construct apartment complexes using low income housing tax credits. In fact the state forecast that over 5,200 tax credit financed rental units would be constructed. As of mid 2010, the actual number was 1,500 below predictions. While some developers who rebuilt on existing locations encountered no zoning or planning opposition, there arose a consistent pattern of opposition to subsidized rental housing in new locations, particularly in majority white areas, from local elected officials and neighborhood residents. In Gulfport, Mississippi, a succession of eight or more subsidized apartment complexes became entangled in controversy beginning in late 2007, and the Mississippi Center for Justice, working with the Lawyers' Committee presented public and private arguments in support of the permitting of these units. While some developers withdrew in face of strong

²⁴ See MCJ Five Year Report, p. 11, Table 2.

²⁵ *Id.* pp. 11-12, Table 3.

²⁶ When one includes closed files and persons who have fallen outside the case management system, the number could be more than 6,000. These estimates are based on interviews with housing resource center representatives, housing advocates, and independent research conducted by MCJ.

opposition, others challenged arbitrary denial of zoning and building permission, including Sandstone and Hillside Terrace. Public education efforts to overcome this NIMBYism, such as the “Warm Welcome Gulf Coast” campaign undertaken by Back Bay Mission, met with very limited success.

Housing activities that produce more racially integrated residential areas, for example, the construction of subsidized housing in areas outside existing segregated residential housing patterns, are one way to fulfill the Fair Housing Act’s requirement to affirmatively further fair housing. The “affirmatively furthering” mandate was one of the non-waivable requirements attached to Mississippi’s disaster CDBG appropriations. Unfortunately, despite Mississippi’s having made available federal disaster block grant funds to help complete tax credit developments, and despite the receipt by many local governments, including the city of Gulfport of disaster block grant down payment grants for homeowners, neither the State nor local governments met the letter or the spirit of the law when it came to permitting new construction of subsidized rentals. Instead, the State disclaimed any authority over local land use decisions, and local governments put up a succession of false claims about rental housing gluts, diminishment of adjacent property values, flooding and traffic problems, and a variety of other pretextual arguments. These problems reached a crisis for a developer working for Mississippi Regional Housing Authority VIII, Realtex, and the housing authority and the City of Gulfport entered into negotiations to enable some of the projects to be permitted after requests for investigation were made to HUD’s Fair Housing unit. In other jurisdictions, such as Waveland and Bay St. Louis, Mississippi Center for Justice challenged moratoria on new multifamily rentals, and persuaded local officials to let these moratoria expire without renewal. On balance, however, too little progress has occurred to desegregate south Mississippi using affordable rental housing.

Across coastal Mississippi, hundreds of households are currently housed in small, strong, modular shotgun houses, known as Mississippi cottages. These cottages were initially intended as a healthier and sturdier alternative form of temporary housing to the FEMA cottage, and were funded under a competitively awarded pilot program administered by FEMA. Local jurisdictions permitted these cottages to be placed on residential lots on a temporary basis. As the time for the cottage program drew to a close, Mississippi Emergency Management Agency (MEMA) decided to offer the cottages to current occupants and to eligible non-occupants on a sliding scale price. Local jurisdictions reacted negatively and enacted a series of exclusionary ordinances with difficult or impossible to meet requirements, intended to force the cottages out of their municipalities. The City of Gulfport, for example, enacted an ordinance that gave absolute veto power over the permanent placement of a cottage to anyone within 160 feet of the applicant. Mississippi Center for Justice obtained records of these objections through public records laws and documented that a number of applicants were vetoed by people more than 160 feet from the applicant’s residence, while others were turned down based upon prejudices against persons of lower-economic status, a common pretext used instead of racial discrimination. MCJ requested that HUD investigate alleged fair housing act violations by several jurisdictions and, as of this writing, foresees a successful conciliation in one city, while others were dismissed on

threshold grounds, including standing. Currently, hundreds of cottages sit idle in staging areas, with MEMA planning auctions of so-called surplus supplies, when the reality is that each of these cottages could serve as a safe and affordable housing option for south Mississippians in need, if local governments would remove discriminatory cottage restrictions.

HUD “STEPS UP” IN TEXAS

While Mississippi and Louisiana housing advocates struggled with the current HUD administration over a series of inherited problems with varying degrees of success, the agency made an important and laudable early intervention in Texas to assure that the Fair Housing Act values were built into the Hurricane Ike recovery plans. Texas Governor Perry submitted a disaster block grant action plan that would have delegated the program design to a council of local and regional governments in such a way as to sharply reduce recovery resources for the areas of greatest housing damage. Housing advocates in Texas raised challenges to the proposal and HUD, perhaps for the first time in its history, rejected outright a state’s disaster block grant housing program.

HUD cited as one area of concern Texas’s reliance upon an out-of-date analysis of impediments to fair housing that did not take into account the impediments spawned by the destruction of public and subsidized housing in coastal Texas communities. In the aftermath of widespread destruction of communities, and displacement and dispersal of populations, federal, state and local governments confront the question of whether to rebuild the pre-disaster pattern of residential housing, which frequently reflect the legacy of *de jure* racial discrimination, or to affirmatively move communities towards greater residential racial integration. HUD’s insistence upon a post-disaster analysis of impediments to fair housing was an important demand for Texas to deeply reassess its position and its obligations to increase housing opportunity for protected classes.

Another area of HUD concern was the risk that Texas’s proposed action plan would stray too far from core disaster recovery functions, including restoration of public and affordable housing and from the requirement to assist persons of low and moderate income. In settlement of an ensuing complaint by housing advocates against Texas under the Fair Housing Act, the State committed in a conciliation agreement to spend at least 55 percent of the funds on housing, and to spend at least 55 percent of the funds to benefit low and moderate income persons.²⁷ These and other vital protections were properly praised in the national media. A New York Times editorial concluded, “Thanks to tough bargaining by Secretary Donovan, hundreds of millions of dollars will be spent as Congress intended and fairness requires: helping to rebuild devastated communities and helping the most vulnerable residents rebuild their lives.”²⁸

²⁷ Texas Low Income Housing Information Service v. State of Texas, Case No. 06-10-0410-8 (Title VIII) -9 (Section 109) Conciliation Agreement, pp. 12-13.

²⁸ See “HUD Steps Up in Texas,” New York Times Editorial, June 13, 2010, <http://www.nytimes.com/2010/06/14/opinion/14mon3.html>

This deeper commitment to take affirmative steps to increase residential racial integration was missing at the early, critical stages of HUD's involvement in Mississippi and Louisiana's recovery from Hurricane Katrina. To pick one example, HUD's earlier approval of Mississippi's excessive requests for waivers of the low-moderate income requirement resulted in fewer block grant dollars being committed to restore critically needed housing for protected residents who are also predominantly of low and moderate income. Another example is Mississippi's failure to track race data on its first, largest, and most generous homeowner assistance program. Mississippi treated the requirement as optional and HUD did not insist that Mississippi do more.²⁹ As a result, HUD and other branches of the federal government lost the opportunity to determine if Mississippi's housing assistance programs were carried out in ways not only that did not discriminate, but also affirmatively advanced the goals of fair housing.

RECOMMENDATIONS

Mississippi Center for Justice joins in the recommendations previously put forward in the testimony of Barbara Armwine, Executive Director of the Lawyers' Committee for Civil Rights Under Law. These recommendations include:

- endorsement of the interpretation of Section 804(b) claims of post-acquisition discrimination under *Block v. Frischolz*; and *CCCI v. Modesto*;
- increased commitment of HUD to enforcement of Section 808 of the Fair Housing Act, as demonstrated in the *Westchester County* case, and to use the threat to cut off federal funds to coerce uncooperative local jurisdictions into compliance with the Fair Housing Act, as was done in the *St. Bernard Parish* litigation;
- more detailed and substantive guidance to recipients of federal housing assistance on the requirements to affirmatively further fair housing under the Fair Housing Act;
- enactment of an express private right of action and an administrative procedure to authorize private party claims based on Section 3608 against state and local entities for violation of the Fair Housing Act; and
- a systematic examination of the need for an amendment to the Fair Housing Act to prohibit discrimination based upon source of income.

²⁹ See 71 Federal Register 7666, at 7670. *Recordkeeping* "For fair housing and equal opportunity purposes, and as applicable, such records shall include data on the racial, ethnic, and gender characteristics of persons who are applicants for, participants in, or beneficiaries of the program." MCJ requested public records on these data and were told that MDA understood that HUD did not require record keeping on racial and ethnic characteristics, and so MDA failed to require applicants to report race and ethnicity. See transcript pp. 46-47 and letter from Mehissa Medley to Reilly Morse, September 6, 2007, attached as Exhibit "H" to Morse testimony to House Financial Services Subcommittee on Housing hearing on May 8, 2008, "Emergency CDBG Funds in the Gulf Coast: Uses, Challenges and Lessons for the Future."

Thank you for the opportunity to testify.

Respectfully Yours,



Reilly Morse
Co-Director of Housing Policy
Mississippi Center for Justice
974 Division Street
Biloxi, MS 39530
228-435-7284
rmorse@mscenterforjustice.org

Mr. NADLER. Thank you. We will now hear from Professor Seicshnaydre.

TESTIMONY OF STACY E. SEICSHNAYDRE, WILLIAM K. CHRISTOVICH ASSOCIATE PROFESSOR OF LAW, TULANE LAW SCHOOL, NEW ORLEANS, LA

Ms. SEICSHNAYDRE. Thank you, Mr. Chairman.

As a native New Orleanian and someone who teaches and practices Fair Housing around New Orleans, I have had an opportunity to study post-Katrina recovery through a fair housing lens. I have been working on a paper, a work in progress, that I have excerpted for the Committee, and I would like to spend a few moments now highlighting in my remarks the challenges we've faced in the rebuilding process and rebuilding a more inclusive New Orleans.

New Orleans is certainly unique in its challenges, but I believe in studying this issue that New Orleans can illustrate the dynamic in which federally assisted housing programs operate everywhere and the way we seem destined to repeat and build on racial segregation in federally assisted housing programs in the absence of a more robust commitment to affirmatively furthering fair housing.

In looking at New Orleans pre-Katrina, it was clear that we exceeded the poverty concentration averages when compared with the top 50 MSAs nationally. We had extremely high—

Mr. NADLER. You mean the Metropolitan Statistical Area?

Ms. SEICSHNAYDRE. Yes. Yes, sir.

So when you look at New Orleans in comparison to the larger cities in the country, our levels of poverty concentration, segregation were higher. And in the 1990's, whereas other communities were experiencing improvements with respect to racial segregation, New Orleans was becoming more segregated.

I think one of the most compelling statistics is when you compare low-income Whites with low-income African Americans and consider, what are the comparative housing choices between those two groups? What you can find when looking at pre-Katrina 2000 Census numbers is that, whereas African Americans are overwhelmingly concentrated in high-poverty neighborhoods, low-income Whites have access in overwhelming numbers to middle-class neighborhoods throughout the metropolitan area of New Orleans.

So the question of whether Whites and African Americans had equal housing choice pre-Katrina is certainly answered in the negative.

So, Katrina, of course, provided an opportunity to undo these patterns of racial and economic concentration and segregation in our housing and create a more inclusive New Orleans with a more regional approach to meeting the housing needs of families of all incomes. And the reason we had this opportunity was that our housing was destroyed, over 200,000 units were destroyed, and we had a massive infusion of Federal dollars coming into our community to help us rebuild.

So did we embrace this opportunity to approach the rebuilding effort from a more regional perspective and a more conclusive perspective? Unfortunately not. And what we see is sort of some enduring fears, customs and market dynamics, as well as government failures that have operated to facilitate exclusion. And unless we understand these dynamics, we appear poised to repeat our past failures.

What are these dynamics? We've seen a proliferation of rental bans, and these have been alluded to by earlier testimony. We have rental bans appearing throughout the metro area. We also have seen—and I think even more disturbingly, we've seen that communities that had disproportionately fewer rental units before the

storm have taken steps to eliminate rental units that pre-existed the storm. So rather than using Katrina as an opportunity to correct historic imbalances of rental versus homeownership units, we're seeing communities take steps to exacerbate or intensify the imbalance.

The other thing that we've seen is that communities that might be considered the second-rung communities on the housing ladder, the places where we're seeing some level of affordability and some level of integration, these tend to be the first places where federally assisted housing is proposed. Now St. Bernard Parish is a huge exception, because that community has remained racially segregated, even though it might have some greater levels of affordability. But we've seen that instead of using Federal resources to make communities more open, more affordable, we're seeing the resources sort of follow a path of least resistance and go to the communities that already have some level of affordability and already have some level of integration.

So, in conclusion, I think New Orleans can help illustrate what the enduring forces of segregation are and how we need to better understand them and resist them, not only in New Orleans but nationally. And in order to do this, we need to use the affirmatively furthering provision of the Fair Housing Act. We need to define it. We need to make it enforceable by private parties. And HUD needs to use the affirmatively furthering provision to ensure that it is doing more than just providing a subsidy, that it's actually opening neighborhoods not already open, making affordable what's not already affordable, enabling housing subsidies to act as gateways to educational and employment opportunity, inform families historically excluded from housing markets about their choices. Any Federal housing interventions that are not so aimed will almost certainly exacerbate existing racial segregation and poverty concentration. Thank you.

[The prepared statement of Ms. Seicshnaydre follows:]

PREPARED STATEMENT OF STACY E. SEICSHNAYDRE

Written Statement of

Stacy E. Seicshnaydre
William K. Christovich Associate Professor of Law
Tulane Law School
New Orleans, Louisiana

Prepared for the Subcommittee on the Constitution, Civil Rights and
Civil Liberties
Congress of the United States, House of Representatives
Committee on the Judiciary

American Dream Part III: Advancing and Improving the
Fair Housing Act
on the 5-year Anniversary of Hurricane Katrina

Thursday, July 29, 2010
2 p.m.

Stacy E. Seichsnaydre
William K. Christovich Associate Professor of Law
Tulane Law School

The following statement is excerpted from a work-in-progress, in draft form, entitled:

Postcards from Post-Katrina New Orleans: Why government assisted housing seems destined to perpetuate racial segregation and what can be done about it?

Introduction

Consideration of the housing landscape in New Orleans following Katrina can provide an illustration of the dynamic in which federally assisted housing programs operate, the exclusionary tendencies of residential communities, and the way in which market forces and government subsidies operate together to perpetuate racial residential segregation.

Although laws prohibiting segregation and discrimination in the nation's housing programs are well-established, racial segregation persists in these programs. African Americans participating in federally assisted housing programs in New Orleans pre-Katrina experienced even higher levels of poverty concentration than the national average. Even more troubling is the fact that low income African Americans before Katrina had far less access to middle income neighborhoods throughout the New Orleans metro area when compared with low income whites.

Given that federally assisted housing programs in New Orleans have operated as engines of segregation and poverty concentration, rather than as gateways of opportunity for low income African Americans, Hurricane Katrina offered an opportunity for a new, more inclusive New Orleans where new federally assisted housing could respond to the regional housing needs of the community. However, as Orleans Parish attempted to reverse a dynamic where a majority of its occupants were renters with the second highest level of poverty concentration in the country, neighboring jurisdictions acted aggressively to avoid any demographic shifts that new rental housing, particularly new federally assisted rental housing, might bring. Rental bans proliferated throughout the region, primarily in communities that had previously served as affordable suburban alternatives for lower and middle income whites in prior decades. These communities sought not only to prevent the development of new rental housing, but to limit the repair of rental housing that pre-existed the storm. On closer examination, it appears that metro New Orleans communities that are least affordable, most homogeneous, and nationally recognized as desirable places to live have not passed sweeping rental bans, perhaps because no federally assisted housing has been proposed for these communities.

Given the extreme challenges and opportunities presented by the post-Katrina rebuilding experience in New Orleans, what can the first five years after Katrina teach us about affirmatively furthering fair housing?

The Law Prohibiting Segregation in Government-Assisted Housing Programs is Well-Established, and Yet . . .

The idea that public housing in the United States was created pursuant to a policy of racial segregation is not particularly controversial. In fact, government agencies, both federal and local, served in a leadership role in formalizing racially segregated housing patterns throughout the nation. In New Orleans, “the creation of racially segregated New Deal public housing developments was the first implementation of legally enforced residential segregation in the city.”¹

In the civil rights era, communities began to challenge government-sponsored segregation in federally assisted housing. As early as 1969, courts pronounced it unconstitutional to select sites for federally assisted housing developments on the basis of race.² Similarly, the U.S. Department of Housing and Urban Development, began in the late 1960s to issue rules and regulations prohibiting the concentration of new federally assisted housing exclusively in African American neighborhoods.³ As observed by one advocate, the idea that HUD “should no longer be permitted to routinely build new low-income housing in segregated, high-poverty neighborhoods” is a point “won” by civil rights advocates decades ago.⁴

HUD as the principal federal agency providing financial backing to local housing authorities, municipal governments, and private property owners need not be the central architect of discrimination to be held accountable. HUD has been found liable when it has done nothing to change a grantee’s operation in the face of “blatant segregation and an admitted determination to intentionally discriminate.”⁵ While awareness on HUD’s part is important in establishing its

¹ Elizabeth Fussell, *Constructing New Orleans, Constructing Race: A Population History of New Orleans*, JOURNAL OF AMERICAN HISTORY 94 (Dec. 2007), 846-55.

² See *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907, 913 (N.D. Ill. 1969) (the plaintiffs in this case also alleged discrimination in the assignment of tenants on the basis of race).

³ See *Young*, 628 F. Supp. at 1045-47 (discussing HUD’s site selection and marketing rules and regulations issued in 1967, 1972, and 1977 for a variety of federally assisted housing programs). *But see id.* at 1048 (discussing discriminatory implementation of site and neighborhood standards such that all Section 8 new construction units were built in white neighborhoods with no affirmative marketing programs providing access to persons of color).

⁴ Philip D. Tegeler, *The Persistence of Segregation in Government Housing Programs*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 197 (Xavier de Souza Briggs ed., 2005).

⁵ *Clients’ Council v. Pierce*, 711 F.2d 1406, 1422 (8th Cir. 1983) (HUD provided over \$1,475,528 in funds to the Texarkana Housing Authority [THA] despite its findings spanning a decade of THA noncompliance with civil rights laws). See also *Garrett v. City of Hamtramck*, 503 F.2d 1236, 1247 (6th Cir. 1974) (“By failing to halt a city program [after it knew] discrimination in housing was being practiced and encouraged, HUD perpetuated segregation in public housing and participated in denial to the plaintiffs of their constitutional rights.”); *Young*, 628 F. Supp. at 1056 (“HUD’s intent to discriminate is established by the combination of HUD’s disingenuous assertions

liability for the discrimination and segregation being practiced by local housing agencies, courts have rejected HUD's claims of ignorance of widespread segregation in the programs it funds.⁶ As stated by Judge Justice in *Young v. Pierce*, "HUD does have a duty to know if it is funding discrimination."⁷

Nor is it necessary for a government agency to act with actual malice to be accountable for perpetuating segregation.⁸ A decision to continue funding programs and entities that perpetuate segregation is not likely to be accompanied by an intention to humiliate or cause others to suffer. Such decisions will more likely be made because of a kind of capitulation to the inevitability of segregation. The notion that segregation is inevitable makes it somehow acceptable. And yet, courts have inferred discriminatory purpose in such instances:⁹ "It is inconceivable that HUD would have so frequently acted to approve the [housing authority's] actions for so long unless its officials held the view that segregation and discrimination were acceptable."¹⁰

HUD's obligation extends beyond the prohibition on discrimination and also encompasses an affirmative duty to further fair housing in the programs it funds. For example, "Congress imposed on HUD a substantive obligation to promote racial and economic integration in administering the section 8 program."¹¹ Further, "[a]s part of HUD's duty under the Fair Housing Act, an approved housing project must not be located in an area of undue minority concentration, which would have the effect of perpetuating racial segregation."¹²

of ignorance, its actual knowledge of segregation, and its continuing financial support of each public housing site in the [36 East Texas] counties.").

⁶ *Young*, 628 F. Supp. at 1056-57 ("HUD has a duty to know how its money is spent, and in fact has known that it is supporting segregated housing in East Texas. Notwithstanding, it has continued to actively support the system in perhaps the most effective possible way-by paying for it, HUD has thus played a crucial and continuing role in creating and maintaining a large system of publicly funded segregated housing."); *Garrett*, 503 F.2d at 1246 ("The record supports a finding that HUD must have known of the discriminatory practices which pervaded the private housing market and the indications of overt prejudice among some of the persons involved in carrying out the urban renewal projects of the City.").

⁷ *Young*, 628 F. Supp. at 1044.

⁸ *Gautreaux*, 296 F. Supp. at 914 ("there is no evidence that the Aldermen who vetoed White sites were necessarily motivated by racial animus when they followed a policy of keeping Negroes out of White neighborhoods."); *Clients' Council*, 711 F.2d at 1423 ("We do not suggest that HUD officials were motivated by malice, but we do believe that this record compels a conclusion that they acted at least in part because of a discriminatory purpose.").

⁹ *Clients' Council*, 711 F.2d at 1423 ("the only reasonable inference that can be drawn is that HUD's actions[continued funding of a housing authority it cited for discrimination] were motivated at least in part by a discriminatory purpose.").

¹⁰ *Clients' Council*, 711 F.2d at 1423.

¹¹ *Alschuler v. Dep't of Hous. and Urban Dev.*, 686 F.2d 472, 482 (7th Cir. 1982) (citing 42 U.S.C. §§ 1437f(a) & 3608(d)(5)).

¹² *Id.* at 482 (citing *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973); *Shannon v. U.S. Dept. of Hous. and Urban Dev.*, 436 F.2d 809, 820 (3rd Cir. 1970)).

Reversing Entrenched Patterns of Racial Segregation in Federally-Assisted Housing Programs has been Difficult...

Despite the well-established pronouncements against discrimination and segregation in the nation's housing programs, reversing patterns of racial segregation in federally assisted housing has proven difficult.¹³ The persistent and seemingly intractable segregation in the nation's housing programs is demonstrated by a 2008 HUD study entitled "Characteristics of HUD-Assisted Renters and Their Units in 2003."¹⁴ The study is based on census data collected in 2003 through the American Housing Survey (AHS) and matched with HUD rental assistance data.¹⁵ According to Julian and Daniel, who have analyzed the data, "poor Black renters, as a result of accepting HUD rental assistance, will be subjected to worse conditions or more segregated conditions, or both, compared to similarly situated Whites using HUD assistance," and compared to similarly situated poor Black renters not using any HUD assistance at all.¹⁶ Thus, not only are African Americans worse off than their white counterparts in federally assisted housing programs, but African Americans who participate in federally assisted housing programs seem to be worse off than those who do not. After pointing out the constitutional and statutory prohibitions against providing housing on such unequal terms, Julian and Daniel note that "much of the debate about national housing policy for the poor goes on as if these conditions did not exist, do not exist, and that the nation does not know about it."¹⁷

There are multiple possible explanations for the persistence of segregation in the nation's housing programs. Among them is the fact that programs creating significant amounts of housing, such as the federal Low-Income Housing Tax Credit (LIHTC) program, "are largely unregulated from a civil rights perspective."¹⁸

¹³ Patterns of racial segregation in public housing, once established, have persisted in the post-civil rights area. See *Young*, 628 F. Supp. at 1043-44 ("The information produced by HUD [in the early 1980s] indicates that the public housing sites it funds are segregated by race. Blacks live in one set of public housing sites, whites in another."). See also *id.* at 1045-47 (discussing twenty-year failure of federal housing agencies to reverse patterns of racial segregation in the federally assisted housing it funded following the end of de jure segregation).

¹⁴ U.S. DEP'T OF HOUS. AND URBAN DEV., CHARACTERISTICS OF HUD-ASSISTED RENTERS AND THEIR UNITS IN 2003 (2008), available at http://www.huduser.org/portal/publications/pubassst/hud_assi_rent.html.

¹⁵ *Id.* at 4-5. See also Elizabeth Julian & Michael M. Daniel, *HUD-Assisted Low-Income Housing: Is It Working and for Whom?* POVERTY & RACE, July/August 2009, at 3 (noting that "the information includes demographic data for hundreds of units, projects and neighborhood conditions for individuals living in HUD-assisted housing and those eligible for, but not receiving, such assistance.").

¹⁶ Julian & Daniel, *supra* note xx, at 6-7. In segregated housing developments historically, units that were occupied by African Americans were frequently inferior, suffering from a lack of maintenance and/or inferior construction methods. See *Clients' Council*, 711 F.2d at 1419 ("HUD found that black projects suffered from neglect 'in spite of constant and numerous complaints resulting from faulty original construction,' and there was 'no evidence' that needed repairs would be made.").

¹⁷ Julian & Daniel, at 7.

¹⁸ Tegeler, at 198 (discussing lack of anti-segregation controls as well in the HOPE VI public housing redevelopment program, low-income housing financed through incentives in the Community Reinvestment Act, and the Housing Opportunities Made Equal (HOME) program for housing rehabilitation).

Especially in New Orleans . . .

Prior to Katrina, New Orleans not only mimicked the national pattern of government assisted housing programs serving as engines of poverty concentration and segregation, but it also exceeded the national averages for such poverty concentration. Families participating in federally assisted housing programs in the New Orleans area were living in poorer neighborhoods, on average, than their counterparts in the nation's largest metropolitan areas.

Vouchers: The Housing Choice Voucher Program (HCV) is currently the largest rental assistance program administered by HUD.¹⁹ According to a HUD study of housing voucher use released in 2003, New Orleans had twice the percentage of voucher families living in neighborhoods with poverty concentrations above 30 percent (46.9%), compared with voucher families in the top 50 MSAs (22%).²⁰ Although New Orleans follows the national pattern of a higher level of poverty concentration for voucher use in central city neighborhoods compared with suburban ones, the level of concentration is much higher in both the central city of New Orleans as well as its suburbs. For example, in central city neighborhoods in the top 50 MSAs, 33.6% of voucher users live in neighborhoods above 30% poverty concentration, compared with over half, or 51.8%, for the central city of New Orleans.²¹ On the other hand, while only 6.1% of voucher users in the suburban neighborhoods of the top 50 MSAs live in neighborhoods above 30% poverty concentration, a startling 40.4% of voucher users in the suburbs of New Orleans live in these high poverty neighborhoods.²²

Consistent with national averages, families of color using the voucher program in the Greater New Orleans area were more concentrated in high poverty neighborhoods than their white counterparts. The starkest example of this phenomenon may be seen with respect to families living in neighborhoods with greater than 40 percent poverty concentration. Only 1.8% of white families using vouchers in the New Orleans MSA lived in such extreme poverty concentration, compared with 21.3% of African American households using vouchers.²³ When compared with

¹⁹ U.S. DEP'T OF HOUS. AND URBAN DEV., HOUSING CHOICE VOUCHER LOCATION PATTERNS: IMPLICATIONS FOR PARTICIPANT AND NEIGHBORHOOD WELFARE, at x (January 2003). The Housing Choice Voucher Program (HCV) is the current tenant-based housing subsidy program run by HUD; it was created in 1998, but evolved from a variety of other tenant-based assistance programs starting in 1975. *Id.* at iv (Foreward). The HCV program allows participants to use their subsidy for housing they have searched for and found in the private market. *Id.* at vii.

²⁰ U.S. DEP'T OF HOUS. AND URBAN DEV., *supra* note x at 33 and Table III-9 [hereinafter "HUD VOUCHER LOCATION PATTERNS REPORT"]. See *id.* at 26 (discussing poverty concentration levels and noting that "[f]amilies and neighborhoods are assumed to be negatively affected when poverty concentrations reach [levels of 30% and above]."). The 2003 HUD Voucher Location Patterns Report relies on then-current characteristics of voucher holders, but neighborhood characteristics derived from the 1990 census. *Id.* at 3. The use of the term "neighborhood" denotes the boundaries of census tracts. *Id.* at 122.

²¹ *Id.* at 27 and Table III-2.

²² *Id.* at 27 and Table III-2.

²³ *Id.* at 28 and Table III-5. Notably, African Americans (non-Hispanic) made up the vast majority, or 93.2%, of the 7864 total voucher users (7864) in the New Orleans MSA at the time of this study, with whites representing only 5.5% of total voucher users. *Id.* at Appendix B-1.

the top 50 MSAs, white voucher users in the New Orleans metro area were half as likely to experience extreme poverty concentration, whereas African American voucher users in the New Orleans metro area were twice as likely to experience such extreme concentration.²⁴

Public housing and project-based Section 8 subsidies: When considering public housing and project-based Section 8 programs as well as vouchers prior to Katrina, there was greater poverty concentration in the New Orleans metro area, on average, than in the top 50 MSAs. As well, there is increasing concentration when voucher programs are compared with project-based Section 8 programs and public housing, which follows the national trend. For example, whereas 46.9% of voucher users in the New Orleans metro area lived in neighborhoods of over 30% poverty concentration, 78.9% of all project-based Section 8 housing tenants lived in such neighborhoods, and an eye-popping 97.4% of public housing residents lived in such neighborhoods.²⁵ This compares with 22.2% of voucher users, 44.4% of Section 8 project-based tenants, and 66.1% of public housing residents living in over 30% poverty concentration in the nation's top 50 MSAs.²⁶ Stated another way, the average neighborhood poverty rate for public housing residents in 2000 was 74%, nearly double the poverty rate associated with neighborhoods of "extreme poverty."²⁷

LIHTC: Nationally, the Low Income Housing Tax Credit Program (LIHTC) is the nation's largest low-income housing production program,²⁸ and was a principal means of restoring rental housing to the New Orleans area after the 2005 storms. A study examining the neighborhood locations of family LIHTC developments between 1995 and 2001 reveals that in pre-Katrina metro New Orleans, absolutely no tax credit units (with at least two bedrooms) were placed in the lowest poverty census tracts (0-10%), compared with a rate of 41.3% nationally.²⁹ New Orleans was the *only* metro area in the nation's top 50 metro areas to have *no* tax credit units in

²⁴See *id.* In the top 50 MSAs nationally, 3.5% of whites lived in neighborhoods that had concentrations of poverty greater than 40 percent, and 10.6% of African Americans lived in such neighborhoods. *Id.* If voucher users who lived in New Orleans metro neighborhoods with greater than 30 percent poverty concentration are included, the numbers jump to nearly 26% for whites and 47.8 for African Americans. See *id.* at Table III-5.

²⁵*Id.* at Table III-9.

²⁶*Id.* at 31.

²⁷ALAN BERUBE AND BRUCE KATZ, *KATRINA'S WINDOW: CONFRONTING CONCENTRATED POVERTY ACROSS AMERICA* 5 (2005).

²⁸Tegeler, at 201. "The Low Income Housing Tax Credit provides investors in rental housing developments a credit against their federal income tax obligations. State agencies receive an allocation of tax credit each year from the U.S. Treasury, which they in turn allocate to developers of rental housing . . ." JILL KHADDURI, LARRY BURON, & LEN LAM, *LIHTC AND MIXED INCOME HOUSING: ENABLING FAMILIES WITH CHILDREN TO LIVE IN LOW POVERTY NEIGHBORHOODS?* 2 (2004). These developers must reserve a percentage of units for households with incomes ranging from 30 to 60 percent of the area median income. *Id.*

²⁹KHADDURI ET. AL., at 13, 15 (for purposes of this study, 1990 census data was used). This study sought to make comparisons between the locational choices of families with children using housing vouchers and the placement of LIHTC units occupied by families. Because the LIHTC program does not keep data relative to family occupancy, the study uses units of two bedrooms or more as a proxy for family occupancy. See *id.* at 4.

the lowest poverty neighborhoods during this pre-Katrina period.³⁰ Southern cities such as Charlotte (71.5%), Nashville (64.3%), Atlanta (32%), and Houston (26.2%) all managed to place tax credit units in their lowest poverty neighborhoods over the same time frame.³¹

Racial segregation in NOLA generally: who bears the costs? When considering the New Orleans population generally prior to Katrina, Orleans Parish was a portrait of racial segregation. Despite the trend in the 1990s towards decreasing segregation, New Orleans between 1980 and 2000 became more racially segregated, with the average African American resident in 2000 living in a neighborhood where 82% of fellow residents were African American.³² Further, in 2000, African Americans were not settled uniformly across the metropolitan area.³³ For example, while 60.1% of households in Orleans Parish were African American in 2000, only 33.4% of New Orleans MSA households were African American and only 6.1% of all households in St. Bernard Parish were African American.³⁴

What have been the consequences of racial segregation for residents of New Orleans? Are whites and African Americans similarly segregated by income?³⁵ The 2000 U.S. Census data show that low income African Americans are more concentrated in high poverty neighborhoods than any other low income group in the metro area. On the other hand, low income whites have greater access to low poverty, middle income neighborhoods than any other low income group in the metro area.

By 2000, a quarter of New Orleans's neighborhoods (47) were considered to be ones of "extreme poverty," that is, with at least 40 percent of residents there having family incomes below the federal poverty line.³⁶ Low-income African Americans (42.6%) lived in these neighborhoods of extreme poverty in the City of New Orleans at roughly four times the rate of low-income whites (10.9%).³⁷ Twice the percentage of low-income African Americans in the City of New Orleans lived in extreme poverty, compared with African Americans in large U.S. cities nationwide.³⁸ When considering the New Orleans metro area as a whole before Katrina, low-income African

³⁰ *Id.* at 14-15. Six percent of families using vouchers in the New Orleans metro area used them in census tracts with 0-10% poverty. *Id.* at 15.

³¹ *Id.* at 14-15.

³² BERUBE & KATZ, at 3.

³³ Declaration of Dr. Calvin P. Bradford at 6, Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, No. 2:06-CV-07185 (E.D. La. December 15, 2008,) (using 2000 census data).

³⁴ Declaration of Dr. Calvin P. Bradford, at 7 (calculating data from U.S. Census Bureau, Table H14 – Tenure by Race of the Householder, Census 2000 Summary File 1 (SF1) 100 Percent Data).

³⁵ Prior to Katrina, New Orleans can be characterized as largely biracial. See Elizabeth Fussell, *Constructing New Orleans, Constructing Race: A Population History of New Orleans*, 94 JOURNAL OF AMERICAN HISTORY 846-55 (2007) (discussing the assimilation of Latin and Asian immigrants prior to Katrina and noting that "[t]he biracial dynamic of the city was hardly challenged by the small numbers of Latin American migrants—mostly Cubans, Hondurans, Mexicans, and Nicaraguans—that arrived in the city at distinct moments in the mid-twentieth century and the Vietnamese migrants that arrived in the late 1970s.").

³⁶ BERUBE & KATZ, at 3. New Orleans as of 2000 ranked second-highest in the nation for percentage of poor people living in extreme-poverty neighborhoods. *Id.* at 3 & Table 1.

³⁷ *Id.* at Appendix A.

³⁸ *Id.* at 3 (Table 1).

Americans (32%) lived in neighborhoods of extreme poverty at a rate *ten times greater* than that of low-income whites (3%).³⁹

The effects of extreme poverty concentration have been well-documented.⁴⁰ What about neighborhoods of low poverty? How may they be characterized? HUD has defined a low poverty neighborhood as a census tract in which fewer than 10 percent of the residents live in households with incomes below the poverty line.⁴¹ Some commentators have described these neighborhoods as “solidly middle class” with a majority (over 75%) of the residents owning homes and a miniscule number (1.6%) on public assistance.⁴² A healthy majority of Americans in metro areas (58%) lived in low poverty neighborhoods in 2000.⁴³ When considering neighborhoods with 10-20% of residents living in households with incomes below the poverty line, a majority own homes and only 4% receive public assistance.⁴⁴ Twenty-four percent of Americans live in these neighborhoods.⁴⁵ Thus, 82% of the U.S. metropolitan population in 2000 lived in what could be described as middle class neighborhoods.

Low-income whites before Katrina had overwhelmingly greater access to low poverty, middle-income neighborhoods in metro New Orleans than did low income African Americans. Low-income whites (30%) were *fifteen times more likely* than low income African Americans (2%) to live in the lowest poverty neighborhoods of metro New Orleans (less than 10% of people living in below-poverty households).⁴⁶ In Orleans Parish, where 70% of the region’s low-income African Americans live, only 1% lived in the lowest poverty neighborhoods.⁴⁷

Interestingly, low-income whites lived in middle income neighborhoods in metro New Orleans pre-Katrina nearly as often as Americans as a whole across all income groups. When considering middle-income neighborhoods at less than 20% poverty, the vast majority, or 72%, of low income whites in the New Orleans metro area lived in these neighborhoods, compared with only 19% of low income African Americans.⁴⁸

Despite the significant racial disparities in apparent access to middle-income neighborhoods throughout the metro area, low income groups in general seemed to fare better in the New

³⁹2000 U.S. Census Data, compiled with the assistance of the Fair Housing Justice Center, New York, New York.

⁴⁰BERUBE & KATZ, at 5-7 (discussing multiple human costs of concentrated poverty);

⁴¹ KHADDUR ET. AL., at 3 (deriving HUD’s definition from the Moving to Opportunity program).

⁴² *Id.* at 3 (using 2000 census figures).

⁴³ *Id.*

⁴⁴ *Id.* at 3-4.

⁴⁵ *Id.* at 4.

⁴⁶ U.S. CENSUS BUREAU, CENSUS OF POPULATION AND HOUSING (2000) (compiled with the assistance of the Fair Housing Justice Center, New York, New York).

⁴⁷ *Id.*

⁴⁸ *Id.*

Orleans suburbs pre-Katrina than in the City of New Orleans.⁴⁹ For example, in Orleans, only 12% of low-income African Americans lived in middle income neighborhoods below 20% poverty.⁵⁰ On the other hand, in Jefferson Parish, the suburban parish adjacent to Orleans, 33% of low income African Americans lived in neighborhoods of less than 20% poverty.⁵¹ In St. Tammany Parish, across Lake Pontchartrain from Orleans, a majority of low-income African Americans, or 63%, lived in these neighborhoods.⁵² Low income whites in suburban New Orleans had overwhelming access to middle income neighborhoods, with 80% living in neighborhoods below 20% poverty in Jefferson Parish and a whopping 93% of low income whites living in these middle-income neighborhoods in St. Tammany Parish.⁵³

Thus, although low income African Americans before Katrina were more likely to have access to a middle class neighborhood in suburban New Orleans than in Orleans Parish, they had far less access to middle income neighborhoods throughout the metro area when compared with low income whites. Given the concentration of federally assisted housing in high poverty neighborhoods in the New Orleans metro area, which exceeds national averages, it appears that federally assisted housing programs in New Orleans have operated as engines of segregation and poverty concentration, rather than as gateways of opportunity for low income African Americans.

After Katrina, the Infusion of Federal Housing Assistance Offered an Opportunity to Reverse, or at Least not Repeat, Racially Segregated Housing Patterns . . .

In the aftermath of the devastation that cost lives and property across the metropolitan area, Hurricane Katrina did present New Orleans with an opportunity for a “do over” in one respect. New Orleans has for decades battled crushing poverty that has fallen disproportionately on its African American population. This multi-generational poverty has thrived in highly racially segregated neighborhoods beset by low-performing schools, high crime rates, and limited access to healthy neighborhood amenities, i.e. with few tools of opportunity for residents. As in many other communities experiencing persistent patterns of racial residential segregation, federally assisted housing has played a pivotal role. But post-Katrina New Orleans would be presented with an unprecedented level of federal resources that could be put to the task of “undoing”

⁴⁹ Not surprisingly, the percentage of individuals living below the poverty line decreases outside of extreme-poverty neighborhoods in Orleans Parish from 54.6% to 21.6%. KHADDURIE ET AL., *supra*, at 4 (using 2000 census figures). When one considers the metro area outside of Orleans Parish, the rate decreases further to 13.1%. *Id.*

⁵⁰ *Id.*

⁵¹ U.S. CENSUS BUREAU, *supra*.

⁵² *Id.*

⁵³ *Id.*

entrenched patterns of racial residential segregation and the poverty that seems to inevitably accompany segregation.⁵⁴

In the early days of the post-Katrina recovery period, certain plans emerged that suggested that not all of New Orleans should be rebuilt. Property owners in certain low-lying neighborhoods were aghast at the notion that their communities might be designated as “green space” neighborhoods. Presumably, they would be forced to sell their low-lying properties and relocate to higher ground. Neighborhood groups targeted for “green spacing” quickly organized and fended off any suggestion that not every property owner could return and rebuild. Rebuilding ensued in single-family, owner-occupied neighborhoods in a highly de-centralized, unregulated manner, albeit at varying rates and levels in varying places.

The post-Katrina recovery story for multi-family housing is markedly different. While representative governments of low-lying neighborhoods quickly understood that any suggestion of limiting the rebuilding of flood-damaged, single family neighborhoods might constitute political death, the use of a local government’s regulatory power to “greenspace” multi-family housing complexes instead seemed to garner valuable political capital for locally elected officials.⁵⁵

Are Segregation and Poverty Concentration Inevitable in Post-Katrina New Orleans?

As some commentators have stated, “[c]oncentrated poverty is not an inevitable phenomenon.”⁵⁶ And yet, our segregated past, present, and future may be linked by the same enduring fears, policies, and customs. Without a better understanding of our history, we seem destined to repeat it. In the uncertainty of the post-Katrina New Orleans landscape, fear of neighborhood change has been palpable. “You hear people say we don’t want any multifamily because there is a perception that (the buildings) automatically translate to Section 8 tenants, crime or other problems.”⁵⁷

There are two impulses -- pulling in opposition directions – that seem to operate in tandem to perpetuate concentrated poverty and segregation. One impulse is to take whatever affordable

⁵⁴ See ALAN BERUBE & BRUCE KATZ, *KATRINA’S WINDOW: CONFRONTING CONCENTRATED POVERTY ACROSS AMERICA* 2 (2005) (noting that “local and regional leaders will have an unprecedented opportunity to rebuild a New Orleans that is more inclusive, more sustainable, and more economically healthy than its predecessor”).

⁵⁵ See, e.g., Staff Reports, *Complex issue: Kenner apartment ban angers affordable-housing advocates*, NEW ORLEANS CITYBUSINESS, April 12, 2008, available at 2008 WLNR 6953861 (reporting that a multi-family development ban in Kenner would keep a 15-acre demolished apartment complex site “an open grassy field” for at least another year).

⁵⁶ BERUBE & KATZ, at 4.

⁵⁷ Staff Reports, *supra* (quoting Wendell Dufour, director of UNO’s Division of Planning in the Center for Urban and Public Affairs).

housing can be gotten, an approach that might be described as “get the housing now.”⁵⁸ The other impulse is to block affordable housing in all forms. This conflict between those who would seem to accept affordable housing anywhere, in any configuration, and on any terms, and those who would seem to accept it nowhere, in no configuration, and on no terms help fuel the worst fears of each camp.

The “anywhere-ists” most fear the potential for the “nowhere-ists” to succeed in abolishing a federal role in the provision of housing for low income households. Thus, the first priority for the anywhere-ists is to secure as much federally assisted housing as possible. On the other hand, the nowhere-ists most fear the potential for the “anywhere-ists” to develop federally supported housing next door to them. Thus, the first priority for the nowhere-ists is to block federally assisted housing in all forms, regardless of the development details. They may point to the abundant failures of government housing programs with respect to poor maintenance and mismanagement to justify their fears of blight, crime, and lowered property values. Worse, the nowhere-ists may associate poor persons of color with historic management and maintenance failures and even blame them for those failures. As a result, many of these nowhere-ists associate neighborhood stability with racial and socio-economic homogeneity and are singularly focused on blocking federally assisted housing as a means of maintaining that homogeneity.

The path of least resistance for both groups, it appears, is to allow for the continued creation of federally assisted housing in impoverished and/or isolated communities. In this scenario, both groups are able to have their primary concerns addressed. The anywhere-ists achieve the development of federally assisted housing. The nowhere-ists keep it out of their communities.

This conflict reflects a fundamental failure of American housing policy with respect to both its vision and its implementation at the federal, state, and local levels. The resulting path of least resistance, i.e., the provision of federally assisted housing for low income families outside of, or away from, high opportunity neighborhoods and communities, represents a kind of toxic cocktail of market failure and government impotence. As those working for more equitable and inclusive communities have recognized, “[i]ncreasing the supply of affordable housing is essential to improving housing opportunity, but achieving racial equity will require more. To reach equity goals, affordable units must be spread across the region.”⁵⁹

⁵⁸ See, e.g., *Thompson v. U.S. Dep’t Of Hous. and Urban Dev.*, 348 F.Supp.2d 398, 444 (D.Md. 2005) (noting in federal civil rights action challenging historic segregation and discrimination in Baltimore’s public housing programs “a further consideration informing the decisions of housing policymakers was the goal of housing as many as possible of the individuals and families that needed public housing. . . . we were simply looking to be able to put a roof over people’s heads.”).

⁵⁹ Angela Glover Blackwell & Judith Bell, *Equitable Development for a Stronger Nation: Lessons from the Field in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 290 (Xavier de Souza Briggs ed., 2005).

Anywhere-ists

The need for affordable “workforce” housing in the post-Katrina recovery period has been acute.⁶⁰ In the immediate aftermath of the 2005 storms, the devastation of over 200,000 single family homes and multi-family rentals, along with a large influx of recovery-related workers, created enormous demand for rental housing.⁶¹ This dynamic resulted in both median rents and median incomes rising. According to one study of the New Orleans metro area, the median gross rent rose 27 percent, from \$676 in 2004 to \$856 in 2007.⁶² In Orleans Parish, median gross rents rose 44 percent over the same period.⁶³ Rents rose nationally only 4 percent over the same period.⁶⁴ Although median incomes also rose, fewer workers earning less than \$20,000 lived in the New Orleans area in 2007 while job vacancies remained high in occupations paying less than \$20,000.⁶⁵ Further, the proportion of renters to homeowners fell from 39 to 34 percent between 2004 and 2007, suggesting that many displaced low income renters may be unable to return home.⁶⁶

Renters in post-Katrina New Orleans struggled more with affordability than renters nationwide, according to the 2007 American Community Survey Data. While nationally, 49% of all renters paid more than 30 percent of their income on housing costs (including utilities) – the measure of affordability frequently used by HUD and others measuring housing cost burdens⁶⁷ – 54% of renters throughout the metropolitan New Orleans area paid unaffordable housing costs, and 60% of renters in Orleans Parish paid unaffordable housing costs.⁶⁸ With respect to suburban parishes, St. Tammany Parish renters were particularly strained, with 61% paying unaffordable housing costs; Jefferson Parish renters were comparable to the national rate, with 51% paying unaffordable rental housing costs relative to income.⁶⁹ According to the Greater New Orleans

⁶⁰ For a separate discussion of the fair housing issues surrounding the demolition of the “Big Four” public housing developments in the City of New Orleans following Hurricane Katrina, see Stacy E. Seicshnaydre, *The More Things Change, the More They Stay the Same: In Search of a Just Public Housing Policy Post-Katrina*, 81 TUL. L. REV. 1263 (2007).

⁶¹ POLICYLINK, BRINGING LOUISIANA RENTERS HOME: AN EVALUATION OF THE 2006-2007 GULF OPPORTUNITY ZONE RENTAL HOUSING RESTORATION PROGRAM 7 (2007).

⁶² GREATER NEW ORLEANS COMMUNITY DATA CENTER, CHANGES IN NEW ORLEANS METRO AREA HOUSING AFFORDABILITY: BASED ON 2004 AND 2007 AMERICAN COMMUNITY SURVEY DATA 11 (2009), available at <http://www.gnocdc.org/HousingAffordability>.

⁶³ *Id.* at 12.

⁶⁴ *Id.* at 11.

⁶⁵ *Id.* at 10. See also BUREAU OF GOVERNMENTAL RESEARCH, THE HOUSE THAT UNCLE SAM BUILT: THE CONTINUED EXPANSION OF SUBSIDIZED HOUSING IN NEW ORLEANS 5 (2009) (noting rising rents as well as fact that median wage rose in the metro area from \$13 to \$16.83 per hour).

⁶⁶ GREATER NEW ORLEANS COMMUNITY DATA CENTER, at 10.

⁶⁷ Although measuring housing affordability for residents already resettled in New Orleans is important and helpful, this indicator of affordability excludes households who have not been able to return to New Orleans or afford the rental housing that is available, such as “displaced households priced out of the market, homeless families and those squatting in blighted buildings.” See *id.* at 3.

⁶⁸ *Id.* at 8-9 (the percentage of renters in the metropolitan area paying unaffordable housing costs in 2007 [54%] was up six points from the pre-Katrina rate of 48% in 2004).

⁶⁹ *Id.* at 9.

Community Data Center, “[r]ental affordability is particularly critical in Orleans because 48 percent of households are renters, as compared with only 21 percent in St. Tammany and 33 percent nationwide.”⁷⁰

Given the urgent need for rental housing following Katrina, there was a corresponding movement to maximize the number of rental units developed as replacement for what was lost. Yet, only 27% of damaged rental units were slated for replacement with public dollars in the metro New Orleans area as of 2008.⁷¹ Moreover, only 2,600 units scheduled for replacement via public subsidies were open for occupancy statewide as of mid-2008.⁷² When considering affordable units, only 17,112 of the 53,210 affordable rental units with severe or major damage (32%) were in the pipeline for replacement in metro New Orleans as of mid-2008.⁷³

Projections concerning the location of these replacement rental units suggests that the path of least resistance has emerged as the operating principle for the location of assisted housing in post-Katrina New Orleans. With the passage of time, nearly all of the suburban parishes surrounding Orleans have insisted that they have “enough” rental housing and need no new development of such housing. Yet when individual parishes are examined, it appears that Orleans Parish, the parish with the highest proportion of rental housing prior to the storm,⁷⁴ had the highest percentage of rental housing scheduled to be replaced with public subsidies, or 33%.⁷⁵ On the other hand, parishes with smaller proportions of rental units prior to the storm, Jefferson, Plaquemines, St. Bernard, and St. Tammany, had even lower projections for replacement of the rental housing they had lost. For example, Jefferson had 13,972 rental units damaged, but only 1,840 (13%) scheduled for replacement with public subsidies.⁷⁶ St. Bernard had 5,936 rental units damaged, but only 924 (16%) scheduled for replacement with public subsidies.⁷⁷ When the subset of rental housing that is affordable is examined, it appears that Orleans Parish was slated to replace 37% of its affordable units, with Jefferson and St. Bernard

⁷⁰ *Id.*

⁷¹ POLICYLINK, A LONG WAY HOME: THE STATE OF HOUSING RECOVERY IN LOUISIANA 8 (2008). For purposes of determining the level of rental housing likely to be replaced, the PolicyLink authors considered those units with funding allocations from government programs, including the Gulf Opportunity (GO) Zone LIHTC Program and Small Rental Property Program (SRPP), less than half which represent units that are completed, under construction, or have closed financing. *Id.* at 9. The authors did not include units scheduled for repair with private insurance proceeds. *Id.*

⁷² *Id.* at 9.

⁷³ *Id.* at 17 (for purposes of this calculation, data was derived using the five parishes of Jefferson, Orleans, Plaquemines, St. Bernard, and St. Tammany).

⁷⁴ According to the 2000 Census, over half, or 53.5%, of the occupied housing units in Orleans Parish were renter-occupied, compared with lower percentages in surrounding parishes: 36.1% in Jefferson, 21.1% in Plaquemines, 25.4% in St. Bernard, and 19.5% in St. Tammany. U.S. CENSUS BUREAU, QT-H2 TENURE, HOUSEHOLD SIZE, AND AGE OF HOUSEHOLDER: 2000 (2000).

⁷⁵ POLICYLINK, at 9.

⁷⁶ *Id.* at 9.

⁷⁷ *Id.* at 9.

only slated to replace 17% and 22% of their affordable units, respectively.⁷⁸ Stated another way, of the 7474 affordable tax credit units in the pipeline in the metro New Orleans area as of mid-2008, 6268, or 84%, were slated to be developed in Orleans Parish.⁷⁹ Thus, rather than using the recovery as an opportunity to correct historic imbalances in the mix of rental to owner-occupied housing, poverty concentrations, or racial segregation occurring throughout the region, the region is poised to use the recovery as a means of accelerating the regional imbalance.

There is no question that the need for affordable housing in New Orleans following the storms was and is enormous. Yet, the great need for low income housing cannot continue to be used as a blanket justification for whatever inequity and segregation results from these programs.⁸⁰ Typically, “[i]n order to get the affordability benefit of federal housing assistance, low-income Black families must accept a higher level of both substandard living conditions and racial inequality than exists for very low-income Black tenants not using HUD rental assistance. Low-income Whites do not have to make this trade-off.”⁸¹

Nowhere-ists . . .

Local governments for decades have sought veto power over the location of subsidized housing units within their borders. Following Katrina, one locally elected official in suburban New Orleans requested state legislation that would have given parish governments veto power over any housing program of the Louisiana Housing Finance Agency proposed in any parish.⁸² This legislative initiative died on the vine, but it demonstrates the enduring quest for exclusion of subsidized housing via the local veto.

⁷⁸ *Id.* at 17 (Orleans was slated to replace 14,004 affordable rental units out of 37,790 such units with severe or major damage; Jefferson was slated to replace 1,414 affordable rental units out of 8,515 such units with severe or major damage; and St. Bernard was slated to replace 869 affordable rental units out of 3,935 such units with severe or major damage).

⁷⁹ *Id.* (data reflects activity in Jefferson, Orleans, Plaquemines, St. Bernard, and St. Tammany parishes). Similarly, 7736 of the projected 9638 Small Rental program units, or 80%, were slated for development in Orleans Parish. *Id.*

⁸⁰ *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907, 914 (N.D. Ill. 1969) (despite the “praiseworthy and urgent goals of low cost housing . . . a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued.”) (citing *Brown v. Bd. of Education of Topeka*, Shawnee County, Kansas, 347 U.S. 483 (1954)); *Clients’ Council v. Pierce*, 711 F.2d 1406, 1423 (8th Cir. 1983) (“HUD argues that its actions [continued funding of a housing authority it had repeatedly cited for discrimination] were an inevitable consequence of its legitimate desire to provide low income housing, but the agency did not have to approve, support, and lobby in favor of the THA’s discrimination in order to provide adequate low income housing.”).

⁸¹ Elizabeth Julian & Michael M. Daniel, *HUD-Assisted Low-Income Housing: Is It Working and for Whom?* POVERTY & RACE, July/August 2009, at 6.

⁸² See HB No. 223 (Regular Session 2007) (“The [LHFA] shall have no authority to approve or allocate housing tax credits or to approve or implement any housing program within a parish without the prior approval of the parish governing authority”); *Times-Picayune*, Meghan Gordon, Jefferson’s housing restrictions attacked, February 17, 2007 (discussing the fact that the LHFA awarded tax credits to a Gretna housing development despite the opposition of the Jefferson Parish council; in response, one Councilman sought legislation that would require prior local approval of LFHA tax credit projects as a matter of state law).

Although Hurricane Katrina displaced households of all incomes, races, and ethnicities, census estimates indicated that 60% of those displaced in the New Orleans MSA were African American.⁸³ In Orleans Parish, an estimated 73% of the population affected by the hurricane, or 272,000 people, were African American.⁸⁴ Further, over half (52.8%) of those living in damaged areas were renters.⁸⁵ Thus, a substantial number of African American renters were displaced in Hurricane Katrina, enough to threaten the segregated housing patterns in place before the storm.

Suburban jurisdictions appear to have sought to avoid the “do over” opportunity that the storm presented, taking measures that reflect significant fear about the way in which their pre-Katrina demographics might be altered in the rebuilding effort. For example, rather than merely banning *new federally assisted* housing, some jurisdictions have taken the additional precaution of banning *all new rental* housing. Further, jurisdictions have not only blocked *new rental* housing, but have taken steps to eliminate rental housing that *pre-existed* Hurricane Katrina.

The metropolitan-wide racial impact of the zoning bans on multi-family and government-assisted housing proliferating in metropolitan New Orleans post-Katrina has been demonstrated in litigation challenging the zoning bans.⁸⁶ With respect to bans on rental housing generally, African American households are more than twice as likely as white households to live in rental units in metropolitan New Orleans.⁸⁷ Furthermore, an ordinance that excludes housing programs that serve low-income households -- such as the Low Income Housing Tax Credit program and other subsidy programs operated by the U.S. Department of Housing and Urban Development -- exclude a disproportionate number of African-American households.⁸⁸ The racial disparities are augmented when families [households with at least two persons] are considered, compared with the population at large. These disparities increase as income decreases. These impacts are calculated using 2007 American Community Survey data compiled by the Census Bureau.⁸⁹

⁸³ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs’ Application for a Preliminary Injunction (Rec. Doc. 6-3, at 24) (citing C. Bradford Aff. 7).

⁸⁴ *Id.* at 7 (citing John R. Logan, *The Impact of Katrina: Race and Class in Storm-Damaged Neighborhoods*, at 7, available at <http://www.s4.brown.edu/Katrina/report.pdf>) (hereinafter “Logan Report”).

⁸⁵ *Id.* at 8 (citing Logan Report at 7).

⁸⁶ In calculating metropolitan-wide racial impacts, Dr. Bradford used the seven-Parish New Orleans Metropolitan Statistical Area (defined by the U.S. Office of Management and Budget in 2003), which included the Parishes of Orleans, Jefferson, Plaquemines, St. Bernard, St. Charles, St. John the Baptist, and St. Tammany. See Declaration of Dr. Calvin P. Bradford, December 15, 2008, Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Rec. Doc. 126-4, at 6 & n.3.

⁸⁷ *Id.* at 3 (finding that the disparate impact of a metro-wide rental housing ban on African Americans is statistically significant, with 51.70% of African American households in metro. New Orleans consisting of renters, compared with only 25.03% of white households).

⁸⁸ *Id.* at 3-4 (finding statistically significant disparities between African Americans and whites when considering a variety of low income ranges and tiers [relevant to low income housing programs]).

⁸⁹ *Id.* at 5 & 10-11.

Terrytown

Terrytown, a small suburb of New Orleans created in 1960, is located on the West Bank of Jefferson Parish.⁹⁰ According to long-time residents, many families moved to Terrytown from New Orleans because they could not afford to buy a home in the City, while the housing was more affordable on the West Bank.⁹¹ This included veterans using the GI bill to buy their first home.⁹² These early residents searching for affordable housing on the West Bank, many with subsidies, were white, largely relocating from the Irish Channel neighborhood in New Orleans.⁹³ By 2000, however, Terrytown had experienced a demographic shift, integrating to nearly 35% black, up from nearly 20% in 1990, only 5% in 1980, and .35% in 1970.⁹⁴

Following Katrina, elected representatives of Gretna and Terrytown (on the West Bank of Jefferson) joined the chorus of those opposing the use of recovery dollars to create replacement rental housing in their communities. On October 18, 2006, a Jefferson Parish councilman from Gretna and Terrytown sponsored a resolution making it clear to agencies charged with overseeing the housing recovery that Jefferson Parish objected to any applications by developers to build apartment complexes or single-family homes in Gretna or Terrytown using low income tax credits.⁹⁵ Council members unanimously approved this district-specific measure without discussion. Even groups that would seem to pose the least threat, such as the displaced elderly, were unwelcome. One of the applications pending at the time of Roberts's resolution was a 200-unit building proposed by Volunteers of America for residents over the age of 62. This project would have replaced 199 flooded units of elderly housing in eastern New Orleans. After the project for elderly housing succeeded in obtaining \$6.29 million in tax credits from the state despite the Parish's resolution, the Council succeeded, via surprise resolution, in imposing an 18-month land use study that would halt development on the site while the Parish considered changing the zoning of the site from multi-family to single-family residential.⁹⁶ This zoning change resulted in the non-profit developer's decision to abandon the project, resulting in the project returning to Orleans Parish, where it had been located prior to Katrina.

⁹⁰ Allen Powell II, *Terrytown celebrates 50 years of small- town living with big-city amenities*, TIMES-PICAYUNE, March 5, 2010, available at http://www.nola.com/news/index.ssf/2010/03/terrytown_celebrates_50_years.html (last visited July 12, 2010).

⁹¹ *Id.* ("For \$12,900 up to \$19,000, one could buy a new house with modern conveniences such as central air conditioning.")

⁹² *Id.* (according to a long time Terrytown resident, "[m]any of the original homeowners were veterans taking advantage of the GI Bill.")

⁹³ *Id.*

⁹⁴ U.S. CENSUS BUREAU, DP-1. PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 (2000) (Terrytown); U.S. CENSUS BUREAU, DP-1. GENERAL POPULATION AND HOUSING CHARACTERISTICS: 1990 (1990) (Terrytown); Minnesota Population Center. *National Historical Geographic Information System: Pre-release Version 0.1*. University of Minnesota (2004). available at <http://www.nhgis.org> (Terrytown 1970 and 1980 census data).

⁹⁵ Meghan Gordon, *More housing for poor opposed: Roberts says those from city unwelcome*, TIMES-PICAYUNE, October 19, 2006 (directing resolution to Louisiana Recovery Authority and Louisiana Housing Finance Agency).

⁹⁶ Meghan Gordon, *Charity, Jeff sued after plan to build housing craters*, TIMES-PICAYUNE, February 22, 2007; Meghan Gordon, *Nonprofit drops plan for senior housing; Parish restrictions prevent use of tax credits, nonprofit says*, TIMES-PICAYUNE, Feb. 17, 2007, at 1, available at 2007 WLNR 2986604.

In addition to blocking new development, some Jefferson Parish officials and constituents failed to support the restoration of certain hurricane-damaged apartment complexes and then used the disrepair of these units to oppose the creation of new subsidized developments.⁹⁷ One councilman's strategy was to allow existing apartments to deteriorate to the point that demolition was the only option.⁹⁸ "I would prefer some of the multifamily housing units be removed and replaced with green space or another form of housing."⁹⁹ Officials seem to equate all multi-family housing with concentrated poverty and crime,¹⁰⁰ use the blight of hurricane-damaged apartments to oppose any new development, and appear to be focused on reducing the stock of multi-family housing even below pre-Katrina levels.¹⁰¹

Of course, one might say that constituents are equally, if not more, concerned about the prospect of new affordable housing options in their neighborhoods.¹⁰² According to a prominent landowner in the district: "I would say now we're just getting a disproportionate share of the lower-income families than we had before. . . . It's changing the whole complexion of the area."¹⁰³ Those in Terrytown and other neighborhoods on the West Bank of Jefferson Parish claim: "I think we have our fair share of multifamily housing already."¹⁰³ As of 2000, Terrytown had a higher proportion of renter-occupied housing than Jefferson Parish as a whole, with the Parish having 36.1% of occupied units inhabited by renters, while 47% of occupied units in Terrytown were rentals.¹⁰⁴

⁹⁷ Meghan Gordon, Jefferson's housing restrictions attacked, *Times-Picayune*, February 17, 2007.

⁹⁸ Deon Roberts, Jeff councilman opposes blighted apartment rehab, *NEW ORLEANS CITYBUSINESS*, May 26, 2007 (quoting Councilman Roberts: "If they fall into further disrepair, that's only better. That only furthers our ability to get some of these rat holes torn down. I think it's all part of a strategic process.").

⁹⁹ See *id.* (discussing his preference for the Parish to purchase multi-family housing developments to allow for demolition of existing rental housing).

¹⁰⁰ *Id.* (quoting Councilman Roberts: "'Our experience in Jefferson Parish clearly shows that clustered multifamily housing for the most part has not been managed properly, usually leads to blight, has a tremendous effect on school performance scores, crime and economic development.'"). Constituents are equally sour: "We don't need any more apartments, period, in Terrytown of any kind." See Meghan Gordon, Jefferson's housing restrictions attacked, *TIMES-PICAYUNE*, February 17, 2007 (quoting the president of the Terrytown Civic Association).

¹⁰¹ See Deon Roberts, Jeff councilman opposes blighted apartment rehab, *NEW ORLEANS CITYBUSINESS*, May 26, 2007 (quoting Councilman Roberts: "'If I have my prerogative, any of them we can get our hands on to tear down, we're going to. Especially the ones that are blighted and a nuisance.'"); see also Deon Roberts, Land shortage stifles for large apartment development in New Orleans, *NEW ORLEANS CITYBUSINESS*, May 15, 2006 (discussing Roberts' interest in tearing down roughly 1,500 apartment units within three complexes because of high crime and the landlord's failure to make repairs).

¹⁰² See Meghan Gordon, Terrytowners resist low-income housing; Group seeks homes for senior citizens, *TIMES-PICAYUNE*, November 2, 2006 (reporting that an "overflow crowd" of Terrytown residents rallied behind the efforts of Chris Roberts to stop new low-income housing in his district, with audience members "rolling their eyes and cackling" at the responses of VOA's executive vice president regarding VOA's senior citizen housing proposal).

¹⁰³ Deon Roberts, Land shortage stifles for large apartment development in New Orleans, *NEW ORLEANS CITYBUSINESS*, May 15, 2006.

¹⁰⁴ U.S. CENSUS BUREAU, QT-H2 TENURE, HOUSEHOLD SIZE, AND AGE OF HOUSEHOLDER: 2000 (2000) (Jefferson Parish); U.S. CENSUS BUREAU, DP-1. PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 (2000) (Terrytown).

Kenner

The City of Kenner, founded in 1855 and classified as a city in 1952, is located ten miles west from downtown New Orleans in Jefferson Parish.¹⁰⁵ Between 1990 and 2000, the African American, Hispanic and Asian population grew over 30% -- from 29.9% to 38.9%.¹⁰⁶ The City acknowledges that, given recent trends, the City is likely to become increasingly diverse: "Current trends suggest that Kenner will become less populated, older, and more ethnically and racially diverse over the next 15 to 20 years. What is likely is that the future population will hover somewhere close to existing levels, but increase slightly and continue to diversify."¹⁰⁷

In mid-2007, the city of Kenner sought a moratorium on the development of new multi-family residential units, pending the completion of a land use plan by the University of New Orleans.¹⁰⁸ Officials cited the "great impact" of multi-family development on "adjacent neighborhoods, public infrastructure, traffic density, [and] the demand for public services."¹⁰⁹ Kenner's Mayor described multi-family residential housing as "the most volatile and the most humanly-dense of residential land uses," justifying a temporary halt in construction until a land use plan could be prepared.¹¹⁰ The passage of the moratorium was put off until April 3, 2008, when the Kenner City Council unanimously approved a ban on the issuance of permits for construction of developments with five or more apartments, citing "an abundance of multi-family property in the City of Kenner."¹¹¹ Constituents made their sentiments plain. According to Kenner City Councilman Joe Stagni: "I think this [multi-family housing] is something that our citizens have spoken out very strongly against."¹¹² At least one developer thought it odd that the moratorium would be placed on housing, rather than commercial development, given that the population has remained flat since the 1980s: "That's what the city of Kenner needs – it needs housing."¹¹³ As might be expected, several developments were in the planning stages at the time the Kenner

¹⁰⁵ <http://www.kenner.la.us/history.html>; <http://www.kenner.la.us/govern.html>.

¹⁰⁶ *Id.* at 7.

¹⁰⁷ *Id.* at 16.

¹⁰⁸ Press Release, City of Kenner, Office of the Mayor, Moratorium Sought on Multi-Family Units, May 18, 2007. See also Mary Sparacello, Multifamily housing faces halt; Kenner awaits land-use plan, TIMES-PICAYUNE, June 6, 2007, at Metro-1, available at 2007 WLNR 10528001 (noting that Kenner signed a \$25,000 contract with UNO to conduct a post-Katrina update of a land use study begun in 2000 entitled, "Pattern for Progress").

¹⁰⁹ Press Release, City of Kenner, Office of the Mayor, Moratorium Sought on Multi-Family Units, May 18, 2007.

¹¹⁰ *Id.*

¹¹¹ See Summary No. 10,564, Ordinance No. 9662, An Ordinance Enacting and Imposing a Moratorium Upon the Issuance of Building Permits for Multi-Family Residential Construction in the City of Kenner (April 3, 2008); Complex issue: Kenner apartment ban angers affordable-housing advocates, NEW ORLEANS CITYBUSINESS, April 12, 2008. This author was interviewed and quoted in a newspaper article following the April 3, 2008 ban. See, e.g., Mary Sparacello, Kenner accused of housing violation; Group says apartment ban is discriminatory, TIMES-PICAYUNE, April 11, 2008, at Metro-1, available at 2008 WLNR 6791234 ("Even if a government entity (is) not trying to exclude a particular group, a court could rule that a government's action has a disproportionate impact on a protected group.")

¹¹² Mary Sparacello, Multifamily construction ban OK'd; Kenner moratorium to last for one year, TIMES-PICAYUNE, April 4, 2008, at Metro-1, available at 2008 WLNR 6343160.

¹¹³ Mary Sparacello, Multifamily housing faces halt; Kenner awaits land-use plan, TIMES-PICAYUNE, June 6, 2007, at Metro-1, available at 2007 WLNR 10528001 (quoting developer Henry Shane).

City Council proposed and passed the moratorium.¹¹⁴ Yet, the Kenner City Council insisted that the ban was not targeted to particular properties.¹¹⁵

The ban on new multi-family housing had the potential to eliminate rental units in Kenner that existed before Hurricane Katrina. In particular, the Redwood Apartment complex on North Kenner consisted of 400 units before the storm and housed many low income renters.¹¹⁶ Despite the fact that this demolished development had already existed before the storm, the homeowners living adjacent to the site approached the redevelopment of the apartment complex as though a change in land use was being proposed. Neighbors expressed concern about noise, traffic, safety, and inadequate infrastructure and sought a multi-family construction ban that would keep the site vacant.¹¹⁷ Thus, the Kenner multi-family housing moratorium adopted post-Katrina threatened to reduce the number of rental units available there compared with those existing before the storm.¹¹⁸ As one constituent puts it: “The less apartments, the better.”¹¹⁹

Despite the Council’s protestations that “an abundance” of rental housing exists in Kenner,¹²⁰ it may not all be affordable to its residents. In March 2008, less than a month before the multi-family housing ban, thousands of people are reported to have lined up outside of the Kenner housing authority office to apply for federal rental assistance vouchers.¹²¹ Did the city of Kenner pursue the multi-family housing ban “despite” the demonstrated needs of its residents,¹²² or did the “thousands” of needy residents create concern on the part of Kenner officials that some action needed to be taken to prevent the influx of federal subsidies into the City?

¹¹⁴ Complex issue: Kenner apartment ban angers affordable-housing advocates. NEW ORLEANS CITYBUSINESS, April 12, 2008 (referring to concerns of investors that “[t]he ban already puts in limbo at least two developments in planning stages and threatens investment in future mixed-income projects”).

¹¹⁵ Mary Sparacello, Multifamily construction ban OK’d; Kenner moratorium to last for one year. TIMES-PICAYUNE, April 4, 2008, at Metro-1, *available at*, 2008 WLNR 6343160 (quoting Councilwoman Michele Branigan, “This is an issue that is citywide. . . it’s not particular to one piece of property.”). *But see* Complex issue: Kenner apartment ban angers affordable-housing advocates. NEW ORLEANS CITYBUSINESS, April 12, 2008 (referring to comments of Kenner City Councilman Joe Stagni that “the law is a response to [neighborhood] opposition” relating to the Redwood Apartment complex).

¹¹⁶ Complex issue: Kenner apartment ban angers affordable-housing advocates. NEW ORLEANS CITYBUSINESS, April 12, 2008.

¹¹⁷ *Id.* When Kenner officials put off the blanket ban on multi-family construction in June 2007, they opted instead to conduct “a study” of the 15 acres of vacant land that included the Redwood apartments. *See* Mary Sparacello, Multifamily construction ban OK’d; Kenner moratorium to last for one year, TIMES-PICAYUNE, April 4, 2008, at Metro-1, *available at*, 2008 WLNR 6343160. The University of New Orleans conducted the study and recommended in early 2008 that the site be used for both residential and commercial development. *See id.*

¹¹⁸ *But see* Mary Sparacello, Multifamily construction ban OK’d; Kenner moratorium to last for one year. TIMES-PICAYUNE, April 4, 2008, at Metro-1, *available at*, 2008 WLNR 6343160 (noting that developments receiving approval prior to the ban’s passage would proceed, including a complex in south Kenner that was in the process of being rebuilt).

¹¹⁹ *See* Complex issue: Kenner apartment ban angers affordable-housing advocates. NEW ORLEANS CITYBUSINESS, April 12, 2008.

¹²⁰ *See id.* (quoting Councilman Joe Stagni); *see also id.* (the UNO study commissioned in mid-2007 of the site of the Redwood apartment complex found “no shortage of multifamily housing in Kenner).

¹²¹ *Id.*

¹²² *Id.* (quoting real estate investment banker and commissioner of the Louisiana Housing Finance Agency Mark Madderra: “There is clearly a significant demand for affordable housing in Kenner as evidenced by the long line of people who showed up to apply for affordable housing, and it concerns me that the government hasn’t recognized that need.”).

In 2000, renter-occupied housing comprised 39% of all occupied housing in Kenner, slightly above the rate for Jefferson Parish as a whole, but nowhere near the proportion for Orleans Parish.¹²³ Also, this proportion of renter-occupied housing in Kenner in 2000 had decreased from 41% in 1990.¹²⁴ Although the UNO study ultimately found no shortage of multi-family housing, it does not recommend a complete ban either, recommending some “high-density residential development” in parts of the city as well as mixed use residential development on the Redwood apartment complex site.¹²⁵ Further, when a jurisdiction like Kenner considers whether there is a “shortage” of rental housing, it is typically considering whether the housing need is being met for existing residents, not for renters across the region. Also, the conclusion that there is no “shortage” does not necessarily support a reduction in rental units, such as that sought by residents and city officials.

St. Bernard Parish

St. Bernard Parish is located five miles east of downtown New Orleans.¹²⁶ In 2000, St. Bernard Parish was 88.3% white and 7.6% African American. A 30-foot tidal surge spawned by Hurricane Katrina damaged or destroyed *all* of the 26,000 homes in St. Bernard Parish.¹²⁷ As of August 2008, 37,000 people had returned, representing only slightly more than half of the pre-Katrina population of 68,000.¹²⁸ In late 2008, St. Bernard Parish’s President made this pitch: “Displaced residents, visitors, *and new residents* are all welcomed to share in what has long been one of Louisiana’s best kept secrets.”¹²⁹ Despite the urgent efforts of the Parish to re-grow its population and rebuild its housing stock and infrastructure, St. Bernard has issued a number of restrictive zoning ordinances that seem to undermine these goals.

In the immediate aftermath of the storm, in November 2005, the Parish passed an ordinance establishing “a moratorium on the re-establishment and development of any multi-family dwellings in St. Bernard Parish throughout the disaster recovery period.”¹³⁰ The moratorium was designed so that only existing multi-family units were considered for redevelopment, and then only if the Council’s concerns were met with respect to “placement irregularities, over density

¹²³ See U.S. Census Bureau, QT-H2. Tenure, Household Size, and Age of Householder: 2000 (2000) (Kenner). Kenner reports its dominant residential land use to be single family residential, at 16,639 units or 83.4% of all residential units. Two-, three- and four-unit buildings comprise 4,285 units, or a total of 8.36% of all residential units. Multi-family structures (more than four units) comprise a total of 6043 units or 8.03% of all residential units. <http://www.kenner.la.us/history.html>; <http://www.kenner.la.us/govern.html>.

¹²⁴ U.S. Census Bureau, QT-H1. Occupancy, Tenure, and Age of Householder: 1990 (1990) (Kenner).

¹²⁵ *Complex issue: Kenner apartment ban angers affordable-housing advocates*, NEW ORLEANS CITYBUSINESS, April 12, 2008.

¹²⁶ Letter from Craig P. Taffaro Jr., St. Bernard Parish President, Katrina, in *THREE YEARS LATER, HURRICANE RECOVERY PROGRESS REPORT FOR ST. BERNARD PARISH, LOUISIANA, FROM DEVASTATION TO DETERMINATION. FROM PROMISE TO PROGRESS* 8 (August 2008), available at <http://www.sbpj.net/images/stories/sbpj3yr.pdf>.

¹²⁷ *Id.* at 2 (August 2008).

¹²⁸ *Id.* at 2.

¹²⁹ *Id.* at 8.

¹³⁰ Ordinance SBPC #632-11-05, Introduced by Craig Taffaro, District D, adopted November 1, 2005 (found at Civ. Action No. 2:06-cv-07185, Rec. Doc. 167-3 (E.D. La.)).

problems and quality of life issues.”¹³¹ High density within the Parish was considered more than two eight plex structures in a one block radius.

Other communities after Katrina had passed bans on rental housing, to be sure, but St. Bernard Parish took a more creative approach. On September 29, 2006, the Parish passed its infamous “blood relative” ordinance.¹³² This ordinance prohibited the rental of single family residences “by any person or group of persons, other than a family member(s) related by blood within the first, second or third direct ascending or descending generation(s), without first obtaining a Permissive Use Permit from the St. Bernard Parish Council.”¹³³ The ordinance went so far as to prohibit the “occupancy or use” of the single family dwelling by anyone other than a blood relative.¹³⁴ The stated purpose of the “blood relative ordinance” was to encourage owners of single family residences to return and rebuild homes and resume living in the parish, as well as “to maintain the integrity and stability of established neighborhoods as centers of family values and activities.”¹³⁵ Violators, including both lessors and lessees, were subject to civil and criminal misdemeanor penalties consisting of various fines and penalties imposed for each day that the property was rented in violation of the ordinance.¹³⁶ Single family property owners renting those homes at the time of the passage of the blood relative ordinance were exempted from its coverage.¹³⁷ By restricting rentals in this way, the Parish allowed rentals to “insiders” (i.e., blood relatives of existing residents), while denying rentals to “outsiders.”

The Greater New Orleans Fair Housing Action Center (GNOFHAC) challenged the blood relative ordinance, alleging that the ordinance “was passed with the intent and has the effect of denying and otherwise making unavailable rental housing to non-white persons . . .”¹³⁸ GNOFHAC also alleged that the blood relative ordinance (as part of a series of ordinances restricting rental of single-family homes in St. Bernard Parish) “perpetuates segregation by preserving the Parish as an overwhelmingly all-white enclave.”¹³⁹ GNOFHAC also challenged the 2005 multi-family housing moratorium on the same grounds, alleging both intentional discrimination and the “effect of denying and making unavailable rental housing disproportionately needed by African American and Hispanic persons.”¹⁴⁰

¹³¹ *Id.*

¹³² The St. Bernard Parish Council (SBPC) had previously passed two ordinances restricting the rental of single family homes. On March 7, 2006, the SBPC passed Ordinance SBPC #643-03-06, which placed a moratorium on the rental of single-family homes “until such time the post Katrina real estate market in St. Bernard Parish stabilizes.” The stated purpose of the ordinance was “to preserve the integrity of single-family neighborhoods.” The SBPC subsequently on July 6, 2006 enacted Ordinance SBPC #661-07-06, which required that all single family dwellings to be used as rental properties obtain a Conditional Use permit from the Office of Community Development. These ordinances may be found at Civ. Action No. 2:06-cv-07185, Rec. Doc. 167-4 and 167-5.

¹³³ Ordinance SBPC #670-09-06, Section I.A., September 19, 2006, found at Civ. Action No. 2:06-cv-07185 (E.D. La.), Rec. Doc. 167-2.

¹³⁴ *Id.*

¹³⁵ *Id.* at Section I.

¹³⁶ *Id.* at Sections I.F., I.G., I.H., & I.I.

¹³⁷ *Id.* at Section I.K.

¹³⁸ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Rec. Doc. 3, at para. 3.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at para. 4.

GNOFHAC cited evidence that the SBPC's purpose was to maintain the racial homogeneity of the Parish. There are contemporaneous statements, such as that of one Councilman: "We're not changing the demographics, all we're doing is saying we want to maintain the demographics . . ."¹⁴¹ Council Chair Lynn Dean, who voted against the ordinance, put it more bluntly, stating that the ordinance was passed to "block the blacks from living in these areas."¹⁴² The demographics are revealing. As of 2000, white families, who made up 88.3% of St. Bernard's population, owned 93% of all owner-occupied houses in the Parish.¹⁴³ Thus, regardless of the intent of the blood relative ordinance, its effect would have been to make single family rentals unavailable to non-white persons. Further, GNOFHAC alleged that all of the St. Bernard Parish ordinances were designed to make rental housing unavailable in St. Bernard Parish, which is disproportionately needed by African Americans and Hispanics in the New Orleans metropolitan area.¹⁴⁴

The Parish sought to justify the blood-relative ordinance as necessary to preserve the Parish's history of mostly owner-occupied neighborhoods.¹⁴⁵ GNOFHAC countered that the justification lacked any rational relationship to the actual effect of the ordinance – "permitting some rentals to a virtually all-white class of persons while denying rentals to virtually all minorities."¹⁴⁶

The parties resolved the litigation through consent decree, signed by the district court in February 2008 and granting the court continuing jurisdiction for a three year period.¹⁴⁷ The Parish agreed to drop the blood-relative ordinance and substitute an alternative procedure for approving certain rental transactions in the Parish. The Parish also agreed to refrain from future discrimination on the basis of race or national origin.

Despite the consent decree it had entered earlier in the year, the Parish in September 2008 resuscitated its multi-family housing ban, placing a moratorium on "any housing developments with five (5) or more units" for twelve months.¹⁴⁸ The ban prompted GNOFHAC and a housing

¹⁴¹ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs' Application for a Preliminary Injunction (Rec. Doc. 6-3, at 13) (citing New Law in St. Bernard Parish Stirs Controversy, available at <http://www.wvltv.com/local/stories/wvl092806jblaw.27895d18.html>). Another Councilman stated: "[w]e don't want to change the aesthetics of a neighborhood." *Id.* (citing Michelle Chen, Housing Watchdogs Call Post-Katrina Ordinance 'Racist,' THE NEW STANDARD (Oct. 6, 2006)). Still another councilman who voted against the ordinance acknowledged that fear of greater racial integration could be the driving force behind community support for the ordinances. *See id.*

¹⁴² Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs' Application for a Preliminary Injunction (Rec. Doc. 6-3, at 14) (citing Michelle Chen, *Housing Watchdogs*).

¹⁴³ *Id.* (Rec. Doc. 6-3, at 4-5) (citing C. Bradford Alf. 5-6 & n.8).

¹⁴⁴ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Rec. Doc. 3, at para. 14.

¹⁴⁵ *Id.* at para. 19.

¹⁴⁶ *Id.* at para. 21.

¹⁴⁷ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Rec. Doc. 114. The Parish had previously agreed through a stipulation entered in November 2006 to refrain from enforcing the blood relative ordinance. *Id.* at Rec. Doc. 19. The Parish rescinded the blood relative ordinance in January 2007. Consent Judgment, at 4 (Rec. Doc. 114).

¹⁴⁸ Ordinance SBPC #905-09-08, September 16, 2008, found at Civ. Action No. 2:06-cv-07185 (E.D. La.) Rec. Doc. 167-6.

developer to file a motion to enforce the consent decree.¹⁴⁹ The Dallas-based developer, Provident Realty Advisors, Inc., met with Parish government officials about its proposed 288-unit development¹⁵⁰ and received preliminary assurances that the properties were properly zoned until an editorial blasting the development sparked a public outcry.¹⁵¹ The outcry prompted the Parish government to withdraw its support and impose the moratorium.¹⁵² Although the Parish claimed that a development moratorium was an accepted planning practice for a jurisdiction engaged in a comprehensive planning and zoning study, the Parish did not ban commercial development or other residential development during this same time frame.¹⁵³ As noted by the court, “the type of housing restricted or forbidden is disproportionately utilized by African Americans.”¹⁵⁴ Following an evidentiary hearing, the district court found that the September 2008 multi-family housing ban violated the Fair Housing Act as well as the February 2008 consent order.¹⁵⁵ In particular, the Court held that the multi-family housing ban was adopted with discriminatory intent and had a racially discriminatory impact.¹⁵⁶ The Court later ruled St. Bernard Parish in contempt for this violation of the February 2008 consent order.¹⁵⁷

Even after a federal judge found St. Bernard Parish to have engaged in intentional race discrimination in enacting its multi-family housing ban, the Parish and its residents continued to wage a public relations war against multi-family housing. The Parish held a series of hearings on the 288-unit development proposed for the Parish.¹⁵⁸ Along with the ongoing statements of concern about ghetto living, gang-banging, drug-dealing, and drive-by shooting,¹⁵⁹ the opposition increasingly emphasized that there was a sufficient supply of affordable rental housing, and that allowing low income tax credit housing to be built in the Parish would result in an over-supply of such housing and a decline in property values.¹⁶⁰ The Parish asked the state

¹⁴⁹ GNOFHAC v. St. Bernard Parish, Civ. Action No. 2:06-CV-07185 (E.D. La.) Rec. Doc. 126.

¹⁵⁰ The Provident development proposed for St. Bernard Parish consists of four mixed-income rental apartment complexes of 72 units each. Thirty percent of the units would rent at fair market rates, fifty percent would be rented to those at 60% of Area Median Income (AMI), and twenty percent would be rented to those at 30% of AMI.

¹⁵¹ GNOFHAC v. St. Bernard Parish, 641 F.Supp.2d 563, 566 (E.D.La. 2009).

¹⁵² GNOFHAC, 641 F.Supp.2d at 570-72.

¹⁵³ *Id.* at 572-73.

¹⁵⁴ Dr. Wade Ragas, Opinion Regarding Multi-Family Discrimination Claim for St. Bernard Parish Government, at 8 & 10 (February 2009), found at Civ. Action No. 2:06-cv-07185 (E.D. La.) Rec. Doc. 201.

¹⁵⁵ GNOFHAC v. St. Bernard Parish, 641 F.Supp.2d at 570 (citing the testimony of plaintiff’s expert, Dr. Calvin Bradford).

¹⁵⁶ *Id.* at 577 & 588.

¹⁵⁷ *Id.*

¹⁵⁸ GNOFHAC v. St. Bernard Parish, Slip Copy, 2009 WL 2177241 (E.D.La., July 22, 2009).

¹⁵⁹ Chris Kirkham, Housing debate in St. Bernard reflects post-Katrina landscape, TIMES-PICAYUNE, at A1, July 19, 2009 (“For nearly three months, the meetings about the mixed-income apartment complexes slated for Chalmette have drawn standing-room-only crowds to the St. Bernard Parish government complex . . . [with residents] voicing unbending opposition to the complexes they say will send the parish’s real estate market into a tailspin . . .”).

¹⁶⁰ GNOFHAC v. St. Bernard Parish, Slip Copy, 2009 WL 2969502, *4 (E.D.La., September 11, 2009).

¹⁶⁰ Chris Kirkham, Housing debate in St. Bernard reflects post-Katrina landscape, TIMES-PICAYUNE, at A1, July 19, 2009. See also, Chris Kirkham, Housing ban lands St. Bernard Parish in court again, TIMES-PICAYUNE, at B-2, December 27, 2008 (quoting Councilman Wayne J. Landry, “It’s going to create the density of rental spaces too close, which is exactly the opposite of what the rental ordinance is trying to do. We didn’t want to have that concentrated density, and now we’re going to go and put 280 units in four locations?”).

agency that awarded the low income housing tax credits, vital to the development, to withdraw the tax credit award.¹⁶¹

In addition to the scheduling of public hearings about the development, St. Bernard Parish engaged in a variety of overt and covert measures designed to block the development, leading to two subsequent contempt orders by the district court. The Parish denied Provident's application to re-subdivide the plats for the development, prompting Provident to file a motion seeking to hold the Parish in contempt of the court's prior orders.¹⁶² After an evidentiary hearing, the Court granted that motion in August 2008, requiring the Parish to consider the re-subdivision applications at the next Planning Commission hearing.¹⁶³

Eight days later, the Parish persisted in its refusal to re-subdivide the plats, with the Planning Commission essentially refusing to consider the Court's August 2009 order, stating "the Judge doesn't say what's a major or a minor subdivision in St. Bernard Parish."¹⁶⁴ Provident filed a second motion for contempt. Again following an evidentiary hearing, the Court partially granted the motion, deeming the re-subdivision applications approved, and setting deadlines for other building permit-related decisions, communications, and approvals on parking, landscaping, drainage, and fire.¹⁶⁵ In its third finding of contempt, the Court noted: "Defendants may disagree with this Court's prior orders, but under our system of laws, they must abide by those prior orders unless and until the Court of Appeals takes a different view. Defendants are not free to defy this Court simply because they think they know better."¹⁶⁶ Regarding the Parish's dilatory efforts, the Court stated: "This Court has repeatedly found the stated justifications given by these officials to be unsound, contrived, pretextual and racially discriminatory."¹⁶⁷ As of the time of this writing, it appears that construction has finally proceeded on Provident's multi-family housing development in St. Bernard Parish.¹⁶⁸

As of 2000, about 25% of all occupied units in St. Bernard Parish were renter-occupied, which is half the amount of rental units that exist in neighboring Orleans. The barriers to entry erected by St. Bernard Parish Council seem not merely designed to preserve the racial and socioeconomic homogeneity that pre-existed Katrina, but rather to reduce the number of ethnic minorities in St. Bernard Parish. This is so because the African American population before Katrina was heavily

¹⁶¹ Chris Kirkham, Housing debate in St. Bernard reflects post-Katrina landscape, *TIMES-PICAYUNE*, at A1, July 19, 2009.

¹⁶² *GNOFHAC v. St. Bernard Parish*, Civ. Action No. 2:06-cv-07185 (E.D. La.) Rec. Doc. 241.

¹⁶³ *GNOFHAC v. St. Bernard Parish*, 648 F.Supp.2d 805, 810-13 (E.D.La.2009) (in a detailed opinion finding the Parish in contempt, the court noted that although the planning commission staff had initially recommended approval of the re-subdividing of the plats as a minor subdivision, the planning commission abruptly recast the application as one for a major re-subdivision, was influenced by a racially-charged public hearing, and engaged in procedural delays and referrals between the parish council and planning commission).

¹⁶⁴ *GNOFHAC v. St. Bernard Parish*, Civ. Action No. 2:06-cv-07185 (E.D. La.) Rec. Doc. 303.

¹⁶⁵ *GNOFHAC v. St. Bernard Parish*, Slip Copy, 2009 WL 2969502, at *4-7 (E.D.La., September 11, 2009).

¹⁶⁶ *Id.* at *2.

¹⁶⁷ *Id.* at *4.

¹⁶⁸ Plaintiffs filed a fourth motion for contempt over the September 15, 2009 passage of Ordinance SBPC #1138-09-09, requiring all multi-family housing developments over 12 units to obtain prior approval of the voters, to be obtained by special election held at the expense of the developer. Before the court could decide that motion, the Parish rescinded the ordinance, purportedly under pressure from the federal government relating to the Parish's continued receipt of community development block grant funding. Rec. Dec. 352.

concentrated in a neighborhood called Village Square, consisting of rental housing that was destroyed by and largely razed after the storm.¹⁶⁹ Village Square is a neighborhood within St. Bernard Parish that was considered blighted prior to Hurricane Katrina.¹⁷⁰ This five-block area of approximately 700 apartments started out as rental housing for working-class families in the 1970s, but then when a local plant closed in the early 1980s, demand fell, the apartments fell into disrepair, and the area became associated with crime and drug activity.¹⁷¹ The Justice Department in 2004 filed a federal fair housing action based on an investigation it conducted of 120 apartments, alleging that property owners steered African Americans towards and whites away from the Village Square neighborhood on the basis of race.¹⁷²

The fact that the SBPC acted within three months of Katrina to prevent the redevelopment of multi-family housing in St. Bernard prevented Village Square residents from returning to Village Square, and thus, the Parish. GNOFHAC alleged that while the St. Bernard Parish officials issued permits for the redevelopment of existing multi-family units in other areas of the Parish, the Parish did not issue permits to allow for the redevelopment of any multi-family units in Village Square.¹⁷³ In September 2006, the SBPC formally designated Village Square as a mitigation area, which would result in it being converted to green space.¹⁷⁴ Further, the 2006 St. Bernard Parish ordinances restricting rentals of single family dwellings would have prevented Village Square residents from renting single family homes as an alternative to multi-family housing in the Parish. It is difficult to imagine a more effective strategy for preventing the return

¹⁶⁹ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs' Application for a Preliminary Injunction (Rec. Doc. 6-3, at 4) (citing C. Bradford Aff. 4-5).

¹⁷⁰ Richard Slawsky, St. Bernard Parish housing authority would work to clean up slums, NEW ORLEANS CITYBUSINESS, June 20, 2005; Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs' Application for a Preliminary Injunction (Rec. Doc. 6-3, at 6) (citing Amy Blakely, Plan to Bulldoze Slum Raises Questions, TIMES-PICAYUNE, at 7 (Feb. 5, 2005) (reporting that the SBPC created a committee in February 2005 "to explore ways to expropriate Village Square, bulldoze the buildings, and expel residents").

¹⁷¹ Richard Slawsky, St. Bernard Parish housing authority would work to clean up slums, NEW ORLEANS CITYBUSINESS, June 20, 2005.

¹⁷² See Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs' Application for a Preliminary Injunction (Rec. Doc. 6-3, at 4 & n.1) (citing United States v. B & S Properties of St. Bernard, L.L.C., Civ. Action No. 04-1063 (E.D. La. 2005)).

¹⁷³ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Rec. Doc. 3, at para. 27-33. See also *id.* at para. 35 (stating that the SBPC denied plaintiff Wallace Rodrigue's formal application to renovate his own property in September 2006 – 9 months after he submitted his application – citing the SBPC moratorium and the Parish's plans to "mitigate" the Village Square area); Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs' Application for a Preliminary Injunction (Rec. Doc. 6-3, at 14-15) (discussing evidence that race of neighborhood residents prior to storm influenced SBPC decisions on permit applications for multi-family housing).

¹⁷⁴ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Rec. Doc. 3, at para. 32. Given that the purpose of the mitigation program is to limit the redevelopment of flood-prone areas, it is notable that the most flood-prone areas of St. Bernard were located outside of Village Square in more predominantly white neighborhoods. Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs' Application for a Preliminary Injunction (Rec. Doc. 6-3, at 15) (citing Logan Report at 8).

of African Americans who had rented housing in St. Bernard Parish pre-Katrina, while ensuring that no new African American renters would be able to migrate there.

Indeed, the fact that the Village Square site is designated as a low-income census tract paved the way for the parish to obtain six million dollars in community development block grant money to use for redevelopment.¹⁷⁵ This availability of federal money to counteract blight in Village Square makes an ironic statement about the way in which the Parish can use the low incomes of former residents to obtain federal dollars for redevelopment activity, even as the Parish takes extraordinary measures to close off all points of re-entry for its former low income residents of color.

To the extent that St. Bernard Parish, would be considered the next rung on the “housing ladder” for low income African Americans looking for better housing conditions and neighborhoods in which to raise their families, given its affordable median housing prices, it is troubling that the Parish – clearly eager to grow its population -- is directing so much energy to deny entry to those in arguably the same circumstances as those entering the parish decades ago. Indeed, between 1960 and the 1980s, whites who had occupied legally segregated housing projects sought to escape desegregation in favor of “affordable-living alternatives in working-class suburbs” such as St. Bernard Parish.¹⁷⁶ These white families, in search of “better school districts, safety, suburban life-styles, less congestion, and lower costs of living”¹⁷⁷ presumably were able to exercise housing mobility to improve the socio-economic position of their families, and thus future generations. Did these white residents, some of them former public-housing residents, face the same barriers currently in place for former public housing residents of color?

New Orleans East

New Orleans East is a suburb located within Orleans Parish, which has experienced substantial racial and demographic shifts since 1980. Most of the neighborhoods within New Orleans East were developed in the 1960s and 1970s. The area was occupied mostly by whites in 1980 and had significant commercial and retail investment, including the largest shopping mall in the region called The Plaza at Lake Forest. After 1986, the Oil Bust severely reduced demand for apartment units in the area, which paved the way for lower-income families to move into previously middle-class apartment complexes. The increasing number of low-income families, most of them African American, moving into the area sparked a massive white exodus in the 1980s and 1990s. By 2005, New Orleans East was a predominantly African American suburb, with some exclusive neighborhoods occupied by upper-income African American families.

¹⁷⁵Chris Kirkham, St. Bernard is back to square one on complex, TIMES-PICAYUNE, May 25, 2009 (“Because the area is designated as a low-income census tract, a \$58 million hospital investment in the area could generate more than \$6 million in additional revenue to use for construction of a medical office building on the site . . .”). Various plans have been proposed for the use of the \$6 million in Community Development Block Grant (CDBG) money made available because of the low incomes of displaced Village Square residents. In addition to the hospital plan, the Parish also had negotiated with a private developer who would purchase individual tracts within Village Square from property owners; the Parish would use FEMA hazard mitigation funds and CDBG funds to assist with acquisition costs.

¹⁷⁶Richard Campanella, An Ethnic Geography of New Orleans, JOURNAL OF AMERICAN HISTORY, 94 (Dec. 2007), 704.

¹⁷⁷*Id.*

Since the storm, New Orleans East has failed to recover a hospital or significant commercial and retail services.

Prior to Katrina, residents in New Orleans East had organized to oppose the development of new affordable apartments in the area, so it was perhaps not surprising that proposals for affordable housing after Katrina would spark the same kind of opposition. For example, residents opposed the development of 38 single-family homes designed to provide affordable “work force” housing under a lease-purchase arrangement near the upscale Lake Carmel subdivision.¹⁷⁸

Consequences of Exclusionary Zoning: Tax credit market freeze

Given the fact that a significant portion of hurricane recovery assistance has come in the form of low income tax credit housing,¹⁷⁹ the rejection of this assistance on the part of local officials throughout the region has certainly obstructed hurricane recovery in metro New Orleans.¹⁸⁰ The fact that the bottom dropped out of the tax credit market in the fall of 2008 also jeopardized the use of tax credits that had not yet been placed in service.¹⁸¹ Of course, local governments in metro New Orleans cannot be blamed for the tax credit market freeze, but the delays occasioned by their rejection of tax credit projects certainly compounded the negative impact of the freeze.

Highest opportunity neighborhoods in the region: Open and Affordable?

Despite the region’s challenges in attempting to recover from Hurricane Katrina, two metropolitan New Orleans area cities have recently managed to make a “top 100” list of best places to live in the United States. Relocate America, an online marketing service for real estate professionals, conducts an annual review of data concerning education, employment, economy,

¹⁷⁸ Bruce Egglar, Affordable housing plan draws opponents from gated Lake Carmel in east New Orleans, TIMES-PICAYUNE, March 25 2009, available at http://www.nola.com/news/index.ssf/2009/03/affordable_housing_plan_draws.html (“residents fear the development would threaten their property values and quality of life”).

¹⁷⁹ See Meghan Gordon, Terrytowners resist low-income housing: Group seeks homes for senior citizens, TIMES-PICAYUNE, November 2, 2006 (referring to comments by Francine Friedman, legislative counsel for the Affordable Housing Tax Credit Coalition, who noted that, under the Gulf Opportunity Zone Act, Congress approved assistance in the form of \$57 million per year for three years in tax credits awarded to private developers who restock Louisiana’s hurricane-ravaged housing supply).

¹⁸⁰ See Meghan Gordon, Jefferson’s housing restrictions attacked, TIMES-PICAYUNE, February 17, 2007 (referring to statements of Mark Madderra, chairman of the LHFA’s multifamily housing committee, “the actions [of Jefferson Parish Councilman Chris Roberts] block the only major program Congress has made available to restore the region’s multifamily housing . . .”); see also *id.* (referring to statements of Ernest Johnson, president of the Louisiana NAACP, “sees [exclusionary actions in Terrytown] . . . as a deliberate barrier to affordable housing that will choke the region’s housing recovery when Jefferson is otherwise well-situated to step in for more devastated areas.”).

¹⁸¹ Bureau of Governmental Research, THE HOUSE THAT UNCLE SAM BUILT: THE CONTINUED EXPANSION OF SUBSIDIZED HOUSING IN NEW ORLEANS, May 2009, at 5 (“A weakened economy and less demand from traditional purchasers of tax credits are taking a toll on tax credit developments.”) (citing U.S. Department of Housing and Urban Development, *Post-Katrina New Orleans: The State of Affordable Rental Housing*, Impact 200 Key Initiative 8 2, November 2008); PolicyLink, *supra*, at 6 (“The national economic downturn means fewer investors in Low Income Housing Tax Credits, jeopardizing the financing for as many as 4,600 of the planned 13,100 units of multifamily rental housing in southern Louisiana.”).

crime, parks, recreation and housing.¹⁸² They also consider nominations from the cities themselves. In 2009, Relocate America selected Metairie, in Jefferson Parish, and Mandeville,¹⁸³ in St. Tammany Parish as Top 100 Places to Live in the nation.¹⁸⁴ What is most interesting about the selection of Metairie and Mandeville as desirable relocation destinations is that these are not communities that have implemented sweeping housing moratoria post-Katrina relating to multi-family housing or rental housing throughout the jurisdiction.¹⁸⁵ This may be explained by the fact that little to no post-Katrina tax credit development has been proposed in these communities. The question arises: why are the communities that have been designated among the highest opportunity communities in the region not slated for any affordable housing development?¹⁸⁶

Conclusion: What can Post-Katrina New Orleans Teach Us About Affirmatively Furthering Fair Housing?

The post-Katrina rebuilding experience with respect to rental housing has revealed that the path of least resistance principle has been an abysmal failure. This laissez faire approach threatens to reinforce racially segregated housing patterns. The post-Katrina development experience has also helped illustrate the way in which private market forces and government interventions frequently conspire to create, maintain, and/or reinforce entrenched racial residential segregation.

Orleans Parish, which prior to Hurricane Katrina had a majority of its housing units occupied by renters and the second highest rate of poverty concentration in the country, sought to reverse a dynamic whereby the majority of the region's poor people lived in the parish. The HUD-run Housing Authority of New Orleans embarked on a massive public housing redevelopment program that sought to demolish approximately 5000 units of public housing in Orleans Parish and replace them with fewer deeply subsidized rental units as well as a majority of market rate units on site.

¹⁸² <http://top100.relocate-america.com/>.

¹⁸³ According to Mandeville's marketing material posted on the Relocate America website, the city "enjoys a lifestyle that is quite different from New Orleans, its South Shore neighbor. . . . Mandeville residents have a common goal: to work hard, and support their families to the best of their ability. Our unemployment rate is extremely low, and our population continues to grow. Mandeville is the most desired city to live within the fastest growing parish in the State of Louisiana." Mandeville, Louisiana Relocation Guide, <http://www.relocateamerica.com/louisiana/cities/mandeville>.

¹⁸⁴ <http://top100.relocate-america.com/>.

¹⁸⁵ Deon Roberts, Land shortage stifles for large apartment development in New Orleans, NEW ORLEANS CITYBUSINESS, May 15, 2006 ("Mike Sevante, St. Tammany Parish council administrator, said the parish has no moratoriums specifically prohibiting multifamily housing, although other types of construction are on hold due to traffic and drainage concerns."); *but see* Cindy Chang, Updated zoning rules passed; condos banned in parts of Mandeville, TIMES-PICAYUNE, October 26, 2007, at Metro-1, *available at*, 2007 WLNR 21121084 (following a December 2006 moratorium on multifamily housing in one historic district within Mandeville, the council adopted restrictions in October 2007 on multi-family development in certain parts of the district, but would allow mixed- use multi-family development).

¹⁸⁶ Seventy-five percent of the housing stock in Mandeville consists of single family homes; the other 25% is a mixture of "condos, newly constructed apartments, and three prestigious retirement communities." Mandeville, Louisiana Relocation Guide, <http://www.relocateamerica.com/louisiana/cities/mandeville>.

At the same time, parishes outside Orleans took concrete action to remove African American renters that had lived in the parish before Hurricane Katrina. Parishes outside Orleans also took concrete action to ban the creation of new rental housing opportunities that might increase the number of African American renters in the parish post-Katrina. Most of the communities imposing bans and other restrictions on the development of rental housing are claiming that they have “enough” rental housing. But in determining whether they have “enough” rental housing to meet the need, they are usually focused on whether the needs of existing residents are being met, not whether they are meeting their fair share of regional need for rental housing.¹⁸⁷

Upon closer examination, the first neighborhoods in which federally assisted housing has been proposed post-Katrina have been those that could be considered the most affordable historically for those seeking to make upward moves. In other words, communities such as Terrytown, St. Bernard, and parts of Kenner and New Orleans East might be considered the next rung on the housing ladder for those wishing to leave high poverty neighborhoods and locate in more working- or middle-class communities. Low-income and working class white families exercised these kinds of housing choices when many of these communities were established. U.S. Census data reflect that, at least in Terrytown, Kenner, and New Orleans East, families of all races had begun to make these moves in the 1980s and 1990s prior to Katrina. Despite its affordability, St. Bernard remained overwhelmingly white outside of the Village Square area, which could be attributable to private market discrimination and limited rental housing. Not surprisingly, these “second rung” communities took decisive action to exclude new federally assisted housing after Katrina, and sought to reverse any demographic shifts that were occurring in these neighborhoods prior to Katrina. On the other hand, the more socioeconomically and racially homogeneous communities, nationally recognized for their desirability, and arguably less affordable or accessible to families seeking to escape concentrated poverty and racial segregation, such as neighborhoods in Metairie and Mandeville, have experienced relatively little intervention in the form of any proposed housing subsidies or tax credit projects. Accordingly, the lack of any significant intervention in these more homogeneous communities could explain the deafening silence with respect to exclusionary zoning activity.

Federally assisted housing programs will continue to perpetuate segregation and poverty concentration if the path of least resistance continues to govern location decisions.

The irony is that aside from the initial act of intervening to provide the housing subsidy itself, the federal government yields to a highly decentralized, laissez faire scheme relating to where the subsidy will be utilized. This is not to suggest that federal housing programs are not heavily burdened by substantial reporting requirements, myriad and conflicting regulations, and byzantine organizational structures. It is to suggest that none of the bureaucracy seems to have

¹⁸⁷ See *Thompson v. HUD*, 348 F.Supp.2d at 463. (“It is high time that HUD live up to its statutory mandate to consider the effect of its policies on the racial and socio-economic composition of the surrounding area and thus consider regional approaches to promoting fair housing opportunities for African-American public housing residents in the Baltimore Region. This Court finds it no longer appropriate for HUD, as an institution with national jurisdiction, essentially to limit its consideration of desegregative programs for the Baltimore Region to methods of rearranging Baltimore’s public housing residents within the Baltimore City limits.”).

ensured that consumers who use federal subsidies have greater access to high quality housing and greater neighborhood choice than those who do not.

HUD has begun to take some positive steps to fulfill its affirmative mandate to further fair housing, which is an encouraging sign.¹⁸⁸ The federal intervention in the housing market must encompass more than merely providing a subsidy. The federal intervention in the housing market should be designed to open neighborhoods not already open, make affordable what is not already affordable, enable housing subsidies to act as gateways to educational and employment opportunity, and inform families historically excluded from housing markets about their choices. Any federal housing interventions that are not so aimed will almost certainly exacerbate existing racial segregation and poverty concentration, as they have done for decades, and -- as post-Katrina New Orleans illustrates -- will continue to do again, and again, and again. . . .

¹⁸⁸ HUD's intervention in the St. Bernard exclusionary zoning battle, its settlement in Westchester County, New York, and its 2011 program initiatives such as the Sustainable Communities Initiative and Choice Neighborhoods Initiative are all promising signs that HUD will act more affirmatively to fulfill its fair housing obligations in the future.

Mr. NADLER. Thank you.

I will now recognize myself for some questions.

First Mr. Perry. In May 2008, you testified before the Financial Services Subcommittee on Housing that the State of Louisiana post-Hurricane Katrina adopted a new building code but removed all the provisions that would have forced developers to build multi-

family units in a manner that was accessible for people with physical disabilities, closed quote. Is there any improvement in terms of fair housing for people with physical disabilities in the building code to date in Louisiana?

Mr. PERRY. Unfortunately, there has not been any improvement. My organization did a study of new construction shortly after that testimony. We investigated 22 new apartment complexes and found that every single one, 100 percent of those complexes, failed accessibility tests under the Federal Fair Housing Act.

Mr. NADLER. And they failed the accessibility test under the ADA?

Mr. PERRY. Not under the ADA. Well, some of them may have had ADA failures, but we didn't investigate for the ADA. We investigated exclusively under the Fair Housing Act.

Mr. NADLER. Now during the same testimony—well earlier, actually 2 months earlier, you recommended the Congress require municipalities to engage in specific activities that further fair housing. What specific activities do you suggest that we could require municipalities to do in order to promote fair housing?

Mr. PERRY. Well, the first is that if organizations or cities are going to get Federal funding, then they should have inclusionary zoning ordinances, ordinances that ensure that there will be some level of construction of affordable rental housing, and it can be properly integrated into communities. Second is that they should engage in education and outreach around Fair Housing laws. And so many communities don't do anything, but they should engage—

Mr. NADLER. You are saying, in other words, as a condition of receipt of Federal funds, they should have to have inclusionary housing laws and do outreach?

Mr. PERRY. Absolutely. And last but not least, they've failed to engage in enforcement, of fair housing laws, and they should engage in enforcement or fund organizations that do engage in enforcement, in their communities.

Mr. NADLER. What would your recommendation be to make them do that enforcement?

Mr. PERRY. Well, I think it's very simple. It's that there aren't regulations for the affirmatively furthering fair housing requirements under the fair housing laws. So if we were to promulgate regulations, those regulations could require them to do so.

Mr. NADLER. Thank you.

Mr. Rothschild, you have been very critical of the Federal Government in its role in the Gulf Coast rebuilding efforts post-Katrina today. You have suggested the best approach to rebuilding occurs by "allowing people in communities to figure out their own solutions to both short-term and long-term housing problems." This approach, in your words, "unleashes their creativity and allows for that pre-Katrina life closure." Where does the Federal Government fit into your bottom-up approach to recovery efforts, if anywhere?

Mr. ROTHSCHILD. The Federal Government has an absolutely critical role to play in rebuilding and recovery after any kind of disaster like this, and that's through establishing and enforcing clear rules of the game, through which people on the ground can make

informed intelligent decisions about how to go about rebuilding their communities and their homes.

Mr. NADLER. But if we're allowing people in communities to figure out their own solutions to both short-term and long-term housing problems, how can we do that and have the Federal Government establish those policies as you have just suggested?

Mr. ROTHSCHILD. I think that also goes to what I was saying about the importance of simplicity in programmatic goals and then simplicity in the execution of those goals.

Mr. NADLER. I mean, in allowing people and communities to figure out their own solutions, what do you do about protecting people in communities where those communities engage in discriminatory practices? What do you do for the people who find themselves subjected to discriminatory ordinances and policies for which the Federal Fair Housing Act should serve as a check if you do this bottom-up development?

Mr. ROTHSCHILD. As I mentioned at the beginning of my testimony, I am not a legal scholar so that's not an issue that I could directly address.

Mr. NADLER. Well, but if you're talking—okay, but if you're talking about a bottom-up approach, it seems to me you have to make a recommendation in there either to say, we don't care about enforcing fair housing provisions, or, despite the bottom-up approach, this doesn't interfere with the enforcement of fair housing provisions if do you this and that.

Mr. ROTHSCHILD. Again, I think the really critical thing is that there is certainty about the rules of the game and that the rules of the game are not constantly changing underneath people's feet as they try to rebuild. So it's important that the government make those clear, credible commitments regardless of what they are.

Mr. NADLER. Even if they're clear Federal commitments about discrimination and fair housing policy, as long as they're there and people know what they are, then they can do the bottom-up?

Mr. ROTHSCHILD. It's dangerous any time the government—it's dangerous to the recovery process if government makes a promise or makes a commitment and government doesn't follow through on it.

Mr. NADLER. But if it makes a rule, you may not discriminate. This is what discrimination is. And that's okay?

Mr. ROTHSCHILD. I'm sorry. Could you repeat the question?

Mr. NADLER. If it makes a rule—because you said certainty—if it makes a rule, you may not discriminate in whatever you do, and here's how we define discrimination, then that's okay.

Mr. ROTHSCHILD. It's important to follow through on the rules that are created, but it's also important that those rules be done in a way—are enacted in a way that people on the ground can understand and can be expected to follow.

Mr. NADLER. Thank you.

Mr. Morse, in a list of recommendations you've shared with us today, you include, quote, "The endorsement of the interpretation of section 804(b), which is the prohibition of discrimination in sale or rental of housing under *Block v. Frischholz*." en banc, the Seventh Circuit found that the Fair Housing Act reaches a broader range of post-acquisition conduct, which in this case could include

the condominium board's repeated removal of a family's mezuzah attached to the front door frame of that family's condo. With such a favorable ruling, can you discuss the need for Federal legislation that ensures the reach of the Fair Housing Act includes post-acquisition conduct? And are you aware of other conduct like that which occurred in the context of religious symbols that dwellers would be particularly vulnerable to without legislation?

Mr. MORSE. Well, I would say, it's a great ruling for the Seventh Circuit.

Mr. NADLER. It's a great what? I'm sorry.

Mr. MORSE. I said, that's a great ruling for the Seventh Circuit, and it's a great ruling I think for the companion case, the Ninth Circuit. I don't know that—the Fifth Circuit, where most of us reside and work, yet have that direct advantage of that ruling. The problem for us is to get consistency and uniformity across the Nation on a specific ruling of that sort. So that's why we would encourage that legislation put that formally in place.

Mr. NADLER. So you would encourage legislation on this?

Mr. MORSE. I would encourage you to put everything firmly in place explicitly, given the sometimes hostile interpretative approach of the courts to the Fair Housing Act.

Mr. NADLER. I will tell you that I designed such legislation after that mezuzah case came down from a three-panel circuit—I think it was the Seventh Circuit, but then they reconsidered it in *Block*, so we put that on the side. But you are saying that because of the uncertainty in circuits, we might reconsider that?

Mr. MORSE. I would encourage you to.

Mr. NADLER. Okay. You have discussed the NIMBY syndrome, Not In My Backyard. We have seen this approach taken with the Mississippi cottages, which were a response to the problem-riddled FEMA trailers that were provided to Katrina victims, which I know seem to be being reused now after the Gulf oil spill, which is incredible. But anyway, jurisdictions are now pursuing ordinances that would eliminate such housing and, again, displaced residents because they, quote, “don't want it in their backyard.” We can create laws to combat such laws, but in the end, when nothing has been done to educate individuals, families and communities as to the importance of having fair and inclusive housing, we will not truly bring an end to the NIMBY syndrome. What can be done in terms of education to combat the NIMBY mind-set in your opinion?

Mr. MORSE. Well, on the Gulf Coast, one of the efforts undertaken was something called Warm Welcome Gulf Coast, which humanized and personified individuals, working families, folks, which other residents of the Gulf Coast area could readily identify with and put a human face on folks who are advantaged by having more inclusionary zoning and more housing opportunity. Those sorts of things, those very public discussions are essential. There is essential leadership that needs to be expressed at the local government level and there has been a paucity of that. So maybe the sort of education efforts that Mr. Perry was referring to would also add to it.

But I must tell you, it's a chronic problem, and it sometimes seems to me that it needs to have some kind of intervention possibility and either through threatening other funds available to mu-

municipalities or through some kind of public interest override. I have heard of such a thing in some cases where repeatedly multifamily rentals are vetoed in local government situations, and the developer in some jurisdictions can appeal to the courts to say, I have made every possible—I have met every possible requirement and this is just an instance of NIMBY. And if you meet a certain set of standards—I think that’s a rule that may be in place in Massachusetts—some version of that sort of override has got to be available because there are some stubbornly recalcitrant jurisdictions where just education—

Mr. NADLER. Nothing will ever work.

Mr. MORSE. Correct.

Mr. NADLER. Thank you. Now you have also testified before other Committees in Congress on the serious housing barriers to lower-income families with limited reading, literacy or financial literacy abilities. Are there still requirements for housing assistance that make the acquisition of such assistance impossible or unnecessarily difficult for low-income families that are limited in reading or literacy or financial literacy skills?

Mr. MORSE. Well, last year, for example, Mississippi received a series of vouchers to try to help very low-income renters who were being pressured to leave FEMA trailers and MEMA cottages to access affordable rental in the area. And the multistep process folks had to go through to achieve eligibility and actually convert that voucher into a location was a serious problem. And in fact, the State officials, folks with whom we’ve had not an especially warm relationship, reached out to us and asked us to help try and increase the usage of those vouchers. So the answer is, yes, there is that sort of need. And it needs to—

Mr. NADLER. There is what?

Mr. MORSE. There is a sort of need to provide—I would call it just extra strong case management and extra strong explanations and very careful sort of guiding people through some of these processes. It’s even more true when folks are in displaced situations and their minds are distracted—

Mr. NADLER. So, in other words, you are saying that—you use the phrase case management to help people through the bureaucracy and the forms and so forth.

Mr. MORSE. In certain cases, I do think that’s an important part of the process. And I think that there are thousands of people in the Gulf region who have just walked away in futility and are living with other relatives just because they can’t—

Mr. NADLER. So what would you think of a provision of law that said that X percent of any grant had to be used by local government either to do it itself or to subcontract with some private organization to provide case management services to applicants?

Mr. MORSE. I think it’s a worthwhile approach. But I would certainly encourage Congress to consider urging municipalities to bring in nonprofit community organizations which, generally speaking, have warmer, more approachable relationships with the disadvantaged populations you are trying to deal with. A lot of times just trying to do the case management through the city people is just reproducing the same problem over and over again. These folks are the same folks that can’t help them in the first in-

stance get through the process, so they need someone who can function more as an advocate, Mr. Chairman.

Mr. NADLER. So you would say that even if the purpose of this division of the city government with the function of the advocates—

Mr. MORSE. Well, I have yet to encounter that where I live, sir. I have yet to encounter that kind of city government official where I live. So I'm unfamiliar with that.

Mr. NADLER. Okay. Now you have previously described FEMA's failure to provide elderly and disabled displaced storm victims with suitable housing. You noted that the Federal Government needs to improve its performance with disability access in catastrophic disasters. What do you think we should do, Congress should do, to ensure that appropriate housing for elderly and disabled disaster victims is afforded properly in the future?

Mr. MORSE. If you are talking about postdisaster, I think the thing that Congress needs to do is, they need to not leave unfettered discretion to Governors on what to set the priorities at. Congress needs to be more directive in how it tells States to spend money. In Mississippi, it was more than 3 years before our State started actually spending money on any rental program. What Congress could do is say, for particularly elderly disabled folks, folks who are especially vulnerable and do not have the ability to lift a hammer and pull themselves up by their bootstraps, is to say, early dollars that you spend need to go out to the most vulnerable populations. We figured the folks who got the money in Mississippi, by about a rate of 80 percent, were relatively wealthy or insured folks, folks who could earn their way or borrow their way or get insurance to hire somebody to take care of their needs.

Mr. NADLER. Do you think the State government and local government doesn't make such judgments?

Mr. MORSE. I am just saying that historically that is not what we have seen in either Louisiana or Mississippi. This is not unique to Mississippi. The thing that I am suggesting you do is to be more explicit and directive and formulaic in the way that you use these moneys.

Mr. NADLER. We should be more explicit and formulaic in directing money in ways that make obvious sense, that benefit the most vulnerable populations, in the expectation that if we don't do that, the States often won't.

Mr. MORSE. Precisely. When you and other Members of Congress came to the coastal area, your sympathies were excited by elderly, disabled folks knee deep in mud. Well, unfortunately, since nobody put it into the law, they did not get the early money that you would have wished them to get. I am encouraging you to be more explicit about that next time around.

Mr. NADLER. Thank you.

Professor Seicshnaydre, a couple of years ago, you said that post-Katrina planning has resulted in two false choices when it comes to affordable housing options. The options are to either, one, keep public housing as it was before the storm, meaning segregated, or two, remove blight, redevelop it, and attract market rate tenants to reduce the number of affordable apartments, which I assume would mean segregated. As this August will mark the fifth-year an-

niversary of Katrina, are we now at a point where we have real choices when it comes to affordable housing options? If so, how have these housing options been pursued and implemented?

Ms. SEICSHNAYDRE. Chairman, that question runs directly into the discussion about the NIMBYism that I think we've all commented on today. And that is that, unfortunately, we've seen a disconnect between public housing redevelopment policy and policy to create more regional, inclusive approaches to providing affordable housing. If we're focused on tearing it down, but we're not focused on creating access and inclusion in a metropolitan area, then have we really succeeded in deconcentrating poverty? Though justifications for the public housing redevelopment programs are to deconcentrate poverty.

Mr. NADLER. Say that again.

Ms. SEICSHNAYDRE. Many of the justifications fueling the redevelopment of public housing are based on the notion that public housing historically has concentrated poor people and has segregated them racially and economically.

Mr. NADLER. And you are saying we shouldn't do that again, obviously.

Ms. SEICSHNAYDRE. We shouldn't do that again. But when we go about fixing that, we need to have a comprehensive approach so that we're not just tearing it down without making sure people have a place to go. And unfortunately, in New Orleans—and I don't think New Orleans is so unique to other communities in this respect—unfortunately, what we've seen is, we tore it down, but we didn't make sure that on a regional basis, we were ensuring that folks had a better place to go.

Mr. NADLER. So you are saying that if you tore it down x units of low-income housing, you weren't making sure that in the reconstruction you were replacing at least x units of low-income housing in the region?

Ms. SEICSHNAYDRE. Certainly there was not one for one replacement and that was a matter of great concern.

Mr. NADLER. Do you think Congress should mandate a one-for-one replacement?

Ms. SEICSHNAYDRE. I would recommend that Congress reconsider that and put back in a one for one replacement provision.

Mr. NADLER. Back in, it used to be there?

Ms. SEICSHNAYDRE. Used to be.

Mr. NADLER. When was it there?

Ms. SEICSHNAYDRE. I would have to—I'm not positive about that.

Mr. NADLER. Are we talking ancient history or until 5 years ago.

Ms. SEICSHNAYDRE. I'm thinking maybe in the 1990's.

Mr. NADLER. In the 1990's, such a requirement which had been there was removed?

Ms. SEICSHNAYDRE. I believe that it was eliminated, yes.

Mr. NADLER. Whenever it was eliminated, do you know what was the rationale at that time?

Ms. SEICSHNAYDRE. Probably expense.

Mr. NADLER. Okay. Now you have argued that a just public housing policy would be resident-conscious, meaning it would be resident-driven and focused on the residents who lived in public housing before the makeover. That's what we were just talking about

in fact. Are you aware of a city, town or other jurisdiction that has implemented a successful resident-conscious public housing policy?

Ms. SEICSHNAYDRE. Well, unfortunately, the jurisdictions that have really managed to embark upon a resident-conscious approach are jurisdictions in which there has been litigation. So where housing authorities and HUD have been sued for historic segregation in their programs, consent decrees have emerged that have brought residents to the table and ensured that, over time, housing authorities and municipalities, you know, remedied historic segregation in a way that included residents.

Mr. NADLER. And those policies have been implemented in various places?

Ms. SEICSHNAYDRE. Yes.

Mr. NADLER. And how have they worked out?

Ms. SEICSHNAYDRE. Well I think in communities like Dallas, in communities where—Baltimore is still—they're still struggling to implement—actually, they're still negotiating a remedy. Chicago had the Gautreaux litigation that had a remedy in place for decades. Those communities are further along. I don't think we can say that they've managed to eliminate racial segregation in their metropolitan areas, but they are further along than certainly we are in New Orleans.

Mr. NADLER. Okay. And finally, as we discuss these fair housing issues in the context of Katrina—we are all aware that these issues of discrimination and housing sales, rentals, financing occurred throughout the entire country—not in the exact form necessarily. But overall they necessarily do. Aside from re-establishing the one-for-one replacement rule, what recommendations would you have for Federal legislation that could strengthen and improve the Fair Housing Act?

Ms. SEICSHNAYDRE. I would strongly recommend that we look at the affirmatively furthering fair housing provision as kind of the missing link in ensuring that when we intervene in the housing market, when the Federal Government intervenes in the housing market, that it does so in a way that promotes a more regional approach, that it promotes inclusion, and that affordable housing can be provided in a way that gives people more housing choice and access to high-opportunity neighborhoods. There is some hope on the horizon. There are some programs in HUD's 2011 budget that give us some hope that we can move in a positive direction.

But I think, with respect to Congress, the affirmatively furthering provision needs to be better defined. We need a private right of action, and we need to make sure that HUD actually enforces it.

Mr. NADLER. Private right of action is very important here.

Ms. SEICSHNAYDRE. Yes.

Mr. NADLER. Thank you. I thank the witnesses.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be made part of the record. Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record. And

we're thanking the Members and thanking the panelists and the witnesses.

This hearing is adjourned.

[Whereupon, at 3:33 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

**Hearing Statement of
Ranking Member F. James Sensenbrenner, Jr.
Subcommittee on the Constitution
Hearing on “Protecting the American Dream Part III: Advancing and Improving the Fair
Housing Act on the 5-year Anniversary of Hurricane Katrina”
Thursday, July 29, at 2:00 p.m. in Room 2141 Rayburn**

This purpose of this hearing is to explore potential gaps in the fair housing laws that some argue were exposed by the events following the devastation caused by Hurricane Katrina in 2005.

Whatever Congress may decide about the merits of those arguments, it should make such a decision having a more complete understanding of the role dysfunctional layers of bureaucracy had on the availability of housing and other resources.

Congress should also reject the use of litigation that relies on the Justice Department’s assertion of legal theories that go beyond those that are authorized by statute. As I have mentioned in previous hearings on similar topics, one such theory involves what are called “disparate impact” claims. The Obama Justice Department has made it clear it intends to follow the Clinton Administration and file more such claims.

“Disparate impact” lawsuits challenge practices that lead to statistically worse results for a particular group relative to other groups without alleging that the practice is actually discriminatory in its terms, design, or application. That is, disparate impact lawsuits claim there is discrimination when there is often no discrimination at all under any reasonable definition of the term.

The abuse of the disparate impact theory in courts has had real-world consequences. There were many pressures on mortgage lenders to relax the standards under which loans were extended in the 1990’s. But one factor was the Clinton Administration Justice Department’s aggressive pursuit of disparate impact claims in which it sought to prosecute entities whose mortgage lending policies did not intentionally discriminate, but only had a disparate impact on one group or another.

In 1998, for example, Clinton Administration Housing Secretary Andrew Cuomo announced the results of a federal lawsuit settlement in which a bank was forced to extend \$2 billion in loans to people who posed a greater credit risk. Secretary Cuomo even admitted during a press conference televised on C-Span that “the 2.1 billion, lending that amount in mortgages, will be a higher risk and I’m sure there’ll be a higher default rate on those mortgages than on the rest of the portfolio.”

A leading article published in the *Banking Law Journal* at the time made clear that “Lenders relying on written standards and criteria in making decisions as to whether to grant a residential mortgage loan application run the risk of exposure to liability under the civil rights law doctrine known as disparate-impact analysis ... Several underwriting guidelines that are fairly common throughout the mortgage lending industry are at risk of disparate-impact analysis [including] creditworthiness standards.”

These lawsuits pressured lenders to bend traditional and time-tested accounting rules and extend more mortgages to many who could not afford them. These relaxed lending standards are now widely regarded as being a prime cause of the current financial crisis. Even the *Washington Post* editorialized that “the problem with the U.S. economy ... has been government's failure to control systemic risks that government itself helped to create. We are not witnesses a crisis of the free market but a crisis of distorted markets ... [G]overnment helped make mortgages a purportedly sure thing in the first place.”

As one economist wrote recently in the *Wall Street Journal*, in addressing housing policy, “political leaders must face up to the actual causes of the ... crisis, not fictitious causes that fit political agendas and election strategies.”

In our efforts to enforce the nation’s housing laws, I hope we do not repeat past mistakes. I look forward to hearing from all our witnesses today.



Congressman Henry C. "Hank" Johnson, Jr.

**Statement for the Hearing on
"Protecting the American Dream Part III:
Advancing and Improving the Fair Housing Act on the 5-Year
Anniversary of Hurricane Katrina"**

July 29, 2010

Next month marks the five year anniversary of Hurricane Katrina. Hurricane Katrina was one of the strongest storms to hit the United States over the past 100 years. It was one of the worst natural disasters that the United States has ever experienced and caused widespread devastation along the Gulf Coast.

Hurricane Katrina also touched upon my home state of Georgia with heavy rains, damaging winds, and tornadoes that damaged homes and lives.

As a result of Hurricane Katrina, nearly 2,000 people lost their lives, many more were injured, and thousands lost their homes.

Some people in the Gulf lost everything and their lives were turned upside down.

Further, many of the Hurricane Katrina victims were facing difficult living conditions before the hurricane struck.

According to the Center on Budget and Policy Priorities, African Americans made up a disproportionate share of the hurricane's victims.

Unfortunately, a lack of affordable housing continues to plague the area for those who need it most.

St. Bernard's Parish has been accused of keeping low-income, working black families from living there.

Just last year, a federal court has ruled twice that St. Bernard Parish has violated the Fair Housing Act in deciding who could move in and had to stay out.

With the demolition of four major housing complexes in New Orleans in 2007, the long-term housing needs of low-income Katrina victims has been difficult to meet. Now, more than ever, the Fair Housing Act is of extreme importance. Especially for those who have lost their homes because of Hurricane Katrina's wrath.

All Americans have the right to be treated equally and free from discrimination. Although the Fair Housing Act has been in existence since 1968, many, especially minorities, are experiencing housing discrimination.

As we mark the 5-year anniversary of Hurricane Katrina, we must ensure that our fair housing laws are strictly enforced to protect everyone, especially the most vulnerable, in our society.

I look forward to hearing from our witnesses about what Congress can do to improve the Fair Housing Act to further prevent and eradicate housing discrimination.

The Chairman has held a series of hearings on the Fair Housing Act and I thank him for his leadership on this issue.

Thank you and I yield back the balance of my time.





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EXECUTIVE
DIRECTOR

JOHN B. BROWN

November 17, 2010

One-Hundred-Eleventh Congress of the United States
House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Chairman Jerrold Nadler,

I apologize for my delay in responding to your correspondence.
International travel related to my recent wedding caused the delay.

Please find responses to questions posed by Congressman Henry C.
"Hank" Johnson, Jr. in addition to a study by the Greater New Orleans
Community Data Center that helps to explain some of the responses.

Best Regards,

James Perry, J.D.
Executive Director

Cc: Honorable James F. Sensenbrenner

Enclosure



Responses to Congressman Henry C. "Hank" Johnson, Jr.'s Witness Questions for the Hearing on Protecting the American Dream Part III: Advancing and Improving the Fair Housing Act on the 5-Year Anniversary of Hurricane Katrina

November 17, 2010

1. As Executive Director of the Fair Housing Action Center, what are the most common types of housing discrimination cases your clients encounter?

The Greater New Orleans Fair Housing Action Center (GNOFHAC) receives hundreds of complaints each year. Generally 50% of our clients complain of discrimination based on their race or color. Approximately 30% complain of discrimination based on their disability. Approximately 10% of our clients complain of discrimination based on their national origin. The remaining 10% are spread among the remaining protected classes.

2. Please describe some of the educational and outreach activities the Center conducts.

The Greater New Orleans Fair Housing Action Center contacts approximately 200,000 people each year through education and outreach activities. Each year we produce public service announcements (psa) about fair housing and the services we provide. Over the years we've done psa's on television, radio and print. Copies of the psa's can be downloaded at www.gnofairhousing.org. In addition, the GNOFHAC staff does a number of fair housing trainings. We lead trainings for both housing professionals and consumers. These trainings have allowed us to have face to face contact with more 1000 individuals annually.

3. You testified that you are the President of the Louisiana Housing Alliance. As you work with that organizations, what are your thoughts about the state of adequate low-income affordable housing in Louisiana? Do you have any figures on how many individuals are on waiting lists, Louisiana, for low-income affordable housing?

Affordable housing is severely lacking in Louisiana. New Orleans provides an example of the difference between the affordable housing need and the affordable housing supply in the State. For example, while the local housing authority has reduced the net number of public housing units by more than half to just over 2000 units, since hurricane the number of homeless

residents in New Orleans has doubled from 6,000 to approximately 12,000 according to Unity for the Homeless, a New Orleans homeless advocacy organization. The Louisiana Housing Alliance Staff engaged in a recent state tour and poll. Consistently among housing organizations and consumers, the common cause for concern was the lack of affordable housing.

Some have questioned the call for more affordable housing given the record amount of low income housing tax credits allocated to Louisiana to build affordable housing. Unfortunately, neighborhood opposition delayed construction on many developments. Later when developments were prepared to proceed, tax credits had waned in value due to the downturn in the national financial market. Gulf Opportunity Zone Tax Credits were not included in recent federal tax credit exchange and extension programs and as a result they have become rather valueless. Numerous projects including the redevelopment of two of New Orleans public housing developments have stalled as a result leaving poor Louisianans with few housing options.

I have attached a recent study by the Greater New Orleans Community Data Center that lays out the details of New Orleans' housing market.

4. In your written testimony, you mention problems with the Road Home Program which was designed to assist Louisiana homeowners affected by Hurricane Katrina rebuild their homes. Please share any specific instance of problems individuals face with the Road Home Program.

The Road Home Program has had nearly 230,000 applicants. About 150,000 have been deemed eligible for the program. As such, the number of individual problems are immense. Rather than attempt to relay a small number of individual problems that may or may not be representative of the program's failures, I have listed newspaper articles that tell representative stories. I would note that generally the program failures fall into one of two major categories: bureaucratic failures and flaws in the grant calculation formula.

http://www.nola.com/opinions/index.ssf/2010/10/louisiana_gov_bobby_jindals_ad.html

<http://fsrn.org/audio/home-rebuilding-program-louisiana-has-faced-struggles-five-years-after-katrina/7377>

http://216.87.191.15/News/Louisiana/Katrina/Rebuild/Heads_Should_Roll_On_Louisiana_Road_Home_3600.asp

<http://www.southernstudies.org/2009/08/paving-the-road-home-new-orleans.html>

<http://www.louisianaweekly.com/news.php?viewStory=2035>

<http://thelensnola.org/2010/04/22/nora-elevation-problem/>

<http://pogoblog.typepad.com/pogo/2009/09/the-far-too-long-and-winding-road-home-program.html>

<http://www.thedefendersonline.com/2010/07/30/court-finds-“strong-inference”-of-discrimination-in-louisianahud-post-hurricane-recovery-program/>

5. What can be done to improve the Road Home Program?

The Program could benefit from any number of tweaks and changes. But there are two fundamental changes that would have the greatest chance of getting residents back into their homes. First, the program should change its formula both prospectively and retroactively to pay residents based on the present day cost of rebuilding their homes rather than the pre-Katrina value of their homes. As noted in my testimony and a recent New York Times Editorial, a large portion of New Orleans’ housing remains blighted because homeowners who participated in the Road Home Program remain short of the capital required to rebuild. Repairing this formula gap would allow homeowners to receive grant awards that would allow them to fully repair their homes.

Second, the program needs more funding. It is estimated that reforming the formula in a manner consistent with the formula noted above, may cost as much as \$1.5 billion for the entire State of Louisiana. The additional funding may be key to returning New Orleans and Louisiana to their pre-Katrina status.





October 21, 2010

Congressman Henry Johnson, Jr.
 House of Representatives
 Committee on the Judiciary
 Attn: Matthew Morgan
 B-353 Rayburn House Office Building
 Washington, D.C. 20515

Re: Witness Questions for the Hearing on Protecting the American Dream Part III: Advancing and Improving the Fair Housing Act on the 5-Year Anniversary of Hurricane Katrina

Dear Congressman Johnson:

Thank you for your questions regarding my testimony before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties on July 29, 2010. I address them individually below.

Question 1: As you know, there have been concerns about the Road Home Program. What suggestions do you have for improving this program?

Response: As I discussed in my testimony, the Road Home program was plagued with problems from the start because it was not intended to be solely a compensation program. Rather, it was made exceptionally complex, both from the point of view of homeowners and the officials charged with administering it, because it sought to plan Louisiana's recovery from the top down. Not only was the application process cumbersome, numbering some 57 discrete steps in the beginning, but it released money in tranches rather than all at once. It also penalized homeowners who chose to rebuild outside of Louisiana or who took more than 180 days to find a new home. A program that was truly just about compensation for homeowners and landlords who suffered damage or destruction as a result of Katrina would not have had these strictures.

There is little that can be done to salvage the program at this point, but policy makers can learn from the Road Home experience for the future. Here are some key lessons:

- Make programs as simple and transparent as possible. Complex programs that serve competing or contradictory goals, such as the Road Home program, frustrate the people that these programs are intended to assist. What we saw in Louisiana in particular was that the complexities of the Road Home and other federal and state programs redirected the time, energy, and resources of people away from productive ends (such as repairing homes and businesses) towards the navigation of complex bureaucracies. This acts, in effect, as a tax on valuable resources.

- Fight fraud ex post, not ex ante. Waste, fraud, and abuse are of serious concern, and such acts should be identified and thoroughly prosecuted. Nevertheless, public policy should not penalize the vast majority of applicants who are honest by subjecting them to excessive compliance requirements. Such requirements delay rebuilding and are particularly taxing in the aftermath of disasters when records have typically been damaged or destroyed. It is better to vigorously prosecute fraud after the fact; accountability and transparency need not mean delays.
- Make programs flexible for citizens. The purpose of post-disaster housing policy should be to empower people and their communities to make those decisions that are right for them. My response to question 2 addresses this point in more detail. Flexibility occurs when public policies provide tools for people to create their own solutions rather than when policies attempt to pre-ordain the solutions.
- Do not make legislative promises that cannot or will not be fulfilled. Any compensation program should have its rules clearly laid out from the start. Making promises that people pin their hopes on but fail to materialize slows rebuilding and sows mistrust towards future promises.

Our research suggests that people and communities can recover effectively from disasters from the bottom up, as long as public policy creates and enforces clear rules for them to do so. By muddying the rules rather than clarifying them, the Road Home program slowed recovery efforts.

Question 2: In your written testimony, you state that flexibility is an effective key to post-Katrina housing policy. You suggest that we should allow people to figure out their own solutions to the housing problems individuals in Louisiana are facing. I have two questions. First, practically speaking, how would this work? Second, is it not true that we need government policies like the Fair Housing Act in place, especially with discrimination that has occurred recently in St. Bernard's Parish?

Response: In the course of our research, we documented dozens of creative housing solutions from residents of Louisiana and Mississippi. Some stayed with family or friends and commuted back to their damaged homes on weekends to fix them. Others decided against rebuilding their old homes. Some are building or fixing up new homes in Louisiana or elsewhere. Some homeowners decided they were better off becoming renters. Some small-business owners lived in their businesses in order to fix them up to reopen quickly. One nurse in New Orleans's Lower Ninth Ward decided that her home would be more valuable as a health clinic for the community than as her residence.

What is clear is that there is no "one-size-fits-all" solution for either short-term or long-term housing after disasters, just as there is no single solution to achieve housing security for families during normalcy.

Just as families and landlords buy, sell, rent, and lease homes every day, these transactions can still occur after a disaster, provided that the "rules of the game" are clear for all those involved. Programs such as the Road Home, which create "signal noise," a term I discuss in my written

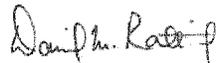
testimony, make these rules less clear. This lack of clarity hampers the ability of markets and civil society, including the nonprofit groups that have played such a critical role in rebuilding, to quickly and efficiently provide housing.

The best way to help households find housing after a disaster is to provide housing vouchers with as few strictures as possible. Trailers might make sense for some households but not for others. Indeed, many people we interviewed were grateful for the fact that they could put trailers in front of their homes while they were rebuilding them. But others were consigned to FEMA trailer parks, miles away from jobs and stores and services. This is a mistake that we should not repeat.

I have no particular expertise on enforcement of housing discrimination laws. What our research suggests is that if governments make a commitment to specific policies, they should be willing and able to carry them out. It is critical that everyone understand the rules, including what actions or inactions meet with government sanctions, and that governments make clear, credible commitments to carry out those sanctions.

Thank you again for your interest in my testimony, and I hope that my responses prove helpful to you.

Respectfully,



Daniel M. Rothschild

**MISSISSIPPI
CENTER
FOR JUSTICE**

5 Old River Place, Ste 203 (39202)
P. O. BOX 1023
JACKSON, MS 39215-1023
601-352-2269
fax 601-352-4769
www.mscenterforjustice.org
A Mississippi Non-Profit Corporation

GULF COAST OFFICE
974 Division Street
Biloxi, MS 39530-2960
228-435-7284
fax 228-435-7285

November 8, 2010

Attention: Matthew Morgan
Committee on the Judiciary
B-3553 Rayburn House Office Building
Washington, DC 20515

re: Responses to Questions of Congressman Henry C. "Hank" Johnson

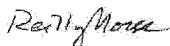
Dear Mr. Morgan:

Please convey my thanks to Chairman Nadler and Representative Johnson for the set of questions arising from the July 29, 2010 hearing on the American Dream, Part III: Advancing and Improving the Fair Housing Act on the 5-year Anniversary of Hurricane Katrina.

Attached are my responses to these questions for inclusion in the record.

With personal regards, I am,

Very Truly Yours,



Reilly Morse
Senior Attorney, Gulf Coast Office
Mississippi Center for Justice

Questions for Mr. Morse:

1. In your legal clinics, what are the most common housing discrimination cases you encounter?

Answer: The most common cases since Hurricane Katrina have been local government zoning and permitting decisions which use various pretexts to block the placement or construction of low-income housing out of fear of increased concentration of African American, Hispanic, or other racial minority individuals or families as tenants, all of which tend to disproportionately more heavily rely upon federally subsidized housing. The next most frequently encountered type of discrimination concerned persons with disabilities who were not adequately served or accommodated by housing providers such as the Federal Emergency Management Agency and the Mississippi Emergency Management agency.

2. Since Hurricane Katrina, what is the status of low-income housing for individuals in Mississippi? Seniors? Do you have any information on how many individuals may be on waiting lists to receive such housing?

Answer: There are several post-Katrina studies of low-income and affordable housing for individuals in Mississippi. They include one by the Rand Gulf States Policy Institute, several on rental housing by W. S. Loper and Associates and four by the Mississippi Housing Data Project. While these studies use different methodologies and time frames for measuring conditions and affordability, they generally agree that in the immediate aftermath, and for several years afterwards, rental rates spiked, which disproportionately burdened low-income individuals and families who sought affordable, safe, and habitable housing. As tax-credit financed properties and other Katrina CDBG-funded programs were completed, the shallow subsidy rental market became overbuilt, while the deep subsidy rental market remained underserved. See Rand report, pp. 30-31, (narrative description); Loper 2010 report, p. 16 (6% vacancy rate for all assisted housing, 0% vacancy rate for traditional public housing); MHDP Report, June 2010, p. 9 (showing 1% vacancy rate for deep subsidy apartments).

Mississippi Center for Justice has no independent current information about waiting lists for individuals seeking public housing or voucher assistance. However, we understand that this information is currently maintained by the housing authorities in the affected areas, which include Mississippi Regional Housing Authority VIII, Biloxi Housing Authority, and Bay-Waveland Housing Authority.

3. Poverty was an issue that affected Mississippi before Hurricane Katrina. What can Congress do to ensure that Mississippi builds back better than before?

Continued Congressional oversight of the actions of HUD and Mississippi in the remaining approvals and uses of Katrina CDBG funds is an appropriate step to take. An Inspector General's report should be prepared on whether Mississippi's programs as implemented met the HUD overall benefit requirement for low- and moderate-income persons. In the future, Congress should never again include provisions that (1) allow HUD to reduce or waive the percentage requirement to spend funds to benefit low and moderate income person or (2) require HUD to accept a state's action plan for use of disaster block grant funds, as was apparently done in the December, 2005 appropriation, Public Law 109-148.

4. Currently, the Fair Housing Act does not prohibit discrimination based upon source of income. Please discuss the problems individuals, who depend on government funds for survival, face when searching for affordable housing in Mississippi.

In Mississippi, as elsewhere, discrimination based upon whether or not a landlord accepts a housing voucher, or whether the source of income is "acceptable," has been a pervasive phenomenon. This is not an area, however, where our organization has developed any detailed local statistical data. Our organization endorses the position set forth in *The Future of Fair Housing*, as recounted in the testimony of our national affiliate's executive director, Barbara Arnwine of the Lawyers' Committee for Civil Rights Under Law, before this committee on March 11, 2010, at pp. 10-11.

"Discrimination based on source of income can have a profound effect on the housing choices that are available to home seekers including an effect of perpetuating neighborhoods that are racially and economically impacted. For that reason, a systematic examination of the need for an amendment to the Fair Housing Act to prohibit discrimination based on source of income is needed."

Responses of Stacy Seicshnaydre, October 28, 2010¹

to

Congressman Henry C. Hank Johnson, Jr.

**Witness Questions for the Hearing on Protecting the American Dream Part III:
Advancing and Improving the Fair Housing Act on the 5-Year Anniversary of
Hurricane Katrina
July 29, 2010**

1. **In your written testimony, you state that federally assisted housing programs in New Orleans have operated as engines of segregation and poverty concentration, rather than as gateways of opportunity for low-income African Americans. In your testimony, you state that Hurricane Katrina offered an opportunity for a new, more inclusive New Orleans where federally assisted housing could respond to the regional housing needs of the community. In the five years since Hurricane Katrina has hit New Orleans, has this been the case?**

Orleans Parish, which prior to Hurricane Katrina had a majority of its housing units occupied by renters and the second highest rate of poverty concentration in the country, sought to reverse a dynamic whereby the majority of the region's poor people lived in the parish. The HUD-run Housing Authority of New Orleans embarked on a massive public housing redevelopment program that sought to demolish approximately 5000 units of public housing in Orleans Parish and replace them with fewer deeply subsidized rental units on site as well as a majority of market rate units.

Meanwhile, neighboring jurisdictions acted aggressively to avoid any demographic shifts that new rental housing, particularly new government-assisted rental housing, might bring. Rental bans proliferated throughout the region, primarily in communities that had previously served as affordable suburban alternatives for lower- and middle-income whites in prior decades.

¹ The responses to these questions are in part excerpted from an article to be published in Volume 60, Issue 3 of the Catholic University Law Review, entitled *How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*.

These communities sought not only to prevent the development of new rental housing, but to limit the repair of rental housing that pre-existed the storm. Most of the communities imposing bans and other restrictions on the development of rental housing have claimed that they have “enough” rental housing. But in determining whether they have “enough” rental housing to meet the need, they are usually focused on whether the needs of existing residents are being met, not whether they are meeting their fair share of regional need for rental housing.

Upon closer examination, the first neighborhoods in which government-assisted housing has been proposed outside of Orleans post-Katrina have been those that could be considered the most affordable historically for those seeking to make upward moves. In other words, communities such as Terrytown, St. Bernard, and parts of Kenner and New Orleans East might be considered the next rung on the housing ladder for those wishing to leave high poverty neighborhoods and locate in more working- or middle-class communities. Low-income and working class white families exercised these kinds of housing choices when many of these communities were established. U.S. Census data reflect that, at least in Terrytown, Kenner, and New Orleans East, families of all races had begun to make these moves in the 1980s and 1990s prior to Katrina. Despite its affordability, St. Bernard remained overwhelmingly white outside of the Village Square area, which could be attributable to private market discrimination and limited rental housing. These “second rung” communities took decisive action to exclude new rental and/or government-housing after Katrina, and sought to reverse any demographic shifts that were occurring in these neighborhoods prior to Katrina.

On the other hand, several socioeconomically and racially homogeneous communities, nationally recognized for their desirability, and arguably less affordable or accessible to families seeking to escape concentrated poverty and racial segregation, such as neighborhoods in Metairie

and Mandeville, have experienced relatively little intervention in the form of any proposed housing subsidies or tax credit projects. Accordingly, the lack of any significant intervention in these more homogeneous communities could explain the deafening silence with respect to exclusionary zoning activity.

2. Many low-income individuals in New Orleans are not going to be purchasing homes, but looking for suitable places to rent to raise their families. In your opinion, are there issues with renters refusing to rent to individuals who use vouchers? If so, please discuss.

There is a recent study to support the conclusion that voucher discrimination inhibits the use of vouchers in the greater New Orleans area, thus denying choice and opportunity to poor persons in the region.² The GNOFHAC Housing Choice Report finds that throughout the New Orleans area, “[l]andlords denied voucher holders the opportunity to rent units **eighty-two percent (82%)** of the time, either by outright refusal to accept vouchers or by the addition of insurmountable requirements for voucher holders making it impossible for voucher holders to rent units.”³

The GNOFHAC Housing Choice Report also suggests that there is reluctance on the part of suburban jurisdictions to accept transfers from inner city voucher holders seeking to use vouchers in suburban neighborhoods. According to the Report’s authors, “[t]he Housing Authority of New Orleans currently accepts voucher transfers from other jurisdictions in the region, however neighboring jurisdictions do not as readily accept transfers. Therefore, voucher

² See GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, HOUSING CHOICE IN CRISIS: AN AUDIT REPORT ON DISCRIMINATION AGAINST HOUSING CHOICE VOUCHER HOLDERS IN THE GREATER NEW ORLEANS RENTAL HOUSING MARKET, [HTTP://WWW.GNOFAIRHOUSING.ORG/PDFS/HOUSINGCHOICEINCRISIS2009.PDF](http://www.gnofairhousing.org/pdfs/HousingChoiceInCrisis2009.pdf) (2009) (emphasis in original) (hereinafter, GNOFHAC Housing Choice Report).

³ *Id.* at 8.

holders face limited regional choice, hampering economic and racial integration on a regional level.”⁴

3. How can Congress improve the Fair Housing Act to prevent federally assisted housing programs from causing segregation?

Government-assisted housing programs will continue to perpetuate segregation and poverty concentration if the federal government continues to yield to a highly decentralized, laissez faire scheme relating to where the subsidy will be utilized. I have elsewhere described this phenomenon as the “path of least resistance” approach. The legislative history to the Fair Housing Act suggests that HUD’s affirmative duty to further fair housing “was seen as a way of buttressing existing legal resources in order to mount a stronger attack on ‘the widespread problem of segregation in public housing.’”⁵ A more vigorous enforcement mechanism must be enacted to fulfill this vision, therefore. Congress should amend the Fair Housing Act to create a private right of action to enforce the requirement at 42 U.S.C. §3608(e)(5) that HUD and other recipients of federal funding affirmatively further fair housing. In this way, Congress can ensure that “HUD use[s] its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”⁶

Further, Congress and HUD must not reward exclusionary jurisdictions by continuing to fund them. As post-Katrina New Orleans demonstrates, without strong inclusionary approaches at the local and state levels for using federally assisted housing, most localities will trend towards exclusion. Congress and HUD, in partnership with other federal agencies, can condition federal funding on the adoption of concrete inclusionary zoning and other strategies designed to

⁴ *Id.* at 18.

⁵ ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION 21:1, at 21-5 (2010).

⁶ NAACP, Boston Chapter v. HUD, 817 F.2d 149, 154-55 (1st Cir. 1987).

accomplish the fair housing policies HUD has promoted in theory, but has failed to implement at the local level.

Congress can impose a more demanding vision of HUD's affirmative duty and require HUD to consider regional approaches to delivering housing opportunity to African-American households.⁷ Ultimately, the federal intervention in the housing market must encompass more than merely providing a subsidy. The intervention must open neighborhoods not already open, make affordable what is not already affordable,⁸ enable housing subsidies to act as gateways to educational and employment opportunity, and inform families historically excluded from housing markets about their choices.

⁷ See *Thompson v. HUD*, 348 F.Supp.2d 398, 463 (D. Md. 2005) ("It is high time that HUD live up to its statutory mandate to consider the effect of its policies on the racial and socio-economic composition of the surrounding area and thus consider regional approaches to promoting fair housing opportunities for African-American public housing residents in the Baltimore Region. This Court finds it no longer appropriate for HUD, as an institution with national jurisdiction, essentially to limit its consideration of desegregative programs for the Baltimore Region to methods of rearranging Baltimore's public housing residents within the Baltimore City limits.")

⁸ See Jill Khadduri, *Comment on Kirk McClure's "Are low-income housing tax credit developments locating where there is a shortage of affordable units?"*, 20:2 *Housing Policy Debate* 181, 183 (2010) ("The objective is to identify places where LIHTC is – or could be – opening up opportunities in places where low-income households would not otherwise have an opportunity to live, even if subsidized by housing vouchers.")

