



**U.S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT**

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VIA ELECTRONIC MAIL & CERTIFIED MAIL – RETURN RECEIPT REQUESTED

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SUBJECT: Supplemental Letter of Findings of Noncompliance

Case Numbers: 06-21-1483-6/9

This letter reports the supplemental findings of the investigation conducted by the U.S. Department of Housing and Urban Development (“HUD”) under, *inter alia*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and its implementing regulations at 24 C.F.R. Part 1 (“Title VI”) concerning the Texas General Land Office’s (“GLO”) design and operation of the Hurricane Harvey State Mitigation Competition (the “Competition”).

HUD initiated this investigation on June 25, 2021, pursuant to *inter alia*, Title VI, 42 U.S.C. § 2000d et seq., as well as the Fair Housing Act, 42 U.S.C. § 3601 et seq., based on a complaint filed with HUD by Texas Housers and Northeast Action Collective alleging that GLO’s design and operation of the Competition discriminated on the basis of race and national origin through the use of scoring criteria that substantially disadvantaged Black and Hispanic residents.

As you know, on March 4, 2022, HUD issued findings that GLO was not in compliance with, *inter alia*, Title VI. In that letter of findings, HUD determined that the design and operation of the Competition discriminated on the basis of race and national origin in that GLO utilized two scoring criteria that substantially and predictably disadvantaged minority residents, with particularly disparate outcomes for Black residents. First, GLO excluded areas designated by HUD as most impacted and distressed from competing for 50% of the Competition funds, though nearly 90% of the eligible population resided in those areas. Second, GLO scored applicants using “the Project Impact Criterion,” which substantially disadvantaged larger population jurisdictions, where Black and Hispanic residents of eligible areas are more likely than White non-Hispanic residents to reside. GLO utilized both of these criteria even though they disadvantaged areas with the greatest mitigation needs by GLO’s own measure and ran counter to the intended focus on low-and moderate-income (“LMI”) households.

On April 1, 2022, GLO submitted a request for review of these findings pursuant to 24 C.F.R. § 6.11(c). On May 16, 2022, HUD issued a letter of determination sustaining its findings of noncompliance. The letter of determination notified GLO that it had 10 calendar days from receipt of this formal determination to come into compliance through the execution of a voluntary compliance agreement. GLO responded that it did not wish to pursue voluntary compliance. Subsequently, on June 28, 2022, the Secretary of HUD sent a letter, as required by 24 C.F.R. § 6.12(a), requesting that the Governor of Texas secure compliance in this matter. On August 26, 2022, the Governor declined to engage in efforts to voluntarily resolve the discriminatory conduct identified.

When GLO initially refused to engage in discussions around voluntary relief, HUD continued its investigation, including through formal discovery.¹

The additional discovery established that GLO did not comply with HUD’s prior investigatory requests; under subpoena, GLO subsequently produced numerous documents that were responsive and relevant to the requests for information issued as part of the initial phase of the investigation which culminated in HUD’s March 4, 2022 findings. The information obtained by HUD following its subpoenas not only reinforced these findings, but also evinced that GLO intended to allocate Mitigation funds in a manner it knew would disadvantage minority communities and therefore discriminate based on race as set forth here.

¹ Further discovery consisted of HUD-issued subpoenas for documents and deposition testimony pursuant to HUD’s authority under the Fair Housing Act. 42 U.S.C. § 3611(a) and 24 C.F.R. § 103.215(b). When GLO refused to comply with HUD’s subpoenas and final order enforcing those subpoenas, HUD referred the discovery noncompliance to the U.S. Department of Justice (“DOJ”) pursuant to 42 U.S.C. § 3614(c). That matter remains open, with DOJ most recently informing GLO of its continued discovery deficiencies—including GLO’s repeated refusal to provide the required oath that GLO had produced all relevant documents, and GLO’s unwillingness to comply with deposition notices for testimony. Moreover, HUD conducted an organizational deposition of GLO pursuant to F.R.C.P. 30(b)(6) on April 24 and April 25, 2024. Heather Lagrone, Senior Deputy Director for Community Development and Revitalization, testified as GLO’s designated representative to present—under oath—GLO’s position. References throughout this letter about GLO’s testimony, admissions, or the like cite to the deposition transcript.

Of note, during the investigation GLO repeatedly asserted that HUD required 50% be allocated to areas GLO determined to be the “most impacted and distressed,” contrary to the plain language of the requirement at issue. Under oath, GLO acknowledged that it could have allocated more, including during discussion of the various scenarios discussed below. GLO thus focused Mitigation resources in communities that benefitted smaller populations of rural White Texans over communities of urban Black and Hispanic Texans, particularly those closer to the coast and more prone to flooding from hurricanes and other natural disasters.

HUD has repeatedly undertaken efforts to negotiate with GLO a Voluntary Compliance Agreement/Conciliation Agreement (VCA/CA) that would remedy GLO’s noncompliance and resolve the outstanding claims under the Fair Housing Act. Because of GLO’s sustained unwillingness to finalize and execute an appropriate VCA/CA that will put GLO on a path towards remedying its past and ongoing violation of Federal law, HUD is now issuing this Supplemental Letter of Findings. This letter also serves to refer to the Department of Justice the Title VI matter pursuant to 42 U.S.C. § 2000d-1. Because the nature of the violations would constitute both a pattern and practice of discrimination and also rise to the level of general public importance, HUD also refers the Fair Housing Act allegations to the Department of Justice pursuant to 42 U.S.C. § 3610(e)(2).

I. SUMMARY OF FINDINGS

Based on HUD’s additional investigation, HUD finds that GLO intentionally discriminated based on race in the design and operation of the Competition. Through a sequence of calculated decisions, GLO knowingly developed and operated a competition for the purpose of allocating funds to mitigate storm and flood risk that steered money away from urban Black and Hispanic communities that had the highest storm and flood risk into Whiter, more rural areas with less risk. Despite awareness that its course of action would result in disparate harm for Black and Hispanic individuals, GLO still knowingly and disparately denied these communities critical mitigation funding. In doing so, GLO compounded the harm that these communities experienced following Hurricane Harvey—harm that continues due to GLO’s intentional denial of funds to these areas. HUD’s findings of fact, conclusions of law, and remedies are set forth in this letter.

II. FINDINGS

A. Background About Hurricane Harvey

On August 25, 2017, Hurricane Harvey made landfall along the Gulf Coast of Texas. The historic storm—identified as a “500 year” rain event—resulted in the loss of 82 lives and caused over

an estimated \$100 billion in damage to the region.² Catastrophic in its own right, the historic storm compounded existing flooding issues in this area, which had experienced several federally declared disasters in the preceding years.

The City of Houston and Harris County (in which the City of Houston is located) experienced the highest number of Harvey-related deaths and the highest number of flooded homes in Texas.³ Houston reported that roughly half of its homes were damaged by the storm.⁴

B. Texas’s \$4.3 Billion Grant

In August 2019, two years after Hurricane Harvey, HUD granted \$4.3 billion to Texas in Community Development Block Grant Mitigation (“CDBG-MIT”) funds via a Federal Register notice (the “HUD Notice”).⁵ Prior to implementing a plan for spending the grant funds, HUD required Texas to submit an Action Plan, that included “a risk-based Mitigation Needs Assessment that identifies and analyzes all significant current and future disaster risks and provides a substantive basis for the activities proposed.”⁶ Texas was also required to assess the effect of its plan under fair housing and civil rights laws including by “assess[ing] how the use of CDBG–MIT funds may affect members of protected classes under fair housing and civil rights laws, racially and ethnically concentrated areas, as well as concentrated areas of poverty.”⁷ While GLO was afforded some discretion in how it designed its program to allocate funding under the Notice, the obligation to both conduct this assessment under the Notice and to comply with fair housing and civil rights laws was not discretionary.

HUD limited the types of activities that were eligible for funding. HUD’s list of eligible activities included many related to the availability of housing—such as buyouts, down payment assistance, housing incentives, and demolition. Eligible activities also included improvements to the infrastructure for housing-related services—such as drainage and flood control.

HUD also limited which people the grant could be used to benefit. HUD required that at least half of the \$4.3 billion benefit low-to-moderate-income persons, defined as 80% or below area median

² *Major Hurricane Harvey – August 25-29, 2017*, NAT’L WEATHER SERV., https://www.weather.gov/crp/hurricane_harvey; Management Alert – Observations and Concerns with FEMA’s Housing Assistance Program for Hurricane Harvey Efforts in Texas, U.S. DEP’T OF HOMELAND SEC. OFF. OF INSPECTOR GEN. (Sept. 29, 2017), .

³ Monique Welch, *Hurricane Harvey by the numbers: 5 years later, see the storm’s lasting toll on Houston*, HOUS. CHRON. (Aug. 23, 2022), <https://www.houstonchronicle.com/news/houston-weather/hurricanes/article/harvey-by-the-numbers-17384825.php>.

⁴ Keaton Fox, *Updated analysis shows nearly half of Houston homes damaged in Harvey*, ABC 13 HOUS. (Oct. 11, 2018), <https://abc13.com/half-of-houstons-homes-were-damaged-in-hurricane-harvey/4461534/>.

⁵ 84 F.R. 45838-45871 (Aug. 30, 2019). The HUD Notice was issued pursuant to the Bipartisan Budget Act of 2018, which appropriated \$28 billion in Community Development Block Grant-Disaster Recovery (“CDBG-DR”) and CDBG-MIT funding. Pub. L. 115-123 (Feb. 9, 2018).

Id. at 45840.

⁷ *Id.* at 45847.

income, in keeping with the CDBG-MIT program’s “statutory focus on benefitting vulnerable lower-income people and communities.”⁸

In addition, HUD limited which geographic areas the grant could be used to benefit. HUD required that *at least* half of the \$4.3 billion benefit areas HUD determined were “most impacted and distressed.” HUD designated 23 counties and 15 ZIP Codes in Texas as most impacted and distressed (“HUD MID areas”) based on data showing that designated disasters, including Hurricane Harvey, left them with the greatest “unmet needs” with respect to damage done to housing, infrastructure, and small businesses. Houston and Harris County were among the areas designated as HUD MID areas.

C. The Hurricane Harvey Competition

On January 31, 2020, GLO submitted its Action Plan to HUD following a brief public comment period. As reflected in the HUD Notice, HUD’s Office of Community Planning and Development (“CPD”) may only disapprove a CDBG-MIT Action Plan if it determines that the plan is “substantially incomplete.”⁹ An Action Plan is “substantially incomplete” if it does not contain all of the required elements identified in the Federal Register notice for use of CDBG-MIT funds.¹⁰ One of the required elements is the submission of certifications that HUD grantees, such as GLO here, promise that it will administer the program in accordance with, among other authorities, Title VI and the Fair Housing Act.¹¹ Put differently, CPD review and approval at this point only means that GLO included in the Action Plan the required elements and the agreement and promise to comply with civil rights and fair housing laws in the administration of the CDBG-MIT grant. Notably, GLO would still develop criteria to implement the Action Plan after this stage of determining whether the plan was “substantially incomplete,” and did so, which included the discriminatory criteria referenced in this letter. On March 31, 2020, based on GLO’s representations, HUD approved GLO’s Action Plan.

GLO’s Action Plan detailed 11 different programs to allocate funds. Most significantly, GLO proposed to allocate roughly half of the \$4.3 billion grant to a two-round Hurricane Harvey Competition, the purpose of which was to mitigate the risk of future damage from storms and flooding in areas impacted by Hurricane Harvey. Entities eligible to apply for the Competition included cities, counties, Councils of Government, state agencies, Indian tribes, port authorities, river authorities, and special purpose districts. Each eligible entity was allowed to apply for up to \$100 million for a project.¹²

⁸ *Id.* at 45838.

⁹ *Id.* at 45846.

¹⁰ *Id.* at 45840.

¹¹ *Id.* at 45870.

¹² The Competition rules also limited each eligible entity to a total of three individual and three joint applications and provided that no applicant would be awarded a second individual or joint project until all successful eligible applicants had been awarded funding at least once.

GLO allocated approximately \$1 billion to each round of the Competition. Round 1 was conducted from May 28, 2020, to October 28, 2020. As discussed below, GLO never proceeded with Round 2.

Though the Action Plan did not make this point explicit, GLO subdivided Round 1 of the Competition into two sub-competitions of \$500 million each. The first sub-competition was for eligible entities located in the HUD MID areas discussed above. The second sub-competition was for eligible entities located in areas designated by GLO as also having been “most impacted and distressed” by Hurricane Harvey (“State MID” areas).

GLO designated as State MID areas all additional counties that received a presidential disaster declaration for Hurricane Harvey, amounting to 29 additional counties. In general, the State MID areas are located further inland and sustained less damage from Hurricane Harvey than the HUD MID areas, which tended to be closer to the coast. GLO did not perform a meaningful analysis of how the damage or unmet needs of the State MID areas compared to the damage or unmet needs of the HUD MID areas.

HUD MID areas contained nearly *eight times* the population of State MID areas (approximately 8 million people compared to 1 million people). HUD MID areas also contained about five times the White population of State MID areas but about *ten times* the minority population of State MID areas.¹³ Only 12% of the total Competition eligible population resided in State MID areas, yet GLO reserved 50% of the funds for those areas. Therefore, awards were made to disproportionately benefit White rural Texans over the minority populations more likely to be burdened with future flooding from disasters. As discussed below, GLO was well aware that this disproportionate outcome would occur based on its design of the Competition.

D. Other Approaches GLO Considered

GLO considered several alternatives to having eligible entities compete for funding before deciding to divide the initial \$1 Billion allocation among two sub-competitions. Those alternatives—considered but not adopted—would not have caused the disproportionate impact based on race and national origin detailed here.

The City of Houston and Harris County repeatedly requested that GLO allocate funding to them directly because of their disproportionate damage from Hurricane Harvey, their unique flood

¹³ In this letter, HUD uses the U.S. Census definition of “White” (a person having origins in any of the original peoples of Europe, the Middle East, or North Africa) and “Black” (a person having origins in any of the Black racial groups of Africa). As used in this letter, the term “minority” refers to residents of all races and national origins other than those who are White-non-Hispanic. This usage is consistent with that of caselaw, the U.S. Census, and certain HUD programs, though other terms such as “communities of color” or “Black and Brown persons” may be more appropriate in other contexts.

risks from the cumulative effects of repeat disasters, and the threat of future flooding from disasters. Although the HUD Notice permitted direct allocations, and despite having data that supported these disproportionate damage assertions by Houston and Harris County, GLO initially declined to take this approach.¹⁴

GLO also developed—but then rejected—several models for allocating the funds using formula methodologies.¹⁵ These models combined population size and measures of mitigation need in various ways to arrive at funding allocations. One of these models was rejected because it “gave a huge preference to population as the main factor,” so an alternative was proposed based on which “smaller areas [would] get a much larger distribution than they normally would.”¹⁶

Another model contained seven permutations for dividing \$500 million among nine Councils of Government (“COGs”).¹⁷ The seven permutations differed in how they split the money between HUD MID and State MID areas, but all would have allocated more money to HUD MID areas than to State MID areas, which would have more proportionately distributed funds among White and minority Texans in eligible areas. As discussed below, such a result would have been more consistent with respective mitigation need.¹⁸

All seven models differed in how each of the following four factors would be weighted: Composite Disaster Index (“CDI”), Social Vulnerability Index (“SoVI”), Per Capita Market Value, and Population.¹⁹ That said, they all would have taken the COG’s population size into account, and several would have awarded funds based on metrics intended to correspond to mitigation need (CDI) and social disadvantage (SoVI). Moreover, all would have resulted in a sizable award for the COG containing Houston and Harris County, ranging from nearly \$60 million to \$200 million. All of these options were rejected.

E. How the Hurricane Harvey Competition was Scored

Having rejected direct allocations or formula methodologies with knowledge of how those alternatives would have affected minority communities along the coast, GLO proceeded to develop the following scoring criteria for the Hurricane Harvey Competition.

¹⁴ GLO’s only justification for not taking this approach is that it was not *required* by HUD although GLO acknowledged it would have been *permitted* by HUD. Tr. Vol. 1, 44:12-15.

¹⁵ Formula methodologies allocate funds on a non-competitive basis to eligible entities or projects. Unlike in a competitive process, allocations are determined by a formula using variables like population, geographic location, project goals, etc.

¹⁶ Email from Zachary Stern to Shawn Strange and Alexnadra Gamble from August 15, 2019, GLO-008177.

¹⁷ Spreadsheet, GLO-005861. A Council of Governments (COG) is a voluntary, regional association of local governments formed to address issues that cross jurisdictional boundaries. COGs serve as collaborative organizations where representatives from member governments work together on regional planning, coordination, and problem-solving. They aim to promote efficiency and regional solutions by pooling resources and coordinating efforts.

¹⁸ For example, one model proposed that 80% of the money go to HUD MID areas and 20% go to State MID areas.

¹⁹ The CDI and SoVI, and their utilization in the Hurricane Harvey Competition, are discussed in more depth below.

Hurricane Harvey State Mitigation Scoring Criteria	
	Maximum
County Composite Disaster Index	10
Social Vulnerability Index	10
Per Capita Market Value	10
Low-to Moderate Income National Objective	20
Project Type Identified in Local Adopted Plan	5
Management Capacity	15
Project Impact	25
- Project Beneficiaries/Total Applicant Population (10)	
- Cost/Beneficiary (15)	
Leverage	5
Mitigation/Resiliency Measures	5
<i>Total Possible Points</i>	<i>105</i>

1. Project Impact Criterion

GLO awarded 10 of the potential 105 points in the Competition based on the percentage of residents in the jurisdiction who would benefit from the project rather than per capita. Per this criterion, a project serving 1,000 people in a 1,000-person town would receive 10 points. The same project serving 1,000 people but located in a 10,000-person town would receive 1 point.

GLO explicitly aimed to reserve these 10 points for less populous, rural areas. According to GLO, those communities “expressed concerns about having to compete against the big boys, Houston, Harris County,” so GLO designed an “offset to benefit the rural area[s].”²⁰ GLO reasoned that this scoring criterion would be an effective way to “balance” the scores of rural and urban areas because “the likelihood of a 2 million person community being able to do a project that benefited everybody was probably not high.”²¹

In practice, the scoring criterion operated as GLO intended. For example, the City of Iola applied for a project benefitting 379 people. This project received 10 points out of 10, because Iola has only 379 residents. The City of Houston applied for a project benefitting 8,845 people in the Kashmere Gardens neighborhood, which is a majority Black neighborhood in Houston. This project received 0.37 out of 10 points, because Houston has approximately 2.3 million residents.

2. Composite Disaster Index

GLO used the CDI to serve as its “objective” measure of mitigation need for the purposes of the Competition. However, GLO only awarded 10 out of a total of 105 points based on CDI ranking.

²⁰ Tr. Vol. 1, 138:4-142:13.

²¹ *Id.*

CDI scoring was based on the applicant area's relative degree of vulnerability to natural hazards, as compared with other areas in the state. Ten points were awarded to areas determined to be in the top 10% of areas most vulnerable to natural hazards. Conversely, 0 points were awarded to areas determined to be in the bottom 25% of vulnerability to natural hazards in the state.

To prepare the scoring criteria, GLO commissioned a report titled "Texas General Land Office CDBG MIT Action Plan: Preliminary Technical Review." The report, authored by two experts in disaster recovery from the University of Central Florida ("UCF"), noted several concerns with the CDI's methodology and use in GLO's action plan. The report first highlighted that the Texas Division of Emergency Management risk assessment had found that severe coastal flooding was estimated to comprise 34% of total future losses due to natural hazards, and the Houston-Galveston-Beaumont area was expected to account for 93% of statewide losses due to hurricanes. The report then concluded "these estimates speak to the disparate nature of hazard exposure and impact across the state of Texas . . .".

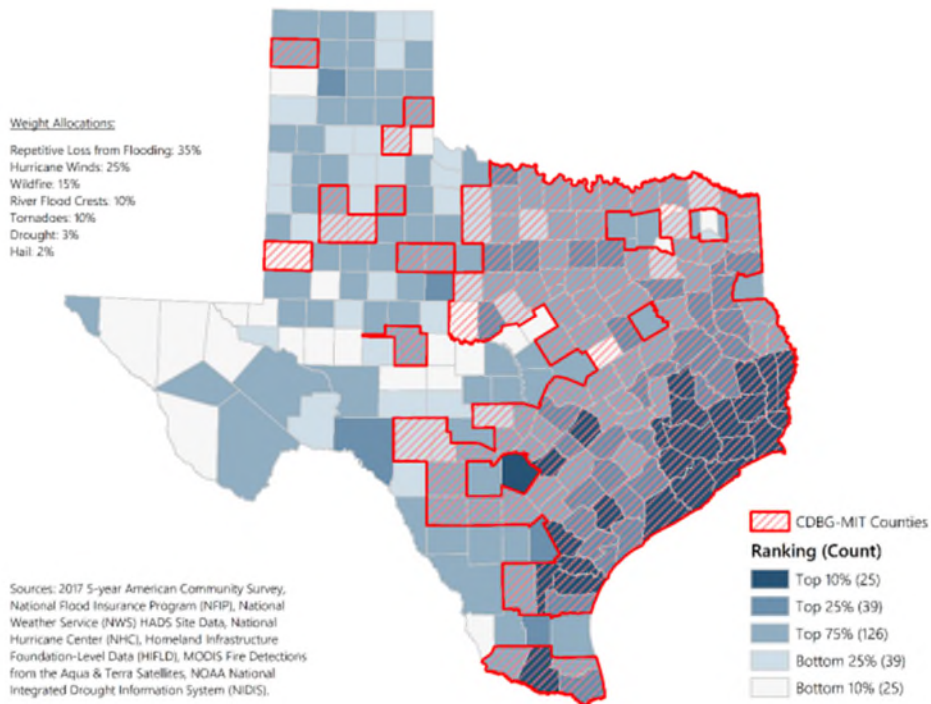
The report then noted concerns with the CDI, finding that repetitive flood loss properties may be under-weighted by other hazards included in the measure, such as hail or wildfires. The report also found that the CDI does "not at all evaluate coastal flood hazards despite the availability of data." When asked if GLO took any actions to address these concerns, GLO testified that, at the time the report was provided to GLO, January 16, 2020, it would have been "too late" to make changes in response to its findings, such as adjusting or eliminating the CDI formulation.²² This is not accurate as GLO could have sought a substantial amendment to its Action Plan.

The CDI is mapped below.²³

²² Tr. Vol. 1, 113:7-114:21.

²³ *State of Texas CDBG Mitigation (CDBG-MIT) Action Plan: Building Stronger for a Resilient Future*, TX GENERAL LAND OFF., Nov. 22, 2019, at 165, <https://www.glo.texas.gov/sites/default/files/resources/cdr/documents/action-plans/mitigation/mitigation-ap.pdf> [hereinafter Action Plan].

Figure 2-73: Composite Disaster Index (2001-2018)



The same UCF team that produced this report supported GLO’s use of the Social Vulnerability Index (“SoVI”) for fund allocation. SoVI is a measurement of social vulnerability of an area that synthesizes 29 socioeconomic variables which contribute to reduction in a community’s ability to prepare for, respond to, and recover from hazards.²⁴ The measurement equally weights the 29 variables, which include percent employment in the service industry, percent of children living in two-parent families, percent of households earning over \$200,000 annually, as well as percent Black, percent Hispanic, among other variables.²⁵ As discussed below, despite the numerous variables incorporated into this measure, GLO represented to HUD in its Action Plan that its inclusion would ensure its allocations complied with civil rights obligations.

3. Other Notable Criteria and their Competition Weighting

Also of note, GLO’s rubric awarded up to 20 points for achieving a 50% LMI threshold. The LMI points were all or nothing; either a jurisdiction achieved the 50% LMI threshold and received 20 points, or it received 0 points. As GLO knew, structuring the criterion this way disadvantaged applicant jurisdictions that would serve a higher amount of LMI beneficiaries than the minimum required by the

²⁴ *Id.* at 32.

²⁵ *Id.* at 34.

notice, denying them the potential for more points for benefitting a higher percentage of LMI residents. For example, a jurisdiction proposing to serve 80% LMI beneficiaries would receive the same 20 points as a jurisdiction that was proposing to serve 50%.

GLO additionally included a Management Capacity criterion to address the Federal Register Notice’s requirement that GLO ensure appropriate subrecipient capacity. GLO awarded up to 15 points on this criterion. This was more points than was being awarded for the highest level of mitigation need (10 for CDI) or the highest level of social disadvantage (10 for SoVI).

F. Civil Rights Concerns Raised to GLO

The HUD Notice required that GLO publish a draft of its Action Plan to the public for review and the opportunity to comment. HUD emphasized the importance of a robust citizen participation process, and also mandated that grantees convene public hearings to provide an opportunity for citizen feedback on the proposed use of funds.

GLO stated that for all comments it received and considered, GLO reviewed, discussed, and decided whether to take action in response.²⁶ GLO further explained though that it was mostly reviewing comments to identify potential miscommunications that it could clarify; not to make substantive changes to its proposed MIT programs.²⁷ Despite GLO’s awareness of civil rights concerns about the Competition design raised by numerous commenters, GLO only made three changes to the Competition in response to public comments, none of which addressed any civil rights issues—it increased the number of applications that jurisdictions could submit, imposed a minimum score of 65 points for funding, and lowered the minimum amount for an individual award to \$5 million.²⁸

Numerous commenters articulated concerns that GLO’s proposed allocation of funds would result in discrimination against Black and Hispanic individuals. The comments asserted that GLO had failed to adequately consider the needs of these populations despite the explicit reminder in the HUD Notice of the applicability of the Fair Housing Act and other civil rights laws to GLO’s use of funds. Commenters further highlighted that Black and Hispanic populations were predominantly clustered in coastal areas, including Houston and Harris County, and GLO’s proposed allocations would fail to provide appropriate mitigation funding to these communities.

One commenter said “[t]he Texas General Land Office needs to conduct more outreach. [The] 50% state requirement will hurt coastal areas. Communities of color are in the most vulnerable,

²⁶ Tr. Vol. 2, 242:9-12.

²⁷ Tr. Vol. 2, 234:17-21.

²⁸ Tr. Vol. 2, 325:5-328:5.

neglected areas.”²⁹ GLO responded in writing in the Action Plan that “[t]he Texas General Land Office recognizes this comment and will give it adequate consideration as CDBG-MIT programs and policies progress.”³⁰ During its organizational deposition, GLO testified that it agreed with this public comment that communities of color are in the most neglected and vulnerable areas, in terms of eligible areas that are repetitively impacted by damaging storms.³¹ GLO nonetheless proceeded without making an amendment to its plan.

Texas Housers, the complainant in this matter, submitted comments to GLO pointing out that the draft Action Plan would likely result in funding activities in violation of various civil rights requirements, including the Fair Housing Act, by failing to address racial disparities in disaster recovery and failing to spend funding in an equitable manner.³² The letter made detailed technical recommendations intended to cure any potential civil rights violations, including requesting that GLO ensure that its allocations do not disparately harm the low-income communities of color that have been most negatively impacted by natural disasters and requesting that subrecipients submit project applications directly addressing the needs of these communities. GLO did not modify its Action Plan, including any of the Competition parameters, in response to these comments.

Another commenter asserted that the Action Plan did not assess how CDBG-MIT funds will affect members of protected classes under fair housing and civil rights laws, despite the explicit requirement in the HUD Notice. As such, the commenter said that the Action Plan did not “recognize the fact that lower-income people and communities of color most have limited access to mitigation and recovery resources.”³³ The commenter further said that they were concerned GLO’s proposed Competition structure would steer funds away from the most impacted areas, and areas where the greatest concentration of people of color live.³⁴ The commenter also explicitly advocated for 80% of CDBG-MIT funds to go to HUD MID areas.³⁵

During its organizational deposition, GLO agreed, under oath, with these commenters that coastal areas are at higher risk for damage due to hurricanes and flooding, and have higher mitigation need to prevent against such disasters.³⁶ During the deposition, GLO also agreed that communities of

²⁹ Action Plan, *supra* note 24, at 354.

³⁰ *Id.*

³¹ Tr. Vol. 2, 255:11-15.

³² Texas Housers, Comment Letter on State of Texas CDBG Mitigation (CDBG-MIT) Action Plan (Jan. 10, 2020), <https://texashousers.org/wp-content/uploads/2020/01/Final-Texas-Housers-CDBG-MIT-Comments.pdf>. [hereinafter Texas Housers Public Comment]. Texas Housers, Comment Letter on State of Texas CDBG Mitigation (CDBG-MIT) Action Plan (January 10, 2020), <https://texashousers.org/wp-content/uploads/2020/01/Final-Texas-Housers-CDBG-MIT-Comments.pdf>.

³³ The Coalition for Environment, Equity and Resilience (CEER) and the Houston Organizing Movement for Equity (HOME), Comment Letter on State of Texas CDBG Mitigation (CDBG-MIT) Action Plan (Jan. 10, 2020), at 7, <https://www.texasappleseed.org/sites/default/files/2023-05/ceer-home-comments-for-cdbg-mit.pdf>.

³⁴ *Id.* at 20.

³⁵ *Id.*

³⁶ Tr. Vol. 2, 256:1-11, 299:15-302:10.

color are more likely to live in vulnerable areas in the State, such as the coastal areas, and flood plains specifically, which are hit with more frequent and severe disasters.³⁷ As discussed below, during its deposition, GLO also acknowledged that it did not perform the required civil rights assessment as part of its Action Plan. Notwithstanding the comments, and GLO's admissions that it knew that minority communities would be disadvantaged by its criteria, GLO did not make any changes to its Action Plan, including to the Competition. Nor did it seek to make a substantial amendment to its Action Plan to account for the racial disparities of which it was aware.

G. Draft Action Plan Submission

On January 31, 2020, GLO submitted its draft CDBG-MIT Action Plan for HUD's review. As part of its review, HUD CPD provided the Draft Action Plan to various stakeholders for comments. HUD's Office of Fair Housing and Equal Opportunity ("FHEO") reviewed the document and found that the Draft Action Plan failed to assess how the proposed use of MIT funds may affect members of protected classes under fair housing and civil rights laws as well as those living in racially and ethnically concentrated areas of poverty. FHEO further noted that the Draft Action Plan did not discuss the mitigation needs of these communities, despite multiple public comments alerting GLO to persistent barriers to equitable recovery for communities in HUD MID areas.

GLO was fully aware of FHEO's expressed civil rights concerns. When asked in HUD's deposition of GLO about FHEO's findings and recommendation to disapprove the Draft Action Plan, GLO testified that it did not disagree with FHEO's conclusion.³⁸ GLO testified that it performed no analysis of the civil rights implications of its proposed allocations in its Action Plan, despite acknowledging that it had racial and demographic data on eligible areas available to perform such an analysis and despite that this requirement was not discretionary.³⁹ During its deposition, GLO repeatedly represented to HUD that it left any such determination to occur only *after* projects had been selected.⁴⁰

However, the record demonstrates that GLO knew it was required to perform an analysis of the civil rights implications of its proposed allocations in developing its Competition methodology because it acknowledged the requirement in its correspondence with HUD during the actual review of its Draft Action Plan. In that correspondence from Wednesday, March 25, 2020, GLO responded to these concerns by saying that it "demonstrated the consideration of [the needs of racial and ethnic groups] by using the SoVI as a scoring factor."⁴¹ During its organizational deposition, GLO acknowledged that FHEO's concerns nonetheless left "some things that were still unresolved."⁴²

³⁷ *Id.*

³⁸ Tr. Vol. 1, 89:11-90:13.

³⁹ Tr. Vol. 2, 265: 24-266:14, 303:11-14.

⁴⁰ Tr. Vol. 1, 56:10-14; Tr. Vol. 2, 306:2-4.

⁴¹ Tr. Vol. 1, 91: 23-25; 92:1-25; Email from GLO to HUD, Wednesday, March 25, 2020.

⁴² Tr. Vol. 1, 88:15-89:10.

H. Results of the Competition

Awards from Round 1 were announced on May 21, 2021. The City of Houston submitted five applications totaling \$469,764,598 in requested funds. Harris County and Harris County Flood Control district⁴³ submitted nine applications, totaling \$874,997,209 in requested mitigation funds. Neither the City of Houston nor Harris County (or its flood control district) had any projects selected for the award of funds. Both jurisdictions received \$0 from the Competition. Several other significantly sized jurisdictions also did not receive funds, including Jefferson and Nueces Counties, which are two of the next three largest eligible counties after Harris County.

Four smaller jurisdictions within Harris County (which each submitted separate applications from the county as a whole) received awards totaling \$90 million, but those were the only funds from the Competition to go to residents of Houston or Harris County. These results occurred despite the fact that the CDI—the composite measure developed by GLO to measure mitigation risk—identified Harris County, City of Houston, Jefferson County, and Nueces County as within the top 10% of areas with the highest level of mitigation need, *i.e.*, future risk of hurricane, storms, and flooding.

These jurisdictions are also home to the largest numbers of residents who suffered harm from Hurricane Harvey. Residents of Harris County (inclusive of the City of Houston) comprise 51% of the total Competition-eligible population, yet Harris County residents received just 9% of the Competition funds. Residents of the City of Houston and Harris County also suffered substantially more damage to their homes from Hurricane Harvey than other eligible areas. Of the 300,000 homes estimated to have been damaged by Hurricane Harvey, 150,000 were located in Harris County.⁴⁴

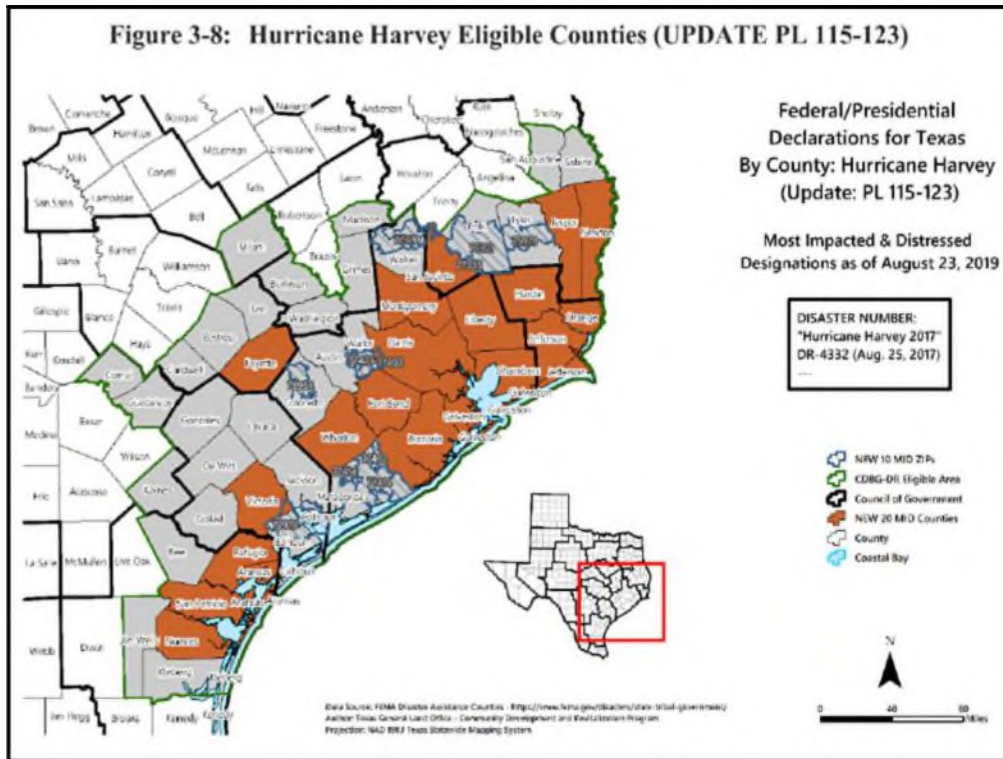
Two key aspects of the Competition were drivers of the results: the HUD MID Exclusion and the Project Impact Criterion. First, GLO split Round 1 of the Competition for \$1 billion into two separate \$500 million competitions: one for HUD MID areas and one for State MID areas. GLO did not state it was going to do this in the Draft Action Plan submitted to HUD and made available for public comment, nor in the companion Eligibility and Scoring Guide. GLO did this even though HUD MID areas had nearly eight times the population of State MID areas (approximately 8 million people compared to 1 million people), or 88% of the total Competition eligible population. This

⁴³ The Harris County Flood Control District is a special purpose district, governed by the Harris County Commissioner's Court, which aims to reduce flood damage within Harris County. The Flood Control District's jurisdiction coincides with Harris County and includes the City of Houston. *See About the Flood Control District*, HARRIS CNTY. FLOOD CONTROL DIST., <https://www.hcfcd.org/About>.

⁴⁴ *See Impact of Hurricane Harvey*, DISASTER HOUS. RECOVERY COAL., C/O NAT'L LOW INCOME HOUS. COAL. (Aug. 21, 2019), <https://nlihc.org/sites/default/files/Hurricane-Impact-Harvey.pdf>; Brina Morales, *Hurricane Harvey's Lasting Impact on Houston*, GREATER HOUS. P'SHIP (Aug. 26, 2022), <https://www.houston.org/news/hurricane-harveys-lasting-impact-houston#:~:text=According%20to%20SBP%20Houston%2C%20a,homes%20in%20Harris%20County%20alone.>

deliberate design and operation of the Competition effectively prevented the substantially more populous HUD MID applicants from competing for any more than 50% of the funds.

The map below shows the HUD MID Areas in orange and the State MID areas in gray.⁴⁵



The State MID areas also had substantially less mitigation need. As previously discussed, CDI served as GLO's measure of disaster risk for the Competition. No State MID applicant scored a 10 on the CDI. Moreover, 75% of all awarded State MID applicants scored only a two or five on the CDI, representing low risk for future disasters. In contrast, 99 of the 128 (77%) *unawarded* HUD MID applicants achieved a nine or 10 point score on the CDI, representing substantially greater risk for future disasters. GLO's decision to exclude HUD MID areas from competing for half of the available funds shifted money away from the areas and people that needed it the most, and those people were disproportionately Black and Brown.

As GLO planned, its decision to split the Competition this way resulted in highly disproportionate outcomes based on race and national origin. As noted in HUD's prior findings, White non-Hispanic residents of the total eligible areas are nearly twice as likely as minority residents to reside in State MID areas, and HUD MID areas contain about five times the White population of State MID areas, but about 10 times the minority population of State MID areas. GLO

⁴⁵ Action Plan, *supra* note 24, at 15.

testified that more minorities would have benefited if HUD MIDs were able to compete with State MIDs.⁴⁶

Racial Demographics of Eligible Population for the Competition ⁴⁷					
	All residents	White non-Hispanic residents	Minority residents	Black residents	Hispanic residents
HUD MID	8,079,190	3,054,824	5,024,366	1,303,542	3,011,918
State MID	1,090,850	583,199	507,651	100,640	374,432
Total	9,170,040	3,638,023	5,532,017	1,404,182	3,386,350

The City of Houston has over five times as many Black residents than the total number of Black Residents in all of the State MIDs combined. In fact, just the City of Houston’s Council District B by itself contains almost the same number of Black individuals as all of the eligible State MID areas combined.⁴⁸ Houston City Council District B is very socially vulnerable and, relatedly, has several extreme-mitigation need areas, including, Kashmere Gardens, Trinity, and Houston Gardens, which were three significant projects offered by Houston to provide critically needed flood mitigation infrastructure.⁴⁹

The HUD MID Exclusion caused disproportionately less funding to be available to benefit minority residents than to benefit White non-Hispanic residents.⁵⁰ Because eligible White non-Hispanic residents were much more likely than minority residents to live in State MID areas and therefore be eligible to benefit from the higher per capita State MID awards, the approximate average dollar amount available to benefit eligible White non-Hispanic residents was \$125 per person. Because Black residents in particular were much less likely to live in State MID areas, the approximate average dollar amount available to benefit eligible Black residents was just \$90 per person.

HUD MID applicants also needed to score significantly higher than State MID applicants to achieve an award under the Competition’s design. HUD MID applicants had to achieve a minimum

⁴⁶ Tr. Vol. 1, 202:11-22.

⁴⁷ 2010-2014 American Community Survey 5-Year Estimates, Table B03002, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B03002.

⁴⁸ *Council District Demographics 2022: District B*, CITY OF HOUS. PLANNING & DEV. DEP’T, <https://www.houstontx.gov/planning/Demographics/2024-council-districts/profiles/2024-profile-b.pdf>.

⁴⁹ See *Kashmere Gardens Trinity | Houston Gardens*, UNIV. OF HOUS. (2018), https://issuu.com/skrogers/docs/ccdi5-kashmeretrinity_briefing_book (noting that an estimated 64% of the 7,726 homes in these neighborhoods was flooded during Hurricane Harvey). On page 7, the report notes that flooding along the Huntington Bayou, where these neighborhoods are located, “has been a persistent hazard for residents, businesses and property owners.”

⁵⁰ GLO’s exclusion of HUD MID areas from competing for 50% of the Competition funds caused substantially fewer funds to be available per capita to benefit residents of HUD MID areas than State MID areas. Specifically, approximately \$458 per resident was made available to State MID applicants, while just \$62 per resident was made available to HUD MID applicants. Put differently, State MID areas were eligible for *seven and a half times* the funding per resident than HUD MID areas.

score *nearly 13 points higher* (12% of the total competition points) than State MID applicants to be awarded funds. The lowest score received by an applicant that won an award in the State MID competition was 65.27 points—just above the minimum score of 65 required to receive an award under the Competition. For HUD MIDs, the lowest score received by an applicant that won an award in the Competition was 78 points. Under the Competition, thirty-three awarded State MID applicants scored between 65.27 and 78, while sixty-four unawarded HUD MID applicants scored between 65.27 and 78. This means that GLO awarded funds to dozens of State MID applications over higher scoring HUD MID applications. Had GLO administered one competition, HUD MID applicants would have been awarded hundreds of millions more dollars, comprised roughly of eight additional HUD MID projects.

GLO received 224 applications for the Competition. One hundred fifty-eight applications were from HUD MID applicants and 66 were from State MID applicants. GLO awarded funding to 30 HUD MID applicants and 50 State MID applicants. In other words, GLO awarded funding to just 19% of HUD MID applicants but 77% of State MID applicants.

The Project Impact Criterion also disparately harmed Black and Hispanic residents in eligible areas. The Project Impact Criterion awarded up to 10 points (out of a total of 25) based on the percentage of total project beneficiaries out of the total population within a jurisdiction. GLO represented to HUD that this criterion was intended to serve as a form benefit-cost analysis. In testimony to HUD, GLO also acknowledged that this criterion was specifically crafted to benefit smaller jurisdictions as the other 15 points awarded under this criterion were purportedly intended to help larger areas.⁵¹ In practice, however, this criterion made it exceedingly difficult for larger jurisdictions to obtain funding.

As intended by GLO, this criterion disadvantaged larger population jurisdictions.⁵² The average size of eligible jurisdictions was 155,424 people and the average size of applicant jurisdictions was 308,902 people. However, the average size for jurisdictions awarded funds in the Competition was just 13,465 people. GLO awarded funds to only one jurisdiction with a population greater than 100,000 (that jurisdiction's population was 154,193). However, 67 applications—nearly a third of all applications—were from jurisdictions with populations over 100,000. GLO denied 66 of those 67 applications.

⁵¹ Tr. Vol 1, 138 12-20; 139:6-17.

⁵² An example of how this criterion played out in the Competition is as follows. The City of Iola, which had a CDI mitigation risk rating of 5, applied for a roughly \$11 million project benefitting 379 people. This project received 10 points out of 10 under this criterion, because Iola has only 379 residents. The City of Houston applied for a project benefitting 8,845 people in the Kashmere Gardens neighborhood. This project received 0.37 out of 10 points, because Houston has approximately 2.3 million residents.

GLO made this decision notwithstanding the fact that minority residents of eligible areas are more likely than White non-Hispanic residents to reside in large-population jurisdictions in Texas. For example, an estimated 45% of eligible Black and Hispanic residents live in jurisdictions with over a million people, while just 25% of White non-Hispanic residents do. By contrast, eligible White non-Hispanic residents are about twice as likely as Black residents and as Hispanic residents to live in a jurisdiction with fewer than 10,000 people. In fact, White non-Hispanic residents comprise the majority of people living in towns with populations under 10,000 while comprising just 25% of residents of larger-population cities and counties with over a million people.

In operation, the criterion made it practically impossible for jurisdictions with over 100,000 residents to score well enough to win an award. As noted above, GLO imposed a \$100 million project cap that served to limit the number of beneficiaries that could reasonably be served with a single project. For example, using an average cost per beneficiary of awarded projects of approximately \$1,600, the most people that could practically be served with a \$100 million project would be approximately 62,000 people.

A further implication of this criterion is that larger jurisdictions had to serve substantially more people *per dollar* than smaller jurisdictions to receive the same score for otherwise identical projects. The following scenario illustrates the score that would be awarded to jurisdictions of different sizes for the same hypothetical project benefitting 50,000 people and costing \$100 million. If the applicant jurisdiction's population was 50,000 people, the project would score 10 points. If the applicant jurisdiction's population was 1,000,000 people, the application would receive just .5 points. The only way for the million-person jurisdiction to achieve a higher score would be to serve substantially more people with the same amount of money. The million-person jurisdiction would need to serve *twenty times* as many people as the 50,000-person jurisdiction to receive the same score.

Of the 14 applications submitted to GLO to benefit residents of Houston or Harris County—the largest jurisdictions in the Competition—only one application scored more than one point on this portion of the Project Impact Criterion. Even still, this application, submitted by the Harris County Flood Control District, scored only 1.68 points out of 10 even though it would have benefitted nearly 800,000 people.

Because minority residents are more likely to live in large jurisdictions in Texas, this criterion caused applications that would benefit minority residents to be eligible for fewer points than other applications for projects that would benefit an equivalent number of residents. By GLO's design, the Jurisdiction Size Criterion shifted funding away from areas with the greatest need. And those areas were disproportionately more minority. GLO's testimony indicated full awareness that larger coastal areas are disproportionately populated by communities of color and have higher relative mitigation need than other parts of the state.

In combination, GLO's decision to run separate Competitions for HUD MID and State MID areas coupled with the Project Impact Criterion caused even fewer funds to be awarded to benefit eligible minority residents. The award data confirms that minority residents were disadvantaged by the two Competition features discussed, and disproportionately so relative to White non-Hispanic residents. Black residents were particularly negatively affected.

If the Competition were run without either the HUD MID Exclusion or the Jurisdiction Size Criterion, over \$300 million would have been awarded differently. The projects that would have been funded would have both been more likely to benefit minority residents and benefited substantially more minority residents. Nearly a million more residents would have benefited in this scenario, approximately 600,000 of whom are minority. Nearly four times as many Black residents would have benefited, and more than twice as many Hispanic residents.⁵³

During HUD's investigation, GLO testified that more minority individuals would have benefited if Houston and Harris County won at least one award each.⁵⁴ It also acknowledged that if HUD MIDs were able to compete with State MIDs, more minorities would have benefited.⁵⁵ The negative effect of the criteria was particularly acute for Black residents. The funds that would have been allocated differently without the two criteria were nearly three times as likely to benefit Black residents without the criteria than with the criteria.

I. GLO's Subsequent Allocation to Harris County via Substantial Amendment

Following the results of the Competition, GLO submitted a substantial amendment to HUD requesting that, rather than proceed with Round 2 of the Hurricane Harvey Competition, \$750 million be allocated directly to Harris County. The substantial amendment provided no mitigation funds directly for the City of Houston or disproportionately affected coastal communities, such as Jefferson County and Port Arthur.

The stated reason at the time of the proposed direct allocation was that then GLO Commissioner Bush stated that he "heard the overwhelming concerns of Harris County regarding the mitigation funding competition."⁵⁶ On March 18, 2022, HUD's CPD approved the substantial amendment as substantially complete. In its approval, CPD stated that "HUD has grave concerns about

⁵³ An exact assessment of alternative beneficiaries is not possible for several reasons. First, the two Competition features considered—the HUD MID exclusion and Project Impact Criterion—interplayed with each other and each affected outcomes in different ways. Second, GLO funded applicants in order of score up to the last fully fundable application (leaving a remainder of funds). How the remainder would be allocated is unknown at this time.

⁵⁴ Tr. Vol. 1, 146:2-13.

⁵⁵ Tr. Vol. 1, 202:11-22.

⁵⁶ *GLO responds to criticism, sends \$750 mil to Harris County*, N. CHANNEL STAR (June 3, 2021), <https://www.northchannelstar.com/2021/06/glo-responds-to-criticism-sends-750-mil-to-harris-county/>.

the civil rights complaints related to the State’s CDBG-MIT competition, including comments from the citizen participation process.”⁵⁷ CPD further noted “[HUD] has been intentional in its efforts to ensure disaster communities from 2015, 2016, and 2017 have mitigation resources to protect them from future disasters . . . Some of the Texas communities that suffered catastrophic disasters from 2015 through 2017 were not awarded CDBG-MIT resources. While CDBG-MIT resources are limited, the State has not identified a plan to protect communities while guarding against competition criteria that could disadvantage minority residents.”⁵⁸ The approval also explicitly reminded GLO that “[HUD’s] approvals of action plans and [amendments thereto] mean the plan and amendments are substantially complete but do not constitute approval of the grantee’s implementation of the activities described in the plan. Grantees are responsible for ensuring that all grant funds are used in accordance with all program requirements.”⁵⁹

Even with the direct allocation to Harris County, the substantial amendment left Harris County with billions of dollars in unmet mitigation needs. The \$750 Million direct allocation alone did not resolve the harm to residents of Harris County. And as noted, it also failed to provide any funding to the City of Houston and other disproportionately affected coastal communities. These areas could have, consistent with the requirements of the Federal Register notice, and the GLO’s own unmet needs analysis, been awarded the vast majority of the \$4.3 Billion dollars allocated to GLO under the CDBG-MIT program. As such, this ostensible move by GLO to mitigate the damage it caused was marginal and the direct allocation under the substantial amendment still failed to rectify the disproportionate harm associated with the discriminatory Competition.

III. ANALYSIS

Title VI and HUD’s implementing regulations mandate that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁶⁰

Among other things, Title VI prohibits “[a] recipient under any program or activity” such as the CDBG-MIT, “directly or through contractual or other arrangements, on the ground of race, color, or national origin” from:

- “Deny[ing] a person any housing, . . . services, financial aid, or other benefits provided under the program or activity,” 24 C.F.R. § 1.4(b)(1)(i);

⁵⁷ Letter from Jesse Kome, Director, Office of Block Grant Assistance, HUD CPD to Mark Havens, Deputy Land Commissioner, Texas General Land Office, approving GLO’s Substantial Amendment (Mar. 18, 2022) [hereinafter CPD Letter].

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 42 U.S.C. § 2000d; 24 C.F.R. § 1.4(a).

- “Provid[ing] any housing, accommodations, facilities, services, financial aid, or other benefits to a person which are different, or are provided in a different manner, from those provided to others under the program or activity,” 24 C.F.R. § 1.4(b)(1)(ii);
- “Subject[ing] a person to . . . separate treatment in any matter related to his receipt of housing, accommodations, facilities, services, financial aid, or other benefits under the program or activity,” 24 C.F.R. § 1.4(b)(1)(iii);
- “Restrict[ing] a person in any way in access to such housing, accommodations, facilities, services, financial aid, or other benefits, or in the enjoyment of any advantage or privilege enjoyed by others in connection with such housing, accommodations, facilities, services, financial aid, or other benefits under the program or activity, 24 C.F.R. § 1.4(b)(1)(iv);
- “Treat[ing] a person differently from others in determining whether he satisfies any . . . requirement or condition which persons must meet in order to be provided any housing, accommodations, facilities, services, financial aid, or other benefits provided under the program or activity, 24 C.F.R. § 1.4(b)(1)(v); or
- “Deny[ing] a person opportunity to participate in the program or activity through the provision of services or otherwise, or afford[ing] him an opportunity to do so which is different from that afforded others under the program or activity,” 24 C.F.R. § 1.4(b)(1)(iv).

As set forth below, through the imposition of unnecessary criteria in the Competition, the housing, services, financial aid, accommodations, facilities, and other benefits provided through the CDBG-MIT award were denied and provided differently, separately, and restricted to minority Texans.

A. GLO Discriminated on the Basis of Race and National Origin in the Design and Operation of the Competition.

GLO engaged in a consistent pattern of decision making that prevented critical mitigation resources from reaching the areas that needed it most. The result was that disproportionately less CDBG-MIT funding went to Black and Hispanic residents in eligible areas despite the fact that these populations lived in the highest need areas, based on GLO’s own analysis. An intentional violation of Title VI by a governmental body may be established by considering six factors set forth by the Supreme Court in *Arlington Heights*: (1) whether the consequences of the decision bear more heavily on certain groups;⁶¹ (2) the historical background of the decision; (3) the specific sequence

⁶¹ The Supreme Court has explained why the consequences of a decision logically function as evidence of discriminatory intent in this framework: “As we observed in *Arlington Heights*, 429 U.S. at 266, the impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions.” *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 487 (1997); *Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016).

of events leading up to the decision; (4) any departures from normal procedural process; (5) any departures from normal substantive criteria; and (6) the legislative and administrative history of the decision. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977). Taken together, these factors can “prov[e] that discriminatory purpose was a motivating factor” in the decision at issue. *Id.* at 270. These factors are non-exhaustive, and not all must be shown to establish a violation. *Ave. 6E Invs. LLC v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016) (“These elements are non-exhaustive and a plaintiff need not establish any particular element in order to prevail.” (citation omitted)); *see also Mhany Mgmt. v. Cty. of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016) (recognizing that discrimination could be proven from two of the *Arlington Heights* factors).

Through a sequence of calculated decisions, GLO developed, designed, and operated a competition for the purpose of allocating funds to mitigate storm and flood risk that actively steered money away from communities that had the highest storm and flood risk. These very at-risk communities had the highest concentrations of Black and Hispanic individuals in areas eligible to receive awards. GLO was keenly aware of both of these facts. Despite awareness that its course of action would result in disparate harm for Black and Hispanic individuals, GLO refused to engage in meaningful course correction and still denied these communities critical mitigation funding.

The record demonstrates a consistent pattern of decisions that imposed more harm on Black and Hispanic individuals in areas eligible to receive awards. First, rather than provide funding directly to these communities or use a formula that appropriately weighted mitigation risk and need, GLO developed a competition that, by design, provided less money for these communities and made it harder—if not impossible—to win awards. Then, despite being alerted to the likely results of the Competition, GLO still proceeded with this course of action. The Competition produced results that were not only contrary to the statutory purpose of CDBG-MIT funds, but also discriminatory based on race and national origin. While GLO has proffered some justifications for various aspects of the Competition, as discussed below, none withstand scrutiny. Moreover, even if some of the rationales underlying different Competition parameters have merit, “racial discrimination need only be one purpose, and not even the primary purpose” to find that intentional discrimination has occurred. *Veasey*, 830 F.3d at 231 (citing *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009)). Based on a careful consideration of this framework, and the evidence collected in the investigation, including testimonial evidence on behalf of GLO, HUD finds that discriminatory purpose was a motivating factor in the adoption, development, and design of the Competition.

1. The Competition Had a Clear Discriminatory Impact on Black and Hispanic Individuals

The evidence regarding the first factor—the consequences of decisions—demonstrate that the development, design, and operation of the Competition disparately harmed Black and Hispanic individuals in eligible areas. GLO’s decision to implement a Competition, as well as the Competition

parameters ultimately used, caused substantially fewer funds to be available for Black and Hispanic residents than for White residents in areas eligible to receive funds.

GLO's decision to run two separate \$500 million Competitions, one between HUD MID areas and one between State MID areas is unrelated to, and in fact contrary to, the purpose of CDBG-MIT funds. The purpose of these funds is to assist areas impacted by recent disasters to carry out strategic and high-impact activities to mitigate disaster risks and reduce future losses. By GLO's own metrics, the Competition's HUD MID areas have a greater need for mitigation funding. No State MID applicant scored a 10 on the CDI; in fact, 75% of all *awarded* State MID applicants scored a two or five on the CDI, representing low risk for future disasters. In contrast, 99 of the 128 *unawarded* HUD MID applicants (77%) achieved a nine- or 10-point score on the CDI, representing substantially greater risk for future disasters. GLO's decision to exclude HUD MID areas from competing for half of the available funds shifted money away from the areas and people that needed it the most.

To support its decision to exclude HUD MID areas from competing for the full Competition funds, GLO cites HUD's requirement set forth in the HUD Notice that *at least 50%* of mitigation funds benefit HUD MID areas. GLO testified that it knew it was allowed to provide more funds to HUD MID areas. In fact, as noted earlier, GLO contemplated several formula allocations which would have resulted in excess of 50% of funds being allocated to HUD MID areas, including one proposed allocation that would have resulted in 80% of funds to HUD MID areas. Therefore, HUD does not find it credible that GLO believed "at least" meant a ceiling on available funds for HUD MID areas. Rather, it testified that allocating funds in excess of this 50% amount would have been questioned by State MID areas.⁶² GLO has articulated no other purpose for this exclusion.

As discussed above, the Project Impact Criterion also substantially disadvantaged larger population jurisdictions and minority residents of eligible areas are more likely than White non-Hispanic residents to reside in large-population jurisdictions. This criterion ran counter to the intent of the program to focus on areas with the greatest need for disaster mitigation per GLO's own metrics. Dozens of applicants with low scores on this criterion had the highest CDI score of 10. Nevertheless, 38 projects with CDI scores of 5 or below and 59 with scores below 10 were awarded funds, in part due to their high Project Impact Criterion scores. Requiring jurisdictions to serve their entire population to achieve full points—as opposed to focusing efforts on serving LMI beneficiaries—is contrary to the statutory objectives of the program.

The HUD Notice explains that "CDBG-MIT grants have a statutory focus on benefiting vulnerable lower-income people and communities and targeting the most impacted and distressed areas."⁶³ All but three of the eligible counties have total LMI populations below 50%, making it impossible for them to both serve their entire population and have 50% of benefited residents be LMI,

⁶² Tr. Vol. 1, 165:25-166:11.

⁶³ 84 F.R. 45838.

as required—and, overall, disincentivizing jurisdictions from serving higher percentages of LMI residents.

GLO provided two justifications for the Project Impact Criterion. GLO asserts that this criterion was designed to enable smaller jurisdictions to compete with larger jurisdictions. This proffered justification has no basis in the requirements of the HUD Notice or the purpose of the CDBG-MIT grant. Moreover, GLO has provided no data indicating that smaller jurisdictions intended to be benefited by this criterion had comparable mitigation risk and need for funds as the larger jurisdictions harmed by this criterion.

GLO also asserts that the HUD Notice required a cost-benefit analysis for certain covered projects. Importantly, the HUD Notice’s requirement to perform a benefit-cost analysis only applies to a “covered project,” which is defined as a project of \$100 million or more.⁶⁴ GLO awarded no such projects that would have required this analysis. Moreover, the HUD Notice did not prescribe the method of benefit-cost analysis undertaken. It certainly did not require the flawed form of the benefit-cost analysis utilized by GLO, which treated beneficiaries the same while completely disregarding the level of actual anticipated mitigation need or benefit to those individuals.

2. The Historical Background of the Design and Development of the Competition

The evidence pertaining to the second factor—the historical background of the decision—demonstrates GLO’s awareness of the disparate mitigation need of Black and Hispanic communities in coastal areas, particularly the City of Houston and Harris County. *See Dowdell v. City of Apopka, Fla.*, 698 F.2d 1181, 1186 (11th Cir. 1983) (highlighting the “continued and systematic relative deprivation of the black community was the obviously foreseeable outcome of spending nearly all revenue sharing monies received on the white community in preference to the visibly underserved black community.”). In 2010, Texas entered into a Voluntary Conciliation Agreement with HUD to resolve allegations that it was discriminating because of race in its proposed use of CDBG-DR Funds provided by HUD to recover from Hurricanes Dolly and Ike. This agreement required, among other provisions, that Texas perform a fair housing analysis on hurricane impacted areas in Texas, including the Houston-Galveston geographic area, and then recommend actions including the use of CDBG-DR funds to address the specific recovery needs for protected groups in these areas.⁶⁵ That analysis, performed in 2011, confirmed the very mitigation needs of Black and Hispanic communities in coastal areas, needs which the plan not only identified but also recommended focused action leveraging HUD’s recovery programs to support these communities.

⁶⁴ 84 F.R. 45840.

⁶⁵ *State of Texas Plan for Fair Housing Choice: Analysis of Impediments*, TEXAS DEPT. OF HOUS. & CMTY. AFFAIRS, app. C (Oct. 18, 2013), <https://www.tdhca.texas.gov/sites/default/files/fair-housing/docs/DRAFT-FairHousingChoice-AI-Phase2.pdf>.

The Houston-Galveston area was subsequently repeatedly battered by catastrophic storm events, compounding the recovery needs of these communities, as well as evidencing the continued mitigation risk. GLO was on clear notice of the heightened risk to these communities, including when in 2017, Hurricane Harvey made landfall along the Texas coast and imposed record damage on this region, including for Black and Hispanic communities that had never fully recovered from past disasters.

Moreover, as discussed above, multiple public commenters on GLO’s Action Plan emphasized historical disparities in disaster recovery based on race and national origin in Texas. As Texas Housers noted in its public comments on GLO’s Action Plan “[i]t is well documented, and GLO is aware, that disaster recovery allocation plans have not equitably served communities of color.”⁶⁶ During HUD’s investigation, GLO testified that these coastal areas have higher relative mitigation need than other parts of the state.⁶⁷ GLO also agreed that communities of color tend to reside in the most vulnerable, neglected areas along the coast.⁶⁸ The discriminatory results of the Competition were thus completely foreseeable to GLO. *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465, (1979) (noting that “actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose.”). Against this backdrop of repeated exposure to harmful storms, GLO knowingly and willfully denied any funding to communities of color that it explicitly acknowledged had higher mitigation need pursuant to a Competition GLO held with the express purpose of allocating CDBG-MIT dollars for storm and flood risk mitigation. *See N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016) (explaining that intentionally targeting a particular race’s voting access in a predictable manner constitutes discriminatory purpose “even absent any evidence of race-based hatred.”).

3. The Sequence of Events Leading Up to the Competition

The third factor—the sequence of events leading up to the decision—further demonstrates that GLO intentionally selected a manner of distributing funds that would result in the fewest dollars going to Black and Hispanic beneficiaries. The initial decision to hold a Competition, as opposed to proceeding with the alternatives considered, began GLO’s process of denying funds to the eligible areas with the largest populations of Black and Hispanic individuals. Prior to devising the Competition, GLO was pressed repeatedly by officials from the City of Houston and Harris County requesting that direct allocations be made. GLO ultimately declined to do so even though providing direct allocations to the City of Houston and Harris County would have certainly resulted in substantially more Black and Hispanic individuals benefiting.

⁶⁶ Texas Housers Public Comment, *supra* note 33, at 4.

⁶⁷ Tr. Vol. 2, 301:16-302:10.

⁶⁸ Tr. Vol. 2, 255:11-15.

GLO also considered various formula allocation methodologies. As discussed, in one scenario in which GLO was projecting allocating \$500 million in CDBG-MIT funds with an 80-20 HUD MID-State MID split, \$192,634,914, or roughly 39% of the \$500 million, would go to the COG for the Houston-Galveston area, which includes Harris County. If this formula methodology was applied to the entirety of the CDBG-MIT allocation, the Houston-Galveston COG would have received roughly \$1.6 billion. But GLO decided not to make direct allocations to any eligible jurisdiction under Round 1, or to use any of the formula methodologies discussed above. Instead, GLO created 11 different programs to allocate funds, with the Competition as the largest in terms of CDBG-MIT dollars.⁶⁹

Not only was the Competition GLO's largest CDBG-MIT program, initially contemplating to disperse roughly \$2 billion (about 50% of the allocation), but it had the explicit purpose of allocating funds to mitigate risk of hurricanes and severe flooding: the greatest disaster risk facing the state. GLO told HUD during its investigation that that it uses a competition format to allocate funds when there is more need than dollars available and referenced the 140 counties eligible to receive funds.⁷⁰ But pursuant to the explicit terms of the HUD Notice, the funds only had to be allocated between the 20 HUD MID areas identified in the Notice.

GLO unnecessarily expanded the pool of eligible areas to receive funds, despite these areas not having comparable mitigation risk. GLO also admitted it performed no analysis to determine whether these areas had comparable mitigation risk, relying only on past disaster declarations which included non-flooding-related disasters. In effect, GLO manufactured the very scarcity which drove its purported need to use a competition by identifying additional areas eligible to receive funds and then considering them to be equally eligible, even though clearly the areas did not have the same level of need for mitigation dollars.

While GLO testified that it could have provided more funds to HUD MID areas, GLO said allocating funds in excess of this 50% amount would have been questioned by State MID areas. Thus, GLO provided greater weight to the interest of these majority non-minority areas than effectuating CDBG-MIT goals.⁷¹ GLO did not provide comparable considerations to areas expressing concern that providing only 50% of funds to HUD MID areas would hurt the areas with the highest mitigation need, including communities comprised of Black and Hispanic individuals. For GLO, some voices mattered more than others. *See also Mhany Mgmt.*, 819 F.3d at 612.

Moreover, not only did GLO make the HUD MID areas—including Houston and Harris County—compete for funds, GLO then had *separate* competitions for HUD MID and State MID

⁶⁹ None of the other programs contemplated by the Action Plan were comparable in scope to the Competition, nor had the express purpose of specifically mitigating the risk of future damage from storms and flooding in areas impacted by Hurricane Harvey.

⁷⁰ Tr. Vol. 1, 70:12-21.

⁷¹ Tr. Vol. 1, 165:25-166:11.

areas. GLO did so knowing it would be easier for State MID areas to win awards by just competing against other State MID areas.⁷² The separate State MID Competition was comprised entirely of areas GLO had deemed eligible to receive CDBG-MIT funds. These areas had substantially less people and substantially less mitigation need. These areas were also able to score lower, *i.e.*, have less impactful projects, while still winning funding. GLO thus went from contemplating direct allocations to Houston and Harris County, to formula methodologies that favored them, ultimately to a competition structure that substantially disadvantaged these areas. *S. Camden Citizens in Action v. New Jersey Dep't of Env't Prot.*, 254 F. Supp. 2d 486, 497 (D.N.J. 2003) (finding that defendant was “well-aware of the potential disproportionate and discriminatory burden placed upon [the predominantly minority] community and failed to take measures to assuage that burden.”). Then, on top of this competition structure, GLO used several criteria that further disadvantaged these areas. This series of decisions compounded the harms to Black and Hispanic residents.

4. Departures from Normal Substantive and Procedural Criteria

The next two factors—departures from the normal substantive criteria and procedural processes—reveal further intent to steer money away from Black and Hispanic communities in areas otherwise eligible to receive an award absent discriminatory criteria. None of the criteria or Competition parameters that operated to steer money away from Black and Hispanic communities furthered the objectives of the CDBG-MIT program. *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.*, 648 F. Supp. 2d 563, 574 (E.D. La. 2009) (explaining that “substantive departures” can include evidence that justifications lack factual support). As noted, CDBG-MIT funds had the express purpose of providing funds to “areas impacted by recent disasters to carry out strategic and high-impact activities to mitigate disaster risks and reduce future losses.” Moreover, CDBG-MIT grants have a statutory focus on benefiting vulnerable lower-income people and communities and targeting the most impacted and distressed areas. Consistent with these clear objectives, GLO initially contemplated formula allocations that sought to effectuate these goals. In contrast, for the Competition, GLO deployed scoring criteria and relative weighting that substantially diluted mitigation risk, social vulnerability, and population. *Arlington Heights*, 429 U.S. at 267 (“substantive departures” are usually indicated when “factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.”).

GLO effectively diluted the specific mitigation risk posed to Black and Hispanic communities in eligible areas in two ways. First, GLO used a composite metric that undervalued the risk of flooding. GLO exclusively used the CDI to assign points for mitigation risk for a Competition purportedly intended to allocate funds to mitigate the risk and reduce damage from severe coastal flooding, riverine flooding, storms, and tornadoes.

⁷² Tr. Vol. 1, 172:8-174:12.

These issues were clearly explained to GLO in the comprehensive report discussed above. Specifically, the GLO was on notice that the CDI underweighted or washed out repetitive loss properties—a key data point on risk posed to homes from flooding. The report also put the GLO on notice that the CDI failed to adequately account for severe coastal flooding. GLO did nothing in response to these concerns.

Despite these flaws, the CDI still recognized Houston and Harris County as having the highest level of mitigation risk. But GLO assigned and then provided a scoring criterion with a relatively very low weighting in the overall Competition. GLO only assigned CDI 10 out of a possible 105 points in the Competition; less than 10% of available points. This means that less than 10% of available points were being assigned based on mitigation risk in a competition intended to allocate funding to address mitigation risk. In at least one alternate formula-based option, GLO projected funding outcomes if the CDI was weighted as high as 30% of the formula. GLO admitted to HUD in testimony that had it assigned more points to the CDI criterion, Houston and Harris County would have received maximum points because they had the highest level of mitigation risk.⁷³

Similar to CDI, GLO also lowered the weighting of SoVI, GLO's measurement of social vulnerability, from 30% in proposed formula allocations to 10 points, less than 10% of the total possible score for the Competition. The record shows then that GLO had contemplated weighting CDI and SoVI as roughly 60% of its formula allocation, effectively allocating funds majorly based on mitigation risk and social disadvantage. GLO departed substantially from this in the actual Competition, awarding less than 20% of overall points based on mitigation risk and social disadvantage. Moreover, this lack of emphasis on social disadvantage further compounded the harm associated with GLO's decision to award up to 20 points for achieving a 50% LMI threshold, providing no additional points for jurisdictions with higher levels of anticipated LMI beneficiaries. Such structuring contravened the clear purpose of CDBG-MIT funding.

GLO further departed from the clear objectives of the CDBG-MIT program through the use of the Project Impact Criterion, particularly the 10-point component.⁷⁴ GLO testified that this criterion was specifically crafted to benefit smaller eligible areas, despite no substantiated connection between these eligible areas and mitigation risk.⁷⁵ GLO also never considered the impact of this criterion in conjunction with its \$100 million award cap.⁷⁶ The combination of the Project Impact Criterion and the award cap made it exceedingly difficult for larger jurisdictions to obtain funding, despite the explicit CDBG-MIT objective of funding high-impact projects. Such high-impact projects could not score well on this rubric, as jurisdictions such as Houston and Harris County were forced to use their entire population, not just the anticipated beneficiaries, to calculate the anticipated “project impact.”

⁷³ Tr. Vol. 1, 121:19-122:2.

⁷⁵ Tr. Vol. 1, 137:14-139:10, 145:4-10.

⁷⁶ Tr. Vol. 1, 162:19-22.

GLO sought to justify this criterion to HUD during the investigation by stating the use of the Project Impact Criterion was its attempt to satisfy the HUD Notice’s requirement to perform a benefit-cost analysis for certain covered projects. Importantly, the HUD Notice’s requirement to perform a benefit-cost analysis only applies to a “covered project,” which is defined as a project of \$100 million or more.⁷⁷ GLO did not award any such projects under the Competition, rendering this criterion unnecessary. Moreover, the HUD Notice did not require this specific and clearly flawed form of benefit-cost analysis, which completely disregarded any meaningful effort to quantify the actual level of anticipated mitigation benefit and instead treated all potential beneficiaries across eligible jurisdictions the same, regardless of mitigation risk.

GLO testified that they did not see it as problematic that only one jurisdiction with a population greater than 100,000 people was awarded funding, despite the mandates of the HUD Notice.⁷⁸ This criterion, purportedly crafted by GLO to level the playing field between smaller and larger jurisdictions, actually had the result of preventing larger jurisdictions from fairly competing for awards. In HUD’s investigation, GLO testified that it was not necessarily trying to help as many people as possible.⁷⁹

5. Administrative History

The sixth factor—the administrative history—further establishes that GLO had discriminatory purpose in administering the Competition. GLO testified to HUD that it understood that the coastal areas had higher mitigation needs and that these areas have higher concentrations of low-income populations.⁸⁰ GLO further testified that it understood during the development of the competition that coastal areas contained vulnerable minority persons.⁸¹ GLO also had demographic data on hand on every eligible area, including the HUD MID and State MID areas. In its Mitigation Needs Assessment, under the HUD Notice, GLO was obligated to “assess how the use of CDBG–MIT funds may affect members of protected classes under fair housing and civil rights laws, racially and ethnically concentrated areas, as well as concentrated areas of poverty.”⁸² Again, while GLO was afforded some discretion in the design of its program, the obligation to conduct this assessment under the Notice and to comply with fair housing and civil rights laws was not discretionary.

Despite this knowledge, and despite the clear obligation in the HUD Notice, GLO testified to HUD that it never actually assessed how its use of CDBG-MIT funds would affect racial and ethnic groups in eligible areas, even though this was required by the HUD Notice.⁸³ GLO also testified that it

⁷⁷ 84 F.R. 45840.

⁷⁸ Tr. Vol. 1, 144: 19-21

⁷⁹ Tr. Vol. 1, 167:14-16.

⁸⁰ Tr. Vol. 2, 300: 1-12.

⁸¹ Tr. Vol. 2, 300: 12-18.

⁸² 84 F.R. 45847.

⁸³ *Id.*

performed no comparative analysis of the demographic makeup of HUD MID or State MID areas.⁸⁴ GLO also said that it never ran projections using this data on the likely results of its proposed use of funds, including the Competition. In sum, GLO was required to evaluate the results of its competition structure on racial and ethnic groups, understood that coastal areas had greater minorities and greater need, had the information available to conduct such an analysis, and still did not conduct the required analysis.

At deposition, GLO purported to satisfy its civil rights requirements *after* the Competition and *after* the projects were selected. GLO also said that its contractor performed affirmatively furthering fair housing (“AFFH”) reviews of selected projects.⁸⁵ But these post-hoc analyses were created after competition design and had no impact on the development of the competition or the distribution of CDBG-MIT funds.

During HUD’s review of GLO’s Draft Action Plan, FHEO pointed out to GLO its lack of efforts to assess the impact of its proposed use of funds on racial and ethnic minorities. GLO responded to HUD at the Draft Action Plan stage that it was accounting for these populations through the use of the SoVI and its AFFH reviews. However, GLO later testified that it had no actual analysis or data to support its assertion that SoVI scores correlated with where racial minorities lived in the state, such that using it as a factor could be fairly said to demonstrate consideration of the needs of these groups.⁸⁶ Thus, GLO knowingly abdicated any effort to prevent disproportionate funding distribution in project selection, deferring any such effort to a post-hoc project review, which upon review, was meaningless. Since the benefits of the program will have already been distributed before the demographics of eligible areas can be analyzed, GLO had willfully and knowingly precluded itself from any real effort to prevent discriminatory allocations. GLO did this while certifying to HUD that it would comply with its civil rights and fair housing obligations in the administration of its program.

Finally, as discussed above, GLO buried its head in the sand on the question of disparate allocation though it was repeatedly put on notice by public comments warning GLO about the discriminatory outcomes of the Competition.⁸⁷ GLO maintained that, in accordance with the federally required public participation process, it properly considered all public comments received and addressed those comments. This position is belied by the record. GLO did nothing in response to the multiple prescient comments which sought to alert GLO to the likely discriminatory results of its proposed allocations. And GLO also testified that it did not really do anything meaningful to change

⁸⁴ Tr. Vol. 1, 102:4-14.

⁸⁵ GLO explained that these AFFH reviews were a way to comply with a prior imposed grant condition. These reviews, though, had no actual impact on funding. No jurisdiction’s project was denied due to these reviews. Tr. Vol 2, 342:1-6; 354:7-9.

⁸⁶ Tr. Vol. 1, 136: 18-20.

⁸⁷ “The grantee must consider all comments, received orally or in writing, on the action plan or any substantial amendment. A summary of these comments or views, and the grantee’s response to each must be submitted to HUD with the action plan or substantial amendment.” 84 F.R. 45853.

the program in response to comments; rather, it was focused only on addressing any “miscommunication” about what it was doing. Notably, these commenters flagged the discrimination that would likely result based on race upon review of GLO’s Draft Action Plan, even though the Draft Action Plan did not explicitly state GLO’s plan to operate separate Competitions between HUD MID and State MID areas, which, as noted above, contributed substantially to the disparate results which occurred. While GLO stated that it was eager to allocate funds, GLO could have, of course, amended the Action Plan to address these concerns and prevent discriminatory allocations.

6. Conclusion Regarding Arlington Heights Analysis

Taken together, these six *Arlington Heights* factors establish that discrimination because of race was a motivating factor in GLO’s design and operation of the Competition. GLO considered alternative funding schemes that would have avoided such discrimination, implemented discriminatory criteria, knew that such criteria would result in discrimination on the basis of race, was repeatedly warned that its actions would result in disproportionate allocation of funding on the basis of race, and proceeded to allocate funds in a discriminatory manner. Proof that the allocation was motivated in part by a discriminatory purpose shifts to GLO the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. *Arlington Heights*, 429 U.S. at 270 n.21.

For its main justification, GLO notes that its Action Plan was approved by HUD. As HUD has made clear to recipients and to GLO specifically, approval of an action plan does not constitute a determination that actions taken to implement the plan are in compliance with civil rights laws.⁸⁸ Action plan approval only means that CPD has determined that GLO’s plan is “substantially complete.”⁸⁹ When determining whether an action plan is substantially complete, CPD is limited by statute in its review and does not review the underlying data used by the grantee to support its assertions. Rather, CPD relies on the grantee’s certifications that it will comply with fair housing and civil rights laws and requirements. GLO understood this, as it certified to HUD that it would conduct and administer the CBDG-MIT grant in conformity with Title VI, the Fair Housing Act, other federal nondiscrimination laws, and their implementing regulations.⁹⁰

Moreover, GLO never explicitly disclosed to HUD its intent to effectively operate the Competition as two competitions, one for HUD MID areas and a separate one for State MID areas. This feature of the Competition had a substantial disparate result on race and national origin, but it was not mentioned in the Action Plan presented for CPD review. HUD thus never had the opportunity to identify this core Competition design as a cause for concern.

⁸⁸ CPD Letter, *supra* note 58, at 1.

⁸⁹ *Id.*

⁹⁰ Action Plan, *supra* note 24, at 289.

GLO also denies the Competition had an adverse impact on Black and Hispanic individuals, asserting that many of the Competition’s beneficiaries are minority. Assuming arguendo that is the case,⁹¹ it is not a defense because Title VI ensures equal opportunity for individuals, not just equal outcomes for protected class groups. *Connecticut v. Teal*, 457 U.S. 440, 451-52 (1982). To assess whether the Competition was discriminatory, HUD analyzes who did *not* receive funding, not just who did benefit from awards, in order to examine any potential disproportionality. *Betsey v. Turtle Creek Assoc.*, 736 F.2d 983, 987 (4th Cir. 1984) (“bottom-line” considerations of the number and percentage of minority individuals benefitting from a policy are “of little comfort” to those minority individuals harmed by the policy). The record evidence establishes that GLO itself understood the proper inquiry in the civil rights context— “This [AFFH] review is as much about who you are serving as who you aren’t serving . . . we also need to know about who you are benefitting and who you *aren’t* benefitting . . .”⁹² At the same time, GLO also testified that it failed to analyze the demographics of eligible communities that did not receive funding from the Competition, *i.e.*, who was not served.⁹³

Moreover, the actual data are clear—GLO’s development, design, and operation of the Competition disproportionately harmed Black and Hispanic individuals in areas otherwise eligible, absent discriminatory criteria, to receive awards. Despite full awareness that there were more Black and Hispanic individuals in HUD MID areas, and that these communities desperately need mitigation funding, GLO made relatively less money available for them. GLO also made it harder for these communities to obtain critical funding under the Competition.

B. GLO failed to provide HUD with access to its records to determine compliance.

HUD’s regulations implementing Title VI require that recipients, such as GLO, permit access to records, accounts, and other information as is necessary to determine the recipient’s compliance with Title VI. 24 C.F.R. § 1.6(c); *see also United States v. El Camino Cmty. Coll. Dist.*, 600 F.2d 1258, 1260 (9th Cir. 1979). As noted, in response to HUD’s initial investigation, GLO improperly withheld at least hundreds of highly relevant records in its possession that were directly responsive to HUD’s request for information and that would have aided HUD in determining GLO’s compliance with Title VI. Such records include the majority of GLO’s communications and analyses discussed in this letter of findings which evidence GLO’s intent to discriminate in the design and operation of the Competition.

GLO’s failure to comply was only established after HUD issued the aforementioned subpoenas *deuces tecum*. Moreover, HUD believes GLO’s production still remains deficient. GLO has consistently refused to submit assertions under oath that it already produced all documents responsive

⁹¹ HUD disagrees with this conclusion by GLO, the only evidence of which GLO proffers is a letter discussing the aggregate number of beneficiaries across multiple CDBG-MIT programs that obscures the effect of the Competition on Black and Hispanic communities.

⁹² Tr. Vol. 2, 354:9-25 (emphasis added).

⁹³ Tr. Vol. 2, 350:4-11.

to the subpoena deuces tecum. GLO is therefore not in compliance with its Title VI assurances required by 24 C.F.R. § 1.5 and its obligation to submit compliance information as required by 24 C.F.R. § 1.6.

IV. CONCLUSION

The above findings reiterate and supplement HUD's prior conclusion that GLO is not in compliance with Title VI. Until such time as the findings are resolved to HUD's satisfaction through voluntary or nonvoluntary means, GLO will continue to be considered ineligible for discretionary funding under any HUD Notice of Funding Opportunity.

HUD's findings that GLO violated Title VI by intentionally discriminating based on race and by administering a program that had an unjustified discriminatory impact on race likewise indicate potential violations of the Fair Housing Act.⁹⁴ HUD disagrees with GLO's argument that neither GLO⁹⁵ nor GLO's conduct⁹⁶ are covered by the Fair Housing Act. Because the nature of the violations would constitute both a pattern and practice of discrimination and also rise to the level of general public importance, HUD refers the Fair Housing Act allegations to the Department of Justice. As this

⁹⁴ Specifically, there are likely violations of subsections 804(a) and 804(b) of the Fair Housing Act. Subsection 804(a) prohibits making a dwelling unavailable to any person because of race or national origin. Conduct prohibited by subsection 804(a) includes "any conduct relating to the provision of housing which otherwise makes unavailable or denies dwellings to persons because of . . . race or national origin." 24 C.F.R. § 100.50(b)(3). Prohibited conduct also includes: "[e]nacting or implementing . . . ordinances, policies, or procedures that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings to persons because of . . . race . . . or national origin." 24 C.F.R. § 100.70(d)(5). Subsection 804(b) of the Act prohibits discrimination against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with the rental of a dwelling, because of race or national origin. Conduct prohibited by subsection 804(b) includes "[l]imiting the use of . . . services . . . associated with a dwelling because of [the] race . . . or national origin of an owner, tenant, or a person associated with him or her." 24 C.F.R. § 100.65(b)(4).

⁹⁵ GLO says that because it did not act as a seller, landlord, or broker of dwellings as part of the Competition process, the Act does not apply. However, the Act is not limited to those who sell, rent, or finance real estate; instead, the Act makes it unlawful to discriminate without reference to who is discriminating.

⁹⁶ GLO's conduct related to the design, development, and operation of the Competition is covered by the Act. Both GLO and HUD acknowledge that CDBG-MIT funds are intended to protect access to residential housing or "dwellings" as defined and covered by the Act. Accordingly, any discriminatory actions taken with regard to CDBG-MIT funds in a way that affects dwellings is prohibited by the Act.

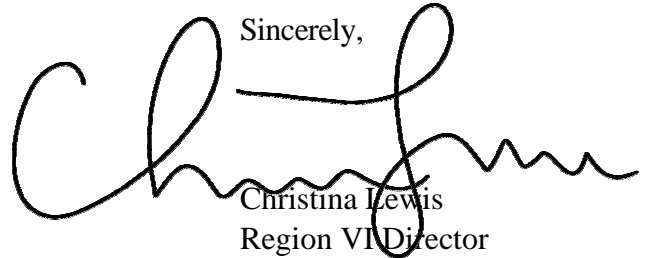
The nexus to housing is recognized in both GLO and HUD authorities. In its Action Plan, GLO notes that "[h]ousing [is] continuously impacted and [is] at risk" due to flooding, hurricane, tropic storms, and tropical depressions. The HUD Notice defined mitigation activities as "those activities that increase resilience to disasters and reduce or eliminate the long-term risk of loss of life, injury, damage to and loss of property, and suffering and hardship, by lessening the impact of future disasters."

Furthermore, HUD's Notice and GLO's Action Plan make eligible for CDBG-MIT funds the following activities: infrastructure improvements, economic development activities, buyouts or home acquisitions with or without relocation assistance, down payment assistance, housing incentives, and demolition. Each and every one of those categories—several explicitly housing-related and all potentially housing-related—were eligible activities under the Competition. Moreover, the Competition did award funding to projects that affected residential housing. For example, one award supported new infrastructure to prevent flooding of residential neighborhoods in the City of Sequin. The applicant repeatedly described the need for a regional detention pond and other drainage improvements as necessary to protect people and property in *residential* neighborhoods.

matter has been referred to the U.S. Department of Justice, GLO is advised to refer all communications in this manner to Carrie Pagnucco, Chief of the Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice. An attorney from the Civil Rights Division will contact GLO soon regarding this matter.

For the convenience of the parties, a copy of the final investigative report will be made available.

Sincerely,

A handwritten signature in black ink, appearing to read 'Christina Lewis', written in a cursive style.

Christina Lewis
Region VI Director
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