No. __-_____

In the Supreme Court of the United States

NYC C.L.A.S.H., INC., WILLIAM DONNELL, CHANEL FOLKS, DIGNA RODRIGUEZ, DOUGLAS SONCKSEN, AND JAMIE WARD,
Petitioners,

v.

MARCIA L. FUDGE, SECRETARY OF HOUSING & URBAN DEVELOPMENT, *in her official capacity*. AND DEPARTMENT OF HOUSING & URBAN DEVELOPMENT,
Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

Public-housing tenants challenge an in-unit ban on smoking imposed on public housing authorities as a condition of federal funding by the Department of Housing and Urban Development ("HUD") under decades-old authority to ensure "safe and habitable" housing. On cross motions for summary judgment, the parties briefed and the trial court granted summary on an unpleaded Spending-Clause claim, finding the ban insufficiently coercive based on a lack of evidence (*i.e.*, tenants did not prove coercion, but HUD did not prove *non-coercion*). Applying "extreme deference" to agency expertise and the broad literal scope of "safe," the court of appeals affirmed notwithstanding HUD's disclaimer of relevant expertise, clear-statement rules under the federalism canon and Spending Clause, the emerging "major-questions doctrine" and constitutional avoidance for a case with significant additional policy and constitutional issues (*e.g.*, Fourth and Fifth Amendment concerns given a nexus with the home, limited congressional delegations on smoking policy).

The questions presented are:

1. Whether HUD lacks authority to adopt or enforce its smoking ban as a means to ensure "safe and habitable" public housing.

2. Whether the lower courts erred in granting HUD summary judgment on the smoking ban's compliance with the Spending Clause without any evidence that the Smoking Ban is *not coercive*.

3. Whether the lower courts erred by ignoring non-record evidence in constitutional adjudication.

4. Whether extra-pleading issues or evidence briefed and reached on summary judgment are "*tried*" by implied consent under FED. R. CIV. P. 15(b)(2).

PARTIES TO THE PROCEEDING

Petitioners are NYC C.L.A.S.H., Inc., William Donnell, Chanel Folks, Digna Rodriguez, Douglas Soncksen, and Jamie Ward, who were plaintiffs in district court and appellants in the court of appeals.*

Respondents are Department of Housing and Urban Development and its Secretary—initially Ben Carson, now Marcia L. Fudge—who were defendants in district court and appellees in the court of appeals.

RULE 29.6 STATEMENT

Petitioner NYC C.L.A.S.H., Inc. has no parent companies, and no publicly held company owns 10 percent or more of its stock.

RELATED CASES

The following cases relate directly to this case for purposes of this Court's Rule 14.1(b)(iii):

- *NYC C.L.A.S.H., Inc. v. Carson,* No. 1:18-cv-1711-ESH (D.D.C.). Filed July 23, 2018; decided Mar. 2, 2020; amendment of judgment denied July 25, 2020.
- *NYC C.L.A.S.H., Inc. v. Fudge,* No. 20-5126 (D.C. Cir.). Filed May 1, 2020; Amended Notice of Appeal: Aug. 7, 2020: decided Aug. 26, 2022; rehearing denied Oct. 21, 2022.

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* Petitioners have lost contact with co-plaintiff and co-appellant Nathan Fields (his phone number and email address no longer work and his mail returns as not being forwardable). Petitioners will serve him at his last known address as a respondent pursuant to this Court's Rule 12.6.

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PETITION FOR WRIT OF *CERTIORARI*

Five public-housing tenants who smoke and a smokers' rights group ("Tenants") petition for a writ of *certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in their challenge to the final rule *Instituting Smoke-Free Public Housing*, 81 Fed. Reg. 87,430 (2016) (codified at 24 C.F.R. pts. 965-966) ("Smoking Ban"), promulgated by the Department of Housing and Urban Development. The respondents are the Department and its Secretary (collectively, "HUD").

OPINIONS BELOW

The D.C. Circuit's Opinion is reported at 47 F.4th 757 and reprinted in the Appendix ("App.") at 1a. The district court's Memorandum Opinion is reported at 442 F.Supp.3d 200 and reprinted at App. 21a. The district court's unreported Order denying Tenants' post-judgment motions under FED. R. CIV. P. 15(b)(2), 59(e), and 60(b)(1) is reprinted at App. 35a.

JURISDICTION

On August 26, 2022, the D.C. Circuit affirmed the district court's grant of summary judgment for HUD. On October 11, 2022, petitioners timely sought rehearing *en banc*. On October 21, 2022, the D.C. Circuit denied the petition for rehearing *en banc*. The district court had jurisdiction under 28 U.S.C. §1331, and the D.C. Circuit had jurisdiction under 28 U.S.C. §1291. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Appendix sets out the relevant constitutional, statutory, and regulatory provisions.

STATEMENT OF THE CASE

The Smoking Ban requires public housing authorities ("PHAs") nationwide to ban smoking not only in common areas—including within 25 feet of buildings—but also in living quarters. HUD promulgated it under authority in the Housing Act of 1937 to "ensure that public housing … [is] safe and habitable." 42 U.S.C. §1437d(f)(2). The parties cross-moved for summary judgment, and the district court ruled for HUD. App. 21a. HUD's only potential authority for the Smoking Ban is the Spending Clause, raising the issue of whether the Smoking Ban is impermissibly coercive. While HUD never established *non-coercion*, Tenants' post-judgment motion established coercion with judicially noticeable materials. The district court denied Tenants' post-judgment motion, App. 58a, and the Court of Appeals affirmed. App. 1a. Even if it does not *reverse*, this Court should vacate HUD's summary judgment and remand for either supplemental briefing or a bench trial on coercion.

REASONS TO GRANT THE WRIT

The case raises important substantive questions under the emerging "major-questions doctrine" and important procedural questions about constitutional litigation with agency defendants.

Although the "major-questions" label is new, the issue flows from a long line of decisions,[1] with more

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[1] *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 642 (1980) ("*Benzene*"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("*B&WTC*"); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) ("*UARG*"); *King v. Burwell*, 576 U.S. 473, 486 (2015).

recent additions sharpening—and naming—the doctrine.[2] The doctrine covers statutory interpretation generally under "a practical understanding of legislative intent," but has added force when agencies claim power through modest or vague statutory language, especially when the power is new but the statute is old. *West Virginia*, 142 S.Ct. at 2607-09. This special force derives from separation-of-powers doctrine and statutory interpretation generally, *id.*, which includes the federalism canon. *Id.* at 2620-2622 (Gorsuch, J., concurring); *Alabama Realtors*, 141 S.Ct. at 2489. Even if *Congress* has authority for a statutory smoking ban, *HUD* still may lack delegated regulatory authority.

Although HUD's regulation of the public-housing market is economically significant,[3] the major-questions doctrine is not limited to economically significant rules. The doctrine applies equally to "major social … policy decisions" and ones with "political significance." *West Virginia*, 142 S.Ct. at 2613. Even if the Smoking Ban lacked economic significance, it would readily meet the social-policy and political hooks for a variety of unusual aspects of the Smoking Ban:

- HUD's intrusion into the landlord-tenant

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[2] *Alabama Ass'n of Realtors v. HHS*, 141 S.Ct. 2485 (2021) ("*Alabama Realtors*"); *West Virginia v. EPA*, 142 S.Ct. 2587 (2022).

[3] Given HUD's claim to the power to take title to PHAs' property, at HUD's discretion, as an enforcement mechanism, 42 U.S.C. §1437d(g)(1), the Smoking Ban's scope meets the criteria for a major economic action, as applied to PHAs. Because they suffer from PHAs' coerced capitulation to HUD, Tenants emphasize the Smoking Ban's *political and social scope*. Either way, the major-questions doctrine applies.

relationship. *Alabama Realtors*, 141 S.Ct. at 2489.

- HUD's intrusion into prior state-and-local occupation of the field of regulating residential exposure to environmental tobacco. *Wyeth v. Levine,* 555 U.S. 555, 565 n.3 (2009).
- HUD's intrusion into bodily integrity and relationships—including family relationships—among tenants in the same unit. *In re A.C.*, 573 A.2d 1235, 1245-46 (D.C. 1990).
- HUD's intrusion into the conduct of lawful activities in the home. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973) ("a man's home is his castle" with respect to "privacy of the home") (interior quotations omitted).

Along these fronts, courts "expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Realtors*, 141 S.Ct. at 2489 (interior quotations omitted). In our democracy, heightened judicial scrutiny of congressional and *a fortiori* agency action extends beyond moneyed interests.

Substantively, the petition raises important issues of judicial review of unconstitutional regulations and provides an ideal vehicle to resolve issues under the developing "major questions doctrine." Procedurally, the lower courts split with decisions from other circuits and this Court on the standard for cross-summary judgment, admitting non-record evidence for constitutional adjudication, and the availability of relief under Rule 15(b)(2) in summary-judgment proceedings. This Court should grant the writ of *certiorari* for five reasons.

1. The panel's reliance on safety's "ordinary meaning," App. 6a, conflicts with the clear-statement

requirement for vague statutory phrases. *See* Sections I.A-I.B, *infra.*

2. The panel's "extreme degree of deference," App. 9a, to an agency with no expertise conflicts with the major-questions doctrine. *See* Section I.B.3, *infra.*

3. Giving HUD summary judgment on coercion with no evidentiary showing conflicts with standards for summary judgment in constitutional cases. *See* Section II.A, *infra.*

4. The panel's rejection of non-record evidence in constitutional adjudication is inconsistent with this Court's decisions. *See* Section II.B, *infra.*

5. Denying Tenants' post-judgment motion under Rule 15(b)(2) splits with three circuits. *See* Section II.C, *infra.*

These important issues warrant this Court's review.

I. HUD LACKS AUTHORITY FOR THE SMOKING BAN.

The major-questions doctrine requires narrowly interpreting the Housing Act for both constitutional and statutory reasons.

A. Constitutional avoidance and doubt require rejecting HUD's authority.

Channeling *Benzene*, HUD interprets an opaque mandate (safety) as "risk-free." Apart from the major-questions doctrine—but also *as part of it*—the constitutional issues counsel for the narrow reading under the avoidance and doubt canons. *Jean v. Nelson*, 472 U.S. 846, 857 (1985); *Jennings v. Rodriguez*, 138 S.Ct. 830, 842 (2018).

1. The Smoking Ban exceeds the federal Commerce Power

Although not reached below, neither Congress nor

HUD have authority to adopt the Smoking Ban under the Commerce Clause.

a. <u>The Smoking Ban does not preempt State law</u>

Although HUD has argued that the Smoking Ban binds PHAs with the force of law, the underlying basis for HUD's authority—the Housing Act—simply does not preempt state law. *James v. Valtierra*, 402 U.S. 137, 140 (1971). Apart from the potential to bind PHAs as recipients of federal funds, *see* Section I.A.3, *infra*, neither the Housing Act nor the Smoking Ban have the preemptive force of law.

b. <u>The Commerce Clause does not reach indoor air in living quarters.</u>

Public housing does not move in interstate commerce. Moreover, "[t]he States have broad authority to enact legislation for the public good—what we have often called a 'police power,'" but "[t]he Federal Government, by contrast, has no such authority[.]" *Bond v. U.S.*, 572 U.S. 844, 854 (2014). Public housing is not open to Congress—much less to HUD—to regulate under the Commerce Power.

Relying on *Katzenbach v. McClung,* 379 U.S. 294, 301-02 (1964), and *Heart of Atlanta Motel, Inc. v. U.S.,* 379 U.S. 241 (1964), appellate decisions[4] have found Commerce-Clause authority for the Fair Housing Act. Those opinions concern restaurants and motels, which

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[4] *See, e.g., Oxford House-C v. City of St. Louis,* 77 F.3d 249, 251 (8th Cir. 1996); *Morgan v. Secretary of Housing and Urban Development,* 985 F.2d 1451, 1455 (10th Cir. 1993); *Seniors Civil Liberties Ass'n, Inc. v. Kemp,* 965 F.2d 1030, 1034 (11th Cir. 1992).

Congress might reasonably deem interstate activity from their use in interstate travel. Unlike hotels or restaurants that interstate travelers might visit, public housing does not "*substantially* affect interstate commerce." *U.S. v. Morrison*, 529 U.S. 598, 616 (2000) (interior quotations omitted, emphasis added).

Similarly, purely *intrastate* consumption of self-grown products nonetheless might affect the *interstate market* for those products. *Wickard v. Filburn,* 317 U.S. 111, 118-19 (1942). But there is no interstate market in subsidized housing, which sits in one state, without moving. The 12-month residency requirement, 24 C.F.R. §982.353(c), attenuates any link with interstate commerce. *Wickard* "involved economic activity in a way that the possession of a gun in a school zone [like smoking in subsidized housing] does not." *U.S. v. Lopez*, 514 U.S. 549, 560 (1995). Even Congress lacks the authority to regulate subsidized housing under the Commerce Power.

2. <u>The Smoking Ban raises federalism concerns.</u>

The Tenth Amendment reserves to the States and the People all powers not expressly transferred to the federal government, U.S. CONST. amend. X, which bars the federal government's commandeering State and local government. *Murphy v. NCAA*, 138 S.Ct. 1461, 1476 (2018) ("conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States"). Because "the States entered the Union with their sovereignty intact," *Sossamon v. Texas*, 563 U.S. 277, 283 (2011) (internal quotations omitted), "respect for the States as 'independent sovereigns in our federal

system' leads [courts] to assume that 'Congress does not cavalierly pre-empt [state law].'" *Wyeth*, 555 U.S. at 565 n.3 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). The Spending Clause provides the only potential federal "hook" to adopt a federal smoking ban in public housing, analogously to a contract struck between the federal government and PHAs. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) But even the Spending Clause has its limits, and HUD exceeded them here. *See* Section I.A.3, *infra*.

a. <u>The Smoking Ban violates the Tenth Amendment.</u>

At the outset, the States did not delegate a general police power to the federal government when they formed the Union. Instead, States retained the ability to regulate health and safety matters under the police powers. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985); *Lexington Fayette County Food & Bev. Ass'n v. Lexington-Fayette Urban County Gov't*, 131 S.W.3d 745, 749 (Ky. 2004) (discussing the wide latitude states have in adopting ordinances promoting health, safety, morals, and welfare in the context of a smoking ban). All states have utilized their general police power to enact comprehensive anti-smoking and other tobacco use regulations. *See Fagan v. Axelrod*, 550 N.Y.S.2d 552, 560 (N.Y. Sup. Ct. 1990) ("regulation of smoking is a valid use of a state's police power"); *Wymsylo v. Bartec, Inc.,* 970 N.E.2d 898, 901 (Ohio 2012) ("Smoke Free Workplace Act, is a valid exercise of the state's police power by Ohio voters"). States typically explicitly exempt private homes from smoking-ban laws, and no state outright prohibits the use of tobacco in private residences except when used as a daycare center or for

some other commercial purpose.[5]

Although Congress (and by extension, federal agencies acting pursuant to Congressional grants of authority) may regulate activities affecting public health in areas under *federal jurisdiction* (such as in national parks or on military bases), there is no federal police power with respect to the regulation of activities that are "completely internal." *Lopez*, 514 U.S. at 594 (1995) (Thomas, J., concurring). Just as the Gun-Free School Zones Act improperly created an invisible federal zone around schools, *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring), the Smoking Ban improperly creates an invisible federal zone *inside private residences.* The exclusive province of the States and their local subdivisions over matters of public health is even more compelling when applied to matters that occur within the sanctuary of private living quarters where there is no discernible link to interstate commerce, such as the non-public, completely internal emissions of smoke from using tobacco products.

The district court held that PHAs have "a choice whether to accept the federal public housing funding and the terms attached to it," App. 34a (emphasis omitted), but the parties disagree on the nature of that choice and the attached terms. HUD claims its rules preempt state law, but the district court did not reach that issue. App. 35a-36aa n.11. Taking HUD at its word—both in its briefs and in its Smoking Ban—PHAs must comply with the Smoking Ban:

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[5] *See e.g.*, ARIZ. REV. STAT. ANN. §36-601.01; ARK. CODE ANN. §§20-7-109(a)(1), 20-27-1801 to -1809 (Clean Indoor Air Act); CAL. LAB. CODE §6404.5; FLA. STAT. ANN. §§386.203(1), 386.2045(1) (Florida Clean Indoor Air Act).

> This rule *requires* each public housing agency (PHA) administering public housing to *implement* a smoke-free policy. … The smoke-free policy *must* also extend to all outdoor areas up to 25 feet from the public housing and administrative office buildings.

App. 88a (emphasis added). In addition, 24 C.F.R. §965.653 provides that "PHAs *must* design and implement a policy prohibiting the use of prohibited tobacco products in all public housing living units and interior areas … as well as in outdoor areas[.]" App. 74a-75a (emphasis added). This section also provides that "[a] PHA's smoke-free policy *must*, at a minimum, ban the use of all prohibited tobacco products." *Id.* (emphasis added). Additionally, 24 C.F.R. §965.655, provides that "PHAs are ***required*** to implement the requirements of this subpart[.]" App. 75a (emphasis added). On commandeering, the Smoking Ban should be vacated, with HUD compelled to rewrite it—if at all—as the choice that the district court saw. *See Murphy*, 138 S.Ct. at 1476 ("conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States"). Otherwise, the Smoking Ban impermissibly directs State and local government what to enact, as distinct from outlining the menu of choices.

b. The presumption against preemption applies.

State and local government have a long history of regulating housing standards for the health and safety of the community. *Edgar A. Levy Leasing Co. v. Siegel,* 258 U.S. 242, 246-47 (1922). State and local housing regulation easily predates the Housing Act's

initial enactment in 1937, PUB. L. NO. 75-412, 50 Stat. 888 (1937); *see generally* Eugene B. Jacobs & Jack G. Levine, *Redevelopment: Making Misused and Disused Land Available and Useable,* 8 HASTINGS L.J. 241 & nn.3-5 (1957) ("governmental bodies have long been concerned about the slums and unpleasant living conditions of cities") (citing California statutes from 1917, 1872, 1903, and 1915). Similarly, State and local government have long regulated exposure to tobacco smoke. *See* note 5, *supra*, and accompanying text. HUD thus regulated here in a field already occupied by State and local government.

In such fields traditionally occupied by State and local government, courts apply a presumption *against* preemption absent "the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947) (emphasis added); *Wyeth,* 555 U.S. at 565; *cf. U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006). Courts "rely on the presumption because respect for the States as independent sovereigns in our federal system leads [courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth,* 555 U.S. at 565 n.3 (internal quotations omitted). For that reason, "[t]he presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.*

If statutory text "is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (internal quotations omitted). Even where Congress has preempted *some*

state action, the presumption against preemption applies to determining the *scope* of preemption. *Lohr*, 518 U.S. at 485. The presumption thus applies not only to the "yes-no" question of federal authority, but also to the "how-much" question about that authority's scope. Even federal statutes *directly* concerning tobacco require "a narrow reading" "in light of the presumption against the pre-emption of state police power regulations." *Cipollone v. Liggett Grp.*, 505 U.S. 504, 518 (1992). The Housing Act's tangentially related safety-and-habitability provision warrants that same narrow reading.

Notwithstanding the literal application of a federal statute, the presumption prevents federal laws' preempting traditional state regulation absent explicit guidance from Congress.[6] Here, Congress in 1937 would not have intended "safe and habitable" housing to include regulating environmental tobacco smoke. The district court found HUD's interpretation a permissible "implicit delegation," under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), App. 50a, but implicit delegations do not apply when the presumption against preemption requires "clear and manifest" congressional intent. While courts generally do not read "vague terms or ancillary provisions" to "hide elephants in mouse holes," *Whitman*, 531 U.S. at 468, under the

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[6] For example, *Santa Fe Elevator,* 331 U.S. at 230, cited a 1944 decision where 21 states regulated warehouses. *Davies Warehouse Co. v. Bowles,* 321 U.S. 144, 148-49 (1944). Under those circumstances, the presumption applied to prevent warehouses' coming under federal regulation of "public utilities" without any apparent congressional consideration of whether warehouses should qualify as "public utilities," even if they fit the statute's literal definition. *Id.*

presumption against preemption Congress cannot hide *anything anywhere*.

This presumption applies even more strongly to HUD's *administrative interpretation of the Housing Act*: "[A]lthough agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing 'court, *as well as the agency*, must give effect to the unambiguously expressed intent of Congress.'" *B&WTC*, 529 U.S. at 125-26 (emphasis added). That presumption compels denying HUD deference here because federal courts have constitutional obligations to defer to independent state sovereigns, *Santa Fe Elevator,* 331 U.S. at 230, and to interpret the statute that Congress wrote. Clearly, federal agencies—which draw their delegated power from Congress—cannot have a freer hand here than Congress itself. In short, the presumption against preemption is the tool of statutory construction that enables a court to answer the statutory question at *Chevron* step one, *Chevron* 467 U.S. at 843 n.9, without deference to HUD's interpretive gloss.

3. The Smoking Ban violates the Spending Clause.

Congressional spending power "is of course not unlimited, but is instead subject to several general restrictions." *South Dakota v. Dole*, 483 U.S 203, 207 (1987) (internal citations omitted); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578 (2012) ("*NFIB*"). Conditions must be unambiguous, allowing "States to exercise their choice knowingly cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Further, conditions cannot be "so coercive as

to pass the point at which pressure turns into compulsion." *Dole*, 483 U.S. at 211.

Citing *Ass'n of Priv. Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 459 (D.C. Cir. 2012), the panel argued that even agencies can condition federal funds on terms beyond the Commerce Clause's reach. App. 13a. While true for clear congressional delegations, that does not apply to ambiguous delegations in statutes subject to the clear-statement rules on which Tenants rely. While *Duncan* found clear-statement rules "a non sequitur in the context of a federal program in which the Department has clear oversight responsibility," 681 F.3d at 459, that begs the questions of whether a delegation is "clear" and which statutory-construction analysis applies.

PHAs' choosing to participate in federal-funding programs cannot authorize HUD to condition funds on *ultra vires* terms: "the language of the statute and not the rules must control." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 n.18 (1979); *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) ("Agencies may play the sorcerer's apprentice but not the sorcerer himself."). Instead, courts must read the Housing Act narrowly as to what the statute requires. *Sossamon*, 563 U.S. at 291 (clear-statement rule); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *cf.* Section I.A.2.b, *supra* (presumption against preemption). Unlike *Dole* and *NFIB*, where states understood non-compliance's consequences,[7] the Smoking Ban affords HUD *total discretion* on how to punish PHAs that exercise their constitutional choice not to comply.

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[7] States in *Dole* stood to lose 5% of federal funding, and States in *NFIB* stood to lose all their federal Medicaid funding.

Spending Clause precedents compel the conclusion that the Housing Act does not authorize the Smoking Ban, but even if *a smoking ban* were allowed, *HUD's Smoking Ban* is impermissibly ambiguous:

- The Smoking Ban may or may not authorize warrantless home searches. *See* Section I.A.4, *infra*.
- The Smoking Ban authorizes penalties up to eviction for tenants and to either fund termination or even property seizure for PHAs. *See* Section I.A.3, *infra*.

Taking these compounding ambiguities together, PHA tenants risk surrendering their rights if PHAs act cautiously to comply with the ambiguous Smoking Ban.

a. <u>The Smoking Ban is a new and ambiguous condition on pre-existing funding.</u>

PHAs cannot afford to forego HUD funding or lose title to their properties, so HUD's threatened penalties are clearly coercive. *See* Section I.A.3.b, *supra*. Tenants admittedly failed to raise that obvious (and uncontested) point in the initial motion for summary judgment but made it in a post-judgment motion via judicially noticeable materials. Rule 60(b) allows correcting this type of inadvertent omission, FED. R. CIV. P. 60(b)(1), which can also be corrected on appeal. FED. R. EVID. 201(d) ("court may take judicial notice at any stage of the proceeding). HUD neither contested that omission on Tenants' part nor provided any evidence to the contrary (*i.e.*, evidence that PHAs *do not* depend on HUD funding), which Tenants could have rebutted in reply. Courts are "not required to

exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2575 (2019) (internal quotations omitted). It is well known that State and local government are desperate for funding.

Under the Housing Act, HUD may replace PHAs, appoint a receiver, or take possession of HUD-assisted housing, but only for a "*substantial* default by a public housing agency." 42 U.S.C. §1437d(j)(3)(A) (emphasis added). This raises one of two alternate possibilities:

- If PHAs' ignoring HUD's Smoking Ban were a "substantial default," the addition of that new and substantial condition is an "expansion [that] accomplishes a shift in kind, not merely degree" is not a mere adjustment. *NFIB*, 567 U.S. at 583. By enabling HUD to cease funding billions—almost half of the New York City PHA's budget—the concept of a Smoking Ban enforceable under §1437d(j)(3)(A) easily falls on the change-in-kind side of the line. *NFIB*, 567 U.S. at 585; Section I.A.3.b, *infra* (coercion). That Smoking Ban violates the commandeering doctrine by posing a purported "choice" under the Spending Clause in coercive terms.
- Alternatively, if PHAs' ignoring HUD's Smoking Ban were *not* a "substantial default" under 42 U.S.C. §1437d(j)(3)(A), then HUD has no authority to enforce the Smoking Ban, and the Smoking Ban's use of language purporting to *require* PHA compliance is false and misleading.

The Ban cannot be a mere *NFIB* adjustment if its violation alone qualifies as "substantial" under §1437d(j)(3)(A). By contrast, if the Smoking Ban is too insubstantial to enforce under §1437d(j)(3)(A), the

Smoking Ban is unenforceable by its terms and should not use compulsory language. *See* Section I.A.1.a, *supra* (Housing Act not preemptive). Either way, the Smoking Ban is unenforceable and should be rewritten as voluntary or vacated.

b. The Smoking Ban is coercive.

Spending-Clause inducements "may not cross the 'point at which pressure turns into compulsion, and ceases to be inducement.'" *NFIB*, 567 U.S. at 676. "If States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power." *Id.* at 679. Simply put, "theoretical voluntariness is not enough." *Id.* On two alternate grounds, this Court should reverse or vacate the district court's summary judgment for HUD:

- First, PHAs' dependency on federal funds is judicially noticeable. *See* Court of Appeals Joint Appendix ("CAJA") 300-18 (judicially noticeable evidence that PHAs rely on HUD funding).
- Second, while the district court faulted Tenants for not showing that PHAs depend on federal funds, the lower courts explained that HUD can—instead of terminating funds—take title to PHAs' buildings. App. 30a, 14a. That is even more coercive than terminating funds, and courts readily assume that parties act in economically rational ways. *Shays v. FEC*, 414 F.3d 76, 90-91 (D.C. Cir. 2005).

Because PHAs' dependence on HUD funding and retaining title to their buildings is obvious, Tenants respectfully submit that this Court can consider these issues now, either to reverse the denials of Tenants' motion for summary judgment and their post-

judgment motion or, at a minimum, to withdraw the grant of summary judgment to HUD on the Spending Clause and remand for further proceedings.

4. The Smoking Ban's nexus with the home raises Fourth Amendment concerns.

The Fourth Amendment protects people from warrantless searches, especially in the home: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. CONST. amend. IV. In district court, HUD inconsistently argued both that regulatorily required lease terms required tenants to consent to warrantless entry, 24 C.F.R. §966.4(j)(2)-(3), and also that "'[t]enants cannot be asked to waive their Fourth Amendment rights.'" App. 18a (quoting HUD, Public Housing Occupancy Guidebook at 200 (2003)). At least one of these HUD arguments must be wrong.

The lower courts dodged the Fourth Amendment issue based on that HUD guidebook citation, App. 18a, 39a, which applies by its terms only to "enter[ing] units *for security purposes* unless the police department has a search warrant or they are in hot pursuit of a suspect who has run into the unit." App. 18a (emphasis added). The Smoking Ban does not involve "security purposes," so the guidebook does not even apply. Instead, one of two situations applies: (1) HUD's Smoking Ban allows and requires PHAs to enforce the Smoking Ban, notwithstanding tenants'

rights against warrantless searches, or (2) HUD's Smoking Ban is ambiguous on what it requires of PHAs and their tenants. This section outlines the former situation, and Section I.A.3, *supra*, outlines the latter. Whichever applies, the Smoking Ban violates the Constitution.

The public-housing context does not obliterate Tenants' rights: "The government as landlord is still the government." *Rudder v. U.S.*, 226 F.2d 51, 53 (D.C. Cir. 1955); *Pratt v. Chicago Hous. Auth.,* 155 F.R.D. 177, 178, 180 (D. Ill. 1994). Accordingly, the Fourth Amendment protects tenants, who have not waived that right.

In Section I.A.5, *infra*, Tenants address due process as a basis for invalidating the Smoking Ban, but the Fourth and Fifth Amendments overlap:

> The principles laid down in [*Entick v. Carrington*, 2 Wils. K.B. 275, 95 Eng.Rep. 807 (K.B. 1765)] affect the very essence of constitutional liberty and security. They … apply to all invasions on the part of the government and its [employees] of the sanctity of a man's home and the privacies of life. … *In this regard the Fourth and Fifth Amendments run almost into each other*.

Boyd v. U.S., 116 U.S. 616, 630 (1886) (emphasis added). As "a case undoubtedly familiar to every American statesman at the time of the founding," *Florida v. Jardines*, 569 U.S. 1, 7 (2013) (interior quotations omitted), *Entick* and its progeny gives a clear indication of the importance of the Fourth and Fifth Amendments' protection of the home from governmental intrusion. This Court has thus "repeatedly stressed" that "the location of [a] search"

in "a home" is "a constitutional difference" that distinguishes non-home searches. *Caniglia v. Strom*, 141 S.Ct. 1596, 1599 (2021) (interior quotations omitted).

Wherever a search occurs, the Fourth Amendment's touchstone is whether one has a "constitutionally protected reasonable expectation of privacy," including societal willingness to recognize that expectation as reasonable. *California v. Ciraolo*, 476 U.S. 207, 211 (1986). These rules apply not only to police investigating crimes but also for administrative searches conducted for civil code enforcement. *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 534 (1967); *Michigan v. Tyler*, 436 U.S. 499, 506 (1978) ("[s]earches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment"), so they apply to the Smoking Ban.

Indeed, "at the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home," *Silverman v. U.S.*, 365 U.S. 505, 511 (1961), which "was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies." *Warden v. Hayden*, 387 U.S. 294, 301 (1967). The Amendment "protect[s] against invasions of the *sanctity* of a man's home," *id.* (emphasis added), with "the principal object [being] *protection of privacy* rather than property." *Id* at 304. (emphasis added).

With HUD implicitly accusing smokers of burning down buildings, it is significant that "it is … impossible to justify a warrantless search on the ground of abandonment by arson when that arson has not yet been proved." *Tyler*, 436 U.S. at 505-06. Using tobacco products is legal activity confined to the home,

and the mere allegation that smoke not only may escape the unit but also may harm third parties does not provide probable cause for a warrant.

5. The Smoking Ban's nexus with the home raises due-process concerns.

The lower courts rejected Tenants' claimed fundamental right to conduct legal activity in the home. The Fifth Amendments provides that no person shall "be deprived of life, liberty or property without due process of law" by the Federal Government, U.S. CONST. amend. V, including federal agencies. *Taylor v. Beckham*, 178 U.S. 548, 601 (1900). "The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint," such as "individual liberty against certain government actions regardless of … the procedures used to implement them." *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (interior quotations omitted).

Due-process review is tiered, ranging from strict scrutiny for fundamental rights[8] and distinctions based on certain immutable criteria to rational-basis review for most social and economic legislation. Other legislative criteria invoke intermediate scrutiny or even "heightened rational basis" on the spectrum between strict-scrutiny and rational-based review. *Ruggiero v. FCC*, 317 F.3d 239, 243-45 (D.C. Cir. 2003) (*en banc*). Whatever standard applies, however, the "essential inquiry … is, however, inevitably a dual

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[8] Fundamental rights include the right "to direct the … upbringing of one's children" and, this Court has "strongly suggested," the "traditional right to refuse unwanted lifesaving medical treatment." *Id.* at 720. These fundamental rights rebut HUD's litigation position concerning in-unit exposure.

one" that pits the regulator's interests against those of regulated parties. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172-73 (1972). "Where there is a significant encroachment on personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). No matter how this Court classifies Tenants' claimed right, the federal government has no legitimate interest in HUD's unauthorized experiment with social engineering.

Given our home-as-castle tradition, *U.S. v. Orito*, 413 U.S. 139, 142 (1973) ("Constitution extends special safeguards to the privacy of the home"), this Court should find the fundamental right that Tenants claim or, alternatively, adopt a level of scrutiny above the rational-basis test.[9] But even the lowest level of scrutiny requires a "legitimate government interest." *R.A.V. v. St. Paul*, 505 U.S. 377, 384 n.4 (1992). Insofar as the Housing Act—properly understood, *see* Section I.A.1-I.A.4, *supra*, I.B, *infra*—cannot be read to delegate to HUD the authority for the Smoking Ban, there is *no legitimate federal interest* in the Smoking Ban. *See id.* (violation of Constitution renders the "government interest … not a 'legitimate' one"). While that parties may prefer that the Court resolve the level of scrutiny, the Smoking Ban fails under any level.

Tenants respectfully submit that this Court should recognize the due-process right Tenants claim under the framework of *Glucksberg,* 521 U.S. at 720-

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[9] The Smoking Ban, CAJA:489 & n.10, improperly premised rational-basis review on decisions involving *institutionalized* plaintiffs or public spaces (including private businesses), not homes.

21 ("fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition"). With a fundamental right to engage in lawful activity at home, Tenants could protect their liberty interests here. The lower courts rejected the authorities on which Tenants rely[10] as based only on First Amendment and personal-intimacy grounds. App. 43a. The sanctity of the home, however, is not limited to pornography and sex. Indeed, *Ravin* and *Sinclair* involved smoking, albeit smoking marijuana.

As indicated, the protections of the Fourth and Fifth Amendments "run almost into each other," *Boyd*, 116 U.S. at 630, creating a special protection of the home on par with other fundamental rights: "The Constitution extends special safeguards to the privacy of the home, *just as it protects other special privacy rights* such as those of marriage, procreation, motherhood, child rearing, and education." *Orito*, 413 U.S. at 142 (emphasis added). These amendments create a "right to privacy, *no less important than any other right* carefully and particularly reserved to the people." *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (emphasis added). Indeed, HUD itself has found the home specially protected:

> One's home is a place of privacy, security, and refuge (or should be)[.] … Consistent with this reality, the Supreme Court has recognized

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[10] *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); *Paris Adult Theatre*, 413 U.S. at 66; *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Orito*, 413 U.S. at 142; *State ex rel. Zander v. District Court of Fourth Judicial Dist.,* 594 P.2d 273, 281 (Mont. 1979); *Ravin v. State*, 537 P.2d 494, 503, 514 (Alaska 1975); *People v. Sinclair*, 387 Mich. 91, 133 (1972) (T.G. Kavanagh, J., concurring).

> that individuals have heightened expectations of privacy within the home.

HUD, *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, 81 Fed. Reg. 63,054, 63,055-56 (2016). In short, this Court should recognize that the home context not only matters but controls here.

B. The Housing Act does not support HUD's claimed authority.

For good reason, Congress has never granted *any* federal agency the authority to regulate the emissions of smoke from using tobacco products in non-public locations: emissions of smoke from using tobacco products in private living quarters and other non-public locations has no connection whatsoever to interstate commerce and is outside the province of the Federal Government. *See* Section I.A.1, *supra*. But even if Congress has authority to regulate an activity or product, that does not mean that Congress has delegated that power.

1. Agencies cannot "find" new authority in vague, long-ago delegations.

The panel's reliance on the "ordinary meaning" of statutory terms (App. 6a) is misplaced under the major-questions doctrine for numerous reasons. These reasons combine to compel the conclusion that the Housing Act did not authorize HUD to regulate lawful activities in the home.

First, contrary to the "ordinary meaning" canon, clear-statement rules such as the major-questions doctrine and the federalism canon require considering alternate definitions that are more consistent with

delegation of law-making authority. *See* Section I.A.2.b, *supra*. Rather than defer reflexively, courts "typically greet [such an] announcement with a measure of skepticism" because they "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *UARG*, 573 U.S. at 324 (interior quotations omitted). When interpreting general language—*e.g.*, the Occupational Safety and Health Act's authorizing standards to provide "safe or healthful employment," 29 U.S.C. §652(8), or the Housing Act safety-and-habitability provision here—courts infer a materiality threshold: "'safe' is not the equivalent of 'risk-free' [and] many activities that we engage in every day—such as driving a car or even breathing city air—… entail some risk of accident or material health impairment; nevertheless, few people would consider these activities 'unsafe.'" *Benzene*, 448 U.S. at 642. Similarly, in the prison-exposure cases, courts require "'expos[ure] to unreasonably high levels' of smoke," not a smoke-free environment. *Scott v. District of Columbia*, 139 F.3d 940, 943 (D.C. 1998) (quoting *Helling v. McKinney*, 509 U.S. 25, 35 (1993)). "Safe" simply does not mean "risk-free."

Under that view, it is unreasonable to infer that Congress *sub silentio*—in 1937, no less[11]—authorized HUD to run the lives of public-housing tenants:

> In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress

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[11] Courts generally "apply the ordinary meaning of [a statute's] terms at the time of their adoption." *BP P.L.C. v. Mayor of Baltimore*, 141 S.Ct. 1532, 1537 (2021). *Benzene*—a 1980 decision about safety under a 1970 statute—suggests that "safety" circa 1937 did not mean "risk-free."

> intended to give the Secretary the unprecedented power over American industry that would result from the Government's view of §§ 3(8) and 6(b)(5), coupled with OSHA's cancer policy.

Benzene, 448 U.S. at 645.[12] There is simply no indication that Congress intended HUD to have that broad power.

Second, as discussed in more detail under the federalism canon, *see* Section I.A.2, *supra*, clear-statement rules require considering alternate definitions, even if an ordinary meaning would support the agency's view.

Third, contrary to the deference by the panel (App. 9a) and district court (App. 50a), courts must "determine the correct reading" of statutes that raise "question[s] of deep economic and political significance," without administrative deference. *King*, 576 U.S. at 486 (interior quotations omitted); *UARG*, 573 U.S. at 324; *West Virginia*, 142 S.Ct. at 2612-13. Nor is the Housing Act the type of statute where Congress provided a long leash to regulate against uncertainty. *Compare*, *e.g.*, 42 U.S.C. §300g-1(b)(1)(B) (EPA must set level for "each contaminant which, in [its] judgment … *may have any adverse effect* on the health of persons") (emphasis added) *with Nat. Res. Def. Council, Inc. v. EPA*, 824 F.2d 1211, 1215-16 (D.C. Cir. 1987). Deference cannot save HUD because

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[12] The vacated *Benzene* rule was less draconian than HUD's outright ban: "Wherever the toxic material to be regulated is a carcinogen, the Secretary has taken the position that no safe exposure level can be determined and that § 6(b)(5) requires him to set an exposure limit at the lowest technologically feasible level that will not impair the viability of the industries regulated." *Id.* at 613.

the issue of deference does not arise here.

Fourth, the doctrine questions congressional delegations to agencies lacking expertise in the relevant field. *West Virginia*, 142 S.Ct. at 2612-13. Here, HUD admits it lacks "expertise in health economics," CAJA:252, so there is little reason to think that Congress would delegate the regulation of smoking for public-health purposes to HUD, especially given that the original Food, Drug and Cosmetic Act did not delegate regulation of cigarettes to the Food & Drug Administration. *B&WTC*, 529 U.S. at 133. HUD could as easily ban red meat or perfume.

Fifth, when Congress intended the Housing Act to cover extraneous issues, it legislated specifically. *See* 42 U.S.C. §§1437z-3(a) (pets in public housing), 4822(d)(3) (lead paint abatement in public housing). Similarly, Congress prohibited smoking in "regular health or day care or early childhood education programs to children" operated or contracted by federal agencies, but exempted "any private residence." 20 U.S.C. §7973(c)(2). These targeted, specific amendments reinforce that the Housing Act does not use its "vague terms or ancillary provisions" to "hide elephants in mouse holes." *Whitman*, 531 U.S. at 468. This Court should reject HUD's latter-day claim to wide authority to regulate tenants' lives.

2. HUD's Smoking Ban should meet the same fate as FDA's cigarette rule.

When FDA attempted to regulate tobacco without explicit congressional authority, this Court rejected that application of FDA's then-existing authority. *B&WTC*, 529 U.S. at 161. "Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority in

a manner that is inconsistent with the administrative structure that Congress entered into law." *Id.* at 125 (interior quotations omitted). This Court based that finding not only on the "overall regulatory scheme" but also on "the tobacco-specific legislation" enacted after the FCDA. *Id.* at 126. While cigarettes met the literal definition of a drug as "articles (other than food) intended to affect … any function of the body," 21 U.S.C. §321(g)(1)(C); *B&WTC*, 529 U.S. at 127, FDA lacked clear authority to regulate cigarettes. Even more so here, this Court should reject HUD's weak statutory claim to an authority to regulate smoking and indoor air quality in private living quarters based on health.

After *B&WTC*, Congress in 2009 vested FDA with authority to regulate tobacco products under the Family Smoking Prevention and Tobacco Control Act, PUB. L. NO. 111-31, 123 Stat. 1776 (2009). With the exception of the FDA since 2009 and various narrow pieces of tobacco-specific legislation, Congress has not granted *any* federal agency specific nationwide authority over tobacco products in any manner. Quite the contrary, Congress explicitly *forbade* FDA's outright banning tobacco products, 21 U.S.C. §387g(d)(3), so even the one federal agency authorized to regulate these products cannot ban them.

Against that background, HUD cannot argue that §1437d(f)(2)'s safety-and-habitability clause allows HUD to ban tobacco use when, as with FDA's statute, the ordinary meaning of HUD's statute is both capable of and more amenable to a narrower construction.

3. *Chevron* deference is inappropriate, especially given HUD's inexpertise.

Citing *Kennecott Greens Creek Min. Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 954–55 (D.C. Cir. 2007), the panel gave HUD "extreme deference" for agencies acting within their technical expertise, App. 9a, which was error for two reasons.

First, HUD readily acknowledged that the public-health aspects of the Smoking Ban fall outside its expertise: "If OMB is asking for something[...] that we're not capable of answering due to lack of expertise in health economics." CAJA:252. "[D]eference ebbs when the subject matter of the dispute is distant from the agency's ordinary duties or falls within the scope of another agency's authority." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2417 (2019). Whether because of its inexpertise or bias, HUD relied on biased data, without reviewing countervailing data. *See* Section II.B, *infra*. For the public-health rationale that drove the Smoking Ban, HUD has no expertise to which to defer.

Second, although the district court deferred under *Chevron*, App. 50a, that deference was inappropriate under the major-questions doctrine. In major-questions contexts, agencies must show "clear congressional authorization" for claimed powers, not a "merely plausible textual basis for the agency action." *West Virginia*, 142 S.Ct. at 2609 (interior quotations omitted); *cf. Chevron*, 467 U.S. at 843 n.9 (*Chevron* "step one" relies on traditional tools of statutory construction, on which courts are "the final authority"). HUD warranted no deference.

C. With health-based rationales stricken, the Smoking Ban is arbitrary and capricious.

HUD's alternate fire-safety and maintenance-cost rationales cannot save the Smoking Ban if they are pretextual and the public-health rationale is *ultra vires*. *Dep't of Commerce*, 139 S.Ct. at 2573-75. And HUD's additional rationales plainly *are* pretextual:

- Agencies that prioritize fire safety would make smoking stations *mandatory at building entrances*, not *optional* 25-plus feet away.
- Agencies motivated by smoke traveling between units would exempt single-unit homes.

Courts are "not required to exhibit a naiveté from which ordinary citizens are free." *Id.* at 2575 (internal quotations omitted). HUD seeks to ban smoking as a public-health measure, notwithstanding its other rationales.

With the public-health rationale stricken as *ultra vires*, the Smoking Ban failed to "examine[] the relevant data and articulate[] a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). Agency action is arbitrary and capricious if it "relie[s] on factors which Congress has not intended it to consider," *id.*, or fails to consider reasonably obvious alternatives. *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013). Rejecting HUD's air-quality rationale would require considering additional alternatives (*e.g.*, banning cigarettes but not pipes, banning candles, requiring better sprinklers or fire insurance, requiring deposits,

eliminating the 25-foot rule, requiring smoking stations outside doorways).[13] If HUD loses on air quality, the whole Smoking Ban must fall.

II. THE LOWER COURTS' DECISIONS ARE PROCEDURALLY FLAWED.

In addition to the substantive issue in Section I, this action raises three important procedural issues about summary judgment against governmental parties.

A. HUD should not have *prevailed* on coerciveness.

The panel affirmed denial of Tenants' Spending-Clause claims based on the lack of evidence of coercion under *Dole* and its progeny. The panel also affirmed the grant of summary judgment *for HUD* on coercion. While both actions were error, the latter splits with universal authority requiring moving parties to make their case. HUD submitted no evidence on coercion.

Although the lower courts found the Smoking Ban a permissible "adjustment," an "expansion [that] accomplishes a shift in kind, not merely degree" is not a mere adjustment. *NFIB*, 567 U.S. at 583. To enforce the Smoking Ban, HUD could not only cease future funding, but also *take title* to PHAs' property. App. 30a, 14a; 42 U.S.C. §1437d(g)(1). That plainly is coercive. A Smoking Ban enforceable by asset seizure falls on the change-in-kind side of the line. *NFIB*, 567 U.S. at 585. While judicially noticeable information (CAJA:300-18) shows dependency on federal funds, no evidence showed *non-coercion*.

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[13] It is judicially noticeable that most smoking-related fires come from cigarettes and that candles cause almost nine times more fires than non-cigarette smoking materials, CAJA:319-48.

Summary judgment requires movants to show the lack of genuine dispute on all material facts that movants have the burden of proving, which fully applies to motions under the Administrative Procedure Act ("APA"). *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 884 (1990). Under the APA's arbitrary-and-capricious test, plaintiffs bear the burden of proving agency action unlawful, but otherwise, moving parties—including federal parties—must make their affirmative showing to win summary judgment. *Weahkee v. Perry*, 587 F.2d 1256, 1265 (D.C. Cir. 1978). ("neither side could prevail upon a motion for summary judgment based upon the administrative record"). "Where neither party has shown what the basic facts are … summary judgment is inappropriate." *Lexington Ins. Co. v. Widger Chem. Corp.*, 805 F.2d 1035 (6th Cir. 1986); *R. J. Corman Derailment Servs., L.L.C. v. Int'l Union, Local Union 150*, 335 F.3d 643, 647-48 (7th Cir. 2003) ("existence of cross-motions for summary judgment does not… imply that there are no genuine issues of material fact"). In the absence of any showing by HUD, rejecting Tenants' coercion evidence required either supplemental briefing or discovery and a bench trial. *See Adair v. England*, 217 F. Supp. 2d 7, 16 (D.D.C. 2002) ("the court denies without prejudice the parties' cross-motions for summary judgment"); *Red Lake Band of Chippewa Indians v. U.S. DOI*, 624 F. Supp. 2d 1, 27 (D.D.C. 2009) (denying cross motions for summary judgment); *U.S. v. General Motors Corp.*, 65 F.R.D. 115, 121 (D.D.C. 1974) (same). Even if Tenants did not prevail in showing the Smoking Ban coercive, HUD did not prevail in showing it non-coercive.

Here, the complaint raises the *inference* that HUD coerces PHAs to implement HUD's Smoking Ban,

which suffices to defeat HUD's motion for summary judgment,[14] even if it does not carry the burden to award Tenants summary judgment. Moreover, HUD did not mention financial coercion (*i.e.*, whether PHAs rely on federal funds) in its cross-motion, *see* App. 35a n.10 (asking whether PHAs would consider a threatened loss of federal funds coercive), thus denying Tenants the opportunity to defend that obvious point[15] in their joint reply and cross-opposition. Under the circumstances, HUD did not carry its burden of establishing that the Smoking Ban is *not coercive*.

B. The lower courts erred by ignoring non-record evidence.

The lower courts ignored non-record evidence, App. 11a-12a, 26a, 65a-66a, and "caselaw on a plaintiff's ability to supplement an administrative record to support a constitutional cause of action is sparse and in some tension." *Bellion Spirits, LLC v. U.S.*, 335 F.Supp.3d 32, 41-42 (D.D.C. 2018). Agencies should have no greater rights in defending their rules than Congress would have defending similar statutes *vis-à-vis* identical charges of unconstitutionality. Rulemaking records do not limit constitutional review. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 167 (1997) ("facial constitutional claims" are "not bound by the administrative record").

The Smoking Ban is predicated on the scientifically dubious notion that the tobacco product

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[14] The evidence and issues that Tenants raised in their briefing "must be treated in all respects as if raised in the pleadings," FED. R. CIV. P. 15(b)(2), which also can infer coercion.

[15] As set forth in Section I.A.3.b, *supra*, PHAs cannot afford to lose HUD funding.

emissions produced by public housing tenants using tobacco products within their private living quarters pose a health risk to tenants living in other apartments. CLASH and other commenters noted the lack of peer-reviewed studies that show adverse health effects at the low levels of environmental-tobacco-smoke exposure that could go with inter-apartment transfer, CAJA:470, 472, 474-75, 477-78:

> A litany of scientific evidence and analysis can be cited here that impeaches the legitimacy of this Rule. But I won't pretend to believe that even a mountain of it will persuade the minds of wo/men on a mission. For now it's enough to say it exists and will leave it at a small sampling for the purpose of the record.

JA:445; *accord* James E. Enstrom, *Defending legitimate epidemiologic research: combating Lysenko pseudoscience*, 4:11 EPIDEMIOL PERSPECT. INNOV. 1, 1 (2007) ("this paper is intended to defend legitimate research against illegitimate criticism by those who have attempted to suppress and discredit it because it does not support their ideological and political agendas") (JA:174); Sheldon Ungar & Dennis Bray, *Silencing science: partisanship and the career of a publication disputing the dangers of second-hand smoke*, 14 PUB. UNDERSTANDING SCI. 5, 19 (2005) ("The results suggest that the public consensus about the negative effects of passive smoke is so strong that it has become part of a regime of truth that cannot be intelligibly questioned.") (JA:202).

Dr. Enstrom's invocation of the Soviet scientist Lysenko—whose politicized science eradicated a generation of Russian geneticists—is apt. "The lesson of Lysenko is that scientific reality does not bend to accommodate ideology or policy" because "[b]elieving

strongly in something does not make it true." Bert Black *et al.*, *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 771 (1994). When presented with two parties—rather than a one-sided diktat—environmental-tobacco-smoke regulations flounder on the lack of actual evidence:

> Are we to believe that any exposure to tobacco smoke, no matter what the level, no matter what the length of time, poses a grave health risk?...."The plaintiffs believe that[...], their involuntary exposure to tobacco smoke at almost any level was unreasonable. The district court apparently agreed with this line of reasoning. We do not.

Scott, 139 F.3d at 943 (internal citations omitted); *Helling*, 509 U.S. at 35; *Feinstein v. Rickman*, 26 N.Y.S.3d 135 (App. Div. 2016); *Ewen v. Maccherone*, 927 N.Y.S.2d 274, 276 (App.Term 2011); *Schuman v. Greenbelt Homes, Inc.*, 212 Md. App. 451, 465 (Ct. App. 2013) (evidence "did not show that secondhand cigarette smoke at any location, in any amount, will cause injury"). Although "Judge Leventhal's memorable phrase" arose in the context of legislative history, *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005), it applies equally to HUD's one-sided survey of scientific literature: "an exercise in 'looking over a crowd and picking out your friends.'" *Id.* (*quoting* Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)); *see also* CAJA:233-43 (studies suggesting lack of transfer and lack of adverse health effects).

While Tenants' studies were not in the Smoking Ban's administrative record, the statement that

HUD's list was incomplete—and biased—was in that record. HUD's one-sided record should be disqualifying under the APA and, *a fortiori*, the Constitution. The lower courts' ignoring Tenants' non-record evidence was error for constitutional adjudication.

C. The lower courts erred in denying Tenants' Rule 15(b)(2) motion.

Although the initial complaint did not raise a Spending-Clause claim, the parties' summary-judgment briefs addressed the issue, and the lower courts reached it. The lower courts denied Tenants' motion to conform the pleadings to the to the facts and issues raised. FED. R. CIV. P. 15(b)(2). In the D.C. Circuit, it "is an open question whether the Federal Rules permit parties to impliedly consent to 'try' issues not raised in their pleadings through summary judgment motions." *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 596 (D.C. Cir. 2001). In at least three circuits, Rule 15(b)(2) applies to summary judgment. *Lone Star Sec. & Video, Inc. v. City of L.A.*, 584 F.3d 1232, 1235 n.2 (9th Cir. 2009); *AFSCME, Local 2957 v. City of Benton*, 513 F.3d 874, 882-83 (8th Cir. 2008); *Cook v. City of Bella Villa*, 582 F.3d 840, 852 (8th Cir. 2009). Tenants will renew their lower-court motion to conform pleadings in this Court.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

January 19, 2023

Respectfully submitted,

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APPENDIX

United States Court of Appeals for the District of Columbia Circuit

Argued September 9, 2021
Decided August 26, 2022

No. 20-5126
September Term, 2022
1:18-cv-01711-ESH

NYC C.L.A.S.H., Inc., et al.,

Appellants

v.

Marcia L. Fudge, Secretary of Housing and Urban Development, in her official capacity and United States Department of Housing & Urban Development,

Appellees

Appeal from the United States District Court for the District of Columbia (No. 1:18-cv-01711)

Before: SRINIVASAN, *Chief Judge*, JACKSON*, *Circuit Judge*, and GINSBURG, *Senior Circuit Judge*.

Opinion for the Court filed by *Chief Judge* SRINIVASAN.

SRINIVASAN, *Chief Judge*:In 2016, the Department of Housing and Urban Development promulgated a rule prohibiting the use of lit tobacco products in HUD-subsidized public housing units

* Circuit Judge, now Justice, Jackson was a member of the panel at the time the case was argued but did not participate in this opinion.

and their immediate surroundings. The Smoke Free Rule is meant to improve air quality within public housing, protect residents from health risks associated with secondhand smoke, reduce the risk of fires, and decrease the cost of property maintenance.

Appellants here, led by New York City Citizens Lobbying Against Smoker Harassment (C.L.A.S.H.), brought an action raising a number of statutory and constitutional challenges to the Rule. The district court rejected all of C.L.A.S.H.'s claims. We agree with the district court and thus affirm its grant of summary judgment to the Department.

I.

A.

The Housing Act of 1937 declares it to be "the policy of the United States" to "assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families." 42 U.S.C. § 1437(a)(1)(A). The statute authorizes the Department of Housing and Urban Development to provide federal financial contributions to public housing agencies (PHAs) to develop and maintain public housing. *Id.* § 1437c. PHAs are state and local entities "authorized to engage in or assist in the development or operation of public housing." *Id.* § 1437a(b)(6)(A).

Contribution contracts for PHAs "shall require that the agency maintain its public housing in a condition that complies with . . . housing quality standards" established by the Department. *Id.* § 1437d(f)(1). The Department's "housing quality standards" must "ensure that public housing dwelling units are safe and habitable." *Id.* §

1437d(f)(2). To that end, the standards "shall include requirements relating to habitability, including maintenance, health and sanitation factors," and "condition . . . of dwellings." *Id.*

B.

In November 2015, relying on its authority under § 1437d(f)(2) "to ensure that public housing dwelling units are safe and habitable," the Department proposed a rule requiring PHAs to implement a smoke-free policy in public housing units. Instituting Smoke-Free Public Housing, 80 Fed. Reg. 71,762 (proposed Nov. 17, 2015). In December 2016, after a period of notice and comment, the Department promulgated the final rule. Instituting Smoke-Free Public Housing, 81 Fed. Reg. 87,430 (Dec. 5, 2016).

The Rule instructs PHAs to prohibit lit tobacco products in all indoor areas of public housing, including but not limited to living units, indoor common areas, electrical closets, and administrative office buildings. *Id.* at 87,444; 24 C.F.R. § 965.653(a). The prohibition also extends to outdoor areas within twenty-five feet of public housing and administrative buildings. PHAs retain the discretion to establish designated smoking areas outside the twenty-five-foot perimeter. 81 Fed. Reg. at 87,444; 24 C.F.R. § 965.653(b).

The Department explained that the Rule "is expected to improve indoor air quality in public housing; benefit the health of public housing residents, visitors, and PHA staff; reduce the risk of catastrophic fires; and lower overall maintenance costs." 81 Fed. Reg. at 87,431. The Department relied on scientific evidence documenting both the

deleterious health effects of secondhand smoke and the migration of secondhand smoke along hallways and between apartments within multi-unit buildings. 80 Fed. Reg. at 71,763–64. The Department noted that "[t]he Surgeon General has concluded that there is no risk- free level of exposure to SHS [secondhand smoke]." *Id.* at 71,763. With regard to the link between smoking and the risk of fires, the Department cited studies documenting the connection and establishing that "[s]moking is the leading cause of fire deaths in multiunit properties." *Id.* at 71,764. "Smoking is also associated with higher maintenance costs for landlords," the Department explained, including "the need for additional cleaning, painting, and repair of damaged items at unit turnover compared to non-smoking units." *Id.* The Department reviewed various studies and surveys estimating those additional costs.

To implement the Rule, the Department amended the regulations governing PHA leases to include the requirement that tenants agree not to smoke in restricted areas. 24 C.F.R. § 966.4(f)(12)(i)(B), (ii)(B). The regulations also require PHAs to amend existing tenant leases and applicable PHA plans in accordance with the Rule. *Id.* § 965.655. A tenant's failure to fulfill household obligations can be grounds for termination or eviction, although the terms of the Rule leave enforcement to the discretion of each PHA. *Id.* § 966.4(*l*).

C.

In July 2018, C.L.A.S.H. and aligned parties filed an action against the Department, raising constitutional and statutory challenges to the Smoke

Free Rule. C.L.A.S.H. argued that the Department lacked statutory authority to promulgate the Rule and that the Rule is arbitrary, capricious, and an abuse of discretion. C.L.A.S.H. further claimed that the Rule exceeds the Department's powers under the Spending and Commerce Clauses, and that it violates the Fourth, Fifth, and Tenth Amendments.

The district court granted summary judgment in favor of the Department, rejecting all of C.L.A.S.H.'s challenges in a thorough opinion. *NYC C.L.A.S.H., Inc. v. Carson*, 442 F. Supp. 3d 200, 223 (D.D.C. 2020). C.L.A.S.H. now appeals.

II.

C.L.A.S.H. renews the same statutory and constitutional claims it unsuccessfully advanced in the district court. We first address the statutory challenges and then turn to the constitutional ones. We, like the district court, conclude that all the challenges lack merit.

A.

In its statutory arguments, C.L.A.S.H. contends that the Smoke Free Rule exceeds the authority granted to the Department under the Housing Act, and that the Rule is arbitrary and capricious in contravention of the Administrative Procedure Act.

1.

We first consider—and reject—C.L.A.S.H.'s contention that the Department's grant of authority under the Housing Act does not encompass the Smoke Free Rule. The Act directs the Department to "establish housing quality standards . . . that ensure that public housing dwelling units are safe and habitable." 42 U.S.C. § 1437d(f)(2). And those

housing quality standards must include "requirements relating to habitability, including maintenance, health and sanitation factors," and "condition . . . of dwellings." *Id.*

The ordinary meaning of terms such as "safe and habitable," "maintenance," "health and sanitation," and "condition of dwellings" embraces a rule prohibiting use of lit tobacco products in public housing units "to improve indoor air quality in public housing; benefit the health of public housing residents, visitors, and PHA staff; reduce the risk of catastrophic fires; and lower overall maintenance costs." 81 Fed. Reg. at 87,431. Those objects of the Rule directly relate to the "safety," "habitability," and "condition of dwellings" in public housing and to "maintenance, health and sanitation factors" associated with those dwellings. 42 U.S.C. § 1437d(f)(2). Below, we consider the extent to which the Department adequately substantiated the connection between the Rule and those objectives when we review C.L.A.S.H.'s arbitrary-and-capricious challenge. But on the question we consider here of whether the Rule lies within the statute's grant of authority to the Department, the plain language of the statute encompasses the Rule.

In resisting that straightforward understanding of the statutory terms, C.L.A.S.H. relies on a presumption against preemption in fields traditionally occupied by state and local governments. No degree of presumption, however, supports the conclusion that a rule directly related to, and promulgated to ensure, the safety, health, habitability, and maintenance of dwelling units falls outside a statutory grant of authority to address

those precise subjects by name.

C.L.A.S.H. emphasizes that states and localities "have a long history of regulating housing standards for the health and safety of the community." C.L.A.S.H. Br. 39. The Rule, though, operates only in the context of public housing subsidized by federal funding—a context in which the establishment and regulation of housing standards is entrusted by statute to a federal agency. And within that domain, the Department's regulations impose an array of obligations on tenants related to the health and safety of their housing— including requirements that tenants safely dispose of garbage and waste, refrain from disturbing the peaceful enjoyment of accommodations by other residents, and maintain their property in "decent, safe, and sanitary" conditions. 24 C.F.R. § 966.4(f)(6), (7), (9), (11). C.L.A.S.H. does not suggest that those kinds of requirements fall outside the Department's statutory authority. And C.L.A.S.H. points to no material distinction between those requirements and the Smoke Free Rule vis-à-vis a presumption against preemption.

C.L.A.S.H.'s reliance on the Supreme Court's recent decision in *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021), is off base. There, the Court held that the Director of the Centers for Disease Control and Prevention (CDC) almost certainly lacked authority under the Public Health Service Act to impose a nationwide moratorium on eviction of tenants in response to the COVID-19 pandemic. That holding rested on the specific terms of the statutory grant of authority, which the Court read to be focused on measures directly relating to the

spread of the disease itself as opposed to the indirect, "downstream connection between eviction and the interstate spread of disease." *Id.* at 2488. And the Court emphasized the "sheer scope of the CDC's claimed authority," which encompassed private landlords nationwide. *Id.* at 2489. Here, by contrast, the Smoke Free Rule falls directly—not indirectly—within the terms of the statutory grant of authority. And the Rule applies only in the specific setting of Department- funded public housing, a context in which the Housing Act expressly contemplates—indeed, requires—Departmental involvement.

C.L.A.S.H. gets no further in relying on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). There, the Court held that the Food and Drug Administration's statutory authority to regulate drugs and devices did not encompass the power to regulate tobacco products. The Court reasoned that Congress had shown in various ways that it intended to exclude tobacco products from the agency's jurisdiction, including through a history of tobacco-related legislation leaving no role for the FDA over tobacco products and through Congress's repeated rejection of legislation that would have granted the FDA the authority to regulate tobacco. *Id.* at 142–44, 147–49. C.L.A.S.H. points to no such legislative indicia here. And importantly, the *Brown & Williamson* Court emphasized the breadth of authority claimed by the agency, which encompassed the purported power to regulate an industry constituting a significant portion of the national economy and to ban the industry's products altogether. *Id.* at 159. This case, again, is decidedly different in that the Rule applies only to federally-

funded public housing, a domain in which Congress has granted the Department the express authority to regulate dwelling conditions by setting health, safety, habitability, and maintenance standards.

2.

C.L.A.S.H. next contends that the Department's promulgation of the Smoke Free Rule was arbitrary, capricious, and an abuse of discretion. We disagree.

Under the arbitrary and capricious standard, we do not "substitute [our] judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The standard is met as long as there is a "rational connection between the facts found and the choice made." *Id.* And we "give an extreme degree of deference to the agency when it 'is evaluating scientific data within its technical expertise.'" *Kennecott Greens Creek Min. Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 954–55 (D.C. Cir. 2007) (quoting *Hüls Am., Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996)).

Here, the Department documented considerable evidence substantiating the health, safety, and cost-saving benefits of the Rule. In terms of health, the Department found "the scientific evidence for the adverse health effects of SHS [secondhand smoke] exposure" to be "compelling." 81 Fed. Reg. at 87,441. The Department discussed, for instance, a report in which the "Surgeon General concluded that there is no risk-free level of exposure to SHS." *Id.* "In children," the Surgeon General found, secondhand smoke "exposure can cause sudden infant death syndrome, and can also cause acute respiratory infections, middle ear infections and more severe

asthma." *Id.* And in adults, exposure "causes heart disease, lung cancer, and stroke," *id.*, resulting in the death of some 41,000 adult nonsmokers each year from lung cancer and heart disease, 80 Fed. Reg. at 71,763. Accordingly, secondhand smoke is considered a known human carcinogen. 81 Fed. Reg. at 87,441–442; *see generally* 80 Fed. Reg. at 71,763–764.

The Department also described the evidence demonstrating that, because of the way secondhand smoke moves through a building, "individuals living in multiunit housing can be exposed to SHS even if no one smokes in their households." 80 Fed. Reg. at 71,764. The Department referenced studies and surveys examining the migration of secondhand smoke in buildings, explaining that "SHS can move both from external hallways into apartments and between adjacent units." *Id.* Studies thus showed that children in non- smoking apartments had substantially higher levels of a nicotine metabolite in their blood than children living in non- smoking detached homes. *Id.* And while "improvements in ventilation systems" and "increased air sealing of units" can help reduce the movement of secondhand smoke through a building, "these strategies cannot fully eliminate exposure." 81 Fed. Reg. at 87,442. "Increased air sealing could also have the disadvantage of increasing SHS exposures to non-smokers in the sealed units, and could increase the amount of SHS that settles on surfaces within the sealed units." *Id.*

With regard to fire safety, the Department discussed the number of residential fires and resulting deaths and injuries caused by smoking and observed that "[s]moking is the leading cause of fire

deaths in multiunit properties." 80 Fed. Reg. 71,764. As for maintenance costs, the Department determined that "the costs and benefits" are "compelling in terms of reduction in maintenance and unit turnover costs." 81 Fed. Reg. 87,438. Various surveys documented the substantial costs associated with fires and smoking damage, with the CDC estimating that a smoke-free policy in public housing would annually save some $43 million in renovation expenses and $16 million in averted fire losses. 80 Fed. Reg. 71,764.

C.L.A.S.H. asserts that the health risks from secondhand smoke to tenants living in other units are "scientifically dubious." C.L.A.S.H. Br. 50–51. But C.L.A.S.H. merely states without elaboration that the data is "inconclusive," and then summarily references, without any further discussion, what it describes as a list of "studies suggesting lack of transfer and lack of adverse health effects." *Id.* at 51–52. C.L.A.S.H. acknowledges, moreover, that its "list of studies were not in the record" before the agency. *Id.* at 52. Indeed, while C.L.A.S.H. provided certain comments to the Department during the comment period for the Rule, it submitted no scientific information and cited no studies supportive of its position. N.Y.C. C.L.A.S.H. Comment Letter on Proposed Rule Instituting Smoke-Free Public Housing, 80 Fed. Reg. 71,762 (proposed Nov. 17, 2015). And we generally do not consider information that was not before the agency when making its decision. *See CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014). C.L.A.S.H.'s conclusory statements questioning the evidence of health risks posed by secondhand smoke, finally,

have no bearing at all on the Department's other rationales for the Rule—i.e., the interest in reducing the risk of catastrophic fires and in decreasing maintenance costs.

C.L.A.S.H. submits that the Department's stated health, safety, and cost-related reasons for the Rule are pretextual because the Department in fact desires only to stop tenants from smoking, not to improve air quality in their units. There is no support for that contention. Indeed, the Department expressly found "it important . . . to reiterate" that the Rule "does not prohibit individual PHA residents from smoking," and that "PHAs should continue leasing to persons who smoke." 81 Fed. Reg. at 87,432. The Department also specifically declined to bar the use of electronic nicotine delivery systems, reasoning in part that doing so would "not necessarily reduce the risk of catastrophic fires or maintenance costs." *Id.* at 87,436.

C.L.A.S.H. also contends that the Department disregarded the risks faced by vulnerable tenants when venturing outside their units to smoke. C.L.A.S.H. Br. 49. But the record reflects that the Department considered those very risks and recommended ways to alleviate them. 81 Fed. Reg. at 87,434; *id.* at 87,434, 87,436.

In short, the Department adequately substantiated its rationales for the Rule and did not act arbitrarily and capriciously in promulgating it.

B.

We turn next to C.L.A.S.H.'s constitutional challenges, which we find to be uniformly without merit.

1.

C.L.A.S.H. first contends that the Rule amounts to an impermissible condition on federal spending under the Spending Clause. That Clause gives Congress the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const., art. I, § 8, cl. 1. Under the Clause, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to 'further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and *administrative directives*.'" *Ass'n of Priv. Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 459 (D.C. Cir. 2012) (emphasis in original) (citing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

But the ability to attach conditions on federal spending is "not unlimited." *Dole*, 483 U.S. at 207. The Supreme Court has set out "several general restrictions" that a spending condition must meet: first, the condition "must be in pursuit of the general welfare"; second, it must be "unambiguous[]," such that recipients can make a "knowing[]" choice to participate, "cognizant of the consequences of their participation"; third, it must be related "to the federal interest in particular national projects or programs"; and fourth, it must comply with any "other constitutional provisions that may provide an independent bar to the conditional grant of federal funds." *Id.* at 207–08 (citations and quotation marks omitted).

C.L.A.S.H. argues that the Rule infringes the second *Dole* factor, which requires conditions on federal funding to be unambiguous in a manner

giving funding recipients adequate notice of the consequences of their participation. C.L.A.S.H. does not suggest that there is any ambiguity about whether funding recipients must comply with the Department's housing quality standards. C.L.A.S.H.'s argument instead is that the Smoke Free Rule is impermissibly ambiguous because it vests discretion in the Department with respect to the consequences for noncomplying PHAs. On that score, the Rule states: "If HUD determines that a PHA is not in compliance with its plan, HUD will take whatever action it deems necessary and appropriate." 81 Fed. Reg. at 87,437.

The governing contracts between the Department and a PHA, however, clearly set forth the consequences for "a serious and material violation of any one or more of the covenants contained" in the agreement—which generally include the Department's regulations, and which specifically include the "failure to maintain and operate the project(s) under [the contract] in a decent, safe, and sanitary manner." Form HUD-53012A, §§ 5, 17(B), J.A. 156, 158, 162–63. If a PHA commits such a violation, the Department may take title to the project, take possession and control of it, terminate the contract, or seek other remedies at law. *Id.* § 17(E)–(F), J.A. 163. Before exercising any such remedy, the Department must provide a notice of default to the PHA, including a period in which to cure, and the PHA has a right to an administrative appeal. *Id.* § 17(C). Those potential penalties are longstanding and not specific to the Rule at issue here, and any participating PHA knows of the potential consequences when entering into a

contract. PHAs thus accept federal funds fully aware of the potential consequences if they violate the Rule.

C.L.A.S.H. also briefly contends that the Rule infringes the third *Dole* factor, which requires conditions on the receipt of federal funds to be related "to the federal interest in particular national projects or programs." *Dole*, 483 U.S. at 207. C.L.A.S.H. characterizes the Rule as out of step with the statute's delegated authority to the Department. C.L.A.S.H.'s argument in this respect thus essentially restates its argument that the Rule lies outside the Department's statutory authority, which we have already addressed and rejected.

C.L.A.S.H. additionally asserts that the Rule imposes a "financial inducement" that is "so coercive as to pass the point at which pressure turns into compulsion." *Id.* at 211 (quotation marks omitted). But C.L.A.S.H. cites no evidence about funding levels demonstrating that the Rule could be considered coercive in the constitutional sense, nor did it do so before the district court. *Compare Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581–82 (2012) (*NFIB*) (plurality opinion).

Finally, relying on the plurality opinion in *NFIB*, C.L.A.S.H. contends that the spending condition is an impermissible "shift in kind" to the preexisting public housing program. *See id.* at 583. Congress, though, may permissibly "make adjustments" to a federal program. *Id.* In C.L.A.S.H.'s view, the Rule unconstitutionally transforms PHA's obligations from providing safe housing infrastructure "to micromanaging tenants' private lives." C.L.A.S.H. Br. 17. But PHAs agree in their contracts to abide by future amendments to

Departmental regulations, Form HUD-53012A § 5, J.A. 158, and the Rule is in keeping with other obligations imposed by the Department on public housing tenants.

Under the Department's preexisting regulations, for instance, PHA leases already require tenants "[t]o keep the dwelling unit . . . in a clean and safe condition," 24 C.F.R. § 966.4(f)(6), and "[t]o dispose of all ashes, garbage, rubbish, and other waste from the dwelling unit in a sanitary and safe manner," *id.* § 966.4(f)(7). Tenants must also agree "[t]o abide by necessary and reasonable regulations promulgated by the PHA for the benefit and well-being of the housing project and the tenants." *Id.* § 966.4(f). And tenants must further "assure that no member of the household engages in an abuse or a pattern of abuse of alcohol that affects the health, safety, or right to peaceful enjoyment of the premises by other residents." *Id.* § 966.4(f)(12)(iii).

C.L.A.S.H.'s attempt to analogize the Rule to the legislation considered in *NFIB* is inapt. Before the enactment of the Affordable Care Act, the Medicaid program required states to cover only certain discrete categories of individuals— pregnant women, children, needy families, the blind, the elderly, and the disabled. The Act's Medicaid expansion, invalidated by the Supreme Court as an impermissible "shift in kind," required States to expand their programs to cover *all* individuals under the age of 65 with incomes below 133 percent of the federal poverty line. *NFIB*, 567 U.S. at 575– 76 (plurality opinion). That was viewed to amount to an entirely "new health care program." *Id.* at 584. Unlike the Medicaid expansion at issue in *NFIB*, the

Smoke Free Rule does not fundamentally transform the nature of the public housing program or expand the population served.

Moreover, the operative inquiry concerns whether the new condition "surpris[es] participating States with post-acceptance or 'retroactive' conditions." *See id.* (quotation marks and citation omitted). Here, PHAs were on notice that the Department might make adjustments to the terms of the program: the contract states that it "incorporates by reference . . . those regulations issued by HUD for the development, modernization, and operation of public and Indian housing projects . . . ." Form HUD-53012A, J.A. 156. PHAs thus knew that they could be subject to future Department regulations. And as explained, PHAs were also on notice of the consequences resulting from violating applicable Departmental rules and regulations.

Because we find that the Rule is a valid exercise of the federal government's power under the Spending Clause, we have no need to reach C.L.A.S.H.'s arguments about the scope of the Commerce Clause.

2.

C.L.A.S.H. contends that the Smoke Free Rule commandeers the States in violation of the Tenth Amendment. Under the Tenth Amendment, "the Federal Government may not compel the States to enact or administer a federal regulatory program." *Printz v. United States,* 521 U.S. 898, 933 (1997) (quoting *New York v. United States,* 505 U.S. 144, 188 (1992)); *see also New York,* 505 U.S. at 176–77; *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018). The Rule, however, leaves the

choice to the States of whether to accept federal public housing funding and its attached conditions. The Rule neither commands the States directly to take any actions nor compels the involvement of state officials in a regulatory scheme. The Rule therefore does not infringe the Tenth Amendment's anti-commandeering principle.

3.

C.L.A.S.H. argues that the Rule violates the Fourth Amendment by permitting unconstitutional searches. The Rule, however, does not contain any type of new authorization to search premises. Instead, the Rule by its terms leaves enforcement up to the discretion of each PHA. *See* 81 Fed Reg. 87,437. The Department's preexisting regulations require PHAs to identify the circumstances under which they may enter the dwelling unit during the tenancy, including for routine inspections, and to provide written notice before entering a dwelling absent a reasonable belief that there is an emergency. 24 C.F.R. § 966.4(j). And the Department Guidebook specifically states that "*[t]enants cannot be asked to waive their Fourth Amendment rights*" and that it "does not authorize PHAs or police departments to enter units for security purposes unless the police department has a search warrant or they are in hot pursuit of a suspect who has run into the unit." J.A. 170 (emphasis added).

4.

In its last constitutional challenge, C.L.A.S.H. submits that the Rule violates tenants' "fundamental due-process right [under the Fifth Amendment] to engage in legal activities within the privacy of their homes." C.L.A.S.H. Br. 29. But C.L.A.S.H.

identifies no authority establishing such a right. The federal decisions C.L.A.S.H. cites involve the exercise of First Amendment rights or "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65, 69 (1973). And the state decisions C.L.A.S.H. cites rely on state constitutional privacy protections, not federal due process guarantees. *See, e.g.*, *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975).

Because the Rule does not impinge on a fundamental right, C.L.A.S.H. must show that the Rule's requirements bear no rational relationship to a legitimate state interest. *E.g., Abigail All. for Better Access to Dev. Drugs v. von Eschenbach*, 495 F.3d 695, 712 (D.C. Cir. 2007). The Supreme Court has expressly held that the protection of tenants is a legitimate state interest. *See Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988). And the Rule, intended to reduce health and safety risks to tenants, readily passes muster under the forgiving rational basis test. *See Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 487–88 (1955).

III.

We last briefly address C.L.A.S.H.'s appeal from the district court's denial of certain post-judgment motions. C.L.A.S.H.'s post-judgment motion for reconsideration and amendment of the judgment simply reprises arguments we have already considered and rejected. C.L.A.S.H. also moved under Rule 15(b)(2) to amend its complaint to introduce the argument that the threat of losing public housing funding is unconstitutionally coercive.

The district court did not err in denying a motion to amend the complaint brought after judgment had already been entered (and in any event, as explained above, C.L.A.S.H. included no evidence in its motion showing that the threat of losing the funding at issue reached the level of unconstitutional coercion).

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For the foregoing reasons, we affirm the judgment of the district court.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 18-1711 (ESH)

NYC C.L.A.S.H., INC., *et al.*,
Plaintiffs,

v.

BEN CARSON, SECRETARY OF DEP'T OF HOUSING & URBAN DEVELOPMENT, *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs, a smokers' rights organization and six individual smokers who reside in public housing, have brought this action against the U.S. Department of Housing and Urban Development ("HUD") and Ben Carson, the Secretary of HUD, challenging a regulation that bans smoking in public housing, including in individual residential units. Plaintiffs claim that the regulation violates the Fourth, Fifth, Tenth, and Fourteenth Amendments and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* Before the Court are the parties' cross-motions for summary judgment. For the reasons stated herein, the Court will grant defendants' motion for summary judgment and deny plaintiffs' motion.

BACKGROUND

I. STATUTORY AND REGULATORY FRAMEWORK

In order to "remedy the unsafe housing conditions and the acute shortage of safe dwellings

for low-income families," Congress passed the Housing Act, which provides funding to state and local agencies that develop and operate public housing ("public housing agencies" or "PHAs").[1] 42 U.S.C. §§ 1437, 1437c, 1437g. Congress tasked HUD with disbursing this funding and ensuring that its use furthered the purposes of the Act. Section 1437d(f)(1) provides that "[e]ach contract for contributions for a public housing agency shall require that the agency maintain its public housing in a condition that complies with standards which meet or exceed the housing quality standards established under paragraph (2)." Congress required in paragraph (2) that:

> The Secretary shall establish housing quality standards under this paragraph that ensure that public housing dwelling units are safe and habitable. Such standards shall include requirements relating to habitability, including maintenance, health and sanitation factors, condition, and construction of dwellings . . . .

42 U.S.C. § 1437d(f)(2). Thus, PHAs are required to agree to comply with HUD's housing quality standards in exchange for public housing funding. 42 U.S.C. §§ 1437d(f)(1); *see also* Form HUD-53012A § 5 (incorporating HUD regulations and any

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[1] The Housing Act defines a PHA as "any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing, or a consortium of such entities or bodies . . . ." 42 U.S.C. § 1437a(b)(6)(A).

amendments to them into HUD's contracts with PHAs).

Citing to its authority under Section 1437d, HUD proposed a rule in 2015 banning smoking in federally funded public housing. Instituting Smoke-Free Public Housing, 80 Fed. Reg. 71,762 (proposed November 17, 2015). After a period of notice and comment, HUD promulgated a final rule (the "Smoke Free Rule" or the "Rule"), which became effective on February 3, 2017. Instituting Smoke-Free Public Housing, 81 Fed. Reg. 87,430. In its final form, the Smoke Free Rule bans the use of all lit tobacco products, including cigarettes, cigars, pipes, and waterpipes.[2] The ban applies to

> all public housing living units and interior areas (including but not limited to hallways, rental and administrative offices, community centers, day care centers, laundry centers, and similar structures), as well as in outdoor areas within 25 feet from public housing and administrative office buildings (collectively, "restricted areas") in which public housing is located.

24 C.F.R. § 965.653(a), (c).[3] HUD's stated purpose for the Rule was fourfold: (1) to "improve indoor air quality in the housing;" (2) to "benefit the health of

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[2] The Smoke Free Rule does not ban the use of electronic nicotine delivery systems, such as electronic cigarettes. 80 Fed. Reg. at 71,765; *see also* 81 Fed. Reg. at 87,436.

[3] The Rule allows PHAs to designate smoking areas on public housing grounds "in order to accommodate residents who smoke," as long as those areas are "outside of any restricted areas." 24 C.F.R. § 965.653(b).

public housing residents, visitors, and PHA staff;" (3) to "reduce the risk of catastrophic fires;" and (4) to "lower overall maintenance costs." 81 Fed. Reg. at 87,431.

To effectuate the Rule, HUD amended the existing regulation setting forth lease requirements to include a requirement that all future PHA leases provide that the tenants will abide by the Smoke Free Rule. 24 C.F.R. § 966.4(f)(12). HUD also required PHAs to amend existing leases to explicitly incorporate the terms of the Rule. 24 C.F.R. § 965.655(a)(2). A tenant's failure to comply with his lease agreement, and thus, the Rule, could lead to termination of the tenancy and eviction. 24 C.F.R. § 966.4(*l*)(2)(i)(B). All PHAs were required to be in full compliance with the Rule by July 30, 2018. 24 C.F.R. § 965.655(b).

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs are New York City Citizens Lobbying Against Smoker Harassment ("NYC C.L.A.S.H."), a nonprofit organization "dedicated to protecting the interests of adults who smoke," and six individuals who are smokers and who live in public housing funded by HUD.[4] (Pls.' Mem. Supp. Summ. J. at 2–3, ECF No. 26-1 ("Pls.' Mem.").) They initiated this action on July 23, 2018, against HUD and Carson, in his official capacity. The complaint alleges that the Smoke Free Rule violates the anticommandeering principle of the Tenth Amendment (Counts One and

[4] The six individual plaintiffs are William Donnell, Nathan Fields, Chanel Folks, Digna Rodriguez, Douglas Soncksen, and Jamie Ward. (Pls.' Mem. at 2–3.)

Two), the Fourth Amendment's ban on unreasonable searches and seizures (Counts Three and Four), the Due Process Clause of the Fifth Amendment (Counts Five and Six), and the unconstitutional conditions doctrine (Count Seven). The complaint further alleges that the Rule is not a proper exercise of Congress' Commerce Clause power (Counts Eight and Nine), that HUD did not have the statutory authority to promulgate the Rule (Counts Ten, Eleven, and Twelve), and that the Rule is arbitrary, capricious, and an abuse of discretion (Count Thirteen).[55] Plaintiffs seek vacatur of the Rule, or, alternatively, modification of the Rule to eliminate the ban on smoking in private residences.

The parties have filed cross-motions for summary judgment, which have been fully briefed. (*See* Pls.' Mot. for Summ. J., ECF No. 26; Defs.' Cross Mot. for Summ. J., ECF No. 33 ("Defs.' Mot."); Defs.' Resp. to Pls.' Mot. for Summ. J., ECF No. 34; Pls.' Opp. to Defs.' Cross Mot., ECF No. 37 ("Pls.' Opp."); Pls.' Reply to Defs.' Resp., ECF No. 38; Defs.' Reply to Pls.' Opp., ECF No. 40 ("Defs.' Reply").)

ANALYSIS

I. LEGAL STANDARDS

A. Constitutional Claims

Under Federal Rule of Civil Procedure 56(a), summary judgment will be granted "if the movant

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[5] Plaintiffs' constitutional challenges are brought directly under the applicable constitutional provision in Counts Two, Four, and Six and under § 706 of the APA in Counts One, Three, and Five. Counts Seven through Thirteen are also brought under the APA.

shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Because the parties' statements of facts and responses thereto reveal no genuine disputes of material fact, the Court need only determine whether either party is entitled to judgment as a matter of law.

B. APA Claims

Plaintiffs' claims brought under the APA are not governed by Rule 56 "because of the limited role of a court in reviewing the administrative record" under the APA. *Alston v. Lew*, 950 F. Supp. 2d 140, 143 (D.D.C. 2013). Under that statute

> it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did."

Sierra Club v. Mainella, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769–70 (9th Cir. 1985)). Under the APA, a court may hold an agency action unlawful when it is, *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity"; or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)–(C).

An agency rule is arbitrary and capricious

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). This standard of review is "highly deferential" and "presumes the validity of agency action." *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007) (citation, alteration, and internal quotation marks omitted). So long as the agency "explain[s] the evidence which is available, and . . . offer[s] a rational connection between the facts found and the choice made," a court will not invalidate an agency rule. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 52 (citation and internal quotation marks omitted).

An agency abuses its discretion in promulgating a rule "if there is no evidence to support the decision or if the decision was based on an improper understanding of the law." *Statewide Bonding, Inc. v. DHS*, No. 19-cv-2083, 2019 WL 6329390, at *2 (D.D.C. Nov. 26, 2019) (citations and internal quotation marks omitted). "Put another way, the court's role is only to consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (citations and internal quotation marks omitted).

Finally, in assessing constitutional challenges brought under the APA, a court does not defer to the agency's pronouncement on constitutional issues; instead, it "make[s] 'an independent assessment of a citizen's claim of constitutional right.'" *Poett v. United States*, 657 F. Supp. 2d 230, 241 (D.D.C. 2009) (quoting *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1173–74 (D.C. Cir. 1980)).

II. COUNTS ONE AND TWO: THE SPENDING CLAUSE AND THE TENTH AMENDMENT

Plaintiffs argue that the Smoke Free Rule violates the anticommandeering principle of the Tenth Amendment and exceeds Congress' Spending Clause power because the Rule impermissibly coerces or commandeers the States into complying with the federal regulation.[6] (Pls.' Mem. at 14–21.)

The Spending Clause gives Congress the power to "provide for the . . . general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Pursuant to this grant, Congress may offer funding to the States on the condition that they comply with certain terms that are designed to ensure that the funds are, in fact, used as Congress intended. *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 567 U.S. 519, 537, 576 (2012) (plurality opinion). Such offers are legitimate even if they "induce the States to adopt policies that the Federal Government itself could not

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[6] Much of plaintiffs' Tenth Amendment argument is tied to their claim that Congress has not authorized HUD to implement the Smoke Free Rule. (*See, e.g.*, Pls.' Opp. at 11 ("Congress has never attempted to legislate a smoking ban, let alone provide HUD the authority to do so without authorizing legislation.").) This claim is addressed *infra* at Section VII.

impose" or "tak[e] certain actions that Congress could not require them to take." *Id.* (citation and internal quotation marks omitted); *see also South Dakota v. Dole*, 483 U.S. 206, 207 ("[O]bjectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." (citation and internal quotation marks omitted)).

Despite the breadth of Congress' power under the Spending Clause, its exercise must conform to four general restrictions: First, it "must be in pursuit of the general welfare"; second, any condition on the receipt of federal funds must be unambiguous; third, it must be "related to the federal interest in particular national projects or programs"; and fourth, it must not violate other constitutional provisions, such as the Tenth Amendment, that "provide an independent bar to the conditional grant of federal funds." *Dole*, 483 U.S. at 207–08 (citations and internal quotation marks omitted). Plaintiffs do not dispute that the Smoke Free Rule was promulgated in furtherance of the general welfare. Accordingly, the Court's analysis focuses on the latter three restrictions.

A. The Smoke Free Rule sets forth its conditions unambiguously.

If an exercise of the Spending Clause contains any conditions on the receipt of federal funds, "it must do so unambiguously" so that the States may "exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* at 207 (citation and internal quotation marks omitted); *see*

also Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"). In essence, a State must be aware of the conditions and be able to ascertain what is expected of it. *See Pennhurst State Sch. Hosp.*, 451 U.S. at 17. Plaintiffs argue that the Smoke Free Rule does not meet this requirement because HUD "fails to inform PHAs . . . what they risk losing if they choose not to comply." (Pls.' Opp. at 12.) But, as defendants note, the consequences of noncompliance with applicable HUD regulations are clearly expressed in HUD's contracts with the PHAs. Those contracts provide that when a PHA substantially defaults—or commits "a serious and material violation of any one or more of the covenants contained in [the contract]"—HUD has a right to take title to the housing project or projects, take possession of them, terminate the contract, or seek other remedies available under applicable law.[7] Form HUD-53012A § 17(B), (E), (F), (H). Because HUD's regulations—including the Smoke Free Rule—are incorporated into the HUD/PHA contract, *id.* § 5, the conditions placed on receipt of federal funding by the Smoke Free Rule are unambiguous.[88] *See also* 42 U.S.C. § 1437d(f)(1)

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[7] Also, the statute explicitly grants HUD the right to claim title or take possession of a project in the event of a substantial default. *See* 42 U.S.C. § 1437d(g)(1).

[8] Plaintiffs do not dispute HUD's rights under the contracts or that the contracts will govern if a PHA fails to comply with the Rule. Instead, they argue that the Smoke Free Rule gives HUD "*total discretion*" to determine the consequences of

(stating that each contract for federal funding must require that the PHA maintain its public housing in compliance with the housing quality standards promulgated by HUD).

B. The Smoke Free Rule is sufficiently related to the purpose of federal housing funding.

Plaintiffs contend that the Smoke Free Rule is not sufficiently related to the purpose of the federal housing funding. (Pls.' Opp. at 10–12.) To support this argument, plaintiffs seek to distinguish *South Dakota v. Dole*, 483 U.S. 206 (1987), where the Supreme Court upheld a federal statute conditioning a State's receipt of a portion of federal highway funds on the adoption of a minimum drinking age of 21. Plaintiffs maintain that setting a minimum drinking age of 21 is sufficiently related to the purpose of the federal funding in *Dole*—safe interstate travel—because "[d]rinking and driving is undeniably linked to auto accidents causing injury and death." (Pls.' Opp. at 11.) They argue that, in contrast, HUD "utterly fails" to demonstrate how the Smoke Free Rule "bears a *bona fide* connection to" the Housing Act. (*Id.*) Plaintiffs' argument is unpersuasive.

To be legitimate, a condition on the receipt of

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noncompliance (Pls.' Opp. at 17), and they point to the final rule, which states, "If HUD determines that a PHA is not in compliance with its plan, HUD will take whatever action it deems necessary and appropriate." 81 Fed. Reg. 87,437. But the fact that HUD has not identified the precise contractual remedy it would select in a case of noncompliance does not mean that PHAs are "simply left clueless as to what they stand to lose." (Pls.' Opp. at 17.) PHAs are aware of the limited options available to HUD if they do not comply with the Rule.

federal funds need not be "undeniably linked" to the funding's purpose; it need only "'bear some relationship' to the purpose of the spending." *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1168 (D.C. Cir. 2004)[9] (quoting *New York v. United States*, 505 U.S. 144, 167 (1992)); *see also Am. Civil Liberties Union v. Mineta*, 319 F. Supp. 2d 69, 80 (D.D.C. 2004) ("[T]he connection between the funding restriction and the purpose of the funding does not have to be particularly closely related to withstand a challenge."). Here, the Rule was designed "to improve indoor air quality . . . ; benefit the health of public housing residents, visitors, and PHA staff; reduce the risk of catastrophic fires; and lower overall maintenance costs." 81 Fed. Reg. 87,431. The evidence HUD relied upon in promulgating the Rule corroborates the relationship between the condition on the receipt of the funding and the purpose of the funding. (*See, e.g.*, AR 2450 (study concluding that secondhand smoke transfers between units in the same building and "the most effective way to ensure that residents of [those] units are not exposed to [secondhand smoke]" is to ban smoking in the building); AR 2460–61 (study discussing negative health effects of secondhand smoke on children, determining that children who live in multiunit buildings are exposed to significantly more secondhand smoke, and recommending that those buildings ban smoking); AR 4823 (study concluding that indoor air quality in

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[9] Indeed, the Supreme Court has never "overturned Spending Clause legislation on relatedness grounds." *Barbour*, 374 F.3d at 1168.

public housing buildings where smoking is permitted is lower than that in buildings that prohibit smoking and recommending that buildings institute smoke-free policies); AR 5958 (Surgeon General's conclusions on health risks associated with exposure to secondhand smoke); AR 9869 (HUD's regulatory impact analysis concluding that the Rule will reduce costs for PHAs by $16 million to $38 million per year and the reduction in cost from fire damage is estimated to be $4.7 million). Because the Rule promotes safer and healthier housing for low-income families—a stated goal of 42 U.S.C. § 1437—the Court concludes that the Smoke Free Rule directly relates to the purpose of the public housing funding. *See Good v. U.S. Dep't of Hous. & Urban Dev.*, No. 3:18-CV-516, 2019 WL 6839320, at *5 (N.D. Ind. Dec. 12, 2019) ("[T]he condition that PHAs implement no smoking policies directly relates to the purpose of the funding.").

C. The Smoke Free Rule does not violate the Tenth Amendment.

Asserting that the Rule "gives the States . . . no option but to follow the federal directives" (Pls.' Mem. at 18), plaintiffs argue that the Smoke Free Rule violates the anticommandeering principle of the Tenth Amendment, which prohibits (1) "federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes" and (2) legislation that "us[es] financial inducements to exert a power akin to undue influence." *NFIB*, 567 U.S. at 577 (plurality opinion) (citation and internal quotation marks omitted). This argument is unpersuasive.

Plaintiffs' argument that the Rule violates the first prohibition because it "affirmatively commands state and local agencies to implement federal policies" (Pls.' Opp. at 15) ignores the fact that, unlike the cases invalidating legislation on this ground, States are given a *choice* whether to accept the federal public housing funding and the terms attached to it. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475–81 (2018) (striking down a federal law prohibiting state legislative authorization of sports gambling); *Printz v. United States*, 521 U.S. 898, 933 (1997) (invalidating a federal law that imposed a mandatory obligation on state law enforcement agents "to perform background checks on prospective handgun purchasers"); *New York*, 505 U.S. at 175–76 (striking down a federal law requiring States to either "take title" to radioactive waste or "regulat[e] according to the instructions of Congress"). If a State chooses not to accept the federal government's public housing funding, it is not required to comply with the Smoke Free Rule.

Plaintiffs argue that HUD's conditioning of federal funding on PHAs' adoption of the Smoke Free Rule violates the Tenth Amendment's second prohibition because it is an impermissible "overlay onto existing funding." (Pls.' Opp. at 17.) Specifically, plaintiffs contend that the government cannot impose a new condition, *i.e.*, compliance with the Smoke Free Rule, on the continued receipt of all pre-existing federal housing funding. (*Id.*; *see also* Pls.' Mem. at 21.) The Supreme Court has ruled otherwise, stating that such "adjustments" to a pre-existing program may be conditioned on both old and

new funding if the State has agreed to future alterations and amendments. *NFIB*, 567 U.S. at 583 (plurality opinion). The Court noted that Congress had done so with the Medicare program through the Omnibus Budget Reconciliation Act of 1990, which extended Medicare eligibility and conditioned compliance on both old and new funding. *Id.* In this case, PHAs agreed in their contracts with HUD to future amendments to the regulations. *See* Form HUD-53012A § 5. Accordingly, HUD's conditioning of public housing funding on compliance with the Smoke Free Rule is permissible and does not contravene the teaching of *NFIB*.[10]

Because the Smoke Free Rule is a permissible exercise of the Spending Clause and does not commandeer the States in violation of the Tenth Amendment, the Court will grant defendants' motion for summary judgment as to Counts One and Two.[11]

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[10] To the extent plaintiffs argue that a PHA's risk of losing all of its public housing funding is "so coercive as to pass the point at which pressure turns into compulsion," *NFIB*, 567 U.S. at 580 (plurality opinion) (citation and internal quotation marks omitted), the Court has no information to assess the merits of this claim. Plaintiffs merely state that a State's decision to not comply with the Rule "might end up costing them significant funding." (Pls.' Opp. at 17.) Since they provide no specifics about the relationship between federal funds received for public housing and a State's public housing budget or a State's overall budget, they have not met their burden of establishing that the Smoke Free Rule violates the Tenth Amendment. *Mississippi Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 178 (D.C. Cir. 2015) (per curiam) ("[T]he burden of establishing unconstitutionality is on the challenger").

[11] With regard to their Tenth Amendment claims, plaintiffs also argue that the Smoke Free Rule does not preempt state

III. COUNTS THREE AND FOUR: THE FOURTH AMENDMENT

Plaintiffs challenge the Smoke Free Rule on the ground that it violates their right to be free in their homes from unreasonable searches and seizures under the Fourth Amendment. (Pls.' Mem. at 25–30; *see also* Compl. ¶¶ 70–87, ECF No. 1.) Plaintiffs claim that, "[i]n order to ensure compliance [with the Rule], PHAs will need to violate the Fourth Amendment rights of tenants, because the prohibited activity will be occurring in the privacy of the tenants' units." (Pls.' Mem. at 29.) Plaintiffs' facial challenge to the Rule is thus premised on their assumption that the Rule authorizes and/or requires PHAs to unlawfully enter tenants' homes.

A. Plaintiffs have standing to assert their Fourth Amendment claim.

As a threshold matter, defendants argue that plaintiffs lack standing because they fail to show an injury in fact to their Fourth Amendment rights, and any injury would not be fairly traceable to HUD's conduct but would be caused by the independent actions of the PHAs. (Defs.' Mot at 25–29.) Plaintiffs

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law. Neither party cites to any state law that presents a conflict with the Rule. Indeed, plaintiffs admit that "there is no conflict to be examined between the federal Smoking Ban and the state PHA policies that the Ban directs the state agencies to implement." (Pls.' Mem. at 23.) Because a ruling on this issue would "offer nothing more than an advisory opinion on potentially difficult questions of federalism and constitutional law," *Norfolk S. Ry Co. v. City of Alexandria*, 608 F.3d 150, 161 (4th Cir. 2010), the Court will not address the preemption argument. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

counter that, because they have standing to challenge the Rule on other grounds, they may also challenge the Rule under the Fourth Amendment or, in the alternative, that they have suffered an injury in fact and that plaintiffs' injuries are traceable to HUD's adoption of the Smoke Free Rule, which requires the compliance of federally funded PHAs. (Pls.' Opp. at 4–7.) Focusing only on plaintiffs' latter argument, the Court concludes that plaintiffs have suffered an injury that is traceable to HUD's conduct.

As the party invoking federal jurisdiction, plaintiffs have the burden of establishing that they have standing by showing that (1) they suffered an injury in fact, (2) the injury is "fairly traceable" to the defendant's conduct, and (3) it is likely redressable by a judicial decision in their favor. *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted). Because the plaintiffs are public-housing tenants who smoke and a smokers' advocacy group made up of members who live in public housing, plaintiffs are injured by the Rule because it bars them from smoking.[12] That injury is fairly

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[12] Defendants' argument to the contrary focuses on the likelihood that plaintiffs will be subject to an unlawful search in the future. (Defs.' Mot. at 26–28.) However, the cases defendants cite for the proposition that plaintiffs must show a substantial likelihood of harm in the future are cases in which the plaintiffs had no actual, present injury. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410–14 (2013) (plaintiffs' injury rested on the *likelihood* that the challenged statute would be applied to them but had no evidence that it had been or would be); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–10 (1983) (*threat* that police policy of using chokeholds was insufficient to support

traceable to HUD's conduct because it was caused by HUD's promulgating the Rule. Finally, their injuries would likely be redressed by the relief sought—a judgment vacating or modifying the Rule to allow public housing tenants to smoke in their private units. *See Bennett v. Donovan*, 703 F.3d 582, 586–90 (D.C. Cir. 2013) (appellants had standing to challenge a HUD regulation applying to third-party lenders because a decision in appellants' favor would *likely* redress their injury, even though relief was not certain). Because plaintiffs have shown that they are injured by the Rule and that their injury was caused by defendants, they need not show more to bring their Fourth Amendment claim.

B. Plaintiffs fail to bring a cognizable Fourth Amendment facial challenge.

To succeed on a facial challenge, "a plaintiff must establish that a law is unconstitutional in all of its applications." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) (citation and internal quotation marks omitted). Where a facial challenge to a statute is made on the ground that it authorizes searches in violation of the Fourth Amendment, "the proper focus of the constitutional inquiry is searches that the law *actually authorizes* . . . ." *Id.* (emphasis added). Thus, the issue before the Court is whether the Rule authorizes unlawful searches. *See, e.g.*, *Payton v. New York*, 445 U.S. 573, 574, 576 (1980) (invalidating "New York statutes that authorize police officers to enter a private residence without a

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standing). Unlike these cases, plaintiffs here are currently suffering an actual injury by being barred from smoking.

warrant").

Here, the Smoke Free Rule does not authorize any type of unlawful search. It does not, for instance, state that public housing tenants are required to submit to searches of their unit or provide that, to enforce the Rule, PHAs may enter tenants' units without consent, a warrant, or some other lawful basis for entry.[13] Instead, as plaintiffs note, HUD does not provide any "specific enforcement mechanisms" for the Smoke Free Rule (Pls.' Mem. at 29), for, as explained in the final rule, "lease enforcement policies are typically at the discretion of PHAs, and it is appropriate for local agencies to ensure fairness and consistency with other policies." 81 Fed. Reg. 87,437. Significantly, HUD's guidance regarding lease provisions governing PHA entry into a tenant's unit expressly states that its regulations "do[] not authorize PHAs or police departments to enter units for security purposes unless the police department has a search warrant or they are in hot pursuit of a suspect who has run into the unit," and that "[t]enants cannot be asked to waive their Fourth Amendment rights." U.S. Dep't of Hous. & Urban Dev., Public Housing Occupancy Guidebook at 200 (2003).

Because the Rule simply prohibits public housing tenants from smoking in their apartments, and it does not authorize any unlawful searches, plaintiffs' Fourth Amendment facial challenge to the Rule is

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[13] In fact, plaintiff Douglas Soncksen was found to be in violation of the terms of his lease because he was observed smoking outside on his porch, but he was given a "free pass" for his first violation. (Soncksen Decl. Ex. B, at 1, ECF No. 26-5.)

not cognizable, and defendants are entitled to summary judgment on Counts Three and Four.

IV. COUNTS FIVE AND SIX: SUBSTANTIVE DUE PROCESS

In Counts Five and Six, plaintiffs argue that the Smoke Free Rule violates the Due Process Clause of the Fifth Amendment because it interferes with their fundamental right to engage in legal activity in the privacy of their homes, and the Rule is not tailored to serve a compelling government interest. (Pls.' Opp. at 27–35.)

Under the Due Process Clause, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Laws that burden fundamental rights are upheld only if the law is "narrowly tailored to serve a compelling state interest," *Reno v. Flores*, 507 U.S. 292, 302 (1993), while laws that do not are only required to bear some rational relation to a legitimate governmental purpose. *Heller v. Doe*, 509 U.S. 312, 319–20 (1993). Thus, the Court must first consider whether the right asserted by plaintiffs is a fundamental right. *See Reno*, 507 U.S. at 302 ("Substantive due process analysis must begin with a careful description of the asserted right, for the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." (citation, alteration, and internal quotation marks omitted)).

Plaintiffs insist that they are not asserting a fundamental right to smoke or to use tobacco products. (*See* Pls.' Opp. at 27.) Instead, they claim that they have "a fundamental right . . . to engage in legal activities within the privacy of their own homes." (Pls.' Opp. at 28.) Neither the Supreme Court nor any other federal court has recognized such an expansive fundamental right. Indeed, the Supreme Court has limited its recognition of fundamental rights to "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, . . . to abortion," *Glucksberg*, 521 U.S. at 720 (citations omitted), and to engage in private sexual activity, *see Lawrence v. Texas*, 539 U.S. 558, 578 (2003). To the extent these rights relate to the home, fundamental rights only "encompass[] and protect[] the *personal intimacies* of the home," not everything that occurs within it. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973) (emphasis added); *see also Paul P. v. Verniero*, 170 F.3d 396, 399 (3d Cir. 1999) ("Th[e] 'guarantee of personal privacy' covers 'only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty.'" (quoting *Roe v. Wade*, 410 U.S. 113, 152 (1973)); *Operation Badlaw, Inc. v. Licking Cty. Gen. Health Dist. Bd. of Health*, 866 F. Supp. 1059, 1067 (S.D. Ohio 1992) (finding no cases "extending the right to privacy as far as the right to smoke either in public or in private"), *aff'd*, 991 F.2d 796 (6th Cir. 1993). The Supreme Court has warned against expanding these rights "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended" and because doing

so "place[s] the matter outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720 (citation and internal quotation marks omitted).

Plaintiffs rely on four Supreme Court cases to support their argument that "adults effectively have a fundamental right . . . to engage in legal activities within the privacy of their own homes." (Pls.' Opp. at 28.) These cases do not support their argument. First, in *Stanley v. Georgia*, the defendant was convicted of possession of obscene material in violation of Georgia law based on the discovery of obscene material in his home. 394 U.S. 557, 558–59 (1969). On appeal, the defendant challenged the constitutionality of the Georgia statute on the ground that it violated the First Amendment, as applied to the States through the Fourteenth, by punishing private possession of obscene material. *Id.* at 559. The Supreme Court agreed and held that the First Amendment's protection of the "right to receive information and ideas, regardless of their social worth," prohibits making mere possession of obscene material in the home a crime. *Id.* at 559, 564. In two subsequent cases cited by plaintiffs, *United States v. Orito* and *Paris Adult Theatre I v. Slaton*, the Court approved two federal laws regulating obscene material outside of the home—one preventing obscene material from entering the stream of commerce, *see Orito*, 413 U.S. 139, 143 (1973), and one prohibiting exhibition of obscene films in public theaters. *See Paris Adult Theatre I*, 413 U.S. at 69–70. In both, the Court held that First Amendment right expounded in *Stanley* did not extend beyond the home. *See Orito*, 413 U.S. at 141–42; *Paris Adult*

Theatre I, 413 U.S. at 66–67. Finally, in *Lawrence v. Texas*, two male defendants were convicted of "deviate sexual intercourse" in violation of Texas law. 539 U.S. at 563. The Court overturned their convictions, holding that the Due Process Clause of the Fourteenth Amendment protected private sexual behavior. *Id.* at 578–79.

Unlike these cases, plaintiffs' claims are not rooted in the First Amendment nor in the fundamental right to engage in private sexual behavior. Nor can these cases be read to extend the implied right to privacy to all legal conduct within one's home. Indeed, the Court in *Stanley* made clear that its holding "turn[ed] upon . . . fundamental liberties protected by *the First and Fourteenth Amendments*." 394 at 568 n.11 (emphasis added). *Orito* and *Paris Adult Theatre I* did no more than affirm the holding in *Stanley*. Finally, the right recognized in *Lawrence* only extended substantive due process protection to private sexual behavior, not all private conduct. *See* 539 U.S. at 578 ("The[] right to liberty under the Due Process Clause gives [petitioners] the full right to engage in their conduct without intervention of the government."). Given the Supreme Court's caution against expanding substantive due process rights, *Glucksberg*, 521 U.S. at 720, the Court declines plaintiffs' invitation to recognize a new fundamental right to conduct *all* legal activity in the home. *See Hutchins v. District of Columbia*, 188 F.3d 531, 536 (D.C. Cir. 1999) (refusing to recognize a general right to free movement based on the right to *interstate* travel).

Plaintiffs also rely on *Ravin v. State*, where the Alaska Supreme Court held that possession of

marijuana in the home for personal use is constitutionally protected. (Pls.' Mem. at 32 (citing 537 P.2d 494 (Alaska 1975).) Plaintiffs' reliance on this case is misplaced for two reasons. First, the court's ruling was based on the Alaska Constitution, which, unlike the U.S. Constitution, contains an explicit right to privacy. *Ravin*, 537 P.2d at 504 ("Thus, we conclude that citizens of the State of Alaska have a basic constitutional right to privacy in their homes under Alaska's constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home"). Second, the Supreme Court of Alaska did not utilize the federal substantive due process test in reaching its conclusion. Instead, the Alaska court first looked to whether the regulation at issue infringed the claimant's rights and, then, whether the infringement was justified. *See id.* at 498. Thus, the court did not determine whether a fundamental right was at issue. Moreover, the court admitted that if it had "utilize[d] the fundamental right-compelling state interest test in resolving privacy issues under [the privacy amendment] of Alaska's constitution, [the court] would conclude that there is not a fundamental constitutional right to possess or ingest marijuana in Alaska." *Id.* at 502. *Ravin* is thus inapplicable.

There are, however, two federal cases that are on point, both of which hold that the Smoke Free Rule does not implicate a fundamental right. *See Good*, 2019 WL 6839320, at *4–5 ("Courts have repeatedly held that smoking is not a fundamental right, entitling special protection under either a right to

privacy or substantive due process analysis."); *Telepo v. Ferguson*, No. 17-cv-2865, 2018 U.S. Dist. LEXIS 231893, at *2 n.3 (E.D. Pa. Jan. 3, 2018) ("Telepo has not shown that smoking in the privacy of a public housing unit is a fundamental right. Courts have repeatedly held that smoking, inside or outside of a home environment, is not a fundamental right, entitling special protection under either a right to privacy or substantive due process analysis."). Plaintiffs attempt to distinguish these two cases by arguing that *Good* and *Telepo* concern the right to *smoke* in private, whereas plaintiffs assert a more general fundamental right to *engage in lawful conduct* in the home. (*See* Pls.' Resp. to Defs.' Notice of Suppl. Authority at 4, ECF No. 44.) However, plaintiffs' distinction is one without a difference, for if their right to engage in legal conduct in the home was indeed fundamental, they would necessarily have a fundamental right to smoke in the privacy of their homes. And, these two cases are not as limited as plaintiffs suggest, since they both concluded that smoking in one's home is not protected by a right to privacy.

Because no fundamental right is implicated by the Smoke Free Rule, it is not subject to heightened scrutiny, and plaintiffs need only "prove that the government's restrictions bear no rational relationship to a legitimate state interest." *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 712 (D.C. Cir. 2007). "The challenged policy 'need not be in every respect logically consistent with its aims to be constitutional.'" *Id.* (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955)).

Indeed, courts afford challenged policies "a strong presumption of validity." *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1156 (D.C. Cir. 2004). Moreover, where a defendant provides multiple reasons for a challenged action, a court only needs to find that one reason is rationally related to a legitimate state interest for the action to survive. *Id.*

Creating safe housing conditions and remedying the shortage of safe homes for low- income families—the purpose behind the Housing Act—are legitimate governmental interests. *See 2910 Ga. Ave. LLC v. District of Columbia*, 234 F. Supp. 3d 281, 312 (D.D.C. 2017) (holding that the government's "affordable housing goals constitute a legitimate state interest"); *Disney v. Knoxville's Comm. Dev. Corp.*, 508 F. Supp. 68, 71 (E.D. Tenn. 1980) (stating that the government's interest in "providing adequate housing for families of low incomes" is legitimate). The Smoke Free Rule reasonably advances these goals by "improv[ing] indoor air quality in the housing; benefit[ing] the health of public housing residents, visitors, and PHA staff; reduc[ing] the risk of catastrophic fires; and lower[ing] overall maintenance costs." 81 Fed. Reg. 87,430; *see also Beatie v. City of New York*, 123 F.3d 707, 713 (2d Cir. 1997) (restrictions on cigar smoking are rationally related to the legitimate government interest of protecting the health of nonsmokers); *Good*, 2019 WL 6839320, at *5 (the Smoke Free Rule "is rationally related to the government's interest in preventing individuals from being exposed to secondhand smoke"); *Telepo*, 2018 U.S. Dist. LEXIS 231893, at *2 n.3 (the Smoke Free Rule serves

legitimate government interests, "include[ing] improving the health of both smokers and those exposed to secondhand smoke, reducing fire hazards, maintaining clean and sanitary conditions, and reducing complaints and the threat of litigation from those who do not smoke"); *Giordano v. Conn. Valley Hosp.*, 588 F. Supp. 2d 306, 314 (D. Conn. 2008) (smoking restrictions are reasonably related to legitimate state interests of reducing fires, improving the health and safety of those affected, promoting clean and sanitary conditions, and reducing complaints from nonsmokers); *Thiel v. Nelson*, 422 F. Supp. 2d 1024, 1030 (W.D. Wis. 2006) (same).[14]

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[14] Plaintiffs also argue that any risk posed by secondhand smoke to the health of nonsmokers does not create a compelling state interest that would support the Smoke Free Rule. (Pls.' Opp. at 29–30.) This is the wrong legal standard, since the Rule is not subject to strict scrutiny. In addition, their argument is not supported by the cases they cite. The state court cases cited by plaintiffs are tort actions brought by nonsmoker-plaintiffs against neighbors who smoke for secondhand smoke transfer in multiunit buildings. *See Feinstein v. Rickman*, 136 A.D.3d 863, 864 (N.Y. App. Div. 2016); *Schuman v. Greenbelt Homes, Inc.*, 69 A.3d 512, 514 (Md. Ct. Spec. App. 2013); *Ewen v. Maccherone*, 927 N.Y.S.2d 274, 275 (N.Y. App. Div. 2011). The courts declined to impose tort liability for secondhand smoke, but the courts did not address the health risk associated with secondhand smoke or the government's ability to regulate smoking. In fact, two of those cases acknowledged "the significant health hazards to nonsmokers inherent in exposure to secondhand smoke." *Ewen*, 927 N.Y.S.2d at 277; *see also Schuman*, 69 A.3d at 520 ("We do understand that although the true effects of secondhand smoke are still being assessed, it obviously can be harmful.").

The two federal cases relied upon by plaintiffs are similarly unhelpful. First, the Supreme Court decision in *Helling v.*

Thus, the Rule does not violate the Fifth Amendment, and the Court will grant summary judgment on Counts Five and Six to defendants.

V. COUNT SEVEN: THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

Plaintiffs allege in Count Seven that the Smoke Free Rule violates the unconstitutional conditions doctrine because it "conditions tenants' receipt of the benefit of public housing on giving up their Fourth Amendment rights." (Pls.' Mem. at 36; *see also* Compl. ¶¶ 220–25.) Under that doctrine, "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). As previously discussed, enforcement of the Smoke Free Rule does not require PHAs to violate plaintiffs' Fourth Amendment rights. *See supra* Section III.B; *see also* U.S. Dep't of Hous. & Urban Dev., Public Housing Occupancy Guidebook at 200 (2003) ("Tenants cannot be asked to waive their Fourth Amendment rights."). Thus, the Rule does not

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McKinney, 509 U.S. 25 (1993), held that the defendant "state[d] a cause of action under the Eighth Amendment by alleging that [prison officials] have, with deliberate indifference, exposed him to levels of [secondhand smoke] that pose an unreasonable risk of serious damage to his future health." *Id.* at 35. Second, the D.C. Circuit decision in *Scott v. District of Columbia*, 139 F.3d 940 (D.C. Cir. 1998), turned on plaintiffs' failure to present sufficient evidence as to the level of their exposure to secondhand smoke. *Id.* at 943. Thus, contrary to plaintiffs' assertion, neither court concluded that secondhand smoke does not create a "substantial risk" to nonsmokers.

"require a person to give up a constitutional right . . . in exchange for a discretionary benefit," *Dolan*, 512 U.S. at 385, and defendants are entitled to summary judgment on Count Seven.

VI. COUNTS EIGHT AND NINE: THE COMMERCE CLAUSE

Counts Eight and Nine allege that the Smoke Free Rule is an impermissible exercise of Congress' power under the Commerce Clause. (Compl. ¶¶ 226–39.) Specifically, plaintiffs argue that use of tobacco in a private home does not substantially affect interstate commerce and the power to regulate that use belongs exclusively to the States. (See Pls.' Mem. at 37–42; see also Compl. ¶¶ 229–32, 236–39.) Because the Court has concluded that the promulgation of the Smoke Free Rule is a valid exercise of Congress' spending power, see supra Section II, the Court does not need to decide whether it is also legitimate under the Commerce Clause. See Benning v. Georgia, 391 F.3d 1299, 1304 (11th Cir. 2004) ("Although [plaintiffs] argue that Congress acted within its authority under both the Spending Clause and the Commerce Clause, we need not address both arguments so long as Congress validly exercised either source of authority."); Charles v. Verhagen, 348 F.3d 601, 609 (7th Cir. 2003) ("Whether or not the Commerce Clause provides an independent justification for RLUIPA does not impact its constitutionality under the Spending Clause." (emphasis in original)). Accordingly, defendants are entitled to summary judgment on Counts Eight and Nine.

VII. COUNTS TEN, ELEVEN, AND TWELVE:

HUD'S AUTHORITY TO PROMULGATE THE SMOKE FREE RULE

In Counts Ten, Eleven, and Twelve, plaintiffs allege that Congress did not authorize HUD to promulgate the Smoke Free Rule. (*See* Compl. ¶¶ 240–53.) They argue that "[n]either HUD's organic statute nor any other statute gives HUD the authority or jurisdiction to regulate emissions of smoke due to use of tobacco products in private living quarters" "or anywhere else," or "to regulate indoor air quality on a nationwide basis." (Pls.' Mem. at 43, 45–46.)

Plaintiffs' argument is flawed for two reasons. First, it assumes that Congress must expressly delegate the power to regulate certain fields. Longstanding Supreme Court precedent recognizes that congressional delegation to an agency may be implicit. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."). Second, plaintiffs mischaracterize the authority that HUD purports to exercise. The issue before the Court is not whether HUD has the authority to regulate use of tobacco products or indoor air quality generally, but whether HUD has the much narrower power to ban the use of certain tobacco products in public housing pursuant to 42 U.S.C. § 1437d(f)(2). (*See* Defs.' Mot. at 37–38.) This issue is governed by *Chevron*. *See City of Arlington v. FCC*, 569 U.S. 290, 296–97 (2013) (a court must defer under *Chevron* to an agency's interpretation of

a statutory ambiguity that concerns the scope of the agency's statutory authority); *Verizon v. FCC*, 740 F.3d 623, 635 (D.C. Cir. 2014) (applying *Chevron* "to determine whether the Commission has demonstrated that the regulations fall within the scope of its statutory grant of authority"). And, as *Chevron* makes clear, agencies are generally entitled to deference in the interpretation of statutes that they administer, but the agency must give effect to the unambiguously expressed intent of Congress. *See* 467 U.S. at 842–44.

Section 1437d(f)(2) commands HUD to "establish housing quality standards . . . that ensure that public housing dwelling units are safe and habitable." The statute leaves to HUD the task of developing those standards, instructing that they "shall include requirements relating to habitability, including maintenance, health and sanitation factors, condition, and construction of dwellings." *Id.* Thus, § 1437d(f)(2) requires HUD "to make interpretive choices for statutory implementation" in filling the gaps in the public housing statute. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 56 (2011).

Those interpretive choices must still represent "a reasonable interpretation of the enacted text." *Id.* at 58 (citation and internal quotation marks omitted). Plaintiffs do not argue that HUD's construction of the statute is unreasonable, nor can the Court conclude that a regulation aimed at "improv[ing] indoor air quality in the housing; benefit[ing] the health of public housing residents, visitors, and PHA staff; reduc[ing] the risk of catastrophic fires; and lower[ing] overall maintenance costs" is an

unreasonable implementation of the power to "establish housing quality standards . . . that ensure that public housing dwelling units are safe and habitable."

In sum, the Smoke Free Rule does not regulate the use of tobacco products as a drug or indoor air quality. It simply prohibits the use of certain tobacco products in designated indoor and outdoor spaces in HUD-financed public housing as part of HUD's expressly delegated authority to regulate the safety, habitability, health, and sanitation of public housing. Therefore, the Court will defer to HUD's interpretation of its authority and will grant summary judgment to defendants on Counts Ten, Eleven, and Twelve.

VIII. COUNT THIRTEEN: VIOLATION OF THE APA

Count Thirteen includes several challenges to the Smoke Free Rule on the ground that it is "arbitrary, capricious, and an abuse of discretion" in violation of § 706(2)(A) of the APA. (Compl. ¶ 256.) Two of those challenges rehash arguments previously raised regarding HUD's authority to promulgate the Rule and plaintiffs' right to engage in legal activities in the privacy of their homes. (Pls.' Mem. at 50–51.) These arguments have already been rejected by the Court.

Plaintiffs also argue that, by banning smoking within twenty-five feet of public housing, the Smoke Free Rule "poses a substantial risk of harm to public housing tenants by forcing them to leave the safety of their homes and venture out into dangerous public areas, in all kinds of harsh weather conditions." (*Id.*

at 51.) Plaintiffs claim that the Rule especially burdens and endangers women, the elderly, and disabled persons. (*Id.* at 52.) HUD considered this issue extensively in promulgating the Rule and recommended various ways PHAs could alleviate the burden for such tenants. *See* 81 Fed. Reg. 87,434. For example, HUD recommended that PHAs consider moving especially burdened tenants to first-floor units, "which would provide easier access to smoking outside of their units," and that PHAs modify walkways for easier use by affected residents. *Id.* It also noted that all residents have the option of using in their private units electronic nicotine delivery systems, which are not banned by the Smoke Free Rule. *Id.*[15]

Plaintiffs also contend that the Rule is arbitrary and capricious because it does not further the stated goal of improving indoor air quality. (Pls.' Mem. at 50.) According to plaintiffs, the Rule does not do so because it "is predicated on the scientifically dubious notion that the tobacco product emissions produced

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[15] In their opposition and reply, plaintiffs attempt to broaden their arbitrary and capricious claim by raising new arguments not pled in their complaint or raised in their summary judgment motion. (*See, e.g.*, Pls.' Opp. at 43 (arguing that "HUD's ambiguous and vague enforcement posture creates unnecessary uncertainty for both PHAs and PHA tenants"); *id.* at 43–46 (arguing that the Smoke Free Rule "disparately discriminates based on handicap, age, and race"); *id.* at 46–49 (arguing that "HUD's stated rationales for the [Rule] are pretextual"). Because plaintiffs may not amend their complaint through their summary judgment briefing, the Court will not consider these arguments. *Wilson v. DNC Servs. Corp.*, No. 1:17-cv-00730, 2019 WL 4737603, at *8 (D.D.C. Sept. 27, 2019); *Bean v. Perdue*, 316 F. Supp. 3d 220, 226 (D.D.C. 2018).

by public housing tenants using tobacco products within their private living quarters pose a health risk to tenants living in other apartments." (*Id.*) Plaintiffs base their argument on two studies in the record that used mechanical devices to measure the transfer of secondhand smoke between dwelling units. (Pls.' Opp at 41.) Plaintiffs characterize these studies as "weak[] in . . . data and method" because both admitted that PM2.5, a particulate environmental marker for secondhand smoke, may be emitted by combustible materials other than tobacco smoke. (*Id.*)

Plaintiffs' argument is flawed. First, plaintiffs do not dispute that the Rule would effectuate its other stated purposes of reducing the risk of fires and lowering maintenance costs. Second, plaintiffs mischaracterize the two studies that they criticize. Although the first admitted that PM2.5 is "emitted from many combustible materials and thus not specific to tobacco smoke," the study later stated that "cigarette smoke has previously been shown to serve as a major source of PM2.5." (AR 2456.) Also, the study found that "individuals who reside in close proximity to one another in [multiunit housing] are especially vulnerable to compromised air quality from [secondhand smoke] incursions originating in units where smoking is permitted" (*id.*), and that "the implementation of a smoke-free building policy represents the most effective way to ensure that residents of [multiunit housing] units are not exposed to [secondhand smoke]." (AR 2450.) As to the second study, plaintiffs point out that it, like the first study, recognized that "PM2.5 itself is not

specific to secondhand smoke." (AR 2777.) Nonetheless, the study found that "households with self-imposed smoke-free policies in smoking-permitted buildings demonstrated higher levels of PM2.5 than did nonsmoking households in buildings with smoke-free policies in place." (*Id.*) The study "attribute[d] this, in part, to smoke transfer within the building," and concluded that "the implementation of a smoke-free policy would reduce secondhand smoke in multiunit housing." (*Id.*) Thus, these two studies do, in fact, support HUD's conclusion that the Smoke Free Rule will improve indoor air quality.

More importantly, plaintiffs ignore the many studies considered by HUD that show strong evidence of secondhand smoke transfer between units in multifamily dwellings and its harmful effects on nonsmokers. For example, one study concluded that children living in multiunit homes are exposed to significantly more secondhand smoke—"at levels associated with morbidity"—than children living in detached homes, and suggests that smoking bans in multiunit housing can reduce this exposure.[16] (AR 2460.) That study also reviewed the

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[16] Conclusions such as this do not, as plaintiffs suggest, support the proposition that the "one- size-fits-all" Smoke Free Rule is not justified in public housing communities with unattached houses and mobile homes because "[t]he smoke transfer justification is non-existent." (Pls.' Mem. at 51.) In promulgating the Rule, HUD was concerned with the effects of secondhand smoke on nonsmokers in the same unit as a smoker, not just those affected by the interunit transfer of smoke. *See* 81 Fed. Reg. 87,442 ("Increased air sealing could also have the disadvantage of increasing SHS exposure to non-

negative health effects caused by *any* level of exposure to secondhand smoke to children: asthma, respiratory infections, sudden infant death syndrome, metabolic syndrome, otitis media, attenuated endothelial function, learning disorders, conduct disorders, decreased lung function, and morbidity. (AR 2461.) The Surgeon General's 2006 report confirmed that "smoke exposure poses serious health risks to children and . . . the home is the major source of exposure for children," and cited studies showing "substantial reductions in the secondhand smoke exposure among healthy children as a result of an intervention." (AR 744–45.) The report also found that secondhand smoke exposure causes heart disease, lung cancer, and stroke in adults. 41 Fed. Reg. 87,441. Based on this, the report found that "[e]liminating smoking in indoor spaces fully protects nonsmokers from exposure to secondhand smoke," and "[s]eparating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot eliminate exposures of nonsmokers to secondhand smoke." (AR 5958.)

Caselaw further supports the conclusion that the Smoke Free Rule is not arbitrary, capricious, or an abuse of discretion. The district court in *Good* addressed this issue and held that the Rule does not violate the APA. 2019 WL 6839320, at *6 ("[The Rule] is not arbitrary and capricious. Instead, it targets a serious harm to the public and is tailored to

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smokers in the sealed units, and could increase the amount of SHS that settles on surfaces within the sealed units."); *see also* AR 2461 ("Parental smoking is the most common source of secondhand tobacco-smoke exposure for children.").

that purpose."). Other courts have also recognized the significant health risk posed by secondhand smoke. *See Helling*, 509 U.S. at 35; *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019–20 (8th Cir. 2012) (city reasonably relied on Surgeon General's report in promulgating ordinance prohibiting outdoor smoking on certain public property); *Davis v. McCain*, No. 1:16-CV-01534, 2018 WL 4936566, at *4 (W.D. La. Sept. 19, 2018) ("It is well-established that second-hand smoke is dangerous."); *Telepo*, 2018 U.S. Dist. LEXIS 231893, at *2 n.3.

While plaintiffs disagree with HUD's action in promulgating the Smoke Free Rule, they have not shown that the Rule violates the APA. Accordingly, summary judgment will be granted in defendants' favor on Count Thirteen.

CONCLUSION

For the foregoing reasons, the Court will grant defendants' motion for summary judgment and deny plaintiffs' motion for summary judgment. A separate Order accompanies this Memorandum Opinion.

DATE: March 2, 2020 /s/
ELLEN S. HUVELLE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 18-1711 (ESH)

NYC C.L.A.S.H., INC., *et al.*,
Plaintiffs,

v.

BEN CARSON, SECRETARY OF DEP'T OF HOUSING & URBAN DEVELOPMENT, *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs, a smokers' rights organization and six individual smokers who reside in public housing, sued the U.S. Department of Housing and Urban Development ("HUD") and Ben Carson, in his official capacity as the Secretary of HUD, challenging a regulation that bans smoking in public housing, including in residential units. The parties filed cross-motions for summary judgment. On March 2, 2020, the Court granted defendants' motion for summary judgment and entered judgment in favor of defendants. (Order, ECF No. 45.) *See NYC C.L.A.S.H., Inc. v. Carson*, No. 18-cv-1711, 2020 WL 999851, at *1 (D.D.C. Mar. 2, 2020). Plaintiffs now move for reconsideration and amendment of the judgment pursuant to Federal Rules of Civil Procedure 59(e) and 60(b)(1) (Pls.' Mot. to Reconsider & Amend the J. ("Pls.' Mot. to Recons."), ECF No. 49) and to amend their complaint pursuant to Rule 15(b)(2). (Pls.' Mot. to Conform Pleadings to Issues & Evid. Raised in Summ. J. Briefing, ECF No. 54.) For

the reasons stated herein, plaintiffs' motion to reconsider will be denied, their motion to amend the judgment will be denied in part and granted in part, and their motion to amend their complaint will be denied.

ANALYSIS

I. LEGAL STANDARDS

Rule 59(e) "provides a limited exception to the rule that judgments are to remain final." *Leidos, Inc. v. Hellenic Republic*, 881 F.3d 213, 217 (D.C. Cir. 2018). Because "the reconsideration or amendment of a judgment is . . . an extraordinary measure," a court will only grant a motion under Rule 59(e) "(1) if there is an intervening change of controlling law; (2) if new evidence becomes available; or (3) if the judgment should be amended in order to correct a clear error or prevent manifest injustice." *Id.* (citation and internal quotation marks omitted). Plaintiffs do not attempt to demonstrate a change in controlling law or to present new evidence; they claim that the Court's March 2, 2020 Order was clearly erroneous. (Pls.' Mot. to Recons. at 4 ("Plaintiffs rely on the clear-error standard of Rule 59(e).").)

"Clear error" under Rule 59(e) is "a very exacting standard," requiring that a judgment be "dead wrong" to grant relief. *Lardner v. FBI*, 875 F. Supp. 2d 49, 53 (D.D.C. 2012) (citations and internal quotation marks omitted). Put more colorfully by the Seventh Circuit, "[t]o be clearly erroneous, a decision must strike [the court] as more than just maybe or probably wrong; it must . . . strike [the court] as wrong with the force of a five-week-old,

unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988). Mere disagreement with a court's ruling will not justify amendment of a judgment. *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002); *Habliston v. FINRA Disp. Resol., Inc.*, 251 F. Supp. 3d 240, 246 (D.D.C. 2017).

Similarly, "Rule 59(e) motions are aimed at reconsideration, not initial consideration." *Leidos, Inc.*, 881 F.3d at 217 (citation and internal quotation marks omitted). Thus, those motions "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (citation and internal quotation marks omitted); *see also Patton Boggs LLP v. Chevron Corp.*, 683 F.3d 397, 403 (D.C. Cir. 2012) ("Rule 59(e) is not a vehicle to present a new legal theory that was available prior to judgment."). Arguments raised for the first time in a Rule 59(e) motion that do not demonstrate a change in controlling law or present new evidence may be deemed waived. *GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 812 (D.C. Cir. 2012).

Rule 60(b)(1) allows a court to relieve a party from a final judgment due to "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). "Relief under Rule 60(b)(1) motions is rare; such motions allow district courts to correct only limited types of substantive errors." *Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006). The movant bears the burden of showing that he or she is entitled to relief, *Norris v. Salazar*, 277 F.R.D. 22, 25 (D.D.C. 2011),

and "'[t]he decision to grant or deny a rule 60(b) motion is committed to the discretion of the District Court.'" *Kareem v. FDIC*, 811 F. Supp. 2d 279, 282 (D.D.C. 2011) (quoting *United Mine Workers of Am. 1974 Pension v. Pittston Co.*, 984 F.2d 469, 476 (D.C. Cir. 1993)).

II. PLAINTIFFS' ARGUMENTS

Plaintiffs raise numerous complaints about the Court's decision, but none demonstrates that reconsideration is warranted. Many of plaintiffs' arguments merely rehash arguments made in their summary judgment pleadings. For instance, plaintiffs reprise their argument that the Smoke Free Rule impermissibly requires States to enact a smoking ban by using language that is, in large part, identical to that used in their pre-judgment briefing. (*Compare* Pls.' Mot. to Recons. at 7, *with* Pls.' Mot. for Summ. J. at 18, ECF No. 26-1.) They also recycle their arguments dealing with HUD's authority to promulgate the Rule, again arguing that HUD's power to establish standards to ensure that public housing is "safe and habitable" does not include the power to regulate smoking in public housing (*compare* Pls.' Mot. to Recons. at 13– 14, *with* Pls.' Opp. to Defs.' Cross Mot. for Summ. J. at 2–3, 35–36, ECF No. 37), and again they use language that initially appeared in their summary judgment briefing. (*Compare* Pls.' Mot. to Recons. at 14, *with* Pls.' Mot. for Summ. J. at 20, 42.) Plaintiffs cannot now relitigate matters that were already decided. *Exxon Shipping Co.*, 554 U.S. at 485 n.5.

Other arguments for reconsideration misunderstand or fail to address the Court's

summary judgment holdings and, thus, do not show that those holdings were clearly erroneous. For example, in arguing for reconsideration of the Court's holding that the Smoke Free Rule is not arbitrary or capricious, plaintiffs quibble with the Court's citation to the final Rule in a footnote. (Pls.' Mot. to Recons. at 18 (citing *NYC C.L.A.S.H., Inc.*, 2020 WL 999851, at *15 n.16).) As support for the proposition that "HUD was concerned with the effects of secondhand smoke on nonsmokers in the same unit as a smoker, not just those affected by the interunit transfer of smoke," the Court cited the final Rule, which states that "'[i]ncreased air sealing could . . . have the disadvantage of increasing [secondhand smoke] exposure to non-smokers in the sealed units.'" *NYC C.L.A.S.H., Inc.*, 2020 WL 999851, at *15 n.16 (quoting Instituting Smoke-Free Public Housing, 81 Fed. Reg. 87,430, 87,442 (Feb. 3, 2017)). Plaintiffs argue that the final Rule "refer[s] . . . to some science-fiction solution of 'air sealing' units" and not to plaintiffs' desired alternative to the Rule, *i.e.*, no Rule at all. (Pls.' Mot. to Recons. at 18.) However, in citing to the final Rule, the Court was not addressing or evaluating air sealing or plaintiffs' "no Rule" alternative; rather, the Court was addressing plaintiffs' argument that the Smoke Free Rule "is demonstrably arbitrary when [it] equally bans smoking in unattached houses and mobile homes," where "[t]he smoke transfer justification is non-existent." (Pls.' Mot. for Summ. J. at 51.) Contrary to this argument, the final Rule shows that HUD was also concerned with the effects of secondhand smoke on nonsmokers in freestanding units.

Plaintiffs also present evidence and arguments that were available prior to the entry of judgment to support reconsideration of two of their claims. First, plaintiffs base their request that the Court reconsider and reach the merits of their preemption argument on law that could have been incorporated into their summary judgement pleadings. (*See* Pls.' Mot. to Recons. 10– 11 (citing *James v. Valtierra*, 402 U.S. 137, 140 (1971), and state and local laws in effect before plaintiffs moved for summary judgment).) Thus, their arguments based on these laws were waived. *GSS Grp. Ltd.*, 680 F.3d at 812. Moreover, plaintiffs assert that *James* "definitively answers the preemption question against preemption." (Pls.' Reply at 3, ECF No. 52.) *James* was decided in 1971, so there can be no excuse for not citing it before judgment was entered, and it does not hold, as plaintiffs' claim, that the Housing Act does not preempt state law. (Pls.' Mot. to Recons. at 10.) Instead, in *James*, the Supreme Court held that the Act "does not purport to require that local governments accept [the offered financial aid]," 402 U.S. at 140, which supports this Court's ruling that the Smoke Free Rule does not mandate action on the part of the States in violation of the Tenth Amendment.

Second, plaintiffs attempt to support reconsideration of their arbitrary and capricious claim with evidence that "smoking represents about 2.0 percent of fires, while open flames (which include candles) represent 4.3 percent of fires." (Pls.' Mot. to Recons. at 3.) This evidence was available prior to the entry of judgment, and thus, this argument was waived. *GSS Grp. Ltd.*, 680 F.3d at 812. Moreover,

far from showing that the Smoke Free Rule is "pretextual" (Pls.' Mot. to Recons. at 19), this evidence shows that, even if candles caused more fires in a five-year period, the Rule will contribute to the "reduc[tion of] the risk of catastrophic fires," 81 Fed. Reg. 87,431, since it shows that "[b]etween 2012 and 2016, smoking materials caused an estimated annual average of 18,100 home structure fires." (Pls.' Mot. to Recons. at 3.)

In addition to claiming that the Court committed clear error, plaintiffs ask the Court to amend the judgment in three respects. First, plaintiffs argue that the Court should have denied summary judgment to defendants on Counts One and Two, which allege that the Smoke Free Rule violates the anticommandeering principle of the Tenth Amendment, because whether the Rule coerces public housing authorities to implement smoking bans is a disputed issue of fact. (Pls.' Mot. to Recons. at 6.) As plaintiffs admit, they "failed to raise th[e] obvious—and likely uncontested—point" that "PHAs cannot afford to forego HUD funding" and thus, "seek to make it now via judicially noticeable materials." (*Id.* at 8.) According to plaintiffs, they seek to use Rule 60(b)(1) to "correct[] this . . . inadvertent omission," even though they fail to cite any support for this proposition. (*Id.*) *See Andree v. Ctr. for Alt. Sentencing & Emp't Servs., Inc.*, No. 92 Civ. 616, 1993 WL 362394, at *3 (S.D.N.Y. Sept. 14, 1993) (denying Rule 60(b)(1) motion where the plaintiff "fail[ed] to cite a single case in which a court has granted [such] a motion . . . in circumstances similar to those present in this case"); *see also Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S.

380, 392 (1993) ("[I]nadvertence . . . do[es] not usually constitute 'excusable' neglect."). Moreover, plaintiffs cannot create a disputed issue of fact by urging the Court, in a motion for reconsideration, to take judicial notice of "facts" that were known, or at least were easily available, to plaintiffs at the time they filed for summary judgment. *PETA v. U.S. Dep't of Health & Human Servs.*, 226 F. Supp. 3d 39, 54 (D.D.C. 2017) (rejecting the plaintiff's attempt to introduce evidence under Rule 60(b)(1) where the plaintiff was aware of the evidence over a year before submitting its summary judgment pleadings); *see also Ellipso, Inc. v. Mann*, 583 F. Supp. 2d 1, 3 (D.D.C. 2008) (denying Rule 60(b)(1) motion in part because the movant sought "to reinstate the claims based on evidence entirely within his control").

Plaintiffs also confuse a summary judgment motion under Rule 56 and a review of an agency action under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* In the latter case, which is the situation here, the Court reviews an agency decision to see if it complies with the law. *See Girling Health Care, Inc. v. Shalala*, 85 F.3d 211, 215 (5th Cir. 1996) ("Judicial review has the function of determining whether the administrative action is consistent with the law— that and no more."). "The administrative agency is the fact finder," not the court. *Id.* (alteration, citation, and internal quotation marks omitted); *see also* LCvR 7(h)(2) (excepting "cases in which judicial review is based solely on the administrative record" from the requirements that the party moving for summary judgment file a statement of undisputed material facts and that the opposing party file a statement of material facts as to

which there is a genuine issue that needs to be litigated); LCvR 7(h) cmt. ("This provision recognizes that in cases where review is based on an administrative record the Court is not called upon to determine whether there is a genuine issue of material fact, but rather to test the agency action against the administrative record.").

Further, as noted in *NYC C.L.A.S.H., Inc.*, 2020 WL 999851, at *6 n.10, it was unclear if plaintiffs were even raising an argument regarding coercion based on the extent of HUD funding. As a result, the Court noted that "[t]o the extent plaintiffs argue that a PHA's risk of losing all of its public housing funding is 'so coercive as to pass the point at which pressure turns into compulsion,'" the Court could not address the argument given the lack of evidence to support such a claim.[1] *Id.* (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 567 U.S. 519, 580 (2012) (plurality opinion) (citation and internal quotation marks omitted)). Specifically, the Court addressed the plaintiffs' argument under the second prong of the anticommandeering doctrine that the Rule was an impermissible "overlay onto existing housing funding" in violation of the spending power. (Pls.' Mot. for Summ. J. at 21.) For this reason, the Court will not permit plaintiffs to use Rule 60(b)(1) to introduce new facts and arguably a new theory in

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[1] At most, plaintiffs made a passing reference to the possibility that a State's decision not to comply with the Rule "might end up costing them significant funding." *NYC C.L.A.S.H., Inc.*, 2020 WL 999851, at *6 n.10 (quoting Pls.' Opp. to Defs.' Cross Mot. for Summ. J. at 17, ECF No. 37).

a motion for reconsideration.[2]

Next, plaintiffs ask the Court "to memorialize its Fourth Amendment holding into a declaratory judgment that the Smoking Ban and HUD's implementing regulations prohibit PHAs from exceeding the bounds of the Fourth Amendment when implementing the Smoking Ban on a HUD-funded project." (Pls.' Mot. to Recons. at 12.) Plaintiffs' request mischaracterizes the Court's holding. The Court did not hold that the Smoke Free Rule *prohibits* PHAs from exceeding the bounds of the Fourth Amendment; it merely held that the Rule "does not *authorize* any unlawful searches." *NYC C.L.A.S.H., Inc.*, 2020 WL 999851 at *8 (emphasis added). Accordingly, plaintiffs' request to amend the judgment in this respect will be denied.

Finally, plaintiffs argue that the Court should deny summary judgment to both parties on Counts Eight and Nine, which allege that HUD lacked authority to promulgate the Smoke Free Rule under the Commerce Clause, because plaintiffs' claims were mooted by the Court's holding that the Smoke Free

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[2] Similarly, the Court does not agree with plaintiffs' attempt to invoke Rule 15(b)(2) to amend their pleadings to add a recitation of legal principles relating to *NFIB*'s holding that the threat of losing federal funding could be "so coercive as to pass the point at which pressure turns into compulsion." *NFIB*, 567 U.S. at 580 (citation and internal quotation marks omitted). This issue was not "tried by the parties' express or implied consent," as required by Rule 15(b)(2), given plaintiffs' blunderbuss approach to the second prong of the Tenth Amendment's anticommandeering principle. Therefore, the Court will deny plaintiffs' motion for leave to amend their complaint (ECF No. 54).

Rule was a valid exercise of Congress' spending power. (Pls.' Mot. to Recons. at 12–13.) Plaintiffs are correct that the Court did not reach the merits of their Commerce Clause claims because of that holding, *NYC C.L.A.S.H., Inc.*, 2020 WL 999851 at *11, and summary judgment should not have been granted for defendants. The Court will issue an amended Order denying defendants' motion for summary judgment on Counts Eight and Nine as moot.

CONCLUSION

For the reasons stated herein, plaintiffs' motion to reconsider will be denied, their motion to amend the judgment will be denied in part and granted in part, and their motion to amend their complaint will be denied. A separate Order accompanies this Memorandum Opinion.

DATE: July 25, 2020 /s/

ELLEN S. HUVELLE
United States District Judge

United States Court of Appeals for the District of Columbia Circuit

No. 20-5126

September Term, 2022

1:18-cv-01711-ESH

Filed On: October 21, 2022

NYC C.L.A.S.H., Inc., et al.,

Appellants

v.

Marcia L. Fudge, Secretary of Housing and Urban Development, in her official capacity and United States Department of Housing & Urban Development,

Appellees

BEFORE: Srinivasan, Chief Judge; and Ginsburg, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for panel rehearing filed on October 11, 2022, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reid
Deputy Clerk

United States Court of Appeals for the District of Columbia Circuit

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Appellants

v.

Marcia L. Fudge, Secretary of Housing and Urban Development, in her official capacity and United States Department of Housing & Urban Development,

Appellees

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, and Pan, Circuit Judges; and Ginsburg, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reid
Deputy Clerk

U.S. CONST. art. I, §8, cl. 1

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

U.S. CONST. art. I, §8, cl. 3

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

U.S. CONST. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. XIV §1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1437d(f)(2) Federal standards

The Secretary shall establish housing quality standards under this paragraph that ensure that public housing dwelling units are safe and habitable. Such standards shall include requirements relating to habitability, including maintenance, health and sanitation factors, condition, and construction of dwellings, and shall, to the greatest extent practicable, be consistent with the standards established under section 1437f(o)(8)(B)(i) of this title. The Secretary may determine whether the laws, regulations, standards, or codes of any State or local jurisdiction meet or exceed these standards, for purposes of this subsection.

42 U.S.C. §1437d(j)(3)(A)

(A) Notwithstanding any other provision of law or of any contract for contributions, upon the occurrence of events or conditions that constitute a substantial

default by a public housing agency with respect to the covenants or conditions to which the public housing agency is subject or an agreement entered into under paragraph (2), the Secretary may—

(i) solicit competitive proposals from other public housing agencies and private housing management agents which (I) in the discretion of the Secretary, may be selected by existing public housing residents through administrative procedures established by the Secretary, and (II) if appropriate, shall provide for such agents to manage all, or part, of the housing administered by the public housing agency or all or part of the other programs of the agency;

(ii) petition for the appointment of a receiver (which may be another public housing agency or a private management corporation) of the public housing agency to any district court of the United States or to any court of the State in which the real property of the public housing agency is situated, that is authorized to appoint a receiver for the purposes and having the powers prescribed in this subsection;

(iii) solicit competitive proposals from other public housing agencies and private entities with experience in construction management in the eventuality that such agencies or firms may be needed to oversee implementation of assistance made available from the Capital Fund under section 1437g(d) of this title for the housing; and

(iv) take possession of all or part of the public housing agency, including all or part of any project or program of the agency, including any project or program under any other provision of this subchapter; and

(v) require the agency to make other arrangements acceptable to the Secretary and in the best interests of the public housing residents and families assisted under section 1437f of this title for managing all, or part, of the public housing administered by the agency or of the programs of the agency.

Residents of a public housing agency designated as troubled pursuant to paragraph (2)(A) may petition the Secretary in writing to take 1 or more of the actions referred to in this subparagraph. The Secretary shall respond to such petitions in a timely manner with a written description of the actions, if any, the Secretary plans to take and, where applicable, the reasons why such actions differ from the course proposed by the residents.

42 U.S.C. §1437z-3(a) (a) Ownership conditions

A resident of a dwelling unit in public housing (as such term is defined in subsection (c)) may own 1 or more common household pets or have 1 or more common household pets present in the dwelling unit of such resident, subject to the reasonable requirements of the public housing agency, if the resident maintains each pet responsibly and in accordance with applicable State and local public health, animal control, and animal anti-cruelty laws and regulations and with the policies established in the public housing agency plan for the agency.

24 C.F.R. §965.653 Smoke-free public housing.

(a) In general. PHAs must design and implement a policy prohibiting the use of prohibited tobacco products in all public housing living units and interior areas (including but not limited to hallways, rental

and administrative offices, community centers, day care centers, laundry centers, and similar structures), as well as in outdoor areas within 25 feet from public housing and administrative office buildings (collectively, "restricted areas") in which public housing is located.

(b) Designated smoking areas. PHAs may limit smoking to designated smoking areas on the grounds of the public housing or administrative office buildings in order to accommodate residents who smoke. These areas must be outside of any restricted areas, as defined in paragraph (a) of this section, and may include partially enclosed structures. Alternatively, PHAs may choose to create additional smoke-free areas outside the restricted areas or to make their entire grounds smoke-free.

(c) Prohibited tobacco products. A PHA's smoke-free policy must, at a minimum, ban the use of all prohibited tobacco products. Prohibited tobacco products are defined as:

(1) Items that involve the ignition and burning of tobacco leaves, such as (but not limited to) cigarettes, cigars, and pipes.

(2) To the extent not covered by paragraph (c)(1) of this section, waterpipes (hookahs).

24 C.F.R. §965.655 Implementation.

(a) Amendments. PHAs are required to implement the requirements of this subpart by amending each of the following:

(1) All applicable PHA plans, according to the provisions in 24 CFR part 903.

(2) Tenant leases, according to the provisions of 24 CFR 966.4.

(b) Deadline. All PHAs must be in full compliance, with effective policy amendments, by July 30, 2018.

24 C.F.R. §966.4(j)

(j) Entry of dwelling unit during tenancy. The lease shall set forth the circumstances under which the PHA may enter the dwelling unit during the tenant's possession thereof, which shall include provision that:

(1) The PHA shall, upon reasonable advance notification to the tenant, be permitted to enter the dwelling unit during reasonable hours for the purpose of performing routine inspections and maintenance, for making improvement or repairs, or to show the dwelling unit for re-leasing. A written statement specifying the purpose of the PHA entry delivered to the dwelling unit at least two days before such entry shall be considered reasonable advance notification;

(2) The PHA may enter the dwelling unit at any time without advance notification when there is reasonable cause to believe that an emergency exists; and

(3) If the tenant and all adult members of the household are absent from the dwelling unit at the time of entry, the PHA shall leave in the dwelling unit a written statement specifying the date, time and purpose of entry prior to leaving the dwelling unit.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NYC C.L.A.S.H., INC.,
2052 Hendrickson St.
Brooklyn, NY 11234

WILLIAM DONNELL,
118 Haller St., Apt. 29
Wood River, IL 62095

NATHAN FIELDS,
701 5th St, Apt. 4
Albuquerque, NM 87102

CHANEL FOLKS,
2352 Batchelder St., Apt. 4D.
Brooklyn, NY 11229

DIGNA RODRIGUEZ,
420 W. 19 St., Apt. 4E
New York, NY 10011

DOUGLAS SONCKSEN,
66 Honeysuckle Lane
Oak Ridge, TN 37830

and

JAMIE WARD,
1111 Jay St., Apt. 309
Ogdensburg, NY 13669

Plaintiffs,

v.

BEN CARSON, Secretary of Housing and Urban Development, *in his official capacity*,

Civil Action No. 1:18-cv-1711-ESH

451 7th Street S.W.
Washington, DC 20410,

and

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
451 7th Street S.W.
Washington, DC 20410,

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs NYC C.L.A.S.H., INC., William Donnell, Nathan Fields, Chanel Folks, Digna Rodriguez, Douglas Soncksen, and Jamie Ward (collectively "Plaintiffs") bring this action for declaratory and injunctive relief, based on the following allegations.

INTRODUCTION

1. This action, brought pursuant to the relevant provisions of the Administrative Procedure Act, 5 U.S.C. §§701 – 706 (the "APA"), the Fourth Amendment (U.S. Const. Am. IV), the Fifth Amendment (U.S. Const. Am. V), the Tenth Amendment (U.S. Const. Am. IV), and the Fourteenth Amendment (U.S. Const. Am. XIV), seeks to vacate or in the alternative modify the U.S. Department of Housing and Urban Development's ("HUD") rule "Instituting Smoke-Free Public Housing, effective February 3, 2017, codified at 24 CFR Parts 965 and 966 (the "Smoking Ban" or the "Ban").

2. Pursuant to the Smoking Ban, not later

than 18 months from the effective date of the Ban, each public housing agency ("PHA") administering public housing[1] must implement and enforce a ban on the use of prohibited tobacco products in all public housing living units, indoor common areas in public housing, and in PHA administrative office buildings. This ban requirement also extends to all outdoor areas up to 25 feet from the public housing and administrative office buildings.

3. Plaintiff NYC C.L.A.S.H., INC. ("CLASH"), together with the individual Plaintiffs, all of whom are tenants of public housing and smokers, seek judicial review of the Smoking Ban pursuant to 5 U.S.C. § 702, and a judicial determination vacating or in the alternative modifying the Smoking Ban pursuant to 5 U.S.C. § 706.

4. As set forth below, the Smoking Ban violates the "anticommandeering doctrine," violates the constitutional rights of a number of CLASH's members, and the constitutional rights of the Individual Plaintiffs and all other tenants of public housing similarly situated; in addition, the Ban exceeds the authority granted to HUD by Congress; and furthermore, the Ban is arbitrary, capricious, and an abuse of HUD's discretion.

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[1] 24 CFR §965.651defines "public housing" for purposes of the Smoking Ban as "low-income housing, and all necessary appurtenances (*e.g.* community facilities, public housing offices, day care centers, and laundry rooms) thereto assisted under the U.S. Housing Act of 1937 ... other than assistance under section 8 of the 1937 Act."

PARTIES

5. Plaintiff CLASH (NYC C.L.A.S.H. is an acronym for "New York City Citizens Lobbying Against Smoker Harassment") is a New York entity operating since 2002 as a non-profit smokers' rights organization dedicated to protecting the interests of adults who choose to smoke. CLASH has over 2,000 members, over 90% of whom are smokers, and some of whom reside in public housing.

6. Plaintiff William Donnell ("Donnell") is forty-two years of age, is of combined Irish and Native American ancestry, is a smoker, and is an eight-year tenant of the Stevens Building in Wood River, Illinois, a two-story, 46-unit series of attached apartments which are controlled and operated by the Madison County Housing Authority, a PHA which is required to comply with the Smoking Ban. Donnell suffers from multiple physical disabilities and barely survives solely on Social Security disability benefits, leaving him with no reasonable residence alternative to public housing.

7. Plaintiff Nathan Fields ("Fields") is fifty-six years of age, is African-American, is a smoker and is a tenant of the 701 5th Street complex in Albuquerque, New Mexico, a 156-unit housing apartment community which is controlled and operated by the Albuquerque Housing Authority, a PHA required to comply with the Smoking Ban. Fields, like Donnell, survives solely on Social Security disability benefits, leaving him with no reasonable alternative to public housing.

8. Plaintiff Chanel Folks ("Folks") is forty years of age, is African-American, is a smoker and is

a tenant of the Sheepshead Nostrand Houses in Brooklyn, New York, a series of high-rise apartment buildings which are controlled and operated by the New York City Housing Authority (the "NYCHA"), a PHA required to comply with the Smoking Ban.

9. Plaintiff Digna Rodriguez ("Rodriguez") is sixty-four years of age, is Hispanic, is a smoker, and is a tenant of the Robert Fulton houses in New York, New York, a series of high-rise apartment buildings which are managed and operated by the NYCHA.

10. Plaintiff Douglas Soncksen ("Soncksen") is fifty-four years of age, is Caucasian, is a smoker and is a tenant of the Honeysuckle Lane apartments in Oak Ridge, Tennessee, a 28-unit series of ground-level apartments under the control and operation of the Oak Ridge Housing Authority, a PHA required to comply with the Smoking Ban.

11. Plaintiff Jamie Ward ("Ward") is forty years of age, is Caucasian, is a smoker and is a tenant of an apartment in Ogdensburg, New York, under the control and operation of the Ogdensburg Housing Authority, a PHA required to comply with the Smoking Ban.

12. Each of the Individual Plaintiffs, together with some of CLASH's individual members who reside in public housing and thousands of other similarly situated individuals, have suffered and will suffer concrete injuries as a result of the Smoking Ban, to wit: they are now prohibited from exercising their right to engage in a legal activity (smoking) in the privacy of their own homes, under threat of eviction.

13. Defendant, Ben Carson ("Carson"), sued

in his official capacity, is the current Secretary of Housing and Urban Development.

14. Defendant, HUD, is a federal agency established in 1965 by the Department of Housing and Urban Development Act (the "HUD Act"). HUD is responsible for administration of national housing policy and programs and enforcement of fair housing laws. As part of this mandate, HUD provides subsidies to PHAs nationwide pursuant to the Housing Act of 1937 and other applicable authority, and conditions receipt of these subsidies on compliance with HUD's regulations, rules, and policies.

JURISDICTION AND VENUE

15. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702.

16. Venue is proper in this District under 28 U.S.C. § 1391(b) and 5 U.S.C. § 703 because the claims arose in the District, Defendants reside in this District, and a substantial part of the events giving rise to this action occurred in the District. Additionally, pursuant to 28 U.S.C. §1391(e)(1)(A), venue is proper in the District of Columbia because all Defendants maintain offices within the District of Columbia.

STATUTORY AND REGULATORY BACKGROUND

Plaintiffs' Statutory Right to Judicial Review under the APA

17. 5 U.S.C. § 702 – Right of Review, provides, in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

18. 5 U.S.C. § 704 – Actions reviewable, provides, in pertinent part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

19. 5 U.S.C. § 706 – Scope of review, provides, in pertinent part:

> To the extent necessary to a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall–
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

20. In this action, the Plaintiffs have suffered a legal wrong because of HUD's adoption of

the Smoking Ban, the Ban is final, and there is no other adequate remedy. Additionally, HUD, in adopting the Ban, abused its discretion, acted contrary to any rights, powers or privileges it may have, and acted in excess of its statutory and constitutional authority. Therefore, judicial review of the Ban is appropriate under the APA.

Historical Background of HUD & Scope of the HUD's Rulemaking Authority

21. In 1934, Congress passed the National Housing Act (a/k/a Capehart Act), which created the Federal Housing Administration ("FHAD") to insure mortgages and to regulate the rates of interest and terms of the mortgages.

22. Three years later, Congress passed the Housing Act of 1937 (a/k/a Wagner-Steagall Act), which created the United States Housing Authority ("USHA") to aid in the construction of low-rent housing.

23. In 1942, President Franklin Roosevelt signed Executive Order 9070, establishing the National Housing Agency ("NHA"). NHA consolidated FHAD and USHA, together with other housing and mortgage-related agencies, under one umbrella.

24. In 1947, the Housing and Home Finance Agency ("HHFA") was established through Reorganizational Plan No. 3, a directive submitted by President Truman to Congress in accordance with the Reorganization Act of 1945. HHFA, which replaced the NHA, was responsible for administration of federal housing programs from 1947-1965.

25. HHFA consisted of FHAD, the Public Housing Administration ("PHAD"), and the Home

Loan Bank Board, the last of which separated from HHFA in 1955.

26. On May 27, 1947, President Truman delivered a "Special Message to Congress Transmitting Reorganization Plan 3 of 1947." He identified the "provision of adequate housing" as "a major national objective ... " and noted the importance of "grouping ... housing functions in one establishment ... ". As identified by President Truman, the functions, powers and duties of HHFA were to include "facilitat[ion] of home construction and home ownership," establishing a credit reserve system for home financing institutions, maintaining "a system for the insurance of home loans and mortgages to stimulate the flow of capital into home mortgage lending ...", and "provision of decent housing for families of low income ...". Today, these and related duties and functions are the duties and functions of HHFA's direct descendant, HUD.

27. HUD was established on September 9, 1965 when President Lyndon B. Johnson signed the HUD Act into law.

28. Pursuant to HUD's organic (enabling statute), 42 U.S.C. Chapter 44 (Department of Housing and Urban Development, 42. U.S.C. §§ 3531 – 3549), which establishes the agency, its functions, and its responsibilities, "all of the functions, powers, and duties of the [HHFA], of the [FHAD] and of the [PHAD]" were "transferred to and vested in" the Secretary of HUD. (42 U.S.C. § 3534).

29. HUD, like other federal agencies, derives its authority to regulate and to promulgate rules from Congress.

30. As with other federal agencies, HUD's authority to promulgate rules derives either from a specific law or from the agency's organic statute.

31. HUD's rulemaking authority is found in Section 7(d) of the HUD Act, 42 U.S.C. § 3535, which is part of HUD's organic statute. Section 7(d) provides as follows:

> (d) DELEGATION OF AUTHORITY; RULES AND REGULATIONS
>
> The Secretary may delegate any of his functions, powers, and duties to such officers and employees of the Department as he may designate, may authorize such successive redelegations of such functions, powers, and duties as he may deem desirable, and may make such rules and regulations as may be necessary to carry out his functions, powers, and duties. As set forth hereinafter, the functions, powers, and duties of the Secretary of HUD do not authorize the Agency to promulgate the Smoking Ban.

32. Pursuant to 42 U.S.C. § 3534, the "functions, powers, and duties" of the Secretary of HUD as set forth in 42 U.S.C. § 3535 are substantially the same as the functions, powers, and duties that were vested in HHFA.

HUD Promulgates the Smoking Ban

33. On November 17, 2015, during a prior presidential administration, HUD published the proposed Smoking Ban in the Federal Register Vol. 80, No. 221 (80 FR 71762 – 71769), entitled

"Instituting Smoke-Free Public Housing." The Proposed Rule Summary in the November 17, 2015 Federal Register stated:

> **SUMMARY**: This proposed rule would require each public housing agency (PHA) administering public housing to implement a smoke-free policy. Specifically, this rule proposes that no later than 18 months from the effective date of the final rule, each PHA must implement a policy prohibiting lit tobacco products in all living units, indoor common areas in public housing, and in PHA administrative office buildings (in brief, a smoke-free policy for all public housing indoor areas). The smoke-free policy must also extend to all outdoor areas up to 25 feet from the housing and administrative office buildings. HUD proposes implementation of smoke-free public housing to improve indoor air quality in the housing, benefit the health of public housing tenants and PHA staff, reduce the risk of catastrophic fires, and lower overall maintenance costs.

34. On December 5, 2016, HUD published the final Smoking Ban in the Federal Register Vol. 81, No. 233 (81 FR 87430 - 87444), with an effective date of February 3, 2017. The Rule Summary in the December 5, 2016 Federal Register was substantially similar to the Proposed Rule Summary in the November 17, 2015 Register:

> **SUMMARY**: This rule requires each public housing agency (PHA) administering public housing to implement a smoke-free policy. Specifically, no later than 18 months from the effective date of the rule, each PHA must implement a "smoke-free" policy banning the use of prohibited tobacco products in all public housing living units, indoor common areas in public housing, and in PHA administrative office buildings.
>
> The smoke-free policy must also extend to all outdoor areas up to 25 feet from the public housing and administrative office buildings. This rule improves indoor air quality in the housing; benefits the health of public housing tenants, visitors, and PHA staff; reduces the risk of catastrophic fires; and lowers overall maintenance costs.

35. The Smoking Ban was codified at 24 CFR Parts 965 and 966 under "Subpart G – Smoke-Free Public Housing."

36. The core of the Smoking Ban is codified at 24 CFR § 965.653, entitled "Smoke-free public housing," which prohibits the use of all tobacco products in virtually all areas of public housing:

> **§ 965.653 Smoke-free public housing.**
>
> (a) *In general*. PHAs must design and implement a policy prohibiting the use of prohibited tobacco products in all public housing living units and interior areas

(including but not limited to hallways, rental and administrative offices, community centers, day care centers, laundry centers, and similar structures), as well as in outdoor areas within 25 feet from public housing and administrative office buildings (collectively, "restricted areas") in which public housing is located.

(b) *Designated smoking areas.* PHAs may limit smoking to designated smoking areas on the grounds of the public housing or administrative office buildings in order to accommodate tenants who smoke. These areas must be outside of any restricted areas, as defined in paragraph (a) of this section, and may include partially enclosed structures. Alternatively, PHAs may choose to create additional smoke-free areas outside the restricted areas or to make their entire grounds smoke-free.

(c) *Prohibited tobacco products.* A PHA's smoke-free policy must, at a minimum, ban the use of all prohibited tobacco products. Prohibited tobacco products are defined as:

(1) Items that involve the ignition and burning of tobacco leaves, such as (but not limited to) cigarettes, cigars, and pipes.

(2) To the extent not covered by paragraph (c)(1) of this section,

waterpipes (hookahs).

37. The manner and timing of implementation of the Smoking Ban is codified at 24 CFR § 965.655, entitled "Implementation," which provides:

> (a) *Amendments*. PHAs are required to implement the requirements of this subpart by amending each of the following:
>
> (1) All applicable PHA plans, according to the provisions in 24 CFR part 903.
>
> ((2) Tenant leases, according to the provisions of 24 CFR § 966.4.
>
> (b) *Deadline*. All PHAs must be in full compliance, with effective policy amendments, by July 30, 2018.

38. In furtherance of the requirements of the Smoking Ban, 24 CFR § 966.4 (Lease requirements) provides, in pertinent part:

> (e) *The PHA's obligations*. The lease shall set forth the PHA's obligations under the lease, which shall include the following ... .:
>
> (12) (i) To assure that no tenant, member of the tenant's household, or guest engages in:
>
> (B) *Civil activity*. For any units covered by 24 CFR part 965, subpart G, any smoking of prohibited tobacco products in restricted areas, as defined by 24 CFR 965.653(a), or in other outdoor areas that the PHA has designated as smoke-free.

> (ii) To assure that no other person under the tenant's control engages in:
>
> (B) *Civil activity*. For any units covered by 24 CFR part 965, subpart G, any smoking of prohibited tobacco products in restricted areas, as defined by 24 CFR 965.653(a), or in other outdoor areas that the PHA has designated as smoke-free.
>
> (Italics in original, underline added).

39. HUD touts several purported benefits of the Smoking Ban, claiming that it will "improve indoor air quality in public housing; benefit the health of public housing tenants, visitors, and PHA staff; reduce the risk of catastrophic fires; and lower overall maintenance costs." (81 FR 87431). Even assuming, arguendo, that these benefits were to be realized, the Smoking Ban, nonetheless, violates the Constitution and is otherwise defective in numerous respects.

40. In response to the publication of the Proposed Rule on November 17, 2015, HUD received numerous public comments, including comments opposing the Smoking Ban.

41. The most extensive comment was submitted by Audrey Silk ("Silk"), CLASH's founder, on behalf of CLASH and its members, objecting to the Smoking Ban. Silk argued that HUD was exceeding its authority in adopting the Ban, that HUD was interfering with adults' right to engage in a legal activity in the privacy of the home, that the Ban would have a disparate impact on minorities and disabled persons, that the Ban does not effectuate any health benefits to tenants of public housing, and that the Ban is unenforceable.

PLAINTIFFS' RISK OF IMMINENT AND CONCRETE INJURY AND STANDING TO BRING THIS ACTION

42. CLASH has standing to maintain this action because it is a smokers' rights organization and has been dedicated to protecting the interests of adults who choose to smoke since 2002. CLASH has over 2000 members, including tobacco users who reside in public housing. On numerous occasions, Courts have found that CLASH had organizational standing to maintain actions challenging anti-smoking regulations. CLASH has standing to sue in its own right and on behalf of its members. *See, Warth v. Seldin*, 422 U.S. 490 (1975).

43. Each of the Individual Plaintiffs have standing to maintain this action because they are tenants of public housing subject to the Smoking Ban, they all use tobacco products, they will all face unreasonable invasions of their private spaces in connection with enforcement of the Ban, and they will all face eviction if they continue to use tobacco products once the Ban is implemented and enforced nationwide on July 30, 2018. In fact, as set forth herein, some of the Plaintiffs' PHAs have already implemented the Ban and have begun enforcement. Therefore, they are all at risk of imminent and concrete injury in the form of eviction. This constitutes "injury in fact." *See, Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

44. Indeed, in response to HUD's promulgation of the Smoking Ban, PHAs nationwide, including the PHAs that operate and manage the public housing in which Plaintiffs reside, are taking

the steps necessary to implement and enforce the Ban in advance of the July 30, 2018 deadline.

45. Among the steps necessary to implement and enforce the Smoking Ban, PHAs nationwide have already informed Plaintiffs and all other tenants of public housing that they will face eviction if they use tobacco products in the privacy of their homes. Additionally, PHAs nationwide have demanded that Plaintiffs and all other tenants of public housing sign revised leases and/or lease addendums requiring them to refrain from using tobacco products under pain of eviction.

46. For example, in April 2018, Folks and Rodriguez received a "Lease Addendum" dated April 6, 2018 from NYCHA, which was delivered to all tenants of NYCHA-managed properties. The Lease Addendum states, in pertinent part:

> **Your lease will be amended as follows:**
>
> 12(dd): To assure that, in compliance with the Landlord's Smoke-Free Policy, the Tenant, any member of the household, a guest, or another person under the Tenant's control, shall not smoke prohibited tobacco products in restricted areas, as described in the Landlord's Smoke-Free Policy. Restricted areas include, but are not limited to, the Leased Premises, all interior areas of the Development or other developments of the Landlord, and areas within 25 feet of development buildings, or to the property boundary

> where that boundary is less than 25 feet from the property line of a development building. Prohibited tobacco products include, but are not limited to, cigarettes, cigars, pipes, and hookahs (water pipes).

47. The Lease Addendum received by Folks and Rodriguez was delivered by NYCHA under cover letter also dated April 6, 2018, which provides in pertinent part:

> Dear Tenant(s):
>
> Here is an addendum to your lease. It includes NYCHA's new smoke-free policy which is required by the U.S. Department of Housing and Urban Development (HUD). The Smoking Bans go into effect July 30, 2018 ... .
>
> **You must sign and return this lease addendum to NYCHA by July 16, 2018 ... .**
>
> **According to HUD regulations, you must sign and return this lease addendum if you want to maintain your NYCHA residency.**
> (bold in original)

48. Donnell, Fields, Soncksen, and Ward have all received similar notices and lease addendums.

49. Ward received a notice from the Ogdensburg Housing Authority which provides as follows:

> **Smoke-Free Public Housing**
>
> HUD's Smoke-Free Housing policy will take effect on July 30, 2018, meaning you will no longer be allowed to smoke in

> your apartment or within 25 feet of any Public Housing building. Failure to comply with this policy may result in eviction. Each tenant was given a copy of this policy during re-certification. Please refer to that document if you have any questions.

50. Soncksen, for his part, received a letter dated March 14, 2018 from Kari King, Public Housing Manager for the Oak Ridge Housing Authority, which stated in pertinent part:

> Dear Mr. Soncksen:
>
> It has come to my attention, you were seen smoking on your back porch. As of March 1, 2018, a smoke-free policy went into effect which prohibits smoking on porches or within 25 feet of the building.
>
> Since this is a new policy and the first time you were seen violating this policy, we are giving a Free Pass this time. This pass is not considered one of the graduated steps for smoke-free policy violators. Only one free pass will be given to any a [sic] household before we begin with [sic] 1st violation.
>
> I have enclosed a copy of the current Smoke-Free Policy, for your reference.

51. The "Oak Ridge Housing Authority Smoke-Free Policy," as delivered to Soncksen, provides in pertinent part:

> Effective March 1, 2018, the use of tobacco products by residents or guests is prohibited in all public housing living

units and interior areas (including but not limited to hallways, porches, administrative offices, maintenance facilities, warehouses, and similar structures). As well as in outdoor areas within 25 feet from public housing, community room, administrative and maintenance office buildings ... .

Residents and employees who smell tobacco smoke from inside housing authority property are to report this to the Public Housing Manager or to the Administrative Office as soon as possible ... .

Evidence of used tobacco products in the unit, other than trash receptacles, will result in a violation of the smoke free policy.

Failure to abide by this Smoke-Free Policy is a lease violation based on civil behavior with the following consequences:

1st Violation will result in a verbal warning document in the resident file.

2nd Violation will result in a Written Lease Violation.

3rd Violation will result in a Final Written Lease Violation.

4th Violation in any 12 month period will result in a *30 day lease termination*. (Emphasis added).

52. Additionally, the Smoking Ban serves as an influential government document that causes PHAs to take action against public-housing tenants who smoke, including the Individual Plaintiffs and CLASH's members, and the PHAs would not take those actions but for the Smoking Ban and would cease taking those actions upon the rescission of the Smoking Ban.

53. Pursuant to the First Amendment (U.S. Const. Am. I) and analogous provisions of state law, not only the Individual Plaintiffs but also CLASH on behalf of its members would like to petition the relevant PHAs both to void their anti-smoking policies and, failing that, to include "grandfather clauses" for smoking tenants whose residence pre-dates the anti-smoking policies, and the Smoking Ban is an obstacle to the exercise of that right of petition because the Smoking Ban prevents the PHAs from considering such petitions. This also constitutes "injury in fact."

54. Finally, by purporting to make law in the area of smoking and tobacco use without the delegated authority from Congress to make such laws, HUD deprives Plaintiffs of their liberty interest in the separation of powers under the Constitution, further adding to their injuries.

LEGAL DEFECTS OF THE SMOKING BAN

The Smoking Ban Violates the Dual Sovereignty Principle of the Tenth Amendment and the Anticommandeering Doctrine

55. The Tenth Amendment provides that all legislative power not conferred on Congress by the Constitution is reserved for the States:

> The powers not delegated to the United

> States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. (U.S. Const. Am. X).

56. Thus, the Tenth Amendment articulates the principle of "dual sovereignty." *Printz v. United States*, 521 U.S. 898, 918 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

57. Consistent with the Tenth Amendment, "[a]bsent from the list of conferred powers is the power to issue direct orders to the governments of the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1467 (2014). This is one half of the so-called "anticommandeering doctrine," which emerged in *New York v. United States*, 505 U.S. 144 (1992), and *Printz*. The second half emerges under the Spending Clause, which allows "Congress …, in the exercise of its spending power, [to] condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take." *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999); *accord Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576 (2012) ("*NFIB*"). Because "this formidable power, if not checked in any way, would present a grave threat to the system of federalism created by our Constitution," *NFIB*, 567 U.S. at 675, the Supreme Court has developed the coercion half of the anticommandeering doctrine to prevent the federal government's use of its spending power to void the liberty that the people and the states retained in the Tenth Amendment.

58. In *New York*, the Supreme Court held

that a federal law unconstitutionally ordered the State to regulate in accordance with federal standards, and in *Printz*, the Court found that another federal statute unconstitutionally compelled state officers to enforce federal law.

59. Under the first half of the anticommandeering doctrine (compulsion), "Congress may not simply 'commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 161. Put another way:

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. *Printz*, 521 U.S. at 935.

The basic principle is that the Federal Government cannot issue direct orders to state legislatures, state agencies, or state officials. The basic principle is that the Federal Government cannot issue direct orders to state legislatures, state agencies, or state officials.

60. When the original States declared their independence, they claimed the powers inherent in sovereignty: the authority "to do all ... Acts and Things which Independent States may of right do." *Murphy*, quoting Declaration of Independence, ¶ 32. The anticommandeering doctrine adheres to this principle.

61. Crucially, the anticommandeering doctrine applies to the Federal Government as a

whole, and thus applies to actions taken by federal agencies (such as HUD) as well as Congress. This was confirmed in *Printz*:

> Federal commandeering of state governments is such a novel phenomenon that this Court's first experience with it did not occur until the 1970's, when the Environmental Protection Agency promulgated regulations requiring States to prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes. The Courts of Appeals for the Fourth and Ninth Circuits invalidated the regulations on statutory grounds in order to avoid what they perceived to be grave constitutional issues ... . and the District of Columbia Circuit invalidated the regulations on both constitutional and statutory grounds ... . After we granted certiorari to review the statutory and constitutional validity of the regulations, the Government declined even to defend them, and instead rescinded some and conceded the invalidity of those that remained, leading us to vacate the opinions below and remand for consideration of mootness.
>
> Although we had no occasion to pass upon the subject in *Brown,* later opinions of ours have made clear that *the Federal Government* may not compel the States to implement, by legislation *or executive*

action, federal regulatory programs.

Printz, 521 U.S. at 925 (emphasis added and internal citations omitted) (commenting on *Brown v. EPA*, 521 F.2d 827, 838-842 (9th Cir. 1975) and *EPA v. Brown*, 431 U.S. 99 (1997)).

62. The anticommandeering doctrine also serves as a check on federal use of the spending power to coerce state and local compliance: "while Congress may seek to induce States to accept conditional grants, Congress may not cross the point at which pressure turns into compulsion, and ceases to be inducement." *NFIB*, 567 U.S. at 676 (internal quotations omitted). Accordingly, a financial inducement cannot be "so coercive as to pass the point at which pressure turns into compulsion." *South Dakota v. Dole*, 483 U.S 203, 211 (1987). "If States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power." *NFIB*, 567 U.S. at 679. Simply put, "theoretical voluntariness is not enough." *Id.*

63. The anticommandeering doctrine assesses federal use of the spending power under a multi-part test: (a) the use of the spending power "must be in pursuit of the general welfare," *Dole*, 483 U.S. at 207; (b) conditions must be unambiguous, allowing "States to exercise their choice knowingly cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); (c) a financial inducement cannot be "so coercive as to pass the point at which pressure turns into compulsion." *Dole*, 483 U.S. at 211; *NFIB*, 567 U.S. at 676; (d) the federal conditions must be related

"to the federal interest in particular national projects or programs." *Dole*, 483 U.S. at 207-08; and (e) the federal conditions cannot induce unconstitutional action. *Dole,* 483 U.S. at 208.

64. In the case at bar, HUD, by adopting the Smoking Ban, has violated the compulsion half of the anticommandeering doctrine because the Smoking Ban is a federal policy through which HUD purports to require PHAs to implement and enforce this federal policy. This is evidenced by the plain language of the Smoking Ban as set forth in the December 5, 2016 Federal Register:

> This rule ***requires*** each public housing agency (PHA) administering public housing to ***implement*** a smoke-free policy. Specifically, no later than 18 months from the effective date of the rule, each PHA ***must implement*** a "smoke-free" policy banning the use of prohibited tobacco products in all public housing living units, indoor common areas in public housing, and in PHA administrative office buildings. The smoke-free policy ***must*** also extend to all outdoor areas up to 25 feet from the public housing and administrative office buildings. (Emphasis added).

65. Moreover, 24 CFR § 965.653 provides that "PHAs ***must*** design and implement a policy prohibiting the use of prohibited tobacco products in all public housing living units and interior areas ... as well as in outdoor areas ... ." (Emphasis added). This section also provides that "[a] PHA's smoke-free policy

must, at a minimum, ban the use of all prohibited tobacco products." (Emphasis added).

66. Additionally, 24 CFR § 965.655, provides that "PHAs are ***required*** to implement the requirements of this subpart ... ."

67. This is the exact type of explicit, naked "commandeering" of state and local authorities that the anticommandeering rule was developed to prevent. The Smoking Ban is a federal regulatory program, or federal policy, and HUD has issued a direct command to the PHAs to implement and enforce this regulatory program or policy.

68. In *Murphy*, the Supreme Court identified the reasons for the anticommandeering doctrine: (a) it serves as "one of the Constitution's structural protections of liberty"; (b) it "promotes political accountability"; and (c) it "prevents Congress from shifting the costs of regulation to the States." *Murphy*, 138 S. Ct. at 1477.

69. The Smoking Ban runs afoul of each of these three rationales: (a) the Ban is antithetical to the principles of liberty by requiring state and local agencies (PHAs) to subject their tenants to the requirements of a federal policy; (b) the Ban does not promote political accountability because the PHAs are left to implement and enforce the Rule while HUD, the creator of the Rule, is insulated from the grievances of tenants by remaining outside of the enforcement and implementation process; and (c) the Ban imposes burdensome operational costs relating to enforcement and implementation to state and local agencies.

70. In the case at bar, HUD, by adopting the Smoking Ban, has violated the coercion half of the

anticommandeering doctrine because the Smoking Ban is a federal policy through which HUD purports to tie all pre-existing federal housing funding to a PHA's accepting the new Smoking Ban conditions, subject only to the vague qualification to "take whatever ***action [HUD] deems necessary and appropriate***" to address a PHA's noncompliance. 81 Fed. Reg. at 87437 (emphasis added). Given the stakes, that vague qualification does not provide PHAs with knowing cognizance of the consequences of violating the Smoking Ban.

71. The Smoking Ban – which coerces PHAs to adopt policies banning smoking not only inside public housing facilities but also within 25 feet of public housing facilities – lacks a sufficient relationship with the purposes of Congress granting funds to PHAs through HUD, as evidenced by HUD's enabling legislation to help establish "safe" and "decent" homes.

72. For the foregoing reasons, the Smoking Ban violates both the compulsion and the coercion components of the anticommandeering doctrine – and thus the Tenth Amendment – and Plaintiffs are therefore entitled, pursuant to 5 U.S.C. § 706(2)(B), to a judgment (i) holding that the Smoking Ban is contrary to the constitutional powers and privileges of HUD; and (ii) vacating the Smoking Ban.

The Smoking Ban Violates the Fourth Amendment by Authorizing and Requiring PHAs to Engage in Unreasonable Searches and Seizures Targeting Adults Engaging in Legal Activities in the Privacy of their Homes

73. Adults have a fundamental right to

engage in legal activities in the privacy of their homes, free from unreasonable searches and seizures, as guaranteed by the Fourth Amendment.

74. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, *against unreasonable searches and seizures*, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV (emphasis added).

75. The Fourth Amendment, as incorporated through the Fourteenth Amendment, prohibits a state or any political subdivision thereof from subjecting individuals to unreasonable searches and seizures. (U.S. Const. Am. XIV § 1).

76. The use of tobacco products is a legal activity, the prohibition of which does not give government or State authorities a valid basis to enter a home.

77. At issue here is not a fundamental right to smoke or use tobacco products, but *the fundamental right to engage in a legal activity in a private home*, free from unreasonable searches and seizures. This is no different than an individual's right to drink his or her alcoholic beverage of choice or to eat fast food of his or her choosing in the privacy of the home.

78. Although public housing is federally subsidized, it is legally no less a private place of residence subject to the protections of the Fourth

Amendment than any other type of housing.

79. Tenants of public housing are free from non-consensual, warrantless searches of their homes, just as tenants of other forms of housing are free from such searches. See e.g., *Pratt v. Chicago Hous. Auth.*, 155 F.R.D. 177 (D. Ill. 1994).

80. For this reason, HUD's arguments about what regulations may be imposed upon inmates in prisons or other state-run facilities (such as psychiatric wards) are irrelevant in relation to the Smoking Ban, because inmates or psychiatric patients do not reside in private homes. *See* 81 FR 87440 at fn. 11.

81. In *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), the Supreme Court recognized that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." One of those zones of privacy is created by the Fourth Amendment, which explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Id.* (quoting U.S. Const. Am. IV).

82. Four years earlier, in *Mapp v. Ohio*, 367 U.S. 643, 656-57 (1961), the Supreme Court laid the groundwork for the holding in *Griswold*:

> We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced

> confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty [secured] ... only after years of struggle" ... . They express "supplementing phases of the same constitutional purpose -- to maintain inviolate large areas of personal privacy." *Id*. (internal citations omitted).

83. Indeed, even far earlier than *Mapp*, the Supreme Court recognized the boundary of the home. In *Boyd v. United States*, 116 U.S. 616, 630 (1886), the Court described the Fourth and Fifth Amendments as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."

84. Thus, government searches conducted without a warrant, particularly those of a private home, are *per se* unreasonable subject to only a few exceptions, one of which is if the government received consent to conduct the search. See e.g., *Arizona v. Gant* 556 U.S. 332, 338 (2009). This is true not only for searches conducted by police officers for evidence of a crime, but also for administrative searches conducted for purposes of civil code enforcement (such as PHAs enforcing the Smoking Ban). See e.g., *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 534 (1967).

85. In the case at bar, the Smoking Ban, like any other regulation, is premised on enforcement to ensure compliance.

86. In order to enforce the Smoking Ban, PHAs will need to violate the Fourth Amendment rights of tenants, because the prohibited activity will

be occurring inside the privacy of the tenants' units. Detection of alleged violations will inevitably involve entry of PHA officials into the tenants' "sphere of privacy" in order to engage in unconstitutional searches and seizures to confirm the suspected use of tobacco products.

87. HUD intentionally fails to address the enforcement issue in its Final Rule Summary and instead claims that the PHAs will be left to enforce the Smoking Ban:

> HUD has not included enforcement provisions in this rulemaking because lease enforcement policies are typically at the discretion of PHAs, and it is appropriate for local agencies to ensure fairness and consistency with other policies. (80 FR 87437).

88. HUD's failure to provide specific enforcement mechanisms is telling. HUD fails to provide these mechanisms because there is no meaningful enforcement mechanism that can make the Smoking Ban workable other than searches of tenants' private spaces or entry into those spaces in order to verify supposed violations of the Smoking Ban, both of which would violate the Fourth Amendment.

89. The implementation and enforcement of the Smoking Ban violates and will continue to violate the Fourth Amendment rights of Plaintiffs and all adult tenants of public housing who engage in the legal activity of using tobacco in the privacy of their own homes.

90. For the foregoing reasons, the Smoking

Ban violates the Fourth Amendment, and Plaintiffs are therefore entitled, pursuant to 5 U.S.C. § 706(2)(B), to a judgment (i) holding that the Smoking Ban is contrary to the constitutional rights of Plaintiffs and all other tenants of public housing similarly situated, to wit: their Fourth Amendment right to engage in legal activities in the privacy of their homes, free from unreasonable searches and seizures; and (ii) vacating the Smoking Ban; or, in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

The Smoking Ban Violates Due Process Clauses of the Fifth and Fourteenth Amendments by Authorizing and Requiring PHAs to Violate the Fundamental Liberty of Individuals to Be Free from Unwarranted Governmental Intrusion into the Home

91. The Fifth Amendment restrains the Federal Government, and § 1 of the Fourteenth Amendment restrains the states, from depriving any person of life, liberty, or property without due process of law.

92. The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall

> be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation. (Emphasis Added)

93. The Supreme Court's interpretation of "liberty" is the same for purposes of the Fifth and Fourteenth Amendments.

94. As Justice Kennedy wrote in the majority opinion in *Lawrence v. Texas*, 539 U.S. 558, 562 (2003):

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.

95. Under *Lawrence* and related Supreme Court decisions, adults have the fundamental right (liberty) to engage in legal activities within the privacy of their own homes.

96. In *Stanley v. Georgia*, the Supreme Court held that mere possession of obscene material in one's home could not be a crime and accordingly found unconstitutional a Georgia law targeting possession of these materials. 394 U.S. 557 (1969). "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Id*. at 564.

97. Although *Stanley* was decided on First Amendment grounds, the Supreme Court later made clear that the sanctity of the home was at the core of the decision:

> In a later case, the Supreme Court noted that *Stanley* was not based on the notion that the obscene matter was itself protected by a constitutional penumbra of privacy, but rather was a "reaffirmation that 'a man's home is his castle.'" At the same time the Court noted, "the Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education."

Ravin v. State, 537 P.2d 494, 503 (Alaska 1975) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 6 (1973); *United States v. Orito*, 413 U.S. 139, 142 (1973), footnotes omitted).

98. Indeed, as the Supreme Court stated in *Orito*:

> The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education. It is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public.

Orito, 413 U.S. at 142-143.

99. In *New York City C.L.A.S.H. v. City of New York*, 315 F. Supp. 2d 461 (S.D.N.Y. 2004), the District Court for the Southern District of New York

upheld various state and city smoking law amendments relating to regulation of smoking in *public* locations. However, the Court allowed that the result would be different were there to be intrusion into private locations:

> The Smoking Bans also do not attempt to intrude in such places that would be considered to be within a person's sphere of privacy, such as in a private residence, automobile, hotel room, or private social event, and thus, do not ruffle the implied right of privacy in the "penumbras" of the Bill of Rights. *Id*. at 479 fn. 13 (citing *Griswold*, 381 U.S. at 484-85).

100. Again, at issue here is not a fundamental right to smoke or use tobacco products, but *the fundamental right to engage in a legal activity in a private home*. See *Orito*, 413 U.S. at 142-143.

101. This right has also been recognized in some State Constitutions. For example, Alaska's Constitution provides: "The right of the people to privacy is recognized and shall not be infringed." (Alaska Const. Art. I, § 22).[2]

102. As Court in *Ravin* recognized, consistent with Supreme Court precedent:

> If there is any area of human activity to which a right to privacy pertains more than any other, it is the home. The importance of the home has been amply demonstrated by constitutional law.

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[2] Hawaii has a similar provision. (Hawaii Const. Art. I, § 5).

537 P.2d at 503.

103. Other State courts have recognized the Supreme Court's ample precedent in the area of privacy in the home:

> Although it is conceivable that some legitimate public interest might warrant state interference with what an individual consumes, "Big Brother" cannot, in the name of *Public* health, dictate to anyone what he can eat or drink or smoke in the *privacy* of his own home.

People v. Sinclair, 387 Mich. 91, 133, 194 N.W.2d 878, 896 (Mich. 1972) (Kavanagh, J., concurring) (emphasis in original).

104. The Smoking Ban violates the Due Process Clauses of the Fifth and Fourteenth Amendments by interfering with the fundamental liberty of individuals (in this case the Individual Plaintiffs and similarly situated tenants of public housing) to engage in a legal activity within the privacy of their homes.

105. The Fifth and Fourteenth Amendments fundamentally protect the liberties of individuals to make personal legal behavioral choices within the confines of their homes.

106. For the foregoing reasons, the Smoking Ban violates the Fifth and Fourteenth Amendments, and Plaintiffs are therefore entitled, pursuant to 5 U.S.C. § 706(2)(B), to a judgment (i) holding that the Smoking Ban is contrary to the constitutional rights of Plaintiffs and all other tenants of public housing similarly situated, to wit: their Fifth and Fourteenth

Amendment liberty to engage in legal activities in the privacy of their homes, (ii) vacating the Smoking Ban; or, in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

The Smoking Ban Violates the "Unconstitutional Conditions Doctrine" by Conditioning Tenants' Receipt of the Benefit of Public Housing on Giving Up their Fourth Amendment Rights

107. The Supreme Court has stated in a number of contexts that "the government may not require a person to give up a constitutional right ... in exchange for a discretionary benefit conferred by the government." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). This is known as the "unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dis*t., 133 S.Ct. 2586, 2594 (2013).

108. As one district court put it, "the government cannot do indirectly that which it cannot do directly." *Lea Family P'Ship Ltd. v. City of Temple Terrace*, 2017 U.S. Dist. LEXIS 46408 at *13 (citing *Koontz*, 133 S. Ct at 2594).

109. Tenancy in public housing is a discretionary benefit conferred on Plaintiffs and all other tenants of public housing by PHAs together with HUD, which provides subsidies to the PHAs and sets regulations that the PHAs must follow.

110. The Smoking Ban unconstitutionally forces Plaintiffs and all other adult tenants of public

housing who choose to engage in the legal activity of using tobacco in the privacy of their own homes to choose between their right to be free from unreasonable search and seizure in their homes on the one hand, and their tenancy in public housing on the other hand.

111. Under the Smoking Ban, if Plaintiffs and all other similarly situated tenants of public housing accept the benefit of public housing, they are agreeing to submit to unreasonable search and seizure in violation of their Fourth Amendment rights.

112. HUD, together with the PHAs, has coerced and will continue to coerce Plaintiffs and all other similarly situated tenants of public housing into acceptance of the Smoking Ban and forfeiture of their Fourth Amendment rights through the threat of eviction.

113. HUD cannot legally coerce Plaintiffs and other tenants of public housing into accepting warrantless, non-consensual searches of their units in relation to enforcement of the Smoking Ban.

114. Likewise, HUD cannot legally withhold the benefit of tenancy in public housing from Plaintiffs and other tenants of public housing if they choose to exercise their Fourth Amendment rights to be free from unreasonable searches of their units.

115. For the foregoing reasons, the Smoking Ban violates the unconstitutional conditions doctrine, and Plaintiffs are therefore entitled, pursuant to 5 U.S.C. § 706(2)(B), to a judgment (i) holding that the Smoking Ban is contrary to the constitutional rights of Plaintiffs and all other tenants of public housing similarly situated, to wit: their Fourth Amendment

right to engage in legal activities in the privacy of their homes, free from unreasonable searches and seizures; and (ii) vacating the Smoking Ban; or, in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

HUD Lacks Authority and Jurisdiction to Promulgate the Smoking Ban, as Congress May Not Regulate Intrastate Activities that Do Not Have a "Substantial Effect" on Interstate Commerce or Are "Completely Internal," Including Smoking Bans in Private Residences

116. Prohibitions and restrictions on smoking, or where smoking may occur, have always been a matter of police power over public health, beyond Congress's power to regulate matters affecting interstate commerce and beyond Congress's power to grant authority to federal agencies to regulate. This power is reserved to the States.

117. Although Congress (and by extension, federal agencies acting pursuant to Congressional grants of authority) may exercise the federal power over commerce in order to undertake measures to regulate activities affecting public health in areas under *federal jurisdiction* (such as in national parks or on military bases), there is no federal police power with respect to the regulation of activities which are "completely internal ... ." *United States v. Lopez*, 514 U.S. 549, 594 (1995)(Thomas, J., concurring).

118. Congress lacks power over activities that do not "substantially affect[]" interstate commerce. *Id.* at 559. Consequently, the general police power is retained by the States. *Id.* at 568.

119. Yet, the Smoking Ban prohibits smoking within private living quarters in public housing, despite the fact that this activity has no discernible nexus to interstate commerce. For that reason alone, the Ban is constitutionally defective. Indeed, as one federal District Court neatly summarized, regulation of indoor air quality by the federal Government does not have a sound legal basis because there is no nexus with interstate commerce:

120. Given the holdings in *United States v. Lopez*, 514 U.S 549 (1995) and *United States v. Hartsell*, 127 F.3d 343 (4th Cir. 1997), an argument may exist concerning where the federal government derives the authority to regulate indoor air quality, a patently intrastate environmental concern. Being neither interstate or commercial, ***it is unclear where indoor air finds a nexus with the instrumentalities of interstate commerce or how it substantially affects interstate commercial transactions***. *Flue-Cured Tobacco Coop. Stabilization Corp. v. United States EPA*, 4 F. Supp. 2d 435, 466 n. 38 (M.D.N.C. July 17, 1998)(internal citations edited)(emphasis added).

121. Moreover, even *if* Congress's power over commerce did extend to regulation of smoking within private residences (which it most certainly does not), the Smoking Ban is a gross regulatory overreach in that it intrudes into the privacy of the home in a manner that goes far beyond the anti-smoking regulations that have been promulgated at the State and local levels, which generally relate to the regulation of tobacco use only in *public* locations.

122. All fifty States have utilized their

general police power to enact comprehensive anti-smoking and other tobacco use regulations. However, no State prohibits the use of tobacco products in private residences except when used as a daycare center or for some other commercial purpose.[3] In fact, almost all States explicitly exempt private homes unless used for daycare or commercial purposes.

123. In *Lopez*, the Court considered the Gun-Free School Zones Act of 1990, which made it a federal offense to possess firearms in a school zone. *Lopez*, 514 U.S. at 551. However, as the Act "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce." *Id*. Therefore, the Act was constitutionally defective. *Id*.

124. Justice Kennedy, concurring, wisely observed the problems that may occur when the federal government infringes on the States' police power:

> The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by

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[3] Many States prohibits smoking in private residences utilized as daycare centers or for a commercial purpose. See e.g., Arizona: 36-601.01 (Smoke-free Arizona Act); Arkansas: Act 96 of 1913, As Amended by Act 990 of 1991 (Ark. Code Ann. § 20-7-109(a)(1)) and Act 8 of the First Extraordinary Session of 2006 (Ark. Code Ann. § 20-27- 1801-1809) (Clean Indoor Air Act); California: Labor Code, Division 5. Safety in Employment Part 1, Chapter 3, 6404.5; Florida: Florida Clean Indoor Air Act. 386.203(1), 386.2045.

> regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term. The tendency of this statute to displace state regulation in areas of traditional state concern is evident from its territorial operation. There are over 100,000 elementary and secondary schools in the United States. Each of these now has an invisible federal zone extending 1,000 feet beyond the (often irregular) boundaries of the school property. *Id*. at 583 (Kennedy, J., concurring)(internal citations omitted).

125. With respect to public housing, there are approximately 1.2 million households living in public housing units, managed by approximately 3,300 PHAs.[4] States have traditionally laid claim to anti-smoking regulations and other regulations relating to the use of tobacco products, just as the Gun-Free School Zones Act created an invisible federal zone around schools, the Smoking Ban creates *an invisible federal zone inside of private residences*.

126. The *Lopez* Court also commented on *Gibbons v. Ogden*, 22 U.S. 1 (1824), in which the Court held that a federal law that licensed ships to engage in the "coasting trade" pre-empted a New York law granting a 30-year monopoly to Robert Livingston and Robert Fulton to navigate the State's waterways by steamship. The Court in *Ogden* found that the federal

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[4] See HUD – "What is Public Housing?" – available at https://www.hud.gov/program_offices/public_indian_housing/programs/ph (last visited Apr. 27, 2020).

power over commerce extended to commerce conducted partly within a State, however:

> At the same time, the Court took great pains to make clear that Congress could *not* regulate commerce "which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." Moreover, while suggesting that the Constitution might not permit States to regulate interstate or foreign commerce, the Court observed that "inspection laws, quarantine laws, **health laws** of every description, as well as laws for regulating the internal commerce of a State" were but a small part "of that immense mass of legislation ... not surrendered to a general government." **From an early moment, the Court rejected the notion that Congress can regulate everything that affects interstate commerce.** That the internal commerce of the States and the numerous state inspection, quarantine, and health laws had substantial effects on interstate commerce cannot be doubted. Nevertheless, they were not "surrendered to the general government."

Lopez, 514 U.S. at 594 (citing *Ogden*) (internal citations omitted)(italics in original, bold added) (Thomas, J., concurring).

127. Indeed, as regards *intrastate* matters, Congress has the authority to regulate only those activities that substantially affect interstate or foreign commerce. *Lopez*, 514 U.S. at 595 (Thomas, J. concurring).

128. As Justice Thomas made clear in *Lopez*, health laws are the exclusive province of the States and their local subdivisions, even to the extent a matter of health may bear somewhat on interstate commerce. The exclusive power of the States over matters of public health is all the more compelling when applied to matters (such as the non-public use of tobacco products) that occur within the sanctuary of private living quarters, where there is no discernible link to interstate commerce.

129. In the December 5, 2016 Rule Summary, HUD inadvertently conceded that federal agencies do not have the power to promulgate anti-smoking regulations or other regulations relating to the use of tobacco products outside of areas under the jurisdiction of the particular agency, regardless of whether those areas are public or non-public locations:

> Courts have held that protecting persons from SHS [secondhand smoke] is a valid use of the State's police power that furthers a legitimate government purpose. (81 FR 87440)

130. Further, in two footnotes, HUD notes that the basis for this assertion is "jurisprudence on smoking prohibitions in public areas and in the state prison context." Id. at fn. 11. HUD goes on to cite *Fagan v. Axelrod*, 550 N.Y.S.2d 552, 560 (N.Y. Sup. Ct. 1990) and *Chance v. Spears*, 2009 U.S. Dist.

LEXIS 11034.

131. However, HUD's reliance on both *Fagan* and *Chance* is misplaced. *Chance* involved an inmate's Fourteenth Amendment Equal Protection challenge to a smoking ban adopted by the West Virginia Department of Corrections, *a state facility*, and certainly not a private residence. *Chance*, 2009 U.S. Dist. LEXIS at*34-37. *Fagan* involved a challenge by tobacco users to the constitutionality of the 1989 New York State Clean Indoor Air Act, *a state law* that affected *only public locations*. *Fagan*, 550 N.Y.S.2d at 552.

132. Simply put, federal agencies are not permitted to promulgate anti-smoking regulations or other regulations relating to the use of tobacco products in relation to properties outside of federal jurisdiction, particularly in relation to private living quarters that have no link to interstate commerce, because Congress lacks the power to grant any such authority to federal agencies. Accordingly, HUD does not now, nor has it ever had the authority to promulgate the Smoking Ban.

133. For the foregoing reasons, the Smoking Ban was promulgated by the use of police powers constitutionally reserved to the States, and moreover promulgated in excess of HUD's statutory jurisdiction, authority, and/or limitations; and Plaintiffs are therefore entitled to a judgment (i) pursuant to 5 U.S.C. § 706(2)(B), holding that the Smoking Ban is an improper exercise of general police powers reserved to the States; (ii) pursuant to 5 U.S.C. § 706(2)(C), holding that the Smoking Ban was promulgated in excess of HUD's statutory

jurisdiction, authority, and/or limitations; and (iii) vacating the Smoking Ban; or, in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

HUD Lacks Authority and Jurisdiction to Promulgate the Smoking Ban, as Neither Congress nor the Executive Branch Has Granted HUD or Any Other Federal Agencies Authority to Regulate the Use of Tobacco Products in Non-Public Locations

134. The Smoking Ban regulates the use of tobacco products in private living quarters.

135. Neither HUD's organic statute nor any other statute gives HUD the authority or jurisdiction to regulate the use of tobacco products in private living quarters.

136. Certain agencies have been granted limited authority by Congress through the agencies' organic statutes or via Executive Order or other Executive document to regulate the use of tobacco products in public locations within the agency's jurisdiction, including the workplace. However, none have been granted authority to regulate the use of tobacco products in non-public locations.

137. For example, the National Park Service ("NPS"), an agency within the Department of the Interior ("DOI"), has adopted a policy prohibiting smoking in the interior of all NPS-owned, leased, or administered buildings, within 25 feet of building entrances, within NPS vehicles, or in other areas designated by site managers. *See*, United States Department of the Interior, National Park Service,

Director's Order #50D: Smoking Policy (June 29, 2009)("Order #50D").

138. Director's Order #50D rests on Congressional and Executive authority, including the National Park Service Organic Act (16 U.S.C. §§ 1 – 4), delegations of authority contained in Part 310 Chapter 11 of the Department of the Interior Manual (310 DM 11), and Executive Order 13058: "Protecting Federal Employees and the Public from Exposure to Tobacco Smoke in the Federal Workplace" (issued August 9, 1997 by President Bill Clinton).

139. Section 1 of Executive Order 13058 makes clear that the scope of the Order extends only to public locations:

> **Section 1**. Policy. It is the policy of the executive branch to establish a smoke-free environment for Federal employees and members of the public *visiting or using Federal facilities*. The smoking of tobacco products is thus prohibited *in all interior space owned, rented, or leased by the executive branch of the Federal Government*, and in any *outdoor areas* under executive branch control in front of air intake ducts. (Emphasis added).

140. Part 310, which like Director's Order #50D, relies on Executive Order 13058, establishes a smoking policy for all facilities occupied by the DOI:

> Smoking is prohibited in the interior space of all facilities occupied by and/or controlled by the Department of the Interior. 310 DM 11.2.

141. Crucially, further demonstrating that

there is no federal authority that grants agencies the power to prohibit the use of tobacco products in non-public locations, Part 310 specifically excludes residential areas of DOI facilities:

142. There is a perfectly good reason why Congress has never granted *any* federal agency the authority to regulate the use of tobacco products in non-public locations, and why there is no Executive Order that grants such authority: use of tobacco products in non-public locations has no connection whatsoever to interstate commerce and is outside the province of the Federal Government.

143. As there is no authority emanating from Congress or the President permitting regulation of the use of tobacco products in non-public locations, HUD exceeded its authority in promulgating the Smoking Ban.

144. For the foregoing reasons, the Smoking Ban was promulgated in excess of HUD's statutory jurisdiction, authority, and/or limitations and Plaintiffs are therefore entitled, pursuant to 5 U.S.C. § 706(2)(C), to a judgment (i) holding that the Smoking Ban was promulgated in excess of HUD's statutory jurisdiction, authority, and/or limitations; and (ii) vacating the Smoking Ban; or, in the alternative to modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

HUD Lacks Authority and Jurisdiction to Promulgate the Smoking Ban, as Neither Congress nor the Executive Branch Has Granted HUD or Any Other Federal Agencies Authority to Regulate Indoor Air Quality on a Nationwide Basis

145. One of the stated rationales of the Smoking Ban is "improvement of indoor air quality."

146. However, neither HUD's organic statute nor any other statute gives HUD the authority or jurisdiction to regulate indoor air quality on a nationwide basis, particularly in areas such as private living quarters that have no connection to interstate commerce.

147. While certain agencies have been granted limited authority by Congress through the agencies' organic statutes or via Executive Order or other Executive document to regulate tobacco use in the federal workplace, there is no statute that permits a federal agency to regulate indoor air in areas wholly beyond the jurisdiction of that agency.

148. As the Court in *Flue-Cured Tobacco* opined (see paragraph 114 *supra*), regulation of indoor air by the federal Government does not have a sound legal basis because there is no " "nexus with the instrumentalities of interstate commerce or how it substantially affects interstate commercial transactions". *Flue-Cured Tobacco Coop*., v. 4 F. Supp. 2d at 466 n. 38.

149. At the federal level, authority to promulgate rules to regulate indoor air with respect to tobacco smoke, particularly in relation to private homes, has not been granted to any agency. As there

is no authority emanating from Congress or the President permitting nationwide regulation of indoor air quality, HUD exceeded its authority in promulgating the Smoking Ban.

150. For the foregoing reasons, the Smoking Ban was promulgated in excess of HUD's statutory jurisdiction, authority, and/or limitations and Plaintiffs are therefore entitled, pursuant to 5 U.S.C. § 706(2)(C), to a judgment (i) holding that the Smoking Ban was promulgated in excess of HUD's statutory jurisdiction, authority, and/or limitations; and (ii) vacating the Smoking Ban; or, in the alternative to modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

HUD Lacks Authority and Jurisdiction to Promulgate the Smoking Ban, as Neither Congress nor the Executive Branch Has Granted HUD Specific Authority to Regulate the Use of Tobacco Products in Any Location, Whether Non-Public or Otherwise

151. Neither HUD's organic statute nor any other statute gives HUD the authority or jurisdiction to regulate the use of tobacco products, whether in private living quarters *or anywhere else*.

152. In fact, the only federal agency specifically granted authority to promulgate regulations relating to tobacco products is the Food and Drug Administration ("FDA"), an agency within the U.S. Department of Health and Human Services ("HHS").

153. Moreover, even the FDA's authority is limited to regulation of the tobacco products directly,

and for the most part not targeted at the *use* of the tobacco products.

154. The FDA is responsible for protecting and promoting public health through the control and supervision of, *inter alia*, food safety, tobacco products, dietary supplements, pharmaceutical drugs, vaccines, biopharmaceuticals, blood transfusions, medical devices, cosmetics, and veterinary products.

155. In 2009, Congress expressed its clear intent that the FDA be the federal agency vested with the authority to regulate tobacco products, enacting the Family Smoking Prevention and Tobacco Control Act (the "FSPTCA"). (Pub.L. 111-31, H.R. 1256, amending the Federal Food, Drug and Cosmetic Act (the "FDCA"), 21 U.S.C. §§ 301 *et seq*.). The FSPTCA now gives the FDA the power to regulate the tobacco industry that it did not have under the FDCA.

156. The FSPTCA creates the Center for Tobacco Products to implement the FSPTCA; requires tobacco companies to reveal all product ingredients; allows the FDA to change tobacco product content; bans flavored cigarettes; delegates authority to the FDA to promulgate rules that prevent tobacco sales except face-to-face exchanges between retailer and consumer; limits advertising that could attract young smokers; sets requirements for prominent warning labels on cigarette packages; and requires FDA approval for the use of advertising expressions that convey that a particular tobacco product poses a reduced health risk.

157. The FSPTCA was enacted in response to the Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (1999), in

which the Court, considering the FDCA as a whole, held that Congress had not granted the FDA jurisdiction to regulated tobacco products.

158. In 1996, the FDA asserted jurisdiction to regulate tobacco products after having expressly disavowed any such authority. *Brown & Williamson*, 529 U.S. at 125 (citing 61 FR 44619-45318). The FDA's basis for asserting jurisdiction was that nicotine is a "drug" within the meaning of the FDCA. *Brown & Williamson*, 529 U.S. at 125. Pursuant to this supposed authority, the FDA promulgated regulations intended to reduce tobacco consumption among children. *Id*.

159. However, as the court in *Brown & Williamson* noted:

> Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law."

Brown & Williamson, 529 U.S. at 125 (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

160. Moreover, as the court in *Brown & Williamson* also observed:

> And although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Brown & Williamson, 529 U.S. at 125-126 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

161. The Court in *Brown* held that Congress "clearly precluded the FDA from jurisdiction to regulate tobacco products." *Brown & Williamson*, 529 U.S. at 126. The authority to regulate tobacco products was "inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA." *Id*.

162. It was not until the enactment of the FSPTCA, which was enacted to amend the FDCA specifically in response to the decision in *Brown & Williamson*, that Congress specifically authorized the FDA to regulate tobacco products and specifically the FDA to reissue the invalidated 1996 regulations. *Bullitt Fiscal Court v. Bullitt County Bd. of Health*, 434 S.W.3d 29, 38-39 (Sup. Ct. Kentucky 2014)(citing *Brown & Williamson*).

163. Outside of the FSPTCA's grant of authority to the FDA to regulate tobacco products, Congress has not spoken specifically about the nationwide regulation of tobacco products except in several narrow instances spread across six separate pieces of legislation since 1965: requirements that health warnings appear on tobacco packaging and in printed and outdoor advertisements (*see* 15 U.S.C. §§ 1331, 1333, 4402); prohibition of advertising tobacco products through "any medium of electronic communication" subject to regulation by the Federal Communications Commission (FCC)(*see* 15 U.S.C. §§

1335, 4402(f)); the requirement that the Secretary of HHS report to Congress every three years on research findings about "the addictive property of tobacco" (*see* 42 U.S.C. § 290aa-2(b)(2)); and the requirement that States' receipt of certain federal block grants are contingent on their making it unlawful "for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18," (*See* 42 U.S.C. § 300x-26(a)(1)).

164. With respect to HUD, there is no administrative structure created by Congress that would permit the agency to regulate tobacco products *or* their use on nationwide basis, which is what HUD is doing in promulgating the Smoking Ban affecting approximately 1.2 million households under the control of approximately 3,300 PHAs nationwide.

165. In the absence of specific authority emanating from Congress to supplement HUD's organic statute, HUD is prohibited from regulating the *behavior* of public housing tenants (use of tobacco products) as much as regulation of the tobacco products themselves.

166. To the extent *any* agency, including the FDA, would seek to regulate tobacco products or their use in private residences, there is no Congressional authority whatsoever for such regulation. Nonetheless, as the FDA is the proper agency to regulate tobacco products or their use on a nationwide basis, HUD would be in excess of its authority with respect to promulgation of *any* anti-smoking regulation, let alone one relating to tobacco use in private living quarters.

167. For the foregoing reasons, the Smoking Ban was promulgated in excess of HUD's statutory jurisdiction, authority, and/or limitations and Plaintiffs are therefore entitled, pursuant to 5 U.S.C. § 706(2)(C), to a judgment (i) holding that the Smoking Ban was promulgated in excess of HUD's statutory jurisdiction, authority, and/or limitations; and (ii) vacating the Smoking Ban; or, in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

The Smoking Ban is Arbitrary, Capricious, and an Abuse of Discretion

168. In support of the Smoking Ban, HUD relies on several health-related rationales, asserting that the Ban will "improve indoor air quality in the housing, benefit the health of public housing tenants and PHA staff, [and] reduce the risk of catastrophic fires." These rationales are arbitrary, capricious, and an abuse of discretion because (a) they are not based on sound scientific principles, (b) the subjects of indoor air quality, public health, and fire prevention are not within HUD's area of agency expertise, (c) none of these rationales justify the gross invasion of privacy and the sanctity of the home caused by the Ban, (d) none of these rationales justify a "one-size fits all" nationwide policy that fails to account for local conditions, and (e) the Ban will actually cause harm to public housing tenants who use tobacco products, and prevent none for non-smokers living in other apartments.

169. The Smoking Ban is predicated on the scientifically dubious notion that the tobacco product

emissions produced by public housing tenants using tobacco products within their private living quarters poses a health risk to tenants living in other apartments.

170. To date, there is no scientific study in existence that has reliably quantified harm to anyone living in an apartment where there is smoking that is occurring in another apartment.

171. As well, HUD cites no credible data or studies in support of its fire-prevention rationale.

172. HUD is not the appropriate agency to promulgate regulations addressing the issue of smoking and its impact on the health of residents in all other apartments, or addressing fire prevention, because HUD's expertise is limited to housing policy and not public health or the science underlying smoking or fire prevention.

173. Moreover, the Smoking Ban targets a particular *behavior* (use of tobacco products), and a legal one at that. HUD's agency mission relates to housing policy, not regulation of adult behavior. Targeting adult behavior through regulation that has nothing to do with housing policy is as much an abuse of discretion as HUD's trespass into the areas of health and science.

174. HUD seeks to impose smoking cessation on adults who choose to smoke, as evidenced by the manner in which the Proposed Rule Summary and Final Rule Summary promote the purported benefits of smoking cessation. Indeed, in its Regulatory Impact Analysis for the Smoking Ban, HUD touts the supposed health and financial benefits to smokers by stating that "[s]uch a positive outcome is desired by

HUD."[5] This sort of foray into public health policy goes well beyond the agency's mission and powers.

175. Most importantly, the Smoking Ban represents an abuse of discretion because it authorizes PHAs to invade the private living quarters of public housing tenants, who have a right to quiet enjoyment of their homes free from governmental intrusion as much as a resident of any other form of housing.

176. Given the lack of credible scientific support for the Smoking Ban, and how no health benefits are gained by non-smokers living in other apartments, the egregious invasion of tenants' privacy is a particularly abusive use of HUD's powers. As the *British Medical Journal* wrote:

> Homes are assumed to be the 'castles' of their occupants, where a wide range of private freedoms of expression are sanctified that are prohibited in public. It would seem inconceivable in any but the most authoritarian states for smoking to be banned in homes.[6]

177. The lack of credible scientific evidence

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[5] *See* HUD, "REGULATORY IMPACT ANALYSIS – Instituting Smoke-Free Public Housing – Final Rule" at p. 27:13 (Dec. 5, 2016) – available at https://www.regulations.gov/document?D=HUD-2015-0101-1014 (last visited Apr. 27, 2020).

[6] The future of smoke-free legislation, *British Medical Journal* 2007; 335:521 available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1976495/ (last visited Apr. 27, 2020).

underpinning the Smoking Ban also shows the arbitrariness of attempting to impose a nationwide rule on public housing tenants who live in a wide variety of local conditions that vary widely, from connected apartments, to unattached houses, to mobile homes.

178. For example, when former NYCHA Commissioner Shola Olatoye was recently asked about bringing free WiFi access to public housing, she was quoted in a local publication as saying that the walls of NYCHA public housing are 'constructed like fortresses,' with the implication being that this would make WiFi access difficult.[7] This raises the question of how particles of tobacco emissions could harm residents of other apartments if even WiFi signals cannot penetrate the walls of NYCHA public housing buildings. While the walls may not be so thick at another public housing location, the point remains the same: a one-size fits all nationwide smoking ban is inappropriate when the PHAs are in the best position to determine what is appropriate based on local architectural and demographic conditions, among other factors.

179. The Smoking Ban is also arbitrary and an abuse of discretion because it poses a substantial risk of harm to tenants of public housing by forcing them to leave the relative safety of their homes and

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[7] Still simmering: Public housing residents will wait another two winters for permanent boilers, *Courier Life's Brooklyn Daily*, 12/10/15, available at http://www.brooklyndaily.com/stories/2015/50/all-nycha-shola-olatoye-2015-12-11-bk.html (last visited Apr. 27, 2020).

venture out into often dangerous public areas.

180. Many public housing buildings and their surroundings are plagued by extraordinarily high levels of crime.[8] Residents who could previously use tobacco products in the relative safety of their own homes, including women, the elderly, and disabled persons will now be forced to venture out into more dangerous surroundings where they are exposed to a dramatically increased risk of becoming a crime victim while they engage in the legal activity of tobacco use.

181. As described by a tenant association president in New York City in an article appearing in *The Daily News*, tenants of public housing already have enough to worry about when it comes to crime:

> Many of the working people and elderly who make up the vast majority of New York City Housing Authority residents live in a constant state of hyper-awareness to avoid becoming a victim… For many NYCHA tenants, stepping alone into an elevator or returning from the drugstore as the sun drops below the horizon can be a heart-thumping moment… Across NYCHA, the constant threat of random confrontation alters behavior. Tenants come home from work

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[8] See e.g., Murders at NYCHA buildings add up despite efforts to bring crime down. NY Daily New, 7/5/15, available at https://www.nydailynews.com/new-york/nyc-crime/exclusive-murders-nycha-buildings-add-article-1.2281875 (last visited Apr. 27, 2020).

> and stay in all night. At the Lincoln Houses in East Harlem, an elderly tenant dashed to the back of her apartment when a bullet ripped through the window. 'Since then she doesn't like to come outside,' said Herman, Lincoln's tenant association president. 'She is fearful, apprehensive — even going to her mailbox.' Herman describes tenants living in a constant state of anxiety: 'There's fear all around here. You never know when someone's going to pop out shooting at someone.'[9]

182. In other instances, public housing tenants, forced to leave the premises of their building entirely, will have no choice but to engage in tobacco smoking along dangerous roadways or other unsafe areas, where they risk serious injury instead of being able to enjoy a legal activity within the safety of their own homes. This has been and will continue to be a result of the HUD's requirement that the Smoking Ban's must extend to all outdoor areas up to 25 feet from the housing and administrative office buildings.

183. In still other instances, public housing tenants, including elderly and disabled persons who are unable to leave their apartments without extraordinary difficulty, will suffer needless anxiety, depression, stress and disruption to their daily

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[9] NYCHA units see spike in crime that outpaces city, leaving residents in fear. *NY Daily News*, 4/6/14 available at https://www.nydailynews.com/new-york/nyc-crime/nycha-residents-live-fear-major-crimes-public-housing-soar-article-1.1747195 (last visited Apr. 27, 2020).

routines by not being able to smoke. Moreover, leaving and returning to apartments in public housing is often as difficult as it is dangerous, as public housing buildings are all too frequently plagued by broken elevators, poorly lit stairwells, and other hazardous physical conditions. In this way, elderly and disabled tenants who cannot negotiate stairs are forced to accept the behavioral choice that HUD has made for them. For example, according to the *New York Post*:

> NYCHA elevators broke an average of 13 times a year during 2016, when a majority of buildings 'had at least one period with no functioning elevator service' at all, leaving elderly and disabled tenants 'stranded in the lobby of their building.'[10]

184. The Smoking Ban will also unnecessarily subject public housing tenants, again including elderly and disabled person, to the misery and potential dangers of extreme cold and heat, inclement weather, and other natural perils, as a result of their being forced to leave the relative safety of their buildings in order to engage in a legal activity.

185. These are just several examples of the arbitrary manner in which the Smoking Ban will inflict potentially dangerous situations upon tenants of public housing for the sake of unsubstantiated

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[10] See "NYCHA admits atrocious living conditions," *New York Post*, June 11, 2018, available at: https://nypost.com/2018/06/11/nycha-takes-responsibility-for-atrocious-living-conditions (last visited Apr. 27, 2020).

claims of benefits to health for those residing in another apartment.

186. The arbitrary and unfair result of the Smoking Ban for tenants who live in dangerous public housing and choose to smoke is either (i) that they are forced to leave their apartments and venture 25 or more additional feet, thereby risking possible danger; (ii) or for those who are unable due to physical inability/lack of mobility, being forced to give up their right to engage in a legal activity in their homes, all under coercive pain of *losing* their homes.

187. For the foregoing reasons, the Smoking Ban is arbitrary, capricious, and an abuse of HUD's discretion, and Plaintiffs are therefore entitled, pursuant to 5 U.S.C. § 706(2)(A), to a judgment (i) holding that the Smoking Ban is arbitrary, capricious, and an abuse of discretion; and (ii) vacating the Smoking Ban; or, in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

CAUSES OF ACTION

COUNT I
Judgment Pursuant to 5 U.S.C. § 706(2)(B) - Violation of the Administrative Procedure Act Through Violation of the Anticommandeering Doctrine

188. Plaintiffs repeat and reallege the allegations set forth in all prior paragraphs of the Complaint as if set forth at length herein.

189. The Smoking Ban, adopted by HUD, requires or coerces PHAs to implement and enforce the Ban.

190. HUD is a federal agency.

191. PHAs are state and local agencies.

192. HUD provides subsidies and funding to PHAs pursuant to the Housing Act of 1937 and other applicable authority, and conditions receipt of these subsidies and funds on compliance with HUD's regulations, rules, and policies.

193. The Tenth Amendment provides for a system of dual sovereignty.

194. Under this system of dual sovereignty, the Federal Government may not direct, instruct, order, require, or coerce state or local government, or their subdivisions, to implement and enforce a federal regulatory program and/or policy. This is the anticommandeering doctrine.

195. By requiring PHAs to implement and enforce the Smoking Ban, HUD is directing, instructing, ordering, requiring, and coercing PHAs to implement and enforce a federal regulatory program and/or policy, to wit: the Smoking Ban and its particular provisions.

196. HUD's inducement for States to participate in the Smoking Ban is much more than the "relatively mild encouragement" that was permissible under *Dole*, 483 U.S. at 211. Indeed, while HUD's Smoking Ban does not set a specific penalty for a PHA's noncompliance, the Smoking Ban purports to tie all pre-existing federal housing funding to a PHA's accepting the new Smoking Ban conditions.

197. Through the Smoking Ban, HUD coerces –and in fact, commandeers – the States and PHAs to adopt HUD's policy conscriptions.

198. Therefore, HUD is in violation of the anticommandeering doctrine, and by extension, the

Tenth Amendment.

199. Accordingly, Plaintiffs are entitled, pursuant to 5 U.S.C. § 706(2)(B), to a judgment (i) holding that the Smoking Ban is contrary to the constitutional powers and privileges of HUD; and (ii) vacating the Smoking Ban.

COUNT II

Judgment Pursuant to 5 U.S.C. § 706(2)(B) - Violation of the Anticommandeering Doctrine

200. Plaintiffs repeat and reallege the allegations set forth in all prior paragraphs of the Complaint as if set forth at length herein.

201. HUD requires PHAs to implement and enforce the Smoking Ban.

202. HUD is a federal agency.

203. PHAs are state and local agencies.

204. HUD provides subsidies and funding to PHAs pursuant to the Housing Act of 1937 and other applicable authority, and conditions receipt of these subsidies and funds on compliance with HUD's regulations, rules, and policies.

205. The Tenth Amendment provides for a system of dual sovereignty.

206. Under this system of dual sovereignty, the Federal Government may not direct, instruct, order, require, or coerce state or local government, or their subdivisions, to implement and enforce a federal regulatory program and/or policy. This is the anticommandeering doctrine.

207. By requiring PHAs to implement and enforce the Smoking Ban, HUD is directing, instructing, ordering, requiring, and coercing PHAs to

implement and enforce a federal regulatory program and/or policy, to wit: the Smoking Ban and its particular provisions.

208. HUD's inducement for States to participate in the Smoking Ban is much more than the "relatively mild encouragement" that was permissible under *Dole*, 483 U.S. at 211. Indeed, while HUD's Smoking Ban does not set a specific penalty for a PHA's noncompliance, the Smoking Ban purports to tie all pre-existing federal housing funding to a PHA's accepting the new Smoking Ban conditions.

209. Through the Smoking Ban, HUD coerces –and in fact, commandeers – the States and PHAs to adopt HUD's policy conscriptions.

210. Accordingly, Plaintiffs are entitled to a declaration that the Smoking Ban violates the anticommandeering doctrine, and by extension, the Tenth Amendment and to a judgment vacating the Smoking Ban.

COUNT III
Judgment Pursuant to 5 U.S.C. § 706(2)(B) - Violation of the Administrative Procedure Act Through Violation of the Fourth and Fourteenth Amendments of the United States Constitution

211. Plaintiffs repeat and reallege the allegations set forth in all prior paragraphs of the Complaint as if set forth at length herein.

212. HUD requires PHAs to enforce the Smoking Ban.

213. Enforcement of the Smoking Ban will necessarily require invasion of the private living quarters of public housing tenants who are suspected

of using tobacco products, including but not limited to Plaintiffs.

214. Public housing tenants, including but not limited to Plaintiffs, have a constitutional right to engage in legal activities within their private living quarters without being subjected to search and seizure.

215. Accordingly, the Smoking Ban violates the Fourth Amendment as incorporated through the Fourteenth Amendment, and Plaintiffs are therefore entitled, pursuant to 5 U.S.C. § 706(2)(B), to a judgment (i) holding that the Smoking Ban is contrary to the constitutional rights of Plaintiffs and all other tenants of public housing similarly situated, to wit: their Fourth Amendment right to engage in legal activities in the privacy of their homes, free from unreasonable searches and seizures; and (ii) vacating the Smoking Ban; or, in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

COUNT IV
Judgment Pursuant to 5 U.S.C. § 706(2)(B) - Violation of the Fourth and Fourteenth Amendments of the United States Constitution

216. Plaintiffs repeat and reallege the allegations set forth in all prior paragraphs of the Complaint as if set forth at length herein.

217. HUD requires PHAs to enforce the Smoking Ban.

218. Enforcement of the Smoking Ban will necessarily require invasion of the private living quarters of public housing tenants who are suspected

of using tobacco products, including but not limited to Plaintiffs.

219. Public housing tenants, including but not limited to Plaintiffs, have a constitutional right to engage in legal activities within their private living quarters without being subjected to search and seizure.

220. Accordingly, Plaintiffs are entitled to a declaration that the Smoking Ban violates the Fourth Amendment as incorporated through the Fourteenth Amendment, and judgment vacating the Smoking Ban.

COUNT V
Judgment Pursuant to 5 U.S.C. § 706(2)(B) - Violation of the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution

221. Plaintiffs repeat and reallege the allegations set forth in all prior paragraphs of the Complaint as if set forth at length herein.

222. The Fifth Amendment restrains the Federal Government, and § 1 of the Fourteenth Amendment restrains the states, from depriving any person of life, liberty, or property without due process of law.

223. The Smoking Ban violates the Due Process Clauses of the Fifth and Fourteenth Amendments by interfering with the fundamental liberty of individuals (in this case the Individual Plaintiffs and similarly situated tenants of public housing) to engage in a legal activity within the privacy of their homes.

224. Accordingly, Plaintiffs entitled,

pursuant to 5 U.S.C. § 706(2)(B), to a judgment (i) holding that the Smoking Ban is contrary to the constitutional rights of Plaintiffs and all other tenants of public housing similarly situated, to wit: their Fifth and Fourteenth Amendment liberty to engage in legal activities in the privacy of their homes, and (ii) vacating the Smoking Ban; or, in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

COUNT VI

Judgment Pursuant to 5 U.S.C. § 706(2)(B) - Violation of the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution

225. Plaintiffs repeat and reallege the allegations set forth in all prior paragraphs of the Complaint as if set forth at length herein.

226. The Fifth Amendment restrains the Federal Government, and § 1 of the Fourteenth Amendment restrains the states, from depriving any person of life, liberty, or property without due process of law.

227. The Smoking Ban violates the Due Process Clauses of the Fifth and Fourteenth Amendments by interfering with the fundamental liberty of individuals (in this case the Individual Plaintiffs and similarly situated tenants of public housing) to engage in a legal activity within the privacy of their homes, to wit: the use of tobacco products.

228. Accordingly, Plaintiffs entitled to a declaration that the Smoking Ban violates the Due

Process Clauses of the Fifth and Fourteenth Amendments, and judgment vacating the Smoking Ban.

COUNT VII
Judgment Pursuant to 5 U.S.C. § 706(2)(B) - Violation of the Administrative Procedure Act Through Violation of the Unconstitutional Conditions Doctrine

229. Plaintiffs repeat and reallege the allegations set forth in all prior paragraphs of the Complaint as if set forth at length herein.

230. HUD requires PHAs to implement and enforce the Smoking Ban.

231. As part of the Smoking Ban's implementation, PHAs are requiring public housing tenants, including but not limited to Plaintiffs, to sign lease addendums in which the tenants agree to refrain from the use of tobacco products inside their apartments or face eviction.

232. Implementation of the Smoking Ban thus results in public housing tenants facing the choice of giving up their Fourth Amendment rights to be free from unreasonable search and seizure while engaging in legal activities within the privacy of their living quarters on the one hand, or be evicted on the other hand.

233. In this manner, the Smoking Ban unconstitutionally conditions tenants' receipt of the benefit of public housing on giving up their Fourth Amendment rights.

234. Accordingly, the Smoking Ban violates the unconstitutional conditions doctrine, and Plaintiffs are therefore entitled, pursuant to 5 U.S.C.

§ 706(2)(B), to a judgment (i) holding that the Smoking Ban is contrary to the constitutional rights of Plaintiffs and all other tenants of public housing similarly situated, to wit: their Fourth Amendment right to engage in legal activities in the privacy of their homes, free from unreasonable searches and seizures; and (ii) vacating the Smoking Ban; or, in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

COUNT VIII
Judgment Pursuant to 5 U.S.C. § 706(2)(B) - Violation of the Administrative Procedure Act Through Promulgation of Regulation Contrary to Constitutional Authority/Powers (Usurpation of General Police Powers Reserved to the States)

235. Plaintiffs repeat and reallege the allegations set forth in all prior paragraphs of the Complaint as if set forth at length herein.

236. Regulation of public health, including regulation of the use of tobacco products, is a matter reserved for the States and their local subdivisions pursuant to their general police powers.

237. The federal government does not have a general police power.

238. Congress's power over intrastate matters such as regulation of the use of tobacco products is limited to matters substantially affecting interstate commerce.

239. Regulation of the use of tobacco products has historically been the prerogative of the States and their police powers.

240. The use of tobacco products *within private living quarters* is completely unrelated to interstate commerce and, to the extent such use is to be regulated, it is a matter of State and local concern subject to the police powers of the States.

241. Accordingly, the Smoking Ban was promulgated contrary to the constitutional powers of the federal government and in usurpation of the general police power reserved to the States, and Plaintiffs are therefore entitled, pursuant to 5 U.S.C. § 706(2)(B), to a judgment (i) holding that the Smoking Ban was promulgated contrary to the constitutional powers of the federal government generally and HUD specifically, and (ii) vacating the Smoking Ban; or, in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

COUNT IX

Judgment Pursuant to 5 U.S.C. § 706(2)(C) - Violation of the Administrative Procedure Act Through Promulgation of Regulation in Excess of Agency Authority and Jurisdiction (Lack of Authority and Jurisdiction to Regulate Matters Reserved to the States)

242. Plaintiffs repeat and reallege the allegations set forth in all prior paragraphs of the Complaint as if set forth at length herein.

243. Regulation of public health, including regulation of the use of tobacco products, is a matter reserved for the States and their local subdivisions pursuant to their general police powers.

244. The federal government does not have a general police power.

245. Congress's power over intrastate matters such as regulation of the use of tobacco products is limited to matters substantially affecting interstate commerce.

246. Regulation of the use of tobacco products has historically been the prerogative of the States and their police powers.

247. The use of tobacco products *within private living quarters* is completely unrelated to interstate commerce and, to the extent such use is to be regulated, it is a matter of State and local concern subject to the police powers of the States.

248. Accordingly, the Smoking Ban was promulgated in excess of HUD's agency authority and jurisdiction and Plaintiffs are therefore entitled, pursuant to 5 U.S.C. § 706(2)(C), to a judgment (i) holding that the Smoking Ban was promulgated in excess of HUD's statutory jurisdiction, authority, and/or limitations; and (ii) vacating the Smoking Ban; or, in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

COUNT X

Judgment Pursuant to 5 U.S.C. § 706(2)(C) - Violation of the Administrative Procedure Act through Promulgation of Regulation in Excess of Agency Authority and Jurisdiction (Lack of Authority and Jurisdiction to Regulate the Use of Tobacco Products in Non-Public Locations)

249. Plaintiffs repeat and reallege the allegations set forth in all prior paragraphs of the Complaint as if set forth at length herein.

250. The Smoking Ban regulates the use of

tobacco products in private living quarters within public housing.

251. Certain agencies have been granted limited authority by Congress through the agencies' organic statutes or via Executive Order or other Executive document to regulate the use of tobacco products in public locations within the agency's jurisdiction, including the workplace.

252. However, no federal agencies have the authority to regulate the use of tobacco products in private living quarters or other non-public locations, as the use of tobacco products in private living quarters and other non-public locations has no connection whatsoever to interstate commerce and is outside the province of the Federal Government.

253. Accordingly, the Smoking Ban was promulgated in excess of HUD's agency authority and jurisdiction and Plaintiffs are therefore entitled, pursuant to 5 U.S.C. § 706(2)(C), to a judgment (i) holding that the Smoking Ban was promulgated in excess of HUD's statutory jurisdiction, authority, and/or limitations; and (ii) vacating the Smoking Ban; or, in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

COUNT XI

Judgment Pursuant to 5 U.S.C. § 706(2)(C) - Violation of the Administrative Procedure Act Through Promulgation of Regulation in Excess of Agency Authority and Jurisdiction (Lack of Authority and Jurisdiction to Regulate Indoor Air Quality on a Nationwide Basis)

254. Plaintiffs repeat and reallege the

allegations set forth in all prior paragraphs of the Complaint as if set forth at length herein.

255. The Smoking Ban regulates the use of tobacco products, with the stated goal of improving indoor air quality.

256. While certain agencies have been granted limited authority by Congress through the agencies' organic statutes or via Executive Order or other Executive document to regulate the use of tobacco products at indoor federal workplace locations, no federal agencies have nationwide authority to regulate indoor air quality.

257. Accordingly, the Smoking Ban was promulgated in excess of HUD's agency authority and jurisdiction and Plaintiffs are therefore entitled, pursuant to 5 U.S.C. § 706(2)(C), to a judgment (i) holding that the Smoking Ban was promulgated in excess of HUD's statutory jurisdiction, authority, and/or limitations; and (ii) vacating the Smoking Ban; or, in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

COUNT XII

Judgment Pursuant to 5 U.S.C. § 706(2)(C) - Violation of the Administrative Procedure Act Through Promulgation of Regulation in Excess of Agency Authority and Jurisdiction (Lack of Authority and Jurisdiction to Regulate the Use of Tobacco Products in Any Locations)

258. Plaintiffs repeat and reallege the allegations set forth in all prior paragraphs of the Complaint as if set forth at length herein.

259. The Smoking Ban regulates the use of

tobacco products in private living quarters within public housing on a nationwide basis.

260. With the exception of the FDA, Congress has not granted any federal agency specific nationwide regulatory power over tobacco products or their use.

261. Nor does HUD's organic statute contain any authority supporting the promulgation of any kind of regulation relating to the use of tobacco products.

262. Accordingly, the Smoking Ban was promulgated in excess of HUD's agency authority and jurisdiction and Plaintiffs are therefore entitled, pursuant to 5 U.S.C. § 706(2)(C), to a judgment (i) holding that the Smoking Ban was promulgated in excess of HUD's statutory jurisdiction, authority, and/or limitations; and (ii) vacating the Smoking Ban; or, in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

COUNT XIII

Judgment Pursuant to 5 U.S.C. § 706(2)(A) - Violation of the Administrative Procedure Act Through Adoption of Regulation That Is Arbitrary, Capricious, and an Abuse of Discretion

263. Plaintiffs repeat and reallege the allegations set forth in all prior paragraphs of the Complaint as if set forth at length herein.

264. The Smoking Ban is arbitrary, capricious, and an abuse of discretion because (a) it is not based on sound scientific principles, (b) the subjects of indoor air quality, public health, and fire

prevention are not within HUD's area of agency expertise, (c) none of HUD's rationales justify the gross invasion of privacy and the sanctity of the home caused by the Ban, (d) none of HUD's rationales justify a "one-size fits all" nationwide policy that fails to account for local conditions, and (e) the Ban will actually cause harm to public housing tenants who use tobacco products, even as it fails to prevent harm to other tenants.

265. Accordingly, the Smoking Ban is arbitrary, capricious, and an abuse of HUD's discretion, and Plaintiffs are therefore entitled, pursuant to 5 U.S.C. § 706(2)(A), to a judgment (i) holding that the Smoking Ban is arbitrary, capricious, and an abuse of discretion; and (ii) vacating the Smoking Ban; or, in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters.

PRAYER FOR RELIEF

266. **WHEREFORE**, Plaintiffs pray for judgment as follows:

A. Pursuant to 5 U.S.C. § 706(2)(A), that the Smoking Ban is arbitrary, capricious, and an abuse of HUD's discretion;

B. Pursuant to 5 U.S.C. § 706(2)(B), that the Smoking Ban was promulgated contrary to the constitutional rights of Plaintiffs and all other similarly situated tenants of public housing nationwide;

C. Pursuant to 5 U.S.C. § 706(2)(C), that the Smoking Ban was promulgated in excess of HUD's statutory jurisdiction, authority, and/or limitations;

D. Pursuant to 5 U.S.C. § 706(2)(A), (B), and (C), vacating the Smoking Ban; or in the alternative, modifying the Smoking Ban to eliminate the prohibition on the use of tobacco products within private living quarters; and

E. Pursuant to 28 U.S.C. §2412 and any other applicable provisions of law or equity, award Plaintiffs' costs and reasonable attorneys' fees.

F. Such other relief as may be just and proper.

Dated: April 27, 2020

Respectfully submitted,

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