

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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KENNETH WAYNE HAWKINS,  
CHERYL BROWN POTTS, KIMANISHA MYLES,  
REBA CURREN JEFFERY, LORETTA GULLEY,  
JEANNIE WARE, SHEALISHA ADAMS,

*Petitioners,*

v.

UNITED STATES DEPARTMENT FOR  
HOUSING AND URBAN DEVELOPMENT,  
JAMIE WASICEK, STEPHANIE WINN,

*Respondents.*

—◆—

**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

—◆—

**PETITION FOR WRIT OF CERTIORARI**

—◆—

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## QUESTIONS PRESENTED

This case concerns the right to judicial review of agency discretion to grant or deny relief that is:

specifically set out in a federal statute,  
for which funds have clearly been appropriated,  
and which relief has been requested, and  
the agency exercises its discretion to withhold  
the relief.

Congress enacted the statute and funding at Senator Marco Rubio's urging to provide for the relief for habitable housing in very particular circumstances when an owner has defaulted on its obligation to provide safe housing. App. 98-99. Petitioners made a request for the relief from HUD based on the prerequisites of the statute. HUD never provided the relief nor stated its reasons for withholding the relief.<sup>1</sup>

HUD's regulation provides for mandatory HUD assistance to find a unit for the family. 24 C.F.R. § 886.323(e). HUD withheld the relief of rehousing the tenants in another dwelling unit.

The questions presented warrant further review because of their great importance to judicial review of agency action:

1. Whether the agency's withholding of statutory relief for tenants to obtain decent housing

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<sup>1</sup> The statutory provision at issue is: 2018 through 2022 Consolidated Appropriations Act, citations, *infra* at note 1.

**QUESTIONS PRESENTED—Continued**

after the statutory prerequisites were met and tenants requested the relief is final agency action subject to judicial review after the agency denies it has authority to provide the relief and otherwise fails to state its reasons for withholding the statutorily available relief.

2. Whether the agency's action of withholding statutory available relief where the agency fails to disclose reasons for not providing the relief is final agency action subject to judicial review in light of the HUD regulation requiring that HUD shall provide assistance in finding a unit for a family.

## **PARTIES TO THE PROCEEDINGS**

In addition to the Petitioners Kenneth Wayne Hawkins, Cheryl Brown Potts, Kimanisha Myles, Reba Curren Jeffery, Loretta Gulley, Jeannie Ware, Shealisha Adams, plaintiffs-appellants below, respondents here are plaintiffs-appellants below Jamie Wasicek and Stephanie Winn.

Respondent the United States Department of Urban Housing and Development was defendant-appellee below.

## **STATEMENT OF RELATED CASES**

*Hawkins, et al. v. The United States Department of Housing and Urban Development et al.*, 4:18-CV-3052, U.S. District Court for the Southern District of Texas. Judgment entered March 26, 2020.

*Hawkins, et al. v. The United States Department of Housing and Urban Development et al.*, 20-20281, United States Court of Appeals for the Fifth Circuit. The first opinion and judgment of the court of appeals was entered on October 13, 2021 (reported at 16 F.4th 147 (5th Cir. 2021)). The second opinion and judgment vacated the first opinion. Final judgment entered April 28, 2022.

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Petitioners Kenneth Wayne Hawkins, Cheryl Brown Potts, Kimanisha Myles, Reba Curren Jeffery, Loretta Gulley, Jeannie Ware, Shealisha Adams respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.



### **OPINIONS BELOW**

The final decision of the court of appeals (App. 1-9) is an unpublished opinion, 2022 WL 1262100. This decision was substituted for and withdrew the published panel opinion (App. 12-45) reported at 16 F.4th 147 (5th Cir. 2021). The decision of the district court (App. 46-47) is reported at 2020 WL 1469793 (S.D. Tex. 2020) which adopted the magistrate's recommendation (App. 46-47) reported at 2020 WL 1480012 (S.D. Tex. 2020).



### **JURISDICTION**

The judgment of the district court adopting the recommendation of the magistrate and dismissing petitioners' amended complaint was entered on March 26, 2020. App. 48-49. Petitioners timely appealed. Dkt. 65. The first opinion and judgment of the court of appeals was entered on October 13, 2021. App. 12-45. HUD filed a petition for rehearing on January 6, 2022. Fifth Circuit Docket Summary. The court of appeals denied HUD's petition for rehearing but substituted the first opinion with the final decision (App. 1-9) and

entered the final judgment on April 28, 2022. App. 10-11. Jurisdiction rests on 28 U.S.C. § 1254(1).



## **STATUTE AND REGULATION INVOLVED**

For each year from 2017 to 2022 the Consolidated Appropriations Act (“the Act”) provides the specific requirements for and allocates funding to HUD for vouchers to relocate Project-Based Rental Assistance (“PBRA”) tenants in dangerous units so that they may obtain relief of a habitable home.<sup>1</sup>

### **Consolidated Appropriations Act**

The Act authorizes HUD to provide vouchers to PBRA tenants if three conditions are met: 1) the units are funded under a project-based federal subsidy contract with HUD; 2) the owner has received a Notice of Default of its housing assistance payment contract; and 3) the units present imminent health and safety risks to tenants. HUD can provide this relief without

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<sup>1</sup> CONSOLIDATED APPROPRIATIONS ACT, 2017, PL 115-31, May 5, 2017, 131 Stat. 135, 760-761; CONSOLIDATED APPROPRIATIONS ACT, 2018, PL 115-141, Title II, Department of Housing and Urban Development, Tenant-Based Rental Assistance (2), March 23, 2018, 132 Stat. 348, 1010; CONSOLIDATED APPROPRIATIONS ACT, 2019, PL 116-6, February 15, 2019, 133 Stat. 13, 436; FURTHER CONSOLIDATED APPROPRIATIONS ACT, 2020, PL 116-94, December 20, 2019, 133 Stat. 2534, 2977; CONSOLIDATED APPROPRIATIONS ACT, 2021, PL 116-260, December 27, 2020, 134 Stat. 1182, 1869; CONSOLIDATED APPROPRIATIONS ACT 2022, PL 117-103, March 15, 2022, 136 Stat. 49, 729.

pursing its enforcement remedies against the owner. The Act provides:

Provided further, That the Secretary may provide section 8 rental assistance from amounts made available under this paragraph for units assisted under a project-based subsidy contract funded under the “Project-Based Rental Assistance” heading under this title where the owner has received a Notice of Default and the units pose an imminent health and safety risk to residents.<sup>2</sup>

Petitioners meet the prerequisites of the Act for section 8 rental assistance voucher relief to relocate from units posing imminent health and safety risks. HUD’s authority to issue section 8 rental assistance vouchers<sup>3</sup> to tenants is separate and distinct from its choice of enforcement remedies under the Act. HUD’s options of enforcement remedies under the HAP contract are in a different section of the Act.<sup>4</sup>

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<sup>2</sup> See citations to the 2017-2022 Consolidated Appropriations Acts *supra* at note 1.

<sup>3</sup> Section 8 rental assistance in this provision of the Act is also referred to as “Tenant Protection Vouchers” by HUD. HUD Notice 2018-09, Implementation of the Federal Fiscal Year (FFY) 2018 Funding Provisions, pages 3, 7.

<sup>4</sup> In Section 222 of the Consolidated Appropriations Act, the HUD Secretary is required to take action when an owner’s project fails to comply with basic housing standards with a variety of enforcement mechanisms:

“SEC. 222. (a) Any entity receiving housing assistance payments shall maintain decent, safe, and sanitary conditions, as determined by the Secretary of Housing and Urban Development (in this section referred to as

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the “Secretary”), and comply with any standards under applicable State or local laws, rules, ordinances, or regulations relating to the physical condition of any property covered under a housing assistance payment contract.

(b) The Secretary shall take action under subsection (c) when a multifamily housing project with a section 8 contract or contract for similar project-based assistance—

(1) receives a Uniform Physical Condition Standards (UPCS) score of 60 or less; or

(2) fails to certify in writing to the Secretary within 3 days that all Exigent Health and Safety deficiencies identified by the inspector at the project have been corrected. . . .

(c)(1) Within 15 days of the issuance of the REAC inspection, the Secretary must provide the owner with a Notice of Default with a specified timetable, determined by the Secretary, for correcting all deficiencies. The Secretary must also provide a copy of the Notice of Default to the tenants, the local government, any mortgagees, and any contract administrator. If the owner’s appeal results in a UPCS score of 60 or above, the Secretary may withdraw the Notice of Default.

(2) At the end of the time period for correcting all deficiencies specified in the Notice of Default, if the owner fails to fully correct such deficiencies, the Secretary may—

(A) require immediate replacement of project management with a management agent approved by the Secretary;

(B) impose civil money penalties, which shall be used solely for the purpose of supporting safe and sanitary conditions at applicable properties, as designated by the Secretary, with priority given to the tenants of the property affected by the penalty;

**Senator Marco Rubio introduced the amendment for Tenant Protection Vouchers rental assistance to provide immediate relief for PBRA tenants living in substandard units**

When faced with tenants living in hazardous conditions because of an owner's default on the obligation to provide habitable housing, Senator Rubio

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- (C) abate the section 8 contract, including partial abatement, as determined by the Secretary, until all deficiencies have been corrected;
  - (D) pursue transfer of the project to an owner, approved by the Secretary under established procedures, which will be obligated to promptly make all required repairs and to accept renewal of the assistance contract as long as such renewal is offered;
  - (E) transfer the existing section 8 contract to another project or projects and owner or owners;
  - (F) pursue exclusionary sanctions, including suspensions or debarments from Federal programs;
  - (G) seek judicial appointment of a receiver to manage the property and cure all project deficiencies or seek a judicial order of specific performance requiring the owner to cure all project deficiencies;
  - (H) work with the owner, lender, or other related party to stabilize the property in an attempt to preserve the property through compliance, transfer of ownership, or an infusion of capital provided by a third-party that requires time to effectuate; or
  - (I) take any other regulatory or contractual remedies available as deemed necessary and appropriate by the Secretary. . . ." CONSOLIDATED APPROPRIATIONS ACT, 2018, PL 115-141, March 23, 2018, 132 Stat. 348, 1034-1035.



introduced legislation that was adopted and funded by Congress to help tenants relocate to decent and safe housing. App. 88-99. “Section 8 housing is Federal taxpayer money going into the hands of these slumlords, and a child now has lead poisoning because of it,” Senator Marco Rubio exclaimed in a 2016 Congressional floor speech. App. 93. During that speech, Senator Rubio introduced four amendments to the Consolidated Appropriations Act to provide immediate relief to PBRA tenants in hazardous units. App. 97-99. Senator Rubio characterized “horrific conditions” in a PBRA complex in Florida. App. 89. The units contained mold, broken staircases and conditions posing imminent health and safety risks to the tenants. App. 89, 92-93.

Senator Rubio was concerned with the tenants being trapped in these properties, with at least one person choosing homelessness instead of staying in his PBRA unit. App. 90. Senator Rubio authored the amendment to the statute to allow HUD to relocate tenants so they would not be forced to continue to live in imminent health and safety risks while HUD decided the enforcement action it wanted to take against the owner. The Rubio amendment would

“make temporary relocation assistance available for residents in situations such as those I have just described. This amendment would make tenant protection vouchers available for tenants living in units where the owner has been declared in default of a HUD Housing Assistance Payments contract due to physical deficiencies, **allowing the Secretary**

**to consider granting tenant relocation vouchers sooner in the process.”** App. 98. (emphasis added).

The purpose of the amendment was stated on the floor of the Senate:

“AMENDMENT NO. 4050 (Purpose: To make temporary relocation assistance available for tenants in project-based section 8 properties with imminent health and safety risks).” App. 103-104.<sup>5</sup>

The problem was widespread, and Senator Rubio implored his colleagues to look for such properties in their states. “If the trends continue, if the trends hold up, then I almost guarantee you are going to find slum-like conditions in your State the way they were found in my State and the way they were found in Tennessee.” App. 99. Senator Rubio explained that habitability issues permeate throughout HUD’s PBRA program. App. 88-99.

Senator Rubio’s amendment was passed and incorporated into the 2017 Act and for each Consolidated Appropriations Act through 2022.<sup>6</sup> HUD has both the funding and the authority to provide vouchers to PBRA tenants trapped in hazardous units because of

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<sup>5</sup> TRANSPORTATION, HOUSING AND URBAN DEVELOPMENT, AND RELATED AGENCIES APPROPRIATIONS ACT, 2016, Congressional Record May 19, 2016—Issue: Vol. 162, No. 80—Daily Edition 114th Congress (2015-2016)—2nd Session, S3004, S3017 (Rubio Amendment 4050).

<sup>6</sup> See citations to 2017-2022 Consolidated Appropriations Acts *supra* at note 1.

the owner's default on the contract with HUD to provide decent, safe, and sanitary housing.

### **HUD regulatory authority mandates tenant relocation**

24 C.F.R. § 886.323(e) obligates HUD to relocate PBRA tenants where the owner has been issued a Notice of Default and fails to take corrective actions timely.

(e) Failure to maintain decent, safe, and sanitary units. If HUD notifies the owner that he/she has failed to maintain a dwelling unit in decent, safe, and sanitary condition, and the owner fails to take corrective action within the time prescribed in the notice, HUD may exercise any of its rights or remedies under the contract, or Regulatory Agreement, if any, including abatement of housing assistance payments (even if the family continues to occupy the unit) and rescission of the sale. **If, however, the family wishes to be rehoused in another dwelling unit, HUD shall provide assistance in finding such a unit for the family.** 24 C.F.R. § 886.323(e) (emphasis added).

The regulation allows HUD to pursue its enforcement remedies under its contract with the owner. Nevertheless, tenants have a right to HUD-funded relocation. "If, however, the family wishes to be rehoused in another dwelling unit, HUD shall provide assistance in finding such a unit for the family." *Id.*



**STATEMENT****A. The requirements of the statutory provision to provide voucher relocation assistance were met**

The Rubio statutory provision requires three things for HUD to provide the vouchers to relocate tenants from substandard housing that the owner has failed to maintain.

First, the tenants must reside in units funded under a project-based subsidy contract between HUD and an owner under the PBRA program.

Second, the owner has received from HUD a Notice of Default of its housing assistance payment contract.

Third, the units pose imminent health and safety risks to tenants.<sup>7</sup>

All three of these statutory requirements are met in this case. 1) The tenants reside in units at Copper-tree Village Apartments funded under a project-based subsidy contract. *See* Amended Complaint, ¶ 1, *Hawkins, et al. v. HUD, et al.*, 4:18-cv-03052, Dkt. 22 (S.D.

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<sup>7</sup> Each Consolidated Appropriations Act from 2017 through 2022 contains this Rubio statutory provision:

Provided further, That the Secretary may provide section 8 rental assistance from amounts made available under this paragraph for units assisted under a project-based subsidy contract funded under the “Project-Based Rental Assistance” heading under this title where the owner has received a Notice of Default and the units pose an imminent health and safety risk to residents. *See* citations *supra* at note 1.

Tex., filed January 4, 2019) (hereinafter Amended Complaint).

2) The owner received two Notices of Default from HUD in October 2018 notifying the owner of the failure of the units to pass basic housing quality standards. Amended Complaint, ¶¶ 13, 43-48. The HUD Notice of Default advised the owner that HUD’s “inspection report identified serious deficiencies that demonstrate the Owner is in default of the HAP” (the housing assistance payment contract). Amended Complaint, ¶ 47.

3) It is indisputable that the units pose imminent health and safety risks to tenants. Amended Complaint, ¶¶ 20-65, 83-112.

HUD’s Notices of Default and inspection reports listed the hazardous conditions: “hazards” including malfunctioning electricity; damaged walls and ceilings; broken and inoperable appliances including refrigerators, dishwashers and disposals; damaged doors and windows with inoperable locks; broken and inoperable plumbing and sewer system; missing tubs and showers; inoperable air conditioning and heat; uninhabitable building from a fire; damaged exteriors; mildew and mold; significant interior deficiencies. Amended Complaint, ¶¶ 43-48. The tenants’ complaint and declarations also described the “horrible” conditions. Amended Complaint, ¶¶ 20-65; Declarations, *Hawkins, et al. v. HUD, et al.*, 4:18-cv-03052, Dkt. 34 (S.D. Tex., filed March 22, 2019). One example is where the owner placed a generator in the parking lot

with lines leading to the units to provide electricity to the units. Amended Complaint, ¶¶ 61-65.

As a result of the hazardous conditions at Copper-tree, the Petitioner tenants requested that HUD provide the voucher rental assistance in the Act to relocate to decent, safe and sanitary units. Amended Complaint, ¶ 74.

HUD did not provide the voucher relocation assistance that the Rubio amendment makes available for these situations where the owner fails to comply with its contractual and legal duty to provide decent, safe, and sanitary housing.

HUD first claimed it lacked statutory authority to issue the vouchers to the tenants. App. 84. HUD's motion to dismiss stated:

Plaintiffs claim HUD failed to take a mandatory agency action (the issuance of tenant protection vouchers). But HUD does not have authority to issue such vouchers unless and until it terminates the Section 8 subsidy contract with the project owner after proper process. At this time, HUD is not even authorized to take the action plaintiffs claim is mandated. App. 84.

HUD also claimed that it had not decided what enforcement action it was going to take against the owner. HUD stated it was "closely monitoring" the owner. See HUD Motion to Dismiss, *Hawkins, et al. v. HUD, et al.*, 4:18-cv-03052, Dkt. 21, page 17 (S.D. Tex., filed December 14, 2018). "HUD's enforcement action

is still ongoing,” and “HUD is still considering its enforcement actions.” See HUD Motion to Dismiss Amended Complaint, *Hawkins, et al. v. HUD, et al.*, 4:18-cv-03052, Dkt. 30, pages 5, 13 (S.D. Tex., filed March 1, 2019).

HUD’s declarant stated that HUD would reinspect the units at a future date without stating or explaining the reason for withholding the relief of relocation vouchers. See HUD Declaration, *Hawkins, et al. v. HUD, et al.*, 4:18-cv-03052, Dkt. 32, page 2 (S.D. Tex., filed March 11, 2019). The declaration did not contradict any of the facts showing imminent health and safety risks on the property. No reasons for withholding the voucher relief were given to the tenants. *Id.*

Months and days have passed without further explanation from HUD. There has been no public statement of reasons for not providing relocation vouchers to the tenants living in these units that pose imminent health and safety risks.

**B. HUD regulatory authority obligates the agency to provide relocation assistance to Petitioners**

HUD failed to comply with its own regulation that would allow Petitioners to escape these dangerous conditions and access decent, safe and sanitary units. HUD’s regulation states that if HUD notifies the owner of a PBRA project that it has failed to maintain the units in decent, safe and sanitary conditions, the owner must make corrective actions within the time

prescribed in the notice. If the owner fails to make the corrective actions timely, HUD shall provide relocation assistance to tenants who request to be relocated. 24 C.F.R. § 886.323(e).

The requirements for HUD to provide relocation assistance to tenants have been met. The October 2021 Fifth Circuit opinion found that the regulation requirements had been met in this case and that HUD had failed to provide relocation assistance. App. 26-27. In October 2018, HUD issued two notices of default to the owner notifying it of its failure to maintain the property in decent, safe and sanitary condition. The owner had 30 days and 60 days, respectively to take the corrective actions specified in the Notices of Default. The owner failed to take the corrective actions within the time prescribed. Amended Complaint, ¶¶ 13-65. Petitioners submitted declarations five months after the Notices of Default were issued to the owner describing conditions on the property and within the units that were not decent, safe or sanitary. The conditions continued to pose imminent health and safety risks. Declarations, *Hawkins, et al. v. HUD, et al.*, 4:18-cv-03052, Dkt. 34 (S.D. Tex., filed March 22, 2019).

A month after HUD issued the Notices of Default to the owner, the tenants submitted a written request to HUD on November 16, 2018 requesting HUD to provide them with relocation assistance to move out of the deplorable conditions at Coppertree. Amended Complaint, ¶ 74.



HUD did not submit a written response to the request. No reasons for withholding the relief of the relocation assistance were provided to the tenants. Amended Complaint, ¶¶ 69-70, 74.

HUD denied having the authority to provide vouchers separate and apart from its enforcement process. App. 84.

Instead, HUD stated that it was going to reinspect and that it could exercise its rights or remedies in the contract. HUD maintained that it had not concluded its enforcement actions against the owner. *See* HUD Motion to Dismiss Amended Complaint, *Hawkins, et al. v. HUD, et al.*, 4:18-cv-03052, Dkt. 30, pages 5, 13 (S.D. Tex., filed March 1, 2019). HUD continued to pay the project-based subsidy for units that were not decent, safe or sanitary. Amended Complaint, ¶¶ 68, 70.

### **C. District Court**

Petitioner tenants sued HUD under the Administrative Procedure Act (APA), 5 U.S.C. § 706. Petitioners alleged that HUD's final decision to withhold voucher relief and relocation assistance was arbitrary, capricious and contrary to the Act and 24 C.F.R. § 886.323(e). Amended Complaint, ¶¶ 69-79. The district court ruled the APA claims were precluded from review because HUD's enforcement actions are "committed to agency discretion by law" under 5 U.S.C. § 701. App. 63-69. The district court cited the provision of the Act that set forth HUD's enforcement remedies against PBRA owners but failed to acknowledge the

agency’s statutory authority to issue tenant protection vouchers without terminating the HAP Contract was separate and apart from that provision. The district court erroneously stated that any “receipt of housing vouchers was dependent on HUD’s enforcement decisions.” App. 66; *Compare* Consolidated Appropriations Act citations *supra* at note 1 *with* Section 222 *supra* at note 3. The court concluded that “HUD’s tacit rejection of certain available enforcement options” is not reviewable final agency action. App. 68-69.

Senator Rubio specifically amended the Act to allow HUD to provide for relocation tenant protection vouchers without HUD having to decide the enforcement action it was going to take prior to relocating the tenants. App. 98-99.

#### **D. The Fifth Circuit’s conflicting opinions and its reversal of the final agency action holding**

The Fifth Circuit issued two conflicting opinions—the first in October 2021 (App. 12-45) and the second in April 2022 (App. 1-9).

##### **1. October 2021 opinion**

In the October 2021 opinion, the majority held that HUD’s actions were not precluded from review. The opinion held that Petitioners had adequately alleged final agency action. App. 28-29. The court determined that HUD’s withholding of voucher relief was

final agency action because HUD's actions prevented or unreasonably delayed the tenants from receiving the relief and that the actions violated the law. App. 29. The opinion reversed the dismissal of the amended complaint and remanded Petitioners' APA claims for further proceedings. App. 32.

The October 2021 opinion found the HUD regulation requiring tenants who wished to be rehoused to be mandatory. App. 25-27. The regulation was not dependent upon HUD's enforcement action of abating the contract with the owner prior to providing relocation assistance to the tenants. The majority opinion stated:

[c]ontrary to HUD's attempt to redraft its regulation, the mandatory language—"[i]f, however, the family wishes to be rehoused in another dwelling unit, HUD shall provide assistance in finding such a unit for the family"—is not a continuation or even a reference to HUD's discretion to exercise abatement of the housing assistance payments. Rather, that language marks a contrast between the mandatory "shall" in this sentence and the permissive "may" in the preceding sentence. If HUD had wished to predicate its obligation to provide relocation vouchers to tenants on its exercise of abatement remedies, it could have and should have so specified in its regulation. App. 25.

The October 2021 opinion found that all three elements of the 24 C.F.R. § 886.323(e) were met:

Plaintiffs have adequately pleaded that all three of the regulation's preconditions to triggering HUD's duty to provide rehousing assistance were satisfied. They pleaded (1) two NODs were issued, which gave the owner thirty days to correct deficiencies on the property, (2) the owner failed to take corrective actions timely, and (3) they indicated their wish to be rehoused in another residence when they requested to HUD in writing that it provide them with relocation assistance, "including voucher assistance. App. 26.

The October 2021 opinion found that HUD had failed to provide the relocation assistance and remanded for further proceedings. App. 32.

## **2. April 2022 opinion**

HUD filed a petition for rehearing on January 6, 2022. Fifth Circuit Docket Summary. On April 28, 2022, the Fifth Circuit denied the HUD petition for rehearing. App. 1-2. At the same time, the Fifth Circuit entered a second opinion and substituted it for the October 2021 opinion. App. 1-9. Without explanation, the Fifth Circuit stated that "tenants have not adequately alleged a specific HUD action that this court can review." App. 6-7. The court held there was "no consummation of the agency decisionmaking process that this court can review" and affirmed the dismissal of the APA claims. App. 7. The Fifth Circuit denied

petitioner's motion to recall the mandate and for leave to file a petition for rehearing. App. 80-81.



## REASONS FOR GRANTING THE PETITION

### **I. The Fifth Circuit Misinterpreted the Act statute and the regulation; the facts show the consummation of agency decision-making for the relocation voucher relief requested**

The second Fifth Circuit opinion misinterpreted the statutory provision at issue for providing the tenants relocation vouchers when specific requirements have been met.

The Consolidated Appropriations Act provides for statutory available relief and funding for vouchers for tenants to relocate from hazardous housing.<sup>8</sup> HUD's withholding of this available relief and of any assistance to help Petitioners relocate is final agency action—HUD is not providing the tenants with vouchers. The APA defines agency action to include an agency “sanction.” 5 U.S.C. § 551(13). The APA further defines “sanction” as including an agency’s “withholding of relief.” 5 U.S.C. § 551(10)(B). “Relief” is defined as the “grant of . . . assistance . . . or remedy.” 5 U.S.C. § 551(13)(A).

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<sup>8</sup> See citations to the Rubio provision in the 2017-2022 Consolidated Appropriations Acts, *supra* at note 1.

The Fifth Circuit opinion denies judicial review of the withholding of the statutorily available relief of relocation vouchers to escape hazardous living conditions. The facts of HUD's withholding of relief demonstrate the consummation of final agency decision.

**A. HUD actions in response to the request for relief were the consummation of the agency's decision-making process**

**1. The Act elements are met, and HUD's actions arbitrarily withheld the statutorily available relief**

HUD's actions demonstrate that it had made the decision to withhold the relief of the vouchers but did not explain publicly the reasons for this withholding. For agency action to be "final" the action must first be the consummation of the agency's decision-making process and not tentative or interlocutory. Second, the action must be one by which rights have been determined or from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). These elements are met in this case.

Petitioners requested in writing the relief of relocating out of Coppertree and out of the conditions of imminent health and safety risks on November 16, 2018. Amended Complaint, ¶ 74. HUD did not respond. A month after the request, HUD stated in its motion to dismiss that it lacked statutory authority to issue

vouchers under the Act. App. 84. That is a final decision by the agency.<sup>9</sup>

Other HUD actions after HUD's assertion that it lacked authority to issue the relocation vouchers demonstrate the finality of HUD's decision to withhold relief of the Rubio amendment vouchers from the tenants. HUD's actions demonstrate a holding pattern of never responding publicly to the tenants' request for vouchers to relocate. Instead, HUD continued to state that HUD had not decided the enforcement action it was going to take against the owner. *See* HUD Motion to Dismiss Amended Complaint, *Hawkins, et al. v. HUD, et al.*, 4:18-cv-03052, Dkt. 30, pages 5, 13 (S.D. Tex., filed March 1, 2019). The first Fifth Circuit opinion that held there was agency action for judicial review found that with this holding pattern action, HUD could and would always avoid judicial review. HUD could simply evade review by saying they had not yet made a decision while continuing to implement the withholding of the requested relief. App. 29. This is arbitrary action that is reviewable under the APA, 5 U.S.C. § 706(2).

HUD continued to fail to respond to the request for the relief of the vouchers to move out of the hazardous and substandard conditions at Coppertree. HUD

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<sup>9</sup> The agency was incorrect, and HUD's own guidance shows that HUD knew this was an incorrect statement of the law. HUD's guidance states that HUD can issue the relocation vouchers at issue under the Act without first terminating the owners' contract. HUD Notice 2018-09, Implementation of the Federal Fiscal Year (FFY) 2018 Funding Provisions, page 7.

vaguely stated that it would reinspect the units. HUD stated that it had yet to decide the enforcement action it was going to pursue against the owner. This indefinite withholding of relief over several months and years results in the finality that the agency is not going to provide the statutorily available relief.

Further, this Court holds that the consummation of agency action is to follow a “pragmatic” approach. *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. 590, 599 (2016). HUD undertook a series of agency actions illustrating the consummation of its decision-making process. HUD issued two Notices of Default to the owner. The Notices list life-threatening conditions found by HUD inspections. Amended Complaint, ¶¶ 13, 43-48 Petitioner tenants requested vouchers and relocation assistance in writing to HUD and through their amended complaint. HUD has continued to withhold vouchers for over four years. Amended Complaint, ¶¶ 74, 147. HUD denied it had the legal authority to grant the relief. The pragmatic approach shows that HUD had definitively and finally decided it will not issue vouchers to the tenants.

Legal consequences have ensued from HUD’s withholding of the relief of relocation vouchers. Petitioners have been required to live in hazardous and substandard housing or lose their housing. The tenants have been denied the availability of decent, safe, and sanitary housing while HUD refuses to publicly state why it will not provide them with standard housing.



HUD's actions demonstrate the final agency action of withholding statutorily available relief. This Court holds that there is a strong presumption of judicial review under the APA to determine the agency's compliance with a legislative mandate. *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 139 S.Ct. 361, 370 (2018); *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 486 (2015). The agency failed to bear its burden that there should be no judicial review.

**2. HUD claimed it had no authority to provide vouchers unless it terminated the PBRA contract, but the Act does not require termination**

Senator Rubio provided this amendment to the Act specifically to rehouse tenants while HUD pursued its remedies against owners who refused to comply with the legal and contractual duties to maintain decent, safe, and sanitary housing in return for its taxpayer funded rent subsidies. App. 98-99.

In this case, HUD claimed that it was only authorized to provide tenant protection vouchers to Petitioners if the HAP contract was terminated. App. 84. This is incorrect. Senator Rubio's amendments to the Consolidated Appropriations Act were passed to resolve this very issue. App. 98-99. The Act funds relocation vouchers so that HUD can navigate its enforcement process with the owner without holding the tenants captive in uninhabitable units. HUD's project-based subsidies tie the housing assistance to the project. Consequently,

prior to Senator Rubio’s amendment, if a tenant was in an uninhabitable PBRA unit, they were forced to stay or lose their subsidy. In his Congressional speech, Rubio recounts a man moving out of his unit because of the horrendous conditions. “Because the conditions were so bad, the guy moved out of the property. In other words, **he would rather be homeless. . .**” App. 90. (emphasis added).

Now, that problem is solved. Rubio’s amendment provides HUD with funding and authority to address this problem. Under the Act, HUD may issue tenant protection vouchers without terminating the PBRA contract.<sup>10</sup> The Act allows HUD to relocate tenants to decent, safe and sanitary units while it concurrently works with the PBRA owner to retain the contract.

HUD set out guidance for the section 8 relocation assistance provision in the Rubio amendment and refers to this assistance as tenant protection vouchers. HUD Notice 2018-09, Implementation of the Federal Fiscal Year (FFY) 2018 Funding Provisions. Its guidance contemplates the PBRA contract with the owner remaining in place following the issuance of tenant protection vouchers. Thus, HUD clearly recognizes that it may provide tenant protection vouchers without terminating the owner’s contract first. This is contrary to HUD’s argument that it lacked statutory authority to issue the vouchers. App. 84. HUD’s guidance states:

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<sup>10</sup> See citations to Consolidated Appropriations act at note 1.

The 2018 Act asserts that HUD may provide:

TPVs [tenant protection vouchers] for families in units under a Section 8 contract funded under the “Project-Based Rental Assistance” account where the owner has received a Notice of Default and the units pose an imminent health and safety risk to residents. **These vouchers are technically relocation vouchers until the Section 8 contract is terminated, at which point they become replacement vouchers.** It is possible that in some circumstances the deficiencies will be addressed, and the Section 8 contract will continue, in which case the vouchers would remain relocation vouchers and would be subject to the sunset provisions at such time that the initial family is no longer receiving voucher assistance.<sup>11</sup>

HUD’s arguments in the courts below conflates the agency’s statutory authority to choose among enforcement remedies with its separate authority to issue tenant protection vouchers. HUD Appellee Brief in the Fifth Circuit, Document pages 25-28 (filed 9/25/2020). HUD’s enforcement options under the Act are in a separate section of the Act than its authority to issue tenant protection vouchers.<sup>12</sup> Petitioners have

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<sup>11</sup> HUD Notice 2018-09, Implementation of the Federal Fiscal Year (FFY) 2018 Funding Provisions, page 7 (Emphasis added).

<sup>12</sup> Compare HUD enforcement options in Section 222 of the Consolidated Appropriations Act, *supra* at note 3 with the Rubio amendment in the Consolidated Appropriations Act *supra* at note 1.

maintained that they are not seeking review of HUD's choice of enforcement remedies against the owner. Petitioners' relief is not contingent upon HUD's choice of enforcement remedies. Petitioners are requesting review of HUD's withholding of voucher relief under the Act despite satisfying the prerequisites of the Act. Petitioners' amended complaint pled uncontroverted facts showing: 1) Coppertree Village Apartments is subsidized with a PBRA subsidy; 2) The owner received two Notices of Default; and 3) The units posed imminent health and safety risks to tenants. Amended Complaint, ¶¶ 1-4, 13, 20-65, 83-112. Yet, HUD continues to withhold this relief without explanation.

### **3. HUD's regulation requires HUD to act, and HUD withheld the required relief**

Once a PBRA owner has been issued a notice from HUD that the units fail to meet decent, safe, and sanitary standards and the owner fails to correct the units, HUD's regulation requires it to act. If a tenant requests to be rehoused, HUD must act to do so under its own regulation. 24 C.F.R. § 886.323(e).

The first Fifth Circuit opinion found all the elements of the regulation to have been met and that HUD had refused to relocate the tenants despite their request to do so. App. 26. The final Fifth Circuit opinion simply found no agency action for judicial review. App. 6-7.

The clear wording of the mandate of HUD's regulation requires the rehousing of the tenants who have requested to be relocated. 24 C.F.R. § 886.323(e). The withholding of the relief to relocate, particularly when HUD has specific voucher funding available to relocate the tenants, is arbitrary and capricious. 5 U.S.C. § 706(2).

**B. The Fifth Circuit's second opinion conflicts with opinions of the D.C. Circuit Court of Appeals, the Second Circuit, the Ninth Circuit, and the Tenth Circuit**

The Fifth Circuit final opinion denying judicial review where an agency withholds statutorily available relief by claiming it lacks legal authority to provide the relief conflicts with a decision of the Tenth Circuit. In addition, the Fifth Circuit's finding that HUD's inaction and delay is not a "consummation of the agency decision-making" process conflicts with cases from the District of Columbia Circuit Court of Appeals, the Second Circuit, and the Ninth Circuit.

**1. The Tenth Circuit holds that denial of legal authority to act is a final agency decision**

The Tenth Circuit holds that an agency's denial of legal authority to act constitutes final agency action. In *Utah Native Plant Soc'y v. United States Forest Serv.*, 923 F.3d 860 (10th Cir. 2019), Plaintiffs argued

that Forest Service's denial of authority to regulate the release of mountain goats was final agency action. The court held that the agency's determination was "not merely tentative or interlocutory in nature"; it was conclusive." *Id.* at 866. The opinion held that the agency's determination that it did not have legal authority for two of the three requests for relief combined with its refusal to provide the requested relief was a consummation of agency decision-making and final agency action. *Utah Native Plant Socy.*, 923 F.3d at 866, 869.

HUD's denial of legal authority to issue relocation assistance parallels these facts. HUD's refusal to issue relocation assistance because it denied having the authority to do so was conclusive. App. 84. The determination was a "consummation of the agency's decision-making process." Petitioners pled facts showing that HUD has not moved from this position. Amended Complaint, ¶¶ 1-4, 66-70, 74, 76. As a result, Petitioners' rights have been determined and they are being denied decent, safe and sanitary units because of HUD's final decision.

**2. The Fifth Circuit opinion conflicts with decisions of the D.C. Circuit Court of Appeals, the Second Circuit and the Ninth Circuit that hold that a series of actions and delay can constitute the consummation of an agency decision**

The Fifth Circuit opinion conflicts with decisions of the D.C. Circuit, the Second Circuit and the Ninth Circuit where a series of agency actions and delay result in a constructive decision and final agency action.

In *Friedman v. Fed. Aviation Admin.*, 841 F.3d 537, 542 (D.C. Cir. 2016), the D.C. Circuit held that an agency's actions provided a constructive denial of the requested FAA certificate even without a formal decision on the application and is final agency action. In *Friedman*, the FAA argued that it did not issue a final order. The court disagreed. The D.C. Circuit held that the three times the FAA stated it could not and would not rule on a discretionary request for relief under a discretionary licensing project constituted the consummation of the agency's decision-making process. The Court held that to rule otherwise would thwart the Court's interest in reviewing those agency actions that, "in practical effect if not formal acknowledgement" constitute the consummation of the agency's decision-making process. *Friedman*, 841 F.3d at 541-42.

Here, as in *Friedman*, HUD has unreasonably delayed a final decision on Petitioners' eligibility for relocation assistance. The Fifth Circuit's second and final opinion entraps Petitioners in a similar "holding

pattern” by acknowledging that HUD has not made a final decision on relocation assistance, yet it continues to withhold the assistance. App. 6-7. The holding pattern enforced by HUD is based on its assertions that it claimed its’ “enforcement action is still ongoing,” and that it was “closely monitoring” the owner. *See* HUD Motion to Dismiss Amended Complaint, *Hawkins, et al. v. HUD, et al.*, 4:18-cv-03052, Dkt. 30, pages 5, 13 (S.D. Tex., filed March 1, 2019). No other reasons for withholding the voucher relief than the lack of authority and the enforcement actions against the owner were publicly stated. As the *Friedman* court stated, “Where an agency has clearly communicated it will not reach a determination on a petitioner’s submission . . . but simultaneously refuses to deny a submission” it has engaged in final agency action. *Friedman*, 841 F.3d at 542. The inquiry for consummation of agency action, as noted by the D.C. Circuit, is pragmatic and flexible. *Id.* at 541.

The Fifth Circuit opinion also conflicts with a decision of the Second Circuit Court of Appeals. In *Brit. Airways Bd. v. Port Auth. of New York & New Jersey*, 564 F.2d 1002, 1010 (2d Cir. 1977), the Second Circuit held that the Port Authority of New York and New Jersey’s indefinite ban on Concorde flights because of its delay in issuing noise regulations was a “denial of rights.” “There comes a time when relegating the solution of an issue to the indefinite future can so sap petitioners of hope and resources that a failure to resolve the issue within a reasonable period is tantamount to refusing to address it at all.” *Id.* at 1010. Similarly,



HUD's indefinite withholding of voucher relief from Petitioners for over four years is a final decision to deny them decent, safe and sanitary units. Nearly six months after Petitioners requested relief of vouchers from HUD to move out of deplorable housing conditions that HUD knew to exist, HUD continued to say it had not decided the enforcement action it was going to take. *See* HUD Motion to Dismiss Amended Complaint, *Hawkins, et al. v. HUD, et al.*, 4:18-cv-03052, Dkt. 30, pages 5, 13 (S.D. Tex., filed March 1, 2019). HUD's declarant at this time did not dispute that the tenants continued to live in conditions of imminent health and safety risks. *See* HUD Declaration, *Hawkins, et al. v. HUD, et al.*, 4:18-cv-03052, Dkt. 32, page 2 (S.D. Tex., filed March 11, 2019). A reasonable time for action has passed for agency decision, but the Fifth Circuit's opinion denies all judicial review of this decision.

The Fifth Circuit opinion also conflicts with a decision of the Ninth Circuit Court of Appeals. In *San Francisco Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564 (9th Cir. 2019), there was no specific order to be reviewed for final agency action. Plaintiffs argued that the Park Service's declaration of authority to prohibit commercial fishing and its subsequent acts to enforce that authority was final agency action. The court held that these series of agency actions marked the consummation of the agency's decision-making process to enforce the agency's fishing ban. The court resolved that "once again, a central rationale of the final agency action requirement is to prevent premature intrusion

into the agency's deliberations; it is not to require regulated parties to keep knocking at the agency's door when the agency has already made its position clear." *Id.* at 579.

As in *San Francisco Herring Ass'n*, HUD has not issued a specific written order denying Petitioners' relocation assistance. Rather, Petitioners' amended complaint pled facts that HUD undertook a series of agency actions illustrating the consummation of its decision process. Amended Complaint, ¶¶ 13, 43-48, 68, 70. HUD issued two Notices of Default to the owner. HUD continued to pay the owner under the Section 8 contract, despite the units not being decent, safe, or sanitary. HUD advised that it was overseeing repairs of the units and would re-evaluate its enforcement options. Petitioners requested vouchers and relocation assistance via comments and its amended complaint and HUD has continued to withhold vouchers for over four years. Amended Complaint, ¶ 74. Under the Ninth Circuit's view, Petitioners are entitled to review of HUD's decision to withhold relocation assistance after a series of actions by the agency have made it clear that HUD has determined petitioners are not entitled to relief.

The Fifth Circuit's first opinion conforms with these other Circuits regarding HUD's consummation of decision-making for final agency action. The Court concluded there that agency inaction constitutes final agency action because it "prevents or unreasonably delays the tenants from receiving relief to which they are entitled by law." App. 29. This holding was consistent with the cited decisions in the other Circuits that such

and similar consummations of agency decisionmaking are reviewable. The substitute opinion put the Fifth Circuit in direct conflict with the cited Circuits justifying this Court’s review.

**II. The issue of not letting agencies evade judicial review that provides for important relief that Congress has intended is of immense and immediate public importance**

This case highlights the failure of an agency to follow the statute making housing assistance relief available because of a HUD subsidized owner’s refusal to provide habitable housing. The importance of restoring judicial review of the agency’s withholding of this relief is shown by the continued Congressional enactment and funding of the relief to correct the lapses and violations in the HUD housing program.

Senator Marco Rubio explained the reasoning behind this congressionally provided housing relief arose because slumlords were profiting with “taxpayer money going into their bank account” while leaving tenants in “deplorable conditions” with “crumbling buildings.” App. 95, 96. He emphasized that “It is not just one property; there are multiple properties across multiple States.” App. 91. HUD had informed Senator Rubio that the agency could not relocate tenants without ending the owner’s contract thus leaving the tenants without any housing. App. 98-99.<sup>13</sup> As a result of

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<sup>13</sup> Senator Rubio explained that “One of the things we hear from HUD is: Well, we can take away the contract, but then what

these “horrific conditions,” Senator Rubio specifically introduced the amendment and Congress adopted this provision giving HUD the authority and funding to relocate tenants who are living at the mercy of a slumlord’s refusal to provide livable housing. App. 89, 98-99.

**A. Congress created the relief at issue in order to correct lapses and errors in the administration of a Congressional housing program subsidizing landlords.**

The importance of judicial review of HUD’s lapses and violations in the administration of the housing relief at issue is heightened because the relief itself was created by Congress to directly give HUD the ability to relocate tenants while separately addressing the owner’s violations of the contract. Prior to this law, HUD lacked the ability to relocate the tenants without terminating the contract with the owner.

Senator Rubio made the following remarks when he first introduced the relief assistance program in 2016. Senator Rubio made it clear that Congress wanted to help tenants move out of horrible living conditions while HUD pursued remedies against the owner. Senator Rubio described the conditions in these HUD-funded properties as the equivalent of theft by slumlord.

This, my friends, is the stealing of American taxpayer money, subjecting people to

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happens to all these people? We don’t want to do that, and slumlords . . . know they can get away with this as a result.” App. 99.

slum-like conditions, pocketing the money, living off the money, and transferring the money App. 96. (Senator Rubio Senate Floor Speech).

The Congressional relief for this slumlord violation of the program requirement for the provision of decent, safe, and sanitary housing was the tenant protection vouchers. Senator Rubio proposed the tenant protection voucher program as a solution for the same problems faced by Petitioners.

This amendment would make tenant protection vouchers available for tenants living in units where the owner has been declared in default of a HUD housing assistance payment contract due to physical deficiencies, allowing the secretary to consider granting relocation vouchers sooner in the process. The lack of temporary relocation assistance has kept these tenants trapped in Eureka Garden. The inability to temporarily relocate resulted in tenants being hospitalized because of gas leaks and other difficult conditions. App. 98.

When Senator Rubio's amendment was introduced on the Senate Floor on May 19, 2016, the purpose was made clear:

AMENDMENT NO. 4050 (Purpose: To make temporary relocation assistance available for tenants in project-based section 8 properties with imminent health and safety risks). App. 103-104.<sup>14</sup>

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<sup>14</sup> TRANSPORTATION, HOUSING AND URBAN DEVELOPMENT, AND RELATED AGENCIES APPROPRIATIONS ACT,

Congress thought the program important to enact and fund it in the 2017 Consolidated Appropriations Act.<sup>15</sup>

Congress thought the relief for the lapses and violations in the HUD rental program important enough to re-enact and authorize funding for the program in every Consolidated Appropriations Act since then: 2018, 2019, 2020, 2021, and 2022.<sup>16</sup>

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2016, Congressional Record May 19, 2016—Issue: Vol. 162, No. 80—Daily Edition 114th Congress (2015-2016)—2nd Session, S3004, S3017 (Rubio Amendment 4050).

<sup>15</sup> Congress adopted Senator Rubio’s amendment which states:

“Provided further, That the Secretary may provide section 8 rental assistance from amounts made available under this paragraph for units assisted under a project-based subsidy contract funded under the “Project-Based Rental Assistance” heading under this title where the owner has received a Notice of Default and the units pose an imminent health and safety risk to residents.” CONSOLIDATED APPROPRIATIONS ACT, 2017, PL 115-31, May 5, 2017, 131 Stat. 135, 760-761.

<sup>16</sup> See citations to Consolidated Appropriations Act *supra* at note 1.

**B. The Fifth Circuit in this case originally recognized the importance of not letting agencies evade the review that Congress intended but then withdrew that Opinion without explanation.**

The effect of judicial review on HUD's withholding relief is shown by comparing the two different Fifth Circuit decisions in this case.

The first Fifth Circuit decision granted judicial review and found that HUD's withholding the relief was an abuse of HUD's discretion. App. 20-29. To adopt HUD's argument that it had not decided whether to provide the vouchers or not meant that "There would never be final agency action because HUD could theoretically change its mind and provide relocation vouchers to families at any point." App. 29. The Fifth Circuit went on to hold that:

The agency's inaction here constitutes a final agency action because it prevents or unreasonably delays the tenants from receiving the relief to which they are entitled by law. App. 29.

The second Fifth Circuit decision withdraws the first decision and without explanation denies judicial review of HUD's decision to withhold the relief because it found no consummation of agency decision-making. App. 6-7.

The contradictory decisions issued by the same panel in this same case show the importance of the need for judicial review. Nothing changed between

time of the two different Fifth Circuit Opinions. The text of the statutory provisions setting out the relief available, the terms upon which eligibility for the relief is based, and the funding for the relief remains the same.<sup>17</sup>

The relevant regulation whereby HUD itself promises relief from the lapses and violations in the program remains the same. 24 C.F.R. § 886.323(e). The violations of the statutory obligation to pay only for housing that is decent, safe, and sanitary remains the same. 24 C.F.R. § 5.70. Petitioners' request for relief is still unmet because HUD's decision to withhold the relief remains in effect.

Resolving whether there is judicial review of HUD's decisions to withhold relief specifically authorized by Congress as relief necessary to remedy lapses and violations in the underlying program upholds Congressional intent under the housing program at issue and the APA. *Weyerhaeuser Co.*, 139 S.Ct. at 363.

### **III. The Fifth Circuit panel's erroneous holding that there is no action for judicial review for this statutorily-provided relief "would forever remove HUD's decisions from judicial review"**

The Fifth Circuit's final opinion holding no action for judicial review is completely the opposite of the

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<sup>17</sup> See citations to the Consolidated Appropriations Act, *supra* at note 1.



same panel’s earlier opinion holding that there was final agency action to review. The October 13, 2021 panel opinion stated that to adopt the view that there was no final agency action because HUD may ultimately change its mind and decide to issue the relief of relocation vouchers “would forever remove HUD’s decisions from judicial review.” App. 29. In fact, “There would never be a final agency action because HUD could theoretically change its mind and provide relocation vouchers to families at any point.” App. 29. The end result from the second and now controlling Fifth Circuit opinion is that there will never be judicial review of HUD’s arbitrary action to withhold the congressionally provided relief of relocation housing. App. 6-7.

The erroneous holding ignores the presumption of reviewability and ignores the statutory scheme at issue. This Court has consistently emphasized the importance of protecting the basic presumption of judicial review created under the APA. *Mach Mining, LLC*, 575 U.S. at 488-89. Judicial review is important for correcting legal lapses and violations by administrative agencies and also serves as a deterrent to such legal lapses and violations. *Weyerhaeuser Co.*, 139 S.Ct. at 370.

The doctrine of final agency action asks whether particular agency action represents the “consummation of its decision-making process” and determines “rights or obligations.” *Bennett*, 520 U.S. at 177-78. This standard is met. HUD cannot avoid the Consolidated Appropriations Act provision that provides funding and housing relief in specific situations by letting days,

months, and years pass and never responding to a request for the relief. Nor can it evade review by equivocating as to whether it will provide the relief. The earlier Fifth Circuit opinion found that “the agency’s inaction here constitutes a final agency action because it prevents or unreasonably delays the tenants from receiving the relief to which they are entitled by law.” App. 29. The final panel opinion just holds there is no action for judicial review. App. 6-7.

There is nothing in the Consolidated Appropriations Act to preclude judicial review. Judicial review of final agency action is traditionally available unless a “statute’s language or structure” precludes judicial review. *American Hospital Ass’n v. Becerra*, 142 S.Ct. 1896 (2022). The agency bears a heavy burden to show review is not available. *Mach Mining*, 575 U.S. at 486. Judicial review of the Consolidated Appropriations Act provision at issue is presumed available.

The agency’s unreasonable withholding of statutorily available relief violates HUD’s own regulation for relocating tenants when an owner has defaulted on the obligation to provide decent, safe, and sanitary housing. HUD has set the deadline for HUD’s own action by its regulation 24 C.F.R. § 886.323(e). The October 13, 2021 panel opinion found these HUD regulation elements are met in this case—HUD has notified the owner of the failure to maintain the units in decent, safe and sanitary condition, the owner has failed to take corrective action in the HUD notice, and the petitioners requested to be rehoused. App. 26-27. HUD allowed the tenants’ request for relocation to pass

without discussion or reasons made to the public. Its actions suggest that HUD has made up its mind, yet it seeks to avoid judicial review by holding out the vague prospect of reconsideration. As a result, petitioners have suffered by continuing to have to live in utterly substandard housing despite the availability of congressionally funded relocation housing provided for this specific situation.

The contradictions between the second panel decision and this Court's precedent on the availability of judicial review warrants certiorari on petitioners' questions presented.



## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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