UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-1087

JEAN MASSIE, et al.,

Appellants,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.,

Appellees.

APPEAL FROM THE FINAL ORDER OF THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA AT C.A. 06-1004 ENTERED ON OCTOBER 31, 2008

BRIEF OF APPELLANT

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Statement of Subject Matter and Appellate Jurisdiction

The Appellant class proceeded before the District Court on claims arising under the Administrative Procedure Act, 5 U.S.C. § 706. Accordingly, subject matter jurisdiction over this matter is provided by 28 U.S.C. §1331 (federal question).

Appellate jurisdiction over the final judgment of the District Court is provided by 28 U.S.C. §1291. This appeal was timely filed on December 30, 2008.

Statement of the Issues Presented for Review

I. Claims under 5 U.S.C. 706(1)

A. To compel agency action unlawfully withheld in violation of 109 P.L. 115, § 311

1. Whether the District Court abused its discretion or erred as a matter of law by deferring to HUD's interpretation of the applicability of 109 P.L. 115, §311 and concluding that HUD is not required by this statute to preserve project-based Section 8 rental assistance contracts at multifamily properties post-foreclosure if HUD unilaterally decides to suspend payments under and terminate these contracts when this interpretation fails to effect the unambiguous intent of Congress, goes beyond the meaning the statute can bear and frustrates the policy Congress sought to implement. This is an issue of first impression in the courts.

B. To compel agency action unlawfully withheld in violation of 24 CFR 290.17(d)

1. Whether the District Court erred as a matter of law by concluding that 24 CFR 290.17(c) always applies to the displacement of residents that occurs in connection with a HUD foreclosure when 24 CFR 290.17(d)

expressly applies "to any displacement that results whenever…federal financial assistance…is provided in connection with the purchase, demolition, or rehabilitation of a multifamily property by a third party."

2. Whether the District Court abused its discretion or erred as a matter of law by concluding that Plaintiff Class Members were not "displaced persons" within the meaning of 24 CFR 290.17(d) because the Court found that (a) they were not "required" to relocate and (b) permanent displacement resulted from conditions at that property when the undisputed evidence in the "Administrative Record" established that permanent displacement directly resulted from HUD's decision non-preservation determination to convey the property with funding for demolition and redevelopment, despite its determination that rehabilitation of the property was feasible.

    a. In the alternative, whether the District Court abused its discretion or erred as a matter of law by denying discovery to the Plaintiff Class and granting summary judgment to HUD on this claim when the evidence in the Administrative Record and the reasonable inferences of the evidence demonstrated, at minimum, a dispute of material fact on the issue of whether residents were "displaced persons" within the meaning of 24 CFR 290.17(d).

    b. In the alternative, whether the District Court erred as a matter of law by denying discovery to the Plaintiff Class and granting summary judgment to HUD when the affidavit and material documents either originated by HUD or before the agency that Appellants submitted to the District Court were not included in the "Administrative Record," clearly demonstrating that the "Administrative Record" produced by HUD was incomplete.

    c. In the alternative, whether the District Court abused its discretion or erred as a matter of law by denying discovery to the Plaintiff Class and granting summary judgment to HUD on this claim when a determination of whether a person is a "displaced person" within the meaning of 24 CFR 290.17(d)(1) and (d)(3) is adjudicatory in nature and HUD provided no fact-finding procedures through which residents could dispute this determination.

d. In the alternative, whether the District Court abused its discretion or erred as a matter of law by denying discovery to the Plaintiff Class and granting summary judgment to HUD on this claim when review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record.

II. Whether Fed. R. App. P. 3(c)(1)(A) or 3(c)(3) is the operative rule under the circumstances of this case, and, if Rule 3(c)(3) is the operative rule, how it should be interpreted in this case, in light of Marrs v. Motorola, Inc., 547 F.3d 839 (7th Cir. 2008).

Statement of the Case

This case was filed as a class action under FRCP 23(b)(2). Relevant hereto, the claims for relief raised by the class were 1) to compel Appellees ("HUD") to maintain the project-based Section 8 contract at the property following foreclosure, as required by 109 P.L. 105, §311 and 2) provide class members with relocation assistance as required by 24 CFR 290.17(d). After denying discovery to the class, the District Court granted summary judgment to HUD. The Appellant class requested reconsideration for the same reasons they taken this appeal.

Statement of the Facts

On November 10, 2004, HUD declared is intention to foreclose on the two mortgages it held on Third East Hills Park (AR Tabs 124, 125 (Mortgage); AR Tabs 127, 128 (Contingent Repayment Mortgage)) and dispose of the property. AR Tab 21 (Notice of Intent to Foreclose). The disposition process concluded on October 26, 2006. AR Tabs 106-116 (Foreclosure Sale Contract and related

documents). Accordingly, HUD acknowledged (Docket No. 37, p. 5, n. 4) and the District Court properly held (Docket No. 40, p. 3) that Section 311 applied to HUD's disposition of the property. 109 P.L. 115, § 311; 110 P.L. 5, § 101(c)(9).

During the course of disposition, HUD performed an economic feasibility analysis to determine whether the property was viable for rehabilitation, based on the cost for repair requirements as determined by a Comprehensive Repair Survey commissioned by HUD, the HUD fair market rental rates applicable to the property and a projected 93% occupancy rate. AR Bates 264-266. See Internal HUD Memorandum (May 31, 2006), Docket No. 35, Ex. 1, pp. 6-7 setting forth the factors and procedure by which HUD will determine whether a property is feasible for preservation of a project-based Section 8 contract under Section 311 (not produced in the "Administrative Record," but produced by Appellant in the District Court).[1] The analysis concluded that the property was viable for rehabilitation and would produce an annual net cash flow, consisting of tenant rents and rental assistance payments under a project-based Section 8 contract, of $343,934. AR Bates 265 (Analysis); Bates 687 (Email Regarding Analysis). This

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[1] Congress expressly authorized HUD to establish factors for reaching a "determination" regarding feasibility within the meaning of the statute, and HUD is certainly free to develop the procedures for reaching this determination. *E.g.* Mt. Emmons Mining Co. v. Babbitt, 117 F.3d 1167, 1172 (10th Cir. 1997) ("While the Secretary is indeed free to implement an internal procedural mechanism of his own choice to determine exemption eligibility, he is not free to change the standard…Congress had chosen….").

was consistent with HUD's determination just four years earlier that the property was fiscally and physically viable for a 20-year renewal of the project-based Section 8 contract. AR Tab 16 (Renewal Section 8 Contract following Mark-to-Market approval pursuant to the Multifamily Assisted Housing Reform and Affordability Act of 1997 (105 P.L. 65, §510 et seq.) and implementing regulations (24 CFR Part 401)).

During the course of disposition, HUD also performed an environmental analysis to determine whether the property suffered from environmental factors that could not be mitigated by HUD or the purchaser following disposition. AR Tab 59 (Environmental Assessment); *see* Internal HUD Memorandum (May 31, 2006), Docket No. 35, Ex. 1, pp. 6-7. HUD concluded there were no adverse environmental factors impacting the property. AR Bates 331.

The "Administrative Record" is devoid of any evidence establishing other facts that would support a determination that the property was infeasible for continued project-based rental assistance following foreclosure. There can be no dispute that the "Administrative Record" does not contain police or fire records demonstrating "inadequate police or fire protection, high crime rates, drug infestation, or lack of public community services needed to support a safe and healthy living environment for residents." See Internal HUD Memorandum (May 31, 2006), Docket No. 35, Ex. 1, pp. 6-7 (requiring such evidence for a

determination of infeasibility on this basis). Given the significant redevelopment already underway or planned for the neighborhood at the time, no such finding could be supported. *See* AR Bates 468 et seq. (2/1/2006 memorandum describing East Hills Restoration Initiative coordinated by HUD, the FBI, the Pittsburgh Bureau of Police, Senator Rick Santorum, the developer that would acquire the property the Urban Redevelopment Authority and others entities); Docket No. 94-2, pp. 30-32 (describing social and supportive services programming available to East Hills residents).

The “Administrative Record” contains no documentation from a unit of local government demonstrating that preservation of the property as rental housing assisted by a project-based Section 8 contract was “not in compliance with State or local land use plans for the area.” See Internal HUD Memorandum (May 31, 2006), Docket No. 35, Ex. 1, pp. 6-7 (requiring such evidence for a determination of infeasibility on this basis). In fact, the Urban Redevelopment Authority of Pittsburgh, to which the property was granted at foreclosure for demolition and redevelopment, requested that the subsidy be maintained, which HUD denied. AR Bates 298. [Nor is there evidence in the “Administrative Record” establishing that HUD required the Urban Redevelopment Authority to provide one-for-one replacement of affordable housing elsewhere in the community following

demolition. *See* Internal HUD Memorandum (May 31, 2006), Docket No. 35, Ex. 1, pp. 6-7 (requiring this).

Based on the evidence in the "Administrative Record," or lack thereof, it is undisputed that HUD in fact never determined the property to be infeasible for continued project-based rental assistance post-foreclosure, in accordance with its internal memorandum or otherwise.

The only evidence in the "Administrative Record" shedding light on HUD's reason for not preserving the project-based Section 8 contract as a condition of the disposition was the April 20, 2005 letter from HUD to the Urban Redevelopment responding to its request that HUD preserve the subsidy, in which HUD stated "continuance of Project Based Section 8 assistance is contrary to current HUD policy" (AR, Bates 298). See also Docket No. 116-8, submitted by Appellant in response to HUD's Concise Statement of the Facts (not produced in the "Administrative Record") (hand-written notes recording 1/14/2005 conversation between HUD staff and Urban Redevelopment Authority staff noting HUD's "long standing policy with foreclosure to voucher out the residents and not restore Section 8").

It was in accordance with this long-standing policy, which is contrary to Congressional preference for project-based assistance over tenant-based vouchers, that HUD failed to preserve the project-based Section 8 subsidy as required by

Section 311 as a condition of the foreclosure. AR Tab 91 (7/5/2006 Contract for Sale without project-based Section 8 contract); AR Tabs 106-116 (10/26/2006 foreclosure documents conveying property without project-based Section 8 contract).

Statement of Related Cases

This case has not been before this Court previously.

Statement of the Scope and Standard of Review

In considering summary judgment decisions, the Court reviews the case *de novo*, applying the same standard that the district court did. See Carlisle Area Sch. v. Scott P., 62 F.3d 520, 526 (3d Cir. 1995).

If reasonable minds could differ as to import of the evidence, and "if there is any evidence in the record from any source from which a reasonable inference in the respondent's favor may be drawn, the moving party simply cannot obtain a summary judgment." In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 259 (3d Cir. 1983). In ruling on motion for summary judgment, court must construe evidence in its most favorable light in favor of party opposing motion and against movant, and papers supporting movant are closely scrutinized, whereas opponent's are indulgently treated. Bohn Aluminum & Brass Corp. v Storm King Corp. 303 F2d 425, 22 (6th Cir. 1962).

"We also exercise plenary review over issues of statutory interpretation." E.I. DuPont de Nemours & Co. v. United States, 508 F.3d 126, 132 (3d Cir. 2007).

Argument

III. Claims under 5 U.S.C. 706(1)

A. To compel agency action unlawfully withheld in violation of 109 P.L. 115, § 311

The issue is whether the District Court erred as a matter of law by deferring to HUD's interpretation of 109 P.L. 115, §311 and concluding that HUD is not required under this statute to preserve project-based Section 8 rental assistance contracts at multifamily properties post-foreclosure whenever HUD unilaterally decides to suspend payments under and terminate these contracts. Because this interpretation fails to effect the unambiguous intent of Congress, goes beyond the meaning the statute can bear and frustrates the policy Congress sought to implement, the Appellant class contends that the Court below erred. This is an issue of first impression in the courts.

1. **By enacting Section 311, Congress unambiguously required HUD to preserve project-based Section 8 contracts at multifamily properties post-foreclosure unless HUD determined the property to be infeasible for this.**

109 P.L. 115, §311 requires HUD to preserve project-based Section 8 contracts at multifamily properties post-foreclosure unless HUD determines the property to be infeasible for this. By enacting 109 P.L. 115, §311 ("Section 311"), Congress required HUD, in disposing of any multifamily property in fiscal year 2006 or thereafter,[2] to "maintain any rental assistance payments under section 8 of the United States Housing Act of 1937 that are attached to any dwelling units in the property." The only exception to this requirement was if HUD determined "that such a multifamily property…[wa]s not feasible for continued rental assistance payments under…section 8, based on consideration of the costs of maintaining such payments for that property or other factors," and then only if HUD, "in consultation with the tenants of that property, contract[ed] for project-based rental assistance payments with an owner or owners of other existing housing properties, or provide other rental assistance." *Ibid.*

2. **In this case, HUD did not determine the property to be infeasible for preservation of the project-based Section 8 contract. In fact, HUD determined the opposite.**

On November 10, 2004, HUD declared is intention to foreclose on the two mortgages it held on Third East Hills Park (AR Tabs 124, 125 (Mortgage); AR

[2] The requirements of Section 311 were reenacted for fiscal year 2007 in Congress' first Continuing Appropriations Resolution for that fiscal year. 109 P.L. 289, Division B, §§ 101(a)(10) and 105 (September 29, 2006). These requirements have been reenacted each subsequent year, and Congress added more detail to the language in the Omnibus Appropriations Act of 2009. 111 P.L. 8, Division I, §218.

Tabs 127, 128 (Contingent Repayment Mortgage)) and dispose of the property. AR Tab 21 (Notice of Intent to Foreclose). The disposition process concluded on October 26, 2006. AR Tabs 106-116 (Foreclosure Sale Contract and related documents). Accordingly, HUD acknowledged (Docket No. 37, p. 5, n. 4) and the District Court properly held (Docket No. 40, p. 3) that Section 311 applied to HUD's disposition of the property. 109 P.L. 115, § 311; 110 P.L. 5, § 101(c)(9).

During the course of disposition, HUD performed an economic feasibility analysis to determine whether the property was viable for rehabilitation, based on the cost for repair requirements as determined by a Comprehensive Repair Survey commissioned by HUD, the HUD fair market rental rates applicable to the property and a projected 93% occupancy rate. AR Bates 264-266. See Internal HUD Memorandum (May 31, 2006), Docket No. 35, Ex. 1, pp. 6-7 setting forth the factors and procedure by which HUD will determine whether a property is feasible for preservation of a project-based Section 8 contract under Section 311 (not produced in the "Administrative Record," but produced by Appellant in the District Court).[3] The analysis concluded that the property was viable for

[3] Congress expressly authorized HUD to establish factors for reaching a "determination" regarding feasibility within the meaning of the statute, and HUD is certainly free to develop the procedures for reaching this determination. *E.g.* Mt. Emmons Mining Co. v. Babbitt, 117 F.3d 1167, 1172 (10th Cir. 1997) ("While the Secretary is indeed free to implement an internal procedural mechanism of his own choice to determine exemption eligibility, he is not free to change the standard…Congress had chosen….").

rehabilitation and would produce an annual net cash flow, consisting of tenant rents and rental assistance payments under a project-based Section 8 contract, of $343,934. AR Bates 265 (Analysis); Bates 687 (Email Regarding Analysis). This was consistent with HUD's determination just four years earlier that the property was fiscally and physically viable for a 20-year renewal of the project-based Section 8 contract. AR Tab 16 (Renewal Section 8 Contract following Mark-to-Market approval pursuant to the Multifamily Assisted Housing Reform and Affordability Act of 1997 (105 P.L. 65, §510 et seq.) and implementing regulations (24 CFR Part 401)).

During the course of disposition, HUD also performed an environmental analysis to determine whether the property suffered from environmental factors that could not be mitigated by HUD or the purchaser following disposition. AR Tab 59 (Environmental Assessment); *see* Internal HUD Memorandum (May 31, 2006), Docket No. 35, Ex. 1, pp. 6-7. HUD concluded there were no adverse environmental factors impacting the property. AR Bates 331.

The "Administrative Record" is devoid of any evidence establishing other facts that would support a determination that the property was infeasible for continued project-based rental assistance following foreclosure. There can be no dispute that the "Administrative Record" does not contain police or fire records demonstrating "inadequate police or fire protection, high crime rates, drug

infestation, or lack of public community services needed to support a safe and healthy living environment for residents." See Internal HUD Memorandum (May 31, 2006), Docket No. 35, Ex. 1, pp. 6-7 (requiring such evidence for a determination of infeasibility on this basis). Given the significant redevelopment already underway or planned for the neighborhood at the time, no such finding could be supported. *See* AR Bates 468 et seq. (2/1/2006 memorandum describing East Hills Restoration Initiative coordinated by HUD, the FBI, the Pittsburgh Bureau of Police, Senator Rick Santorum, the developer that would acquire the property the Urban Redevelopment Authority and others entities); Docket No. 94-2, pp. 30-32 (describing social and supportive services programming available to East Hills residents).

The "Administrative Record" contains no documentation from a unit of local government demonstrating that preservation of the property as rental housing assisted by a project-based Section 8 contract was "not in compliance with State or local land use plans for the area." See Internal HUD Memorandum (May 31, 2006), Docket No. 35, Ex. 1, pp. 6-7 (requiring such evidence for a determination of infeasibility on this basis). In fact, the Urban Redevelopment Authority of Pittsburgh, to which the property was granted at foreclosure for demolition and redevelopment, requested that the subsidy be maintained, which HUD denied. AR Bates 298. [Nor is there evidence in the "Administrative Record" establishing that

HUD required the Urban Redevelopment Authority to provide one-for-one replacement of affordable housing elsewhere in the community following demolition. *See* Internal HUD Memorandum (May 31, 2006), Docket No. 35, Ex. 1, pp. 6-7 (requiring this).

Based on the evidence in the "Administrative Record," or lack thereof, it is undisputed that HUD in fact never determined the property to be infeasible for continued project-based rental assistance post-foreclosure, in accordance with its internal memorandum or otherwise.

The only evidence in the "Administrative Record" shedding light on HUD's reason for not preserving the project-based Section 8 contract as a condition of the disposition was the April 20, 2005 letter from HUD to the Urban Redevelopment responding to its request that HUD preserve the subsidy, in which HUD stated "continuance of Project Based Section 8 assistance is contrary to current HUD policy" (AR, Bates 298). See also Docket No. 116-8, submitted by Appellant in response to HUD's Concise Statement of the Facts (not produced in the "Administrative Record") (hand-written notes recording 1/14/2005 conversation between HUD staff and Urban Redevelopment Authority staff noting HUD's "long standing policy with foreclosure to voucher out the residents and not restore Section 8").

It was in accordance with this long-standing policy, which is contrary to Congressional preference for project-based assistance over tenant-based vouchers, that HUD failed to preserve the project-based Section 8 subsidy as required by Section 311 as a condition of the foreclosure. AR Tab 91 (7/5/2006 Contract for Sale without project-based Section 8 contract); AR Tabs 106-116 (10/26/2006 foreclosure documents conveying property without project-based Section 8 contract).

3. **The District Court erred by deferring to HUD's interpretation of Section 311 because the interpretation fails to effect the unambiguous intent of Congress, goes beyond the meaning the statute can bear and frustrates the policy Congress sought to implement.**

The clear language and intent of Congress in Section 311 requires that project-based rental assistance be maintained at the property post-foreclosure. HUD, nevertheless, argued to the District Court that the phrase "attached to any dwelling units in the property" in Section 311 is ambiguous, such that the Court was required to defer to that portion of the agency's internal memorandum interpreting the applicability of the statute. According to the memorandum, HUD is not required to comply with Section 311's mandate to preserve existing subsidies via disposition any time HUD decides to suspend payments under the project-based Section 8 contract and will terminate the contract. Internal HUD Memorandum (May 31, 2006), Docket No. 35, Ex. 1, p. 4. The District Court

agreed. Opinion, Docket No. 130, pp. 14-20. This was error, based in large part on the District Court's serious misreading of legislative history.

The plain language of Section 311 is clear and unambiguous. It requires HUD to maintain after foreclosure "any rental assistance payments under section 8 of the United States Housing Act of 1937 that are *attached to any dwelling units in the property*." 109 P.L. 115, §311. Section 8 of the U.S. Housing Act creates two, distinct forms of rental assistance: "project-based" and "tenant-based." *See* 42 U.S.C. §§ 1437f(f)(6) and (7), respectively. Rental assistance payments "*attached*" to a property are "project-based." 42 U.S.C. §§ 1437f(f)(6) (emphasis added). Rental assistance payments *attached* to a person are "tenant-based." 42 U.S.C. §1437f(f)(7). Congress' requirement in Section 311 that HUD preserve rental assistance payments "attached to…dwelling units" simply refers to the former. *See, e.g.,* United States v. Freeman, 44 U.S. 556, 565 (1845) (provisions of statutes on the same subject are to be construed *in pari materia*); *accord* Erlenbaugh v. United States, 409 U.S. 239, 245 (1972). The second clause of Section 311 affims this: "[If HUD determines] that *such a multifamily property*…is not feasible for continued *rental assistance payments under…section 8*…[then HUD] may, in consultation with the tenants *of that property*, contract for *project-based rental assistance payments* [at] *other existing housing properties*, or provide other rental assistance." 109 P.L. 115, §311 (emphasis added). The intent stated by Congress

for introducing Section 311 is equally clear. Its "[p]urpose" was "[t]o allow disabled and non-disabled tenants to keep their *section 8 contracts on their properties* post foreclosure." 151 Cong Rec S 11603, S11640 (emphasis added).

The District Court's contrary opinion was based largely on a serious misreading of the legislative history of P.L. 115. Based on its reading of the House and Senate Committee Reports, the Court viewed Congress to express a preference for "budget-based" over "unit-based" funding. Docket No. 130, pp. 17-19. The Court interpreted these phases, however, as if they expressed a preference for "tenant-based" over "project-based" assistance. The Committees' references to "budget-based" and "unit-based" had nothing to do with project-based assistance or Congress' intent regarding Section 311. It was merely a discussion of two different methods for providing funding to public housing authorities ("PHAs") to administer the tenant-based Section 8 Voucher program.[4] Both Committee discussions were published under the heading "Tenant Based Rental Assistance," and both concern only funding for that program. The House Committee explained that, in the previous year, funding for Vouchers was provided to PHAs based on

[4] House Report language at: http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp109&sid=cp109KDlRM&refer=&r_n=hr153.109&item=&sel=TOC_277093&; Senate Report language at: http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp109&sid=cp109yi67F&refer=&r_n=sr109.109&item=&sel=TOC_623734&

the number of units under contract ("unit-based") but that the current appropriation would provide a fixed "budget" amount for each PHA, restoring this practice. Which methodology Congress thought best for funding PHA administration of the tenant-based Voucher program has nothing to do with Congress' intent regarding whether project-based contracts between private owners and HUD should survive foreclosure.

The quoted discussion in the Senate Committee Report is relevant to Congress' purpose for enacting Section 311. It addresses Tenant Protection Vouchers, which provide assistance to "tenants that live in projects where the owner of the project has decided to leave the Section 8 program." The Senate Committee expressed Congress' long-standing preference for preserving the project-based units rather than converting to tenant-based vouchers and criticized HUD for its failure to share this Congressional commitment. This sheds some light on the thinking behind Congress' stated purpose with Section 311 to "keep…section 8 contracts on…properties post foreclosure." 151 Cong Rec S 11603, S11640. Inexplicably, the District Court failed to this cite the Congressional Record, even though it speaks directly to the issue here.

Of course Congress did not intend to "reward[] owners who allow their properties to become indecent, unsafe and unsanitary by continuing payments [to them]," as HUD argued and the Court concluded would result if Section 311

applied (Opinion, Docket No. 130, p. 16). Section 311 has nothing to do with maintaining payments to owners found to be in default. Foreclosure, by definition, always follows some default by the prior owner. Such an interpretation would render Section 311 meaningless, as continued Section 8 assistance would never be required following disposition. Sekula v. FDIC, 39 F.3d 448, 454 and n. 16 (3d Cir. 1994) ([A] fundamental rule of construction is that effect must be given to every part of a statute or regulation, so that no part will be meaningless. One must look at the entire provision, rather than seize on one part in isolation."). Rather, Congress' purpose was to require HUD to preserve the project-based Section 8 contract at the property post-foreclosure as part of the disposition, to protect disabled and non-disabled tenants. HUD's argument to the District Court that it is the "payments" under the contract, and not the contract itself, that must be preserved under Section 311 was a post hoc argument created uniquely for this case. Even HUD's internal memorandum recognizes Congress' intent that "[i]n accordance with Section 311…the Secretary is required to maintain *the project-based Section 8 HAP contract* in any multifamily property…for which the Secretary holds the mortgage and is in the process of disposing the property at foreclosure [emphasis added]." See Internal HUD Memorandum (May 31, 2006), Docket No. 35, Ex. 1, p. 4. HUD's ability to substitute other assistance payments to tenants is expressly limited to when it determines infeasibility (see below).

Because the statute is clear and unambiguous, the District Court should have interpreted the statute to effect the unambiguous intent of Congress. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984); ; *see also* Mt. Emmons Mining Co. v. Babbitt, 117 F.3d at 1171 (collecting cases) ("Although the Secretary is free to adopt a reasonable interpretation of an ambiguous statute, he is not free to disregard an unambiguous aspect of the statute…."). Because the undisputed evidence of record established that HUD had determined the property to be economically and environmentally feasible for ongoing project-based Section 8 assistance and because the record is devoid of evidence establishing other factors that HUD determined would render the property infeasible for preservation of the contract post-foreclosure, the District Court should have entered summary judgment for Plaintiffs on this claim.

Furthermore, even if this phrase "attached to any dwelling units in the property" is susceptible to a charge of ambiguity, the Court's agreement with HUD's interpretation of the phrase was erroneous. Rental assistance payments under Section 8 of U.S. Housing Act are "attached" to dwelling units by contract. 42 U.S.C. §§ 1437f(f)(6) and 1437f(f)(d)(2). Suspension of payments under such contract does not terminate the contract or otherwise sever it from the property. *See* HUD Handbook 4315.1, "Multifamily Property Dispositions – Management,"

Appendix 5-4, §13.[5] In this case, it is undisputed that if HUD terminated the contract, it did so on March 10, 2006 (Opinion, Doc. 130, p. 11), well after the effective date of Section 311. Therefore, the subsidy under project-based contract was "attached" to the dwelling units while the property was in the process of disposition and should have been preserved as a term of the disposition.

The District Court also erred in deferring to HUD's interpretation of the statute—that project-based Section 8 subsidies are not "attached" to dwelling units whenever HUD decides to suspend payments and terminate the contract—because this interpretation goes beyond the meaning the statute can bear. MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 229 (1994). Not only does it fail to incorporate the plain meaning of the statute (Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 171 (1989)), it frustrates the policy Congress sought to implement. Securities Industry Ass'n v. Board of Governors of Federal Reserve System, 468 U.S. 137, 143 (1984). In fact,

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[5] "Condition of Dwelling Unit and Rental Abatement Based Thereon. …If a rental abatement based upon deficiencies listed in the Unit Inspection Report has been given to the Resident, such abatement will terminate as follows:

a. Once each deficiency is repaired, that portion of the abatement attributable to that deficiency will be withdrawn and the rent will rise.
b. After all deficiencies are repaired, the abatement will be totally withdrawn and the rent will rise to the normal level stated in the lease."

Available on the HUD website at http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4315.1/index.cfm.

it directly contravenes Congress' purpose to "keep…section 8 contracts on…properties post foreclosure." 151 Cong Rec S 11603, S11640. Prior to the enactment of Section 311, HUD's long-standing policy in multifamily property dispositions was to suspend (i.e. abate) all payments under the project-based Section 8 contract, use this suspended authority to relocate residents from the property and then terminate the contract. See Docket No. 116-8 submitted by Appellant in response to HUD's Concise Statement of the Facts (not produced in the "Administrative Record") (hand-written notes recording a 1/14/2005 conversation between HUD staff and Urban Redevelopment Authority of Pittsburgh staff noting HUD's "long standing policy with foreclosure to voucher out the residents and not restore Section 8"). *See also* AR TAB 51, Bates 298 (Letter from HUD to Urban Redevelopment Authority of Pittsburgh) ("[C]ontinuance of Project Based Section 8 assistance is contrary to current HUD policy."); *see also* Amicus Brief of Housing Law Project and Housing Preservation Project, Docket No. 120. Because HUD's interpretation would permit the agency to continue this long-standing policy in circumvention of Section 311, it is not entitled to deference, and it should have been disregarded as an impermissible construction of the statute. National R.R. Passenger Corp. v. Boston and Maine Corp., 503 U.S. 407, 417 (1992) (quoting Chevron, 467 U.S. at 843). See also Mt. Emmons Mining Co. v. Babbitt, 117 F.3d at 1171 (collecting cases).

Likewise, because there is no indication that HUD's internal memorandum interpreting the applicability of Section 311 was the product of a "formal adjudication," "notice-and-comment rulemaking," or any other circumstance with "the force of law," its memorandum is not entitled to *Chevron* deference. United States v. Mead Corp., 533 U.S. 218, 229-234 (2001); see also Christensen v. Harris County, 529 U.S. 576, 586-588 (U.S. 2000) (agency interpretations in opinion letters, policy statements, agency manuals, and enforcement guidelines are not entitled to *Chevron* deference). Therefore, the Court's conclusion that *Chevron* deference "is warranted" (Opinion, Docket No. 130) was erroneous.

At this juncture, Third East Hills Park is to be redeveloped as rental and for-purchase housing. AR Bates 570-575 (Contract for Sale, Riders 3-5). HUD is required by Section 311 to use a project-based Section 8 contract to support the rebuilding of affordable rental housing in connection with this disposition of the property. *See* 24 CFR 290.23; 61 FR 11684, 11702, ¶ 31 (existing authority for HUD to do this). This Court should compel the agency to take the action called for by Section 311. 5 U.S.C. §706(1).

B. **To compel agency action unlawfully withheld in violation of 24 CFR 290.17(d)**

1. **24 CFR 290.17(d) requires relocation assistance for displaced persons at the levels described in the Uniform Relocation Act whenever federal financial assistance is provided in connection with the purchase, demolition, or rehabilitation of a multifamily property by a third party.**

The first issue here is whether the District Court erred as a matter of law by concluding that 24 CFR 290.17(c) always applies to displacement that occurs in connection with a HUD foreclosure. Because 24 CFR 290.17(d) expressly applies "to any displacement that results whenever…federal financial assistance…is provided in connection with the purchase, demolition, or rehabilitation of a multifamily property by a third party," the Appellant class contends that the Court erred.

Whenever HUD disposes of a multifamily property with a HUD mortgage, the agency must preserve the property at foreclosure unless it determines this to be infeasible or makes an otherwise permissible non-preservation determination. *See* 24 CFR 290.25 (circumstances justifying HUD determination not to preserve a project); 24 CFR 290.17(b) (duty to minimize displacement); *see generally* 24 CFR 290.1 (incorporating requirements, goals, objectives of 12 U.S.C. 1701z-11).

"If HUD decides not to preserve an occupied multifamily housing project at a foreclosure sale," however "tenants must be provided relocation assistance as described in § 290.17." 24 CFR 290.25. Whenever federal financial assistance is provided in connection with such a disposition, as in this case, 24 CFR 290.17(d)

requires that displaced persons be provided "relocation assistance at the levels described in Uniform Relocation Act levels."[6]

[6] 24 CFR Part 290 requires one of three levels of relocation assistance for occupants of a multifamily property who relocate as a result of HUD's management or disposition of the property: 1) temporary relocation assistance under 290.17(e); 2) permanent relocation assistance under 290.17(c); and 3) permanent relocation assistance under 290.17(d).

Only 8 scenarios determine which of these levels of assistance is required:

1) For temporary relocation (i.e. lasting less than 1 year, *see* 49 CFR Part 24 APPENDIX A, §24.2(a)(9)(ii)(D)) resulting from a HUD determination of immediate threat to health and safety (24 CFR 290.7(c)), §290.17(e) applies;
2) For temporary relocation resulting from any other circumstance (e.g. repair of non-exigent conditions by HUD or purchaser), §290.17(e) applies;
3) For permanent relocation resulting from rehabilitation of the property by HUD, §290.17(c) applies;
4) For permanent relocation resulting from demolition of the property by HUD (e.g. following HUD determination that conditions render repairs infeasible), §290.17(c) applies;
5) For permanent relocation resulting from a non-preservation disposition without federal financial assistance (e.g. HUD determines that conditions render repairs infeasible or makes another permissible non-preservation determination and no federal funding is provided in connection with the disposition of the property), §290.17(c) applies;
6) For permanent relocation resulting from disposition with federal financial assistance for rehabilitation of the property by a third party (i.e. to preserve the property), §290.17(d) applies;
7) For permanent relocation resulting from a non-preservation disposition with federal financial assistance for acquisition of the property by a third party (i.e. to preserve the property, but not as affordable rental housing), §290.17(d) applies; and
8) For permanent relocation resulting from a non-preservation disposition with federal financial assistance for demolition of the property by a third party, §290.17(d) applies.

The instant case exemplifies this last scenario.

2. **The District Court erred by concluding that 24 CFR 290.17(c) applies whenever there is a HUD foreclosure.**

The District Court disagreed that 24 CFR 290.17(d) applied in this case, first by holding that 24 CFR 290.17(c) applies whenever there is a HUD foreclosure, irrespective of whether federal financial assistance is provided at foreclosure for the acquisition or demolition or rehabilitation of the property. The Court emphasized the language of paragraph (c) in this way to reach this conclusion:

> Under 24 C.F.R. 290.17(d), Plaintiffs argue that HUD owed the residents relocation at URA levels. However, 24 C.F.R. 290.17(c) states as follows:
>
> (c) **Relocation assistance at non-URA levels**. **Whenever** the **displacement** of a residential tenant (family or individual) **occurs** in connection with the management or disposition of a multifamily housing project, but is not subject to paragraph (d) of this section (*e.g.*, occurs **as a direct result of** HUD repair or demolition of all or a part of a HUD-owned multifamily housing project or as a direct result of **the foreclosure of a HUD-held mortgage on a multifamily housing project** or sale of a HUD-owned project without federal financial assistance), **the displaced tenant shall be eligible for the following relocation assistance**….
>
> Under the facts of this case, HUD relocation assistance requirements clearly fell into the non-URA category described in subpart (c) of the regulation, not the URA-level found in subpart (d).

Opinion, Docket No. 130, pp. 24-25 [emphasis original].

This interpretation §290.17(c) cannot be correct. It would render §290.17(d) meaningless, as any HUD disposition of a privately-owned property with a HUD mortgage necessarily entails foreclosure of the

mortgage. Sekula v. FDIC, 39 F.3d at 454 and n. 16 (effect must be given to every part of a statute or regulation, so that no part will be meaningless). Section 290.17(d) expressly applies when federal assistance is provided in connection with the sale, demolition or rehabilitation of a property. *See also* HUD Handbook 4315.1, Chapter 13, §13-5(B) ("Displacement Covered by the Uniform Relocation [Act], Policies (Sale Related). [W]henever…the project sale is subsidized, a person displaced as a result of the sale or demolition or repair related to the sale is eligible for relocation assistance at the levels provided under URA.").

In this case, it is undisputed that HUD conveyed the property at the foreclosure sale to the Urban Redevelopment Authority of Pittsburgh for one dollar ($1) (AR Bates 751) and provided three million four hundred thousand dollars ($3,400,000.00) for demolition and redevelopment of the property (AR Bates 693). Therefore, HUD was required by 24 CFR 290.17(d) to provide for URA-level relocation assistance to any displaced person.

3. **The undisputed evidence in the "Administrative Record" established that Appellant Class Members were displaced persons within the meaning of 24 CFR 290.17(d) because they moved permanently as a direct result of HUD's non-preservation determination to fund the demolition of their property.**

The District also found that class members were not displaced persons under of 24 CFR 290.17(d) because (1) they were not "required" to relocate and (2) permanent displacement resulted from conditions at that property. The Appellant class contends that this was an abuse of discretion or error of law because the undisputed evidence in the "Administrative Record" established that permanent displacement directly resulted from HUD's non-preservation determination to convey the property for demolition even though it determined preservation to be feasible.

In this case, it is undisputed that members of the Appellant class were permanently displaced in connection with the disposition of the property. Every resident was relocated from his or her dwelling, most offsite and 14 onsite. (Opinion, p. 12). The relocation has lasted more than one year. Relocation is deemed permanent if the displacement from the person's dwelling lasts for more than one (1) year. 49 CFR Part 24 APPENDIX A, §24.2(a)(9)(ii)(D) ("Temporary relocation should not extend beyond one year before the person is returned to his or her previous unit or location. The Agency must contact any…tenant who has been temporarily relocated for a period beyond one year and offer all permanent relocation assistance.").

It is also undisputed that conditions at the property did not result in this displacement. As set forth in Section I.A.2 of this brief, HUD determined that

conditions at the property were repairable, and the property was feasible for preservation with ongoing project-based Section 8 assistance post-foreclosure. Nevertheless, HUD determined foreclose the mortgages, as needed to extinguish the use restriction at the property, and convey the property with funding for demolition and redevelopment. Therefore *permanent* displacement occurred only because HUD did not repair the property or require this at foreclosure. See also 24 CFR 290.7 ("Whenever HUD determines that there is an immediate threat to the health and safety of the tenants, HUD may *require* the tenants to vacate the premises and shall provide *temporary* relocation benefits as provided in § 290.17 to tenants required to vacate the premises." (emphasis added)).

The Court's found that class members were not "required to relocate" because HUD "expressed HUD's 'hope' that people would relocate using the assistance HUD provided but also expressed that it was the resident's choice." Docket No. 130, p. 23. This finding was based on the second to last sentence in the November 14, 2004 **"NOTICE OF DISPLACEMENT"** sent to each resident by HUD. AR Bates 194 (emphasis original). The first sentence of this notice stated "the U.S. Department of Housing and Urban Development (HUD) has made a decision to relocate the remaining tenants at Third East Hills Park Coop." The notice stated that HUD had contracted with a relocation firm to "assist you with the details of *the move* and the financial benefits that will be available to assist with

your move." The notice further stated that "*when* you move out of Third East Hills Park Coop, you will be entitled to the [relocation] benefits." The letter in no way alluded to a choice regarding whether to move. Importantly, the notice failed to inform residents that if they *chose* not to move, they would receive full URA-level benefits at the time of demolition. In fact, HUD never notified residents of this. The Appellant class contends that, under these circumstances, it was an unreasonable inference of fact to find that class members were not "required" to move.

a. **In the alternative, the evidence in the "Administrative Record" and the reasonable inferences of the evidence demonstrated a dispute of material fact on the issue of whether residents were "displaced persons" within the meaning of 24 CFR 290.17(d)**

In the alternative, the Appellant class contends that the District Court abused its discretion or erred as a matter of law by denying discovery to the Plaintiff Class and granting summary judgment to HUD on this claim because any factfinder could reasonably infer that residents were required to permanently relocate as a direct result of HUD's non-preservation disposition with federal funding. Therefore, discovery to supplement the record or trial were the only appropriate options available to the District Court. If reasonable minds could differ as to import of the evidence, and "if there is any evidence in the record from any source from which a reasonable inference in the respondent's favor may be drawn, the

moving party simply cannot obtain a summary judgment." In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 259 (3d Cir. 1983).

b. **In the alternative, it is clear that the "Administrative Record" produced by HUD was incomplete, and the District Court should have considered the material evidence submitted by Appellant and permitted discovery of other evidence not provided by HUD.**

In the alternative, the Appellant class contends that in granting summary judgment without discovery or the opportunity to supplement the "Administrative Record," the District Court erred as a matter of law. In response to HUD's motion for summary judgment, the Appellant class submitted an affidavit and numerous documents either originated by HUD or otherwise before the agency that HUD did not include in the "Administrative Record" evidencing that it had determined to dispose of the property for demolition and redevelopment long before initiated foreclosure or even declared a conditions default. Denial of discovery to complete the administrative record was error. Dopico v. Goldschmidt, 687 F.2d 644, 653-654 (2d Cir. 1982); Franklin Sav. Ass'n v. Director, Office of Thrift Supervision, 934 F.2d 1127, 1137-1138 (10th Cir. 1991); *accord* Higgins v. Kelley, 574 F.2d 789, 793-794 (3d Cir. 1978).

c. **In the alternative, the District Court should have reviewed issue of whether a person is a "displaced person" within the meaning of 24 CFR 290.17(d) de nove because this determination is adjudicatory in nature and HUD provided no fact-finding procedures through which residents could dispute this determination.**

Agency action that is adjudicatory in nature is reviewed *de novo* under 5 U.S.C. § 706 when the fact-finding procedures of the agency were inadequate. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971); Armstead v. United States Dep't of Housing & Urban Dev., 815 F.2d 278, 281 (3d Cir. 1987); *accord, e.g.,* NOW, Washington, D.C. Chapter v. Social Sec. Admin. of Dep't of Health & Human Services, 736 F.2d 727, 736-741 (D.C. Cir. 1984). The Administrative Procedure Act defines "adjudication" as an "agency process for the formulation of an order," 5 U.S.C. § 551(7) and defines "order" as a "final disposition…of any agency in a matter other than rule making." 5 U.S.C. § 551(6). The reason review is *de novo*, as the D.C. Circuit Court of Appeals explained for instance, is that adjudicative facts, i.e. "facts pertaining to particular parties and their businesses and activities," "are intrinsically the kind of facts that…ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial…. [T]he parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts." NOW, 736 F.2d at 738, n. 95.

In this case, HUD's determination that class members were not displaced persons, and therefore that 24 CFR 290.17(d) did not require URA-level relocation

assistance, was adjudicatory in nature. It is undisputed that Defendants did not provide any opportunity for class members to dispute this determination. Therefore, the District Court's review of this claim was *de novo*, and summary judgment without discovery was error.

d. **In the alternative, the District Court should have reviewed this claim de novo because judicial review of a claim to compel agency unlawfully withheld is not limited to any record as it existed at any single point in time, as there is no final agency action to demarcate the limits of an "administrative record."**

Similarly, judicial review of action unlawfully withheld or unreasonably delayed is *de novo*. *E.g.* Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir. 2000) ("[In] an action arising under 5 U.S.C. § 706(1) to 'compel agency action unlawfully withheld or unreasonably delayed…' review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record.") citing Independence Mining Co., Inc. v. Babbitt, 105 F.3d 502, 511 (9th Cir. 1997). Therefore, the District Court erred by granting summary judgment to HUD without providing the opportunity for discovery to the Appellant Class.

IV. **Both FRAP 3(c)(1)(A) and 3(c)(3) apply in this case, and the Appellant Class complied with the procedure provided by Rule 3(c)(3) for naming a class in accordance with the requirement of 3(c)(1)(A) to specify the party taking the appeal by naming it.**

Finally, this Honorable Court has directed the parties to brief "whether Fed. R. App. P. 3(c)(1)(A) or 3(c)(3) is the operative rule under the circumstances of

this case, and, if Rule 3(c)(3) is the operative rule, how it should be interpreted in this case, in light of Marrs v. Motorola, Inc., 547 F.3d 839 (7th Cir. 2008)." The Appellant is the Rule 23(b)(2) class certified by the District Court including the named, qualified representative of the class (Docket No. 82). The appellant class respectfully submits that both FRAP 3(c)(1)(A) and 3(c)(3)(c) apply in this case and were satisfied.

Rule 3(c)(1)(A) requires, in every case, that the notice of appeal *specify* the appellant(s) *by naming* it, her or them. It provides that the party taking the appeal may be specified either in the caption *or* the body of the notice and permits the use of "et al." or similar descriptors in doing so. Rule 3(c)(3) was created for the specific purpose of providing a procedure for *naming* a class as the appellant, by specifying "one person qualified to bring the appeal as representative of the class."

In a class action, the class has interests in its own right. *See, e.g.,* Finberg v. Sullivan, 634 F.2d 50, 64 (3d Cir. 1980) (Rule 23(b)(2) class may survive the named members' loss of standing); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 249 (3d Cir. 1975) (describing intrinsically cohesive nature of a 23(b)(2) class and that individual members have no right to request exclusion from the class). Following class certification, any judgment is binding on all members of the class. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 (1996) ("[U]nder [FRCP] 23, all members of the class…are bound by the judgment entered in the

action unless, in a Rule 23(b)(3) action, they make a timely election for exclusion.") (internal punctuation and citation omitted). The class is the functional party with respect to class claims. Therefore, a notice of appeal not specifying the class as the party taking the appeal would forever bind every class member with the judgment.

Recognizing this nature of class litigation—that the class is the party with respect to the claims and that class members are bound by a final judgment—FRAP 3(c)(1)(A) and (3) provide for an informal and simple procedure for *naming* the class in order to *specify* it as the party taking the appeal.

As it explained in its Note to the rule, the Advisory Committee on the Federal Rules of Appellate Procedure comprehensively amended Rule 3(c) in 1993 to ameliorate the confusion and satellite litigation spawned by the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). Notes of Advisory Committee on 1993 Amendments, "Note to Subdivision (c);" *see* Becker v. Montgomery, 532 U.S. 757 (2001). The Committee's overall purpose was to "state[] a general rule that specifying the parties should be done by naming them." *Id.* The Committee's specific purpose with Rule 3(c)(3) was to provide a uniform procedure for specifying a class as the appellant through the caption or body of the notice and naming one person qualified to bring the appeal. It was designed to provide the recipe for naming a class in compliance with 3(c)(1)(A) and consistent

with 3(c)(4). As with the other 1993 amendments, the Committee's purpose with Rule 3(c)(3) was "entirely ameliorative" (Becker, 532 U.S. at 757), designed "to prevent the loss of a right to appeal through inadvertent omission of a party's name." Report of the Advisory Committee on the Federal Rules of Appellate Procedure (September 1992), *reprinted in* 147 F.R.D. 287, 335.

In this case, the representative class members sought only class-wide injunctive relief. Therefore, they moved for class certification pursuant to FRCP 23(b)(2). Following discovery on the issues and full briefing by the parties, the District Court certified the class under 23(b)(2) (Docket No. 82). Utilizing the District Court's caption and naming the lead plaintiff in the blank on the District Court's form Notice of Appeal calling for "Named Party" fully complied with the procedure created by Rules 3(c)(1)(A) and (3) for specifying a class in the caption or body and naming a single person qualified to take the appeal for the class. Docket No. 141 (Notice of Appeal).

When the Seventh Circuit Court of Appeals held in Marrs v. Motorola, Inc. that a notice in which "one person qualified to bring the appeal as representative of the class" was insufficient despite the rule's express terms, it also simply ignored, without reference, the Advisory Committee's express purpose for Rule 3(c)(3). Rule 3(c)(3) was created precisely to avoid the sort of litigation that culminated

with the Seventh Circuit's Marrs decision. As such, this Court should not feel obligated to follow the Seventh Circuit's lead.

Furthermore, Marrs is distinguishable from the present case on its facts. In that case the Appellee argued, apparently without dispute, that "the notice [of appeal] contained *no indication of any kind whatsoever* that he intended the appeal to be in a representative capacity." 547 F.3d at 840 (emphasis added). FRAP 3(c)(1)(A) expressly permits "naming" the appellant either "in the caption *or* body of the notice [emphasis added]" and the use of "et al." in doing so. In this case, the caption named "Jean Massie, et al."

Conclusion

For the foregoing reasons this Court is requested to reverse the decision of the District Court and grant summary judgment to the Appellant class or, in the alternative, remand for discovery or trial as necessary.

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Certifications

I hereby certify that the word count of this brief is within the required word count limit.

I also certify that I am admitted to the bar of this Court.

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