12-2399

IN THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EMANUEL KU,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SHAUN DONOVAN, Secretary of the United States Department of Housing and Urban Development, CUTLER, TRAINOR & CUTLER, LLP, Foreclosure Commissioner, CITY OF NEWBURGH, BURTON TOWERS LLC,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF *AMICI CURIAE* THE NATIONAL HOUSING LAW PROJECT, ET AL., IN SUPPORT OF DEFENDANTS-APPELLEES ADVOCATING AFFIRMANCE

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DISCLOSURE STATEMENT PURSUANT TO FED. R. APP. P. 26.1

Amici Curiae the National Housing Law Project (NHLP), the Housing Preservation Project (HPP), the NYS Tenants and Neighbors Information Service, the Association for Neighborhood and Housing Development (ANHD), and the Local Initiatives Support Corporation (LISC), are non-profit corporations, and are not publicly held companies that issue stock. The *amici* have no financial interest in the outcome of this litigation.

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GENERAL STATEMENT OF INTEREST[1]

The National Housing Law Project (NHLP) is a nonprofit national housing and legal advocacy center established in 1968, whose mission is to advance housing justice for poor people by increasing and preserving the supply of decent, affordable housing. Through policy advocacy and litigation, NHLP has contributed to many important changes to federal housing policy and programs that have resulted in increased housing opportunities and improved housing conditions for poor people.

The Housing Preservation Project (HPP) is a nonprofit public interest advocacy and legal organization. Founded in 1999, its primary mission is to preserve and expand affordable housing for low income individuals and families. Although based in Minnesota, HPP works nationwide with tenant and advocacy organizations, public and private housing funders, owners, developers, and policy makers in their efforts to protect and expand affordable housing.

The New York State Tenants & Neighbors Information Service is a state-wide, non-profit organization that works with tenants to preserve affordable housing and strengthen tenants' rights. Tenants & Neighbors has done organizing,

[1] Pursuant to Fed. R.App. P. 29(c)(5), the undersigned attests that no party's counsel has authored this brief in whole or in part, and that no party, or any other person other than the *amici curiae*, their members, or their counsel, has contributed money intended to fund preparing or submitting the brief.

education, and policy work related to federally subsidized housing for over 15 years.

The Association for Neighborhood and Housing Development (ANHD) is a membership organization founded in 1974, comprised of 98 nonprofit neighborhood housing groups serving low- and moderate-income New Yorkers. Over the past decade alone, ANHD's training, policy research, advocacy, strategic communications, and leadership development has resulted in leveraging over $1.3 billion for affordable housing, rescuing over 30,000 apartments and 160 buildings for low-income residents, and creating breakthrough policies for community development.

The Local Initiatives Support Corporation (LISC) is the largest community development support organization in the country; LISC assembles private and public resources and directs it to locally-defined priorities, including preservation of affordable and subsidized housing.

The *amici* have had extensive experience working with and advocating for tenants in HUD-subsidized properties subject to HUD enforcement actions, in which HUD-restricted auctions were essential in preserving the affordability of the subject properties and preventing tenant displacement. The New York-based *amici*, in particular, provided assistance to the tenants in the properties subject to the decisions in *GP-UHAB Hous. Dev. Fund Corp. v. Jackson*, 2006 WL 297704

(E.D.N.Y. 2006) and *Guity v. Martinez*, 2004 WL 1145832 (S.D.N.Y. 2004), cited by the court below.

SUMMARY OF ARGUMENT

The District Court properly granted the motion of defendant U.S. Department of Housing and Urban Development (HUD) to dismiss the complaint below, as HUD acted reasonably, appropriately, and within the framework of the applicable statutes and regulations in restricting the sale of the subject property to developers who would be willing and able to rehabilitate and preserve the property as safe, sanitary and affordable housing. *Amici* have found such restricted auctions to be critical tools in preserving the dwindling supply of federally subsidized housing.

However, as *amici* demonstrate below, the District Court's reasoning was flawed. The District Court held that HUD's actions were unreviewable under the Administrative Procedure Act because the "notwithstanding" provision of 12 U.S.C. § 1715z-11a – the so-called "flexible authority" statute – leaves "no law to apply." Such a broad rationale is both unnecessary and legally incorrect. The dismissal judgment below can and should be affirmed without reference to whatever discretion HUD may have under the flexible authority statute, and without characterizing that discretion as unreviewable.

HUD's own brief cites district court decisions holding that whatever discretion HUD may have under the flexible authority statute, the agency must still comply with its own regulations. *See* Federal Appellee's Appellate Brief, at 30-31, fn. Such regulations therefore give the courts "law to apply" in reviewing HUD's actions under the APA. As further explained below, courts have also recognized that, in addition to HUD's regulations, federal housing statutes may provide additional "law to apply." Accordingly, this Court should uphold the judgment below, but reject HUD's claim of unreviewable discretion that was accepted by the District Court and is asserted once again as a defense to Plaintiff-Appellant's meritless appeal. The lower Court's unnecessarily broad application of Section 1715z-11a of the National Housing Act has the potential to weaken the ability of tenants in HUD properties, as well as units of local government and other stakeholders, to enforce federal laws and regulations enacted to ensure the preservation of scarce affordable housing, and will undermine the intent of Congress expressed through its enactment of detailed policies governing HUD's actions with respect to multifamily properties.

Amici therefore suggest that this Court need not address such a far-reaching issue, which has divided the lower courts and has not yet been addressed at the Circuit level, and instead should affirm the judgment on the narrower and

incontrovertible grounds that HUD's actions were fully consistent with applicable statutes and regulations.

ARGUMENT

I. HUD'S LIMITATION OF BIDDING TO NON-PROFITS, GOVERNMENTAL ENTITIES, AND OTHER LIEN HOLDERS WAS LEGALLY AUTHORIZED.

The District Court correctly concluded that restricting the bidding at the Burton Towers foreclosure auction was "likely to advance HUD's objectives and protect the tenants who occupy the properties it administers." Special Appendix, at 8. The Court noted that "all of the units of the property house low-income, elderly tenants, and the property had substantial safety deficiencies. Therefore, HUD prioritized bidders with experience in administering and rehabilitating affordable senior housing, and limited the bidding process accordingly." *Id.* The District Court properly credited HUD's contention that such a limitation was "the most effective way to ensure that an experienced owner would purchase the property and make the necessary repairs," rejecting Appellant's claim that HUD's actions lacked a rational basis. *Id.*

As HUD correctly argues here, moreover, the Multifamily Mortgage Foreclosure Act ("MMFA", 12 U.S.C. §§ 3706 and 3714, enacted in 1981) provides authority to HUD, acting through the Foreclosure Commissioner, to set "appropriate terms" for the foreclosure sale, and HUD's regulations specifically

require that only bids conforming to the specific terms of the foreclosure sale Notice must be accepted. 24 C.F.R. § 27.30 (2012). *See* Federal Appellee's Appellate Brief, at 26, 31.

Moreover, in addition to the MMFA, the Multifamily Property Disposition Reform Act ("MPDRA", 12 U.S.C. § 1701z-11(c)(3)(B)) requires HUD to dispose of a multifamily project through a foreclosure sale only to a purchaser determined by HUD to be:

> capable of implementing a sound financial and physical management program that is designed to enable the project to meet anticipated operating and repair expenses to ensure that the project will remain in decent, safe and sanitary condition and in compliance with any standards under applicable State or local laws…an any such standards established by the Secretary.

The broad language of the MPDRA permits HUD to pre-screen potential bidders by establishing restricted bidder qualifications to narrow the possibility that a high bidder will not be found capable of meeting HUD's standards. Further, the MPDRA at § 1701z-11 (c)(1) provides HUD with broad discretion to carry out negotiated sales, such as that to the City here, in order to assure a buyer capable of "responding to the needs of the tenants," as well as meeting other HUD requirements.

A restricted bid auction decreases the chances of HUD being outbid by an over-reaching bidder that will then be unable to operate the property in a fashion that is both fiscally sound and in accordance with all requirements. In this case, as

it has done many times in the past, HUD determined that restricting the sale to potential buyers most likely to be highly qualified is the most efficient and productive method of carrying out its statutory mandates.[2]

Thus the District Court had ample grounds to dismiss the complaint based on the consistency of HUD's actions with applicable statutes and regulations. There is thus no reason for this Court to reach HUD's far-reaching argument that its actions are completely insulated from judicial scrutiny based on yet another statute of indeterminate scope, 12 U.S.C. § 1715z-11a(a). Indeed, as explained fully below, the detailed provisions of the statutes set forth above belie HUD's assertion that there is no law to apply in this case, and provide a proper basis for judicial review under the APA.

[2] *Amici* are familiar with unrestricted bidding situations in which HUD has held multiple auctions in order to find a responsible high bidder. Such situations squander scarce administrative resources and contravene the Congressional finding that long periods to complete foreclosure lead to property deterioration and frustrate attainment of the national housing objectives. *See,* MMFA, 12 U.S.C. §§ 3701(a)(2) and (3).

II. HUD'S MULTIFAMILY FORECLOSURE AND PROPERTY DISPOSITION ACTIONS ARE REVIEWABLE UNDER THE APA.

This Court has recognized that there is a "strong presumption that Congress intends judicial review of administrative action" under the APA. *Conyers v. Rossides,* 558 F.3d 137 (2nd Cir. 2009), *citing*, *Bowen v. Mich. Acad. of Family Physicians,* 476 U.S. at 670. Although review under the APA may be precluded where agency action is "committed to agency discretion by law," this exception is construed narrowly and applies only in "'those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.,* at 144, *citing, Sharkey v. Quarantillo,* 541 F.3d at 91 (2nd Cir. 2008).

The District Court wrongly concluded that there was "no law" for a court to apply in reviewing HUD's dispositions of multi-family properties. In so concluding, the Court relied upon the so-called "flexible authority" provision of 12 U.S.C. § 1715z-11a (a), which states:

> During fiscal year 1997 and fiscal years thereafter, the Secretary may manage and dispose of multifamily properties owned by the Secretary . . . and multifamily mortgages held by the Secretary on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law.

The District Court found that the "notwithstanding" clause "supersedes any other law that could hinder its objectives," and confers absolute discretion upon HUD to ignore the mandates of any other housing statute. Special Appendix, at 7.[3]

The District Court's analysis was incorrect for several reasons. First, even HUD recognizes the existence of a long line of cases holding that an agency's failure to follow its own regulations can be challenged under the APA. *See* Federal Appellee's Appellate Brief, at 30 - 31, fn. HUD cites the Supreme Court's observation, in *Webster v. Doe*, 486 U.S. 592, 602 n.7 (1988), that the federal agency in that case had conceded the availability of APA review under a scheme similar to the one in the instant case. *Id.* Moreover, HUD itself cites a string of decisions suggesting specifically that HUD's regulations form a basis for APA review, notwithstanding the provisions of § 1715z-11a (a). *See Jewish Center for Aged v. HUD,* 2007 WL 2121691, at *5 n.9 (E.D. Mo. 2007); *GP-UHAB Hous. Dev. Fund Corp. v. Jackson*, 2006 WL 297704, at *10 (E.D.N.Y. 2006); *Massie v.*

[3] Both Appellant and HUD have made an error regarding the legislative history of Section 1701z-11a. At pages 18-20 of his brief, Appellant purports to demonstrate that the legislative history of Section 1715z-11a does not support HUD's assertion of unbridled authority. Section 1715z-11a originated as Section 204 of Pub.L. 104-204. The legislative history cited by Appellant is that of Section 204 of HR 3666, the House version of Pub.L. 104-204, set out in House Report 104-628. However, the numbering of the administrative provisions of Pub.L. 104-204 was changed from the numbering of those in HR 3666. Section 204 of HR 3666 is authorization for a portfolio reengineering program; Section 206 is what became Section 1701z-11a. The only legislative history of Section 206 appears in House Report 104-628: "Section 206 includes permanent reforms to the HUD multifamily disposition program." HUD uncritically accepted Appellant's assertions regarding legislative history, and in a three page footnote at pages 23-25 of its brief, purports to explain why the legislative history of a wholly unrelated statutory proposal supports HUD's interpretation of its discretion under Section 1715z-11a.

HUD, 2007 WL 674597, at *3 (W.D. Pa. 2007), *rev'd on other grounds*, 620 F.3d 340 (3rd Cir. 2010).

These decisions cited by HUD in its footnote were based on the long-established principle that, no matter how much discretion an agency may have, it must follow its own regulations. Thus in *Service v. Dulles*, 354 U.S. 363, 370 (1957), the Supreme Court held that the Secretary of State was bound to follow his own regulations even where a statute provided that "notwithstanding the provisions of … any other law" the Secretary of State had "absolute discretion" to discharge any employee in the interests of the United States. *See also*, *United States v. Nixon*, 418 U.S. 683, 695 (1974), *summarizing United States v. Shaughnessy*, 347 U.S. 260, 266 (1954) (so long as the Attorney General's regulations remained operative and unamended, he lacked authority to exercise the discretion otherwise delegated to the Board).

This principle applies to whatever discretion may be provided by the flexible authority statute; HUD can use such authority only in compliance with existing regulations or by adopting revised regulations. HUD recognizes that it has promulgated a regulation governing the type of property disposition at issue in the instant case, 24 C.F.R. § 27.30, under which it may impose bidding requirements at foreclosure auctions. *See* Federal Appellee's Appellate Brief, at 31. However, HUD illogically argues that because it properly followed this regulation in the

matter below, the District Court lacked jurisdiction to determine *whether or not* it so complied. The error in this reasoning is readily apparent. Although § 27.30 sets out HUD's authority to impose bidding requirements, it bars the foreclosure commissioner from accepting bids not in conformance with those requirements. Under HUD's reasoning, the courts would be barred from reviewing a case where HUD accepted a bid in violation of its own requirements. Such a result would be wholly inconsistent with applicable precedent governing administrative decision-making.

Not only do HUD's regulations provide this Court with "law to apply" for the purposes of the APA, but also the mandates of the MMFA or MPDRA may serve as additional standards for judicial review of HUD's actions in multifamily foreclosures. In *Auburn Housing Authority v. Martinez*, 277 F.3d 138, 145 (2nd Cir. 2002), this Court cautioned that, even where Congress' use of the word "notwithstanding" might suggest an intention to override a prior statute, such a "repeal by implication is not favored." The use of the word "notwithstanding" does not eliminate the courts' duty to examine the language and design of the statute as a whole pursuant to established canons of statutory construction, and harmonize its provisions where possible. *Auburn Housing Authority*, at 144, *citing K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281 (1988). Accordingly, this Court in *Auburn* directed HUD to provide assistance to 7,000 locally developed housing

units, despite language in a simultaneously enacted statute that on its face appeared to bar the issuance of such funds.

This Court's decision in *Auburn* was in accordance with decisions in other Circuits holding that the flexible authority statute did not divest the courts of all standards of review under the APA. *See*, *Darst-Webbe Tenant Association v. St. Louis Housing Authorit*y, 417 F.3d at 907 (8th Cir 2005) (Fair Housing Act, 42 U.S.C. § 3608, provides a standard for review of HUD actions);[4] *Cheatham v. Jackson*, 2007 U.S.Dist. LEXIS 94356, 2007 WL 4572482 (E.D. Mi. 2007) (flexible authority statute did not conflict with or preempt National Housing Act provisions in 42 U.S.C. § 1441). *Cf., Northwest Forest Resources v. Pilchuck Audubon Soc*., 97 F. 3d 1161, 1166-67 (9th Cir. 1996) ("notwithstanding" provision in statute generally requiring the sale of certain timber did not override the general statutes and specific regulations governing bidding in the sales of such timber).

Thus the District Court departed from the precedent in this Circuit in finding that Section 1715z-11a so utterly nullified the clear provisions of the Multifamily Mortgage Foreclosure Act and its implementing regulations as to deprive the

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[4] The Eighth Circuit distinguished *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), relied on by the federal appellees, on the grounds that *Norton* concerned a mandamus action under Section 706(1) of the APA, not a proceeding seeking to annual an arbitrary determination under Section 706(2). For the same reason, *Norton* does not apply to the instant case. *See*, Federal Appellee's Appellate Brief, at 28.

courts of all jurisdiction to review HUD's foreclosure actions, no matter how arbitrary or irrational they might be.

Although the result reached by the Court below was fully consistent with the provisions and purposes of the Housing Act, a recent case in this Circuit, in which the *amici* were directly involved, illustrates the pernicious effects that can arise from an overbroad application of the "flexible authority" statute. In *Guity v. Martinez*, 2004 WL 1145832 (S.D.N.Y. 2004), the tenants of the Pueblo de Mayaguez project in the Bronx filed suit to prevent HUD from auctioning their property to company controlled by Emmanuel Ku, the Plaintiff-Appellant in the instant action, rather than restricting the auction to reputable developers who would preserve the habitability and affordability of the property. In stark contrast to the instant case, in *Guity,* HUD invoked its "flexible authority" to support its *refusal* to take the very actions that it took in the case below, and HUD's actions were upheld to the detriment of the tenants by the District Court, in deference to the Secretary's "broad discretion." *Id.,* at *4.

Given the potential harm to the beneficiaries of HUD's programs, *amici* respectfully suggest that this Court should refrain from endorsing the reasoning of the Court below, which would allow HUD, at its whim, to act in the interests of the tenants in any one case, while abandoning them to the mercies of unscrupulous developers in similar situations. Reaching this contentious issue would be

especially inappropriate in the instant case, where HUD in fact acted rationally and appropriately, and fully within the framework of all applicable statutes and regulations. This case therefore does not present an appropriate vehicle for delineating the contours of judicial review of HUD actions challenged under the APA as contrary to law or as abuses of discretion.

CONCLUSION

The judgment of dismissal should be affirmed, not on the grounds that HUD's actions are unreviewable under the APA, but because HUD's actions were fully consistent with the applicable statutes and regulations, and Plaintiff-Appellant thus failed to state a claim upon which relief may be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Certificate of Compliance With Type-Volume Limitation,
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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,852 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Counsel For *Amici Curiae*
Dated: October 1, 2012

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2012, I served the foregoing Brief of *Amicus Curiae* upon the parties below, by filing it on CM/ECF as provided by Local Rule 25.1(h).

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