United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
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No. 20-20281

KENNETH WAYNE HAWKINS; CHERYL BROWN POTTS; KIMANISHA MYLES; REBA CURREN JEFFERY; STEPHANIE WINN; LORETTA GULLEY; JEANNIE WARE; JAMIE WASICEK; SHEALISHA ADAMS,

Plaintiffs—Appellants,

versus

THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:18-CV-3052

Before WIENER, DENNIS, and DUNCAN, *Circuit Judges*.

WIENER, *Circuit Judge*:

This case concerns tenants living in substandard conditions in a Houston, Texas "Section 8" housing project. Those tenants sought relocation assistance vouchers from the Department of Housing and Urban Development ("HUD") in the belief that HUD was obliged under federal law to provide such assistance. After HUD failed to do so, the tenants sued

in federal court to compel HUD to provide the relocation assistance vouchers.[1]

HUD has a menu of statutory options when a Section 8 landlord refuses to correct deficiencies in housing conditions within a specified time period after being notified by HUD of such deficiencies.[2] HUD may, among other options, require "immediate replacement of project management," impose "civil money penalties" on the owner, and pursue "exclusionary sanctions, including suspensions . . . from Federal Programs."[3] At the end of this menu, the 2018 Appropriations Act allows HUD to "take any other regulatory or contractual remedies available as deemed necessary and appropriate by the Secretary."[4]

In December 1979, the Secretary bound himself pursuant to this statutory authority to provide "assistance"—*e.g.*, relocation vouchers—"[i]f . . . the family wishes to be rehoused in another dwelling unit."[5] Because we hold HUD to its self-imposed obligation, we rule that the district court has jurisdiction over the tenants' Administrative Procedure Act ("APA") and Fair Housing Act ("FHA") claims and thus erred in dismissing those claims. We therefore reverse the district court's dismissal of those claims and remand for further proceedings consistent with this opinion.

We agree with the district court, however, that the tenants failed to state a claim for which relief can be granted on their Fifth Amendment equal

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[1] The tenants also alleged intentional discrimination under the Fifth Amendment's equal protection component. We discuss that claim *infra*.

[2] *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. L, tit. II, 132 Stat. 348, 1034–35 (2018) (discussing the Secretary's options when the owner fails to correct all deficiencies specified in a Notice of Default within the circumscribed time period) [hereinafter 2018 Appropriations Act].

[3] *Id.* at 1034–35.

[4] *Id.* at 1035.

[5] 24 C.F.R. § 886.323(e).

protection claim. We therefore affirm the district court's dismissal of that claim.

I.

Factual Background

Plaintiffs-Appellants are African-American tenants who live in Coppertree Village, a privately owned apartment complex in Houston. Defendant-Appellee HUD's relationship with Coppertree dates to the early 1980s, when the agency first signed a housing assistant program ("HAP") contract with Coppertree's then-owner. HUD's most recent renewal of its contract relationship with Coppertree was in 2013.[6] The HAP contract requires the owner to maintain the rental units in a "decent, safe, and sanitary" condition.

Two HUD inspections (in June and September 2018) revealed "serious deficiencies" in many of Coppertree's rental units and in the property's common features.[7] These wide-ranging problems included infestations of cockroaches and spiders, leaky roofs that spawned colonies of mold, widespread lack of operable locks, and missing or nonfunctioning smoke detectors. As a result, HUD issued two Notices of Default ("NOD") to Coppertree's owner. The NODs instructed the owner to take corrective action and warned that failure to comply could result in HUD exercising

[6] HUD approved assignment of the contract to Coppertree's current owner in 2015. The current owner was originally a named defendant in this lawsuit but has been voluntarily dismissed.

[7] HUD regulations provide that the agency "will inspect" Section 8 housing "at least annually" and "at such other times as HUD may determine to be necessary to assure that the owner is meeting his or her obligation to maintain the units and the related facilities in decent, safe, and sanitary condition." *Id.* § 886.323(d).

"any and all available remedies." In response, Coppertree's owner submitted a survey of the property and began undertaking repairs.[8]

After the first inspection, Plaintiffs sued in federal court. The second inspection revealed ongoing problems, so Plaintiffs filed an amended complaint. In these pleadings, Plaintiffs criticized HUD's decision to maintain the HAP contract with Coppertree and the agency's focus on correcting the deficiencies revealed by the inspections. Plaintiffs also contended that because Coppertree remained in a state of disrepair, HUD was obligated to provide "assistance for relocation" in the form of vouchers, which would help Plaintiffs move elsewhere. Specifically, they alleged that HUD's failure to issue them vouchers was arbitrary and capricious under the APA.[9] Plaintiffs further alleged that HUD's inaction amounted to race-based discrimination in violation of the FHA[10] and the equal protection component of the Fifth Amendment.[11] Contrasting Coppertree with Section 8 properties elsewhere in Houston, Plaintiffs alleged that HUD's failure to provide vouchers was done with the discriminatory motive of "maintain[ing] racial segregation and . . . disadvantag[ing] a group of minority households."

HUD moved to dismiss Plaintiffs' claims under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The agency alleged specifically that Plaintiffs had not challenged any final agency action, a prerequisite for APA review. The agency also contended that its selection of one enforcement remedy from the available options was a decision

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[8] The parties disagree about whether the repair efforts have resolved the many issues identified in the 2018 inspections.

[9] 5 U.S.C. § 701 *et seq*.

[10] 42 U.S.C. § 3601 *et seq.*

[11] *See Washington v. Davis*, 426 U.S. 229 (1976).

committed to its discretion and thus unreviewable. To the extent that these barriers did not preclude review of Plaintiffs' claim of racial discrimination, HUD insisted that Plaintiffs did not plausibly allege any discriminatory motive or purpose.

The district court granted HUD's motion and dismissed all of Plaintiffs' claims. As to their APA claims, the court reasoned that HUD's decision to take "a less draconian enforcement action" than abatement and instead to seek to "secure compliance with [its] regulations through additional inspections and other . . . enforcement actions" was a choice "committed to HUD's discretion by law" and therefore "not reviewable." That court ruled that HUD's "tacit rejection" of other enforcement options did not constitute reviewable final agency action. According to the district court, HUD was taking a "wait and see" approach, holding abatement in reserve should the agency's chosen enforcement method not "ultimately . . . br[ing] [Coppertree] into compliance with [the] applicable housing regulations." As to the claim of discrimination in violation of the FHA, the court concluded that Plaintiffs could pursue that claim only through the APA so that the lack of APA jurisdiction barred it.

The district court did, however, review Plaintiffs' Fifth Amendment claim on the merits and dismissed it for failure to state a claim. The court specifically found that "Plaintiffs fail[ed] to allege the existence of a [Section 8] property in a comparably deplorable condition where White non-Hispanic residents were issued housing vouchers." Absent any "comparator property or comparator residents who were treated more favorably," Plaintiffs failed to state a Fifth Amendment equal protection claim "based on the non-issuance of housing vouchers."

Plaintiffs timely appealed.

II.

Standard of Review

We review a district court's grant of a motion to dismiss *de novo*.[12] "To survive a motion to dismiss, a complaint must contain sufficient factual matter which, when taken as true, states a claim to relief that is plausible on its face."[13] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[14]

A motion to dismiss contesting jurisdiction should be granted if "the court lacks the statutory or constitutional power to adjudicate the case."[15] The burden lies with the party asserting jurisdiction to establish "that jurisdiction does in fact exist."[16]

III.

Analysis

The district court found two barriers to Plaintiffs' APA and FHA claims. First, the APA precludes judicial review of agency action "committed to agency discretion by law."[17] Second, the APA provides judicial review of

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[12] *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

[13] *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019) (cleaned up).

[14] *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

[15] *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (cleaned up).

[16] *Ramming*, 281 F.3d at 161.

[17] 5 U.S.C. § 701(a)(2); *see, e.g.*, *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 229, 232 (5th Cir. 2015).

"final agency action" only.[18] On appeal, Plaintiffs contend that the district court erred on both points. We consider each in turn.[19]

A.

Exceptions to Judicial Review

The APA affords a right to judicial review of a federal agency action,[20] "except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."[21] The second exception, the one at play here, has been read "quite narrowly, restricting it to those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[22] One such circumstance is "a decision not to institute enforcement proceedings."[23] In those cases, "the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in

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[18] 5 U.S.C. § 704; *see, e.g.*, *Veldhoen v. U.S. Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994).

[19] The FHA has no provision for review of agency action, so Plaintiffs' FHA claim depends on the APA's judicial-review provisions. *See Godwin v. Sec'y of Hous. & Urb. Dev.*, 356 F.3d 310, 312 (D.C. Cir. 2004) (FHA confers no cause of action against HUD); *see also McCardell v. U.S. Dep't of Hous. & Urb. Dev.*, 794 F.3d 510, 522 (5th Cir. 2015) (FHA does not waive state sovereign immunity). Our jurisdictional analysis therefore pertains equally to Plaintiffs' claims under the APA, *see* 5 U.S.C. § 706(2)(A), and the FHA, *see* 42 U.S.C. § 3608(e)(5).

[20] 5 U.S.C. § 702.

[21] *Id.* § 701(a).

[22] *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2568 (2019) (quoting *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018)) (cleaned up).

[23] *Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985)).

exercising its enforcement powers."[24] "Thus, in establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers."[25]

We begin our analysis with the text of the 2018 Appropriations Act, followed by an analysis of the text of the relevant regulation. We conclude that jurisdiction exists because (1) the text of 24 C.F.R. § 886.323(e), as authorized by the 2018 Appropriations Act, is not discretionary, and (2) Plaintiffs adequately alleged final agency action in their amended complaint.

The 2018 Appropriations Act provides $85 million to HUD "for section 8 rental assistance for relocation and replacement of housing units . . . ."[26] The Supreme Court has instructed that "[t]he allocation of funds from a lump-sum appropriation is . . . [an] administrative decision traditionally regarded as committed to agency discretion."[27] "After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."[28]

But this "traditional[]" rule is not without limits. "[A]n agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes."[29] Thus, when a "statute being administered quite

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[24] *Heckler*, 470 U.S. at 832–33.

[25] *Id.* at 833.

[26] 2018 Appropriations Act, 132 Stat. at 1009–10.

[27] *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

[28] *Id.*

[29] *Id.* at 193.

clearly withdr[aws] discretion from the agency and provide[s] guidelines for exercise of its enforcement power," review is available.[30]

This principle applies with full force when an agency promulgates binding regulations on itself.[31] "When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."[32] When an agency fills this gap, its "pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding."[33]

The 2018 Appropriations Act authorizes the Secretary of HUD to undertake discretionary enforcement action "[a]t the end of the time period for correcting all deficiencies specified in the [NOD], if the owner fails to fully correct such deficiencies."[34] The Act lists enforcement possibilities, such as requiring "immediate replacement of project management"; imposing "civil money penalties" on the owner; and pursuing "exclusionary

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[30] *Heckler*, 470 U.S. at 834.

[31] *See, e.g.*, *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 648 (D.C. Cir. 2020) (reviewing agency action where there was a lump-sum appropriation and the statute provided that the agency may promulgate such "[s]upplemental agency regulations which the agency determines are necessary and appropriate"; the agency bound itself pursuant to its regulation, making its action reviewable).

[32] *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)).

[33] *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 383 (D.C. Cir. 2002) (citations omitted); *see also Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015).

[34] 2018 Appropriations Act, 132 Stat. at 1034.

sanctions, including suspensions . . . from Federal Programs."[35] It also includes a catch-all provision that permits the Secretary to "take any other regulatory or contractual remedies available as deemed necessary and appropriate by the Secretary."[36] Consistent with the Secretary's broad authority under the last provision, the Secretary promulgated 24 C.F.R. § 886.323, sub-section (e) of which reads:

> 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*.[37]

The first sentence of the regulation states that if (1) HUD provides notice to the owner that he or she has failed to maintain decent, safe, and sanitary conditions, and (2) the owner fails to take corrective action timely, HUD "*may* exercise any of its rights or remedies under" its contract with the owner.[38] HUD thus has discretion to exercise rights and remedies—including abatement of payment and recission of the sale, arguably the most extreme sanctions that HUD may impose—when these two conditions are met.

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[35] *Id.* at 1034–35.

[36] *Id.* at 1035.

[37] 24 C.F.R. § 886.323(e) (emphasis added).

[38] *Id.* (emphasis added).

The subsequent sentence of the regulation then creates a clear contrast with the preceding sentence. This latter sentence begins, "If, however,"—indicating a departure from the prior sentence—then explains that when the two conditions established in the first sentence are met *and* the family receiving rental assistance "wishes to be rehoused" elsewhere, "HUD *shall* provide assistance" to rehouse the family.[39] Whereas the first sentence in the regulation employs discretionary language when the two conditions are present (HUD "may" undertake certain actions), the second sentence uses quintessential mandatory language (HUD "shall" provide assistance) when a third condition is established in addition to the first two. The juxtaposition of these two sentences in the regulation demonstrates that when an owner has been notified by HUD of health and safety deficiencies but fails to take timely action to correct the defects, HUD is unconditionally obligated to provide rehousing assistance to the beneficiary or beneficiaries who request such assistance.

HUD contends that § 886.323(e) contains no mandatory language except when HUD exercises its permissive authority to abate the housing assistance contracts: In that case, "HUD shall provide assistance" in the form of relocation vouchers. To bolster this argument, HUD rewords key language of the regulation. It states that, "[a]mong other remedies, HUD may undertake 'abatement of housing assistance payments (even if the family continues to occupy the unit),' *but* '[i]f . . . the family wishes to be rehoused in another dwelling unit, HUD shall provide assistance in finding such a unit for the family.'"

Contrary to HUD's attempt to redraft its regulation, the mandatory language—"[i]f, however, the family wishes to be rehoused in another

[39] *Id.* (emphasis added).

dwelling unit, HUD *shall* provide assistance in finding such a unit for the family"[40]—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.[41] 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.

Granted, there is evidence that HUD did intend that its obligation to provide relocation vouchers would be contingent on its right to exercise abatement remedies. For example, HUD points to the official rulemaking history of § 886.323, which states that its subsection was revised to reflect that "HUD will provide assistance in finding eligible families suitable units in other buildings or projects *in the event assistance payments are abated*."[42] But this is not the language that HUD chose to include in § 886.323(e). Instead, it imposed an obligation on itself to provide relocation vouchers if a family wishes to be rehoused and the owner of that family's Section 8 housing fails to take corrective action within the time prescribed in an NOD.[43]

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[40] *Id.* (emphasis added).

[41] *See id.* ("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.") (emphasis added).

[42] 44 Fed. Reg. 70362, 70363 (Dec. 6, 1979) (emphasis added).

[43] HUD also asserted at oral argument that, at the time § 886.323(e) was promulgated in 1979, "the only way HUD would ever have money to relocate families would be if they abated the contract." However, because the regulation unambiguously

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."[44]

We hold that, because § 886.323(e) mandates that HUD provide relocation assistance, its alleged decision not to provide relocation vouchers to Plaintiffs is not a decision committed to agency discretion by law and is therefore reviewable.[45]

Despite the contentions of our esteemed colleague in dissent, we are not creating a "judge-made system." We are merely enforcing—as we are bound to do—the plain language of HUD's own regulations. Agency discretion is often expansive, but not without limits. This is especially true when discretion is expressly limited by a regulation that the agency itself wrote.

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requires HUD to provide relocation assistance, the historical practices of abatement are irrelevant to our analysis.

[44] Plaintiffs' claims are distinguishable from those in the cases decided by other circuits that were cited by the district court in this case. For example, in *Hill v. Group Three Housing Development Corporation*, the Eighth Circuit held that the plaintiffs had failed to identify any obligations that HUD had refused to enforce, and that HUD had broad discretion in the specific statutory provision being enforced. 799 F.2d 385, 396–97 (8th Cir. 1986). In similar fashion, the Third Circuit has held that a regulation using the word "may" provided discretion to HUD in making an enforcement decision under Section 504 of the Rehabilitation Act. *See Am. Disabled for Attendant Programs Today v. U.S. Dep't of Hous. & Urban Dev.*, 170 F.3d 381, 386–87 (3d Cir. 1999).

[45] *See Heckler*, 470 U.S. at 832–33; 5 U.S.C. § 701(a)(2).

The dissent contends that "[t]he majority does not explain why HUD would have written a regulation that veers between such extremes—granting wide enforcement discretion on the one hand while, on the other, withdrawing that discretion if a tenant asks to move." But it is not our role to speculate why HUD chose to limit its own authority when the meaning of the regulation is plain and unambiguous. It is not out of the realm of possibility, however, that the agency might have decided to prioritize the wishes of tenants over exercising its own range of options in such cases.

The dissent also makes much of the use of the phrase "the family" in both sentences of the regulation. The use of that collective noun in both sentences presumably is meant to signify a stronger logical connection between abatement and the issuance of vouchers. This is all an attempt by the dissent to get around the inclusion of the inconvenient phrase, "If, however," at the beginning of the second sentence of the regulation. The first sentence of the regulation provides a host of options, but the next sentence restricts the agency's authority. No appeal to legislative history or general agency authority undermines the mandatory language of the regulation.

B.

Final Agency Action

We must next determine whether Plaintiffs have adequately alleged final agency action.

The APA defines "agency action" to include the "denial of relief," a "failure to act," and a "sanction," which includes "withholding of relief."[46]

> As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the

[46] 5 U.S.C. § 551(10)(B), (13); *see also id.* § 701(b)(2) (incorporating these definitions into the judicial review chapter).

> 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'[47]

Plaintiffs' allegations arise under 5 U.S.C. § 706(2)(A), which provides review of "agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[48] Since we hold today that § 886.323(e) obligates HUD to provide Plaintiffs with relocation vouchers, its decision not to provide such vouchers is necessarily "not in accordance with law."[49] Plaintiffs have also alleged that this decision is the consummation of HUD's decisionmaking process, so it is not "merely tentative or interlocutory in nature."[50] HUD thus exercised final agency action, making its action reviewable.[51]

The dissent contends that this theory "conjures 'final agency action' out of thin air." To adopt the view that the dissent proposes, however, would forever remove HUD's decisions from judicial review. There would never be a final agency action because HUD could theoretically change its mind and provide relocation vouchers to families at any point. 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.

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[47] *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted).

[48] 5 U.S.C. § 706(2)(A).

[49] *Id.*

[50] *Bennett*, 520 U.S. at 177–78.

[51] *See* 5 U.S.C. § 704.

C.

Racial and Ethnic Discrimination

Plaintiffs also claim that HUD's withholding of assistance constitutes intentional discrimination on the basis of race and ethnicity, in violation of the Fifth Amendment to the Constitution.[52] HUD concedes that the APA's review provisions do not foreclose review of this constitutional claim.[53]

"Proof of racially discriminatory intent or purpose is required" to show an equal protection violation.[54] Discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[55] Plaintiffs may rely on circumstantial evidence (or allegations of such, at the pleading stage) to show discriminatory purpose. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[56]

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[52] "[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Washington*, 426 U.S. at 239.

[53] *See Webster v. Doe*, 486 U.S. 592, 603–05 (1988) (holding § 701(a)(2) barred statutory but not constitutional claims of discrimination). Although it is clear that § 701(a)(2) does not bar Plaintiffs' constitutional claim under *Webster*, neither party has briefed (and the district court did not address) whether the claim is barred by lack of final agency action. Nevertheless, Plaintiffs' constitutional claim does not appear to target issuance of relocation vouchers *per se*, but rather HUD's allegedly more general disparate treatment of different races, of which withholding vouchers is an ingredient. We therefore reach the merits of the constitutional claim, as did the district court.

[54] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

[55] *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

[56] *Arlington Heights*, 429 U.S. at 266; *see also Veasey v. Abbott*, 830 F.3d 216, 231 (5th Cir. 2016) (listing types of evidence that may support discrimination claim).

Plaintiffs' allegations of intentional discrimination rely on the fact that the housing units HUD subsidizes at Coppertree are in worse condition than HUD-subsidized units elsewhere in the Houston area. They allege that Coppertree is located in a zero percent non-Hispanic white census tract and that eighty-seven percent of Coppertree's tenants are African-American. Plaintiffs further allege that HUD subsidizes housing in disproportionately white areas that does meet minimum standards, with comparable rent and vastly higher quality.[57] HUD allegedly knows about these disparities but continues to make decisions, including the withholding of vouchers, which Plaintiffs claim denies them relocation assistance to which they are entitled. Plaintiffs characterize this disparate treatment as a "substantive departure" from HUD's mission,[58] and thus probative of discriminatory intent. We disagree.

These allegations by Plaintiffs fail to state a plausible claim of intentional race discrimination. Even when taken as true, they show at most that HUD is aware of varying conditions in the numerous housing projects that it subsidizes in the Houston area. In no way, however, do these allegations support an inference that HUD has made any decision "'because of,' not merely 'in spite of,'" different conditions.[59] Plaintiffs do not allege any procedural irregularities in HUD's enforcement actions at Coppertree nor in its consideration of relocation vouchers for Coppertree residents. Plaintiffs also fail to allege that HUD has provided relocation assistance to

[57] Plaintiffs reference as comparators several projects restricted to elderly tenants: six in the Woodlands, outside Houston, and two within the city limits—the only two, out of forty-four, in majority-white census districts. HUD does not own or operate these projects, but subsidizes tenants living there.

[58] *Cf. Veasey*, 830 F.3d at 231.

[59] *Feeney*, 442 U.S. at 279.

any similarly situated non-minority tenants. Plaintiffs failed to raise a plausible inference of discriminatory purpose, so the district court correctly dismissed their Fifth Amendment claim.

IV.

Holding

The district court's judgment is REVERSED in part and AFFIRMED in part. We REVERSE that judgment as it relates to the district court's jurisdiction of Plaintiffs' APA and FHA claims, and we REMAND that issue to the district court for further proceedings. We AFFIRM the court's judgment as to the Fifth Amendment equal protection claim.

STUART KYLE DUNCAN, *Circuit Judge*, dissenting:

Misreading a forty-year-old regulation, the majority creates a regime under which Section 8 tenants can, for the first time, sue landlords to force them to issue relocation vouchers. This judge-made system sharply departs from the one HUD has administered for the past four decades, under which the agency has multiple enforcement options (including vouchers) for bringing recalcitrant Section 8 landlords into compliance. Now, if a tenant wants a voucher, HUD must provide one or face an APA suit. This mistaken view will seriously disrupt the Section 8 program.

I would instead affirm the district court's dismissal of Plaintiffs' APA claims, either because HUD's enforcement decisions here are committed to its discretion by law or because Plaintiffs have entirely failed to identify any final agency action with respect to issuing vouchers. I therefore respectfully dissent from parts III(A) and III(B) of the majority opinion.[1]

I.

When an owner lets Section 8 housing fall into chronic disrepair, HUD has various remedial options under this 1979 regulation:

> 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

[1] I join part III(C), which correctly affirms the district court's dismissal of Plaintiffs' Fifth Amendment race discrimination claims.

> unit, HUD shall provide assistance in finding such a unit for the family.

24 C.F.R. § 886.323(e). HUD's "rights or remedies" for bringing the unit back into compliance include: imposing civil money penalties on the owner, barring the owner from federal programs, pursuing transfer of the property to a new owner, seeking appointment of a receiver, working with the owner to stabilize the property, or infusing third-party capital into the property.[2]

One option, as the regulation states, is "abatement of housing assistance payments." *Ibid.* The agency can then redirect those payments to tenants who want to relocate in the form of redeemable vouchers. *See, e.g.*, *Englewood Terrace Ltd. P'ship v. United States*, 61 Fed. Cl. 583, 585 (2004) (explaining "HUD obtained vouchers for the [Section 8] residents . . . and began issuing these in place of the project-based subsidy that had previously been paid to [the owner]"). As the Government explained in its briefing and at oral argument, until recently abatement was the only scenario in which vouchers *could* be provided because, otherwise, the agency had no money to fund them. *See, e.g.*, 44 Fed. Reg. 70,362, 70,363 (1979) ("HUD will provide assistance in finding eligible [tenants] suitable units in other buildings or projects *in the event assistance payments are abated*.") (emphasis added).

In 2018, Congress dedicated additional funds for relocation assistance within a broader Section 8 appropriation. *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. L, tit. II, 132 Stat. 348, 1009 (2018) [hereinafter 2018 APPROPRIATIONS ACT] (appropriating $85 million for Section 8 purposes, including "tenant protection assistance including replacement and relocation assistance"). Even then, however, relocation

[2] These options are expressly recognized in congressional section 8 appropriations acts. *See, e.g.*, Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. L, tit. II, 132 Stat. 348, 1034–35 (2018).

vouchers were not mandatory: the appropriation provided that the Secretary "may" draw on the funds to "provide section 8 rental assistance" to tenants "where the owner has received a Notice of Default and the units pose an imminent health and safety risk to residents." *Id.* at 1010. In other words, the appropriation did not remove HUD's longstanding discretion about how to bring unsafe or unsanitary Section 8 housing up to code.

The majority has now upended that decades-old system. It rules that the 1979 regulation "unconditionally obligate[s]" HUD to provide relocation vouchers upon a tenant's request when an owner fails to correct noticed deficiencies. Op. at 11. In that situation, HUD's discretion to select some other enforcement option vanishes. As a result, a tenant can sue under the APA for the agency's ostensibly "refusing" to provide vouchers. Op. at 13.

II.

The majority errs for two reasons. First, how to remediate Section 8 housing is an enforcement decision "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The majority finds otherwise by misreading the 1979 regulation to create an "unconditional obligation" to provide relocation vouchers. That contravenes the 1979 regulation's text and decades of agency practice under which vouchers could be provided only upon abatement of subsidies. Second, even assuming some obligation to provide vouchers, the majority conjures "final agency action" out of thin air. *See* 5 U.S.C. § 704. Nothing in the complaint or the record shows HUD has "finally" decided anything beyond continuing to work with the owner to remedy deficiencies at Coppertree. For either reason, the district court correctly dismissed the plaintiffs' APA claims.

A.

1.

The majority erases HUD's enforcement discretion by misreading the 1979 regulation, 24 C.F.R. § 886.323(e). It acknowledges, as it must, that the regulation's first sentence explicitly gives HUD discretion to choose among various remedial options, including abatement. *See* Op. at 10 (recognizing that, if the owner fails to correct problems after notice, "HUD . . . has discretion to exercise rights and remedies—including abatement of payment and rescission of the sale"). But the majority then overrides that discretion by reading the regulation's second sentence to impose an "unconditional obligation" to provide vouchers if tenants request them. Op. at 11.

This misreads the regulation. Its second sentence reads: "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) (emphases added). "The family" points directly back to the "family" mentioned at the end of the preceding sentence—*i.e.*, "the family" that "continues to occupy the unit" after HUD has "abate[d] . . . housing assistance payments." *Ibid*. So, this is what the two sentences say in plain English: if HUD cuts off subsidies to a landlord, then it must help tenants find another unit. That is how the agency explained it in the 1979 rulemaking: "HUD *will provide assistance* in finding eligible families suitable units in other buildings or projects *in the event assistance payments are abated*," while expressing its "intention to work with owners, tenants, and other interested parties to the extent possible to forestall such action." 44 Fed. Reg. at 70,363 (emphases added). That is how the agency has run the program until now.

The majority misses this textual link between "the family" in the two sentences. As a result, it reads the second sentence to erase the enforcement discretion in the first. That makes little sense. On the majority's view, a

tenant's mere request to relocate means HUD automatically forfeits all other options to remediate the property. The majority does not explain why HUD would have written a regulation that veers between such extremes—granting wide enforcement discretion on the one hand while, on the other, withdrawing that discretion if a tenant asks to move. Nor can the majority square its reading with the agency's decades-long practice of providing vouchers *only* when abatement frees up funds. The majority "grant[s]" this is "evidence" that the agency understood its obligation to provide vouchers was "contingent on its right to exercise abatement remedies." Op. at 12. But then it bats the evidence away by claiming "this is not the language that HUD chose to include in [the regulation]." *Ibid.* Not so. The language is right there, if the majority would only read it correctly.

One final point underscores the majority's error. It claims the agency's view "rewords key language of the regulation." *Id.* at 11. What language? According to the majority, the agency wants to change the words "if, however" at the beginning of the second sentence to "but if." *Ibid.* That is hardly "rewording" the regulation. If anything, HUD was merely explaining how the court ought to read the language in context—*i.e.*, as linking the agency's obligation to provide vouchers to its prior decision to abate payments. And that is a far better reading than the majority's, which overreads "if, however" to erase the agency's discretion in choosing enforcement measures to remedy Section 8 housing defects.

2.

When the regulation is read properly, it becomes evident that the action challenged here is "committed to agency discretion by law." 5 U.S.C. § 702(a)(2). That is so for two reasons.

First, HUD's choosing remedial options other than abatement is a non-reviewable "decision not to institute enforcement proceedings." *Dep't*

of Com. v. New York, 139 S. Ct. 2551, 2568 (2019) (citing *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985)). At bottom, Plaintiffs contest HUD's decision to deploy one enforcement tool (demanding the landlord make repairs and correct other deficiencies) over another (abating assistance payments and issuing vouchers). But selecting among enforcement measures is a classic example of a purely discretionary agency decision exempt from judicial review under § 701(a)(2). There is a "well-established tradition" that an "agency's decision not to prosecute or enforce is generally committed to [the] agency's absolute discretion." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1906 (2020) (quoting *Chaney*, 470 U.S. at 831) (cleaned up); *see also Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) ("An agency's decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." (quoting *Chaney*, 470 U.S. at 832) (cleaned up)). Our court has similarly explained that when an agency "[r]efus[es] to take [some] enforcement step[] . . . the presumption is that judicial review is not available." *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 234 (5th Cir. 2015) (quoting *Chaney*, 470 U.S. at 831); *see also Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 464 (5th Cir. 2003) ("Under the APA, an agency's decision not to invoke an enforcement mechanism provided by statute is not typically subject to judicial review.") (citations omitted).

Second and relatedly, Plaintiffs' challenge is barred because an agency's use of funds allocated to it in a lump-sum appropriation "is . . . traditionally regarded as committed to agency discretion." *Lincoln*, 508 U.S. at 192; *see also, e.g.*, *State of Texas v. United States*, 809 F.3d 134, 165 (5th Cir. 2015) (same). "After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way." *Lincoln*, 508 U.S. at 192. Yet Plaintiffs want to compel a specific use (relocation vouchers) for funds Congress has appropriated to HUD for its

discretionary use. *See* 2018 APPROPRIATIONS ACT, 132 Stat. at 1010 (stating the Secretary "*may* provide section 8 rental assistance from amounts made available under this paragraph" if owner receives notice and units present "imminent health and safety risk") (emphasis added). Under § 701(a)(2), courts have no jurisdiction to entertain such a claim.

Plaintiffs counter by citing the Supreme Court's decision in *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018). They argue *Weyerhaeuser* found reviewable an agency's decision under a statute providing the agency "may" take some action, which they believe comparable to the HUD provisions here. *See id.* at 371 (noting "[t]he use of the word 'may' certainly confers discretion on the Secretary"). Plaintiffs thus assert they have brought "the sort of claim that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion under § 706(2)(A)." *Ibid.*

That is incorrect. In *Weyerhaeuser*, a statute directed the agency to consider specific factors regarding "the economic and other impacts of [a critical habitat] designation." *Ibid.* (citing 16 U.S.C. § 1533(b)(2)).[3] Thus, the *Weyerhaeuser* plaintiffs advanced "the familiar [claim] in administrative law that the agency did not appropriately consider all of the relevant factors that the statute sets forth to guide the agency in the exercise of its discretion." *Ibid.* By contrast, here there is no comparable enumeration of factors in a statute or regulation, meaning a court cannot coherently review whether

[3] Specifically, the statute required the Secretary to "tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact," while also providing that he "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," subject to one exception. 16 U.S.C. § 1533(b)(2).

HUD "appropriately consider[ed]" them.[4] Contrary to Plaintiffs' arguments, then, *Weyerhaeuser* only shows why the challenged actions here are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

Plaintiffs also suggest a court may review HUD's actions under standards in the Fair Housing Act, specifically the agency's duty "affirmatively [to] further" policies aimed at effectuating the Act's purposes. *See* 42 U.S.C. § 3608(e)(5). That is also wrong. Plaintiffs fail to explain how § 3608 offers a meaningful standard against which courts may judge the agency's discretionary choice of one enforcement option over another. *See Am. Disabled for Attendant Programs Today v. U.S. Dep't of Hous. & Urb. Dev.*, 170 F.3d 381, 388–89 (3d Cir. 1999) (rejecting argument that a similar FHA provision provides courts a "substantive standard to apply to constrain HUD's enforcement and investigative decisions").[5]

In sum, Plaintiffs demonstrate no meaningful standards against which to judge HUD's discretionary enforcement actions taken thus far at Coppertree. Those decisions are committed to agency discretion by law. The district court therefore correctly concluded that it lacked subject matter jurisdiction over Plaintiffs' APA claims.

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[4] The 2018 Appropriations Act states only that HUD may provide assistance from appropriated funds "where the owner has received a Notice of Default and the units pose an imminent health and safety risk to residents." 2018 APPROPRIATIONS ACT, 132 Stat. at 1010. If an owner fails to correct deficiencies, the Secretary may select from a menu of eight remedial options plus "any other regulatory or contractual remedies available as deemed necessary and appropriate." *Id.* at 1035.

[5] The First Circuit once found that HUD action could be reviewed for its compliance with § 3608, but that case presented quite different allegations against the agency. *See NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 157–60 (1st Cir. 1987). There, plaintiffs alleged a comprehensive city-wide failure by HUD to further fair housing. *Id.* at 151. Whether that decision was correct or not, it does not support Plaintiffs' contention that a discrete enforcement decision is reviewable for compliance with § 3608.

B.

The majority also errs by finding "final agency action." Without citation to evidence, the majority merely references HUD's putative "decision not to provide . . . vouchers," and accepts that "Plaintiffs have . . . alleged that this decision is the consummation of HUD's decisionmaking process." Op. at 14. This is mistaken.

The APA confers jurisdiction to review only "final agency action." 5 U.S.C. § 704. Agency action is final when two conditions are satisfied. "First, the action must mark the consummation of the agency's decisionmaking process," as opposed to being "of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quotation marks omitted and citation). "[S]econd, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Ibid.* (quotation marks and citation omitted); *see also Sierra Club v. Peterson*, 228 F.3d 559, 565 (5th Cir. 2000).

Plaintiffs fail to show that HUD's alleged withholding of vouchers has these qualities of finality. They argue only that there is nothing further HUD needs to do in order to issue vouchers, and yet the agency has not acted. In particular, they highlight that: the agency has "authority and funding" to provide assistance; Plaintiffs need not (and indeed cannot) apply for vouchers; HUD has already issued a Notice of Default; and their housing is allegedly uninhabitable.

None of these allegations plausibly shows final agency action. The fact that HUD is not currently *prevented* from issuing vouchers does not mean it has finally decided not to do so. As the record shows, nothing HUD has done with respect to Coppertree—*i.e.*, working with the owner to enforce housing standards without relocating current tenants—precludes the agency from issuing vouchers in the future. Thus, Plaintiffs have not shown that HUD's

withholding of assistance thus far is a "consummation of the agency's decisionmaking process" or a fixed determination that Plaintiffs will not be entitled to such assistance. *Cf., e.g.*, *Luminant Generation Co. v. EPA*, 757 F.3d 439, 442 (5th Cir. 2014) (EPA's issuance of a notice of violation was not final agency action because the notice had an "intermediate, inconclusive nature" and "d[id] not commit the EPA to any particular course of action").

The majority's analysis of this point is inadequate. It finds only that Plaintiffs have "alleged" that HUD's "decision" not to provide vouchers is "the consummation of HUD's decisionmaking process." Op. at 14. But even at the motion to dismiss stage, Plaintiffs must do more than mouth conclusory allegations of finality. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (complaint is insufficient "if it tenders naked assertions devoid of further factual enhancement") (cleaned up). Plaintiffs' threadbare allegations point to nothing even suggesting that HUD has made any final decision with respect to vouchers. To the contrary, the record shows without dispute that HUD has chosen the remedial option of working with the owner to remedy Coppertree's deficiencies, instead of the more extreme option of abating payments and issuing vouchers. The majority is mistaken in accepting Plaintiffs' conclusions in lieu of plausible allegations of finality.

Because the challenged agency action is nonfinal, the district court correctly found it lacked jurisdiction over Plaintiffs' APA claims.

III.

For these reasons, I respectfully dissent from parts III(A) and III(B) of the majority opinion.