Supreme Court of the State of New York
Appellate Division – First Department

No. 2019-02380

A'SEELAH DIAMOND and RUTH BRITT, on behalf of themselves and a class of those similarly situated,

Plaintiffs-Appellants,

v.

NEW YORK CITY HOUSING AUTHORITY and OYESHOLA OLATOYE, in her official capacity as Chairperson of the New York City Housing Authority,

Defendants-Respondents.

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

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INTEREST OF THE STATE

The Attorney General appears here on behalf of the State of New York as amicus curiae to support plaintiffs' argument that federal preemption does not bar their state-law warranty-of-habitability claim under Real Property Law (RPL) § 235-b against defendant New York City Housing Authority (NYCHA).

The State has a strong interest in preserving state law against improper claims of federal preemption. The State's regulation of housing is a core exercise of its police power to protect the "health and safety" of its residents, *Park W. Mgt. Corp. v. Mitchell*, 47 N.Y.2d 316, 324-25 (1979), and thus an essential element of its sovereign right to govern, *see Tenement House Dept. of City of N.Y. v. Moeschen*, 179 N.Y. 325, 330-31 (1904), *aff'd*, 203 U.S. 583 (1906). Federal preemption in an area traditionally occupied by the states encroaches on the states' prerogative to regulate matters of local concern, including ensuring the adequacy of housing for low-income individuals. *See* N.Y. Const., art. 17, § 1 ("The aid, care and support of the needy are public concerns and shall be provided by the state.").

Contrary to NYCHA's arguments and the decision of the court below, there is no basis here to disregard "the background principle that

Congress does not normally intrude upon the police power of the States." *Bond v. United States*, 572 U.S. 844, 863 (2014). NYCHA claims that plaintiffs' state-law claims are preempted because NYCHA entered into a settlement agreement ("the Agreement") with the United States Department of Housing and Urban Development (HUD) that requires NYCHA to address various deficiencies in public housing facilities—including problems with heating services—that plaintiffs' claims also seek to remedy. (HUD has regulatory authority over NYCHA under the U.S. Housing Act of 1937, 42 U.S.C. §§ 1437 et seq., which subjects public housing agencies such as NYCHA to HUD oversight as a condition of receiving federal funding.)

NYCHA's arguments are meritless. The Agreement with HUD expressly provides that NYCHA retains the "responsibility . . . for achieving and maintaining complete compliance with all applicable . . . state[] and local laws, regulations, and permits"; that NYCHA's "compliance with this Agreement shall be no defense to any action commenced pursuant to any such laws, regulations, or permits"; and that the Agreement does not "limit the rights of third parties . . . against NYCHA." (Record on Appeal (R.) 95-96 (¶¶ 104-105).) HUD's regulations likewise direct that federal

standards for public housing funded under the Housing Act "do not supersede or preempt State and local codes for building and maintenance with which [public housing agencies like NYCHA] must comply." 24 C.F.R. § 5.703(g). More broadly, the Housing Act repeatedly expresses Congress's intent that public housing agencies comply not only with federal standards, but also state and local standards, to most comprehensively protect the interests of public-housing tenants.

That congressional judgment makes sense. As the U.S. Supreme Court has recognized, "state and local regulation related to matters of health and safety can normally coexist with federal regulations." *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 718 (1985). Such overlapping regulation best serves the common objective under federal and state law to provide safe and sanitary housing to the residents of public housing. In effect, federal law supplements state and local standards by providing a backstop of housing quality standards to protect tenants. NYCHA simply misconstrues federal policy as supplanting rather than complementing state law. And NYCHA's argument is particularly absurd because the Agreement with HUD that forms the basis of its preemption theory is based on NYCHA's *violations* of federal

standards; nothing in the Agreement or the underlying federal regime suggests that Congress or HUD thought that a public housing agency's violation of federal standards would excuse it from complying with parallel state and local standards. Such a position would disserve rather than support the tenants whose interests NYCHA is legally obligated to serve.

STATEMENT OF THE CASE

A. New York's Creation of Public Housing

In 1926, the New York Legislature enacted the State Housing Law[1] due to its concern that "unsanitary housing conditions which exist in certain . . . low priced dwellings are a menace to the health, safety, morals, welfare and reasonable comfort of the citizens of the state." Ch. 823, § 2, 1926 N.Y. Laws 1507, 1507. The new law created and authorized public housing agencies that would oversee "the construction and supervision of dwelling and for the letting of apartments at reasonable rentals." *Id.* Such public housing would "promote the public health and

[1] The State Housing Law was superseded by the Public Housing Law in 1939. *See* Ch. 808, § 227, 1939 N.Y. Laws 1978, 2039.

safety by providing for the elimination of unsanitary and dangerous housing conditions" for low-income residents. *Id.*

NYCHA is one such public housing agency—the first of its kind in the country. A public-benefit corporation under New York law, NYCHA was established in 1934 to provide housing to low- and moderate-income families in New York City. *See* Public Housing Law § 401; *Knickerbocker Vil., Inc. v. Lackow*, 191 Misc. 874, 879 (N.Y. Mun. Ct. 1947). NYCHA is currently the largest public housing agency in the country, with more than 175,000 units and approximately 400,000 residents (R. 163 (¶ 32)). *See* NYCHA, *NYCHA 2019 Fact Sheet* 1 (2019) (internet).[2]

Public housing, like all other residential housing in New York, is subject to state and local laws that establish minimum standards for health, safety, welfare, and comfort. *See, e.g.*, *Matter of Semyonova v. New York City Hous. Auth.*, 15 A.D.3d 181, 182 (1st Dep't 2005) (claim of breach of warranty of habitability); *Green v. New York City Hous. Auth.*, 7 A.D.3d 287, 288 (1st Dep't 2004) (claims of State Multiple Dwelling Law and local housing code violations); *see also Public Housing Lease and*

[2] For authorities available on the internet, full URLs are available in the Table of Authorities.

Grievance Procedures, 56 Fed. Reg. 51,560, 51,565 (Oct. 11, 1991) (codified at 24 C.F.R. pt. 966) (noting that "tenancy rights of a public housing tenant are governed by elements of both Federal and State law," and state law may afford such tenants "additional rights"). One such statutory protection is the warranty of habitability, currently codified at RPL § 235-b, which requires landlords to maintain a property in habitable condition and provides tenants with a right to seek enforcement of that obligation. *See Park W. Mgt. Corp.*, 47 N.Y.2d at 324-25. Specifically, RPL § 235-b(1) requires landlords to guarantee that residential premises "are fit for human habitation . . . and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety." RPL § 235-b(1). Specifically, as relevant here, landlords must ensure that tenants do not have "insufficient heat" and that they are given "essential services" like hot water that "bear[] directly on the health and safety of the tenants." *Park W. Mgt. Corp.*, 47 N.Y.2d at 328. Currently, other than Arkansas, every state and the District of Columbia imposes a similar duty on residential landlords to maintain their properties in habitable conditions. Janet Portman & Marcia Stewart, *Every Tenant's Legal Guide* 135 (9th ed. 2018).

B. Federal Assistance for State and Local Public Housing

The federal government began supporting state and local public housing in the mid-1930s, in response to the housing crisis of the Great Depression. *See* Maggie McCarty, Libby Perl & Katie Jones, Cong. Research Serv., RL34591, *Overview of Federal Housing Assistance Programs and Policy* 1 (2019) (internet). Congress passed the National Housing Act of 1934, 12 U.S.C. §§ 1701 et seq., which, among other provisions, authorized the federal government to subsidize both the rental payments of residents of low-income housing, and the construction of homes and rental housing for low-income families, *see id.* §§ 1701s, 1715z, 1715z-1.

The federal assistance provided by the National Housing Act "proved controversial with local government officials who thought that they were not consulted in the process." McCarty et al., *supra*, at 2. In addition, courts rejected direct federal attempts to build and own public housing in light of federalism concerns. *See* Susan M. Hoffmann, *Strengthening Public Housing Agencies: Why It Matters* 2 (U. Penn. P'ship for Effective Pub. Admin. & Leadership 2018).

The federal government's inability to operate public housing on its own "provided the background for the enactment of the U.S. Housing Act of 1937," Pub. L. No. 75–412, 50 Stat. 888 (1937) (now codified at 42 U.S.C. §§ 1437 et seq.). McCarty et al., *supra*, at 2. Acknowledging "that the Federal Government cannot through its direct action alone provide for the housing of every American citizen," 42 U.S.C. § 1437(a)(2), the Housing Act of 1937 instead adopted the alternative approach of "assisting local authorities that would own" and operate public housing projects, Hoffmann, *supra*, at 2. This model of federal assistance required the formation of "partnerships between the federal government, states, and localities." McCarty et al., *supra*, at 2.

To manage this federal assistance, the Act created the United States Housing Agency (the predecessor of HUD). *See id.* HUD currently provides federal assistance to approximately three thousand state and local public housing agencies that own and operate roughly one million low-income housing units across the country. *See id.* at 11; Hoffmann, *supra*, at 2-3, 7.

In 1998, in light of growing concerns at the federal level about the quality of federally funded public housing, Congress amended the Housing Act of 1937 to direct HUD to set minimum "housing quality standards"

for such public housing "relating to habitability." Veterans Affairs & HUD Appropriations Act, Pub. L. No. 105–276, secs. 530, 545, §§ 6, 8, 112 Stat. 2461, 2570 (1998); *see* 42 U.S.C. § 1437d(f)(2). To continue receiving federal funding, a public housing agency must "maintain its public housing in a condition that complies with standards which meet or exceed" HUD's standards. 42 U.S.C. § 1437d(f)(1).

In 1998, HUD promulgated federal housing standards in 24 C.F.R. § 5.703, which sets forth physical condition standards relating to habitability. In proposing these standards, HUD expressly recognized that public housing would continue to be subject to state and local standards, in addition to their federal obligations. *See Uniform Physical Condition Standards and Physical Inspection Requirements for Certain HUD Housing*, 63 Fed. Reg. 35,650, 35,651 (June 30, 1998) (noting that previous rules for public housing required "compliance with applicable State and local laws"). The same HUD regulation that sets federal housing quality standards thus provides that these standards "do not supersede or preempt State and local codes for building and maintenance with which [public housing agencies] must comply." 24 C.F.R. § 5.703(g); *see id.* § 5.701(c)-(d). And consistent with this approach, HUD requires that

public housing agencies' contracts with tenants commit the agencies to comply not only with "HUD regulations materially affecting health and safety," but also with all other "applicable building codes [and] housing codes." *Id.* § 966.4(e)(2).

If a public housing agency fails to meet federal standards, HUD is authorized under federal law to essentially supersede the agency by petitioning a court for appointment of a receiver, or taking possession of the agency or a particular property. 42 U.S.C. § 1437d(j)(3)(A)(ii), (iv); *see also id.* § 1437d(g). HUD also has less drastic remedial options. In particular, as relevant here, HUD may enter into an agreement with the defaulting public housing agency under which the agency retains control of its facilities and operations but commits to specific reforms to resolve outstanding problems. HUD's authority to enter into such agreements derives from a statutory provision allowing HUD to "require the agency to make other arrangements . . . for managing all, or part of, the public housing" on terms "acceptable to the [HUD] Secretary." *Id.* § 1437d(j)(3)(A)(v).

C. Factual and Procedural Background

Plaintiffs here are tenants of NYCHA public housing. Their amended class action complaint—filed in Supreme Court, New York County (Edmead, J.)—alleges that, during the winter of 2017-2018, hundreds of thousands of NYCHA residents suffered significant heat and hot water outages, sometimes lasting more than a week. (*See* R. 155-156 (¶¶ 2-4), 158 (¶ 10).) The complaint claims that NYCHA has breached the warranty of habitability in RPL § 235-b and seeks damages and injunctive relief regarding heat and hot water services. (R. 171-174.)

Soon after plaintiffs filed suit, and after a long investigation of conditions at NYCHA properties, HUD sued NYCHA in the United States District Court for the Southern District of New York based on NYCHA's failure to meet federal housing quality standards. (*See* R. 71 (¶ 4).) The federal complaint was based in part on the same heating failures that underlie plaintiffs' claims, but HUD also asserted broader violations of HUD regulations, including those concerning lead paint exposure, unchecked mold growth, pest and vermin infestations, failing elevators, leaks, and other deterioration. *See United States v. New York City Hous. Auth.*, 347 F. Supp. 3d 182, 189-92 (S.D.N.Y. 2018).

In January 2019, to resolve the federal action, HUD exercised its authority under 42 U.S.C. § 1437d(j)(3)(A)(v) and entered into a settlement agreement with NYCHA and New York City[3] "to remedy the deficient physical conditions in NYCHA properties, ensure that NYCHA complies with its obligations under federal law, reform the management structure of NYCHA, and facilitate cooperation and coordination between HUD, NYCHA, and the City." (R. 71-72 (¶ 8).) Exhibits A and B to the Agreement set forth specific requirements and deadlines to remedy particular deficiencies at NYCHA properties, including lead-based paint issues (Exhibit A (R. 102-109)), and heat, mold, elevators, and pest problems (Exhibit B (R. 110-120)). NYCHA must prepare Action Plans that specify the steps it will take to accomplish these objectives, and a federal monitor appointed pursuant to the Agreement will approve those Action Plans and oversee NYCHA's progress for a minimum of five years.[4] (R. 74-77 (¶¶ 16, 25, 28, 35-38); *see also* R. 111 (¶ 10).)

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[3] The City was not named as a defendant in the federal action but is obligated under the Agreement to provide funding for NYCHA's implementation of the Agreement. (R. 72 (¶ 9).)

[4] The federal monitor set a deadline of October 1, 2019, for NYCHA to submit for review a draft Action Plan regarding its heating obligations

The Agreement also expressly addresses NYCHA's continuing obligation to comply with other federal, state, and local laws. Specifically:

- "This Agreement does not remove any responsibility of NYCHA for achieving and maintaining complete compliance with all applicable federal, state, and local laws, regulations, and permits." (R. 95 (¶ 104).)
- "NYCHA's compliance with this Agreement shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein." (R. 95 (¶ 104).)
- "HUD and [the U.S. Attorney's Office for the Southern District of New York] do not, by entering into this Agreement, warrant or aver in any manner that NYCHA's compliance with any aspect of this Agreement will result in compliance with any provisions of federal, state, or local laws, regulations, or permits." (R. 95 (¶ 104).)

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under the Agreement. Bart M. Schwartz, *Monitor's First Quarterly Report for the New York City Housing Authority* 48 (July 22, 2019) (internet). On November 1, 2019, the monitor acknowledged that the final Action Plan was still "[i]n [p]rogress." Bart M. Schwartz, *Monitor's Second Quarterly Report for the New York City Housing Authority* 37 (Nov. 1, 2019) (internet).

- This Agreement does not "limit the rights of third parties, not party to this Agreement, against NYCHA, except as otherwise provided by law." (R. 96 (¶ 105).)
- NYCHA must establish a Compliance Department to oversee "NYCHA's regulatory compliance with regard to federal, state, and local obligations." (R. 81 (¶ 53(a)).)

After execution of the Agreement in January 2019, NYCHA moved to dismiss this case in Supreme Court, arguing, among other things, that the Agreement preempted the injunctive relief that plaintiffs sought under state law. (*See* R. 5.) Supreme Court agreed, holding that any injunctive relief would conflict with the "broad" terms of the Agreement and obstruct the Agreement's "purposes and objectives" of "remedy[ing] the deficient physical conditions in NYCHA properties" and providing "safe and adequate housing." (R. 11-12.) The court accordingly dismissed plaintiffs' warranty-of-habitability claim for injunctive relief.

ARGUMENT

THE AGREEMENT BETWEEN HUD AND NYCHA DOES NOT PREEMPT PLAINTIFFS' WARRANTY-OF-HABITABILITY CLAIM UNDER STATE LAW

Supreme Court erred in finding that plaintiffs' state-law claim against NYCHA for breach of RPL § 235-b's warranty of habitability was preempted by the Agreement between NYCHA and HUD. That holding is contrary both to the plain language of the Agreement and to the underlying federal regime that Congress established to oversee federally funded public housing.

"[I]n a field which the States have traditionally occupied," including the regulation of public housing, courts "presume[] that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quotation marks omitted). "That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Id.*

NYCHA contends that there is "doubt" as to whether this presumption against preemption applies to federally regulated properties. Br. for Defs.-Respondents (NYCHA Br.) at 25 n.11. But the only case that it cites—the trial court decision in *Mother Zion Tenant Assn. v. Donovan*,

2007 N.Y. Slip. Op. 30851(U) (Sup. Ct. N.Y. County Apr. 11, 2007)—concerned a quite different statute. The local law at issue in that case effectively sought to control participation in a federal housing program (in that case, section 8) by limiting landlords' ability to withdraw from that program. Both the trial court and this Court on appeal recognized that the local law implicated unique federal interests regarding HUD's administration of its own program, rather than imposing generally applicable standards in an area "traditionally regulated by the states." *Id.* at *10; *see id.* at *13; *Mother Zion Tenant Assn. v. Donovan*, 55 A.D.3d 333, 336 (1st Dep't 2008); *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) ("The relationship between a federal agency and the entity it regulates is inherently federal in character.").

Here, by contrast, the state-law warranty of habitability that plaintiffs seek to enforce against NYCHA is a generally applicable law addressing core questions about "the health and safety of the tenant," *Park W. Mgt. Corp.*, 47 N.Y.2d at 328, that courts routinely recognize to be a quintessential area of state rather than federal concern. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) ("States have broad power to regulate housing conditions in general and

the landlord-tenant relationship in particular."); *Perry v. Housing Auth. of City of Charleston*, 664 F.2d 1210, 1216 (4th Cir. 1981) ("It would be hard to find an area of the law in which the states have a greater interest or have had greater involvement than in the legal area of landlord-tenant."). The presumption against federal preemption thus applies. And here, NYCHA has failed to rebut that presumption because the express language of the Agreement, as well as the underlying federal statute and HUD's regulations, all show federal intent to preserve rather than preempt state-law protections such as the warranty of habitability.

A. The Agreement Expressly Contemplates NYCHA's Continuing Compliance with State and Local Laws.

The express language of the Agreement demonstrates an intent to preserve, rather than preempt, NYCHA's obligation to comply with state laws such as the warranty of habitability.[5] Paragraph 104 expressly

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[5] Because the Agreement does not even purport to preempt state law, this Court need not address or resolve the threshold question of whether federal agency action can have *any* preemptive effect independent of the underlying federal law. *See Lipschultz v. Charter Advanced Servs. (MN), LLC*, 140 S. Ct. 6, 7 (Oct. 21, 2019) (Thomas and Gorsuch, JJ., concurring in the denial of certiorari) ("It is doubtful whether a federal [agency] policy"—as opposed to "the 'Constitution,' the 'Laws of the United States,' or 'Treaties'"—"is 'Law' for purposes of the Supremacy

provides that the "Agreement does not remove any responsibility of NYCHA for achieving and maintaining complete compliance with all applicable . . . state[] and local laws, regulations, and permits," and further provides that "NYCHA's compliance with this Agreement shall be no defense to any action commenced pursuant to any such laws, regulations, or permits." (R. 95 (¶ 104).) The following paragraph likewise provides that the Agreement does not "limit the rights of third parties, not party to this Agreement, against NYCHA." (R. 96 (¶ 105).) See *supra* at 13-14. Indeed, far from supplanting state or local law, the Agreement expressly incorporates the heating requirements in New York City's local administrative code in describing NYCHA's obligations in Exhibit B. (R. 110.) This language by itself forecloses NYCHA's argument that the Agreement preempts state law and excuses NYCHA from complying with its state-law obligations, including the warranty of habitability.

There is no merit to NYCHA's contention that these provisions in the Agreement preserve only "individual tort or breach of contract actions

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Clause."); *In re Santa Fe Natural Tobacco Co. Mktg. & Sales Practices & Prods. Liab. Litig.*, 288 F. Supp. 3d 1087, 1220-21 (D.N.M. 2017) (discussing circuit split over preemptive effect of consent decrees entered into by federal agencies).

where a tenant seeks redress for his or her individual claim," and not class actions like this lawsuit. NYCHA Br. at 33. No such distinction appears in the Agreement's broad language confirming the continued obligations imposed by "*all* applicable . . . state[] and local laws, regulations, and permits" (R. 95 (¶ 104) (emphasis added)), and preserving "the rights of third parties" like plaintiffs "against NYCHA" (R. 96 (¶ 105)).

Nor would any such distinction make sense. NYCHA's preemption argument here is that the Agreement forecloses injunctive relief ordered by state courts under state law because such relief might create a specific conflict with NYCHA's compliance with the federal Agreement. But thousands of individual claims against NYCHA would, if anything, raise more concerns about creating some specific conflict than would a single, consolidated class action. *Cf. Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987) (finding federal preemption where Congress preferred "a single set of regulations" to a "patchwork scheme of regulation"). The logical consequence of NYCHA's concession that the savings language in the Agreement would permit individual claims is thus that the same language would encompass class actions like this lawsuit.

The Agreement's language is also consistent with the particular approach that HUD chose to take here to enforce NYCHA's compliance with federal obligations. As explained earlier (*supra* at 10), HUD's options when a federally funded public housing agency is in default of its federal obligations include remedies as drastic as completely taking over the agency through receivership or direct HUD possession. *See* 42 U.S.C. § 1437d(j)(3)(A)(ii), (iv). Even in those circumstances, federal preemption of state and local laws is not automatic. But HUD (or the receiver) does have the option under the statute to declare that it "shall not be required to comply with any State or local law relating to . . . financial or administrative controls," based on a "written determination" that the law "substantially impedes correction of the substantial default." *Id.* § 1437d(j)(3)(C)(v), (D)(i)(V).

HUD elected not to pursue such dramatic remedies here. Instead, HUD chose the less extreme measure of entering into a settlement agreement that allows NYCHA to continue operating its facilities but that "require[s] [NYCHA] to make other arrangements acceptable to the [HUD] Secretary." *Id.* § 1437d(j)(3)(A)(v). For this remedial option, the Housing Act contains no comparable language authorizing HUD to declare,

based on a written determination, that the local public housing agency is exempt from state or local laws. And the Agreement here does not purport to do so—to the contrary, as explained, it preserves NYCHA's obligation to comply with state and local laws in addition to its federal obligations, as NYCHA is ordinarily required to do. The Agreement itself thus forecloses NYCHA's claim of federal preemption.

B. The Authorizing Statutes and HUD's Regulations Confirm Federal Intent to Preserve State Law Protections for Public-Housing Tenants.

The Agreement's express preservation of state and local laws is consistent with the underlying statutory and regulatory regime. As explained above, Congress enacted the Housing Act of 1937 against a background in which courts had prohibited the federal government from operating public housing directly. As result of these limitations, Congress deliberately chose a different model in which the federal government would provide financial assistance but then work closely with "State[] and local governments" to ensure the adequacy of federally funded public housing. 42 U.S.C. § 1437(a)(4). See *supra* at 7-8. In the decades since the Housing Act's enactment, Congress has adhered to its original view that public housing is a matter for both "HUD *and local government*" to

address—not a matter of exclusively federal control. S. Rep. No. 101–316, 1990 WL 272745, at 121 (1990) (emphasis added).[6]

HUD's regulations reflect this congressional judgment. In the same regulation setting federal housing quality standards relating to habitability, HUD expressly provides that its standards "do not supersede or preempt State and local codes for building and maintenance with which [public housing agencies] must comply"; instead, public housing agencies "must continue to adhere to these codes." 24 C.F.R. § 5.703(g); *see id.* § 5.701(c)-(d). In a subsequent regulatory amendment, HUD explained that, to the extent that federal and state standards differ, "the general rule" under § 5.703(g) "is that the more stringent standard is applicable." *Public Housing Assessment System (PHAS) Amendments to the PHAS*, 65 Fed. Reg. 1,712, 1,730 (Jan. 11, 2000). And HUD requires that public housing agencies' contracts with tenants commit the agencies to comply not only with "HUD regulations materially affecting health and

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[6] For example, in authorizing HUD to designate public housing agencies as "troubled" (rather than in "substantial default"), Congress authorized HUD "to enter into agreements with each troubled agency" and then "required [HUD] to seek the assistance of local public and private entities in carrying out executed agreements." S. Rep. No. 101–316, 1990 WL 272745, at 121 (emphasis added); *accord* 42 U.S.C. § 1437d(j)(2)(C).

safety," but also with all other "applicable building codes[and] housing codes." 24 C.F.R. § 966.4(e)(2); *see also id.* § 966.4(f)(5) (tenants also must "comply with all obligations imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety").

HUD has consistently expressed the same view in litigation. For example, in *Multi-Family Management, Inc. v. Hancock*, HUD submitted an amicus brief taking the position that "the D.C. Housing Code standards imposed on the landlord d[id] not conflict with the federal housing standards imposed by HUD on properties receiving" federal assistance. 664 A.2d 1210, 1215 (D.C. 1995) (Ferren and Steadman, JJ., concurring in part) (quotation marks omitted). Because "there is no federal preemption," both "the tenant and HUD can litigate separately to enforce District of Columbia and federal housing standards, respectively." *Id.* Similarly, in *City of Joliet, Ill. v. New West, L.P.*, HUD "disclaim[ed] [a] theory of preemption" based on its contracts with recipients of federal subsidies under the Housing Act of 1937 and confirmed that such "contracts do not affect state or local powers"; as a result, owners of such housing "must comply with all state and local laws" in addition to their federal obligations. 562 F.3d 830, 834 (7th Cir. 2009). HUD's position that state and

local regulation is consistent with federal regulation of public housing merits deference here. *See Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (deferring to agency's view on preemption).

Practical reasons also support Congress's and HUD's judgment that public housing agencies must generally comply with federal, state, and local laws. It is simply not feasible for HUD to regulate and enforce by itself housing condition standards in approximately one million public housing units that are located across all fifty states and United States territories and that are owned or operated by approximately three thousand different public housing agencies. See *supra* at 8. Nor would exclusive federal control make sense even for the more limited class of public housing agencies found to be in substantial default of their federal obligations. Indeed, when HUD placed the Chicago Housing Authority in receivership in 1995, a congressional committee made an express finding that "HUD does not have the staff resources necessary to run several troubled housing agencies at once." H.R. Rep. No. 104–437, at 2 (1995). And HUD's takeover of the Chicago Housing Authority, considered "an unprecedented model for intervention," involved only 55,000 public

housing units, *id.* at 1, 3—less than a third of NYCHA's public housing stock at issue here.

Ultimately, NYCHA does not dispute that it ordinarily must comply with state and local laws, including the warranty of habitability. NYCHA appears to argue, however, that the Agreement it entered into with HUD changes this default rule. But nothing in the Housing Act or HUD's implementing regulations support such an argument. And it would be perverse for NYCHA to become exempt from its usual state-law obligations by virtue of violating its concurrent federal obligations. If anything, NYCHA's violation of federal standards reinforces the importance of requiring its continued compliance with the state and local standards that ordinarily would apply to its conduct.

C. NYCHA's Concerns about Conflicts Between This Litigation and Implementation of the Agreement Are Premature and Meritless.

At base, NYCHA's preemption argument is based on its concern that any injunctive relief ordered in this lawsuit might conflict with NYCHA's remedial obligations under the Agreement. *See* NYCHA Br. at 12. But that speculative concern is not enough to warrant the dismissal of plaintiffs' state-law claims.

Conflict preemption applies both when a state law would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and "when it is impossible for a private party to comply with both" the state and federal laws. *Doomes v. Best Tr. Corp.*, 17 N.Y.3d 594, 603 (2011) (quotation marks omitted). But "whether a state regulation unavoidably conflicts with national interests is an issue incapable of resolution in the abstract." *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1220 (D.C. Cir. 1984). "Without the facts of any alleged conflict . . . [a court] cannot begin to make a conflict-preemption assessment." *Mozilla Corp. v. FCC*, 940 F.3d 1, 82 (D.C. Cir. 2019).

Here, NYCHA has identified no actual, concrete conflict—only the speculation that a conflict *may* arise between any injunction ordered here and the requirements of an as-yet-unspecified Action Plan that the federal monitor may approve. *See* NYCHA Br. at 27-29. Such speculation based on a *future* Action Plan is "at this stage premature," *Rice v. Santa Fe El. Corp.*, 331 U.S. 218, 237 (1947), and insufficient to constitute an "actual conflict" that triggers preemption, *Louisiana Pub. Serv. Commn. v. FCC*, 476 U.S. 355, 368 (1986).

There is good reason to doubt that any actual conflict will arise. As presented in the amended complaint, plaintiffs' requested injunctive relief would supplement and reinforce the objectives of the Agreement to correct NYCHA's deficiencies. In particular, the Agreement requires NYCHA to ensure that its properties are "decent, safe, sanitary, and in good repair." (R. 83 (¶ 60).) New York's warranty of habitability serves the same ends, requiring landlords to ensure that their properties are "fit for human habitation and for the uses reasonably intended by the parties," and that residents are not "subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety." RPL § 235-b(1). Similarly, NYCHA could comply with both the Agreement and the injunctive relief sought in plaintiffs' complaint by complying with the local administrative code's minimum heat levels. (*Compare* R. 110, *with* R. 174.) And even if it were the case that an injunction in this litigation would impose stricter standards than the Agreement would impose on its own, there is no indication that such greater protection of NYCHA tenants would be opposed by the federal monitor or seen as adverse to HUD's interests; as HUD itself has explained, "the general rule is that the more stringent standard is applicable" when

federal and state rules differ. 65 Fed. Reg. at 1,730. Every indication is thus that "the object sought to be obtained by the federal law and the character of obligations imposed by it" would be consistent with any relief that state law would provide. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (quotation marks omitted).

To the extent that actual disagreements may arise about the best way to accomplish these shared objectives, there is no basis at this time to conclude that the parties and the federal monitor will be unable to work out those disagreements. Plaintiffs' counsel has represented their willingness to work collaboratively with NYCHA and the federal monitor (Reply Br. for Pls.-Appellants at 11). And the Agreement itself contemplates that the federal monitor will engage with NYCHA residents—including plaintiffs here—"to solicit input regarding the achievement of the Agreement's purpose." (R. 76 (¶ 30).)

Far from conflicting with federal objectives, this type of collaboration between federal, state, and local authorities was precisely the model that Congress adopted when it initially enacted the Housing Act of 1937. See *supra* at 7-8. And NYCHA's obligation to comply with multiple legal regimes also accords with Congress's intent. In our federalist system, the

"powers of the Federal Government and the States often overlap" and "result[] in two layers of regulation." *Gamble v. United States*, 139 S. Ct. 1960, 1968-69 (2019). For housing in particular, courts have recognized that "federal and state law depend on each other; neither excludes the other." *Rosario v. Diagonal Realty, LLC*, 8 N.Y.3d 755, 764 (2007). When, as here, "Congress has indicated its awareness of the operation of state law" but has incorporated rather than preempted state regulation, the natural conclusion is that Congress "decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Wyeth*, 555 U.S. at 575 (quotation marks omitted). Supreme Court thus erred in finding that the state-law warranty of habitability underlying plaintiffs' claim was preempted by HUD's Agreement with NYCHA.

CONCLUSION

For the foregoing reasons, the Court should reverse Supreme Court's dismissal of plaintiffs' state-law warranty-of-habitability claim.

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Respectfully submitted,

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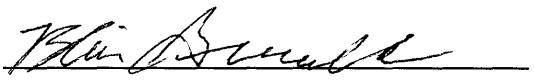
By: 
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