

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

2013-5093

CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF  
THE CITY OF BREMERTON, NATIONAL HOUSING COMPLIANCE, ASSISTED  
HOUSING SERVICES CORP., NORTH TAMPA HOUSING DEVELOPMENT  
CORP., CALIFORNIA AFFORDABLE HOUSING INITIATIVES, INC.,  
SOUTHWEST HOUSING COMPLIANCE CORP., and NAVIGATE AFFORDABLE  
HOUSING PARTNERS

(formerly known as Jefferson County Assisted Housing Corporation),

Plaintiffs-Appellants,

v.

MASSACHUSETTS HOUSING FINANCE AGENCY,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in consolidated Case Nos.  
12-CV-0852, 12-CV-0853, 12-CV-0862, 12-CV-0864, and 12-CV-0869,  
Judge Thomas C. Wheeler.

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**BRIEF FOR THE NATIONAL COUNCIL OF STATE HOUSING AGENCIES  
AS *AMICUS CURIAE*  
IN SUPPORT OF DEFENDANT-APPELLEE UNITED STATES**

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Date: July 26, 2013

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL  
CIRCUIT

CMS CONTRACT MANAGEMENT ET AL. V. UNITED STATES  
No. 2013-5093

CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* National Council of State Housing Agencies certifies the following:

1. The full name of every party represented by me is:

National Council of State Housing Agencies

2. The name of the real party in interest represented by me is:

National Council of State Housing Agencies

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of *amicus curiae* represented by me are:

The National Council of State Housing Agencies (“NCSHA”) does not have a parent corporation and there is no publicly held company owning 10 percent or more of NCSHA stock.

4. The names of all law firms and the partners or associates that appeared for *amicus curiae* in the trial court or are expected to appear in this court are:

Kevin P. Mullen – Jenner & Block LLP  
Charles L. Capito III – Jenner & Block LLP

/s/ Kevin P. Mullen  
Kevin P. Mullen

Dated: July 26, 2013

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## STATEMENT OF INTEREST

The National Council of State Housing Agencies (“NCSHA” or the “Council”) is a non-profit, nonpartisan organization created by the nation’s state Housing Finance Agencies (“HFAs”). Its members are the HFAs of every state, the District of Columbia, New York City, Puerto Rico, the U.S. Virgin Islands, and over 300 affiliate members in the affordable housing field. The Council’s mission is to advance through advocacy and education the state HFAs’ efforts to provide affordable housing to those who need it.<sup>1</sup>

The Council offers an important viewpoint not fully represented by the existing parties in this appeal. HFAs are mission-based, publicly accountable, nonprofit entities created under state law to advance affordable housing in their states. They operate with statewide authority and qualify as Public Housing Agencies (“PHAs”) for purposes of administering federal housing assistance funded by the United States Department of Housing and Urban Development

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(c)(5), no party’s counsel authored this brief in whole or in part, and no person – other than the *amicus curiae* – contributed money to fund preparing or submitting the brief.

(“HUD”). As such, NCSHA’s members have a strong stake in the proper functioning of HUD’s project-based housing assistance programs.

The Council participated in this matter as *amicus curiae* on brief and at oral argument before the United States Court of Federal Claims. In permitting NCSHA’s motion for leave to participate as *amicus curiae*, Judge Wheeler found that, “as the principal trade association for the nation’s HFAs, [NCSHA] can provide the Court with useful information and context it might not otherwise receive regarding the statutory framework of project-based Section 8 programs and, in particular, the historical role of state HFAs within those programs.” Order Granting Motion for Leave to File Amicus Brief at 2, *CMS Contract Mgmt. Servs. et al. v. United States*, No. 12-cv-00852, Doc. 54 (Ct. Fed. Cl. Feb. 1, 2013). Similarly, here, the Council provides argument in support of the terms of HUD’s Notice of Funding Availability (“NOFA”) limiting the eligibility of out-of-State PHAs. The Council’s perspective is based on its understanding, not only of the statutory framework under which HUD implements the Section 8 Housing Programs, but also the laws of the states providing for the creation and operation of PHAs.

## SUMMARY OF ARGUMENT

Appellants and Appellee devote the majority of their opening briefs to whether the Court of Federal Claims correctly found that HUD's use of cooperative agreements with state-authorized PHAs to assign project-based program administration responsibility was compliant with the Federal Grant and Cooperative Agreement Act ("FGCAA"), specifically 31 U.S.C. § 6305. Although NCSHA will not address this issue in any detail, it agrees with Appellee that the NOFA properly characterizes the Annual Contribution Contracts ("ACCs") as cooperative agreements. The Council finds especially compelling the fact that never, in the 39-year history of Section 8, has HUD awarded an ACC to a PHA as a procurement contract, or used the strictures of the Competition in Contracting Act ("CICA") and the competition requirements in the Federal Acquisition Regulation ("FAR") when selecting PHAs as contract administrators.

In principal, the Council's arguments support the Court of Federal Claims' conclusion that the terms of HUD's NOFA restricting the eligibility of out-of-State PHAs were reasonable and compliant with the FGCAA. The requirements in the CICA to ensure "full and open

competition” do not apply in this case because those requirements apply to procurement contracts, not cooperative agreements. Thus, in the absence of specific statutory or regulatory requirements, HUD’s decision to restrict the eligibility of out-of-State PHAs and PHAs not authorized to operate on a statewide basis is reviewed under the “arbitrary and capricious” standard set forth in the Administrative Procedures Act (“APA”), 5 U.S.C. § 706(2)(a). This standard requires only that the agency action have a rational basis.

HUD’s decision to impose eligibility restrictions on out-of-State PHAs was rational. HUD was faced with unanimous guidance from numerous state attorneys general, who concluded either that out-of-State PHAs are not authorized to operate as an in-State PHA, or that only the state’s HFA could operate on a statewide basis, or both. HUD also understood, as evidenced by the NOFA itself, that state law limits the area of operation of PHAs “to the locality or to the State that they were established to serve.” JA300/AR1262. Indeed, the state laws under which Appellants and their parent PHAs were created expressly limit the PHAs’ authority to accept Federal assistance to operate

housing projects to those projects existing within the boundaries of each PHA's locality. As the record reflects, HUD was reasonably concerned that the limitations imposed by state laws would lead to disputes or disruption if HUD permitted out-of-State PHAs to apply for non-home-state ACCs. In order to mitigate these risks, HUD included the challenged terms in the NOFA. HUD's action was rational, as was the Court of Federal Claims decision affirming HUD's chosen NOFA terms.

## ARGUMENT

### I. Standard Of Review<sup>2</sup>

For appeals of pre-award bid protests, this Court applies the “arbitrary and capricious” standard of review of the APA. *See Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1358 (Fed. Cir. 2009). This requires the Court to determine whether the agency's “decision lacked a rational basis; or [whether]. . . the procurement procedure

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<sup>2</sup> For purposes of the Council's arguments, we assume, without taking a position, that the Court of Federal Claims was right to retain jurisdiction over Plaintiffs' protests after the court determined that HUD was properly using cooperative agreements. If Appellee is correct, however, and the Court of Federal Claims should have dismissed the case for lack of jurisdiction under the Tucker Act, 28 U.S.C. § 1491, *see* U.S. Br. at 51-54, then the Council's arguments, *infra* Parts I-III, are moot.

involved a violation of regulation or procedure.” *PGBA, LLC v. United States*, 389 F.3d 1219, 1225 n.4 (Fed. Cir. 2004) (quoting *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001)). This Court has repeatedly characterized this standard of review as “highly deferential.” *See CHE Consulting, Inc. v. United States*, 552 F.3d 1351, 1354 (Fed. Cir. 2008); *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1058 (Fed. Cir. 2000). Only if the agency fails to provide “a coherent and reasonable explanation of its exercise of discretion” will a court find that the agency action lacks a rational basis. *See Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009). Where the appellant alleges a violation of statute or regulation, it “must show a clear and prejudicial violation of applicable statutes and regulations.” *Id.* (quoting *Impresa Construzioni Geom. Domenico Garufi*, 238 F.3d at 1333).

## **II. The Terms Of The NOFA Addressing The Eligibility Of Out-Of-State Applicants Are Rationally Based.**

The Appellants concede that, if the ACCs are cooperative agreements, the Court need only determine whether HUD had a

rational basis for restricting out-of-State applicants in the event that HUD received applications from qualified in-state PHAs. App. Br. at 55, 59.<sup>3</sup> For the reasons set forth below, the challenged terms of the NOFA are rationally based.

**A. The Agency Record, Specifically the NOFA and HUD’s Responses During the Question and Answer Process, Clearly Set Forth the Basis for HUD’s Decision to Restrict the Eligibility of Out-of-State Applicants.**

In the NOFA, HUD explained that it would:

[C]onsider applications from out-of-State applicants only for States for which HUD does not receive an application from a legally qualified in-State applicant. Receipt by HUD of an application from a legally qualified in-State applicant will result in the rejection of any applications that HUD receives from an out-of-State applicant for that state.

JA300/AR1261. In short, HUD would not consider an out-of-State PHA unless there was no qualified in-State applicant. The NOFA defines an “in-State applicant,” in relevant part, as “an applicant formed under the laws of the same State for which it proposes to serve as [performance-based contract administrator (“PBCA”)]. *Id.* The NOFA

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<sup>3</sup> “App. Br. at \_\_” refers to page numbers in the Appellants’ corrected brief filed on July 15, 2013 (Docket No. 58).

defines an “out-of-State applicant” as “an applicant formed under the laws of a State other than the State for which it proposes to serve as PBCA.” JA300/AR1262.

To be eligible as an out-of-State applicant, not only must there be no “legally-qualified in-State applicant,” but the out-of-State applicant:

[M]ust demonstrate that it (a) satisfies the definition of PHA in section 3(b)(6)(A) of the 1937 Act; and (b) has the legal authority, both under the law of the State of its creation and under the law of the State for which it is applying to act as PBCA, to operate throughout the entire State for which it is applying.

*Id.* To demonstrate the legal authority to operate on a statewide basis in another state, the out-of-State applicant is required to submit a Reasoned Legal Opinion (“RLO”) and Supplemental Statement (both of which are also defined by the NOFA). *Id.* The NOFA also limits eligible applicants to those entities “created *directly* by ‘any State, county, municipality, or other governmental entity or public body.’” *Id.* (quoting 1937 Housing Act § 3(b)(6)(A)) (emphasis in NOFA). The NOFA further provides that the “[s]ubmission of an RLO on behalf of an instrumentality that itself was created by one or more

instrumentalities,” rather than directly by state or local law, would be disqualified. JA300/AR1262.

Appellants contend that these terms, specifically the terms restricting the eligibility of out-of-State applicants, appeared out-of-the-blue, without context or rationale, and thus are arbitrary and capricious. *See* App. Br. at 21. Appellants’ contention is contrary to the record. The NOFA itself, as well as HUD’s communications to interested parties during the question and answer process after the Agency’s public issuance of the NOFA, disproves Appellants’ contention. HUD quite plainly explains that the challenged terms mitigated the risk of programmatic delay caused by potential conflicts among the states’ housing laws, and specifically, the state laws defining and empowering PHAs to operate within a state’s borders. In the NOFA, HUD explains that a “PHA is a creature of State law” and that “[i]ts authority and power to act derive from the State law(s) under which it was created.” JA300/AR1262. HUD notified the applicants that, under these State laws, “[o]ut-of-State entities are typically limited in their

area of operation under the law of the State of their creation to the locality or to the State that they were established to serve.” *Id.*

In the NOFA, HUD observes that under its prior practice, out-of-State PHAs “typically” circumvented state restrictions on PHAs’ area of operation by “creat[ing] an instrumentality under the laws of its own State (e.g., the State’s nonprofit corporation statute) which typically authorizes the nonprofit corporation to operate anywhere inside or outside the State of its creation.” *Id.* In such circumstances, “the resulting nonprofit corporation, rather than the parent entity that created it, becomes the out-of-State applicant.” *Id.*

It was this questionable maneuvering around State housing laws that HUD sought to quell under the NOFA by limiting the eligibility of out-of-State PHAs. The Agency took these reasonable measures not principally because HUD wanted to ensure that the housing laws of the states were respected, but because the Agency wanted to avoid potential disputes with and among the states and their PHAs concerning the extraterritorial jurisdiction of out-of-State PHAs. Such disputes could cause major disruption to HUD’s project-based program. To that end,

the NOFA directed interested parties to the opinions posted on HUD's website that the Agency received from the states' attorneys general, which HUD characterized as "relevant to the administration of the Section 8 PBCA program." *Id.*

This rationale also was apparent from HUD's responses to interested party questions. There, HUD clarified it was not relying "solely on State Attorneys' General opinions as a basis" for its action, but that the letters were a factor along with other "policy and logistical concerns." JA300/AR1318, 1331. According to HUD, the possibility of conflicts among the states' laws "pose[d] an unacceptable risk of interruption to its administration of the PBCA program."

JA300/AR1318.

In response to a direct question about "the basis for HUD's decision to effectively prohibit PHA's from bidding in other States," HUD responded that:

Some States have made their position known to HUD that their State laws prohibit an out-of-state PHA from acting as a PHA to the extent necessary to comply with the 1937 Act and the ACC within their State. As stated in the NOFA, HUD has made the decision to consider

applications from out-of-state applicants only for States for which HUD does not receive an application from a qualified in-state applicant.

JA300/AR1319.

It was reasonable for HUD to rely in part on the AG letters because, according to HUD, the opinions of the attorneys general provided an authoritative interpretation of the state's housing laws, second only to the opinions of the state's highest court. JA300/AR1330 (Question 163). Accordingly, through the NOFA itself and the Agency's responses during the question and answer process, HUD has offered "a coherent and reasonable explanation of its exercise of discretion." Thus, HUD's inclusion of the out-of-State restrictions in the NOFA was rational.

**B. The NOFA's Terms Are Based on HUD's Reasonable Consideration of State Law.**

Conspicuously absent from Appellants' argument concerning the challenged terms of the NOFA is any contention that states' laws do not, in fact, impose limitations on PHAs' ability to operate outside of the jurisdiction in which they were organized. In other words, Appellants are not arguing, and have never argued throughout this litigation, that

HUD was wrong about the states' laws; rather, Appellants contend that HUD (and the Court of Federal Claims) failed to spill enough ink substantiating its decision to restrict eligible applicants to qualified in-State PHAs authorized to operate on a statewide basis. The opinion letters from 19 states' attorneys general, and an analysis of nearly uniform state housing laws, demonstrate that HUD's limitation on out-of-State PHAs was a prudent, if not necessary, measure.

Nineteen state attorneys general provided opinions or analyses of the states' laws concerning an out-of-State PHA's ability to operate in-State and/or on a statewide basis. These attorneys general made the following conclusions:

<u>State</u>	<u>Excerpts from Attorney General Letter</u>
Arizona	"The [Arizona Department of Housing] is the only entity authorized to act as a statewide PHA in Arizona . . . . PHAs may also be established by cities, counties or towns, as authorized by A.R.S. § 36-1404. However, all of these agencies are mandated to carry out activities that benefit the residents of their jurisdiction." AZ AG Ltr. at 1-2.
California	"[A] housing authority created under the sovereign power of another state does not have authority to exercise that power in California." CA AG Ltr. at 4.
Connecticut	"[Connecticut code] makes clear that a housing

authority is created by and operates within the geographical boundaries of the municipality . . . . Nothing in [Connecticut’s housing code] suggests that one municipality may create and operate a housing authority outside its geographical boundaries.” CT AG Ltr. 2 at 2.

Delaware “The deliberate process established by 31 *Del. C.* Ch. 43 for the formation of a housing authority shows that a corporate instrumentality of a non-Delaware housing authority would be incapable of acting as a public housing authority. . . . Only a housing authority that is created and operates under the exacting strictures of Delaware law may operate as a public housing authority in Delaware.” DE AG Ltr. at 2, 5.

Hawaii “[A]n ‘out-of-State’ housing authority could not legally serve or be designated as the exclusive PHA for Hawai’i with Statewide jurisdiction. Chapter 356D, Haw. Rev. Stat., does not allow or authorize out-of-State PHA’s essentially to cross State lines and perform the duties and powers of the [Hawai’i HFA] relating to low-income public housing.” HI AG Ltr. at 1.

Illinois “Neither the State Housing Act nor the Housing Authorities Act authorizes out-of-state agencies or instrumentalities to act as housing corporations or housing authorities in Illinois.” IL AG Ltr. at 6. The letter concludes that an out-of-state PHA may provide housing services in Illinois, but that would only be possible if the out-of-State PHA was “acting in consort with a public agency of” Illinois. *Id.* at 7-8.

Indiana The Indiana HFA “is the only public housing agency qualified under state law to serve as contract administrator for the PBCA program because [it] is the only PHA authorized to act throughout the entire state.... A PHA created by a municipality may only

operate inside th[at] municipality or within a five mile radius.” IN AG Ltr. at 1, 3.

Kentucky “As a matter of state law, therefore, this office is aware of no entity, public or private, other than [Kentucky’s HFA], which has been given statutory authority to conduct ... project-based rental assistance for a federal agency in the Commonwealth of Kentucky.” KY AG Ltr. at 3.

Maryland “In our opinion, an out-of-state public housing agency or its instrumentality may not operate as a public housing agency within Maryland.” MD AG Ltr. at 1.

Michigan “[I]t is our opinion that no local government or instrumentality of that local government has the authority to implement programs of housing assistance throughout the State of Michigan. We reach the same conclusion with respect to any out-of-state governmental entity.” MI AG Ltr. at 10.

New Mexico “By statute, [New Mexico’s HFA] is designated as the single housing authority in New Mexico. An out-of-state public housing authority or instrumentality of an out-of-state public housing authority has no authority to act as a public housing authority within New Mexico.” NM AG Ltr. 2 at 2.

North Carolina “[I]t is my opinion that the [North Carolina HFA] is the only entity in this State with the exclusive authority to administer a statewide Project-Based Section 8 contract.” NC AG Ltr. at 1.

Oregon Based on Oregon’s housing and corporation code, “a governmental entity in another state cannot use the corporate form to confer upon itself the power to act as an Oregon governmental entity. Any Oregon ‘governmental entity’ with ‘authori[ty] to engage in or assist in the development or operation of public housing’

must be specifically authorized by Oregon law.” OR AG Ltr. 1 at 2.

- Pennsylvania The Pennsylvania HFA “is the only entity, within the Commonwealth of Pennsylvania, with the exclusive authority to administer a statewide Project-Based Section 8 contract.... It is [also] our belief, and you are advised, that an out-of-state entity is not enabled by state law to serve as a ‘public housing authority’ under Pennsylvania law.” PA AG Ltr. at 1.
- Rhode Island “The term ‘public housing authority’ has a specific statutory meaning under Rhode Island law that precludes its application to any other entity, including instrumentalities of in-state or out-of-state entities, not specifically organized within the applicable sections of the Rhode Island General laws.” RI AG Ltr. at 4.
- South Carolina “[I]t is not plausible to infer that local housing authorities may operate state-wide, particularly where their jurisdiction is subject to strict statutory limitations. Conversely, the [South Carolina HFA] has express statutory authority to act state-wide.” SC AG Ltr. at 3.
- Tennessee “The [Tennessee] General Assembly has created no entity other than the [Tennessee HFA] with the statutory authority to administer a state-wide Project-Based Section 8 contract.” TN AG Ltr. at 1.
- Virginia “[I]t is my opinion that a local, regional or consolidated housing authority organized pursuant to the Housing Authorities Law is not authorized to operate throughout the entire Commonwealth without first meeting the requirements of [Virginia’s housing code].” VA Ag Ltr. at 2.
- West Virginia “[C]ity, county or regional [housing] authorities formed under West Virginia Code §§ 16-15-3 or 4, having

limited geographical authority, are not authorized to serve as a PBCA for the State of West Virginia.” WV AG Ltr. at 1.

*See* HUD Online Program Office for PBCA NOFA, *available at*

[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/housing/mfh/PBCA%20NOFA](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/PBCA%20NOFA) (last visited July 25, 2013) (*see* JA6596 – 6694).

Each and every state that provided a letter advised HUD either that an out-of-State PHA is prohibited under state housing laws from operating directly as a housing authority within that state, or that the state’s HFA is the only entity authorized to operate as a PHA on a statewide basis, or both. In the face of such unanimity, HUD’s decision to restrict the eligibility of out-of-State PHAs in order to mitigate potential programmatic risks was not only the rational choice, it was the compelling choice. Indeed, only if HUD had willfully disregarded such evidence and proceeded to permit PHAs to apply for out-of-State ACCs in spite of the states’ laws would its decision have been arbitrary, capricious, and unreasonable.

In addition, as HUD recognized in the NOFA, “[o]ut-of-State entities are typically limited in their area of operation under the law of

the State of their creation to the locality or to the State they were established to serve.” JA300/AR1262. Indeed, the very laws under which Appellants and their parent PHAs were created expressly limit their areas of operation to the city, county, or region in which they are organized. These state laws provide express limitations on the PHAs’ authority to accept and use Federal assistance for housing projects. The following are examples of the laws under which Appellants were created, and which impose clear limitations on their ability to operate outside of their localities:

<u>Appellant</u>	<u>St.</u>	<u>State Code Provision(s)</u>
California Affordable Housing Initiatives (instrumentality of the Oakland Housing Authority)	CA	CAL. HEALTH & SAFETY CODE § 34327 (“An authority may... accept grants or other financial assistance from the federal government for or in aid of any housing project <u>within its area of operation.</u> ”) (emphasis added). <i>Id.</i> §§ 34208, 34209 (“Area of operation,” in the case of a city authority, includes the city and the area within five miles of its territorial boundaries.”). <i>See also</i> CA AG Ltr. <i>supra</i> .
Contract Management Services (instrumentality of Bremerton Housing Authority)	WA	WASH. REV. CODE § 35.82.200 (“[A]n authority is empowered to ... accept ... financial assistance from the federal government for or in aid of any housing project <u>within its area of</u>

operation.”) (emphasis added); *id.* § 35.82.020 (defining Area of Operation for a housing authority of a city as including “such city and the area within five miles from the territorial boundaries thereof”).

National Housing Compliance (instrumentality of various Georgia PHAs)

GA GA. CODE ANN. § 8-3-62 (“An authority is empowered to . . . accept . . . financial assistance from the federal government for, or in aid of, any housing project within its area of operation.”) (emphasis added); *id.* § 8-3-3 (similarly defining “area of operation”).

Navigate Affordable Housing Partners (instrumentality of the Jefferson County Housing Authority)

AL ALA. CODE § 24-1-73 (empowering PHA to accept grants from federal government for “operation of any housing project which the authority is empowered by this article to undertake”); *id.* § 24-1-62 (similarly defining “boundaries” of county PHAs as the county boundaries, excluding the territories of any city or town).

Southwest Housing Compliance Corporation (instrumentality of the Housing Authority of the City of Austin)

TX TEX. LOC. GOV’T CODE ANN. § 392.052(f)1 (authorizing PHAs to take action, including acceptance of financial assistance from the federal government “for, or in aid of, a housing project in the authority’s area of operation”) (emphasis added); *id.* § 392.014 (similarly defining “area of operation” for municipal housing authority).

National Tampa Housing

FL FLA. STAT. § 421.21 (“an authority is

Development Corporation  
(instrumentality of  
Tampa Housing  
Authority)

empowered to ... accept grants or other financial assistance from the Federal Government for or in aid of any housing project within its area of operation.”) (emphasis added); *id.* § 421.03 (similarly defining “area of operation”).

Assisted Housing Service Corporation  
(instrumentality of the  
Columbus Metropolitan  
Housing Authority)

OH OHIO REV. CODE ANN. § 3735.31(C) (authorizing the PHA to “accept grants or other financial assistance from the federal government for or in aid of any housing project within its territorial limits”) (emphasis added); *id.* § 3735.27(A)(2) & (G) (defining the “territorial limits” of metropolitan housing authorities, which, if enlarged, “shall be less than that of the [surrounding] county”).

As with the attorneys general letters, there is once again unanimity on the issue of state law. Here, in every case, the power of Appellants and their PHAs to accept assistance from the Federal government for housing projects – which would include assistance conveyed from HUD via the ACCs – is explicitly limited to projects within the PHAs’ areas of operation or territorial limits. These boundaries are limited by statute to the locality in which the PHA is located. A comprehensive survey of the housing laws of all 42 states

covered by the NOFA is not necessary here, but no doubt would reflect similar if not identical limitations on local PHAs' operations.

Given these clear demarcations in state law, it was prudent for HUD to limit the eligibility of out-of-State PHAs under the NOFA. Put into perspective, it is difficult to find any merit in Appellants' argument, which essentially contends that HUD acted capriciously by taking into consideration the largely uniform laws of the states. Instead, Appellants aver that, because Federal law did not require the NOFA's restrictions on out-of-State PHAs, HUD was compelled to ignore the states' laws, and permit the state-created PHAs to compete across state lines regardless of express statutory limitations on their authority to do so.<sup>4</sup>

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<sup>4</sup> Rather than refute the limitations placed on local PHAs by state law, Appellants point to the fact that, prior to the 2012 NOFA, HUD did not impose such limitations, and that the Appellants had been performing across state lines "without restriction." *See* App. Br. at 21, 61. To the extent that HUD's practice between 1999 and 2012 may have differed, that past practice "is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the

**C. The NOFA’s Restrictions on Out-of-State PHAs Are Consistent with the Housing Act of 1937 and Congressional Intent Concerning HUD’s Project-Based Program.**

In addition to being based on a reasonable consideration of state housing laws, the NOFA’s restrictions on out-of-State PHAs finds further support in the Housing Act of 1937. The statute’s definitions of what qualifies as a “public housing agency” differs in important ways under HUD’s tenant-based program versus what qualifies as a “public housing agency” under project-based programs.

For HUD’s Section 8 tenant-based assistance program only, “public housing agency” includes:

- (i) a consortia of public housing agencies that the Secretary determines has the capacity and capability to administer a program for assistance under such section in an efficient manner;
- (ii) any other public or private nonprofit entity that, upon the effective date under section 503(a) of the Quality Housing and Work Responsibility Act of 1998, was administering any program for tenant-based assistance under section 1437f of this title (as in effect before the effective date of such Act), pursuant to a

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agency ... must consider varying interpretations and the wisdom of its policy on a continuing basis.”).

contract with the Secretary or a public housing agency; and

- (iii) with respect to any area in which no public housing agency has been organized or where the Secretary determines that a public housing agency is unwilling or unable to implement a program for tenant-based assistance [under] 4 section 1437f of this title, or is not performing effectively—
- (I) the Secretary or another public or private nonprofit entity that by contract agrees to receive assistance amounts under section 1437f of this title and enter into housing assistance payments contracts with owners and perform the other functions of public housing agency under section 1437f of this title; or
  - (II) notwithstanding any provision of State or local law, a public housing agency for another area that contracts with the Secretary to administer a program for housing assistance under section 1437f of this title, without regard to any otherwise applicable limitations on its area of operation.

42 U.S.C. § 1437a(b)(6)(B) (emphases added).

Thus, for tenant-based programs only, Congress provided a contingency for circumstances in which there are no eligible PHAs that are willing and able to perform, and expressly provided that state law, and its limitations on a PHA's area of operation, would not encumber

HUD's authority to select out-of-State PHAs as contract administrators for the tenant-based assistance program.

Similar statutory alternatives, and the explicit override of state law, are not available to HUD for the Section 8 project-based program, which includes all of the projects covered by the NOFA. For the project-based program, PHAs are defined more narrowly as “any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing.” *Id.* § 1437a(b)(6)(A). The NOFA repeatedly refers interested parties to this narrower definition. *See* JA300/AR1261-63, 1265-69.

Congress declined to expand the definition for purposes of HUD's project-based program. Consistent with well-settled principles of statutory construction, this evidences congressional intent that PHAs authorized to operate within a certain state be the only eligible PHAs for assistance under HUD's project-based program. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (“[W]here Congress includes particular language in one section of a statute but omits it in another

section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal citations omitted). In other words, HUD’s decision to accept applications from PHAs “authorized to engage in or assist in the development or operation of public housing” in the state and throughout the state was in harmony with the Housing Act of 1937 and congressional intent concerning what constitutes an eligible PHA for purposes of HUD’s project-based programs.

**D. The NOFA’s Terms Are in Harmony with Well-Settled Principles of State Sovereignty and Federalism.**

As the NOFA observed, PHAs are creatures of state law. JA300/AR1262. As such, PHAs, or their instrumentalities, cannot purport to operate as a PHA outside of the state in which they were created; nor can the authority vested by one state to act as a “public” or “quasigovernmental” housing agency transfer *ipse dixit* to another state. This principle is akin to the well-established rule that an entity licensed to conduct business in its home state does not give it the right to operate in a sister state without first obtaining the requisite license from the sister state.

As described above, *supra* Part II.B, each state, acting as an independent sovereign, implements policies and procedures required to qualify and operate as a PHA within the boundaries of that state. It is not enough to say that the standards of State A are stricter than the standards of State B, and that, therefore, a PHA from State A may administer federal and state housing assistance to projects in State B. To operate otherwise would “vest the power of determining the extraterritorial effect of a State’s own laws and judgments in the State itself [and] risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent.” *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 271 (1980).

As is evident from the numerous opinions from the states’ attorneys general, and the near uniform restrictions on a PHA’s area of operation, the potential for conflict with state law is not an academic or theoretical problem facing HUD. It is real, and it presented a potentially significant stumbling block for efficient administration of HUD’s project-based rental assistance programs. In order to avoid the

numerous and potentially disruptive conflicts with state housing laws, HUD took the prudent, well-reasoned, and necessary step of incorporating into the NOFA a preference for in-state PHAs. Appellants' complaints concerning the restrictions on competition – especially in the absence of CICA's requirement for full and open competition – are unavailing and pale in comparison to the statutory and programmatic interests HUD has in implementing its federal housing policies designed “to assist the States” in a manner that is harmonious with the state law.

**E. The NOFA's Preference for PHAs that Can Operate Legally on a Statewide Basis Is Reasonable.**

**1. The NOFA's Preference for Statewide PHAs Is Consistent with Legislative Preferences for State HFAs.**

State HFAs understand the unique community housing needs and markets throughout their states. They leverage and coordinate other federal and state resources under their control, such as tax-exempt bonds, HOME Investment Partnerships program funds (“HOME”), and the Low Income Housing Tax Credit, to address the physical and financial problems of these properties. The advantages and unique

capabilities that state HFAs offer to HUD have not gone unnoticed by Congress in the development of HUD’s statutory landscape. Indeed, Congress expressed a preference for state HFAs in the 1974 legislation establishing HUD’s Section 8 housing assistance program:

To encourage the formation and effective operation of state housing finance agencies and state development agencies which have authority to finance, to assist in carrying out, or to carry our activities designed to . . . provide housing and related facilities though . . . construction, or rehabilitation . . . .

Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 802(a), 88 Stat. 633, 42 U.S.C. § 1440 (emphasis added).

Distinct from local PHAs, the statute defines “state housing finance agencies” as “any public body or agency, publicly sponsored corporation, or instrumentality of one or more States which is designated by the Governor.” 42 U.S.C. § 1440(b)(2)(A) (emphasis added). Thus, concurrent with the establishment of HUD’s Section 8 housing programs, Congress established a clear preference for state HFAs.

In this regard, the Senate Report accompanying the 1974 legislation noted that:

[T]he Committee has been cognizant of the increasingly important and effective role that State housing finance agencies have come to play in the field of government-assisted housing, and of the growing number of States that within the past few years have assumed this kind of responsibility for dealing with housing needs within their States. . . . The Committee welcomes and encourages this approach, which combines the use of State resources, through State financing of housing and other measures such as tax abatement, with Federal housing assistance for low-and moderate income housing.

S. Rep. No. 93-693 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4273, 4309, and in *Compilation of the Housing and Community Development Act of 1974*, 567, 605-06 (Comm. Print 1974); *see also id.*, *reprinted in* 1974 U.S.C.C.A.N. at 4314, and in *Compilation of the Housing and Community Development Act of 1974* at 612 (“[T]he Committee acknowledges and supports the growing role of state housing finance agencies in providing housing to low income families. The Committee expects these agencies to function as public housing agencies in the administration of assistance under this Section [dealing with Section 8’s leased housing assistance program].”).

In recent appropriations, Congress has expressed preferences for HUD's utilization of state HFAs in a number of related areas. For example:

- The Senate Committee Report accompanying FY 2011 Transportation and HUD Appropriations noted that “[t]he Committee recommends the use of State housing finance agencies for REAC, where appropriate” for inspection activities related to HUD’s Real Estate Assessment Center. S. Rep. No. 111-230, at 166 (2011).
- In urging HUD to work to limit or eliminate mortgage rescue scams, the Senate Appropriations Committee “advises that State housing finance agencies have a unique perspective on State and local housing issues, where such experience may be valuable in limiting and eliminating mortgage rescue scams.”

*Id.* at 176. The NOFA’s preference for PHAs that can operate statewide, which would include state HFAs, is thus consistent with Congress’s clearly established preference for state HFAs within HUD’s affordable housing programs.

**2. State HFAs Further the Statutory Purpose to Assist States in Providing Affordable Housing for Low-Income Families.**

HFAs reinvest excess income from HUD’s Section 8 housing assistance programs back into affordable housing programs in their states. In most cases, the HFA makes investments in, or for the benefit

of, local low- and moderate-income communities. Not only is this a boon to local housing, but it also leads to job growth in related or ancillary areas including construction, property management, maintenance and repair services, brokerage services, and more. In addition, state HFAs can leverage and coordinate other federal and state resources under their control, such as tax-exempt bonds, HOME, and the Low Income Housing Tax Credit, to address the physical and financial problems of these properties. In many instances, out-of-State PHAs or non-statewide PHAs do not have the resources, (such as tax exempt bonds, tax credits and state financing) to work directly with owners to address the physical, functional or financial needs of the properties or to increase the affordable housing stock to meet housing needs within the entire state.

Local PHAs do not share the same comprehensive knowledge and understanding of statewide housing portfolios and markets. They do not regularly come into contact with the properties, tenants, and other stakeholders as state HFAs do. Also, fees earned by the out-of-State entities are taken out of the state in which they are generated, rather

than being retained in the state to address critical housing needs. Thus, rather than “assisting” the states identified by HUD as warranting assistance, out-of-State PHAs redirect portions of the federal monies for other uses in other states. Unlike out-of-State PHAs, statewide HFAs, acting as the contract administrators, redirect the net revenue they earn to other affordable housing activities within the state, including affordable housing preservation, homeless assistance, and first-time homebuyer help, further advancing the affordable housing mission they share with HUD.

### **III. Appellants Have Not Demonstrated That HUD’s Restrictions On Out-Of-State PHAs Violate A Statute Or Regulation.**

Appellants appear to assert at the end of their opening brief that the NOFA’s restrictions on out-of-State PHAs limits competition and therefore is contrary to law under the APA. App. Br. at 62. To succeed on this ground, Appellants “must show a clear and prejudicial violation of applicable statutes and regulations.” *Id.* (quoting *Impresa Construzioni*, 238 F.3d at 1333). Needing a provision of law upon which to base this argument, Appellants identify one of the “purposes” enumerated under the FGCAA, which is to “encourage competition in

making grants and cooperative agreements.” 31 U.S.C. § 6301(3). This argument is unavailing.

As an initial matter, it is important to juxtapose this “precatory goal” (as Judge Wheeler labeled it, *see* JA0038) against the preceding statement of purpose regarding procurement contracts, which aims to “maximize competition.” 31 U.S.C. § 6301(3). Thus, rather than restrict HUD, the FGCAA’s language further bolsters the Agency’s discretion when determining how best to render Federal assistance.

In any event, it is well-settled that a statute’s statement of purposes, or its preamble, “is not an operative part of the statute.” *Ass’n of Am. R.R.s v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (“The operative provisions of statutes are those which prescribe rights and duties and otherwise declare the legislative will.”). Thus, the FGCAA’s precatory provision – upon which Appellants exclusively rely – cannot serve as the basis of a statutory violation. With regard to the NOFA’s preference for in-State PHAs, therefore, Appellants fall well-short of demonstrating a clear violation of an applicable statute.

## CONCLUSION

For the foregoing reasons, as well as those set forth in the Appellee's Opening Brief, this Court should affirm the judgment of the Court of Federal Claims.

Date: July 26, 2013

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify under that on this 26th day of July, 2013, I caused the foregoing Brief of the National Council of State Housing Agencies as *amicus curiae* in Support of Defendant-Appellee United States to be filed electronically filed with the Clerk of the Court using CM/ECF, which will send notification to all registered users.

Dated: July 26, 2013

/s/ Kevin P. Mullen  
Kevin P. Mullen

**CERTIFICATE OF COMPLIANCE  
UNDER FEDERAL RULES OF APPELLATE PROCEDURE  
32(a)(7) AND FEDERAL CIRCUIT RULE 32**

Counsel for *amicus curiae* National Council of State Housing Agencies certifies that the brief contained herein has a proportionally spaced 14-point typeface, and contains 6,628 words, based on the “Word Count” feature of Word 2007, including footnotes. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b), this word count does not include the words contained in the Certificate of Interest, Table of Contents, and Table of Authorities.

Dated: July 26, 2013

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