IN THE

Supreme Court of the United States

FORT PECK HOUSING AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; ALPHONSO JACKSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT; MICHAEL LIU, ASSISTANT SECRETARY FOR PUBLIC AND INDIAN HOUSING

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Native American Housing Assistance and Self Determination Act of 1996 (NAHASDA), Congress directed the Secretary of Housing and Urban Development (HUD) to establish a formula to allocate annual block grants to Indian Tribes for affordable housing activities. Congress directed that the formula be based on factors which reflect housing need, including three explicit factors. The first factor is the number of dwelling units owned or operated by the Tribes under the 1937 Housing Act at the time the regulations became effective. 25 U.S.C. § 4152 (b) (1). The Secretary promulgated a regulation, 24 C.F.R. § 1000.318, that removes some of these dwelling units from the formula. After the regulation was invalidated by the district court as violative of the statute, Congress amended the statute to incorporate, with significant exceptions, part of the regulation into the statute. The questions presented are:

(1) When Congress mandates a definitive number of units to be considered as a factor in an annual funding formula, may the Secretary lawfully impose a regulation that fails to include all of the units in the formula?

(2) The Tenth Circuit declined to address the effect of the 2008 amendment on the regulation's validity. Does the amendment of the statute following the district court's decision support the district court's ruling that the regulation was invalid prior to the amendment?

(3) Does the Tenth Circuit's decision that the Secretary may exclude dwelling units from the formula conflict with the decisions of other circuits holding that

statutory factors which Congress mandates for consideration by an Agency must be considered in full?

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The unpublished opinion of the United States Court of Appeals for the Tenth Circuit in *Fort Peck Hous. Auth. v. United States HUD*, No. 06-1425, (10th Cir. 2010), is set forth in the Appendix hereto (App. 1a-23a).

The published decision of the District Court for the District of Colorado in *Fort Peck Housing Auth. v. HUD*, 435 F. Supp. 2d 1125 (D. Colo. 2006), is set forth in the Appendix hereto (App. 37a-59a). Subsequent post judgment opinions of the District Court are set out in the appendix (App 30a-36a).

JURISDICTION

The decision of the United States Court of Appeals for the Tenth Circuit reversing the judgment of the District Court was filed on February 19, 2010. The timely Petition for Rehearing was denied on May 6, 2010. This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of rehearing. 28 U.S.C. § 2101(c); Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

25 U.S.C. § 4152(a)- (b):

Prior to its amendment on October 14, 2008 the statute stated:

> (a) Establishment.
> The Secretary shall, by regulations issued not later than the expiration of the 12-month period beginning on October 26, 1996, in the manner provided under section 4116 of this title, establish a formula to provide for allocating amounts available for a fiscal year for block grants under this chapter among Indian tribes in accordance with the requirements of this section.
> (b) Factors for determination of need. The formula shall be based on factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, including the following factors:
> (1) The number of low-income housing dwelling units owned or operated at the time pursuant to a contract between an Indian housing authority for the tribe and the Secretary.
> (2) The extent of poverty and economic distress and the number of Indian families within Indian areas of the tribe.
> (3) Other objectively measurable conditions as the Secretary and the Indian tribes may specify.

Subsequent to its amendment on October 14, 2008 the statute now states:

(a) Establishment.

(1) In general. The Secretary shall, by regulations issued not later than the expiration of the 12-month period beginning on the date of the enactment of this Act [enacted Oct. 26, 1996], in the manner provided under section 106 [25 USCS § 4116], establish a formula to provide for allocating amounts available for a fiscal year for block grants under this Act among Indian tribes in accordance with the requirements of this section.

(2) Study of need data.

(A) In general. The Secretary shall enter into a contract with an organization with expertise in housing and other demographic data collection methodologies under which the organization, in consultation with Indian tribes and Indian organizations, shall—

(i) assess existing data sources, including alternatives to the decennial census, for use in evaluating the factors for determination of need described in subsection (b); and

(ii) develop and recommend methodologies for collecting data on any of those factors, including formula area, in any case in which existing data is determined to be insufficient or inadequate, or fails to satisfy the requirements of this Act.

(B) Authorization of appropriations. There are authorized to be appropriated such sums as are necessary to carry out this section, to remain available until expended.

(b) Factors for determination of need. The formula shall be based on factors that reflect the

need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, including the following factors:

(1) (A) The number of low-income housing dwelling units developed under the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.), pursuant to a contract between an Indian housing authority for the tribe and the Secretary, that are owned or operated by a recipient on the October 1 of the calendar year immediately preceding the year for which funds are provided, subject to the condition that such a unit shall not be considered to be a low-income housing dwelling unit for purposes of this section if—

(i) the recipient ceases to possess the legal right to own, operate, or maintain the unit; or

(ii) the unit is lost to the recipient by conveyance, demolition, or other means.

(B) If the unit is a homeownership unit not conveyed within 25 years from the date of full availability, the recipient shall not be considered to have lost the legal right to own, operate, or maintain the unit if the unit has not been conveyed to the homebuyer for reasons beyond the control of the recipient.

(C) If the unit is demolished and the recipient rebuilds the unit within 1 year of demolition of the unit, the unit may continue to be considered a low-income housing dwelling unit for the purpose of this paragraph.

(D) In this paragraph, the term "reasons beyond the control of the recipient" means, after making reasonable efforts, there remain—

(i) delays in obtaining or the absence of title status reports;

(ii) incorrect or inadequate legal descriptions or other legal documentation necessary for conveyance;

(iii) clouds on title due to probate or intestacy or other court proceedings; or

(iv) any other legal impediment.

(E) Subparagraphs (A) through (D) shall not apply to any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after the date of enactment of this subparagraph [enacted Oct. 14, 2008].

(2) The extent of poverty and economic distress and the number of Indian families within Indian areas of the tribe.

(3) Other objectively measurable conditions as the Secretary and the Indian tribes may specify.

25 U.S.C. § 4181(a):

(a) Termination of assistance. After September 30, 1997, financial assistance may not be provided under the United States Housing Act of 1937 or pursuant to any commitment entered into under such Act, for Indian housing developed or operated pursuant to a contract between the Secretary and an Indian housing authority, unless such assistance is provided from amounts made available for fiscal year 1997 and pursuant to a commitment entered into

> before September 30, 1997. Any housing that is the subject of a contract for tenant-based assistance between the Secretary and an Indian housing authority that is terminated under this section shall, for the following fiscal year and each fiscal year thereafter, be considered to be a dwelling unit under section 302(b)(1) [25 USCS § 4152(b)(1)].

24 C.F.R. § 1000.310:

> What are the components of the IHBG formula?
>
> The IHBG formula consists of two components:
> (a) Formula Current Assisted Housing Stock (FCAS); and
> (b) Need.

24 C.F.R. § 1000.314:

> What is formula current assisted stock?
>
> Formula current assisted stock is current assisted stock as described in § 1000.312 plus 1937 Act units in the development pipeline when they become owned or operated by the recipient and are under management as indicated in the Formula Response Form. Formula current assisted stock also includes Section 8 units when their current contract expires and the Indian tribe continues to manage the assistance in a manner similar to the Section 8 program, as reported on the Formula Response Form.

24 C.F.R. § 1000.318(a):

> When do units under Formula Current Assisted Stock cease to be counted or expire from the inventory used for the formula?
>
> (a) Mutual Help and Turnkey III units shall no longer be considered Formula Current Assisted Stock when the Indian tribe, TDHE, or IHA no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise, provided that:
>
> (1) Conveyance of each Mutual Help or Turnkey III unit occurs as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA; and
>
> (2) The Indian tribe, TDHE, or IHA actively enforce strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment.

24 C.F.R. § 1000.322:

> Are IHA financed units included in the determination of Formula Current Assisted Stock?
>
> No. If these units are not owned or operated at the time (September 30, 1997) pursuant to an ACC then they are not included in the

determination of Formula Current Assisted Stock.

STATEMENT

This case presents important issues involving a federal agency's authority to implement regulations which expand the plain meaning of Congress' authorizing statute. The district court had jurisdiction over this action pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and 28 U.S.C. §§ 1331 (federal question) and 1346 (United States as a defendant), as this case was brought to challenge federal agency action and arises under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. §§ 4101 *et seq.* The district court invalidated the regulation at issue, 24 C.F.R. §1000.318(a), based on a literal reading of the plain language of the statute, 25 U.S.C. §4152 (b) (1). The Tenth Circuit disagreed, however and read the statute differently, even though it agreed that the language of the statute was plain and unambiguous.

Under NAHASDA, block grant funding is provided annually to all Tribally Designated Housing Entities ("TDHEs") for affordable housing programs. Congress directed the Secretary to promulgate regulations on or before October 26, 1997, through negotiated rulemaking that would implement Congress' formula for allocating block grant amounts made available each fiscal year. 25 U.S.C. § 4152(a). Congress directed that these regulations be based on factors that reflect the need of the tribes for low-income

housing assistance, "including" three specific factors. § 4152(b) (1)-(3). The first factor that Congress mandated be part of this formula was "the number of low income dwelling units" that each TDHE owned or operated pursuant to an annual contributions contract (ACC) with the Secretary at the time the regulations were to be implemented. § 4152(b)(1).

In response to § 4152, HUD formed a Negotiated Rulemaking Committee, and the final rule was implemented on March 12, 1998. 63 Fed. Reg. 12334 (Thursday, March 12, 1998). The block grant formula regulations are codified at 24 C.F.R. §§ 1000.301-340. The formula consists of two parts, "Formula Current Assisted Stock" (FCAS) and need. The FCAS part of the formula purports to include the number of dwelling units each TDHE had under an ACC as of September 30, 1997, in accordance with 25 U.S.C. § 4152(b)(1). The regulations refer to "Current Assisted Stock" consisting of all of a TDHE's dwelling units under a TDHE's management as of September 30, 1997, 24 C.F.R. § 1000.312. FCAS is defined as Current Assisted Stock plus all dwelling units "in the development pipeline" as of September 30, 1997 (i.e., units planned and under an ACC at the time, but not yet completed), plus units utilized to provide housing assistance which were previously managed under Section 8 of the 1937 Housing Act. 24 C.F.R. § 1000.314; See 25 U.S.C. § 4181 (a). However, §1000.318 excludes dwelling units referred to in the statute at §4152 (b) (1). Section 1000.318 (a) excludes dwelling units covered by the statute from being factored for block grant purposes when the TDHE conveys or demolishes a dwelling unit, even when the unit is replaced with a newly

constructed dwelling unit. The regulation as applied by HUD also eliminates mutual help units after the initial 25 year term, even when the TDHE has not conveyed the unit because of non-payment, non-eviction or other reasons, or when a mutual help unit was converted to low rent after September 30, 1997. 24 C.F.R. § 1000.318(a) (1)-(2); *See Fort Peck Housing Authority v. HUD*, 435 F. Supp. 1125, 1132-1135 (D. Colo. 2006). It is the validity of this regulation that is at the heart of this case.

The FPHA is the TDHE for the Assiniboine and Sioux Tribes, and receives an annual block grant from HUD to construct, operate, and maintain affordable housing for low-income families on the Fort Peck Indian Reservation in Montana. Like many TDHEs, the FPHA operates two major housing programs, a low rent housing program, and a homeownership program. The homeownership program is best described as a lease-to-own arrangement, which consists of the FPHA's Turnkey III and Mutual Help Homeownership Programs (referred to collectively as Mutual Help), under which eligible participating families are able to achieve ownership of single-family homes after leasing over an initial 25-year term, commencing on the units "Date of Full Availability" (DOFA). In order to achieve ownership, the family must make monthly payments over this 25-year term based upon a percentage of their income. Families who fail to make all the required payments are not eligible for conveyance.

The dispute began after HUD charged that the FPHA had been overfunded for fiscal years 1998-2002

because Mutual Help units were counted for funding purposes when, according to HUD, they were ineligible under § 1000.318(a). HUD demanded repayment in excess of 1.8 million dollars. *Fort Peck*, 435 F. Supp. 2d at 1130, n.5. The FPHA filed its Complaint in the district court below challenging HUD's overfunding determination. The FPHA argued that: 1) § 1000.318(a) was invalid because it conflicted with NAHASDA; 2) HUD was required to comply with the hearing requirements of 25 U.S.C. §§ 1461 and 1465 prior to seeking the repayment of the disputed block grant funds; and 3) that HUD lacked the legal authority to require the FPHA to repay funds that had already been awarded. *Fort Peck*, 435 F. Supp. at 1131.

The district court agreed with the FPHA's first argument that the exclusion of Mutual Help units from the block grant formula under § 1000.318(a) runs afoul of the plain language of § 4152(b) (1):

> The text of the statute makes its meaning is clear. The use of that word "shall" limits the agency's discretion. Congress expressly directed that the first factor in determining a tribe's need for housing assistance is the number of dwelling units for which a tribe was receiving federal assistance when NAHASDA went into effect. The use of the phrase "the number" is definitive. The statute leaves no room for the formula to include some, but not all of the number of dwelling units that a tribe owned or operated pursuant to an ACC.

Fort Peck, 435 F. Supp. 2d at 1132.

The district court also held that § 1000.318(a) (1)-(2) could not be reconciled with § 4152(b), because it was not reasonably related to housing needs within the meaning of NAHASDA, and was not consistent with the overall goal of NAHASDA to encourage Indian self-determination. 435 F. Supp. 2d at 1133-1135. Because the district court held the regulation invalid, the court did not address the merits of the FPHA's other two claims. *Id.* at 1131, 1135.

The Tenth Circuit agreed that the statute was plain and unambiguous, but interpreted the language differently and reversed, holding that the regulation did not violate §4152(b), and that the regulation validly excluded dwelling units which the FPHA "no longer owned or operated." (App. 3a, 15a and 17a). Focusing on the phrase "based on" in the statute, the Tenth Circuit held that the definitive number of dwelling units mandated in § 4152(b) (1) was merely a starting point, and that HUD could reduce the number of dwelling units under the third catch all factor, §4152 (b) (3), which includes "other objectively measurable conditions as the Secretary and the Indian Tribes may specify". (App. 13a-15a). This "interplay" between subsections (1) and (3) in the court's view, justified the regulation. (App. 17a). The Tenth circuit did not address the validity of the regulation as it applied to excluded dwelling units which were still owned and operated by TDHEs, though the FPHA asked it to do so in its petition for rehearing.

Following the district court's ruling but prior to the Tenth Circuit decision on appeal, § 4152 (b) (1) was amended by the NAHASDA Reauthorization Act of

2008, P.L. 110-411 (October 14, 2008). The amendment deleted subsection (b) (1) entirely and replaced it with extensive provisions that incorporated, with significant modifications, some of the provisions of 24 C.F.R. § 1000.318 (a). The new version of the statute allows HUD to exclude from the formula dwelling units if the TDHE loses the "legal right to own, operate or maintain the unit" or the unit is lost due to "conveyance, demolition, or other means." 25 U.S.C. § 4152 (b) (1) (A). The amendment also provides that if a homeownership unit is not conveyed at the end of its 25 year term the TDHE "shall not be considered to have lost the legal right to own, operate, or maintain the unit" if the unit has not been conveyed "for reasons beyond the control of the recipient". §4152 (b) (1) (B). The term "reasons beyond the control of the recipient" is defined in §4152(b) (1) (D) and generally prohibits removal of a dwelling unit if there remain legal impediments to conveyance after reasonable efforts to convey have been made. Finally, Congress provided that the amendments do not apply to any TDHE with a claim challenging an FCAS calculation for any fiscal year through 2008 if a civil action was filed within 45 days of the enactment of the amendment. § 4152 (B) (1) (E).

Following the district court decision and the amendment to §4152 (b), a number of Tribes and TDHEs filed *Fort Peck* type actions in federal district court and the federal court, involving millions of dollars in disputed FCAS funding. Many of these actions were stayed pending the decision of the tenth circuit in this case. Because the tenth circuit's decision is

unpublished, it is not binding precedent, but may be cited for its persuasive value. (App. 3a, 19a n.*).

REASONS FOR GRANTING THE PETITION

1. The Court Should Grant Review to Reaffirm the Principle That Courts Must Apply the Plain Language of Statutes Literally in Accordance with Their Text, Without Resort to Perceived Post Hoc Notions of Legislative Intent or Deference to the Agency Charged with the Statutes Implementation.

In cases where the text of a statute is clear and explicit, this Court has admonished the judiciary and federal agencies to apply the statute in accordance with its plain text:

> Our role is to interpret the language of the statute enacted by Congress. This statute does not contain conflicting provisions or ambiguous language. Nor does it require a narrowing construction or application of any other canon or interpretative tool. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992) (quoting Rubin v. United States, 449 U.S. 424, 430, 66 L. Ed. 2d 633, 101 S. Ct. 698 (1981)) (internal citations omitted). We will not

> alter the text in order to satisfy the policy preferences of the Commissioner. These are battles that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch.

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461-462 (U.S. 2002)

The district court was faithful to this command, but the tenth circuit panel was not. Both the tenth circuit and the district court held that the language of section 4152(b) was plain and ambiguous, in accord with *United Keetoowah Band of Cherokee Indians v. HUD*, 567 F.3d 1235 (10th Cir. 2009), and yet both courts reached opposite conclusions. The district court invalidated §1000.318 (a) based on a literal reading of the text of §4152 (b) (1), holding that the word "shall" in subsection (b) was a mandate that left no room for the exercise of discretion. *Fort Peck*, 435 F. Supp. 2d at 1132; *Accord, Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (concluding that "the mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion"); *Hewitt v. Helms*, 459 U.S. 460, 471(1983) (calling shall "language of an unmistakably mandatory character"). The district court then applied a literal straight forward reading to subsection (b) (1), holding that definitive number of units mandated to be counted in subsection (b) (1) left no room for the agency to consider some, but not all of the units in the block grant formula. *Id.* at 1132.

The tenth circuit panel, on the other hand, focused on the phrase "based on" in section 4152(b), and concluded that this phrase, though admittedly ambiguous by itself, means that the factors described in subsections (1)-(3) "form the basis, beginning, or starting point, of the formula". (App. 13a). The tenth circuit reasoned that as long as HUD considered all of the dwelling units as a starting point, HUD could then backtrack and exclude units from the formula under the catch all subsection (b) (3), which allows HUD to consider "other objectively measurable conditions". (App. 14a-15a). According to the court, an interpretation allowing HUD to exclude covered dwelling units from the formula was more in line with the overall intent of NAHASDA. (App. 15a- 16a). Such an interpretation simply cannot stand in light of *Barnhart* and the Court's other cases mandating that statutes be interpreted in accordance with their plain text, without regard to perceived notions of legislative intent. The tenth circuit's interpretation is fundamentally flawed because it fails to recognize that Congress itself explicitly declared in subsection (b) (1) that an important part of a recipient's need is reflected by the definitive number of dwelling units for which a tribe was receiving federal assistance when NAHASDA went into effect, explicitly describing a definite number as of a definite date. The text of the statute allows for nothing less. There is no gap to fill, nothing for the agency to interpret.

Reduced to its essence, the tenth circuit decision lays aside the plain text of § 4152 (b) (1) in favor of an interpretation favored by HUD, one that the court felt was more in line with the intent of Congress. Such an

interpretation cannot stand in light of *Barnhart* and the Court's other decisions. *See, eg, FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law." (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)); *Koshland v. Helvering*, 298 U.S. 441, 447 (U.S. 1936) ("where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation"); *14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1472 (U.S. 2009)*; *United States v. Gonzales*, 520 U.S. 1, 6, 10 (U.S. 1997); *Mansell v. Mansell*, 490 U.S. 581, 594 (U.S. 1989); *See also, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 105 (U.S. 2007)* (Scalia, J., dissenting) (stressing that judge supposed legislative intent cannot override the plain text of a statute). The tenth circuit decision conflicts with these fundamental principles by failing to adhere to the plain text of subsection (b) (1) and by failing to recognize that when Congress explicitly defines a factor in a funding formula, that factor must be applied without exception or limitation.

The tenth circuit's use of the phrase "based on" to circumvent the literal text of subsection (b) (1) does not survive serious scrutiny. The court relied on the D.C. circuit's decision in *Sierra Club v. EPA*, 356 F.3d 296, 306 (D.C. Cir. 2004) to support its conclusion. However, other D.C. circuit cases undermine the tenth circuit's analysis when the phrase "based on" is read in context. First, the court in *Sierra Club* acknowledged

that the phrase "based on", by itself, is ambiguous. *Id.* But the tenth circuit acknowledged, as it must, that § 4152, when read in context, is unambiguous. (App. 13a, 15a-16a); *Accord, Keetoowah*, 567 F.3d at 1240-1242. The tenth circuit's focus on the ambiguous term "based on" is narrowed by "the commonsense canon of noscitur a sociis —which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). Thus, when the term "based on" in §4152(b) is coupled with the definitive number stated in the text of subsection (b) (1), the phrase becomes unambiguous. Notably, the D.C. circuit has qualified *Sierra Club*, consistent with this maxim. The D.C. circuit explained its decision in *Sierra Club in Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004) . The court there clarified that the phrase "based on" when used to describe a factor in a statute is ambiguous when it is not limited by a specific number. However, when the statute prescribes "a precise quota figure," the meaning of the statute becomes plain. *Id.* at 1269, citing *Natural Resources Defense Council, Inc. v. Daley*, 209 F.3d 747, 753-754 (D.C. Cir. 2000).

The failure of the tenth circuit to read the phrase "based on" in its proper context also runs afoul of its own decision in *Keetoowah*. According to *Keetoowah*, "[s]ection 4152(b) states that the formula must be based on "factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, **including three specific factors.**" 567 F.3d at 1242 (emphasis added). Keetoowah noted that "subsection (b) (3) is simply one of the need-based factors that Congress explicitly

specified." *Id.* Moreover, the tenth circuit's holding here, that the catch all factor in subsection (b) (3) authorized HUD to exclude dwelling units prescribed in subsection (b) (1) despite its literal text, violates other important canons of statutory construction. "One of the most basic canons of statutory interpretation is that a more specific provision takes precedence over a more general one." *United States v. Perry*, 360 F.3d 519, 535 (6th Cir. 2004) (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524, (1989) and *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Second, courts:

> are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. ...a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.

Perry, 360 F. 3d at 537, quoting *Wash. Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879).

The tenth circuit panel was concerned that allowing the dwelling units described in subsection (b) (1) to be funded "in perpetuity" even after the units have been conveyed or demolished, does not reflect need. (App. 14a). This concern, however, is not warranted and in any event is insufficient to disregard a congressional mandate under the analyses in *Barnhart*. First, it was undisputed that dwelling units that are conveyed or demolished can be replaced with new units, and in fact dwelling units were replaced

in this case as the district court noted. *Fort Peck*, 435 F.Supp.2d at 1133, n 8 and accompanying text. Yet HUD's Formula regulations do not account for this reality, but instead provide for a continual decrease in the dwelling unit factor mandated by section 4152 (b) (1) and expressly preclude the inclusion of newly constructed units as replacements in the formula. 24 C.F.R. §§ 1000.312, 1000.314, and 1000.322. This anomaly led the district court to conclude that § 1000.318 "has the perverse effect" of turning the number of dwelling units mandated as formula factors into an ever declining factor, with no regard for the fact that the number can remain at the 1997 number mandated by 4152(b)(1) when units are built to replace the lost units. *Fort Peck*, 435 F.Supp.2d at 1132. HUD's argument, which the tenth circuit accepted, that conveyed or lost units no longer reflect need and must therefore be eliminated as a formula factor, was not supported by the administrative record.

Moreover, the tenth circuit failed to consider the fact that low income Indian families who become home owners or whose units become eligible for conveyance are in many cases still low income and in need of affordable housing assistance. As the district court noted, some homebuyers are behind in their payments at the expiration of the 25 year term, and others are simply not ready for homeownership when the unit becomes eligible for conveyance, in which case the unit may be converted to low rent and continue to be owned and operated by the FPHA. *Fort Peck*, 435 F.Supp.2d at 1132-33. Yet HUD insists that these units may not be counted for formula purposes, under the guise of §1000.318. Further, FPHA Policies required by 25

U.S.C. § 4133, submitted as part of the administrative record, allow dwelling units that have been conveyed or are eligible for conveyance to be modernized and remodeled using NAHASDA funds. In many cases Homeownership units are in need of such assistance even after they have been conveyed, because in many cases they have become dilapidated due to the homebuyers inability to afford repair and maintenance costs. Even conveyed dwelling units remain eligible for housing assistance because there is a need to keep these units safe and habitable, even after they have reached the end of the 25 year term. *See* 25 U.S.C. § 4132 (1). There was nothing in the administrative record to support the notion that the dwelling units described in §4152(b) (1), and the families who occupy them somehow magically lose there need simply because the units were conveyed. On the contrary, HUD pushed this post hoc rationalization in an attempt to save the regulation, something that the tenth circuit should not have permitted. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, (1962); ("the courts may not accept appellate counsel's post hoc rationalizations for agency action."); *See, Hill v. Norton*, 275 F.3d 98, 105 (D.C. Cir. 2001); *GHS HMO, Inc. v. United States*, 536 F.3d 1293, 1300 (Fed. Cir. 2008).

In the end, the Court's decision in *Barnhart* requires courts to follow the plain text of an unambiguous statute, without regard to canons of interpretation or policy notions of what Congress really intended. The Court should grant certiorari to reaffirm this principle.

2. The Court should Grant Certiorari to Resolve the Important Federal Question of Whether the Intervening Amendment to § 4152 (b) (1) Which Incorporated Part of the Regulation Invalidated by the District Court Supports the District Court's Decision.

Congress amended sections 4152 (b) (1) to incorporate parts of the regulation invalidated by the district court after this case was briefed and argued before the tenth circuit panel. Although both parties filed supplemental letter briefs addressing the amendment's potential effect on the issues following oral argument, the Tenth Circuit did not address the effect of the amendments to section 4152 (b) in its Order and Judgment. See Appendix A, Slip Op. 2 n.1. The Petitioner also asked the court to address the amendment's effect in its Petition for Rehearing, which was denied without opinion. (App. 60a). The fact that HUD implemented a regulation which was invalidated by a federal court, and then went back to Congress to advocate a change in the statute to incorporate the regulation, presents a serious federal question concerning the roles of administrative agencies Congress and the judiciary. What seems apparent is that HUD made law in the form of a regulation and then asked Congress to approve the law after the district court determined that the regulation violated the statute. In effect, the legislative and administrative process has been stood squarely on its head in this case.

The 2008 amendment to § 4152(b) effects a substantive change in the language and meaning of the original version of the statute. The amendment deleted

§4152(b) (1) entirely and substituted new language which incorporated, with significant modifications, the regulation invalidated by the district court. HUD lobbied for the amendment after the district court decision, calling the amendment a "change" in the existing statute. *See Reauthorization of the Native American Housing Assistance Self-Determination Act: Hearing before the H. Comm. on Financial Services Subcommittee on Housing & Community Opportunity*, 110th Cong. 45 (2007) (statement of Orlando J. Cabrera, Asst. Sec. for Public & Indian Housing, U.S. Dept. of Housing and Urban Dev.); *see also Legislative Hearing on Discussion Draft Legislation to Amend and Reauthorize the Native American Housing Assistance and Self-Determination Act: Hearing before the S. Comm. on Indian Affairs*, 110th Cong. 3 (2007) (statement of Rodger J. Boyd, Deputy Asst. Sec. for Native American Programs Office of Public Health and Indian Housing, U.S. Dept. of Housing and Urban Dev.). Because the amendment changed the plain language of §4152(b) (1), it may only be applied prospectively. *Bennett v. New Jersey*, 470 U.S. 632, 637 (U.S. 1985); *See Suiter v. Mitchell Motor Coach Sales*, 151 F.3d 1275, 1281, n.7 (10th Cir. 1998); *See also Fowler v. Unified School Dist. 259*, 128 F.3d 1431, 1435-36 (10th Cir. 1997).

In this regard, is significant that Congress expressly declined to apply the amendment retroactively. *See* 25 U.S.C. §4152(b)(1)(E) (2010). That Congress saw the need to amend §4152(b)(1) to accommodate part of the regulation invalidated by the district court, and refused to apply the amendment retroactively, is strong evidence that the original

statute did not authorize the regulation. In *Commissioner v. Callahan Realty*, 143 F.2d 214 (2nd Cir. 1944), the second circuit reviewed a decision of the U.S. tax court which invalidated an IRS regulation that used the term "sale or exchange" when the authorizing statute used the word "sale", even though another subsection of the same statute had used the same term as the regulation. Congress subsequently amended the statute to incorporate the regulation, but made the amendment effective upon enactment. The second circuit rejected the IRS's argument that its regulation was valid in light of the fact that the statute was amended to incorporate the challenged regulation, despite the fact that the legislative history described the amendment as a clarification:

> This limitation upon the effect of the amendment seems to us to show that it plainly was not made merely to clarify existing law. Had the intent of Congress been only to state more clearly what the statute had meant from its original enactment, there would have been no point in limiting the effect of the restatement to the period following December 31, 1936. We think such a limitation shows that it did realize that the amendment enlarged the scope of original enactment and made sure that taxpayers would understand that it was not to be applied retroactively....
>
> **We think it now tips the scales in favor of the respondent and leads to the conclusion that the regulation was a broadening of the original statute involving legislation beyond**

> **the power of the treasury. Until Congress itself amended the statute the regulation went beyond its scope and was invalid.** The decision of the Tax Court was therefore right.

143 F.2d at 216 (2d Cir. 1944) (emphasis added); *See Arrow Fastener Co. v. Commissioner*, 76 T.C. 423, 431 (T.C. 1981) (following *Callahan* and holding that the IRS had no power to promulgate a regulation adding provisions that it believed Congress should have included, citing *Helvering v. Credit Alliance Corp.*, 316 U.S. 107 (1942)).

The tenth circuit is in accord with the analysis in *Callahan. Suiter*, 151 F.3d at 1281. n.7. (holding that a subsequent amendment to a statute that validated an agency's authority under an existing regulation did not affect the court's decision that the regulation was invalid prior to the amendment). That Congress saw fit to rewrite the statute in question here, in order to adopt acceptable parts of the regulation invalidated by the district court, supports the conclusion that the original statute could not accommodate the regulation. The Court should take up and resolve the important federal question of whether the district court was correct in light of the intervening amendment to § 4152 (b) (1) and the second circuit's holding in *Callahan.* Alternatively, Petitioner respectfully requests that the Court grant its petition, vacate the tenth circuit's decision, and remand for reconsideration in light of the 2008 amendment and the decision in *Callahan.*

3. The Tenth Circuit's Decision Conflicts with the Decisions of Other Circuits and Within the Tenth Circuit Itself Which Hold that Statutory Factors Which Congress Mandates for Consideration by an Agency Must be Considered in Full.

The tenth circuit's decision upholding HUD's right to exclude dwelling units from being considered in the block grant formula conflicts with the decisions of other circuits involving the application of congressionally mandated factors for agency consideration. *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005) ; *Levine v. Apker*, 455 F.3d 71, 81 (2d Cir. 2006) ; *Fults v. Sanders*, 442 F.3d 1088, 1092 (8th Cir. Ark. 2006); and *Rodriguez v. Smith*, 541 F.3d 1180, 1187 (9th Cir. Cal. 2008). The Tenth circuit's decision also conflicts with its own published decision in *Wedelstedt v. Wiley*, 477 F.3d 1160 (10th Cir. 2007). All of these cases hold that when Congress instructs an agency to consider specific factors in its implementation of a statute, those factors must be considered in full. Considering the analysis undertaken in these cases, the tenth circuit's decision in this case also conflicts with its own published decision in *Keetoowah*.

Prior to its amendment, Section 4152(b) (1) stated clearly that the block grant formula "shall be based on factors which reflect the need of the Indian tribes" for affordable housing, "**including**" three explicit factors. In *Wedelstedt* , this Court interpreted a statute which mandated the Bureau of Prisons (BOP) to consider five enumerated factors in determining whether to transfer an inmate to a correctional facility, and invalidated a BOP regulation that allowed the BOP

to refuse to transfer certain inmates without considering the enumerated factors in full. *Wedelstedt*, 477 F.3d at 1164. The Court followed the decisions of the second, third and eighth circuits that had reached the same conclusion, *Woodall, Levine*, and *Fults*. The *Wedelstedt* court adopted the more rigorous textual analysis of the statute's language undertaken in *Woodall* and *Levine*. 477 F.3d at 1166. *Woodall* held that the BOP could not "categorically refuse to consider in full one of the factors explicitly enumerated" in the statute. *Woodall*, 432 F.3d at 247. "[W]e are faced with a statute providing that the BOP must consider several factors in CCC placement, and a regulation providing that the agency may not consider those factors in full. The conflict between the regulation and the statute seems unavoidable." Id. at 249; *accord, Wedelstedt*, 477 F.3d. at 1164. The court in *Levine* noted that, while the agency had discretion to consider factors for placing or transferring prisoners, Congress was "not silent on the criteria for placing a prisoner". *Levine* , 455 F.3d at 81. The court held that the agency was required to consider these factors in all placement or transfer decisions, and could not categorically exclude some prisoners from consideration of all five factors:

> What agencies may not do, however, is edit a statute. Categorical rulemaking, like all forms of agency regulation, must be consistent with unambiguous Congressional instructions. And, an agency may not promulgate categorical rules that do not take account of the categories that are made significant by Congress. ... The BOP is not empowered to implement selectively the instructions given by § 3621(b), **by picking and**

choosing those factors that it deems most compelling.

Levine, 455 F.3d at 85, (emphasis added); accord, *Landstar Express Am., Inc. v. FMC*, 569 F.3d 493, 498 (D.C. Cir. 2009) (rejecting the argument that the plain reading of a statute's text undermines its purpose, and noting that "neither courts nor federal agencies can rewrite a statute's plain text to correspond to its supposed purposes").

The court in *Levine* also rejected the agency's assertion that it considered all five of the congressionally mandated factors when it initially promulgated the regulation categorically excluding some of the factors for some inmates. Id. at 85, n9; accord, *Wedelstedt*, 477 F.3d at 1168; See *Fults*, 442 F.3d at 1092 ("It is impossible for the BOP to consider all five factors on a categorical basis"). These holdings, as well, conflict with the tenth circuit's decision in this case, that the mandatory dwelling unit number in § 4152 (b) (1) is a mere starting point (App. 14a).

The first circuit is the only circuit to disagree with the *Woodall* line of cases. In *Muniz v. Sabol*, 517 F.3d 29 (1st Cir. Mass. 2008), cert denied *Gonzalez v. Sabol*, 129 S. Ct. 115 (2008), the court held that the five factors listed in the statute were not exclusive. *Muniz*, 517 F.3d at 35. The court added that, in its view, "[n]othing in [the statute] requires consideration of the five factors for every facility or type of facility that is ruled out. Nor is there a clear expression of intent to withhold the authority to make rules of general applicability." Id. at 38. Subsequent to *Muniz*, the ninth

circuit aligned itself with the *Woodall* line of cases and invalidated the same regulation, holding that "an 'unavoidable conflict' exists because the statute requires the BOP to consider five factors in determining CCC placement, while the regulation provides that the enumerated factors will not be fully considered." *Rodriguez*, 541 F.3d at 1187, quoting *Woodall*, 432 F.3d at 249. Although agreeing with *Muniz* that the statute did not preclude rules of general applicability, the court held that no rule of general applicability could categorically exclude consideration of the five enumerated factors in the statute, because these factors were, by virtue of the statute, mandatory. *Rodriguez*, 541 F.3d at 1187.

The statutory command in §4152(b) is even more explicit than the statute at issue in the *Woodall* line of cases. According to *Keetoowah*, "[s]ection 4152(b) states that the formula must be based on "factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, **including three specific factors.**" 567 F.3d at 1242 (emphasis added). *Keetoowah* also held that "subsection (b) (3) is simply one of the need-based factors that Congress explicitly specified." *Id.* *Wedelstedt* held that the agency had to make placement decisions "with reference to **each of the five factors** enumerated" in the statute. 477 F.3d at 1166 (emphasis added). Read together, these cases reject the tenth circuit panel's interpretation in this case, one that would play one subsection off against another, or an interpretation of one subsection that would limit or supplant part of another, as the panel decision does here. (App. 15a, 17a). To do so is inconsistent with the analysis in

Keetoowah and *Wedelstedt*, and the rules of statutory interpretation discussed in Part 2 of this petition.

CONCLUSION.

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Tenth Circuit and to vacate or reverse the judgment and remand the matter to the Tenth Circuit with instructions to affirm the district court's judgment invalidating the regulation, or provide petitioners with such other relief as the Court deems fair and just under the circumstances of this case.

Respectfully submitted,

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