23-397

To Be Argued By:
MARK OSMOND

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 23-397

LYDIA GONZALEZ DIAZ, on behalf of a class of similarly situated tenants of the New York City Housing Authority at Harlem River Houses, VANESSA WALSH, on behalf of a class of similarly situated tenants of the New York City Housing Authority at Harlem River Houses, NINA CRAWFORD, on behalf of a class of similarly situated tenants of the New York City Housing Authority

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

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Plaintiffs-Appellants,

—v.—

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, NEW YORK CITY HOUSING AUTHORITY, HARLEM RIVER PRESERVATION LLC, C+C APARTMENT MANAGEMENT LLC,

Defendants-Appellees.

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BRIEF FOR DEFENDANT-APPELLEE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Preliminary Statement

In February 2022, the U.S. Department of Housing and Urban Development ("HUD") approved a conversion of Harlem River Houses, a public-housing project in upper Manhattan, from a property owned and operated by the New York City Housing Authority ("NYCHA") to one managed by a private company, but with rents still subsidized by the federal government. The deal raised funds to finance a $220 million renovation of the property, which is now well underway. Planned improvements include newly renovated kitchens and bathrooms for each unit as well as the rehabilitation of building infrastructure. Despite these improvements, and even though tenants' rents and rights remain the same, eighteen Harlem River Houses residents brought this suit, seeking to reverse HUD's approval of the conversion.

The district court correctly dismissed their action. As the district court concluded, plaintiffs' alleged injuries are unlikely to be redressed by a favorable

decision and therefore plaintiffs lack Article III standing. Specifically, HUD's approval of the conversion set in motion numerous corporate, financial, tax, operational, and real-estate transactions, including the issuance of several mortgages, loans, and other debt and equity contributions. As the district court found, there is no practical way for those transactions to be undone given their complexity, the involvement of numerous entities that are not parties to this suit, and regulatory requirements that would impede any reversion of Harlem River Houses to its prior status. For that reason, a decision in plaintiffs' favor, reversing HUD's approval of the conversion, would not redress their alleged injuries. Plaintiffs therefore lack standing, and the district court's dismissal of this action for lack of subject matter jurisdiction should be affirmed.

Jurisdictional Statement

For the reasons stated below, the district court lacked subject matter jurisdiction. *See* Argument, *infra*. Plaintiffs invoked subject matter jurisdiction under 28 U.S.C. § 1331 on the basis that their claims arose under federal law. (Joint Appendix ("JA") 19). Final judgment was entered on February 21, 2023 (JA 11, 1539), and plaintiffs filed a timely notice of appeal on March 17, 2023 (JA 11, 1550). This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

Issue Presented for Review

Whether the district court properly dismissed this case for lack of subject matter jurisdiction after concluding that plaintiffs lacked Article III standing

because their alleged injuries were not likely to be redressed by a decision in their favor.

Statement of the Case

A. Procedural History

Plaintiffs initiated this action on March 11, 2022 (JA 4); their amended complaint, brought as a putative class action, asserted claims against HUD under the Administrative Procedure Act ("APA"). (JA 13–80).[1] On May 27, 2022, HUD moved to dismiss plaintiffs' APA claims for lack of subject matter jurisdiction. (JA 846). On February 21, 2023, the district court (Loretta A. Preska, J.) dismissed the APA claims on that basis after concluding that plaintiffs lacked Article III standing.[2] (Special Appendix ("SPA") 1–21); __ F. Supp. 3d __, 2023 WL 2138602. Final judgment was

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[1] Plaintiffs also brought claims under New York's Freedom of Information Law, which they later withdrew. (JA 1517).

[2] Plaintiffs named as "necessary part[ies]" defendants NYCHA, Harlem River Preservation LLC, and C+C Apartment Management LLC ("C+C"). (JA 13, 24; Dist. Ct. ECF No. 20). These other defendants also moved to dismiss under Rules 12(b)(1) and 12(b)(6), incorporating by reference HUD's arguments. (JA 846, 1514). The district court noted that "only HUD's papers provide substantive arguments regarding dismissal" and therefore relied only on HUD's motion papers in the order of dismissal. (SPA 10 n.10).

entered that same day. (JA 1539). Plaintiffs filed a notice of appeal on March 17, 2023. (JA 1550).

B. Background and Factual Allegations

1. Statutory and Regulatory Framework

a. Section 8 and Section 9 Housing Programs

NYCHA is the largest public-housing agency ("PHA") in the nation. (JA 90). HUD administers two low-income housing programs that fund NYCHA: Section 8 and Section 9. (JA 68). Section 9 was created by the United States Housing Act of 1937, which was enacted to help "remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families." 42 U.S.C. § 1437(a)(1)(A). Through Section 9, HUD aids PHAs around the country by allocating money to a "Capital Fund" and an "Operating Fund." 42 U.S.C. § 1437g(c)–(e). PHAs use money allocated to them from these funds to cover the costs of housing low-income families in public-housing projects that the PHAs themselves own and operate. (JA 68).

Section 8 was established by Housing and Community Development Act of 1974, which amended the 1937 Housing Act. *Hills v. Gautreaux*, 425 U.S. 284, 303–04 & n.20 (1976). PHAs receive Section 8 funding to finance "tenant-based" vouchers, which subsidize housing rented by low-income families on the private market. (JA 68); 24 C.F.R. § 982.1(b)(1). PHAs also use Section 8 funding for "project-based" assistance programs. 42 U.S.C. § 1437f(o)(13)(A)–(B); 24 C.F.R.

§ 983.5. Unlike tenant-based programs, project-based programs receive funds for families who live in specific housing projects or units. 24 C.F.R. § 982.1(b)(1). Owners of projects that participate in the Project-Based Voucher Program (the program into which Harlem River Houses was converted (JA 984)) agree to reserve certain housing units for eligible families. 24 C.F.R. § 983.5(a). The PHA, in exchange, makes assistance payments to the project owner for units leased and occupied by Section 8-eligible families. 24 C.F.R. § 983.5(a)(4).

b. RAD Conversion Program

In 2011, Congress authorized the Rental Assistance Demonstration ("RAD") program, which allows PHAs to voluntarily convert "properties with assistance under Section 9 . . . to properties with assistance under a project-based subsidy contract under Section 8." Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 673–75 (2011). Low-income families in converted projects pay the same rent as they paid under Section 9 (*i.e.*, up to 30 percent of their income). *See* 24 C.F.R. § 5.628(a); 42 U.S.C. § 1437a(a)(1). They also enjoy, at a minimum, "the same rights" that they enjoyed under Section 9. 125 Stat. 552, 674.

The RAD program allows PHAs to leverage public and private debt and equity to reinvest in public housing stock. *See* www.hud.gov/RAD (last visited Oct. 13, 2023). That reinvestment, according to HUD, will help address an estimated $35 billion backlog of capital public housing needs. *Id.*

NYCHA launched its RAD conversion program under the name Permanent Affordability Commitment Together in May 2015. (SPA 7); *Baez v. New York City Housing Authority*, 533 F. Supp. 3d 135, 140 (S.D.N.Y. 2021). Under this program, NYCHA "leases its buildings to private developers, who in turn renovate them and manage day-to-day operations." *Baez*, 533 F. Supp. 3d at 140. NYCHA views the program as a "critical tool" to restore and renovate its buildings, which it estimates will cost tens of billions of dollars. *See* www.nyc.gov/site/nycha/about/pact.page (last visited Oct. 13, 2023).

To participate in the RAD program, a PHA must be classified as a " 'Standard' " or " 'High Performer' " under HUD's Public Housing Assessment System, which evaluates and audits PHAs based on numerous metrics related to physical conditions, financial conditions, management operations, and capital spending. (SPA 8 (quoting Rental Assistance Demonstration—Final Implementation, Revision 4 (H-2019-09 PHI-2019-23 (HA)) (Sept. 5, 2019) ("RAD Notice") § 1.3); 24 C.F.R. § 902.9. A PHA classified as " 'Troubled' " may still participate if HUD determines that the PHA is making progress under a formal improvement plan and can successfully supervise the RAD conversion. (SPA 8 (quoting RAD Notice § 1.3)). NYCHA is classified as a Standard Performer based on its last score, which it received in 2016.[3]

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[3] *See* www.hud.gov/sites/dfiles/PIH/documents/PHAS_ScoreLatest3Years04-19-2019.pdf (last visited Oct. 13, 2023); www.hud.gov/sites/dfiles/PIH/

c. *United States v. NYCHA*

In June 2018, the United States sued NYCHA, alleging that it had violated federal health and safety regulations, including regulations that required NYCHA to protect children from lead paint and otherwise provide decent, safe, and sanitary housing. (JA 84–158). The government's complaint further alleged that NYCHA had intentionally deceived HUD inspectors. (JA 122–27). The United States never alleged that NYCHA met the definition of a "Troubled Performer" under the applicable regulations, or was classified as such by HUD. (JA 84–158). Nor did the parties' settlement agreement, which was consummated in January 2019, change NYCHA's performance score. (Case No. 18 Civ. 5213 (S.D.N.Y.), ECF No. 75-1).

d. Plaintiffs' Correspondence with HUD Between June and December 2021

In June 2021, plaintiffs sent two emails addressed to the "HUD Special Projects Center," asking that HUD "withdraw approval" of the RAD conversion of the Harlem River Houses because there had been "[in]adequate tenant engagement" and because defendant C+C—the management company selected to operate the project after the conversion—had a "high[ ]

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documents/PIH2021-14.pdf (last visited Oct. 13, 2023) (limiting Public Housing Assessment System inspections due to the COVID-19 pandemic and carrying forward past scores).

eviction rate." (JA 75, 769, 783). Plaintiffs advised that they had sued C+C for pressuring tenants to sign leases. (JA 783).[4] In reply, Taí Merey Alex from HUD's Office of Recapitalization clarified that HUD had not yet approved the RAD conversion and stated that the agency would investigate plaintiffs' allegations and issue a findings letter. (JA 784–85).

In a September 2021 letter to Alex, plaintiffs' counsel reiterated that C+C had been pressuring residents to sign leases, which residents were told would become effective after "'the conversion occurs in Fall 2021.'" (JA 786–87). Counsel further complained that C+C had been surveying apartments and doing repairs. (JA 786). Counsel asked to be kept apprised of HUD's investigation of plaintiffs' complaints, saying that the information was relevant to plaintiffs' lawsuit against NYCHA. (JA 786); *supra* n.4.

Plaintiffs' counsel followed up in October 2021, writing that plaintiffs were told to expect HUD approval of the conversion "in early November." (JA 789–90 (quotation marks omitted)). Counsel complained that, after the conversion, C+C would act as a

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[4] In June 2021, plaintiffs, represented by the same counsel, sued C+C and NYCHA chairman Gregory Russ to enjoin the RAD conversion and restore plaintiffs' tenancy with NYCHA. *See Walsh v. Russ*, No. 21 Civ. 4872 (S.D.N.Y.). Plaintiffs voluntarily dismissed that case in July 2022, four months after commencing this action. *See* No. 21 Civ. 4872 (S.D.N.Y.), ECF No. 79.

"Section 8 landlord" and stated that it did not understand why NYCHA was not deemed a Troubled Performer under the Public Housing Assessment System. (JA 790). Counsel made other complaints, including that town hall meetings concerning the conversion were held over Zoom, which some residents could not access. (JA 789).

In November 2021, Alex wrote that the agency was still investigating plaintiffs' claims and that HUD could not "predict when or whether" it would approve the RAD conversion. (JA 788). Plaintiffs' counsel responded by asking if he could "bring a group of tenants down to meet with HUD." (JA 1500). Alex wrote that an in-person meeting was not possible because HUD's staff were "working remotely due to the COVID-19 pandemic" and there was no date by which its offices would "reopen for external visitors." (JA 1500).

e. HUD's Approval of RAD Conversion in February 2022 and the Transactions That Facilitated Conversion

HUD approved the RAD conversion of Harlem River Houses on February 10, 2022 (JA 1472), and a closing was held one week later (JA 929, 1472). The closing consummated numerous corporate, financial, tax, operational, and real-estate transactions that raised more than $274 million to finance the acquisition of Harlem River Houses and a renovation estimated to cost more than $220 million. (JA 1131, 1135). The planned rehabilitation, which is expected to last 48 months and is now well underway, includes, among

other things, new kitchens and bathrooms for all units, window replacements, building infrastructure rehabilitation, lead and asbestos mitigation, and the implementation of security measures. (JA 1136). The transactions that made the conversion (and the associated renovation) possible include:

- phased periodic equity investments totaling almost $63 million by non-party Chase Community Investments, LLC in exchange for federal and state historic tax credits (JA 1136, 1144);
- several mortgages, loans, and other debt totaling more than $209 million (JA 1131), including $34.75 million in mortgage loans funded by investments from individual bondholders (JA 1139, 1170);
- a contract with C+C to manage Harlem River Houses and to replace the now-disbanded NYCHA workforce there (JA 76–77);
- a 99-year ground lease among NYCHA, Harlem River Preservation, and the non-party not-for-profit corporation Harlem River Housing Development Fund Company, Inc. ("HRHDFC") through which HRHDFC acquired the property, and a nominee agreement between HRHDFC and Harlem River Preservation through which HRHDFC bifurcated its interests in the property and made Harlem River Preservation the equitable

and beneficial leasehold owner of the project (JA 849, 901–07, 911–25).[5]

Through these transactions and others, a complex corporate reorganization was undertaken which allocated control over the project—and the investments that enabled the RAD conversion—among NYCHA and at least 14 other for-profit and non-profit corporate entities. (JA 1133, 1135–37).

On February 18, 2022, one day after the closing, C+C notified Harlem River Houses residents that, "effectively immediately, we are the new managing agent of Harlem River Houses." (JA 164). Three weeks later, plaintiffs brought this lawsuit. (JA 4).

C. The District Court's Opinion

Granting HUD's motion to dismiss, the district court concluded that plaintiffs had not shown that a decision in their favor would likely redress their alleged injuries and therefore they lacked Article III standing. The district court determined that there was no feasible way to revert Harlem River Houses to Section 9 because "the conversion is already complete and has been effected through multiple transactions that have changed Harlem River Houses' corporate

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[5] This complex arrangement was necessary to comply with RAD requirements for tax credit-generating projects and to permit the project to qualify for certain state tax benefits needed to finance the rehabilitation. *See* RAD Notice § 1.4.A.11; N.Y. Priv. Hous. Fin. Law § 577.

structure, generated debt greater than $209 million, and released the project's original declarations of trust." (SPA 18). Put differently, there had been a "'commingling of assets and other substantial changes in the structures of the enterprise involved.'" (SPA 18 (quoting *Bank of New York Co. v. Northeast Bancorp, Inc.*, 9 F.3d 1065, 1067 (2d Cir. 1993)). As the district judge noted, this Court, in like circumstances, has held that courts "'lack the power, once a bell has been rung, to unring it.'" (SPA 18 (quoting *Presidential Gardens Assocs. v. U.S. ex rel. Secretary of Housing & Urban Development*, 175 F.3d 132, 143 (2d Cir. 1999)). Because a reversion to Section 9 was not viable, plaintiffs' alleged injuries from the conversion were not likely to be redressed by a favorable judicial decision and, thus, the district court concluded that plaintiffs lacked Article III standing.

Summary of the Argument

Because plaintiffs have failed to show that a decision in their favor would likely redress their alleged injuries, they have not established Article III standing, and the district court correctly dismissed their claims for lack of subject matter jurisdiction.

Plaintiffs asked the district court to reverse HUD's approval of NYCHA's application to convert Harlem River Houses under the RAD program. But the conversion—which was completed three weeks before plaintiffs filed suit—cannot practicably be undone. More than $274 million in debt and equity was issued in a series of transactions that integrated more than a dozen for-profit and non-profit entities—most of which

are not parties to this suit—into Harlem River Houses' organizational structure. The funds raised will finance a $220 million renovation, which is now well underway. Beyond the complexity of those transactions, regulatory requirements make them impossible to unwind. To be able to revert to Section 9, NYCHA would have to record a declaration of trust granting HUD, in first position, an interest in the property, which would be impossible to do now because the declaration would be subordinate to dozens of other encumbrances on the property, including approximately 40 mortgages. And NYCHA would be unable to certify that Harlem River Houses' finances are sustainable, as required, because if it were reverted to Section 9, the project would be unable to service its debt and would be vulnerable to foreclosure. This Court has made clear that judges lack the power to undo complex transactions like this. Because a reversion to Section 9 is not feasible, plaintiffs cannot carry their burden to show that a decision in their favor would likely redress their alleged injuries. The district court's order dismissing this case should therefore be affirmed. *See infra* Point C.

While plaintiffs now complain that dismissal on redressability grounds would mean that HUD's approval of RAD conversions is entirely insulated from judicial review, that argument is based on the incorrect premise that plaintiffs could not have sought relief before HUD approved the RAD conversion. But the APA authorizes courts, when appropriate, to issue limited preliminary relief to preserve their prospective jurisdiction. Plaintiffs here knew about NYCHA's application to convert Harlem River Houses for eight months before the conversion occurred, but failed to seek relief

that was potentially available to them. *See infra* Point D.

Lastly, the district court's standing holding applies equally to plaintiffs' applications for injunctive and declaratory relief. *See infra* Point E.

Because plaintiffs lack Article III standing, the district court's dismissal for lack of subject matter jurisdiction should be affirmed.

ARGUMENT

Plaintiffs Lack Article III Standing Because Their Alleged Injuries Are Not Likely to Be Redressed by a Favorable Decision

A. Standard of Review

When defendants move to dismiss for lack of subject matter jurisdiction and, like here, rely on evidence outside the pleadings, this Court reviews the district court's legal conclusions *de novo* and its factual findings for clear error. *SM Kids, LLC v. Google LLC*, 963 F.3d 206, 210 (2d Cir. 2020). The party asserting subject matter jurisdiction has the burden of establishing that jurisdiction exists by a preponderance of the evidence. *Landau v. Eisenberg*, 922 F.3d 495, 497 (2d Cir. 2019).

B. Article III Standing Requirements

"'[T]he irreducible constitutional minimum of standing contains three elements' that a plaintiff must plead and—ultimately—prove." *Department of Educa-*

tion v. Brown, 143 S. Ct. 2343, 2351 (2023) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A plaintiff "must show (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by the requested relief." *FEC v. Cruz*, 142 S. Ct. 1638, 1646 (2022). "If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim." *Bohnak v. Marsh & McLennan Companies, Inc.*, 79 F.4th 276, 283 (2d Cir. 2023) (quotation marks omitted).

To satisfy the redressability requirement, a plaintiff must establish "that there is a substantial likelihood that the relief requested will redress the injury claimed." *E.M. v. New York City Department of Education*, 758 F.3d 442, 450 (2d Cir. 2014) (quotation marks omitted). Relief that would "not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998). The redressability requirement is not met when the court "lack[s] the power" to award the requested relief. *Western Coal Traffic League v. Surface Transportation Bd.*, 998 F.3d 945, 950–51 (D.C. Cir. 2021); *accord Haaland v. Brackeen*, 143 S. Ct. 1609, 1639–40 (2023) ("[R]edressability requires that the court be able to afford relief through the exercise of its power . . . ." (emphasis and quotation marks omitted)).

C. Plaintiffs Lack Standing Because Any Favorable Decision Would Not Redress Their Alleged Injuries

Because Harlem River Houses cannot be feasibly reverted to Section 9, a decision reversing HUD's approval of the conversion would not redress plaintiffs' alleged injuries. The RAD conversion involved many transactions with numerous entities, most of which are not involved in this lawsuit, making it impractical to undo them. That alone would mean plaintiffs' alleged injuries are not redressable. But in addition, the regulatory requirements for reestablishing a Section 9 public housing project make relief impossible at this stage.

The RAD conversion was effectuated through numerous corporate, financial, tax, real-estate, and operational transactions that raised over $274 million to finance the acquisition and renovation of Harlem River Houses. To facilitate the conversion, Chase is making periodic equity investments of nearly $63 million in exchange for tax credits. (JA 1136, 1144). Another $209 million was raised through debt (JA 1131), including $34.75 million in mortgage loans financed by individual bondholders (JA 1139, 1170). A 99-year ground lease was signed by multiple parties (JA 849, 901–07), and C+C has replaced NYCHA's now-disbanded workforce at Harlem River Houses (JA 76–77). Investment in the conversion and the accompanying financial risk—as well as control over the project—have been carefully allocated among NYCHA and more than a dozen for-profit and non-profit

corporate entities, most of which are not named parties. (JA 1133, 1135–37).

Regulatory requirements would also impede any effort to undo the conversion. Section 9 public-housing projects must record a declaration of trust, which grants HUD, in first position, an interest in the real property. 24 C.F.R. §§ 905.108, 905.318, 905.505(c)(4). The declarations of trust here were released at the closing (JA 1471), and any new declarations would now be subordinate to numerous later-recorded encumbrances, including use agreements, regulatory agreements, memorandums of lease, subordination agreements, and more than 40 mortgages. (JA 849–60). Further, before a project can qualify for Section 9, HUD must determine that the project would be financially sustainable and that it meets several specific requirements to ensure that the federal investment is adequately protected. *See* 24 C.F.R. §§ 905.606, 905.610. Such a determination would be impossible here: if Harlem River Houses were reverted to Section 9, the project would lose millions in annual revenue, which would make the project insolvent, vulnerable to foreclosure, and unable to complete the rehabilitation work already in progress.[6] (JA 982 (estimating

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[6] The stoppage of rehabilitation work would presumably lead Chase to cease its periodic equity investments, which it makes in exchange for tax credits that it receives for financing this work. *See* 26 C.F.R. § 1.47-7(c) (tax credits are tied to rehabilitation expenditures). Moreover, if the project were foreclosed on, plaintiffs would be required to relocate from Harlem

annual cash flow reduction of $5,932,148 if reverted to Section 9), JA 1122 (annual net cash flow of only $1,287,078 after conversion[7]).

As the district court noted (SPA 18), although "federal courts possess great authority, they lack the power, once a bell has been rung, to unring it." *Presidential Gardens*, 175 F.3d at 143 (quotation marks omitted) (district court "lacked jurisdiction to issue an injunction to hold trust funds when the trust corpus no longer existed, and could not issue an injunction to enjoin an auction that had already taken place"). When faced with requests to undo complex transactions, courts have repeatedly held that they lack jurisdiction to resolve the dispute. *See, e.g.*, *id.*; *Bank of New York*, 9 F.3d at 1067 (noting that "where a merger has been consummated, restoration of the status quo may be impossible" and dismissing as moot appeal of a denial of preliminary injunction that sought to enjoin merger); *FTC v. Exxon Corp.*, 636 F.2d 1336, 1342–43 (D.C. Cir.

River Houses. In this way (and others), the reversal of HUD's approval of the RAD conversion would not only fail to redress plaintiffs' alleged injuries, but also create new ones.

[7] This figure is a significant overestimate of the project's post-conversion cash flow because it accounts only for the cost of servicing "First Mortgage Debt Service" and not over $70 million in "Soft Debt," meaning debt repayable based on the project's financial position rather than a fixed amortization schedule. (JA 1122, 1131).

1980) ("commingling of assets and other substantial changes in the structures of the enterprises involved" often make "a return to the status quo, and the legality of the challenged merger or acquisition . . . essentially a moot question") (citing *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966)); *see also Christopher Village, L.P. v. Retsinas*, 190 F.3d 310, 314–15 (5th Cir. 1999) (holding that a court cannot "'unscramble the eggs'" and award injunctive relief after HUD foreclosed on property and transferred it to a PHA for redevelopment).

The district court "agree[d] with HUD's analysis" that a reversion to Section 9 was not feasible. (SPA 14–18). This finding—which was supported by a voluminous record that contained detailed information about the transactions involved in the conversion and multiple declarations from HUD officials—was not clear error. *See Brown v. Plata*, 563 U.S. 493, 513 (2011) (clear error occurs only when appellate court is "left with a definite and firm conviction that a mistake has been committed" (quotation marks omitted)). Indeed, plaintiffs have never articulated how a reversion to Section 9 could be accomplished. As noted by the district court, "the conversion is already complete and has been effected through multiple transactions that have changed Harlem River Houses' corporate structure, generated debt greater than $209 million, and released the project's original declarations of trust." (SPA 18). There has been a "'commingling of assets and other substantial changes in the structures of the enterprise involved,'" which make the reversion infeasible. (SPA 18 (quoting *Bank of New York*, 9 F.3d at 1067). Because the conversion cannot be undone, an order reversing HUD's approval of the conversion

would not redress plaintiffs' alleged injuries from the conversion. This case was therefore properly dismissed for lack of subject matter jurisdiction.

None of plaintiffs' counterarguments demonstrate otherwise—rather, they ignore the complex nature of the RAD conversion and incorrectly equate the relief they have sought to a simple request for money damages. Plaintiffs contend they have standing because relief is not "impossible" given that the "key parties" are before the court and "all of the matter undertaken (mortgages and repairs) involve money." (Br. 45–46). But the standard is not whether redress is hypothetically possible, but rather whether plaintiffs can show that a favorable decision is likely to redress their alleged injuries. *E.M.*, 758 F.3d at 450. The fact that the transactions involve money is no answer; as the cases cited above demonstrate, a financial transaction that cannot feasibly be unwound is an insurmountable barrier to plaintiffs' ability to show they could obtain relief from the courts. Nor do plaintiffs seek money as a remedy: this APA action seeks injunctive relief to undo a complex transaction that involves several unnamed corporate entities, intricate regulatory and statutory schemes, and a large-scale construction project that is well underway—relief that is far afield from money damages, and relief that cannot reasonably be achieved.

Relying on *Savoie v. Merchants Bank*, 84 F.3d 52, 54 (2d Cir. 1996), plaintiffs contend that courts have jurisdiction to "undo a completed transaction" (Br. 46), but that case is not applicable. In *Savoie*, the plaintiffs sought an order to require a bank to set aside $500,000

of a $9 million distribution pending a decision on plaintiffs' motion for attorneys' fees. *Savoie*, 84 F.3d at 54. The matter was referred to a magistrate judge, who, after holding a hearing, recommended that a preliminary injunction be granted. *Id.* But before the district judge ruled on the magistrate judge's report and recommendation, the bank made the $9 million distribution, without the requested set-aside. *Id.* This Court ordered the defendant bank to place $500,000 in escrow for a potential fee award on the ground that "'where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the *status quo*.'" *Id.* at 58 (quoting *Porter v. Lee*, 328 U.S. 246, 251 (1946)).

Distinct from this case, *Savoie* concerned an injunction that "merely ordered the Bank to set aside a portion of money in an interest-bearing account for a short time," a "minor restraint" that "did not significantly intrude into the Bank's decision-making abilities." *Id.* In sharp contrast, this case involves a multifaceted transaction that is vastly more complex. Further, because plaintiffs here never moved for preliminary relief against HUD before the conversion was completed, defendants were not on "'notice [of] an injunction proceeding.'" *Id.* And indeed, the plaintiffs in *Savoie* properly sought preliminary relief in order to *prevent* a distribution of funds that would make "recourse . . . so impractical as to be infeasible," *id.*—precisely what occurred here because plaintiffs did not seek an injunction before the transactions took place. Plaintiffs' reliance on *Savoie* is thus misplaced.

In its motion to dismiss, HUD explained in detail why the relief plaintiffs seek—the reversal of HUD's approval of NYCHA's application for the RAD conversion of Harlem River Houses (JA 81; Br. 41–42)—will not redress plaintiffs' alleged injuries. Plaintiffs have never explained how a reversion to Section 9 might be workable. Neither have they proposed alternative relief, either in the district court or this Court.[8] While they insist that they can satisfy the third standing prong by showing some "effective relief" may be available (Br. 46–47), they never identify what relief might be "effective" to remedy their alleged injuries.[9]

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[8] To the extent plaintiffs contend that reversal of HUD's decision can stand alone as a remedy because "HUD's approval of the RAD conversion . . . in and of itself, is an injury" (Br. 43), that argument contradicts basic principles of standing: "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573–75; *accord id.* (rejecting view that a supposed "'right' to have the Executive observe the procedures required by law" standing alone is a concrete injury in fact that can confer standing; instead, a plaintiff must show "a direct injury as a result of [executive or legislative] action" (quotation marks omitted)).

[9] In addition, the case they primarily cite for the "effective relief" standard is *Garcia v. Lawn*, 805 F.2d

Plaintiffs cannot resuscitate their case by stating that some undefined and unidentified relief might still be possible. Because plaintiffs have not carried their burden to demonstrate that a favorable decision would likely redress their alleged injuries, the district court correctly held they lack standing.

D. HUD's Approval of the RAD Conversion May Have Been Reviewable if Plaintiffs Had Not Failed to Seek Preliminary Relief

Plaintiffs argue that the dismissal of their case on redressability grounds would mean that "an APA case could never be brought concerning a RAD conversion approval." (Br. 46). Plaintiffs maintain that they learned about HUD's approval of the conversion only after the conversion was complete, and they could not have sued before then because the APA allows for judicial review only of a "'final agency action.'" (Br. 46, 52 (quoting 5 U.S.C. § 704)). They thus insist that there is no way they could have obtained judicial review of the conversion.

But as the district court observed, that is "incorrect." (SPA 19). Plaintiffs knew about the planned conversion eight months before HUD's approval was

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1400, 1403 (9th Cir. 1986). But that case involved mootness, which a defendant has the burden to establish; in contrast, as explained above, a plaintiff must demonstrate the three prongs of standing. *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016).

announced and there was a one-week period between that approval and the closing. *See supra* n.4 (plaintiffs initiated the *Walsh* suit against C+C and NYCHA's chairman to enjoin the RAD conversion in June 2021); (SPA 20; JA 164, 769, 783, 929, 1472). Although plaintiffs would have had to demonstrate several prerequisites to obtain relief—including standing and ripeness—plaintiffs never took steps to preserve the possibility of judicial review. (SPA 20 (plaintiffs never "moved for a preliminary injunction or a stay under § 705 of the APA.")). In particular, plaintiffs never sought relief under 5 U.S.C. § 705, which authorizes courts, when appropriate, to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." That authority reflects the "limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels," which is "incidental to the courts' jurisdiction to review final agency action." *Dean Foods*, 384 U.S. at 604 (quotation marks omitted); *see Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9 (1942) ("an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong"). And even if such relief were not available under the APA, plaintiffs may have been able to invoke the All Writs Act, 28 U.S.C. § 1651(a), which empowers courts, under certain circumstances, to act to "preserve [their] prospective jurisdiction." *In re NTE Connecticut, LLC*, 26 F.4th 980, 987 (D.C. Cir. 2022); *see*

Pennsylvania Bureau of Correction v. U.S. Marshals Service, 474 U.S. 34, 43 (1985) (explaining that the All Writs Act is "a residual source of authority to issue writs that are not otherwise covered by statute").

Thus, while plaintiffs could not have sought to enjoin or reverse HUD's approval of the conversion before the approval occurred given the APA's finality requirement, plaintiffs could have, subject to the usual threshold requirements for bringing such an action, sought, for example, an order requiring HUD to notify them of the agency's approval so that they could have challenged it before the closing.[10] The district court rightly concluded that plaintiffs' "failure to bring their case at the appropriate time does not give them standing to sue now when the conversion has closed and the Court can no longer redress any alleged injuries they may have." (SPA 20). Where anticipated events threaten to defeat their prospective jurisdiction, courts have, when they deemed it appropriate, offered limited, narrow interim relief to preserve their jurisdiction until the case ripens for judicial review. *See, e.g.*, *Federal Capital Habeas Project v. Rosen*, No. CV 20-3742, 2021 WL 125917, at *1 (D.D.C. Jan. 13, 2021) (requiring government defendants to notify plaintiff and court before relying on federal regulations governing executions to avoid "danger that [defendants] could invoke the [regulatory provisions being challenged by

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[10] *See Winter v. NRDC*, 555 U.S. 7, 20 (2008) (setting out plaintiff's burden for seeking preliminary relief); *Bauer v. DeVos*, 325 F. Supp. 3d 74, 104–05 (D.D.C. 2018) (same requirements under § 705).

plaintiff under APA] and then execute [plaintiff] without giving the Court a chance to rule on his challenges"); *Astrazeneca Pharmaceuticals LP v. Burwell*, 197 F. Supp. 3d 53, 55–60 (D.D.C. 2016) (ordering schedule to facilitate judicial review of pharmaceutical manufacturer's APA challenge to Food and Drug Administration's anticipated approval of generic version of drug because "generic manufacturers are at times poised to ship their products within hours of [agency's] approval" and discussing various approaches taken by other district courts in like circumstances).[11] But plaintiffs here failed to take any steps to preserve their ability to seek review.

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[11] *See also Dean Foods*, 384 U.S. at 599–600 (enjoining proposed merger to maintain the status quo pending decision by Federal Trade Commission on whether a merger would violate antitrust laws because the merger would be "very probably impossible" to undo if it was completed before the agency decided the question); *NTE Connecticut*, 26 F.4th at 987; *Michael v. INS*, 48 F.3d 657, 664 (2d Cir. 1995) (staying agency's deportation order to "preserve the jurisdiction of this Court" because otherwise plaintiff would "suffer irreparable injury through deportation, thereby mooting this case"); *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 884 (2d Cir. 1981) (although agency had "preliminary jurisdiction" until administrative proceedings were complete, court had "incidental equity jurisdiction to grant temporary relief to preserve the status quo pending the ripening of the claim for judicial action").

Plaintiffs' conversations with HUD were no substitute for seeking judicial relief at the proper time. Plaintiffs contend they expected to meet with HUD and to receive its factual findings on their complaints before HUD approved the RAD conversion (Br. 39, 46), but HUD never gave plaintiffs these assurances (JA 788, 1500). Although counsel asked to bring a "group of tenants" to meet with HUD, Alex told counsel that a meeting was not possible. (JA 1500). Further, in November 2021, months after plaintiffs started complaining to HUD, Alex informed plaintiffs' counsel that she could not "predict when or whether" HUD would approve the RAD conversion. (JA 788). Alex never told plaintiffs that HUD would abstain from approving the RAD conversion before meeting with plaintiffs or issuing findings on their complaints. Nor is there any indication in the record, or an allegation by plaintiffs, that they relied on Alex's statements in deciding not to seek preliminary relief. Under these circumstances, the district court correctly held that plaintiffs' inability to obtain judicial review of the RAD conversion resulted from their own failure to seek judicial relief at the proper time. (SPA 20).

E. Plaintiffs' Request for Declaratory Relief Does Not Create Article III Standing

Finally, plaintiffs complain that the district court ignored their request for declaratory relief. (Br. 7). To the contrary, the district court expressly acknowledged that request. (SPA 10). Its holding that plaintiffs lack standing applied to both injunctive and declaratory relief: "just like suits for every other type of remedy, declaratory-judgment actions must satisfy

Article III's case-or-controversy requirement," under which a dispute must "admit of specific relief through a decree of a conclusive character," and a remedy must "redress the individual plaintiffs' injuries." *California v. Texas*, 141 S. Ct. 2104, 2115–16 (2021). To the extent plaintiffs seek to "forestall[] efforts by NYCHA and HUD to secure approval of later RAD proposals" involving other projects (Br. 49–50), plaintiffs lack Article III standing because a Harlem River Houses resident cannot plausibly "allege a distinct and palpable injury to himself" based on conversions of other properties. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *accord Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1620 (2020).[12]

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[12] Because it concluded that plaintiffs lacked Article III standing on redressability grounds, the district court did not rule on HUD's argument that plaintiffs failed to allege a legally cognizable injury in fact. Similarly, the district court did not address the merits, which HUD did not raise as a ground for dismissal below but mentioned in footnotes. There, HUD noted, first, that plaintiffs' theory that HUD should not have approved the conversion because NYCHA met the criteria of Troubled Performer (JA 78–79) failed because RAD eligibility is based on assigned Public Housing Assessment System scores and, at the time of the conversion application, NYCHA was (and still is) classified as a Standard Performer (SPA 8; Dist. Ct. ECF No. 30 at 1–2 n.1). Second, plaintiffs claimed NYCHA lacked sufficient control over Harlem River Houses for the project to be RAD-eligible (JA 79–80), but NYCHA

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had a sufficient interest in the project under the applicable regulations (Dist. Ct. ECF No. 30 at 18 n.11; JA 901–07). Third, plaintiffs inaccurately claimed NYCHA failed to perform a required capital needs assessment (JA 78–79) when, in fact, NYCHA submitted this assessment to HUD (Dist. Ct. ECF No. 30 at 18 n.11). As these issues were neither addressed by the district court nor briefed on appeal, they should not be considered by this Court; rather, if this Court disagrees with the district court's standing analysis, these issues should be considered by the district court in the first instance. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("[A] federal appellate court does not consider an issue not passed upon below."); *Brown v. City of New York*, 862 F.3d 182, 188 (2d Cir. 2017) ("appellee is [not] required, upon pain of subsequent waiver, to raise every possible alternate ground upon which the lower court could have decided an issue").

CONCLUSION

The judgment of the district court should be affirmed.

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October 17, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 6675 words in this brief.

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