Fifth Circuit Holds Public Housing Demolition Law Unenforceable*

The Court of Appeals for the Fifth Circuit handed public housing residents a crushing defeat in *Anderson v. Jackson*,[1] holding that, in the context of the demolition of housing developments, tenants' notice and relocation rights under the United States Housing Act[2] are not enforceable under 42 U.S.C. § 1983. While the Fifth Circuit recognized that the United States Housing Act could be enforced under the Administrative Procedure Act (APA), the court held that public housing residents were not entitled to an injunction, finding that they had not met their burden of showing a likelihood of success on the merits of their APA claim. The decision takes an expansive view of the Supreme Court's decision regarding § 1983 in *Gonzaga University v. Doe*,[3] which narrowed court access to enforce individual rights. The Fifth Circuit was the first circuit to rule on the enforceability of the demolition provision following the statute's modification by Congress in 1998, and the legislative history of the provision weighed heavily in the court's decision. Nevertheless, two district courts from other circuits have reached the opposite conclusion regarding the post-modification enforceability of the demolition provision,[4] suggesting the possibility of a future circuit split on this question.

Facts

The Housing Authority of New Orleans (HANO) submitted an application to the Department of Housing and Urban Development (HUD) requesting approval to demolish and redevelop four public housing developments that were in a state of disrepair. HANO assured the federal government that it would provide comparable housing to the residents and cover relocation costs. To inform the residents, HANO sent two notices, published a notice in several newspapers, and held several meetings.[5]

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[1]556 F.3d 351 (5th Cir. 2009).

[2]42 U.S.C.A. § 1437p(a)(4) (West 2003).

[3]536 U.S. 273 (2002).

[4]Arroyo Vista Tenants Ass'n v. City of Dublin, 2008 WL 2338231 (N.D.Cal. May 23, 2008); Givens v. Butler Metro. Hous. Auth. 2006 WL 3759702 (S.D. Ohio 2006).

[5]*Anderson*, 556 F.3d at 354. Significantly, the opinion is silent on the timing of those meetings, which took place after HANO submitted to HUD the application for permission to demolish the public housing.

In June 2006, the residents filed suit against HUD and HANO, alleging that their constructive eviction due to the poor conditions in the developments violated the Housing Act. The district court held that 42 U.S.C. § 1983 did not provide a cause of action for the residents to challenge constructive eviction under the Housing Act, and no actual eviction claim was ripe, since HUD had not ruled on HANO's application.

In September 2007, HUD approved HANO's application after finding that all the statutory criteria were met. HUD concluded that the costs of rehabilitating the properties substantially exceeded the amount required to justify demolition.

The residents then moved for a preliminary injunction to stop the demolition, amending their complaint to add an actual eviction claim. The district court denied the requested relief, holding that the tenants did not have a private right of action against either HANO or HUD to enforce an actual eviction claim based on their rights under the Housing Act. The court of appeals denied the residents' request for an expedited appeal. The appellate court reported that as it issued its decision, three of the developments had been demolished, but 621 units remained open in the fourth.[6]

Development of Supreme Court § 1983 Jurisprudence

In 1980, the Supreme Court held in a case involving welfare law that 42 U.S.C. § 1983 provides a cause of action to enforce federal statutes.[7] In two subsequent decisions, the Court upheld a cause of action under § 1983 in cases concerning the United States Housing Act and Medicaid.[8] However, in all these cases, conservative Supreme Court Justices, including Chief Justice Rehnquist, fiercely dissented, initially on policy grounds and later on the ground that the statutes at issue did not have sufficient indicia of Congressional intent to create "rights."[9]

As the composition of the Court changed, a majority of five Justices began reining in the scope of § 1983. In 1992, Rehnquist wrote the Court's opinion in *Suter v. Artist M.*, holding that the Adoption Assistance Act was not enforceable under § 1983, because the structure of the law did not evince congressional intent to permit private enforcement.[10] The Court focused on the Act's inclusion of individual rights in a list of state requirements. Rehnquist reasoned that because the "generalized duty [of] the State" was contained in a list of state plan requirements, the law did "not unambiguously confer an enforceable right upon the Act's beneficiaries."[11] The Court concluded that this overall structure defeated the availability of a cause of action under § 1983.

In October 1994, just weeks before Congress turned from Democratic to Republican control, Congress passed an amendment to the Social Security Act intended to overrule Rehnquist's reasoning in *Suter*.[12] The "*Suter* fix" provides that the placement of an individual right in a list of state plan requirements does not indicate congressional intent to limit individual enforcement.[13]

Shortly thereafter, the Supreme Court reaffirmed the standards established in the earlier, more favorable cases for evaluating claims under § 1983. In 1997, the Court reiterated the three-part test for such claims in *Blessing v. Freestone*:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.[14]

Blessing also criticized the court of appeals for evaluating the statute as a whole and emphasized that the test must be applied to the specific provision at issue.[15]

Nevertheless, in *Gonzaga v. Doe*, decided in 2002, Justice Rehnquist authored a decision narrowing the first prong of the test.[16] *Gonzaga* emphasized that a mere expression of congressional intent to benefit the plaintiffs in the statute would not suffice to support a cause of action under § 1983. The Court required that the intent to confer rights be "unambiguously" expressed in "explicit rights-creating terms."[17] Analyzing the provisions of the Family Educational Rights and Privacy Act, the Court then concluded that the statute did not meet the requirement for rights-creating language.[18]

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[6] *Id*. at 354-55.
[7] Maine v. Thiboutot, 448 U.S. 1 (1980).
[8] Wright v. City of Roanoke Redev. & Housing, 479 U.S. 418 (1987) (U.S. Housing Act); Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990) (Medicaid).
[9] Rochelle Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access for Safety Net Statutes*, 10 Loy. J. of Pub. Int. L. 27, 42, 44-45, 50-51 (2008); *see also* Lauren Sanders, *Preemption as an Alternative to Section 1983*, 38 Clearinghouse Rev. 705 (March/April 2005).
[10] Suter v. Artist M, 503 U.S. 347 (1992).
[11] *Id*. at 363.
[12] Erwin Chemerinsky & Martin A. Schwartz, *Section 1983 Litigation: Supreme Court Review, A Roundtable Dialogue*, 19 Touro L. Rev. 625, 665-66 (2003).
[13] 42 U.S.C.A. §§ 1320a-2, 1320a-10 (Westlaw May 22 , 2009).
[14] Blessing v. Freestone, 520 U.S. 329, 340-41 (1997) (citing *Wright*, 479 U.S. at 430-32 and *Wilder*, 496 U.S. at 510-11).
[15] *Id*. at 342.
[16] Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).
[17] *Id*. at 283-84.
[18] *Id*. at 287.

The Fifth Circuit's Rejection of the Enforceability of 42 U.S.C. § 1437p

In *Anderson*, the Fifth Circuit's analysis of a cause of action under § 1983 to enforce 42 U.S.C. § 1437p began by focusing on the "overall structure of the statute,"[19] rather than the specific statutory provision. The circuit court noted that the demolition provision "is introduced with the statement that '[T]he Secretary shall approve the application, if the public housing agency certifies [.]' "[20] The court held that because the statute is styled as a "directive" to the Secretary, "[t]here is no indication in the statute that Congress intended public housing residents to have legal recourse against local housing authorities to enforce these administrative checklist requirements."[21]

While the Fifth Circuit cites *Blessing* and *Gonzaga* in its § 1983 analysis,[22] the court's reasoning follows *Suter*. The statutory provision at issue in *Suter* listed "qualifications which state plans must contain in order to gain the Secretary's approval."[23] The Supreme Court held in *Suter* that "in that context" only the Secretary, and not private individuals, could enforce the listed requirements.[24] Similarly, in *Anderson*, the Fifth Circuit focused on the placement of tenants' rights in the midst of requirements for federal approval of a demolition application. While the *Suter* fix is contained within the Social Security Act, it clearly evinces congressional intent that Congress disapproved of the reasoning of *Suter*, which is equally applicable in the context of housing statutes. The Fifth Circuit's emphasis on the placement of the statutory requirements in a list of items for federal approval, similar to the reasoning of *Suter*, would be a basis for arguing that *Anderson* was wrongly decided.

The Fifth Circuit also based its rejection of the residents' § 1983 claims on the legislative history of the United States Housing Act. In 1987, the D.C. Circuit rejected the enforceability of § 1437p in a case involving constructive eviction, *Edwards v. District of Columbia*, where HUD had not yet approved the demolition application and the residents had not been displaced.[25] In response, Congress amended § 1437p, adding a provision after the checklist stating: "A public housing agency shall not take any action to demolish or dispose of a public housing project or a portion of a public housing project without obtaining the approval of the Secretary and satisfying the conditions specified in…this section."[26] The legislative history included explicit repudiation of *Edwards*' holding and the statement that the demolition provision "shall be fully enforceable by tenants of and applicants for the housing that is threatened."[27] However, a decade later, Congress streamlined the United States Housing Act and, in the process, removed the provision that had been added in response to *Edwards*.[28] The legislative history of the 1998 amendment contains no discussion of whether, as amended, § 1437p contains rights enforceable by tenants.[29]

The Fifth Circuit found that "the logical inference" from the legislative history "is that Congress intended to remove the private right of action."[30] Then, perhaps recognizing the weakness of its conclusion based on Congress' silence, the Fifth Circuit stated:

> The repeal of the provision added in 1987, combined with the text and structure of the current statute, makes it at least ambiguous as to whether Congress intended for the current version of § 1437p to create a federal right. Accordingly, we hold that § 1437p does not unambiguously confer individual rights enforceable through § 1983.[31]

The court's reasoning is easily rebutted. *Edwards* only rejected enforcement for constructive eviction, in which HUD had not yet approved the demolition application.[32] Even if the 1998 revision was designed to roll back the 1987 expansion of enforceability that had included constructive eviction, there was never any question, even in *Edwards*, that tenants could enforce their rights in the event of an actual eviction, following approval of the demolition application by HUD. Since Congress never contemplated that actual eviction would be unenforceable, the 1998 revision could not possibly have been meant to eliminate the enforceability of the statute in the case of an actual eviction.

Anderson's holding is in direct contradiction to that of *Arroyo Vista Tenants Association v. City of Dublin*,[33] from a district court in California.[34] In *Arroyo*, the court noted

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[19]556 F.3d at 358.
[20]*Id*.
[21]*Id*.
[22]*Id*. at 365.
[23]*Suter*, 503 U.S. at 351.
[24]*Id*. at 363.
[25]Edwards v. Dist. of Columbia, 821 F.2d 651, 652 (D.C.Cir.1987).
[26]Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 121(d), 101 Stat. 1815, 1838-39 (1988).
[27]H.R. Conf. Rep. 100-426, 1987 U.S.C.C.A.N. 3458 at 3469.
[28]Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 531, 112 Stat. 2461, 2570-73 (1998).
[29]*See Anderson*, 556 F.3d at 357; *Arroyo*, 2008 WL 2338231 at *9.
[30]*Anderson*, 556 F.3d at 358.
[31]*Id*.
[32]Edwards v. Dist. of Columbia, 821 F.2d 651, 659-60 (D.C. Cir. 1987); *see also id*. at 664 (Williams, J., concurring) (addressing possible "actual demolition" claims is "quite unnecessary to our holding"); *id*. at 666 ("I further agree with Chief Judge Wald that § 1437p provides a private cause of action against PHAs that engage in actual demolition without obtaining prior HUD approval").
[33]2008 WL 2338231 (N.D.Cal. May 23, 2008).
[34]For a detailed review of the *Arroyo* decision, see NHLP, *Tenants Can Sue for Violation of Public Housing Demolition Law*, 38 Hous. L. Bull. 125 (2008).

that in the process of revising § 1437p in 1998, Congress expanded the notification requirements, evincing the intent to expand, rather than contract, tenants' rights.[35] Two post-1998 cases from a district court in Ohio held that § 1437p contains enforceable rights without discussion of the 1998 legislative history.[36] This conflict creates hope that other courts will not follow *Anderson*. In the interim, unfortunately, the unpublished decisions of two district courts may not have the persuasive power of even a poorly reasoned case from a circuit court.

Other circuit courts and other cases from the Fifth Circuit have generally not imported the *Suter* reasoning and have permitted enforcement under § 1983 of statutory provisions containing the words "individuals," "person," "family," or comparable language in setting forth a specific right.[37] This has held true in the context of Medicaid[38] as well as housing cases.[39] On the other hand, a recent decision concerning the No Child Left Behind Act rejected enforceability under § 1983, after concluding that the *Blessing* test had been met, based on the overall structure of the statute which was phrased in terms of federal regulation of state actors.[40]

The Administrative Procedure Act Claim

In *Anderson*, the Fifth Circuit reversed the district court's holding that the residents could not bring a claim under the APA against HUD to enforce § 1437p. The court of appeals stated that regardless of the § 1983 analysis, tenants could pursue a claim for injunctive relief (though not monetary damages) under the APA for failure to comply with § 1437p.[41]

However, the court held that even though the APA could be used to enforce § 1437p, the residents could no longer pursue that claim. The court found that at the time of the appeal, injunctive relief was "no longer availing," since the demolition of the housing developments had already been "substantially complete[d]."[42] The court, in this part of the opinion, ignored the 621 units that it conceded still housed residents.

Moreover, the court found no error in the district court's denial of a preliminary injunction to halt the demolition. The court of appeals held that the tenants had not met their burden of demonstrating a likelihood of success on the merits. The Fifth Circuit stated that the district court reasonably concluded that the demolition application process did not violate the APA. The court based this conclusion upon HANO's certification that the requirements of § 1437p were met and upon evidence that HANO gave the residents notice, provided opportunities for consultation, and offered alternative comparable housing in New Orleans.[43] The court rejected the residents' contention that the expedited review of HANO's application by HUD reflected "impropriety."[44]

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The Fifth Circuit was utterly unconcerned with the issuance of an injunction to preserve the remedy of repairing the developments. Indeed, the Fifth Circuit's refusal to provide temporary relief and to provide an expedited appeal[45] contributed to the futility of injunctive relief. Finding that the APA claim was unlikely to succeed on the merits, the court did not even comment on the importance of a preliminary injunction to prevent the displacement of the residents and the concomitant harm the tenants suffered.

Nevertheless, since the court clearly held that the residents properly stated a claim under the APA, this statute would provide an avenue for relief under § 1437p in future cases, even within the Fifth Circuit. In a subsequent case, tenants would need to make a stronger showing on the merits of the APA claim, such as submitting evidence that notices regarding relocation rights or opportunities for consultation were not provided.

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[35]2008 WL 2338231 at *12.
[36]English Woods Civic Ass'n v. Cincinnati Metro. Hous. Auth., 2004 WL 3019505 (S.D. Ohio Dec. 17, 2004); Givens v. Butler Metro. Hous. Auth., 2006 WL 3759702 (S.D. Ohio Dec. 19, 2006).
[37]Bobroff, *supra* note 9, at 63.
[38]Ball v. Rodgers, 492 F.3d 1094, 1107-8 (9th Cir. 2007); Westside Mothers v. Olszewski, 454 F.3d 532, 539 (6th Cir. 2006); Watson v. Weeks, 436 F.3d 1152 (9th Cir. 2006); S.D. v. Hood, 391 F.3d 581 (5th Cir. 2004); Sabree v. Richman, 367 F.3d 180 (3d Cir. 2004); Bryson v. Shumway, 308 F.3d 79, 89 (1st Cir. 2002); Pediatric Specialty Care v. Ark. Dep't of Human Servs., 293 F.3d 472 (8th Cir. 2002).
[39]Johnson v. Hous. Auth. of Jefferson Parish, 442 F.3d 356, 360 (5th Cir. 2006); Price v. City of Stockton, 390 F.3d 1105, 1110-11 (9th Cir. 2004).
[40]Newark Parents Ass'n v. Newark Pub. Schs., 547 F.3d 199, 212 (3d Cir. 2008).
[41]Anderson v. Jackson, 556 F.3d 351, 359 (5th Cir. 2009).
[42]*Id*.
[43]*Id*. at 360.
[44]*Id*.
[45]*Id*. at 355.

Future Steps in Other Cases

While a circuit split on the enforceability of § 1437p under § 1983 would create the possibility of an appeal to the Supreme Court, it is doubtful that such claims would have a receptive audience at the nation's highest court.[46] In the past, Justice Kennedy has never voted to uphold court access under § 1983 for safety net statutes,[47] and Chief Justice Roberts was the attorney representing Gonzaga University in *Gonzaga v. Doe* and arguing for the result adopted by the Court.[48]

In cases involving a state statute or regulation in conflict with federal law, preemption under the Supremacy Clause provides an alternative route to judicial review. Jurisdiction arises under federal question jurisdiction, 28 U.S.C. § 1331, and authorizes injunctive and declaratory relief, though not damages or attorneys' fees.[49] However, a preemption claim is less likely to succeed in the event of inaction by the state, such as failure to provide a notice or delays in compliance.[50]

The problem of unenforceability of specific provisions of the United States Housing Act could readily be resolved through legislative action, such as the addition of a private right of action to the statute. Advocates should explore the possibility of positive legislative changes that would overturn the court's denial of judicial enforcement of rights clearly delineated in the housing statute. It is noteworthy that the legislative fix enacted after *Edwards* was phrased in terms of the obligations of federal and state government actors, with only the legislative history referencing the rights of individuals. In order to be certain to withstand challenge following *Gonzaga*, a legislative fix should clearly enumerate the rights of individuals in the text of the statute and not merely the legislative history.[51] ■

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[46]*See* Lauren Saunders, *Are There Five Votes to Overrule* Thiboutot*?*, 40 Clearinghouse Rev. 5-6 (Sept-Oct 2006); *see also* Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. Davis L. Rev. 413, 452 (Dec. 2008) (*Wilder* "risks being overturned by a Court that is interested in limiting section 1983 causes of action and in limiting the scope of conditions on Spending Clause legislation.").

[47]Justice Kennedy joined the dissent in *Wilder* and the majority in *Suter* and *Gonzaga*.

[48]536 U.S. 273, 275 (2002); *see also* Simon Lazarus, *Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court's Federalism Revolution?*, 56 DePaul L. Rev. 1, 13 n.45 (2006).

[49]Bobroff, *supra* note 9, at 3-4.

[50]*Id*. at 62.

[51]*See* Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy, 548 U.S. 291, 304 (2006) ("Whatever weight this legislative history would merit in another context, it is not sufficient here. . . . In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds.").