

In the
United States Court of Appeals
For the
Ninth Circuit

DEBORA BARRIENTOS, ARMANDO BRISENO, BERTHA CARDENAS,
MARTA CHAJON, MANUEL CUEVAS, FRANCISCO A. DEL CID,
MIGUEL GONZALEZ, JEONG SOON HWANG, BONG CHA KIM, JAE OK KIM,
LEANNA KIM, NONG-SOON KIM, YOUNG SUK KIM, MARIA LANDAVERDE,
JANE LEE, JEONG LEE, SUSAN LEE, YOUNG HEAN LEE, JIN M. PARK,
NORMA ANGELICA PENA, MARIA RODRIGUEZ and HELEN H. YU,

Plaintiffs-Appellees,

v.

1801-1825 MORTON LLC,

Defendant-Appellant.

*Appeal from a decision of the United States District Court for the Central District of California
(Western Division - Los Angeles) No. 06-CV-06437 · Honorable Audrey B. Collins*

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to 28 U.S.C. §§1331 and 1367(a). This Court has jurisdiction pursuant to 28 U.S.C. §1291. The appealed judgment is “final” within the meaning of 28 U.S.C. §1291, because it disposes of all claims of all parties to this action. See Burkett v Shell Oil, 487 F.2d 1308 (1973) (order granting motion for summary judgment is a final judgment). The appeal is timely under 4(a)(1)(A) of the Federal Rules of Appellate Procedure, as the final judgment appealed from was entered on October 24, 2007, and the notice of appeal was filed on November 13, 2007.

ISSUES PRESENTED

1. Did The Department of Housing and Urban Development (“HUD”), under Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984), exceed its Congressionally-delegated authority by promulgating 24 C.F.R. § 982.310(d)(1)(iv)? (This regulation pertains to a federal government program, known as the Section 8 program, which subsidizes rents for low- and moderate-income families. The program was enacted by Section 8 of the United States Housing Act of 1937, currently codified, as amended, at 42 U.S.C. §1437f. The regulation at issue permits a property owner to terminate a tenant’s lease, after expiration of its initial term, for a “business or economic reason,” defined to include the “desire to lease the unit at a higher rental.”)

2. If this Court concludes, under Chevron, that HUD exceeded its authority in enacting 24 C.F.R. § 982.310(d)(1)(iv) and, consequently, strikes down HUD's regulation, should the Court apply its decision retroactively?
3. Is the district court's injunction overbroad?
4. Did the district court err in awarding attorneys' fees?

STATEMENT OF THE CASE

On October 13, 2006, twenty two Section 8 tenants (Appellees or "Tenants") filed this action against their landlord (Appellate or "Owner"). See Complaint for Violation of the Unified Enhanced Voucher Authority Statute and the Los Angeles Rent Stabilization Ordinance, Filed October 13, 2006 ("Complaint") ¶¶ 1-8 (Excerpt of Record "ER" 240-248).

Tenants alleged Owner, by serving notices to terminate Tenants' leases pursuant to 24 C.F.R. § 982.310(d)(1)(iv), violated: (1) subsection (t) of Section 8 of the United States Housing Act of 1937, codified at 42 U.S.C. §1437f(t) and; (2) section 151.09A of the Los Angeles Rent Stabilization Ordinance ("LARSO"). Id. at 6-7 (ER 245-246). Tenants sought a permanent injunction enjoining such termination. Id. at 7-8 (ER 246-247).

Owner answered on December 18, 2006. (ER 31). The parties then stipulated to a preliminary injunction. (ER 261). The parties also stipulated to the facts of this case. ("Stipulation of Facts"). (ER 144-21)).

On May 7, 2007, Tenants moved for summary judgment. Owner filed its opposition on June 4, 2007. Tenants replied on July 9, 2007. Amicus Curiae City of Los Angeles filed a brief on Tenants' behalf on July 9, 2007. Amicus Curiae California Apartment Association filed a brief on Owner's behalf on July 16, 2007. On August 16, 2007, the district court requested supplemental briefing on an issue raised—not by Tenants—but by the City of Los Angeles, namely: whether HUD exceeded its authority in issuing 24 C.F.R. §982.310(d)(1)(iv). (ER 47). Owner and Tenants submitted supplemental briefs on this issue on August 27 and August 29, 2007, respectively.

On September 11, 2007, the district court granted Tenants' motion for summary judgment on all claims in Tenant's complaint. ("Order Granting Summary Judgment"). The district court concluded 24 C.F.R. § 982.310(d)(1)(iv) comes into actual conflict with section 151.09A of the LARSO. Order Granting Summary Judgment ¶ 33 (ER 51). However, applying, Chevron, the district court held HUD exceeded its authority in promulgating that regulation. Id. at 41 (ER 59). The district court's judgment, dated September 10, 2007, declared Tenants are entitled to attorneys' fees, declared Owners' termination notices void, and permanently enjoined Owner from terminating Tenants' leases without "complying with all the requirements of the [LARSO]." Judgment ¶ 2 (ER 64). On September 24, 2007, Owner filed a motion for reconsideration, which was granted in part.

(ER 266). However, the underlying judgment was affirmed on October 24, 2007.

See Order re: Defendants Motion to Reconsider ¶¶ 1-18 (ER 1-18).

On November 7, 2007, Tenants moved for \$122,999.50 in attorneys' fees. (ER 267), which the district court granted on December 10, 2007. Order re: Plaintiff's Motion for Attorney fees (ER 68-77). This appeal followed.

STATEMENT OF FACTS

Owner owns the Morton Gardens apartment complex in the city of Los Angeles. Stipulation of Facts ¶ 2 (ER 145). It was developed in 1971 as a low-income, rental housing project pursuant to Section 236 of the National Housing Act. Id. at 8 (ER 151). Under that program, Morton Gardens was subject to a use agreement that required rentals to low-income households and further limited the rents that could be charged for each unit. Id. In January 1998, the Section 236 loan was prepaid in advance of the original maturity date. Id. This prepayment extinguished the use agreement but resulted in the issuance of "enhanced voucher" subsidies to sixteen Tenants residing at Morton Gardens at the time of the prepayment. Id. at 8-9 (ER 151-152). Their subsidies are governed by 42 U.S.C. §1437f(t). Id. The remaining six Tenants moved into the complex after the 1998 prepayment and hold "standard" vouchers governed by 42 U.S.C. §1437f(o). Id.

"Enhanced" and "standard" voucher Tenants pay towards rent a percentage of their income to Owner, as determined under the "Fair Market Rent" ("FMR")

formula set forth generally at 24 C.F.R. § 982.507. The remainder of rent for each Tenant's unit is paid by the federal government through the Housing Authority of the City of Los Angeles ("HACLA"), the local housing authority which administers the Section 8 program in Los Angeles. Stipulation of Facts ¶ 10 (ER 153). Each tenancy is subject to a lease (between Owner and each Tenant) and a contract (between Owner and HACLA), known as an "assistance contract," "housing assistance payment" contract, or "HAP" contract. *Id.* Each HAP contract limits, pursuant to the FMR formula, the rent Owner may charge for each Tenant's unit. See 24 C.F.R. § 982.507; Stipulation of Facts ¶ 9 (ER 152).

24 C.F.R. § 982.310 specifies the grounds upon which Owner must rely upon in order to terminate Tenants' leases during their term. § 982.310(d)(1)(iv) allows Owner to terminate for "other good cause," defined to include "a business or economic reason for termination of the tenancy (such as sale of the property, renovation of the unit, or desire to lease the unit at a higher rental)." On June 30, 2007, in accordance with § 982.310(d)(1)(iv) and California Civil Code section 1954.535,¹ Owner served Tenants with 90-day notices to terminate their leases for a "business or economic reason, including but not limited to the desire to lease the unit at a higher rental rate." Stipulation of Facts ¶ 13 (ER 156).

¹ California Civil Code § 1954.535 allows landlords in California to terminate their Section 8 contracts in rent-controlled jurisdictions upon service of a 90-day notice. Wasatch Prop. Mgmt. v. Degrate 112 P.3d 647 (Cal. 2005), *modified*, (2005) 2005 Cal. LEXIS 8224, 2005 D.A.R. 9110, *modified*, (2005) 2005 Cal. LEXIS 8368.

On July 5, 2006, after Owner served its notices, the Los Angeles City Council amended the LARSO to cover Section 8 tenancies, thereby subjecting such tenancies at Morton Gardens to the eviction restrictions set forth therein. See City of Los Angeles Ordinance Number 177587, effective July 5, 2006.

On September 30, 2006, Owner's 90-day notices expired. Stipulation of Facts ¶ 13 (ER 156). Owner extended the notice period to October 31, 2006, in order to give Tenants time to file this lawsuit. Id. at 13-14 (ER 156-157). Once Tenants filed their case, the parties submitted the matter on stipulated facts to resolve the issue of whether or not Section 8 owners subject to the LARSO can rely upon 24 C.F.R. § 982.310(d)(1)(iv).

STATUTORY BACKGROUND

Congress enacted the United States Housing Act in 1937. See P.L. 75-412, 50 Stat. 888, currently codified, as amended, at 42 U.S.C. § 1437 *et seq.* This act authorized states to create local public housing authorities ("PHA") to own and manage public housing projects. For nearly thirty years, government-owned housing was the main form of housing assistance for low-income families. Starting in the late 1950's, however, the federal strategy for housing assistance shifted from publicly-owned housing projects toward privately-owned developments. Consistent with this strategy, in 1965, Congress established HUD, empowered it with plenary authority to implement federal housing programs,

see 42 U.S.C. § 3531, and expressly instructed it to “encourage private enterprise to serve as large part of the nation’s total housing and urban development needs as it can and develop the fullest cooperation with private enterprise in achieving the objectives of the Department” 24 U.S.C. § 3532(b). Congress also created housing programs designed to encourage - but not to force – private enterprise to provide affordable housing to low- and moderate- income tenants.² One such federal program is the Section 8 program, whose complex legislative history began in 1974.

1974: Congress created the Section 8 program.

In 1974, Congress enacted Section 8 of the United States Housing Act of 1937 to create what is known as the Section 8 housing program (“Section 8”), currently codified as amended, at 42 U.S.C. §§1437f *et seq.* See Pub. L. No. 93-383, 88 Stat. 633, (1974). Section 8 authorizes federal rent subsidies for lower-income families renting from private owners and seeks to promote “decent,” “economically-mixed” housing with respect to “existing, newly-constructed, or substantially rehabilitated housing.” 42 U.S.C. § 1437f(a).

² Others programs include the Section 236 program (discussed *supra*); the Section 202 program which subsidizes housing to the elderly and disabled, see Ross v. Broadway Towers, Inc., 228 S.W.3d 113 (Tenn. 2006); the Section 515 program, codified as amended at 42 U.S.C. § 1485, which subsidizes low-interest loans in return for renting to persons with low and moderate incomes); and the Section 221(d)(3) program, codified as amended at 12 U.S.C. §§ 1715l(d)(3) and (d)(5), which subsidizes below-market-interest loans to private developers to promote construction of affordable housing).

As originally enacted, Section 8 included “project-based” assistance for existing, newly-constructed or rehabilitated housing and “tenant-based” assistance for existing housing. In project-based assistance, the PHA contracted with owners of eligible properties to pay a subsidy for specified units for a specified term. To fill vacancies, the PHA referred persons eligible for Section 8 assistance to the owner, and such persons leased units from the owner. The subsidy was “attached” to the unit. So, tenants who moved from the project-based unit lost the subsidy. In contrast, in the tenant-based assistance program, sometimes called the “finders keeper” or “certificate program,” families selected their own housing. The PHA contracted with the owner to pay the subsidy for the tenant. If the tenant vacated the unit, the subsidy followed the tenant.

1981: Congress enacted the “other good cause” basis for Section 8 lease terminations.

In 1981, Congress amended Section 8 of the United States Housing Act of 1937 in three relevant ways. **First**, Congress specified that the lease must be for at least one year or the term of the HAP contract, whichever is shorter. See Section 326(e)(1), Pub. L. 97-35, 95 Stat. 402 (August 13, 1981) (the “1981 Amendments”). **Second**, Congress provided that the owner may only “terminate a tenancy” for “serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State or local law, or for *other good cause*.” Id. (emphasis added). **Third**, Congress authorized HUD to specify additional “terms

and conditions” for the lease (which would include the “other good cause” grounds under which the lease terminates). Id. Congress did not define what constitutes “other good cause” for tenancy termination, and, thereby, delegated that task to HUD. See Chevron, 467 U.S. at 843-44.

1982 – 1995: HUD defined “other good cause.”

In 1982, HUD issued an interim rule to implement the 1981 Amendments.³ See 47 Fed. Reg. 33497 (August 3, 1982). Originally, the interim rule did not define other good cause and further provided, in section 882.215, that the owner had to have good cause either to terminate a lease mid-term or to decline to renew the lease (except if the owner intended to remove the unit from the Section 8 program) Id. at 33499.

HUD received 58 public comments to the interim rule, including comments from legal aid organizations and PHAs. See 49 Fed. Reg. 12215 (March 29, 1984). PHA’s expressed concern that the creation of a “perpetual tenancy” terminable only for cause would hurt voluntary owner participation in the program. Id. at 12231. While such a requirement might be appropriate for project-based

³ The Administrative Procedure Action requires government agencies to use a two-stage notice and comment publication process for new regulations. See 5 U.S.C. §§553(b)-(c). First, the agency must publish an interim rule in the Federal Register to invite public comments on the new regulation. Id. Second, the agency must publish a final rule in the Federal Register responding to any public comments. Id. at § 553(c)-(d).

assistance, the PHA's lamented that it was not appropriate for the rental certificate program, where the family could move and receive assistance in a new unit. PHAs believed that the owner should have the right to terminate the tenancy without cause at the lease's end. Id.

PHA's and legal aid offices objected to the interim rule to the extent it required execution of a new assistance contract and lease in order to extend a subsidized tenancy. Id. Commentators recommended that HUD provide for automatic extension of the assistance term, either until the tenancy is renewed or terminated. Id.

Meanwhile, in 1983, a federal district court, in ruling on a preliminary injunction motion, held that there were "serious issues deserving of litigation as to whether Congress intended that good cause be required for non-renewal of a housing assistance lease." Mitchell v. United States Dep't of Hous. & Urban Dev., 569 F. Supp. 701, 708 (N.D. Cal. 1983). The Mitchell court noted an expanded good cause requirement would not be "onerous" for the landlord because good cause could be "business or economically based." Id. at 708.

In 1984, predicting that other courts would follow Mitchell and in response to public comments, HUD issued a final rule in which HUD required "good cause" for all lease terminations and non-renewals. 49 Fed. Reg. 12215 (March 29, 1984). This rule became known as the "endless lease" rule, because the lease

would continue in perpetuity unless the owner terminated the tenancy based upon a federal good cause ground. To offset the disincentive to owner participation caused by the endless lease, HUD defined "other good cause" in section 882.215 of its final rule to include "a business or economic reason for termination of the tenancy (such as the sale of the property, renovation of the unit, **desire to rent the unit at a higher rental**)." 49 Fed. Reg. 12233-12234 (March 29, 1984) (emphasis added). In issuing the 1984 final rule, HUD stated: "The substantive Federal good cause requirements under the statute and the HUD regulation *are binding* in the State judicial proceeding." *Id.* at 12235(emphasis added).

In 1986, to protect tenants, HUD precluded owners from citing to a business or economic reason for termination of tenancy during the first year of the lease. See 51 Fed. Reg. 16296 (May 2, 1986).

In 1987, Congress formally authorized a new Section 8 sub-program, called the voucher program, currently codified as amended, at 42 USC § 1437f(o). See Pub. L. 100-242, 101 Stat. 1815, (February 5, 1988). Originally authorized by Congress as a demonstration program in 1984, the voucher program was similar to the old certificate program but allowed families more housing choices.

In 1993, HUD published an interim rule that, among other things, combined tenant-based rental assistance under the certificate and voucher programs. See 58 Fed. Reg. 11292 (February 24, 1993). Section 982.307 of the interim rule gave

owners the right to terminate tenant-based tenancies in either program for a “business or economic reason” such as “the desire to rent the unit at a higher rental” after the first year of the lease. Id. at 11341-11342.

In 1995, after receiving about 400 comments on the 1993 interim rule (60 Fed. Reg. 34660 (July 3, 1995)), HUD issued a final rule. The final rule included 24 CFR §982.310, which like its predecessors, sections 882.215 and 982.307, defined “other good cause” to include, after the first year, a “business or economic reason,” such as “the desire to lease the unit at a higher rental.” Id. at 34704-34705. HUD noted commentators disliked its definition of “other good cause” because it created “legal loopholes” for owner eviction. Id. at 34674. Other commentators objected to the final rule on the ground it created a perpetual lease and discouraged owner participation. HUD, however, determined that the rule “reflects a reasonable balance between the interest of the assisted tenant and the owner within the context of the existing law.” On the one hand,” HUD explained, “the lease protects the tenant against arbitrary and ungrounded termination by the owner.” Id. “On the other hand,” HUD concluded, “the owner is not locked in but may terminate the tenancy for lease violation or other good cause.” Id. After the initial year, HUD noted, the family may terminate the tenancy simply upon giving the owner notice, and the owner may terminate the tenancy for other good cause—

specifically including a 'business or economic reason' for termination of the tenancy." Id.

1998: Congress merged the certificate and voucher programs to create the Section 8 Housing Choice Voucher Program.

In 1998, Congress made three relevant changes to Section 8. **First**, Congress merged the certificate and voucher programs into a single program, now known as the Section 8 Housing Choice Voucher Program, currently codified, as amended, at 42 USC §1437f(o). (See The Housing Quality and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat 2461, 2596-2604 (1998); 1998 H.R. 4194 (the "1998 Act")) **Second**, Congress re-enacted "other good cause" as a basis for lease termination under the new Section 8 Housing Choice Voucher Program by providing that "during the term of the lease the lease owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause." § 545 of the 1998 Act, currently codified at 42 USC §1437f(o)(7)(C). **Third**, Congress permanently repealed the endless lease rule. See § 549(a) of the 1998 Act. Because of this repeal, an owner need not show good cause to refuse to renew a Section 8 tenant's lease. Rickert & Associates v. Amy Law, 132 N.M. 687 (2002). In connection with these changes,

Congress expressly authorized HUD to issue regulations to implement the Section 8 Housing Choice Voucher Program. See § 559 of the 1998 Act.

1999: HUD defines “other good cause” for the Section 8 Housing Choice Voucher Program.

In 1999, pursuant to Congress’ express authorization to implement the Section 8 Housing Choice Voucher Program, HUD published a final rule which contained the current version of 24 C.F.R. § 982.310(d)(1)(iv), the regulation at issue in this case. 64 Fed. Reg. 56894 (October 21, 1999). The revised regulation allows for termination of tenancy for a “business or economic” reason (such as “the desire to lease the unit a higher rental”) but only after the initial term of the lease. See 24 C.F.R § 982.310(d)(2).

1999: Congress enacted the Enhanced Voucher Authority.

As early as 1987, Congress became concerned about the loss of affordable housing units due to owners prepaying their Section 236 mortgages and terminating their low-income rent restrictions. Congress has since sought ways to maintain affordable housing units following prepayment while simultaneously protecting the owner’s return on investment. (See e.g., § 202, The Emergency Low Income Housing Preservation Act of 1987; P.L. 100-204; 101 Stat. 1815 (1988)). In 1997, for instance, Congress required HUD to issue “enhanced vouchers” to eligible tenants occupying a property following termination of their project-based subsidies. See Section 108 of the Fiscal Year 1998 Departments of

Veteran Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, Pub. L. No. 105-65, 111 Stat. 1351 (1997). In this case, sixteen Tenants received enhanced vouchers when the Section 236 loan on the Morton Gardens complex was prepaid in 1998. Stipulation of facts ¶¶ 8-9 (ER 151-152). (The remaining six Tenants hold standard vouchers governed solely by 42 U.S.C. § 1437f(o)). Id.

In 1999, Congress permanently established enhanced vouchers assistance via the Enhanced Voucher Authority, currently codified as amended at 42 U.S.C. § 1437f(t). Pub. L. No. 106-74, §538, 113 Stat. 1122 (Oct. 20, 1999) (the “1999 Enhanced Voucher Authority”). Enhanced vouchers preserve affordable housing units, minimize tenant displacement and assure owners a reasonable return on their investment by automatically offering project-based residents voucher assistance when the project-based contract terminates. Residents can use their voucher at their current property or somewhere else. See 42 U.S.C. § 1437f(t)(1)(B). If they elect to remain at the current property, the voucher becomes enhanced, in the sense that the FMR rent standard *may* be higher than a standard voucher. Id. Also, unlike standard Section 8 vouchers, which are primarily targeted to very low-income households of no more than 50 percent of an area’s median income, enhanced vouchers are available to households with incomes up to 95% of the area median income. See 24 C.F.R. §§ 982.101 and 201(b)(v).

Relevant to this case is the opening sentence of the 1999 Enhanced Voucher Authority which provides “[e]nhanced voucher assistance under this subsection for a family **shall be voucher assistance under subsection (o)**” (except under certain circumstances none of which are relevant here). 42 U.S.C. §1437f(t)(1)(emphasis added). Because “other good cause” for termination applies to voucher assistance under subsection (o), the plain language of the 1999 Enhanced Voucher Authority makes it clear that the other good cause standard also applies to enhanced voucher assistance. Accordingly, both standard and enhanced voucher tenancies may be terminated for “other good cause,” previously defined by HUD to include the owner’s desire to obtain higher rent. 24 C.F.R. § 982.310(d)(1)(iv).

The LARSO

The LARSO, codified at L.A.M.C. § 151.01 *et seq.*, limits the grounds upon which a landlord may bring an action to recover possession of a rental unit to twelve grounds, none of which includes a “business or economic” reason such as the “desire to lease the unit at a higher rental.” *See* L.A.M.C. §§ 151.09A (1) through (12). As a result, and as the district court held, the LARSO comes into actual conflict with HUD’s regulation.

SUMMARY OF THE ARGUMENT

In 1981, Congress authorized Section 8 Owners to terminate tenancy for, among other things, “*other good cause*.” Congress, however, did not define other

good cause. In 1984, HUD defined "other good cause" to include a legitimate "business or economic reason" such as the owner's desire "to lease the unit for a higher rent." This definition is currently codified at 24 C.F.R. § 982.310(d)(1)(iv).

The district court erred for several reasons when it declared HUD's definition of "other good cause" invalid. **First**, Congress authorized HUD to define other good cause; and then, in 1998, approved of that definition, as applied to standard vouchers, by re-enacting "other good cause" as a basis for lease termination in the Section 8 Housing Choice Voucher Program. In 1999, Congress approved of HUD's definition as applied to enhanced vouchers by making such vouchers subject to Section 8 Housing Choice Voucher Program's rules. **Second**, HUD's regulation further complies with Congress' intent, because the regulation promotes for-profit, owner participation in the Section 8 program, participation which is needed to supply decent, economically-mixed housing to lower income families - a primary goal of Section 8. Furthermore, Congress intended for federal - local law - to set the substantive grounds for termination of Section 8 leases. **Third**, HUD's regulation is not arbitrary and capricious. HUD issued it after multiple, extensive notice-and-comment rule-making sessions. The regulation represents a reasonable accommodation of conflicting policies committed to HUD's care, namely: promoting owner participation in the Section 8 program and protecting tenants from arbitrary evictions.

However, if this Court strikes down HUD's regulation, this Court's ruling should be applied prospectively only. The regulation has been valid for more than twenty years and has been applied by owners to Section 8 tenancies around the country. To hold Owner liable here, as the district court did, for merely following this regulation, violates elementary fairness considerations, under which parties should have a chance to know what the law is and act accordingly.

The district court's injunction is also overbroad. This case only tested the validity of HUD's regulation. Any injunction must, therefore, be limited to enjoining Owner from terminating tenancies in order to raise rent. However, the district court's injunction impermissibly enjoins Owner from "failing to allow the Enhanced Voucher Plaintiffs to remain at Morton Gardens . . ." and further bars Owner "from evicting or terminating the tenancy or lease of all Plaintiff's without complying with all the requirement of the [LARSO]." Judgment Filed September 10, 2007 ¶ 2 (ER 64).

The district court's award of attorneys' fees is also erroneous. Before entry of judgment, Tenants submitted no authority or evidence to support such a fee claim. Tenants are not entitled to contractual attorney fees under section 1717 of the California Civil Code, as Tenants assert in their motion for attorneys' fees, because this action is not "an action on a contract." Moreover, one of Tenants' attorneys in this case, Legal Aid Foundation of Los Angeles, is a recipient of Legal

Services Corporation funding, and, hence, may not claim, collect or accept attorney fees under federal law.

ARGUMENT

I. STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed de novo "to determine 'whether the district court correctly applied the law and if, viewing the evidence in the light most favorable to the non-moving party, there are no genuine issues of material fact.'" Gov't of Guam v. U.S., 179 F.3d 630, 632 (9th Cir. 1999) (citing Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998)).

II. HUD DID NOT EXCEED ITS AUTHORITY WHEN IT ISSUED 24 C.F.R § 982.310(d)(1)(IV).

Under the Supremacy Clause, Article VI, clause 2 of the U.S. Constitution, "[t]he statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof." City of New York v. FCC, 486 U.S. 57, 64 (1988). This rule is known as conflict preemption.

In this case, the district court held section 151.09A of LARSO actually conflicts with 24 C.F.R. § 982.310(d)(1)(iv), because it "takes away a right specifically granted by the HUD regulation." Order Granting Motion for Summary Judgment ¶ 33 (ER 51). But rather than finding conflict preemption, the district court, applying Chevron, found HUD exceeded its authority in defining "other

good cause” to include a “business or economic” reason such as “the desire to obtain a higher rental.” Id. at 34-41 (ER 52-59). This conclusion is erroneous.

Chevron requires a two-part analysis. Under the first part, a court must look to the language and history of the Section 8 legislation to determine whether Congress has already addressed the meaning of “other good cause.” Chevron 467 U.S. at 842-43. Under the second part, if the first part is not determinative, a court must examine 24 C.F.R. § 982.310(d)(1)(iv) to see if it is “arbitrary or capricious in substance, or manifestly contrary to the statute.” See United States v. Mead, 533 U.S. 218, 227 (2001) (citing Chevron 467 U.S. at 837); see also Zurich Am. Ins. Co. v. Whittier Properties, 356 F.3d 1132, 1137 n25 (9th Cir. 2004). This Court should uphold HUD’s regulation under both parts of the Chevron test, because: (1) Congress specifically ratified HUD’s definition of “other good cause”; (2) HUD’s regulation is not “manifestly contrary” to Congressional intent; and (3) HUD’s regulation is not arbitrary or capricious.

A. **Congress has addressed the issue before this Court, because Congress authorized HUD to define “other good cause” and then ratified HUD’s definition as applied to both standard and enhanced vouchers.**

1. **Congress authorized HUD to define “other good cause.”**

As explained earlier, Congress empowered HUD with broad authority to implement federal housing programs. See 42 U.S.C. § 3531. With respect to Section 8 leases, Congress expressly directed HUD to establish the terms of the

Section 8 tenancy. For example, 42 U.S.C. §1437f(d)(1)(B)(i), states: “the lease between the tenant the owner shall be for at least one year ... *and shall contain other terms and conditions specified by the Secretary.*” (emphasis added).

Likewise, 42 U.S.C. §1437f(o)(7)(F) allows the lease to contain “any addenda required by the Secretary to set forth the provisions of this subsection.” Moreover, while Congress authorized Section 8 lease terminations for “other good cause” under §§ 1437f(d)(1)(B)(ii) and 1437f(o)(7)(C), Congress did not define “other good cause.” By declining to define “other good cause,” Congress implicitly authorized HUD to define the term. Chevron, 467 U.S. at 843-44 (when Congress leaves a gap for an agency to fill, there is an implicit delegation of authority to the agency). Congress further specifically instructed HUD to engage in notice-and-comment rulemaking as needed to implement the Section 8 Housing Choice Voucher Program. See The 1998 Act, § 559. Acting pursuant to this express authorization, HUD issued the regulation at issue in this case, which gives owners *nationwide* the right to terminate their section 8 leases in order to obtain higher rent. 24 C.F.R. § 982.310(d)(1)(iv).

2. Congress ratified HUD’s definition of “other good cause” as applied to both standard and enhanced vouchers.

It is well-established that “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” Lorillard v. Pons, 434 U.S. 575,

580-81 (1978) (citations omitted). See also Bragdon v. Abbott, 524 U.S. 624, 645 (1998). So too, where “Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.” Lorillard, 434 U. S. at 580-81.

Congress ratified HUD’s definition of “other good cause” by re-enacting “other good cause” as a basis for tenancy termination in the 1998 Act. As explained earlier, the 1998 Act created the Section 8 Housing Choice Voucher Program and restated the provision “that during the term of the lease, the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause.” 42 U.S.C. 1437f(o)(7)(c). Repetition of the phrase “other good cause “ into the Section 8 Housing Choice Voucher Program indicates Congress intended to incorporate HUD’s prior definition of the term, which included “business or economic” reasons such as the “desire to lease the unit at a higher rental.” 24 C.F.R. § 982.310(d)(1)(iv).

Congress further ratified and incorporated HUD’s definition of “other good cause” into the 1999 Enhanced Voucher Authority. As explained earlier, Congress made enhanced vouchers subject to the Section 8 Housing Choice Voucher Program established by the 1998 Act-which included the “other good

cause” basis for lease termination. Because HUD had already defined “other good cause” to include a “business or economic reason” including the “desire to lease the unit at a higher rental,” Congress, consequently, incorporated that definition into the 1999 Enhanced Voucher Authority.

Moreover, HUD’s definition of “other good cause” to include a “business or economic reason,” including the desire to obtain a higher rental, has remained in place since 1984 without any modification or interference by Congress. A long-standing and consistent interpretation by an agency is often given greater weight by the courts, especially where Congress leaves the regulation in place for an extended period of time. See, e.g., General Electric Co. v. Gilbert, 429 U.S. 125, 142-43 (1976). In this case, Congress repeatedly reviewed and modified Section 8 while leaving HUD’s definition intact. Earlier iterations of the rule were at issue in federal district court litigation. See Mitchell, 569 F. Supp. 701 (N.D. Cal. 1983); 51 Fed. Reg. 12215 (March 29, 1984). Such litigation indicated judicial approval that good cause could include termination for a business or economic reason following the initial year of a lease. Congress took no action to legislate otherwise, and such Congressional inaction indicates that Congress accepted HUD’s definition of phrase. See Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 133 n.4 (2002) (Congressional intent inferred from fact that Congress,

“presumably aware” of a HUD interpretation, made no change to the Section 8 statute).

B. HUD’s regulation is not “manifestly contrary” to Congressional intent but is consistent with it. The district court erred in ruling to the contrary.

Because Congress specifically ratified HUD’s definition of “other good cause” as applied to standard and enhanced vouchers, HUD’s definition expresses Congressional intent and is consistent with it. HUD’s definition is also consistent with Congressional intent for two additional reasons. First, HUD’s definition is consistent with Congress’ intent to promote for-profit, owner participation in the provision of decent, economically-mixed, affordable housing. Second, HUD’s definition is consistent with Congressional intent, even if the definition conflicts with local law, because Congress intended for federal—not state or local law—to set substantive requirements for Section 8 lease terminations.

1. Congress intended for HUD to promote for-profit owner participation in the Section 8 program, which is essential to promote decent, economically mixed housing—a primary goal of Section 8.

As explained earlier, initial federal housing programs focused on government-owned housing projects, which concentrated low-income families together in tight geographical areas. Later, Congress sought, and specifically instructed HUD, to “encourage private enterprise to serve as large a part of the Nation’s total housing and urban development needs as it can.” 42 U.S.C.

§ 3532(b). More specifically, with Section 8, Congress sought to disperse low-income housing into decent, privately-owned structures, resulting in economically-mixed housing. See 42 U.S.C. §1437f(a) (Section 8's purpose is to aid "low-income families in obtaining a decent place to live and of promoting economically mixed housing. ..."). Economically-mixed housing will not happen without private participation, and private participation will not occur unless private owners get a fair rate of return on investment. As HUD acknowledges, "the ability of the Section 8 Existing Housing program to provide a broad choice of housing opportunities to program families depends completely on the voluntary choice of private owners to rent their units under the program." 49 Fed. Reg. 12215 (March 29 1984).

By its very nature, the Section 8 program limits investment return. Every year Section 8 owners must request rent increases from their PHA, which must be supported by market comparables. See 24 C.F.R. § 982.519(a) and (b)(6), and § 982.507(c). If approved, the rent increase is limited to the lesser of (1) the amount requested (§ 519(b)(iii)); (2) market comparables as determined independently by HACLA (§ 519(b)(ii)) or; (3) the percentage increase allowed pursuant to the Section 8 annual adjustment factor (§ 519(b)(i)). In cities with rent control, HUD further permits the local housing authorities to limit during the

tenancy the percentage rent increase to the local rent control cap. 24 CFR

§ 982.509.

Congress itself has identified below-market rents as a persistent problem within the Section 8 program. As Congress noted, "Despite its best efforts, HUDs FMRs do not always accurately reflect true market rents for certain areas and submarkets within broadly defined areas. *In fact, the description most often made of FMRs is that they are neither fair nor market.*" H. Rep. No. 104-461, at 100-101 (1996) (emphasis added). The fact is FMRs can never guarantee fair market rents as . . ."within any market area, rents vary because of the unit's age, quality of construction and maintenance, location, and differences in amenities. Unless, and perhaps even if, an area were defined as a few square blocks, rent variations would remain and could be significant." *Id* at 102. Therefore, HUD's decision to provide owners with the ability to protect themselves from low FMRs reasonably addresses a specific concern expressed by Congress as existing within the Section 8 program.⁴

Congress and HUD both understand that protecting owners from below-market rents is fundamental to encouraging owner participation in the Section 8 program. As HUD stated, "The explicit regulatory statement that a business or

⁴ Not surprisingly, PHA's will not approve increases that they cannot fund, and their funding, which comes from Congressional appropriations through the PHA's annual contributions contracts with HUD, is limited.

economic reason is good cause for termination of tenancy should help PHAs in responding to owner concern, as described in the public comment.... " 49 Fed. Reg. 12215, 12234 (March 29, 1984). Obviously, owners are more likely to join a housing program if they know they will not be "locked in" and forced to accept below market rents in perpetuity. As one court has noted: "Many landlords would no doubt be reluctant to join a program from which there was, in reality and existentially, no exit. Such a result would certainly not be consistent with Congress' intent in creating such a program." Graoch Associates v. Louisville and Jefferson County Metro Human Relations Commission, 430 F. Supp. 2d 676 at 678 (W.D. KY 2006).

Protection from low FMRs is important for another reason. Section 8 owners must maintain units in accordance with federal housing quality standards. See 24 C.F.R. § 982.401. When a single property contains multiple, below-market Section 8 leases, cash flow problems can cripple investment, leaving insufficient funds to pay employees, cover operating costs, and maintain the property. A regulation such as 24 C.F.R. § 982.310(d)(1)(iv) addresses the problem of inadequate rents, which can make it difficult, if not impossible, to maintain "decent affordable housing" as required by federal law.

For all these reasons, HUD's decision to allow owners to terminate Section 8 leases for a "business or economic" reason such as the "desire to obtain a higher

rental” is consistent with Congress’ intent to promote for-profit, owner participation in the provision of decent, economically-mixed, affordable housing. As explained below, HUD’s definition is further consistent with Congressional intent, because Congress intended for federal—not state or local law—to set substantive requirements for Section 8 leases.

2. Congress intended for federal—not state or local law—to set substantive requirements for Section 8 lease terminations and to pre-empt conflicting state or local laws.

Three times Congress considered proposed changes to the Section 8 statute which would have made Section 8 lease terminations subject to the substantive requirements of local law. Three times Congress rejected these proposals in favor of nationwide, federal-eviction standards. Thus, Congress intended for federal – not state or local law – to set the substantive requirements for terminating Section 8 leases.

In 1981, for example, Congress rejected a Senate proposal which would have made Section 8 evictions subject to both the procedural and *substantive* requirements of local law. The Senate proposal was intended to “clarify that the procedural and substantive rights of a tenant of Section 8 existing housing to occupancy of a particular unit are determined by the terms of the lease, in accordance with State and local law.” S. Rep. No. 97-139, 1981 U.S.C.C.A.N. 396 at 552. However, the Conference Committee deleted the preceding language and

instead replaced it with the following: “the owner shall not terminate the tenancy except for serious or repeated violation of the lease, applicable state, local or federal law, or for other good cause. H.R. conf. Rep. 97-208, 1981 U.S.C.C.A.N. 1010 at 1053-1054 (emphasis added). Thus, when Congress was faced with the initial choice between local law and federal eviction standards, Congress chose the latter.

Likewise, in 1998, Congress rejected two more bills which would have subjected the substantive requirements for termination of Section 8 leases to state or local law. The first bill, H.R. 2, would have eliminated the federal good cause grounds all together and replaced them with the applicable state law.⁵ It was not enacted. The second bill, S. 462, would have subjected Section 8 evictions to the same substantive laws applicable to non-assisted tenants at the property. As explained by Sen. Rept. 105-21, the bill would have required owners to terminate tenancy of assisted tenants “on the same basis and in the same manner as they would for unassisted tenants in the property.” Sen. Rep. 105-21, 1997 WL 282462 at 37. As the Senate report stated, “Lease terminations would have to comply with state and local law.” Id. And “. . . a section 8 tenant would have access to

⁵ “SEC. 325. TERMINATION OF TENANCY. Each housing assistance payments contract shall provide that the owner shall conduct the termination of tenancy of any tenant of an assisted dwelling unit under the contract in accordance with applicable State or local laws, . . .” H.R. 2, The Housing Opportunity and Responsibility Act of 1997.

remedies under State, tribal, and local law on the same basis as any other tenant.”

Id. Considering the above proposals to be a *change* to existing statutory requirements, proponents of S. 462 stated: “A [] critical step, which would require statutory changes, would be to allow owners to maintain the right to terminate Section 8 tenancies the same way they terminate other tenancies.”⁶ However, Congress did not adopt S. 462. Moreover, it **has never adopted** a requirement that owners terminate tenancy of assisted tenants “on the same basis and in the same manner” as unassisted tenants. Therefore, Congressional intent has remained consistent: federal – not state or local law – sets the substantive requirements for Section 8 lease terminations. See Rucker, 535 U.S. at 133 n.4 (Congressional intent may be inferred from bills rejected by Congress). And by setting nationwide, federal terminations standards for Section 8 leases, Congress left no doubt that a federal objective was at stake.

⁶ Abt Consulting Report at 1186, reprinted in *Downsizing Government and Setting Priorities of Federal Programs: Hearing Before Subcommittees of the Committee on Appropriations, U.S. House of Reps., 104th Cong., 1st Sess. (Feb 9, 1995)* (Testimony of Ron Rather).

When a federal objective is at stake, courts are to assume that Congress intends for federal law to prevail over *conflicting* state or local laws. See Geier v. Honda Motor Co., 529 U.S. 861, 873 (1999). In Geier, the United States Supreme Court refused to interpret a savings clause to bar ordinary conflict preemption principles.⁷ As the court stated,

Why, in any event, would Congress not have wanted ordinary preemption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates....Id. at 871.

Many courts have already recognized the existence of federal objectives behind Section 8 lease termination regulations and the pre-emptive effect of those regulations upon conflicting local laws. For example, in Scarborough v. Winn Residential, 890 A.2d 249 (D.C. Cir. 2006), the District of Columbia Court of Appeals found that a provision in the D.C. Code came into actual conflict HUD

⁷ In contrast to Geier, there is not a savings clause at issue in this case. Moreover, the district court has done exactly what Geier warned against – allowing local law to impose a legal duty on Section 8 owners in direct conflict with federal housing regulations. The district court’s decision to strike down HUD’s regulation with respect to “standard” vouches relies exclusively upon the existence of a local rent-control ordinance. But it is inappropriate to judge the validity of the HUD regulation by reference to the LARSO. After all, if the HUD regulation is valid in a jurisdiction with no conflicting local laws, it must be equally valid in a jurisdiction where an actual conflict exists. To hold otherwise, as the district court did, violates the Supremacy Clause.

regulations giving owners the right to evict for criminal activity. Other courts have reached similar results. See Boston Hous. Auth. v. Garcia, 449 Mass. 727 (2007); Ross v. Broadway Towers, 228 S.W.3d 113 (Tenn. 2006); Oakwood Plaza Apartments v. Smith, 352 N.J. Super. 467, 474 (2002). The same reasoning applies to this case.

3. The district court erred when it found the 1999 Enhanced Voucher Authority shows Congress intended enhanced voucher tenants to have the perpetual the right to remain in their units in the face of rent increases desired by owners.

According to the district court, Congress barred an owner from terminating an enhanced voucher tenancy in order to obtain higher rents, because 42 U.S.C. § 1437f(t)(1)(B) “provides enhanced voucher tenants a right to remain when the rent is raised.” Order Granting Summary Judgment ¶ 17 (ER 35). The language relied upon by the court to invalidate HUD’s regulation reads: “[T]he assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event ... “ 42 U.S.C. § 1437f(1)(1)(B).

The district court’s finding is wrong. The phrase “may elect to remain in the same project” addresses the circumstances under which an enhanced voucher tenancy is created upon the date of the eligibility event—not the circumstances under which the owner may later terminate tenancy. This case concerns the termination of enhanced voucher tenancies *ten years after* their creation.

Furthermore, the 1999 Enhanced Voucher Authority does not state the length of time a tenant may remain in his or her unit. Nor does the statute modify in any way the termination standards set forth in 42 U.S.C. §1437f(d)(1)B(ii) or § 1437f(o)(7)(C), 24 CFR § 982.310, which were incorporated by reference into the 1999 Enhanced Voucher Authority.

To the contrary, examination of the text reveals that Congress did not intend enhanced voucher holders to have indefinite lease terms. For example, the statute, in 42 U.S.C. § 1437(t)(1)(A), expressly provides that enhanced vouchers shall, subject to certain exceptions not relevant here, be treated like standard vouchers under 42 U.S.C. §1437f(o). For standard vouchers, Section 8 limits lease terms to one year or the HAP contract's term, whichever is shorter. 42 U.S.C. § 1437f(d)(1)(B)(i). Because the HAP contract term cannot exceed one hundred and eighty months, lease terms are finite. See 42 U.S.C. § 1437f(d)(2)(A). Due to the "endless lease" rule's repeal, leases do not automatically renew, and as far as federal law is concerned, an owner may choose not to renew for any reason. See, e.g., Rickert & Assocs. v. Amy Law, 132 N.M. 687, 691 (2002) (landlord need not show good cause to refuse to renew the tenant's lease under the Section 8 housing program). Given this statutory framework, one cannot reasonably infer intent on

the part of Congress to force owners to continue to participate if the enhanced FMR falls too far below market.⁸

Properly interpreted, the 1999 Enhanced Voucher Authority allows a project-based resident to stay in his or her unit upon the date of an eligibility event, such as the prepayment of the Section 236 loan as happened in this case. After a tenant “elects to remain” under 42 U.S.C. § 1437f(t)(1)(B), the PHA must recalculate the contract rent for the unit and enter into a new HAP contract, while the owner and tenant must enter into a new lease. The new lease must generally be for at least one year. See 42 U.S.C. § 1437f(o)(7). The enhanced voucher remains in place until: (1) the tenant moves; (2) the owner terminates the lease, under 42 U.S.C. § 1437f(o)(7)(C), for serious or repeated lease violations, violations of local, state or federal law, or “other good cause”; or (3) the owner terminates the lease, under 42 U.S.C. § 1437f(o)(7)(D), for prohibited criminal activity. See Jeanty v. Shore Terrace Realty Ass’n, 2004 WL 1794496 at 4 (landlord must accept the

⁸ While an enhanced voucher allows for FMRs above those permitted for standard vouchers, enhanced vouchers do not guarantee owners actual market rents or even a higher rent than a standard voucher. See 42 U.S.C. § 1437t(1)(B) (enhanced voucher rent still limited to “reasonable” standard). Over the years, rents paid by an enhanced voucher can fall below market. Moreover, owners forced to accept enhanced vouchers incur the same costs related to the Section 8 program, such as the costs associated with maintaining properties in accordance with HUD housing quality standards (24 C.F.R. § 982.401), annual inspections (24 C.F.R. § 982.405), and extra paperwork and added training costs. As with standard vouchers, these costs can add up to the point where participation is no longer economically feasible. When a single property contains multiple below market enhanced voucher contracts, cash flow problems can cripple an investment, leaving

enhanced voucher until the tenant moves or the lease is terminated for good cause).
See also HUD's PIH Notice 2001-41 ("the owner may not terminate tenancy of a family that exercises its right to remain except for serious or repeated lease violation or other good cause"). (HA), page 25, issued November 14, 2001. Because 24 C.F.R. § 982.310(d)(1)(iv) provides that "other good cause" shall not include a "business or economic reason" during the initial lease term, HUD's regulation insure that tenants who elect to remain in their unit may not be forced out of their units for a "business or economic reason" until after expiration of the original lease term.

When the language of a statute is clear, courts must construe statutes in accordance with their plain meaning. See Caminetti v. United States, 242 U.S, 470 (1917). Given the clear language of the 1999 Enhanced Voucher Authority, this Court should not engraft a judicially created exception into the statute.

4. The district court erred when it found Congress intended to treat assisted tenants the same as unassisted tenants.

In invalidating HUD's regulation, the district court stated "Congress could not have intended for assisted tenants to be less well-off than unassisted tenants in rent control areas." Order Granting Summary Judgment ¶ 39 (ER 57). This is at best a guess on the district court's part. Congress has never codified a requirement that HUD guarantee assisted tenants the same eviction protections as unassisted

insufficient funds to maintain the property and pay employees.

tenants. As discussed *Supra* at 28-29, Congress rejected a bill (S. 462) that would have required owners to terminate the lease of an assisted tenant "on the same basis and in the same manner as they would for unassisted tenants in the property." Thus, the district court's statement that *Congress could not have intended for assisted tenants to be less well-off than unassisted tenants* is not supported by the legislative history.

Moreover, Section 8 tenants are different by law than their unassisted neighbors. They are subject to Congressional standards for termination that do not apply to their neighbors, such as termination for certain criminal activity. (See, e.g., 24 C.F.R. §§ 982.310(c)(2)(ii)(A) - termination for fleeing to avoid prosecution, and (b) termination for violation of parole). As explained earlier, courts have interpreted the federal criminal eviction standards to take away rights that Section 8 tenants would have otherwise had under state or local law. Tenants also receive benefits their unassisted neighbors do not enjoy. Tenants here have enjoyed subsidized housing for years, and in some cases, decades. To keep their benefits, they must relocate to another complex. This is part of being a Section 8 tenant. Moreover, Tenants' vouchers are portable and, with HACLA's approval, they may remain intact when they find alternative housing, inside or outside of Los Angeles. § 982.353(b). In this way, Tenants carry with them a benefit that makes them ***better off*** than their non-assisted neighbors in Los Angeles.

5. The district court erred when it found “other good cause” was intended to “*minimize the disturbance of the private landlord tenant relationship.*”

The district court also found “the congressional record on the “other good cause” provision” demonstrates a continuing desire to “minimize the disturbance of the private relationship under state law between the unit owner and the tenant . . .” Order Granting Summary Judgment ¶¶ 37-38 (ER 55-56). The language cited by the court comes from a 1981 Senate Report explaining section 322-5(e) of Senate Bill 1377: “*Section 322-5(e) is intended to minimize disturbances of the private market under State law between the owner and the tenant. . .*” S. Rep. No. 97-139, 1981 U.S.C.C.A.N. 396 at 552. But that bill did not contain a federal “other good cause” provision. Rather, section 322-5(e) sought to amend Section 8 so that local law would govern the “substantive” occupancy rights of Section 8 tenants. *Id.* As explained earlier, Congress rejected the Senate’s proposed language in favor of federal statutory eviction grounds. Congress, therefore, felt it more important to provide nationwide eviction grounds than “*minimizing disturbances of the private market.*”

The fact is Congress never codified a requirement that the Section 8 program operate *as much like the private market as possible*. Every citation by the district court in support of this position comes from the legislative history of amendments

that were not adopted by Congress and cannot assist the Court.⁹ See Rucker, 535 U.S. at 133 n.4. Moreover, the federal grounds for eviction were never intended to *minimize disturbances of the private market*. Rather, Congress enacted federal good cause to provide owners and tenants with uniform tenancy standards so as to promote owner participation and protect tenants. Congress chose this option instead of *minimizing disturbances of the private market*. Therefore, the fact that HUD's business regulation makes the program operate *less like unassisted tenancies* does not conflict with Congressional intent. That result is rather a natural by-product of Congressional policy favoring federal eviction standards for all Section 8 tenants regardless of jurisdiction.

6. The district court erred when it found 42 U.S.C. §1947(0)(10) expresses a Congressional intent to preserve rent control.

According to the district court, 42 U.S.C. § 1947f(o)(10)(C) creates a "Congressional understanding" to preserve local rent control. Order Granting Summary Judgment ¶ 40 (ER 58). This is not true. Subsection (10)(C) does nothing more than provide instruction to HUD on how to calculate rents in rent controlled jurisdictions. The subsection reads, in pertinent part,

⁹ First, the district court cites to § 322-5(e) of Senate Bill 1377, which was not adopted. Order Granting Summary Judgment ¶ 38 (ER 56). Second, the court cites to Senate Report 105-21, which accompanied Senate Bill. 462, as evidence of Congressional intent to treat assisted tenants the same as unassisted tenants. Id. However, Senate Bill. 462 was not enacted, and as discussed earlier, Congress never adopted language requiring that the substantive rights of assisted tenants be the same as unassisted tenants.

(A) The rent for dwelling units for which a housing assistance payment contract is established under this subsection shall be reasonable in comparison with rents charged for comparable dwelling units in the private, unassisted local market.

.....
(C) If a dwelling unit for which a housing assistance payment contract . . . is exempt from local rent control provisions during the term of that contract, the rent for that unit shall be reasonable in comparison with other units in the market area that are exempt from local rent control provisions.

This language shows Section 1437f(o)(10) protects owners from artificially low rents in rent-controlled jurisdictions. It does this by keeping the rent calculations for non-rent-controlled units from being skewed by comparables generated by rent-controlled units. In this sense, Section 1947f(o)(10) promotes the same goal as HUDs business regulation - protecting owners from below-market rents. This section is not, as the district court found, evidence of Congress' intent to deny Section 8 owners the right to exit the Section 8 program in order to seek higher rents.

Furthermore, the district court's finding that "*HUD cannot pre-empt local eviction controls, yet leave rent control in place*" is simply wrong. Order Granting Summary Judgment ¶ 39 (ER 57). Here the district court failed to differentiate between rent control and eviction control. For example, in California, the cities of Los Gatos and San Jose have rent control but no eviction control.¹⁰ San Diego and

¹⁰ See San Jose Municipal Code § 17.23 *et seq.*, and The Los Gatos Town Code § 14.80.010 *et seq.*

Glendale, on the other hand, have enacted eviction control but not rent control.¹¹ Other municipalities, such as Los Angeles, combine both. See L.A.M.C. § 151 *et seq.* Thus, while rent control and eviction controls can be combined, one is not dependent upon the other. Moreover, there is a place for rent control during a Section 8 tenancy. Thus, for instance, in cities with rent control, HUD permits the local housing authorities to tie the percentage rent increase to the local rent control increase *during the term of the Section 8 tenancy.* 24 C.F.R. § 982.509.

7. The district court erred in finding HUD's regulation contrary to Congressional intent, because the district court considered only certain supposed Congressional goals and ignored others.

The district court's analysis as to why HUD's regulation is contrary to Congressional intent is flawed for another reason. As explained above, Congress intended Section 8, like much legislation, to accomplish many goals, including: providing affordable housing for low- and moderate-income tenants; creating decent, economically-mixed housing and encouraging private, for-profit owner participation in the nation's housing programs. The district court selected other Congressional goals purportedly at work in Section 8, such as the desire to allow enhanced voucher tenants to remain in leaseholds indefinitely, to treat assisted tenants the same as unassisted tenants, to "minimize the disturbance of the private landlord tenant relationship," and to preserve rent control. Even if these were true

¹¹ See San Diego Municipal Code § 98.0701 *et seq.*, and Glendale Municipal Code

Congressional goals-which, as explained above, they are not-HUD's regulation still represents a reasonable accommodation of the policies charged to its care.

This is a classic case where an agency was charged by Congress with balancing competing policies. The district court did not like the balance struck by HUD, and decided to invalidate HUD's regulation in order to tip the balance in Tenants' favor. Yet, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by ... an agency." Chevron, 467 U.S. at 843. As the United States Supreme Court has stated, if the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." Id. at 845 (quoting United States v. Shimer, 367 U.S. 374, 382, 383 (1961)). See also Resident Councils v. Leavitt, 500 F.3d 1025, 1031 (9th Cir. 2007) ("It is well established that legislative history which does not demonstrate a clear and certain congressional intent cannot form the basis for enjoining regulations").

Because, as explained below, HUD's interpretation of "other good cause" is not "arbitrary and capricious" but rather represents a reasonable accommodation of conflicting policies charged to its care by Congress, the regulation is binding upon the courts.

C. **HUD's regulation is not arbitrary and capricious and is, therefore, binding.**

Because HUD is the agency charged with administering the Section 8 Housing Choice Voucher Program, its interpretation of "other good cause" is entitled to substantial deference. Chevron, 467 U.S. at 844. Under Chevron, even if the court does not find Congress addressed the precise issues presented by this appeal, HUD's regulation must be enforced so long as it was not promulgated in an arbitrary and capricious fashion. See, e.g., United States v. Mead, 533 U.S. 218, 229 (2001) (citing Chevron at 842-845). See also Zurich Am. Ins. Co. v. Whittier Properties, 356 F.3d 1132, 1137 n25 (9th Cir. 2004)

Section 982.310(d)(1)(iv) is binding here, because that regulation is not arbitrary or capricious. HUD followed the Administrative Procedure Act and engaged in an extensive rulemaking process, on multiple occasions between 1982 and 1999. During this process, HUD published interim rules, solicited comments, held public forums, and received numerous comments from local public-housing authorities, state-housing agencies, organizations representing local public housing authorities, organizations representing women who are victims of domestic violence, legal-service organizations, advocates for persons with disabilities, low-income-housing advocates, and various other organizations and individuals. See e.g., 49 Fed. Reg. 12215 (March 29, 1984). HUD considered these comments in a detailed and reasoned fashion.

The final regulation at issue is carefully-crafted, reasonable balance between competing interests of the assisted tenant and the owner—interests represented during the rulemaking process and specifically entrusted by Congress to HUD. As explained earlier, HUD's regulation promotes owner participation in the Section 8 program which is essential to promote decent, economically mixed housing. Moreover, the regulation also provides sufficient protections to tenants in both rent controlled and non-rent controlled jurisdictions.

HUD is acutely aware of its duty to protect tenants from arbitrary evictions. See e.g., 49 Fed. Reg. 12215 March 29, 1984 (“the Department has decided that the final rule will not provide or permit any exemption of the owner from the good cause requirement for termination of tenancy”). Accordingly, HUD took appropriate steps to protect tenants when it drafted 24 C.F.R. § 982.310(d)(1)(iv).

Substantively, the regulation protects tenants during their lease's first term from termination for a “business or economic” reason, including “the desire to lease the unit at a higher rental.” Id. (“During the initial lease term, the owner may not terminate the tenancy for ... a business or economic reason”). Secondly, in eviction proceedings, the owner must prove a legitimate “business or economic reason” for termination. So, if the FMR is a true, fair market rent, the owner cannot rely upon the HUD regulation as a ground to evict based on the desire to obtain a higher rental. As HUD explains, “Eviction for good cause is not a

'loophole' ... but is a ground for eviction specifically provided in the statute." 60 Fed. Reg. 34660 (July 3, 1995). Moreover, and perhaps most importantly, if the owner terminates for a "business or economic" reason, the tenant may use its voucher, which is portable (*See* 42 U.S.C. §1437f(r)), to rent from another participating owner, even one located outside the Los Angeles area.¹²

Procedurally, HUD requires that no tenant be removed from the premises without a state court eviction order. 24 C.F.R. § 982.310(f). HUD also requires written notice be given to the tenant specifying the grounds for termination before the commencement of the eviction action (§ 982.310(e)(i)), and that the local housing authority be given a copy of the termination notice. (§ 982.310(e)(ii)). Finally, HUD evaluated the procedural due process protections of the state-court, eviction proceedings and found them sufficient to protect Section 8 tenants. *See Directive Number: GCH-0025; PH Due Process Determination, 1991* ("HUD finds that the requirements of California law governing an action for unlawful detainer in the superior, municipal and justice courts include all of the elements of basic due process, as defined in 24 C.F.R. § 966.53(c)").

¹² In contrast, in the project-based voucher program, HUD regulations specifically provide that "good cause" does not "include a business or economic reason." 24 C.F.R. § 983.257. The rationale for the distinction is that in project-based assistance, the subsidy is "attached" to the unit, so that tenants who move from the project-based unit lost the subsidy. But in tenant-based assistance, the subsidy follows the tenant. PHAs have long-recognized that less stringent protections against termination of tenancy are appropriate in the tenant-based program for this reason. *See* 47 Fed. Reg. 33597 (August 3, 1982).

All of these protections are written into 24 C.F.R. § 982.310(d)(1)(IV) and are available to every tenant, including those tenants in rent-controlled jurisdictions. The substantive and procedural rights made available by HUD to tenants demonstrates the agency did not favor owner participation to the “*complete exclusion*” of protecting tenants as asserted by the district court. Order Granting Summary Judgment ¶ 36 (ER 54).

Based upon the above, it simply defies logic to hold HUD’s decision to allow owners to seek higher rents in the non-subsidized market was manifestly contrary to statute. To the contrary, the regulation promotes policies Congress deems critical to the success of the Section 8 program, including encouraging owner participation, protecting owners from low FMRs and protecting tenants from arbitrary no cause evictions. Given the importance Congress places on these issues, 24 C.F.R. § 982.310(d)(1)(iv), represents far more than a mere a plausible interpretation of the relevant Section 8 legislation. It therefore, must be upheld.

III. IF THIS COURT DECIDES HUD EXCEEDED ITS AUTHORITY, THAT DECISION SHOULD BE APPLIED PROSPECTIVELY.

If, this Court decides HUD exceeded its Congressionally-delegated authority, this Court must then decide whether to apply its ruling retroactively. Retroactivity, however, “is not favored in the law.” Bowen v. Georgetown

University Hospital, 488 U.S. 204, 208 (1988). To the contrary, there is a strong presumption against retroactive application. See, e.g., Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (declining to retroactively apply a federal statute that effectively created “a new cause of action” under federal law). This presumption is deeply rooted in our jurisprudence and derives from elementary fairness considerations, under which individuals should have a chance to know what the law is, to act accordingly, and to have the legal effect of conduct assessed under the law that existed when the conduct took place. Landgraf, 511 U.S. at 265-76; See also Hernandez De Anderson v. Gonzales, 497 F.3d 927 (9th Cir. 2007).

The Ninth Circuit, in deciding whether judicial decisions are to be applied retroactively, uses the following test:

“First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed Second, it has been stressed that ‘we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. . . . Finally, we have weighed the inequity imposed by retroactive application’” George v. Camacho, 119 F.3d 1393, 1399-400 & n.9 (9th Cir. 1997), overruled on other grounds by United States v. Sadler, 480 F.3d 932 (9th Cir. 2007), quoting Chevron Oil v. Huson, 404 U.S. 97, 106-107 (1971)).¹³

¹³ Chevron v. Huson also illustrated a principle known as “selective prospective” adjudication, because the Supreme Court declined to retroactively apply a rule of law issued and that had been applied retroactively in a prior, separate case. The “selective” adjudication aspect of Chevron v. Huson no longer remains good law following the Supreme Court’s decision in Harper v. Virginia Dep’t of Taxation,

Consideration of these factors leads to only one conclusion: if HUD exceeded its authority in promulgating 24 C.F.R. § 982.310(d)(1)(iv), a judicial decision to that effect should apply prospectively. **First**, no one could have foreshadowed a decision invalidating HUD's regulation. This case concerns an issue of first impression as well as a federal regulation that owners around the country have relied upon for the past 20 years. The regulation does not on its face conflict with the statute it implements. Moreover, Congress, presumably aware of HUD's regulation, never took any action to override it. Neither has any other court. In fact, cases such as Mitchell, 569 F. Supp. 701 (N.D. Cal. 1983), suggest that HUD appropriately interpreted good cause to include "business or economic" reasons.

Second, if this Court invalidates the regulation retroactively, then such a decision will apply retroactively to *everybody*. See n. 13 supra. Thus, owners who recently terminated Section 8 leases for a "business or economic" reason and whose tenants voluntarily vacated their units might find themselves subjected to civil liability. Owners who terminated enhanced voucher tenancies may be held

409 U.S. 86 (1993). While the Chevron v. Hudson test was originally applied on a case by case basis, now if the new rule of law is applied in the case in which it was announced, it must be applied to all pending cases. See Ditto v. McCurdy, 510 F.3d 1070 (9th Cir. 2007); Crowe v. Bolduc, 365 F.3d 86, 93-94 (1st Cir. 2004); Glazner v. Glazner, 347 F.3d 1212, 1218 (11th Cir. 2003). Discretion still remains, however, not to apply the new rule to the parties in the case in which the rule is first announced.

liable for violating the Enhanced Voucher Authority even in the absence of a local rent control law. Such a punitive effect on owners would not only be contrary to Congressional intent to encourage owner participation, it would also raise serious due-process issues.

Third, the inequities against Owner caused by retroactive application in this case would be great. Owner's sole, supposed misdeed was to issue notices to terminate Tenants' leases for a legitimate business or economic reason-notices which indisputably complied with § 982.310(d)(1)(iv). To hold Owner liable here, violates elementary fairness considerations, under which individuals should have a chance to know what the law is, to act accordingly, and to have the legal effect of conduct assessed under the law that existed when the conduct took place. In George, the Ninth Circuit, in declining to apply its decision retroactively, noted that "*no court has ever applied a change to a procedural rule in a manner that serves to forfeit a litigant's substantive rights when that litigant had fully complied with the provisions of the rule as it existed at the time he acted.*" 119 F.3d. at 1399 (emphasis in original). Similarly, *no court should ever invalidate a substantive regulatory rule and then impose liability for conduct specifically authorized by that rule. Prospective application of a ruling that HUD exceeded its authority would not harm Tenants, because a prospective ruling would apply to any subsequent unlawful detainer action instituted to recover possession of Tenants' apartments.*

Thus, Owner could not evict Tenants in state-court proceedings.

For all these reasons, the district court erred in taking a contrary approach. This Court should instruct the district court to enter judgment in Owner's favor on Tenants' claims for relief, order both sides pay their own costs, and declare that neither party be awarded attorneys' fees.

IV. THE INJUNCTION ISSUED BY THE COURT IS OVERBROAD.

A. Standard of Review

The scope of an injunction is reviewed for abuse of discretion. See EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1544 (9th Cir. 1987).

B. The injunction issued by the district court – to the extent it goes beyond barring Owner from evicting in order to raise rents – must be reversed.

As the district court stated, “to resolve the instant matter, the Court need only answer the narrow question whether HUD’s definition of “other good cause” as including raising rents is “reasonable” or “arbitrary, capricious or manifestly contrary to statute.” Order Granting Summary Judgment ¶ 35 (ER 53). Therefore, any injunctive relief granted in this case must be narrowly tailored to proscribe Owner from terminating tenancy in order to raise rents. See NLRB v Express Pub. Co. 312 US 426, 436 (1941) (“This Court will strike from an injunction decree restraints upon . . . acts which are thus dissociated from those which a defendant has committed”). Moreover, injunctive relief must “describe in reasonable

detail . . . the act or acts restrained or required. Federal Rule of Civil Procedure 65(d)(1)(C).

However, the district court issued a sweeping injunction “barring the Defendant and any of its agents from failing to allow the Enhanced Voucher Plaintiffs to remain at Morton Gardens with enhanced voucher assistance” and further “barring the Defendant and any of its agents from evicting or terminating the tenancy or lease of all Plaintiff’s without complying with all the requirement of the [LARSO].” Judgment Filed September 10, 2007 ¶ 2 (ER 64).

This language is vague and overbroad. The injunction is impermissibly vague under Federal Rule of Civil Procedure 65(d)(1)(C) because it completely fails to explain what is meant by “failing to allow the Enhanced Voucher Plaintiffs to remain at Morton Gardens.” Id.

The injunction is overbroad because it goes beyond prohibiting Owner from terminating tenancy in order to raise rents. Under the district court’s order, Owner must allow every enhanced voucher tenant “to remain at Morton Gardens.” Id. In addition, every future attempt by Owner to terminate a section 8 tenancy must simultaneously meet “all the requirements” of the LARSO. Id. There are many other separate federal good cause regulations that were not analyzed by this case (See 24 C.F.R. § 982.310 *et seq.*), as well as three other separate statutory good cause grounds (See 42 U.S.C. § 1437f(o)(7)(C)). As written, the injunction will

subject Owner to the LARSO *whenever* it attempts to rely upon these federal provisions without regard to whether the LARSO conflicts with the federal housing policies behind these provisions. As the Supreme Court has stated, the mere fact that a party has violated a statute, “does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.” NLRB at 435-36. Therefore, the injunction issued September 11, 2007 – to the extent it goes beyond barring Owner from evicting in order to raise rents – must be reversed.

V. TENANTS ARE NOT ENTITLED TO ATTORNEY FEES.

This Court should reverse the district court’s judgment insofar as it declares Tenants entitled to attorneys’ fees. Federal and California law do not ordinarily allow for such recovery unless authorized by statute or contract.

Travelers Casualty & Surety Co. v. Pacific Gas & Elec. Co., 127 S. Ct. 1199 (2007); Trope v. Katz, 11 Cal. 4th 274 (1995).

Before entry of judgment, Tenants did not claim that they were entitled to fees on any particular basis; they submitted no authority or evidence to support such a claim. Hence, it is axiomatic that the district court had no basis to award fees. For this reason alone, the Court should reverse the district court’s judgment.

In their motion for attorneys' fees, Tenants claimed entitlement to fees based on section 1717 of the California Code of Civil Procedure. Tenants also sought attorneys' fees for pro bono services provided by a Legal Services Corporation (LSC). But, as explained below, Tenants are not entitled to fees on these grounds or under these circumstances.

A. Tenants are not entitled to attorney fees under California Code of Civil Procedure 1717.

Tenants seek attorney fees based on California Code of Civil Procedure section 1717, which provides, in relevant part:

In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract...shall be entitled to reasonable attorney's fees in addition to other costs.

Tenants, however, cannot recover fees under this section for several reasons.

First, section 1717, applies only to an action "on a contract." As the Ninth Circuit has previously recognized, an action on a federal statute is not an "action on a contract" under this section. In re Johnson, 756 F.2d 738 (9th Cir. 1985), cert. denied, 474 U.S. 828 (1985). Accordingly, Tenants' first claim for violation of 42 U.S.C. §1437f(t) cannot give rise to a claim for attorneys' fees. Furthermore, claims based on violation of the LARSO sounds in tort under California law. See Castillo v. Friedman, 197 Cal. App. 3d 6; 243 Cal. Rptr. 206 (1987). Because the

California Supreme Court has held a tort claim is not an “action on a contract,” Santisas v. Goodin, 17 Cal. 4th 615, 617 (1998), Tenants’ second claim for relief for violation of the LARSO cannot give rise to a claim for attorneys’ fees under section 1717. See also Casella v. Southwest Dealer Services, 157 Cal. App. 4th 1127 (2007) (fees on non-contractual claims not recoverable under C.C.P. § 1717); Drybread v. Chipain Chiropractic Corp., 151 Cal. App. 4th 1063 (2007) (§ 1717 does not apply in tort action to oust a holdover tenant following expiration of a lease).¹⁴

Second, while Tenants, in their motion for fees, attach leases for two Tenants, Tenants did not submit a contractual attorney fees provision into evidence during summary judgment proceedings. Hence, the district court had no basis to award fees. Moreover, since the leases were introduced *post judgment*, Owner requested an evidentiary hearing to determine which Tenants possessed valid attorney fees clauses. Affidavit of Chris J. Evans ¶¶ 23-26 (ER 87-91). For example, in their motion for attorney fees, Tenants attempt to introduce one lease via affidavit of Tenant Jin M. Park. Declaration of Jin M. Park (ER 132). But, the

¹⁴ Nor can the attorneys’ fees provision here give rise to a claim for attorneys’ fees under some other contractually-based theory under California law. California courts narrowly construe clauses authorizing recovery of fees in an action to “enforce” a contract to exclude tort and other non contract claims. See Casella v. Southwest Dealer Services, Inc., 157 Cal. App. 4th 1127, 69 Cal. Rptr. 3d 445 (2007)(claims for wrongful termination in violation of public policy, fraud, and violation of Labor Code section 970 do not seek to “enforce the employment agreement”) (citations omitted).

affidavit was not executed by Mr. Park; rather it contains an illegible signature from an unidentified third party with the words "I have power of attorney" scribbled underneath. Id. This affidavit cannot authenticate the attached document. Therefore, this lease, and the attorney fee clause contained therein, cannot be considered as evidence. See Hal Roach Studios, Inc., v. Richard Feiner & Co., 896 F.2d 1542, 1551 (9th Cir. 1989) (a document that is not properly authenticated cannot be considered).

However, apparently *assuming* the existence of at least one valid attorney fees clause, the court awarded fees to all twenty two Tenants. Order re: Plaintiff's Motion for Attorney fees (ER 68-77). But this is not the law in California. See e.g., Paul v. Schoellkopf, 128 Cal. App. 4th 147 (2005) (*rejecting* a lower court's conclusion "that Civil Code section 1717 requires recovery for all parties if any one party can recover attorney fees for any aspect of a contract"). Therefore, the validity of each contract is relevant to both the issue of entitlement and amount of fees. The district court erred when it denied Owner opportunity to contest *all of the alleged attorney fee provisions* via evidentiary hearing or some other method; it further erred when it awarded all twenty two tenants entitlement to attorney fees

without first identifying which Tenants possessed leases with valid fee provisions.¹⁵

Finally, Legal Aid Foundation of Los Angeles is a Legal Services Corporation and cannot recover attorneys' fees based on statute. (*See Infra*). Because attorney fees recovery under section 1717 is statutory, See PLCM Group v. Drexler, 22 Cal. 4th 1084, 95 Cal. Rptr. 2d 198 (2000) (following certain amendments made to the section 1717 in 1981, attorneys' fees were to be seen as allowed by statute under this section, rather than by contract), Tenants cannot recover on that theory for this reason as well.

B. Legal Aid Foundation cannot claim, collect or accept attorneys' fees in this case.

Legal Aid Foundation of Los Angeles is a recipient of Legal Services Corporation funding, and, therefore, cannot recover attorneys' fees. Tenants, therefore, have no right to recover \$122,999.50 for legal services claimed by A.C. Abasto, an employee of Legal Aid.

Congress prohibits Legal Services Corporation (LSC) recipients from claiming, collecting or retaining attorneys' fees. Section 504(a)(13) of the FY 1996 LSC appropriation, Pub. L. 104-134, 110 Stat. 1321 (1996). Congress made no

¹⁵ Even the case relied upon by Tenants in their motion for attorneys' fees, Cruz v. Ayromloo, 66 Cal. Rptr. 3d 725 (2007), involved a division of fees between those tenants who had contracts and those who did not.

exception for attorney fees based upon contract. Under the heading “fairness”, the Senate Report accompanying the Legal Services Reform Act of 1996 (S. Rep. 104-392), emphatically stated:

[T]he legislation prohibits LCS attorneys from seeking attorneys fees from private defendants . . . Defendants pay Federal taxes, which subsidize the salaries of LCS attorneys. Defendants also pay for their own lawyers when they are sued by LCS-represented clients. And defendants are required to pay any monetary judgment that may result from the lawsuit. **This is enough.** Defendants should not also be required, as a matter of course, to pay for the LCS attorneys who represent the plaintiff. LEXSEE 104 S. RPT. 392 at 9 (emphasis added).

Congress has incorporated this restriction in each of its subsequent appropriations for LSCs. *See e.g.* Pub. L. 107-77, 115 Stat. 748 (2001) incorporating 1996 restrictions by reference through Pub. L. 105-119, 111 Stat. 2440 (1997).¹⁶ In so doing, Congress sought to avoid exactly what happened in this case. Here, Owner is a private party, whose tax dollars fund Legal Aid Foundation of Los Angeles. Owner was forced to pay for its own lawyers as a result of being sued by Tenants. Tenants, however, have no out-of-pocket attorneys’ fees. Now, Owner faces the prospect of having to further subsidize Legal Aid in the amount of \$122,999.50. As Congress stated: “This is enough.”

¹⁶ LSC implemented this prohibition into its regulations at 45 C.F.R. § 1642. “Except as permitted by paragraph (c) of this section, no recipient or employee of a recipient may claim, or collect and retain attorney’s fees in any case undertaken on behalf of a client of the recipient.” Subsection (c) lists four, and only four, permissible exceptions where fees may be awarded, none of which include an award based upon contract.


Thus, Legal Aid must not receive attorneys' fees for its services, and Tenants should not be awarded attorneys' fees for such services.

CONCLUSION

For the reasons discussed in this brief, this Court should reverse the district court's order and remand with instructions to dismiss Tenants' claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 13,662 words.

STATEMENT OF RELATED CASES

No related cases are pending, and there have been no previous appeals concerning this matter.