IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docket No. 10-15303

PARK VILLAGE APARTMENTS TENANTS ASSOCIATION, et el.,

Plaintiffs-Appellees

vs.

MORTIMER HOWARD TRUST, et al.,

Defendant-Appellants

On Appeal From an Order of the
United States District Court
For the Northern District of California, Oakland

BRIEF OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 plaintiffs certify that the only Appellee who is not an individual is the Park Village Apartments Tenants Association which is not a corporation and issues no stock.

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STATEMENT OF JURISDICTION

Plaintiffs/Appellees Park Village Apartments Tenants Association, et al. (hereafter collectively "Tenants") agree with Defendants/Appellants Mortimer Howard Trust and Mortimer R. Howard's (hereafter "Howard") Statement of Jurisdiction pertaining to the Jurisdiction of the Court of Appeals.

STATEMENT OF THE ISSUES

1. Did the District Court commit an abuse of discretion in granting Tenants' Motion for Preliminary Injunction when it concluded that Tenants were likely to succeed on the merits?

2. Did the District Court commit an abuse of discretion when it ordered Howard to sign assistance contracts with the Oakland Housing Authority and/or "take other steps necessary to effectuate Plaintiffs' right to remain" in their apartments?

ADDENDUM

Pursuant to Circuit Rule 28-2.7 the statutes, regulations, rules and ordinances pertinent to Appellees' argument are bound in the addendum attached to this brief.

STATEMENT OF THE CASE

I. Nature Of The Case And Course Of Proceedings Below

Tenants are low-income elderly tenants, many of whom are frail and have disabilities, who reside at Park Village Apartments, a rental housing community for low-income seniors in the Glenview neighborhood of Oakland. When Howard sought to terminate its participation in the federal project-based Section 8 rental assistance program in late 2005 without providing the notice required by federal law, Tenants successfully blocked rent increases by obtaining an injunction in a prior federal action. No. C 06-7389 SBA, 2007 WL 519038 (N.D. Cal. Feb. 13, 2007) (preliminary injunction); 2008 U.S. Dist. LEXIS 54246 (N.D. Cal. July 16, 2008) (declaratory and injunctive relief). After that ruling, in July 2008, Howard gave proper notice to end the project-based federal subsidy contract, to be effective in July 2009. In that notice, Howard certified that he would honor Tenants' right to remain in their homes with the tenant-based enhanced vouchers provided by the Oakland Housing Authority. However, when Howard attempted to increase the rent after the notice and prior injunction expired, he refused to honor his prior certification to accept enhanced vouchers from the tenants, who were otherwise unable to pay the increased rent.

Facing imminent eviction, Tenants again brought suit to enforce their right to remain with enhanced vouchers. The District Court granted the Tenants' motion for preliminary injunction and directed the parties to meet and confer and submit a proposed preliminary injunction order for the District Court's signature. (Excerpts

of the Record ("ER") 150; Rep.'s Tr. of Proceedings, ln. 14-17). The jointly prepared order prohibited Howard from evicting Tenants and ordered Howard to take all steps necessary to accept the vouchers. No. C 09-4780 SBA, 2010 WL 431458 (N.D. Cal. Jan. 29, 2010) (ER 90-96). The District Court found that federal law establishes a right for Tenants to remain in their homes with vouchers, relying on recent federal cases from other jurisdictions, the statutory scheme, and the intent of Congress.

On February 9, 2010, Howard appealed the preliminary injunction order to this Court. Howard subsequently applied to the District Court to stay part C of the order pending this appeal. On March 23, 2010, the District Court denied the stay application. No. C 09-4780 EDL, Docket No. 65 (Order Denying Defendant's Application to Stay of Preliminary Injunction Order Pending Appeal) (Mar. 23, 2010).

II. Statement of Facts

Park Village Apartments was developed in 1978 with federal project-based rental subsidies pursuant to a housing assistance payments ("HAP") contract with the United States Department of Housing and Urban Development ("HUD") under Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f. (ER 78; First Amended Complaint). Park Village Apartments was also developed under a

City of Oakland conditional use permit that requires that the housing be reserved specifically for senior citizens for 50 years, until 2026. *Id.*

After an initial Section 8 HAP contract with HUD for 20 years, Howard and HUD executed several renewal contracts, with the last covering a one-year term from November 21, 2004 to November 20, 2005. *Id*. When that contract expired, Howard refused to enter into another renewal contract with HUD, and stopped receiving HAP subsidies from HUD as of December 2005. (ER 78-79; First Amended Complaint). Howard never executed a renewal HAP contract. When Howard attempted to increase Tenants' rents to $1,192 without providing the notice required by federal law, the District Court issued a preliminary injunction prohibiting rent increases or evictions, and that ruling was upheld by this Court. *Park Village Apts. Tenants Ass'n v. Mortimer Howard Trust*, 252 Fed. Appx. 152 (9th Cir. 2007).

After Howard served yet another invalid notice in May of 2007, Tenants filed an amended and supplemental complaint and moved for summary judgment. The primary legal deficiency in Howard's May 2007 Notice was its failure to inform Tenants of their right to remain and certify that the owner would accept Tenants' replacement vouchers. (ER 79; First Amended Complaint). The District Court granted Tenants' Motion in part, issuing a declaratory judgment and permanent injunction prohibiting rent increases or related evictions until Howard

complied with the federal notice requirements. *Park Village Apts. Tenants Ass'n*, 2008 U.S. Dist. LEXIS 54246 (N.D. Cal. July 16, 2008).

Howard then served another one-year federal termination notice on July 25, 2008. (ER79; First Amended Complaint). In this July 2008 notice, Howard stated: "Federal law allows you to elect to continue living at this property provided that the unit, the rent, and I, the Owner, meet the requirements of the tenant-based assistance program. As an Owner, I will honor your right as a tenant to remain at the property on this basis as long as it continues to be offered as rental housing, provided that there is no cause for eviction under Federal, State or local law." *Id.*

In late 2008, the prior case was settled pursuant to an agreement whereby Tenants would dismiss without prejudice in exchange for Howard's agreement to sell the property to a nonprofit organization under a plan to preserve Park Village as affordable senior housing. The terms of the settlement stipulated that Tenants released any claims concerning the legal sufficiency of Howard's most recent July 25, 2008 one-year termination notice. Unfortunately, the proposed sale transaction never closed, due to issues related to obtaining environmental clearances and financing. (ER 80; First Amended Complaint).

One year after having served the July 25, 2008 federal one-year notice, Howard emerged from the restrictions of the District Court's July 2008 injunction prohibiting rent increases or evictions absent compliance with federal notice

requirements. On July 25, 2009, while the parties to the purchase and sale contract were still hopeful of negotiating a mutually acceptable extension, Howard informed Tenants in writing that the scheduled rent increase would be deferred, and that Howard would provide 30 days' written notice of its intent to increase the rents. *Id.* On August 31, 2009, Howard served such notices purporting to increase Plaintiffs' rents to $1,192, effective October 1, 2009. *Id.*

As a result of the termination of the project-based Section 8 contract, Tenants are eligible for special enhanced rental assistance vouchers under federal law. 42 U.S.C. §1437f(t). The enhanced vouchers Tenants are entitled to use at Park Village Apartments are administered by the Oakland Housing Authority ("OHA"). On July 15, 2009, Douglas Lee from OHA sent a letter from the OHA Director of the Section 8 Program to Howard stating that OHA had HUD authorization to issue enhanced vouchers to Tenants and requesting that Howard execute the necessary paperwork and new one-year leases with Tenants. This letter informed Howard that Tenants had the right to use the enhanced vouchers to remain at Park Village in the units they currently occupy. (Supplemental Excerpts of Record ("SER") 000002; Decl. of Douglas Lee, ¶¶4-6).

Howard did not respond to OHA's letter and has repeatedly refused to accept Tenants' vouchers. On October 1, 2009, Howard's counsel communicated to Tenants' counsel that Howard would not execute any housing assistance

payments contracts with OHA and leases with the tenants under the voucher program, nor take any other steps necessary to complete the process of receiving the replacement rental assistance on the tenants' behalf from OHA. (ER 80; First Amended Complaint)

On October 3, 2009 Howard began returning rent payments for October with a letter stating that Tenants had to pay in full the $1,192 demanded in the August 31, 2009 rent increase notice. (ER 81; First Amended Complaint). Tenants then sought and were granted the preliminary injunction order that is at issue in this appeal, which was jointly prepared by the parties at the District Court's direction.

SUMMARY OF ARGUMENT

1. The enhanced voucher statute clearly establishes Tenants' right to remain, and the District Court properly relied on HUD's policy statement to conclude that Tenants have a right to remain in their homes. All other courts that have interpreted the enhanced voucher statute have reached the same conclusion as the District Court, further demonstrating that the District Court properly exercised its discretion in concluding that federal statutes mandate Howard to accept enhanced vouchers.

2. Tenants' right to remain under enhanced voucher statute is not limited by the notice statute, 42 U.S.C. § 1437f(c)(8). The notice statute and the enhanced

voucher statute exist independently. When read together, the statutes serve the same purpose of protecting tenants from involuntary displacement.

3. The District Court's Preliminary Injunction Order is not impermissibly overbroad. Other federal courts have ordered owners to accept enhanced vouchers by executing the necessary contracts with the housing authority, and the District Court properly exercised its discretion in ordering a similar remedy in this case.

4. Howard's objection to the scope of the injunction should not be considered because it should be made in the District Court.

STANDARD OF REVIEW

Plaintiffs seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public interest. *Reed v. Town of Gilbert*, 587 F.3d 966, 973-74 (9th Cir. 2009). A reviewing court will overturn an order granting a preliminary injunction only if it finds an abuse of discretion—"when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Stormans Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009). Because the granting of a preliminary injunction "rests within the sound discretion of the trial court," *G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1107 (9th Cir. 2003), this

Court's review is "deferential and limited in scope." *Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009).

ARGUMENT

I. The Judgment Should Be Affirmed Because Federal Law Clearly Requires Howard to Accept Enhanced Vouchers

The federal enhanced voucher statute, HUD's interpretation of that statute, and the rulings of all federal courts that have addressed the issue unanimously confirm that Tenants have a right to remain in their homes using enhanced vouchers. Accordingly, the District Court did not rely on an erroneous legal premise or abuse its discretion in concluding that Tenants demonstrated a likelihood of success on the merits.

A. The District Court Properly Exercised Its Discretion in Concluding that Federal Statutes Mandate Howard to Accept Enhanced Vouchers

Using the well-recognized standard for issuing a preliminary injunction (ER 92 ln. 11-18, DC Order), the District Court found that Tenants demonstrated a substantial likelihood of success on the merits (ER 94, ln. 4-6, DC Order) because statutory authority clearly requires Howard to accept enhanced vouchers. The District Court's order should be affirmed because Howard has failed to demonstrate that this legal conclusion was clearly erroneous.

1. The Enhanced Voucher Statute Clearly Establishes Tenants' Right to Remain

The language of the enhanced voucher statute, 42 U.S.C. § 1437f(t), and its legislative history unambiguously establish Tenants' right to remain in their homes using enhanced vouchers following an owner opt-out from the project-based Section 8 program. The vouchers are called "enhanced vouchers" because they are designed to cover any market-reasonable rents that exceed the ordinary subsidy limit set by the local public housing authority for its regular Housing Choice Voucher program. [1] *See* 42 U.S.C. § 1437f(t).

A distinguishing feature of enhanced vouchers is that the tenant has continued occupancy rights. The Unified Enhanced Voucher Authority statute currently provides that, where an eligible tenant family receives an enhanced voucher,

> the assisted family *may elect to remain in the same project in which the family was residing on the date of the eligibility event for the project*, and if, during any period the family makes such an election and continues to so reside, [language describing the special enhanced voucher payment standard] . . . .

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[1] To enable tenants to remain in their homes with enhanced vouchers, an owner must become a participant in the public housing authority's (PHA) Housing Choice Voucher program, which requires a lease and a Housing Assistance Payments contract. *See* HUD, Section 8 Renewal Policy, Ch. 11, ¶ 11-3 (as revised Jan. 15, 2008)(SER 000020). The voucher program, unlike the project-based Section 8 program, is a portable rental subsidy – funded by HUD through and administered by local PHAs – that tenants may use to rent units of their choice. *See* 42 U.S.C. § 1437f(o).

42 U.S.C. § 1437f(t)(1)(B) (emphasis added).

The legislative history of this provision is especially instructive. In 1999, Congress—recognizing that a landlord's decision not to renew a project-based Section 8 contract would place existing low-income tenants at risk of homelessness—created the enhanced voucher statute, 42 U.S.C. § 1437f(t), while amending the Multifamily Assisted Housing Reform and Affordability Act of 1997 ("MAHRAA") to require HUD to provide enhanced voucher assistance on behalf of each low-income family in residence at the time of the termination or expiration of a project-based Section 8 contract – the eligibility event. Pub. L. No. 106-74, §§ 531 and 538, 113 Stat. 1047, 1113 and 1122 (1999). Faced with uncertainty concerning the tenant's right to remain under the language as originally enacted in 1999 (Pub. L. No. 106-74, § 538, 113 Stat. 1122 (1999). Congress acted *less than a year later* in 2000 to clarify the statute. Confirming that the law protects tenants from displacement after an owner withdraws from a project-based subsidy program, Congress amended the language of 42 U.S.C. §1437f(t)(1)(B):

> by striking "during any period that the assisted family continues residing in the same project in which the family was residing on the date of the eligibility event for the project, if" and inserting "the assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event for the project, and if, during any period the family makes such an election and continues to so reside."

Pub. L. 106-246, § 2801, 114 Stat. 511, 569 (July 13, 2000).

The Conference Report describes this amendment as "clarifying the intent of … section 538 of Public Law 106-74 [the original enhanced voucher statute]." H.R. Conf. Rep. No. 106-710, at 164 (2000), *reprinted in* 2000 U.S. Code Cong. Admin. News 435, 482. By inserting the phrase "the assisted family may elect to remain," Congress removed any doubt that 42 U.S.C. § 1437f(t) guarantees enhanced voucher tenants an enforceable right to maintain their current residence if they so choose. By clarifying that the choice belongs to the tenant, not to the owner, the legislative history conclusively demonstrates that enhanced voucher tenants have a federal statutory right to remain in their homes which Howard must honor.

Congress' insertion of the election to remain in the enhanced voucher statute refutes Howard's assertion that Tenants do not have a right to remain. By its very nature, a tenant's receipt of voucher assistance, as already authorized by Congress in the 1999 unified enhanced voucher authority, provides the tenant with the choice of where to live, subject to finding a willing owner and a unit meeting program requirements, including that the rent be reasonable as measured by market comparables. Howard's claim that the additional "election to remain" language adopted in 2000 adds nothing to the tenants' rights or a landlord's legal obligations – essentially that he may veto the tenants' election to remain in their homes at Park Village by refusing their enhanced vouchers -- would render Congress' separate

and specific legislative act a nullity. *See Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 681 (9th Cir. 2005) ("We try to avoid, where possible, an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress.") (internal quotation marks and citation omitted). Accordingly, the District Court did not abuse its discretion in relying on 42 U.S.C. § 1437f(t) in ordering Howard to take steps to accept Tenants' enhanced vouchers.

2. Howard Misinterprets 42 U.S.C. § 1437f(c)(8) as Limiting the Enhanced Voucher Statute

Howard contends that the requirement that he accept enhanced vouchers under 42 U.S.C. § 1437f(t) cannot be reconciled with the federal opt-out notice statute, 42 U.S.C. § 1437f(c)(8). The notice statute, § 1437f(c)(8), provides that in the event the owner does not provide the required notice for opting out of the project-based Section 8 program, "the owner may not evict the tenants or increase the tenants' rent payment until such time as the owner has provided the notice and 1 year has elapsed." According to Howard, if owners are required to accept enhanced vouchers under § 1437f(t), they will be powerless to evict tenants or raise rents as permitted under § 1437f(c)(8). However, the notice statute does not create substantive rights to evict and raise rents, but rather establishes a procedural requirement to which the right to remain was subsequently added. Howard's interpretation runs contrary to the legislative history, incorrectly assumes that the enhanced voucher statute eliminates an owner's ability to raise rents or to evict for

good cause, and creates discord rather than, as HUD's consistent interpretation has done, harmony between the two statutes at issue.

Where proper notice is not provided, as demonstrated by the injunctions issued and affirmed in the prior litigation between these parties, the notice statute clearly prohibits evictions[2] or increases in the tenants' rent payments for a specific period.[3] It does not create independent, self-executing rights to evict tenants or raise rents one year after proper notice is served. For example, Howard cannot now evict Tenants or increase their rents without complying with the terms of any lease agreements, as well as state and local law. Specifically, separate from any federal law protections, Howard must comply with both Oakland's just cause for eviction and rent control laws. *See* Oakland Mun. Code § 8.22.300 *et. seq.*; *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1214 (9th Cir. 2009). The federal notice law does nothing to abrogate such local protections or to enlarge an owner's rights.

Howard's assertions that the enhanced voucher statute eliminates an owner's ability to raise tenants' rents or to evict are meritless. One year after

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[2] Presumably, this proscription applies only to evictions for nonpayment of any illegally increased rent, not evictions for breach of lease or good cause. *See, e.g.*, *Park Village Apartments Tenants Association*, 2008 U.S. Dist. LEXIS 54246 (prohibiting Howard from evicting Tenants, except for good cause, until Howard complied with the notice requirements of § 1437f(c)(8)).

[3] Where improper notice is served, the notice statute also permits renewal of the project-based subsidy contract for the duration of the period for a legally compliant notice (§1437f(c)(8)(B)), but Howard refused this option.

proper notice is served, owners may once again evict tenants for good cause and raise tenant rents, but only if either action is otherwise authorized. *See* HUD, Section 8 Renewal Policy, Ch. 11, ¶ 11-3.B (SER 000020). Tenant rents may be increased via a recertification of family income by the PHA administering the voucher, and the enhanced voucher assistance covers the difference between the new reasonable market rent and the tenant contribution. *See id.*, Ch. 11, ¶ 11-1 (SER 000018).

The notice statute and the enhanced voucher right-to-remain complement rather than limit each other, a conclusion that is reinforced by the legislative history surrounding these two statutes. The federal notice law was originally passed in 1988, and it was last amended to take its current form in 1999. Pub. L. No. 100-242, §262, 101 Stat. 1890 (1988) (establishing then 42 U.S.C. § 1437f(c)(9)), amended by Pub. L. No. 105-18, §10002, 111 Stat. 158 (1997), Pub. L. No. 105-276, §549, 112 Stat. 2607 (1998), and Pub. L. No. 106-74, §535, 113 Stat. 1047 (1999)). The portion of the text proscribing rent increases or evictions as the remedy for a noncompliant notice was first adopted in 1998. As discussed *supra*, in 1999, Congress then passed the unified enhanced voucher authority, and required HUD to provide enhanced voucher assistance to tenants when project-based contracts expire or are terminated. Pub. L. No. 106-74, §§ 531 and 538, 113 Stat. 1047, 1113 and 1122 (1999). After initially omitting language previously

used in analogous situations[4] to guarantee the tenants' right to remain, Congress acted quickly, less than nine months later, to re-establish that language in the newly created unified enhanced voucher authority. Pub. L. No. 106-246, § 2801, 114 Stat. 511, 569 (July 13, 2000).

Contrary to Howard's interpretation, the legislative history of these two statutes demonstrates that they further a similar purpose – to protect tenants against involuntary displacement from owner-initiated subsidy terminations or post-termination rent increases. These statutes should be harmonized, as HUD has done. *See* HUD, Section 8 Renewal Policy, Ch. 1, ¶ 1-5.I (as revised Jan. 15, 2008)(SER 000014). The notice statute requires one year's advance notice with specific content. 42 U.S.C. §1437f(c)(8)(A). A key provision of that statute requires the notice to comply with other requirements. 42 U.S.C. §1437f(c)(8)(C). After passage of the enhanced voucher statute in 1999 and the clarification of the right to remain in 2000, HUD issued guidance requiring that an owner certify in the notice that it will honor the right to remain. *See* HUD, Section 8 Renewal Policy, Ch. 8, at ¶ 8-1 (SER 000016).

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[4] During the period immediately prior to 1999, Congress had also provided enhanced vouchers to protect tenants where owners prepay their HUD-subsidized loans and convert to market-rate, but specified that tenants may elect to remain. Pub. L. No. 104-204, 110 Stat. 2885 (1996) (HUD Appropriations Bill for FY 1997). This phrasing was carried forward by incorporation for several years (e.g., Pub. L. No. 105-276, 112 Stat. 2469 (1998)), until passage of the unified enhanced voucher authority in 1999, when it was inexplicably omitted, until the correction in July of 2000.

The notice statute and the right to remain exist independently. When read together, the statutes serve the same purpose of protecting tenants from involuntary displacement. Accordingly, Howard's assertion that the notice statute somehow authorizes rejection of Tenants' vouchers must be rejected.

B. The District Court Properly Exercised Its Discretion in Relying on HUD's Interpretation of the Enhanced Voucher Statute

Howard argues that HUD's interpretation of the enhanced voucher statute should have been given little or no deference by the District Court. In granting the preliminary injunction, the District Court cited HUD's Section 8 Renewal Policy, which expressly states that tenants with enhanced vouchers have a right to remain. *See* HUD, Section 8 Renewal Policy, Ch. 11, ¶ 11-3.B (as revised Jan. 15, 2008) (SER 000020). Because the Section 8 Renewal Policy conforms with the unambiguous language of the enhanced voucher statute, the District Court did not abuse its discretion in relying upon HUD's policy statement.

Agency policy statements reflect "'a body of experienced and informed judgment to which courts and litigants may properly resort for guidance.' " *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Accordingly, they are entitled to a "measure of respect" under the *Skidmore* standard. *Id.*; *see also Barrientos*, 583 F.3d at 1214 (stating that HUD's interpretive policy statements are at least entitled to a "measure of respect"). "Among the factors courts consider are the interpretation's

thoroughness, rational validity, consistency with prior and subsequent pronouncements, and the logic and expertness of the agency's decision." *Bamonte v. City of Mesa*, __F.3d__, 2010 WL 1131492, at *8 (9th Cir. Mar. 25, 2010).

HUD's Section 8 Renewal Policy elaborates on the landlord's statutory duty to accept enhanced voucher assistance following an opt-out. The policy states that:

> tenants who receive an enhanced voucher have the right to remain in their units as long as the units are offered for rental housing when issued an enhanced voucher sufficient to pay the rent charged for the unit, provided that the rent is reasonable. Owners may not terminate the tenancy of a tenant who exercises this right except for cause under Federal, State, or local law.

HUD, Section 8 Renewal Policy, Ch. 11, ¶ 11-3.B (as revised Jan. 15, 2008).

The HUD Section 8 Renewal Policy also requires owners at the time of opt-out to certify to HUD that they will comply with the families' right to remain and accept enhanced vouchers. *See id.* at Ch. 1, ¶ 1-5.I (SER 000014)("Owners must certify on the Option 6 Renewal Form [for opt-outs] that they will comply with the requirement to allow families receiving enhanced vouchers who elect to remain to do so as long as the property remains a rental property, unless the owner has just cause for eviction."); *id.* Ch. 8, at ¶ 8-1 (SER 000016)(requiring owner's notice to certify that it will honor the right to remain). To ensure compliance with these requirements, the Renewal Policy requires an owner's notice to use the express language in HUD's model opt-out notification letter regarding the tenant's right to

remain in his or her home. *See id.* ¶ 11-4C and App 11-1 (SER 000022 and 000025)("Federal law allows you to elect to continue living at this property provided that the unit, the rent, and we, the owners, meet the requirements of the Section 8 tenant-based assistance program. As an Owner, we will honor your right as a tenant to remain at the property . . . .") (emphasis added).

HUD's Section 8 Renewal Policy is entitled to a "measure of respect" because of the policy's rational validity and consistency with HUD's prior interpretations. As discussed *supra*, the enhanced voucher statute unambiguously requires owners to accept enhanced vouchers. *See Jeanty v. Shore Terrace Realty Ass'n*, No. 03 Civ. 8669, 2004 WL 1794496, at *4 (S.D.N.Y. Aug. 10, 2004) (finding the Section 8 Renewal Policy "entirely rational," because "Congress intended to require that owners accept the tenants' enhanced vouchers"). The Section 8 Renewal Policy is entirely consistent with the enhanced voucher statute in informing owners of their obligation to honor tenants' right to remain. Additionally, the Policy's statement that enhanced voucher tenants have a right to remain is consistent with the rulings of all of the federal courts that have interpreted the enhanced voucher statute. *Feemster v. BSA Ltd. P'ship*, 548 F.3d 1063 (D.C. Cir. 2008); *Estevez v. Cosmopolitan Assocs. L.L.C.*, No. 05 CV 4318, 2005 WL 3164146, at *6 (E.D.N.Y. Nov. 28, 2005); *Jeanty*, 2004 WL 1794496; *Barrientos v. 1801-1825 Morton, LLC*, No. CV 06-6437 (C.D. Cal. Sept. 10, 2007)

(Order re: Plaintiff's Motion for Summary Judgment), *aff'd on other grounds*, 583 F.3d 1197 (9th Cir. 2009).

Finally, HUD has never deviated from its position that enhanced voucher tenants have a right to remain and has promulgated regulations and an administrative notice consistent with this position. *See* 24 C.F.R. § 402.8 (2009); HUD Notice PIH 2001-41 (HA, "Section 8 Tenant-Based Assistance (Enhanced and Regular Housing Choice Vouchers) For Housing Conversion Actions – Policy and Processing Guidance" at 26, § II (B) (Nov. 14, 2001). Accordingly, HUD's interpretation of the enhanced voucher statute reflects a body of informed judgment to which courts may properly resort for guidance. Howard has therefore failed to demonstrate that the District Court abused its discretion in relying on HUD's guidance in granting the preliminary injunction.

C. The District Court's Ruling that Howard Must Accept Enhanced Vouchers Is Consistent With the Rulings of All Other Courts that Have Decided this Issue

All other courts that have interpreted the enhanced voucher statute have reached the same conclusion as the District Court, further demonstrating Howard's failure to show that the District Court relied on an erroneous legal standard. Since enactment of the revised enhanced voucher statute, all of the federal courts interpreting the statute have held that owners must accept the vouchers, whether at the point immediately following conversion or years later. In *Jeanty v. Shore*

Terrace Realty Ass'n, No. 03 Civ. 8669, 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004), the court ruled that an owner must accept the tenants' vouchers because any other interpretation would render the statute's tenant protections meaningless. After examining both the statutory language and HUD's interpretation, the court found that both clearly obligated the landlord to enter into enhanced voucher tenancies for all tenants who wished to remain. *Id.* at *4-5. Rejecting the landlord's argument that enhanced voucher acceptance was voluntary, the court stated: "If a landlord's obligation to accept enhanced vouchers upon opt-out was merely voluntary, then § 1437f's grant to the tenant of the right to remain would be illusory." *Id.* at *3. The fact that the owner was willing to execute voucher tenancies for some but not all tenants was of no legal significance to the court's holding that the tenants have a federal statutory right to remain.

More recently, affirming the lower court on this ground, the United States Court of Appeals for the D.C. Circuit concurred that tenants had the right to use their enhanced vouchers to remain in their homes after the owner terminates Section 8 project-based assistance. *Feemster v. BSA Ltd. P'ship*, 548 F.3d 1063 (D.C. Cir. 2008). Although the federal law issue on appeal was whether the right to remain under § 1437f(t) could be conditioned on the owner's subjective intent to offer the unit for rental housing, the court held that the tenants had a right to remain regardless of the owner's intention to offer the units for rent. *Id.* at 1069.

The court held that the tenants had the right "to remain in their homes, and to pay their rent with enhanced vouchers" until "their tenancies are validly terminated" under state and local laws. *Id*.

Another 2005 federal decision confirms that the tenants' federal right to remain requires owners to accept their enhanced vouchers. In *Estevez v. Cosmopolitan Assocs. L.L.C.*, No. 05 CV 4318, 2005 WL 3164146, at *6 (E.D.N.Y. Nov. 28, 2005), where the owner initially permitted tenants to use their enhanced vouchers after the project-based opt-out but later sought to refuse to renew them while seeking the full contract rent, the court nevertheless held that the statute required the owner to continue to accept the vouchers.

Finally, the United States District Court for the Central District of California has ruled that the enhanced voucher statute provides a right to remain. *Barrientos v. 1801-1825 Morton, LLC,* No. CV 06-6437 (C.D. Cal. Sept. 10, 2007) (Order re: Plaintiff's Motion for Summary Judgment), *aff'd on other grounds,* 583 F.3d 1197 (9th Cir. 2009). On appeal, this Court did not reach the statutory right to remain issue, because the Court held that the evictions of the tenants-appellees were precluded on other grounds. *Barrientos*, 583 F.3d at 1207 n.3.

No reported decision has held that owners may deny tenants in opt-out buildings their federal statutory right to remain in their homes with vouchers by refusing that assistance. Accordingly, the District Court did not rely on an

erroneous legal standard in reaching a similar conclusion.

II. The District Court's Preliminary Injunction Order Is Not Impermissibly Overbroad

The District Court found that because Howard refused to accept enhanced vouchers as required under federal law, Howard is barred from "demanding or collecting rent payments in excess of the amount the tenants were paying as of September 1, 2009, and from evicting any tenant at Park Village Apartments, or taking any action to accomplish such an eviction … based upon nonpayment of an rental amount that exceeds the tenant's rent contribution as of September 1, 2009, unless the rent increase results from a recertification under the voucher program." (ER 96, ln. 7-14, DC Order). The Court also ordered Howard to "take all steps necessary to enter into and execute housing assistance payments contracts with the Oakland Housing Authority for the acceptance of tenant based vouchers." (ER 96, ln. 15-17, DC Order).

Howard claims that the portion of the order requiring Howard to take all steps necessary to execute the housing assistance payments contracts is overbroad. However, complaints about the scope of the preliminary injunction, if any, should be made in the district court. *See Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 883 (9th Cir. 2003) (stating that the proper approach for challenging the scope of an injunction is to seek a modification or clarification of the injunction from the district court); *Park Village Tenants Ass'n v. Mortimer*

Howard Trust, 252 Fed. Appx. 152 (9th Cir. 2007) (mem.) ("Complaints about the scope of the preliminary injunction, if any, should be made in the district court."). Additionally, the preliminary injunction order was jointly prepared by the parties at the District Court's instruction, and any requests to modify its scope are therefore more properly directed to the District Court.

Further, the District Court was well within its discretion in ordering Howard to enter into voucher assistance contracts with the housing authority. *See Feemster*, 471 F. Supp. 2d at 106 (obligation to accept enhanced vouchers "includes completing the necessary paperwork for the tenants to participate in the enhanced voucher program"); *Jeanty*,2004 WL 1794496, at *5 (requiring owner to accept enhanced vouchers and to offer enhanced voucher tenants the option to renew their leases). *See also Riddick v. Summit House, Inc.*, 835 F. Supp. 137, 145 (S.D.N.Y. 1993) (court would consider relief requiring execution of documents required to reinstate subsidy). Howard offers absolutely no legal basis for disturbing this ruling, much less demonstrating an abuse of discretion. Accordingly, there are no grounds for altering the scope of the preliminary injunction.

CONCLUSION

The plain language of the enhanced voucher statute, HUD's interpretation, and unanimous federal judicial decisions all support the District Court's ruling that

Howard must accept Tenants' enhanced vouchers. Requiring Howard to take the steps necessary to do so is a logical extension of this legal requirement, and well within the District Court's discretion. Since Howard has not demonstrated an abuse of discretion, this Court should affirm the order of the District Court.

DATED: April 23, 2010

Respectfully submitted,

By: _*s/James R. Grow*_____
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STATEMENT OF RELATED CASES

Appellees are not aware of any related cases that are currently pending in this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that Appellees' brief is proportionately spaced, has a typeface of 14 points or more and contains 5,478 words.

Dated: April 23, 2010

By: _*s/James R. Grow*_____
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