

No. 11-36

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**In The  
Supreme Court of the United States**

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MORTIMER HOWARD TRUST, et al.,

*Petitioners,*

v.

PARK VILLAGE APARTMENT  
TENANTS ASSOCIATION, et al.,

*Respondents.*

—————◆—————  
**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

—————◆—————  
**RESPONDENTS' BRIEF IN OPPOSITION**

—————◆—————  
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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Supreme Court Rule 29.6, Respondents certify that the only Respondent who is not an individual is Park Village Apartment Tenants Association which is not a corporation and issues no stock.

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## INTRODUCTION

Congress enacted the Enhanced Voucher statute, 42 U.S.C. § 1437f(t), to enable low-income tenants to remain in their homes at market rents after an owner decides to no longer participate in the project-based Section 8 rental assistance program. Enhanced voucher tenants who exercise the right to remain are only responsible for a portion of the new market rent, with enhanced vouchers covering the rest. In upholding part of a preliminary injunction, the Ninth Circuit held below that an owner who refuses to accept enhanced vouchers may not evict tenants for non-payment of rent that would otherwise be covered by the vouchers. As enhanced voucher tenants cannot afford the entire contract rent, any other holding would have rendered the right to remain illusory.

Petitioners ask this Court to grant certiorari to declare that owners may refuse to accept payment by voucher and then evict poor and elderly tenants for nonpayment of rent. Petitioners have presented no compelling reasons to warrant further review. There is no circuit conflict. Every court of appeals has agreed with the Department of Housing and Urban Development's (HUD) interpretation of the statute to include a right for tenants to remain in the property with enhanced vouchers. The Petition should be denied.



## STATEMENT

### I. Statutory and Regulatory Background

The federal government provides rental assistance to private owners on behalf of eligible low-income families through two types of programs, both authorized under Section 8 of the United States Housing Act of 1937, codified at 42 U.S.C. § 1437f. The first type of program is known as “project-based” assistance, under which the rental assistance from HUD is attached to the property for a specific period determined by the contract term. 42 U.S.C. § 1437f(c). The second type of program is known as “tenant-based” assistance, including most prominently vouchers, under which the rental assistance provided by HUD is administered by local public housing authorities, and which is portable by the tenant under specified conditions. 42 U.S.C. § 1437f(o); 24 C.F.R. pt. 982 (Housing Choice Vouchers, largely supplanting the former certificate program authorized under § 1437f(d)).<sup>1</sup> Under both types of Section 8 programs, the tenant makes a rent contribution based on a federal statutory formula (usually 30 percent of adjusted income), and the Section 8 rental assistance payment covers the rest of the specified

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<sup>1</sup> One variant of the voucher program, so-called “project-based vouchers,” under which local housing authorities attach a portion of their voucher funding to specific properties, was authorized in 2000, 42 U.S.C. § 1437f(o)(13), but that program has no bearing on this case.

contract rent. § 1437f(c)(3) (project-based); § 1437f(o)(2) (vouchers).<sup>2</sup>

When an owner of a project-based Section 8 property seeks to end its participation in that program, Congress has established a balanced framework of specific procedures and replacement assistance to protect tenants from precipitous displacement, while providing owners with market-reasonable rents. First, federal law requires a specific one-year notice of the contract expiration or termination, as well as remedies for noncompliance. 42 U.S.C. § 1437f(c)(8).<sup>3</sup> The federal statute also requires, *inter alia*, that the notice comply with other HUD requirements

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<sup>2</sup> The Petition (Pet. 23-30, 32-36) is replete with citations to other Section 8 programs or statutes (e.g., § 1437f(d) (the old Section 8 certificate program), § 1437f(o)(13) (the so-called “Project-Based Voucher” program), and the provision formerly codified at § 1437f(t) that was repealed in 1996), and often their accompanying legislative history, that have nothing to do with this case. This case concerns only the meaning of the enhanced voucher statute (current § 1437f(t)), which may involve other statutes directly related thereto, including § 524(d) of MAHRAA (Pub. L. No. 105-65), portions of the Housing Choice Voucher statute (§ 1437f(o), but not § 1437f(o)(13)), and perhaps the notice statute (§ 1437f(c)(8)) governing opt-outs from the project-based program. Howard’s recitation of isolated snippets from a jumbled Section 8 codification that itself authorizes a myriad of subprograms over the past 37 years only serves to confuse the issues presented.

<sup>3</sup> Prior litigation between the parties resulted in an injunction against Petitioner preventing rent increases or evictions, as specified by the statute, for noncompliance with its requirements. No. C 06-7389 SBA, 2008 U.S. Dist. LEXIS 54246 (N.D. Cal. July 16, 2008).



(§ 1437f(c)(8)(C)), which include a certification that the owner will honor the tenant's right to remain in his or her home. HUD, Section 8 Renewal Policy, ¶ 11-4C and App. 11-1; Ch. 8, at ¶ 8-1; Pet. App. 9-10. HUD's Renewal Policy also requires the owner to make related certifications to HUD that it will accept the enhanced vouchers provided to tenants and honor the right to remain. *Id.*, Ch. 1, ¶ 1-5.I. Once the owner has provided legally required notice and the statutorily required period of one year has elapsed,<sup>4</sup> the project-based assistance payments cease.

Second, upon expiration of a project-based contract, HUD is required to provide special replacement subsidies for eligible low-income tenants called "enhanced vouchers." 42 U.S.C. § 1437f(t) (establishing the features of enhanced vouchers); Pub. L. No. 106-74, § 531, 113 Stat. 1047, 1113 (1999) (requiring HUD to provide such vouchers upon termination of a project-based Section 8 contract). These vouchers are like other tenant-based Housing Choice Vouchers under § 1437f(o), except as overridden by the specific requirements of § 1437f(t). Enhanced vouchers have a higher payment standard than regular vouchers, in order to cover any market-reasonable rent increases. 42 U.S.C. § 1437f(t)(1)(B). Tenants receiving enhanced vouchers may elect to remain in their homes. *Id.*

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<sup>4</sup> During the notice period, the owner may continue to receive housing assistance payments under the expiring project-based Section 8 contract, or a temporary extension. 42 U.S.C. § 1437f(c)(8)(B).

HUD provides funding for these vouchers to local housing authorities, who in turn make housing assistance payments to owners to cover the new market-reasonable rents.

The decision below gave effect to this carefully balanced scheme. It recognizes that Congress has created a statutory right for elderly and disabled low-income tenants to remain in their homes absent good cause for eviction, such as breach of their rental agreements, and that an owner cannot unilaterally thwart this protection by refusing the assistance payments and then seeking to evict for nonpayment of the market rent.

## **II. Factual and Procedural Background**

Respondents (Tenants) are low-income elderly tenants, many of whom are frail and have disabilities, who reside at Park Village Apartments, an 84-unit rental housing community for seniors in Oakland, California. Petitioners own Park Village Apartments and entered into a contract to receive federal project-based Section 8 rental assistance in 1978. When Petitioners (Howard) sought to terminate his participation in the federal project-based Section 8 rental assistance program in late 2005 without providing the notice required by federal law, 42 U.S.C. § 1437f(c)(8), Tenants obtained an injunction blocking rent increases, a remedy provided by the statute. No. C 06-7389 SBA, 2008 U.S. Dist. LEXIS 54246 (N.D. Cal. July 16, 2008). 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. Pet. App. 9-10. 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 in their homes with enhanced vouchers.<sup>5</sup> Granting the Tenants' motion for preliminary injunction, the District Court found that federal law establishes a right for Tenants to remain in their homes with vouchers. The District Court's order prohibited Howard from evicting Tenants for nonpayment of rent increases that would be covered by the vouchers and ordered Howard to accept the vouchers by entering into housing assistance payment contracts with the Oakland Housing Authority. Pet. App. 37-47.

On appeal, the Ninth Circuit affirmed, holding that "§ 1437f(t) provides tenants a right to remain in

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<sup>5</sup> At that time, 15 of the 84 units in Park Village were occupied by tenants eligible for enhanced voucher assistance. Of those 15, only 10 now remain because of either voluntary relocation or death. Accordingly, 74 units are available for unrestricted market rental.

their rental units absent just cause for eviction, and that tenants with enhanced vouchers cannot be required to pay more than the tenant's portion of the rent as defined by the Section 8 statute and applicable regulations." Pet. App. 17. The panel, however, held that the owner may not be compelled to enter into housing assistance payment contracts with the housing authority and reversed that part of the District Court's preliminary injunction.



## REASONS FOR DENYING THE WRIT

### **I. The Circuit Courts Agree That The Enhanced Voucher Statute Grants Tenants A Right To Remain.**

Only two circuits – the Ninth and the D.C. Circuit – have addressed whether § 1437f(t) grants tenants the right to remain. Both have answered in the affirmative. *See* Pet. App. 1; *Feemster v. BSA Ltd. P'ship*, 548 F.3d 1063 (D.C. Cir. 2008). Nonetheless, attempting to conjure a conflict, Howard asserts that the Ninth Circuit opinion “does not find support in other circuits.” Pet. 37. Howard is wrong. The holdings and reasoning in the only two cases cited are entirely consistent with the decision below.

First, Howard relies on *People to End Homelessness, Inc. v. Develco Singles Apts. Assocs.*, 339 F.3d 1 (1st Cir. 2003) (“*PEH*”), to suggest a circuit split. *PEH* is inapposite, however, because it does not address the question presented in this Petition. In *PEH*, a

nonprofit seeking to preserve affordable housing challenged HUD's funding of enhanced vouchers for tenants where the project-based Housing Assistance Payments contract had expired, despite an owner's alleged illegal notice. The First Circuit upheld HUD's action in lieu of requiring renewal of the project-based contract, because it found that another federal statute requires HUD to make the vouchers available. *PEH*, 339 F.3d at 5. Contrary to Howard's assertion, nowhere does *PEH* address the tenants' right to remain once they received the enhanced vouchers, as the question was not before the court. *See Estevez v. Cosmopolitan Assocs. LLC*, No. 05 CV 4318, 2005 WL 3164146, at \*10 (E.D.N.Y. Nov. 28, 2005) (explaining that *PEH* "dealt with whether enhanced vouchers could be issued by HUD if the landlord had not met the requirement of providing one year's notice to opt out" and therefore "has no relevance to the instant case" concerning tenants' right to remain with enhanced vouchers).

Second, Howard relies on *Feemster v. BSA Ltd. P'ship*, 548 F.3d 1063 (D.C. Cir. 2008). In *Feemster*, 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. *Id.* at 1069. 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, and the court held that the tenants had a right to remain regardless of this subjective intention. *Id.* 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.* Howard attempts to manufacture a circuit split by mischaracterizing *Feemster* as based solely on local law. Pet. 39. In fact, as the D.C. Circuit explained, under the federal Enhanced Voucher statute, “[o]ne thing that [the owner] may not do . . . is refuse to accept payment by voucher and then contend that eviction is warranted for nonpayment of rent.” *Feemster*, 548 F.3d at 1069. This is precisely what the Ninth Circuit held below.

Moreover, the district courts that have considered the issue also agree that tenants have a right to remain under the Enhanced Voucher statute. As the court below noted, “every court to consider the question has concluded that § 1437f(t) affords tenants a right to remain, exercisable as against the owner.” Pet. App. 16-17.<sup>6</sup>

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<sup>6</sup> Citing *Feemster*, 548 F.3d at 1069; *Barrientos v. 1801-1825 Morton, LLC*, No. CV 06-6437, 2007 WL 7213974, at \*6 (C.D. Cal. Sept. 10, 2007), *aff’d on other grounds*, 583 F.3d 1197 (9th Cir. 2009) (“[T]he enhanced voucher provision creates a right for tenants to remain in tenancy upon an ‘eligibility event’ as defined in that provision. The plain language of the statute . . . indicates that it is up to the assisted family, not the owner, to decide whether to continue tenancy upon occurrence of the eligibility event.”); *Estevez*, 2005 WL 3164146, at \*4 (“The text of 42 U.S.C. § 1437f(t), given its ordinary meaning, makes clear that tenants renting apartments in developments receiving

(Continued on following page)

Howard's claim that landlords would be left adrift without this Court's guidance, Pet. 40, is belied by the clear guidance from HUD and the unanimity of the lower courts, all of which interpret § 1437f(t) to contain a right to remain. No reported decision to date has held that owners may deny tenants in former project-based Section 8 buildings their federal statutory right to remain in their homes with vouchers by refusing that assistance and then evicting for nonpayment of market rent.

Because every court of appeals has agreed with HUD's interpretation of the statute to include a right for tenants to remain in the property with enhanced vouchers, review by this Court is unwarranted.

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project-based assistance will, upon the termination of that assistance, have the right to remain in their apartments as long as they remain eligible and continue to occupy the apartments.”); *Jeanty v. Shore Terrace Realty Ass'n*, No. 03 Civ. 8669, 2004 WL 1794496, at \*3 (S.D.N.Y. Aug. 10, 2004) (“Giving the words used in 42 U.S.C. § 1437f(t)(1) and (2) their ordinary meaning, it is clear that the statute provides families renting at the time of the termination of the project-based subsidy contract the right to remain in their units, using enhanced vouchers, for so long as the tenant remains eligible for the vouchers or until the tenant is evicted.”).

## **II. The Decision Below Correctly Held That § 1437f(t) Provides Tenants A Right To Remain.**

### **A. The Enhanced Voucher Statute Clearly Establishes Tenants' Right To Remain.**

As the court below held, 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 after an owner ceases participation in the project-based Section 8 program. Pet. App. 14-15. The Enhanced Voucher 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]. . . .*

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

In 1999, Congress – recognizing that a landlord's decision not to renew a project-based Section 8 contract would place existing low-income assisted tenants at risk of homelessness – created the enhanced voucher statute, 42 U.S.C. § 1437f(t), 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* 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. No. 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. As the decision below recognizes, the insertion of the phrase “the assisted family may elect to remain” 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. Pet. App. 14-15. 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.

**B. The Decision Below Correctly Accorded Deference To HUD's Interpretation Of The Statute.**

The court below also correctly deferred to the HUD Secretary's guidance contained in the Section 8 Renewal Policy Guide (Guide), which interprets the statute to give "assisted families' the right 'to remain in the same project.'" Pet. App. 13 (quoting HUD, Section 8 Renewal Policy Guide, Ch. 11, ¶ 11-3.B (as revised Jan. 15, 2008)<sup>7</sup>).

The Guide elaborates on the landlord's statutory duty to accept enhanced voucher assistance following an opt-out. The Guide 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

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<sup>7</sup> Available at <http://www.hud.gov/offices/hsg/mfh/exp/guide/s8renew.pdf>.

who exercises this right except for cause under Federal, State, or local law.

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

As the Ninth Circuit recognized, the Guide “provides that under § 1437f(t)(1)(B), tenants with enhanced vouchers have a right to remain, and that owners must honor that right.” Pet. App. 15. The Guide is an agency interpretation entitled to deference, and the court below correctly saw no reason to “depart from the Secretary’s . . . construction of the statute,” one that has been adopted by every court to have considered the question. *Id.* at 16-17.<sup>8</sup>



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<sup>8</sup> This Court should not consider the takings argument advanced by Howard and amicus California Apartment Association because it was not fairly presented to the court below. Nevertheless, the argument is meritless because the enhanced vouchers provide Howard with full market rent if he chose to accept the housing assistance payments. Howard’s claim of endless leases is similarly unfounded, as the declining number of enhanced voucher tenants at Park Village shows that most enhanced voucher tenancies are far from eternal.

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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