No. _____

In The
Supreme Court of the United States

MORTIMER HOWARD TRUST, et al.,

Petitioners,

v.

PARK VILLAGE APARTMENT TENANTS ASSOCIATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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July 5, 2011

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QUESTION PRESENTED

At the expiration of a Section 8 housing contract between a private owner and the Department of Housing and Urban Development and after statutory notice is provided, does Title 42 U.S.C. § 1437f(t)(B)'s clause stating that the assisted family "may elect to remain" bar the owner from evicting a tenant for failing to pay the portion of the rent previously paid by HUD during the term of the contract?

LIST OF PARTIES

Petitioners/Defendants-Appellants:

1) Mortimer Howard Trust, owner of Park Village Apartments.
2) Mortimer Howard, Trustee of the Mortimer Howard Trust.

Plaintiffs-Appellees:

1) William Foster;
2) Shirley Smith;
3) Cornelius Weekley;
4) Isabel Aleman;
5) Fred Allen;
6) Virginia Chung;
7) Chi Chung
8) Patricia Johnson;
9) Martin Koch;
10) Lawrence Lee;
11) Kwan Hg;
12) Foster Reuben;
13) Maria Lillian Sanchez;
14) Christine Thomas;
15) Alison Wright;
16) Park Village Tenants Association.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners certify that the only party seeking review in this Court who is a corporation is the Mortimer Howard Trust, which does not issue stock.

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OPINION BELOW

The orders and judgment of the United States District Court for the Northern District of California (per Saundra Brown Armstrong, J.) granting respondents' motion for preliminary injunction are reprinted at App. 37-47 and are not otherwise published. The Ninth Circuit's published decision (per Milan Smith, J., joined by James Todd, S.J. and concurred with in part and dissented from in part by William Fletcher, J.) affirming in part and reversing in part, entitled *Park Village Tenants Ass'n, et al. v. Mortimer Howard Trust, et al.,* 636 F.3d 1150, No. 10-15303, slip op. at 2915, 2916 (9th Cir. 2011) ("Opinion"), is reprinted at App. 1-36. The court of appeals' order denying rehearing en banc is reprinted at App. 115 and is not otherwise published.

JURISDICTION

The Ninth Circuit Court of Appeals' judgment was entered on February 25, 2011. App. 1. A timely petition for rehearing en banc was denied on April 5, 2011. App. 115. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

The Ninth Circuit had jurisdiction over this matter pursuant to 28 U.S.C. § 1292(a)(1). App. 11.

This District Court had jurisdiction over this matter under 28 U.S.C. § 1331 because the claims arose under 42 U.S.C. §§ 1437f and 3601. App. 37-47.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C. § 1437f, which is reprinted in its entirety at App. 116-211).

113 Stat. 1047, 1113 (1999), Pub. L. No. 106-74, § 531(d)(1) (codified at 42 U.S.C. § 1437f note, Multifamily Assisted Housing Reform and Affordability Act of 1997, § 524(d)(1)) (referred herein as MAHRAA), reprinted at App. 228, states in pertinent part:

> In the case of a contract for project-based assistance under section 8 for a covered project that is not renewed under subsection (a) or (b) of this section (or any other authority), to the extent that amounts for assistance under this subsection are provided in advance in appropriation Acts, upon the date of the expiration of such contract the Secretary shall make enhanced voucher assistance under section 8(t) of the United States Housing Act of 1937 (42 U.S.C. 1437f(t)) available on behalf of each low-income family who, upon the date of such expiration, is residing in an assisted dwelling unit in the covered project.

113 Stat. 1047, 1122-23 (1999), Pub. L. No. 106-74, § 538(a) (previously codified as Title 42 U.S.C.

§ 1437f(t)), reprinted at App. 230, states in pertinent part:

> (1) Enhanced voucher assistance under this subsection for a family shall be voucher assistance under subsection (o) of this section, except that under such enhanced voucher assistance – . . . .
>
> (B) 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 the rent for the dwelling unit of the family in such projects exceeds the applicable payment standard established pursuant to subsection (o) of this section for the unit, the amount of rental assistance provided on behalf of the family shall be determined using a payment standard that is equal to the rent for the dwelling unit . . . subject to paragraph (10)(A) of subsection (o). . . .

114 Stat. 511 (2000), Pub. L. No. 106-246 § 2801, reprinted at App. 236, states in pertinent part:

> SEC. 2801. Title V, subtitle C, section 538 of Public Law 106-74, is amended 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,"

Title 42 U.S.C. § 1437f(c)(8)(A), reprinted at App. 126, states in pertinent part:

> Not less than one year before termination of any contract . . . an owner shall provide written notice to the Secretary and the tenants involved of the proposed termination. The notice shall also include a statement that . . . the owner and the Secretary may agree to a renewal of the contract, thus avoiding termination, and that in the event of termination the Department of Housing and Urban Development will provide tenant-based rental assistance to all eligible residents, enabling them to choose the place they wish to rent, which is likely to include the dwelling unit in which they currently reside. . . .

Title 42 U.S.C. § 1437f(c)(8)(B), reprinted at App. 126-127, states in pertinent part:

> In the event the owner does not provide the notice required, 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. The Secretary may allow the owner to renew the terminating contract for a period of time sufficient to give tenants 1 year of advance notice under such terms and conditions as the Secretary may require.

Title 42 U.S.C. § 1437f(o) reprinted at App. 143-181.

Title 42 U.S.C. § 1437f(t), reprinted at App. 188, states in pertinent part:

> (1) Enhanced voucher assistance under this subsection for a family shall be voucher assistance under subsection (o) of this section, except that under such enhanced voucher assistance – . . . .
>
> (B) 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 election and continues to so reside, if the rent for the dwelling unit of the family in such projects exceeds the applicable payment standard established pursuant to subsection (o) of this section for the unit, the amount of rental assistance provided on behalf of the family shall be determined using a payment standard that is equal to the rent for the dwelling unit . . . subject to paragraph (10)(A) of subsection (o) . . .

STATEMENT OF THE CASE

This matter arose out of the United States District Court for the Northern District of California. The district court had jurisdiction over this matter under 28 U.S.C. § 1331 because the claims arose under 42 U.S.C. §§ 1437f and 3601. App. 37-47.

A. Ninth Circuit's Holding.

In its February 25, 2011 Opinion and Order, the Ninth Circuit held that 42 U.S.C. § 1437f(t) "gives 'assisted families' the right 'to remain in the same project,'" exercisable against the owner, at the termination of a Section 8 project-based housing contract. App. 13. The court further held that owners could not evict tenants for their failure to pay the portion of the rent which was previously paid by the Department of Housing and Urban Development (hereinafter HUD) under the terminated contract. App. 14. The court also held that the owners could either sign a housing assistance project (HAP) contract or forego the significant rental income which would otherwise be paid to them by HUD. App. 27.

The court found that the right of the tenant to remain on the property and the concomitant prohibition of the owner to evict was "supported by the plain language of the statute, and by the language of the statutory provision that preceded it." App. 14. The court found that whereas the statutory provision that preceded it "did not explicitly provide a right to remain," *Id.*, the current version of 42 U.S.C. § 1437f(t) made "explicit the tenant's right to remain." *Id*. The Court of Appeals reasoned that if Congress' intent in amending the statute in 2000 had been merely to provide that the Secretary of HUD (hereinafter Secretary) was obligated to supply families with enhanced vouchers while they remain in their existing units, the amendment "making explicit" the tenant's

right to remain would have been unnecessary. App. 15.

B. Statutory Background of Section 8 Housing Programs.

There is no dispute that government subsidized housing represents a significant segment of the overall American housing market. Two million Americans enjoy private-owner, project-based housing assistance, while another five million people live in dwellings subsidized through tenant-based housing assistance. App. at 248. The decision of the Ninth Circuit implicates more than seven million people living in more than three million homes, a regulatory scheme on which the government spends more than $15 billion each year. App. at 249.

The success of the Section 8 rent subsidy program for low-income families has been in large part dependent on participation by individuals and corporate owners of private housing.

The Section 8 program depends on owners willing to enter into agreements with the government, making available their properties to low-income families through rent subsidy contracts between the government and owners, wherein the government pays the lion's share of the low-income family's rent. The tenants are third-party beneficiaries of these contracts.

Because of the magnitude and national importance of providing housing for low-income families through the Section 8 program, the Supreme Court, by the reversal of this egregious decision, can preserve private sector participation, the key element to the success of the Section 8 program.

Understanding the breadth and reach of the Ninth Circuit's holding requires some background into the history of the complex regulatory scheme that is publicly-subsidized housing in America.

1. Section 8 and Privatization – Congress Creates Private-Based Housing Projects.

In the 1960s, Congress sought to entice landowners to create and build inexpensive and affordable rental housing for low-income families by subsidizing and insuring mortgage loans for the construction of multifamily housing projects. See Housing and Urban Development Act of 1968, 82 Stat. 476, 498-503 (1968), Pub. L. No. 90-448, §§ 201(a), 236(a)-(g) (codified as amended at 12 U.S.C. § 1715z-1 (2000)). Under this program HUD insured and subsidized the interest payments of 40-year mortgages executed by the owners for these new projects. *Id.* Upon meeting the eligibility requirements, a family would be allowed to live in a specific project, while having a portion of their rent subsidized by HUD. 42 U.S.C. § 1437a(a). After a contract's expiration, the owners could choose to opt out of the Section 8 program altogether. 24 C.F.R. § 221.524(a)(ii) (1970).

2. Section 8 and Decentralization – Congress Seeks to Diversify Assisted Housing By Creating a Tenant-Based Voucher Program.

In 1974 Congress wanted to move away from large project-based housing for low-income families and into community-based and economically-mixed housing. See Title II of the Housing and Community Development Act of 1974, 88 Stat. 633, 662-66 (1974), Pub. L. No. 93-383, § 201(a), codified as amended at 42 U.S.C. § 1437f (adding to the United States Housing Act of 1937); see also 42 U.S.C. § 1437f(c)(1) ("Section 8"). Accordingly, Congress created a tenant-based voucher program to operate in parallel with the project-based programs.

Under the tenant-based voucher program the government would enter into a HAP contract with private property owners for individual units and thus allow low-income, elderly, and disabled persons to essentially choose the locales in which they wished to reside. *Id.* The program is financed and managed by HUD but is administered locally by a public housing authority (PHA), *see id*. § 1437f(a), and the rental subsidies are provided through the use of vouchers. 42 U.S.C. § 1437f(o). Under this program, the tenant provides a portion of their family income towards the rental payment (the greater of 30 percent of "adjusted income" or 10 percent of gross income) and HUD, usually through a PHA, pays the owner the balance through the voucher program. *Id*.

Tenant subsidized vouchers are portable, in that the tenant may choose to live in other properties where an owner had or will sign a HAP contract agreeing to accept the voucher and comply with the other applicable HUD regulations. *Id*. 42 U.S.C. § 1437f(o)(1)(B), 42 U.S.C. § 1437f(o)(2)(A)-(B), (r). HUD retains discretion to disapprove a tenants housing selection under certain conditions. *Id.* § 1437f(o)(6)(C). HUD also is responsible to insure that income is monitored to assure ongoing eligibility. 42 U.S.C. § 1437f(k).

3. Movement of Project-Based Tenants into the Tenant-Based Voucher Program.

Upon the expiration of numerous project-based contracts, Congress began moving project-based subsidized tenants into the voucher program by authorizing HUD to issue these tenants "enhanced vouchers." 113 Stat. 1047, 1113 (1999), Pub. L. No. 106-74, § 531(d)(1) (codified at 42 U.S.C. § 1437f note, Multifamily Assisted Housing Reform and Affordability Act of 1997, § 524(d)(1) (hereinafter MAHRAA)). Under the enhanced voucher program, if an owner chooses not to renew his project-based contract with HUD, the Secretary is authorized to issue "enhanced" vouchers (to the extent that advance appropriations were made) to tenants who are residing in the project at the date of contract expiration. 42 U.S.C. § 1437f, note, MAHRAA § 524(d). Under the 1999 provision, the rental limits applicable to standard tenant-based vouchers did not apply "during any period that the

assisted family continue[d] [to] reside[ ] in the same project in which the family was residing on the date of the contract's termination." 113 Stat. at 1122-1124, (previously codified as 42 U.S.C. § 1437f(t)); hence the "enhanced" quality of the voucher.

On July 13, 2000, Congress amended subsection (t) to provide that the "the assisted family may elect to remain in the same project" at the time of the contract termination. 114 Stat. 569 (2000), Pub. L. No. 106-246 § 2801.

It is this amendment which the Ninth Circuit held gave tenants a right to remain in the project exercisable against the owner; and further held that the owner could not evict the tenant for failure to pay the previously subsidized portion of the rent.

C. Background – The Park Village Project.

In 1978, Mortimer Howard created Park Village Apartments, an 84 unit housing complex, so as to make housing available to low-income senior citizens and needy individuals. App. 9. The City of Oakland authorized the construction of the complex because Mr. Howard intended to limit residency to people over sixty years old. Mr. Howard also entered into a HAP contract with HUD. Essentially, in this agreement, the federal government agreed to provide Mr. Howard rental subsidies for a portion of the tenants' rents. The tenants would be responsible for paying no more than 30 percent of their income. The initial contract was entered in 1978 under Section 8 of the Housing

Act of 1937, 42 U.S.C. § 1437f and was for a twenty-year term. By the terms of the HUD contract, Mr. Howard guaranteed that his apartments would be affordable to seniors with very low incomes. After twenty years, Mr. Howard renewed the HAP contract on three separate occasions, making the entire contract period with HUD twenty-six-and-a-half years.

D. The Contract Lapses; The Project Winds Down.

After more than twenty-six years of contracting with the federal government, Mr. Howard wished to move on. He no longer wanted to contract with HUD and so in November of 2005, upon the expiration of his third renewed contract, he did not execute a new HAP contract. App. 9. As a result, Mr. Howard has not received any rental subsidies since that time.

On May 17, 2007, Mr. Howard provided notice to the remaining tenants at Park Village that he would not be entering into any future contracts with HUD. Specifically he informed the tenants:

> 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, which is not likely since I will not enter into any contracts thus far provided by HUD.

This notice as well as a subsequent notice was deemed inadequate. App. 9. On July 25, 2008, Mr. Howard was able to serve the tenants with a notice

that complied with HUD's requirements and that of the Oakland Housing Authority (hereinafter OHA).

On July 15, 2009, the OHA sent a letter to Mr. Howard stating that the OHA had HUD authorization to issue enhanced vouchers to tenants and requested that Mr. Howard execute a HAP contract for each of the tenants in his building and new one-year leases for each of the tenants eligible for enhanced vouchers. App. 10.

Mr. Howard informed the OHA that he did not want to enter into any more contracts with the OHA, or HUD and would not accept tenants' vouchers as payment for rent. Mr. Howard further informed the OHA that he would not execute any HAP contracts, nor enter into any new 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 the OHA. App. 10.

E. The Litigation

In August of 2009, Mr. Howard notified the tenants that they would have to begin paying rent of $1192 per month, the rent charged at the expiration of the HAP contract in November, 2005.

Several tenants then filed a lawsuit in the United States District Court for the Northern District of California, which sought, *inter alia*, a preliminary injunction enjoining Mr. Howard from evicting them

or raising their rents, and ordering Mr. Howard to sign new tenant-based assistance contracts with the OHA and accept enhanced vouchers from those tenants.[1] The District Court granted that preliminary injunction. App. 11.

On appeal, the Ninth Circuit reversed the district court's injunction requiring Mr. Howard to sign new contracts with the OHA against his will, but affirmed the court's order enjoining Mr. Howard from seeking payment of the entire rent charged for the apartments and from evicting the tenants for failure to pay the portion of the rent previously subsidized by the government. App. 29-30.

F. The Holding

The Ninth Circuit found specifically that 42 U.S.C. § 1437f(t) provided tenants of the now-defunct Project with a "right to remain" enforceable against the owner. App. 19. While Mr. Howard could not be compelled to enter into contracts with the government nor leases with the tenants, he likewise could not raise the rents to market rate, or in fact demand ANY rent above that which the occupants were paying at the time that the contract expired. App. 17.

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[1] In a prior action, the District Court for the Northern District of California twice enjoined Mr. Howard from raising the rents for failing to comply with the notice requirements. App. 9.

At the current time, there are eleven tenants remaining in this 84 unit building, each of whom pays a fraction of the market-rate rent. Mr. Howard is obligated to maintain the entire facility. The court set no end date for its injunction.

REASONS FOR GRANTING THE PETITION

Only this Court can set a national and uniform standard explicitly clarifying owners' rights and responsibilities under and after the expiration of a Section 8 project-based housing contract. Without this Court's intervention to correct the Ninth Circuit's erroneous ruling, private landlords will be so disinclined against participation in the Section 8 program as to undermine the program itself, leaving thousands of families across the nation without the safe, adequate, affordable housing contemplated by Congress. It is this Court which is in the position to correct the Ninth Circuit's error and reset the balance of the Section 8 regulatory scheme which had taken Congress decades to craft.

To allow this decision to stand is to suffer an egregious invasion of the rights of private property owners across the nation, as well as to threaten deeper harm. This decision will establish a negative precedent informing private citizens to beware of contracting with the federal government, as such contracts contain the risk of the addition of *post hoc* terms fundamentally altering the agreement – and

leaving the individual doing the job of the government.

As this Court has never addressed the complex regulatory scheme at issue in this case, courts around the nation are left with no uniform guidance. This Court should seek to explicate a uniform understanding of the congressional mandate under Section 8. Doing so would not only provide guidance but would insure a uniform national application of Section 8 – helping to ensure its continued success.

I. The Supreme Court Should Grant Certiorari in this Case Because the Ninth Circuit's Holding Threatens Private Sector Housing by Discouraging Essential Private Participation in the Section 8 Program.

Congress and HUD understood that participation by private owners was necessary for HUD to provide available housing to low-income families through the subsidized housing program. Congress sought to encourage private participation by harmonizing the assisted and private rental markets, see Hearing Before the Subcomm. on Hous. & Cmty. Dev. of the Comm. on Banking, Fin. & Urban Affairs, 95th Cong. 66-67 (1978), and avoiding regulations which would reduce private owners' inclination to offer units for rental under Section 8. See 49 Fed.Reg. 12,215, 12,231 (March 29, 1984).

To read the "may elect to remain" provision as chargeable against the owner is to tell the owner of an apartment building that if he chooses to contract with the federal government for project-based assistance, that he will be obligated to enter into government contracts in perpetuity or else forego the rents to which he is entitled; it is to tell an owner that he must forfeit his property's alienability and subject himself to a federal regulatory scheme which is potentially much more restrictive than either local or state regulations. In short, it is to put an owner in a demonstrably worse position than his non-government contracting neighbors. The Ninth Circuit's opinion threatens future private participation. Owners, without assurance that upon the expiration of the HAP subsidy contract their obligations and duties would end, will be discouraged from participation in this important program.

Both project-based and, to an even greater degree, tenant-based public housing suffer from far greater demand than supply, with occupancy rates at 90 percent for all such programs, App. at 248. By creating unwholesome and unintended disincentives to private property owners to participate in the program, the Ninth Circuit's ruling will have the consequent effect of discouraging private project participation, which will only further add to the scarcity of available subsidized housing stock.

Further, landlords of multi-unit dwellings currently contracting with the government and enjoying a mix of assisted and non-assisted tenants will

naturally prefer prospective non-assisted tenants, rather than those who, at the expiration of their project contract, would enjoy a "right to remain" irrespective of their ability to pay market rent.

If this decision stands, low-income families who are the intended beneficiaries of this program will be the ultimate losers. This program has improved the quality of millions of lives by providing housing opportunities that would never have been possible without private participation.

The Section 8 program has been the most successful government effort to give dignity to low-income families, rather than the stigma of public housing, whose demise was the wrecking ball and the bulldozers.

The Section 8 program, by history and design, depends on the participation of private citizens to provide housing stock to millions of low-income Americans. The Ninth Circuit's error threatens this scheme, 40 years in the making. This Court should review this case and bring the law back to the congressional intent.

II. The Supreme Court Should Grant Certiorari in this Case Because the Ninth Circuit's Holding Upsets Congress' Carefully Balanced Subsidized Housing Scheme to the Detriment of Millions of low income families.

In affirming the district court's finding that the "may elect to remain" provision created a right chargeable against the landlord, the Ninth Circuit has dramatically tipped the balance of interests on which the entire scheme of publicly subsidized housing rests.

Congress has, over a period of 40 years, worked to create a delicately balanced regulatory scheme which both assists low-income families and puts private owners who contract with the government on fair footing with those who do not. The ruling of the Ninth Circuit dramatically alters this balance, to the detriment of all parties.

The Ninth Circuit's decision is at odds with Congress' carefully crafted balance, upon which the Section 8 program and its beneficiaries depend; only this Court can restore this balance.

A. The Ninth Circuit's Holding Nullifies the Notice Provision of 42 U.S.C. § 1437f(c), Which Was Enacted to Balance an Owner's Right to Evict His Tenants with the Concern For Massive Tenant Displacement.

The owners were allowed to repay their loans early after twenty years, at which time they could

exit the program. 24 C.F.R. § 221.524(a)(ii) (1970). Congress understood that owners of projects had a right to evict their tenants upon the expiration of their Section 8 contract. In the 1980s Congress, because of concerns that a large number of project-based owners would seek to repay their mortgages and withdraw from the housing program and thus potentially displace Section 8 tenants, required that owners of project-based buildings provide notice of their intent to opt out of the program. See 101 Stat. 1815, 1890-91 (1988) Pub. L. No. 100-242, § 262(a) (codified as amended at 42 U.S.C. § 1437f(c)(8)).[2] The first notice provisions were enacted in 1988. 101 Stat. 1815, 1890-91 (1988) (Pub. L. No. 100-242, § 262(a), codified as amended at 42 U.S.C. § 1437f(c)(8)). Although the notice period has changed over time, currently this protection requires that an owner provide not less than one year notice of his intention to opt-out of the Section 8 project-based program to the tenant and the Secretary. 42 U.S.C. § 1437f(c)(8)(B).[3]

The notice provision recognizes an owner's right to evict a tenant, but curtails that right until

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[2] Congress also passed a number of laws aiming to restrict the prepayment option in an effort to forestall evictions. See Cranston-Gonzalez National Affordable Housing Act (NAHA), 104 Stat. 4079 (1990), Pub. L. No. 101-625; Low Income Housing Preservation and Resident Homeownership Act of 1990, 104 Stat. 4079 (1990), Pub. L. No. 101-625, § 601(a), Emergency Low Income Housing Preservation Act of 1987, 101 Stat. 1815, 1877-91 (1988) (ELIHPA), Pub. L. No. 100-242.

[3] The Secretary may establish additional requirements for sufficient notice. 42 U.S.C. § 1437f(c)(8)(C).

sufficient notice is provided. *Id.* 42 U.S.C. § 1437f(c)(8)(B). This provision was enacted as a protection for tenants who were residing in projects whose contracts – and thus, the tenants' subsidy – was terminating. Congress was concerned with the lack of available affordable residential housing units for these tenants. In addressing these concerns, Congress enacted a significant notice period. *Id.* Currently subsection 42 U.S.C. § 1437f(c)(8)(A) of this notice provision provides:

> Not less than one year before termination of any contract . . . an owner shall provide written notice to the Secretary and the tenants involved of the proposed termination. The notice shall also include a statement that . . . the owner and the Secretary may agree to a renewal of the contract, thus avoiding termination, and that in the event of termination the Department of Housing and Urban Development will provide tenant-based rental assistance to all eligible residents, enabling them to choose the place they wish to rent, which is likely to include the dwelling unit in which they currently reside. . . .

This section provides a tenant with adequate time to procure other affordable housing should the owner choose not to renew a Section 8 contract or to renew his lease with the particular tenant. The tenant is given information regarding HUD's duties to provide continued assistance, and time in which to put it to use.

The following provision then sets forth the consequences to the owners for failure to provide proper notice. Subdivision (c)(8)(B) goes on to state:

> In the event the owner does not provide the notice required*, 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.* The Secretary may allow the owner to renew the terminating contract for a period of time sufficient to give tenants 1 year of advance notice under such terms and conditions as the Secretary may require.

(Emphasis added).

It is this provision which specifically addresses the owner's rights with regard to the termination of the project-based contracts. What this subsection makes clear is that an owner may only exercise his right to "evict the tenants or increase the tenants' rent payment" after such time as the owner has provided the notice and 1 year has elapsed. 42 U.S.C. § 1437f(c)(8)(B).

The notice provisions have two functions. One, it provides the tenants a year's notice that their tenancy may expire and thus would provide them with sufficient time to secure new housing. Two, it tolled the owner's right to evict or raise rents in situations where notice was not properly provided. Subsection (A) requires notice; subsection (B) informs the owner of the limitations imposed by improper notice. It would strain logic to read into this provision the

Ninth Circuit's requirement that the owner must continue the tenancy regardless whether the owner provided proper notice; its holding makes the penalty for failure to provide adequate notice a nullity. Under its reasoning, the owner cannot evict the tenant, irrespective of his compliance with the notice provision; under the Ninth Circuit's opinion, there is no purpose to the notice provision; the tenant can never be evicted nor will they ever have to pay an increase in rent. The notice is protecting them from nothing.

The Ninth Circuit's interpretation reads out the notice provision, ignoring Congress' carefully developed balance of interests; this interpretation must be corrected.

B. The Ninth Circuit's Holding is an End Run Around the Repeal of the Endless Lease Provision Which Was Enacted to Balance the Subsidized Housing Market with the Unsubsidized Housing Market.

In seeking to balance the interests of owners and the concern for the availability of low-income housing, Congress had to respond early on to complaints by owners regarding the burdens of the Section 8 program – specifically, owners wanted the program to harmonize assisted and private rental markets. See Hearing Before the Subcomm. on Hous. & Cmty. Dev. of the Comm. on Banking, Fin. & Urban Affairs, 95th Cong. 66-67 (1978). Of concern was the PHA's exclusive right to evict tenants during the term of the

lease. *Id*. The Senate agreed to eliminate the PHA's "sole right to evict" the tenants and make the Section 8 tenant's rights the same as tenants in the non-subsidized market in an effort to encourage more owners to participate in the program. S.Rep. No. 97-139 (1981), reprinted in 1981 U.S.C.C.A.N. 396, 552. The House added to the Senate version the requirement that an owner not terminate a tenancy or fail to renew a lease except for serious and repeated violations of State, local or Federal law, or other "good case". H.R.Rep. No. 97-208, at 694-95 (1981) (Conf.Rep.), reprinted in 1981 U.S.C.C.A.N. 1010(d)(1)(B)(ii).

This new provision, barring owners from evicting tenants mid-lease or from refusing to renew a lease without cause, became known as the "endless lease provision." *See id*. Once again the owners objected by expressing concern over the creation of "perpetual tenancies"; HUD "share[d] the concern that [the new requirement] could reduce the desire of private landlords to offer units for rental under the program[.]" 49 Fed.Reg. 12,215, 12,231 (March 29, 1984).

Due to these concerns, in 1994 the National Apartment Association commissioned a report by Abt Associates on Section 8 housing. The commission recommended that Section 8 conform as much as possible to regular market operations by eliminating the "good cause" requirements for nonrenewal and provide Section 8 tenants the same protections afforded to other tenants in the local jurisdiction. *Id*. Thereafter, landlord groups pushed for the adoption

of the Abt Report's recommendations to eliminate the endless lease provision, claiming that "[s]ection 8 families should get all the protections that their nonsubsidized friends and neighbors receive but no greater protections." Hearing on H.R. 2406 Before Subcomm. on Hous. & Cmty. Opportunity of the Comm. on Banking, Fin. & Urban Affairs, 1995 WL 602577 (Oct. 13, 1995) (testimony of Christina L. Garcia, Vice President of Wildwood Mgmt. Group, Inc.).

In 1996 Congress repealed the endless lease provision, 110 Stat. 1321-1328 (1996), Pub. L. No. 104-134, § 203(c)(2), which became permanent in 1998. 112 Stat. 2461, 2596-2604, 2607-2609 (1998), Pub. L. No. 105-276, §§ 545, 549(a), codified at 42 U.S.C. § 1437f(o)(7)(C).

The Ninth Circuit's holding is an end run around the repeal of the endless lease provision. Under the lower court's holding, owners who have opted out of the Section 8 program now must again provide "endless leaseholds" to the tenants. The absurdity of this holding is highlighted by the fact that owners who are under Section 8 contracts would have more rights of eviction than opted-out owners. Consider that an owner, while under a HAP tenant-based voucher contract, would not be required under § 1437f to renew leases to tenants; yet his opted-out project-based neighbor will be required to keep tenants under perpetual leaseholds if this decision stands.

This frustrates Congress' intention to repeal the endless lease provision. The decades of congressional consideration upon this specific provision is lost due to the erroneous decision by the holding.

The lower court has altered the congressional scheme, such that owners are stuck with endless leases even though they are no longer in a contract with HUD and are no longer receiving rental subsidies for the tenants. Congress did not intend *sub silencio* to repeal a legislative scheme which it took such time and care to enact.

C. The Creation of the Enhanced Voucher Program Was A Congressional Balance Between the Owners' Right to Evict Their Tenants and the Prevention of the Displacement of Low-Income Families.

The enhanced voucher program addresses Congress' concerns regarding sufficient housing in two ways. One, it created a market incentive for the owners to remain in the HUD program as they would be receiving the same rents as they could procure in the open market. Two, if the tenants chose to leave the particular project or the owner chose not to renew their lease, the tenants would be immediately entitled to tenant-based vouchers. See 42 U.S.C. §§ 1437f(o)(13)(E)(ii); (o)(13)(J). The substantial waiting period which attends receipt of standard vouchers under subsection (o) would not apply. The tenant would immediately be able to seek housing elsewhere.

At the expiration of a project-based contract, the owner could still choose to forgo contracting with the government or forego renewing the leases of the tenants. If he chooses to do so, the tenants would be required to vacate (as they would be in the open rental market.) The difference being, these tenants received a year's notice to find appropriate affordable housing as well as the guarantee of a housing voucher by HUD; thus providing them the financial security to pay rent for a new residence.

The Ninth Circuit's holding entirely disrupts the balance created by Congress in establishing the enhanced voucher program. This holding puts owners who do not wish to enter into contracts with the government with the Hobson's choice of either entering into contracts with the government or forfeiting significant rental income from their land. The coercive nature of this holding is not what Congress intended when enacting the enhanced voucher provisions; it was precisely what Congress worked to avoid.

III. The Decision Below Is Incorrect and Erroneously Interprets the Statute in a Manner which Renders it Unworkable.

A. The Ninth Circuit's Holding is Not Supported by the Plain Language of the Statute.

The previously discussed 1999 legislation obligated HUD to provide enhanced vouchers to tenants

who were residing in project-based units at the time of the project-based contract's termination:

> In case of a contract for project-based assistance under section 8 for a covered project that is not renewed . . . upon the date of the expiration of such contract the Secretary shall make enhanced voucher assistance . . . available on behalf of each low-income family who, upon the date of such expiration, is residing in an assisted dwelling unit in the covered project.

42 U.S.C. § 1437f note, MAHRAA § 524(d). The 1999 version on 42 U.S.C. § 1437f(t) was amended to define what an enhanced voucher was. Specifically, it stated:

> (1) Enhanced voucher assistance under this subsection for a family shall be voucher assistance under subsection (o) of this section, except that under such enhanced voucher assistance – . . . .
>
> (B) 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 the rent for the dwelling unit of the family in such projects exceeds the applicable payment standard established pursuant to subsection (o) of this section for the unit, the amount of rental assistance provided on behalf of the family shall be determined using a payment standard that is equal to the rent

> for the dwelling unit . . . subject to paragraph (10)(A) of subsection (o) . . .

(Emphasis supplied). Congress made clear that an enhanced voucher mirrored the standard vouchers set forth in subsection (o) except that the rent limits would not apply while the tenant was residing in the project. Accordingly, § 524(d) of MAHRAA, determined *who* would be eligible for an enhanced voucher, and § 1437f(t) defined *what* the benefits of an enhanced voucher were.

Seeking to clarify how the enhanced vouchers would be administered, Congress, several months later, in 2000, passed an amendment to subsection 42 U.S.C. § 1437f(t)(1)(B). The new version removed:

> 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,

and replaced it with:

> 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 election and continues to so reside,

114 Stat. 511, 569 (July 13, 2000), Pub. L. No. 106-248, § 2801. This provision was enacted to "clarify the intent of . . . section 538 of Public Law 106-74 [the original enhanced voucher provision]." This section was not to create a new substantive right or alter

fundamentally the structure of the Section 8 program.

To be clear, the provision of the statute which was amended concerned the application of the rental payment limitations contained in the standard voucher provision. *Id.* § 1437f(o), (t). Although the tenants had a statutory right to receive the enhanced vouchers if they remained in the project, see MAHRAA § 524(d)(1), the subsection (o) rent limits applied only "during any period that the assisted family continues residing in the same project." 113 Stat. at 1122-1123 (previously codified as 42 U.S.C. § 1437f(t). The enhanced vouchers were otherwise identical to standard vouchers set forth in subsection (o), "[e]nhanced voucher assistance under this subsection *shall be voucher assistance under subsection (o) of this section*," *Id.* § 1437f(t)(1). Accordingly, each of the provisions of subsection (o) apply to enhanced vouchers – including the authority that HUD may require approval for any unit which rent exceeds 110 percent of the fair market rent. *Id.* at §§ 1437f(o)(1)(D); (o)(6)(C); (o)(8)(A), (B); (o)(13)(C).

During the period of the 1999 version of § 1437f(t), HUD had the authority to disapprove the continued residency of a tenant. *Id.* § 1437f(o)(1)(D). There was no requirement of this provision that HUD would authorize continued residency. Although, such a requirement could be implied, it was not clear from MAHRAA § 524(d), or § 1437f(t) if HUD had this authority. It was not clear if a tenant had the right to elect to remain in the unit without the approval of

HUD. The subsequent amendment clarified that the tenant, not HUD, retained the choice of remaining in the unit – just as any tenant-based Section 8 tenant had the choice to choose his dwelling unit. Consider that the entirety of subsection (t) states, in essence, that enhanced voucher assistance shall be standard voucher assistance *except* the family may elect to remain in their project and if they do remain the rent limits of standard vouchers do not apply. This was a right of election chargeable against HUD not the landlord.

The 2000 amendment prevented HUD from issuing the enhanced vouchers to the tenants and only authorizing that they be used in other Section 8 units. The only part of the enhanced voucher which would not be triggered would be subsection 42 U.S.C. § 1437f(t)(1)(B). All other characteristics would continue to apply.

Further, the clause which provides that the rent limits only apply if the tenant "continues to so reside" makes clear that this provision does not bind the owner. This clause contemplates an owner's right not to renew a HAP contract or not to extend a leasehold. Although a tenant may "elect to remain" the waiver of the standard voucher rent limits are not triggered just by that election. The tenant must also "continu[e] to so reside." This provision takes into consideration that a tenant may make such an election to remain in the project, but does not continue to so reside because of the owner's intent not to extend a leasehold. The Ninth Circuit's reasoning renders this clause

superfluous – as it can never have any operative effect given that under its reasoning, the tenant election is all that is necessary. Accordingly, a tenant could elect to remain but not continue to so reside when the owner decides that he does not want to participate in the Section 8 program.

Further, the clause does not ever refer to the owners of the projects. If Congress intended to be compelling owners to engage in lifelong leaseholds it would have done so clearly, and would have done so in the section which addressed them specifically. It did not do so here. The provision at issue simply defined the parameters of the newly created enhanced vouchers which HUD was obligated to provide to tenants. The program, which was directed to HUD, did not obligate the owners in any manner. Nothing in 42 U.S.C. § 1437f supports the lower court's position.

B. The Ninth Circuit's Holding is Not Supported by the Statutory Structure.

When looking at the structure of 42 U.S.C. § 1437f in its entirety, the Ninth Circuit's error becomes more clear. Consider the enhanced voucher provision in relation to the standard voucher's portability, § 1437f(o), the notice provision, § 1437f(c)(8), the duty of HUD to monitor the eligibility of the section 8 tenants, § 1437f(k), § 1437f(o)(5)(B), the right of the owners to choose their tenants, §§ 1437f(d), (o)(6)(B), and the right of the owners not

to renew a lease, § 1437f(d)(1)(B)(ii). The Ninth Circuit's holding cannot be harmonized with the Section 8 structure which had been carefully established over years by Congress.

As stated earlier, under the Section 8 program, an enhanced voucher *is* a voucher under subsection (o) (i.e., it is in all respects a tenant-choice voucher, except that the rent limits do not apply if the tenant continues to reside in the project). As such, it is portable, i.e., a tenant with an enhanced voucher may use the voucher in any approved Section 8 unit. See § 1437f(o), (t)(1).

A tenant's housing selection is always conditioned upon the owner's approval. The tenant has a right to elect his choice of housing under the voucher program, but this right is not exercisable against Section 8 owners. *See id.* §§ 1437f(d); (o)(6)(B); (o)(13)(E)(i). As with standard Section 8 vouchers under subsection (o), a Section 8 landlord is **not** required to accept their tenancy.

The Ninth Circuit's holding is also unworkable within the Section 8 framework. Under §§ 1437f(k) and (o)(5)(B), HUD is required to determine a tenant's eligibility for assistance. The tenant's portion that he must pay directly to the owner is dependent upon certain factors set by HUD. Depending on where the tenant fits within the formula, the portion that he pays may move up, down, or his eligibility may be revoked all together. The eligibility requirements still apply to tenants that receive enhanced

vouchers. However, if an owner chooses not to renew a HAP contract, HUD is no longer contractually required to establish eligibility. This would freeze the tenant's rent to the amount at the time of the contract's termination, irrespective of the future financial fortune of the tenant – unless he executes another government contract.

The amount the tenant pays is not set in stone. However, under the Ninth Circuit's reasoning, an owner could never require a tenant to pay more than the portion that he was paying at the time of the termination of the HAP contract. There is no mechanism for this amount to change as HUD is no longer a party to a contract with the owner. There is no statutory authority for the owner to require that the tenant establish eligibility to remain in the unit. Accordingly, this tenant would enjoy benefits that no other Section 8 tenant would enjoy. He is guaranteed an apartment outside of the Section 8 program for an amount that will never change for the tenant's lifetime. It would be immaterial should this tenant come into wealth, inherit money, or win the lottery. The only way this tenant could be required to pay more money would be if the owner, once again, contracted with HUD.

Importantly, § 1437f(d) acknowledges that the "selection of tenants *shall be the function of the owners* . . . " as well as the owner's right not to renew a lease at its expiration. Before 1996, owners' choice on who they could rent to had been substantially curtailed by this section's prior requirement that an

owner could not "refuse to lease any available dwelling unit . . . " to someone because they are a Section 8 certificate holder. See now repealed, 42 U.S.C. § 1437f(t)(1)(A); 110 Stat. 1321-1328 (1996). This provision, known as the "take one, take all" provision, was repealed due to its undue burdens on owners, as well as because it was a disincentive to prospective private participation in future project-based contracts. *See id*.

The same amendment also repealed the provision that mandated that owners could not refuse to renew leases with Section 8 tenants unless they could establish good cause. This provision, known as the "take one, take all" provision was objected to by numerous landlord groups. Congress became concerned that this provision would create a disincentive for new owners to engage in future project-based contracts. As such, in 1996 (three years before the creating of the enhanced voucher statute) Congress repealed the "take one, take all" provision. 110 Stat. 1321-1328; see also, 42 U.S.C. § 1437f(d)(1)(B)(ii). Congress understood that the burdens of Section 8 participation are substantial enough that participation should not be forced upon landlords.

The Ninth Circuit dismissed the argument that this new provision was an obligation imposed upon HUD assuming that another section already imposed this obligation. See App. 14-15, citing 42 U.S.C. § 1437f, note, MAHRAA § 524(d). Section 524 of MAHRAA, along with the 1999 version of § 1437f(t) did not require that HUD approve the tenant's

continued residency in the same project. This provision in conjunction with the 1999 version of 42 U.S.C. § 1437f(t) only required that HUD issue enhanced vouchers, which could be used elsewhere, and that should the tenant remain, the rent limits of (o) will not apply. The 2000 provision simply clarified that HUD must honor a tenant's decision to remain on the property. It does not, however, require that an owner honor the tenant's decision to remain.

The lower court's holding interprets that an owner has an extraordinary obligation under Section 8 in a part of the statute where the owner is not even mentioned. Its interpretation is not supported by the statutory language, structure, or legislative history. Had Congress intended to create a right as significant as the lower court holds, it would have explicitly done so. The specific purpose of the 2000 amendment was for clarification. If it wanted to clarify a "right" it would have used that word – as it did so in other portions of the statute.

The lower court's reasoning is insensate when put into context with the entire legislative scheme. Consider for example, the repeal of the "endless lease" provision, and the repeal of the "take one take all" provision as well as other provisions within this section.

Section 8 is a complex regulatory scheme, built in layers over a course of decades. The Ninth Circuit did not interpret its varied provisions correctly, a misinterpretation with potentially far-reaching consequences.

IV. The Opinion of the Ninth Circuit does not find support in the other circuits which have considered the issue.

A. First Circuit.

In *People to End Homelessness, Inc. v. Develco Singles Apartment Associates*, 339 F.3d 1 (1st Cir. 2003), a project-based HAP contract was set to expire. The owners sent notice to the tenants pursuant to 42 U.S.C. § 1437f(c)(8) that the HAP contracts would not be renewed. *Id.* HUD then issued the tenants enhanced vouchers. *Id.*

The group, People to End Homelessness (an association formed on behalf of Section 8 tenants, hereinafter PEH), filed suit in the District Court seeking an injunction against the owners and HUD arguing that the notice provision was violated and that HUD was acting in violation of federal law for approving the owner's decision not to renew the expiring HAP contract. *Id*. The district court issued a restraining order prohibiting the owners from evicting the tenants or raising their rent for one year and dismissed HUD from the litigation. *Id.* at 8. The district court then granted the owners' motion for summary judgment as there was no other remedy it would issue. *Id.*

The Court of Appeals agreed with the district court that "there was no statutory authorization which would require the Owners to continue participating in HAP contracts once they expired." *Id.* at 4, 9. The district court stated that the "sole remedy for

failing to provide the requisite notice is that the owner is prohibited from evicting tenants or increasing their rent payments *until such notice has been provided and the prescribed notice period has elapsed*." *Id.* at 4; emphasis added.

The First District considered both the enhanced voucher mandates of § 1437f(t) and the notice provisions of § 1437f(c), and harmonized them by finding ONLY that HUD was obligated to provide a voucher, and the landlord was estopped from evicting during the notice period; no other remedies – much less a "right" to remain in tenancy after the conclusion of the landlord's government contract – survived even the motion for summary judgment.

B. D.C. Circuit.

The Ninth Circuit relies on *Feemster v. BSA Limited Partnership,* 548 F.3d 1063 (D.C. Cir. 2008) for the conclusion that there is a statutory "right to remain," failing to distinguish that the right in that case was entirely a creature of municipal creation. App. 13. In *Feemster*, a group of current and former tenants sued their landlord, BSA Limited Partnership, for unlawfully refusing to accept their enhanced vouchers as payment for rent. The BSA defendants sought to limit the Court's consideration to the question of the meaning of the phrase "offered for rental housing" in the section 1437f schema, claiming that their subjective efforts to remove the units from the rental market defeated the "right to remain"

provision. *Feemster v. BSA Limited Partnership supra*, 548 F.3d at 1067. The Plaintiffs, in turn, conceded that – had they been properly evicted under D.C. law – "nothing in the enhanced voucher rules" would stand in the way of their landlords refusing their vouchers and evicting them for non-payment of rent. *Id* at 1068. The Court, in rejecting the argument that BSA was being subjected to an "endless lease," noted that nothing in the Federal scheme "bars landlords from terminating a tenancy on any ground permitted by D.C. law." *Id.* The *Feemster* tenants were protected, found the court, not by section 1437f, but by the District of Columbia Human Rights Act, which forbade "source of income" discrimination. *Id.*

Thirteen states have some sort of law forbidding "source of income" discrimination, including California. The California source of income protections are found at California Government Code § 12955(p)(1); under California law, "source of income" has been interpreted by the Fair Employment and Housing Department to NOT include Section 8 vouchers, an interpretation upheld by the Court of Appeal. See *SABI v. Sterling,* 183 Cal.App.4th 916 (2010).

Thus *Feemster*, far from finding an independent "right to remain" under section 1437f, premised the tenants' interests on local ordinances designed to protect tenants generally. The same deference should be shown to the California Legislature, who has made a deliberate policy choice under Government Code § 12955(p)(1) to allow landlords to decline transactions

that would require their signing contracts with the government to get paid.

Because this is a matter of first impression before this Court, and because eviction actions overwhelmingly arise in state courts, many localities are adrift for guidance when trying to interpret the dictates of section 1437f(c) (the notice provision) and section 1437f(t) the "elect to remain" provision.

There are more than 130,000 privately-owned, Section 8 project-based housing units in California alone, App. 250, all of whose tenants might expect their eviction litigation to proceed in State Court, where the Ninth Circuit's conclusion as to this question of Federal law implicates this matter of traditional State concern, which will be litigated almost entirely in State courts using – as in *Feemster* – principles of State law.

Because this Federal question so deeply implicates these State Court proceedings, it must be answered correctly and with uniformity. This Court should speak.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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