No. 11-36

**IN THE**
# Supreme Court of the United States

MORTIMER HOWARD TRUST, et al.,
*Petitioners,*

v.

PARK VILLAGE APARTMENT TENANTS ASSOCIATION, et al.,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN REPLY TO OPPOSITION

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## TABLE OF CONTENTS

**TABLE OF CONTENTS** ..... i

**TABLE OF AUTHORITIES** ..... iii

**ARGUMENT** ..... 1

**I. The Issue Presented In This Petition Raises Significant Issues of National Importance.** ..... 1

**II. Respondents' Effort to Establish that the Ninth Circuit Correctly Interpreted 42 U.S.C. § 1437f (t) is Unavailing.** ..... 1

**III. The Circuit Opinions Relied Upon By Respondents Do Not Support the Lower Court's Opinion That the Enhanced Voucher Statute Grants Tenants a Right to Remain in Their Units Exercisable Against the Owner.** ..... 4

**CONCLUSION** ..... 10

## TABLE OF AUTHORITIES

**Cases**

*Federal Express Corp. v. Holowecki,*

552 U.S. 389 (2008) ..... 4

*Feemster v. BSA Limited Partnership*,

548 F.3d 1063 (D.C. Cir. 2008) ..... 4, 5, 6

*Graoch Associates #33 Limited Partnership d/b/a Autumn Run Apartments v. Louisville and Jefferson County Metro Human Relations Commission,*

430 F. Supp. 2d 676 (W.D. Ky. 2006) ..... 6, 7

*Knapp v. Eagle Property Management Corp.,* 54 F.3d 1272 (7th Cir. 1995) ..... 7, 9

*People to End Homelessness, Inc. v. Develco Singles Apartment Associates,*

339 F.3d 1 (1st Cir. 2003) ..... 4, 5

*Salute v. Stratford Greens Garden Apartments,* 136 F.3d 293 (2d Cir. 1998) ..... 6, 7,8, 9

**Statutes**

114 Stat. 511 (2000), Pub. L. No. 106-246 § 2801 ..... 1

42 U.S.C. § 1437f(c)(8)(A) ..... 5

42 U.S.C. § 1437f(t)..... 1, 2, 3, 9

California Government Code § 12955(p)(1) ..... 6

**Other Authorities**

HUD Secretary's guidance contained in the Section 8 Renewal Policy Guide..... 2, 3, 4

## ARGUMENT

### I. The Issue Presented In This Petition Raises Significant Issues of National Importance.

Respondents expended no effort in their opposition to address petitioners' argument that the legal issue presented here is of significant national importance. Rather than engage the significance of the issue raised by the petition, respondents assert that this Court should not review this case because the Ninth Circuit's Opinion correctly interpreted 42 U.S.C. § 1437f(t) and because a circuit split is not present below. Opp. 7-14.

For the reasons set forth in the petition for writ of certiorari and the *amicus* brief review should be granted to answer the important legal question presented in this case and to bring needed clarity to the Section 8 housing scheme to ensure continued participation by landowners.

### II. Respondents' Effort to Establish that the Ninth Circuit Correctly Interpreted 42 U.S.C. § 1437f(t) is Unavailing.

Respondents' oppose the Petition for Certiorari on the grounds that Section 1437f(t) clearly establishes tenants' right to remain in the housing units after an owner has lawfully opted-out of his Section 8 housing contract. Opp. 11. Respondents make a cursory argument that the 2000 amendment to Section 1437f(t) (114 Stat. 511 (2000), Pub. L. No. 106-246 § 2801) establishes that tenants have a right to remain

in the previously subsidized housing units irrespective of the tenants' failure to pay the portion of the rent formally paid for by HUD. Opp. 12-13. Respondents' minimalist analysis of § 1437f fails to address the lengthy and significant legislative history and structure of this complex regulatory scheme. Rather, respondents simply rely upon the Ninth Circuit's holding that the tenants of a Section 8 project have a right to remain exercisable against the owners regardless of whether the tenants pay rent in full.

As explicated in the petition, respondents' position is unsupportable by Section 1437f's legislative history, text, and structure.

Respondents assert that the Ninth Circuit "correctly deferred to the HUD Secretary's guidance contained in the Section 8 Renewal Policy Guide (hereinafter The Guide)" when interpreting Section 42 U.S.C. § 1437f(t). Opp. 13. In support of its position, respondents quote the following passage from The Guide:

> Tenants who receive an enhanced voucher have the right to remain in their units as long at [sic] 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 to remain except for cause under Federal, State or local law.

The Guide, Ch. 11, ¶ 11-3.B (as revised Jan. 15, 2008). However, respondents fail to quote the last two sentences of that section:

> In order to receive the full rent charged for the unit, the owner must agree to enter into a Housing Assistance Payment contract with the local PHA on behalf of each covered family. *If an owner refuses to honor the tenants right to remain, the tenant's remedy will depend on State and local law.*

*Id*. emphasis supplied.[1]

The last two sentences are an implicit recognition by HUD that the right to remain is exercisable against *it* rather than against the owner. The Guide acknowledges that the tenant will not have a remedy against the owner under 42 U.S.C. § 1437f if the owner does not honor the tenant's election to remain. Rather, his remedies are limited to State and local law—the traditional forums for landlord-tenant disputes.

However, assuming *arguendo* that the quoted passage reflects HUD's interpretation that Section 1437f(t) gives Section 8 tenants a right to remain exercisable against the opted-out owners, such an interpretation is neither supported by the text, the structure, nor the legislative history of Section 1437f. This interpretation by HUD, although entitled to

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[1] The entire HUD Section 8 Renewal Policy Guide can be found at http://www.hud.gov /offices/hsg/mfh/exp/guide/s8renew.pdf.

some deference, *Federal Express Corp. v. Holowecki,* 552 U.S. 389, 399 (2008), is nonetheless erroneous and only adds to the interpretive ambiguity of Section 1437f(t) which further bolsters the need for this Court to address the issues presented in the petition.

The lower court erred in its analysis and interpretation of The Guide. Respondents' reliance upon it and argument that this Court should not grant review in this case is tautological and misplaced. Respondents are in error and this Court should address the significant issues of national importance raised in the petition.

## III. The Circuit Opinions Relied Upon By Respondents Do Not Support the Lower Court's Opinion That the Enhanced Voucher Statute Grants Tenants a Right to Remain in Their Units Exercisable Against the Owner.

Respondents suggest that review by this Court is unwarranted because "every court of appeals has agreed with HUD's interpretation of the statute to include a right to remain in the property with enhanced vouchers[.]" Opp. 10, citing *Feemster v. BSA Limited Partnership*, 548 F.3d 1063 (D.C. Cir. 2008) and *People to End Homelessness, Inc. v. Develco Singles Apartment Associates,* 339 F.3d 1 (1st Cir. 2003). This suggestion is only true if one views the cases from a level of generality inapposite to the question before this Court; that is, the only thing the cases have in common is their outcomes, not their reasoning. Respondents' position that the views of

the other circuits are "entirely consistent with the decision below" – Opp. 7 – is wrong.

The erroneous decision complained of by petitioner, as articulated by the Ninth Circuit, is that "§ 1437f(t) provides tenants a right to remain in their rental units absent just cause for eviction…" Opp. 6.

The First Circuit, in *People to End Homelessness, Inc.,* 339 F.3d at 3, considered a matter where the tenants who had been issued "enhanced vouchers" were simultaneously subjected to a premature eviction action by the property owners. After restraining the property owners from evicting the tenants prior to the statutory notice period under Section 1437f(c)(8)(A), the district court denied plaintiffs any further relief. The court of appeals affirmed stating that the plaintiffs' "alleged injuries, to the extent they can be redressed, have already been remedied by the district court." *Id.* at 9. The Court of Appeals did not find the perpetual "right to remain" claimed by the Ninth Circuit; but rather affirmed that those tenants could not be evicted without satisfying the statutory notice provision. *Id.* at 4.

In like fashion, the D.C. Circuit, in *Feemster,* 548 F.3d 1063, reached its holding based on a different rationale than the Ninth Circuit. There, as here, eligible recipients of enhanced vouchers were the subject of eviction actions. Against the backdrop complaint that the HUD schema would create "endless leases," the Court found such concerns unpersuasive. The court of appeals instructed that Section 1437f could not bind owners into endless leases. *Id.* at 1069. The court recognized that "[n]either the U.S. Housing Act nor HUD's

interpretation of that Act bars landlords from terminating a tenancy on any ground permitted by D.C. law." *Id.* D.C. law forbade evictions on the basis of "source of income" discrimination; those tenants could not be evicted, not because §1437t protected their tenancies, but because *local law* protected Section 8 tenancies. As discussed in Petitioner's Brief at 39, California, unlike D.C., specifically excludes Section 8 vouchers from the protections of "source of income" discrimination. California Government Code § 12955(p)(1).

Thus, although the plaintiffs in both *PEH* and *Feemster* were recipients of enhanced vouchers who could not be evicted, neither case relied on the theory advanced by the Ninth Circuit. Rather, the reasoning in *PEH* suggests a contrary result of the Ninth Circuit. Moreover, the circuits cited by respondents are similar only in that they reached similar factual outcomes, not that they shared similar legal reasoning, which they did not.

Moreover, other cases have acknowledged that the Housing Voucher Program was designed to encourage voluntary private landlord participation in the federal government's efforts to expand the available housing stock for low-income residents.

Several federal courts have recognized that one of the fundamental purposes of the Section 8 Program was to advance *voluntary* participation by property owners. *Graoch Associates #33 Limited Partnership d/b/a Autumn Run Apartments v. Louisville and Jefferson County Metro Human Relations Commission,* 430 F. Supp. 2d 676 (W.D. Ky. 2006); *Salute v. Stratford Greens Garden Apartments,* 136

F.3d 293 (2d Cir. 1998); *Knapp v. Eagle Property Management Corp.,* 54 F.3d 1272 (7th Cir. 1995).

In *Graoch,* the district court held that a landlord's withdrawal from the federal Section 8 Program was *not prima facie* evidence of discrimination under the federal Fair Housing Act. *Graoch,* 430 F. Supp. 2d at 682. In reaching its decision, the court clearly recognized the intent of Congress to make participation in the Program voluntary. The court concluded:

> Many landlords would no doubt be reluctant to join a program from which there was, in reality and existentially, no exit.[2] Such a result would certainly not be consistent with Congress' intent in creating such a program.
>
> [2][…While the court does not here embrace existentialist views, we nevertheless note the Orwellian absurdity of a "voluntary" program attracting participants through a one-way door, past which they would become trapped forever by the impact of any attempt to leave.]

*Graoch,* 430 F. Supp. 2d at 679, fn. 2. In reaching its conclusions, the district court in *Graoch* relied on the Second and Seventh Circuit cases of *Salute v. Stratford Greens Garden Apartments.* 136 F.3d 293 (2d Cir. 1998) and *Knapp v. Eagle Property Management Corp.,* 54 F.3d 1272 (7th Cir. 1995).

In *Salute v. Stratford Greens Garden Apartments,* 136 F.3d 293 (2d Cir. 1998) although addressing a subsequently repealed section of the statute, the Court of Appeals for the Second Circuit explicitly

recognized the potential burdens associated with participation by private landowners in the Section 8 housing program. The defendant in *Salute* refused to rent to handicapped plaintiffs who received Section 8 housing assistance because he refused to rent apartments to Section 8 certificate holders. *Salute,* 136 F.3d at 295. The court found:

> We think that the voluntariness provision of Section 8 reflects a congressional intent that the burdens of Section 8 participation are substantial enough *that participation should not be forced on landlords,* either as an accommodation to handicap or otherwise. The "take one, take all" and "endless lease" provisions were part of the statute when the voluntariness provision was adopted and they reflect the kind of burdens that the federal government may impose on participating landlords. These burdens are one side of a coin, and the voluntariness is the other. [fn] The repeal of the "take one, take all" and "endless lease" provisions does not affect the voluntariness of the Section 8 program, which remains as voluntary today as it was when originally enacted.
>
> The repeal of these provisions does not reduce the potential for burdensome requirements. A landlord may consider that participation in a federal program will or may entail financial audits,

> maintenance requirements, inspection of the premises, reporting requirements, increased risk of litigation and so-on.

*Salute,* 136 F.3d at 300 (emphasis added).

In *Knapp,* the plaintiff alleged the defendants had discriminated against her by refusing "to rent her an apartment because of her race and her status as a recipient of federal rent assistance under the 'section 8' voucher program." *Knapp,* 54 F.3d at 1275. In addressing the question of what remedies are available to redress a violation of Section 1437f(t), the Seventh Circuit Court of Appeals stated:

> In enacting § 1437f(t), Congress intended to increase the availability of low-income housing. To do so, the section 8 program must be attractive to owners and must ensure that once they are a part of the program they fully participate by continuing to accept voucher holders as tenants. Allowing the recovery of potentially unlimited compensatory damages undoubtedly would deter owners from participating in the section 8 program and would be counterproductive to congressional goals.

*Knapp,* 54 F.3d at 1278. It is clear that Section 8's scheme intended that participation in the voucher program be voluntary and the Ninth Circuit's holding does violence to this principle.

The Ninth Circuit's holding is not supported by any other circuit to consider the issue. Respondents' suggestion that "every court of appeals has agreed with HUD's interpretation of the statute" is wrong.

## CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, this Court should grant the petition for writ of certiorari.

Respectfully Submitted,

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