IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

U.S. Court of Appeals Docket No. 10-15303
Lower Court Docket No. 4:09-cv-04780-SBA

PARK VILLAGE APARTMENT TENANTS ASSOCIATION, et al.,

Plaintiffs-Appellees

vs.

MORTIMER HOWARD TRUST, et al.,

Defendants-Appellants

Preliminary Injunction Appeal from an Order
of the United States District Court
for the Northern District of California, Oakland Division
The Honorable Sandra B. Armstrong, Judge

PETITION FOR REHEARING EN BANC

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I. Purpose for Rehearing En Banc.

This case presents a question of exceptional importance regarding the future viability of this nation's Section 8 housing program. Although the statute in question – 42 U.S.C. § 1437f(t)(1)(B) ("Section 1437f(t)(1)(B)") – actually never refers to any "right" of tenants and does not discuss property owners at all, the three-judge panel (following HUD's aggressive lead) has invented a new "right," available to every tenant whose landlord has legally left the Section 8 program, to remain in his or her apartment *for the rest of his or her life*.

Very few property owners will be willing to join the Section 8 program if this decision is allowed to stand. The Court's opinion forces property owners who legally leave the program (often, as here, after participating for three decades) to retain their existing tenants indefinitely, and to forgo market rates for those tenants' units unless they agree to keep signing contracts of adhesion – again indefinitely – with the local housing authority. The opinion leaves property owners with no economically feasible way to extricate themselves from Section 8 tenants or Section 8 bureaucracy. This outcome is particularly troubling given that these property owners were originally induced to enter the program by another provision of the statute – 42 U.S.C. §1437f(c)(8)(B) – which clearly allows them to leave the program and thereafter evict the tenants or raise their rents, provided they

(like the property owners here) follow certain notice procedures and wait the prescribed period.

II. The Three-Judge Panel's Claim That the Statute Contains an "Explicit" Right to Remain Is Simply Untrue, and Its Interpretation of the Statutory History Is Unsound.

In its February 25, 2011 Opinion and Order, this Court held that Section 1437f(t) "gives 'assisted families' the right 'to remain in the same project,'" and claimed that its reading of the statute was "supported by the plain language of the statute, and by the language of the statutory provision that preceded it." (*Park Village Tenants Ass'n et al. v. Mortimer Howard Trust et al.*, No. 10-15303, slip op. at 2915; 2916 (9th Cir. Feb. 25, 2011)) (the "Opinion"). This reading is flawed, and must be corrected. At its heart is the assertion that whereas the statutory provision that preceded it "did not explicitly provide a right to remain," (Opinion, at 2916), the current version of Section 1437f(t) made "explicit the tenant's right to remain." (Id.). This is untrue; *neither* version of the statute contains the word "right," although if Congress had intended by amending the statute to create such a right, it could easily have done so simply by saying that assisted families "have the right to remain."[1]

[1] Indeed, Congress had no difficulty using the words "right" and "rights" in other subsections of Section 1437f: those words appear *twenty-nine* (29) times in other subsections thereof, including 1437f(c)(9)(B) ("actual or threatened domestic violence . . . shall not be good cause for terminating the . . . occupancy rights of the victim"); 1437f(d)(1)(B)(iii) (tenant's "right to peaceful enjoyment of the

The Opinion arrived at its conclusion that Congress intended to give tenants a "right to remain" based on two statutory arguments. First, it claimed that

> if Congress's intent in amending the statute in 2000 had been merely to provide that the [HUD] Secretary was obligated to supply families with enhanced vouchers while they remained in their existing units, the amendment making explicit the tenant's right to remain would have been unnecessary.

(Opinion, at 2916). In order to evaluate this assertion, we must look at the two versions of the statute side by side. The 1999 version of Section 1437f(t) contained the following language:

> (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. . . .

(Emphasis supplied). In 2000, Congress passed a new version of subsection (B):

> (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,*** the rent for the

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premises"); 1437f(f)(1) (defining an "owner" as someone "having the legal right to lease or sublease dwelling units"); and 1437f(o)(20)(D)(i) (referring to "[p]ublic housing['s] right to terminate [a tenant] for criminal acts").

> 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 . . . .

(Emphasis and underlining supplied). What *is* unnecessary is to read this change as giving tenants a "right to remain" vis-à-vis their landlords, who are not even mentioned in the statute, rather than vis-à-vis HUD, which is. Under the 1999 version, it was not explicit that a tenant could "elect to remain" in his or her unit absent HUD's agreement. Only if HUD did not object to the tenant's remaining in his or her unit (for which HUD's share of the rent might now be higher) would there ever be a "period that the assisted family continues residing in the same project," and only then would the tenant be entitled to an enhanced voucher.

With the 2000 version, what Congress made clear was that a tenant could "elect to remain" in his or her unit regardless of whether HUD approved; if the tenant so elected (*and continued to reside in the project*),[2] HUD had to give him or her an enhanced voucher.

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[2] This "*and continues to so remain*" clause – ignored by the Opinion – is rendered superfluous by the Court's reading of the amendment. If the Court were correct – and the "right to remain" obligated the property owner – the 2000 amendment could have omitted that clause entirely and said, "the assisted family may elect to remain . . . and if, during any period the family makes such election, the rent for the dwelling unit of the family in such projects exceeds the applicable payment standard . . . the amount of rental assistance provided . . . shall be determined using a payment standard that is equal to the rent for the dwelling unit . . . ." Nothing

The second statutory argument made by the Court here was that "there is a separate statutory provision that already required the [HUD] Secretary to provide enhanced vouchers to eligible families. *See* 42 U.S.C. § 1437 note, MAHRAA § 524(d)." (Opinion, at 2916-17). This "separate statutory provision," however, cannot be said to obligate HUD to all tenants who elect to remain, since its applicability is entirely conditioned on an appropriation's having been made in advance.[3] It has nothing to do with the focus of the 2000 amendment to Section 1437f(t), which, ensures HUD assistance to eligible tenants unconditionally, but also recognizes that of all the families living in the project on the termination date, only some of those families may "elect to remain" (while others will not), and of those who "elect to remain," not all of those will necessarily also "continue to so remain," and thus ultimately be entitled to enhanced vouchers.

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would have been lost. Under Appellants' reading, however, that clause is necessary in order to indicate that Congress envisioned certain circumstances in which a family might "elect to remain" but *not* ultimately "continue to so remain" – such as here, where the property owner does not agree to sign HAP contracts that are a statutory prerequisite to a tenant's obtaining an enhanced voucher.

[3] The "separate statute" reads, in relevant part: "In the case of a contract for project-based assistance under section 8 for a covered project that is not renewed . . . , *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 . . . 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." 42 U.S.C. § 1437 note, MAHRAA § 524(d)(1). (Emphasis supplied).

III. The Court's Basis for Holding That Tenants Have an Absolute "Right to Remain" Cannot Be Reconciled With Its Holding That Appellants May Not Be Compelled to Sign New HAP Contracts.

In the second part of its Opinion, the majority acknowledged that "'[t]he statute nowhere explicitly requires an owner to enter into a HAP contract," (Opinion at 2924), and correctly rejected the dissent's notion that "Congress intended *sub silentio* to require Section 8 opt-outs to enter contracts of adhesion whose terms are dictated solely by PHAs [Public Housing Authorities] but whose financial burdens can easily frustrate other provisions of the Act.'" (Id., at 2926). This holding cannot be reconciled with the majority's recognition of a tenant's absolute "right to remain."

The conflict between the first holding, finding a "right to remain," and the second holding, finding no obligation to enter into HAP contracts, becomes clear when one examines HUD's self-serving construction of the statute – itself one of the bases for the Opinion's first holding. (Opinion, at 2917). As the Opinion notes, HUD's Section 8 Renewal Policy Guide "conditions an owner's ability to opt-out of the project-based assistance program on the owner's provision of an 'acceptable one-year notification' to tenants," including a letter "stat[ing]that the owner will honor the right of residents to remain" as long as the property is offered for rental housing. (Id.) But the Opinion quotes only *part* of the text of the letter – thus masking the conflict.

The actual text of the letter that HUD required Appellants to send was: "***Federal law allows you to elect to continue living at this property provided that the unit, the rent, and I, the Owner, meet the requirements of the Section 8 tenant-based assistance program.*** As an Owner, I will honor your right as a tenant to remain on the property ***on that basis*** as long as it continues to be offered as rental housing, provided that there is no cause for eviction under Federal, State or local law." (Emphasis supplied).

If Appellants cannot be compelled to sign HAP contracts, however, then the "units" do not "meet the requirements of the Section 8 tenant-based assistance program," because they have not undergone the requisite inspections and approval processes. See Section 1437f(o)(8) (inspections must take place before HAP contract is signed or voucher payment is made). But if a unit does not meet those requirements, then according to the foregoing letter, the tenant *cannot* "elect to remain" there. In other words, according to the Opinion's only source for an explicit "right to remain," such a "right" only attaches to units for which owners have signed HAP contracts.

Appellants maintain that the only way to reconcile: (1) the tenants "may elect to remain" language of Section 1437f(t); (2) the Court's holding that owners may not be compelled to sign HAP contracts; and (3) the owner's right under Section 1437f(c)(8)(B) to evict tenants or raise rents after termination of the

project-based contract, proper notice, and the expiration of the one-year waiting period, is to understand the "may elect to remain" language as Appellants do. Tenants – just like students with "school choice" vouchers -- may "elect" (choose) to remain in the unit they are in when the project-based contract expires. But then – just like voucher-accepting schools -- the property owners are not compelled to accept *every* tenant who has made such "election"; they have a choice, too.

On the one hand, property owners can choose to submit to various inspections which are prerequisites to the unit's acceptability as Section 8 housing and sign HAP contracts with the local housing authority, in which case their tenants "continue to so remain" under Section 1437f(t) and are entitled to enhanced vouchers; this is what the property owner did in *Estevez v. Cosmopolitan Assocs. L.L.C.,* 2005 WL 3164146 (E.D.N.Y. Nov. 28, 2005), one of the cases cited in the Opinion. On the other hand, property owners can choose to exercise their right under Section 1437f(c)(8)(B) to evict tenants or raise rents after termination of the project-based contract, proper notice, and the expiration of the one-year waiting period (as Appellants tried to do here).

IV. Conclusion.

The Court should grant this Petition for Rehearing En Banc in order to permit a full panel to decide this issue of critical importance to the future of the Section 8 housing program.

Dated: March 11, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 40-1, I certify that Appellants' Petition for Rehearing En Banc is proportionately spaced, has a typeface of 14 points Times New Roman, and contains 2171 words.

Dated: March 11, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 11, 2011.

I hereby certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/CCECF system.

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