



A. Christian Abasto  
 LEGAL AID FOUNDATION OF LOS ANGELES  
 1550 West 8th Street  
 Los Angeles, California 90017  
 Telephone: 213-640-3826  
 Fax: 213-640-3850

James R. Grow  
 NATIONAL HOUSING LAW PROJECT  
 614 Grand Avenue, Suite 320  
 Oakland, California 94610  
 Telephone: 510-251-9400  
 Fax: 510-451-2300

Counsel for all Plaintiffs-Appellees

Michael E. Soloff  
 MUNGER, TOLLES & OLSON LLP  
 355 South Grand Avenue, 35th Floor  
 Los Angeles, CA 90071-1560  
 (213) 683-9100

Counsel for Plaintiff-Appellee Debora Barrientos

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UNITED STATES COURT OF APPEALS  
 FOR THE NINTH CIRCUIT

DEBORA BARRIENTOS, et al. )	C.A. No. 07-56697
Plaintiffs-Appellees, )	D.C. No. CV 06-6437-ABC-FMO
v. )	(C.D. Cal.)
1801-1825 MORTON LLC, )	<b>APPELLEES'S MOTION FOR</b>
Defendant-Appellee. )	<b>LEAVE TO EXCEED THE TYPE-</b>
)	<b>VOLUME LIMITATION FOR THE</b>
)	<b>ANSWERING BRIEF;</b>
)	<b>DECLARATION OF MICHAEL E.</b>
)	<b>SOLOFF</b>
)	

In accordance with Ninth Circuit Rule 32-2, Plaintiffs-Appellees Debora Barrientos, Armando Briseno, Bertha Cardenas, Marta Chajon, Manuel Cuevas, Francisco A. Del Cid, Miguel Gonzalez, Jeong Soon Hwang, Bong Cha Kim, Jae Ok Kim, Leanna Kim, Nong-Soon Kim, Young Suk Kim, Maria Landaverde, Jane Lee, Jeong Lee, Susan Lee, Young Hean Lee, Jin M. Park, Norma Angelica Pena, Maria Rodriguez and Helen H. Yu (collectively, "Plaintiffs") respectfully move for leave to exceed the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(A) with respect to Appellees' Answering Brief, and to file the brief attached hereto which contains 17,044 words. Under this Court's November 21, 2007 Time Schedule Order, the answering brief was originally due on June 9, 2008. On May 27, 2008, Plaintiffs filed an unopposed motion seeking a 45 day extension to July 24, 2008. The Court has not yet ruled on that motion. On July 22, 2008, Plaintiffs filed an unopposed motion for a further eleven day extension to file their answering brief to August 4, 2008. The Court has not yet ruled on that motion.

Good cause exists for the request to exceed the type volume limitation.

First, as set forth in the declaration of Michael E. Soloff attached hereto ("Soloff Decl."), this appeal involves the application of the protection

of the eviction controls of the Los Angeles Rent Stabilization Ordinance (“LARSO”) to Plaintiffs as recipients under two related but distinct federal benefit programs, the Section 8 regular voucher program and the Section 8 enhanced voucher program. These two programs have distinct statutory and regulatory histories. (Soloff Decl. ¶ 6)

Second, as to each of these programs, this appeal involves two distinct issues: (1) Is there a sufficient conflict between the application of the eviction controls of the Los Angeles Rent Stabilization Ordinance and the HUD regulations governing these programs to warrant preemption, and (2) if there is such a conflict, are the HUD regulations that create such a conflict authorized by the Section 8 statute under a *Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984) analysis? (Soloff Decl. ¶ 7)

Third, the District Court answered the first of the two questions against Plaintiffs with respect to each of the two federal programs, but granted summary judgment in favor of Plaintiffs after finding on the second question that the HUD regulations were invalid under a *Chevron* analysis as to each of the programs. The District Court’s original opinion was 44 pages in length, and its opinion on Appellant’s Motion for Reconsideration was an additional 18 pages. (Soloff Decl. ¶ 8)

Fourth, Appellant chose in its Opening Brief to address only the second of the issues. Put another way, Appellant's Opening Brief devoted virtually the entirety of its 13,662 words to addressing only the issue on which it lost below. (Soloff Decl. ¶ 9)

Fifth, Plaintiffs strongly believe that they were entitled to prevail on both of the issues; that is, that there is no preemptive conflict between LARSO's eviction controls and the HUD regulations involved in either of the two Section 8 voucher programs, *and* that, even if there was such a conflict, the HUD regulations are invalid to the extent they otherwise would preempt LARSO's eviction controls. Plaintiffs therefore have to present in their answering brief both the affirmative case for the lack of a preemptive conflict, *and* their response to the entire almost 14,000 word argument by Appellant regarding the validity of the HUD regulations under *Chevron* (as well as various attacks on the types of relief granted to Plaintiffs). (Soloff Decl. ¶ 10)

Sixth, in order to determine whether there is a preemptive conflict between LARSO and the HUD regulations, and to then determine whether the HUD regulations impermissibly conflict with the Section 8 Statute, Plaintiffs believe it is necessary to understand the history of the provisions at issue as they have evolved since Section 8 was first passed in 1974.

Plaintiffs' *pro bono* counsel have utilized the service of a legislative and regulatory history research firm in Washington D.C. that has devoted hundreds of hours to looking for pertinent legislative and regulatory history. Plaintiffs have worked to pare down the materials to those important to this Court's evaluation of the merits of this appeal, but the amount of material to present remains quite large. (Soloff Decl. ¶ 11)

Seventh, Plaintiffs also must respond to a second brief filed by the California Apartment Association, as *amicus curiae*. (Soloff Decl. ¶ 12)

Counsel for Plaintiffs have acted with diligence in preparing the answering brief in this matter. Counsel have reviewed extensive legislative and regulatory history materials and have selected those that they believe are material to this Court properly evaluating the merits. Michael Soloff, the counsel who has had primary responsibility for the brief, has devoted some 200 *pro bono* hours preparing Appellees' answering brief. (Soloff Decl. ¶ 13)

For the foregoing reasons, Plaintiffs' motion for leave to exceed the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(A) with respect to Appellees' Answering Brief, and to file the brief attached hereto which contains 17,044 words, should be granted.

DATE: August 4, 2008 Respectfully submitted,

LEGAL AID FOUNDATION OF LOS ANGELES

NATIONAL HOUSING LAW PROJECT

MUNGER, TOLLES & OLSON LLP

By: Michael E. Soloff / M

Authorized to sign for all  
Attorneys for Plaintiffs-Appellees

DECLARATION OF MICHAEL E. SOLOFF

I, Michael E. Soloff, do hereby declare as follows:

1. I am a partner in the law firm of Munger, Tolles & Olson LLP, which firm is co-counsel for Plaintiff-Appellee Debra Barrientos and fourteen other Plaintiffs in *Debra Barrientos et al. v. 1801-1825 Morton LLC*, CA No. 07-56697. I am a member in good standing of the bar of this Court. In accordance with Ninth Circuit Rule 32-2, I submit this declaration in support of “Appellees’ Motion For Leave To Exceed The Type-Volume Limitation For The Answering Brief.” The matters set forth herein are based upon my own personal knowledge, and if called upon to do so, I could and would testify competently thereto.

2. I have worked as *pro bono* co-counsel with the Legal Aid Foundation of Los Angeles on various cases in the California court system in which landlords have asserted that the eviction controls of LARSO do not apply to Section 8 tenants for a variety of reasons. I became co-counsel for Plaintiff-Appellee Debra Barrientos in this case shortly before oral argument of Plaintiffs’ successful summary judgment motion, and appeared for Ms. Barrientos at that argument together with A. Christian Abasto. I have now been retained by 14 additional Plaintiffs as co-counsel for this appeal.

3. Plaintiffs' answering brief originally was due on June 9, 2008. On May 27, 2008, Plaintiffs filed an unopposed motion seeking a 45 day extension of the due date for their answering brief to July 24, 2008. This Court has not yet ruled on that motion.

4. On July 22, 2008, Plaintiffs filed an unopposed motion seeking an additional 11 day extension of the due date for their answering brief to August 4, 2008. This Court has not yet ruled on that motion.

5. For the reasons set forth below, Plaintiffs are requesting leave to exceed the volume-type limitations of Federal Rule of Appellate Procedure 32(a)(7)(A) with respect to Appellees' Answering Brief, and to file the brief attached hereto which contains 17,044 words.

6. This appeal involves the application of the protection of the eviction controls of the Los Angeles Rent Stabilization Ordinance ("LARSO") to Plaintiffs as recipients under two related but distinct federal benefit programs, the Section 8 regular voucher program and the Section 8 enhanced voucher program. These two programs have distinct statutory and regulatory histories.

7. As to each of these programs, this appeal involves two distinct issues: (1) Is there a sufficient conflict between the application of the eviction controls of the Los Angeles Rent Stabilization Ordinance and the

HUD regulations governing these programs to warrant preemption, and (2) if there is such a conflict, are the HUD regulations that create such a conflict authorized by the Section 8 statute under a *Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984) analysis?

8. The District Court answered the first of the two questions against Plaintiffs with respect to each of the two federal programs, but granted summary judgment in favor of Plaintiffs after finding on the second question that the HUD regulations were invalid under a *Chevron* analysis as to each of the programs. The District Court's original opinion was 44 pages in length, and its opinion on Appellant's Motion for Reconsideration was an additional 18 pages.

9. Appellant chose in its Opening Brief to address only the second of the issues. Put another way, Appellant's Opening Brief devoted virtually the entirety of its 13,662 words to addressing only the issue on which it lost below.

10. Plaintiffs strongly believe that they were entitled to prevail on both of the issues; that is, that there is no preemptive conflict between LARSO's eviction controls and the HUD regulations involved in either of the two Section 8 voucher programs, *and* that, even if there was such a conflict, the HUD regulations are invalid to the extent they otherwise would

preempt LARSO's eviction controls. Plaintiffs therefore have to present in their answering brief both the affirmative case for the lack of a preemptive conflict, *and* their response to the entire almost 14,000 word argument by Appellant regarding the validity of the HUD regulations under *Chevron* (as well as various attacks on the types of relief granted to Plaintiffs).

11. In order to determine whether there is a preemptive conflict between LARSO and the HUD regulations, and to then determine whether the HUD regulations impermissibly conflict with the Section 8 Statute, Plaintiffs believe it is necessary to understand the history of the provisions at issue as they have evolved since Section 8 was first passed in 1974. Plaintiffs' *pro bono* counsel have utilized the service of a legislative and regulatory history research firm in Washington D.C. that has devoted hundreds of hours to looking for pertinent legislative and regulatory history. Plaintiffs have worked to pare down the materials to those important to this Court's evaluation of the merits of this appeal, but the amount of material to present remains quite large.

12. Plaintiffs also must respond to a second brief filed by the California Apartment Association, as *amicus curiae*.

13. Counsel for Plaintiffs have acted with diligence in preparing the answering brief in this matter. Counsel have reviewed extensive legislative

and regulatory history materials and have selected those that they believe are material to this Court properly evaluating the merits. I the counsel who has had primary responsibility for the brief, has devoted some 200 *pro bono* hours preparing Appellees' answering brief.

I declare under Penalty of Perjury that the foregoing is true and correct.

Executed at Los Angeles, California on August 4, 2008.

A handwritten signature in cursive script, appearing to read "Michael E. Soloff", written in black ink. The signature is positioned above a horizontal line.

---

Michael E. Soloff

**NO. 07-56697**  
**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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**DEBORA BARRIENTOS, ET AL.,**

Plaintiffs-Appellees,

v.

**1801-1825 MORTON LLC,**

Defendant-Appellant.

---

Appeal from a decision of the United States District Court for the Central  
District of California (Western Division - Los Angeles) No. 06-CV-06437  
Honorable Audrey B. Collins

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**APPELLEES' BRIEF**

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A. CHRISTIAN ABASTO, ESQ.  
LEGAL AID FOUNDATION OF  
LOS ANGELES  
1550 West Eighth Street  
Los Angeles, California 90017  
Telephone: (213) 640-3826  
Facsimile: (213) 640-3850

JAMES R. GROW, ESQ.  
NATIONAL HOUSING LAW PROJECT  
614 Grand Avenue, Suite 320  
Oakland, California 94610  
Telephone: (510) 251-9400  
Facsimile: (510) 451-2300  
Attorneys for All Plaintiffs-Appellees

MICHAEL E. SOLOFF, ESQ.  
MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue  
Thirty-Fifth Floor  
Los Angeles, California 90071-1560  
Telephone: (213) 683-9100  
Facsimile: (213) 687-3702

Attorneys for Appellees,  
Deborah Barrientos, Susan Lee, Miguel A. Gonzalez, Francisco A. Del Cid,  
Bong Cha Kim, Leanna Kim, Jane Y. Lee, Nong-Soon Kim, Maria Rodriguez,  
Manuel Cuevas, Young Hean Lee, Helen H. Yu, Bertha A. Cardenas, Jeon  
Goon Hwang and Jin M. Park

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## INTRODUCTION

Appellees (“Tenants”) are low-income residents in the Morton Gardens apartment complex who rent their long-time homes with the assistance of either the Section 8 enhanced voucher or standard voucher program. This appeal arises from the attempt by Appellant (“Landlord”) to evict Tenants as part of a plan to circumvent the rent controls imposed by the Los Angeles Rent Stabilization Ordinance (“LARSO”).

Landlord concedes that Tenants have done nothing wrong, and that Landlord does not have “good cause” to evict Tenants under LARSO’s eviction controls. Rather, Landlord contends that LARSO is preempted by the less stringent federal eviction controls imposed by HUD on Section 8 owners, controls that permit evictions based on a “desire to lease the unit at a higher rental.” Stated differently, Landlord argues that federal eviction controls -- added to the Section 8 program in order to provide assisted tenants a minimum nationwide floor of protection against no-cause evictions -- somehow are transformed into a preemptive ceiling that precludes Tenants from enjoying the benefits of the same LARSO eviction controls that their unassisted neighbors enjoy.

This is not the first time that an owner has come before this Court to assert that federal preemption allows it to circumvent LARSO’s rent controls at the Morton Gardens apartment complex. In *Topa Equities, Ltd. v. City of Los Angeles*,

342 F.3d 1065 (9th Cir. 2003), a prior owner argued that because it constructed Morton Gardens with a mortgage that HUD subsidized in exchange for the owner's agreement to charge below-market rents to its low-income tenants, and because the owner thereafter was released from its agreement when it prepaid the mortgage pursuant to federal law, the owner therefore had a federal right to raise initial rents following prepayment to market levels that preempted LARSO's contrary rent controls. This Court rejected that argument, however. *See id.* at 1073.

Landlord's attempt to use a different preemption argument to achieve the same result is equally devoid of merit. First, application of LARSO's more stringent eviction controls is not an obstacle to HUD's policy in establishing less stringent federal controls, and therefore is not preempted. Congress mandated that Section 8 tenants only be evicted for good cause. HUD -- recognizing that landlords in most jurisdictions can evict unassisted tenants for no cause at all under state and local law -- promulgated regulations for the standard voucher program that minimized the additional burden imposed by this federal good cause requirement, in order to avoid the disincentive to voluntary owner participation that would be created if assisted tenants were too much harder to evict than unassisted tenants. As HUD repeatedly has recognized, owner participation in the standard voucher program is encouraged by making the rules governing assisted tenancies as much like the rules governing unassisted tenancies as possible.

Application of LARSO's more restrictive local eviction controls to assisted and unassisted tenants alike therefore actually furthers HUD's policy for the standard voucher program by making the eviction process uniform.

Moreover, Congress made owner participation in the enhanced voucher program mandatory in certain circumstances, such as upon the 1998 prepayment of the HUD subsidized mortgage at Morton Gardens. Therefore, application of LARSO's stricter eviction controls to those Tenants participating in the enhanced voucher program cannot in any event constitute an obstacle to a HUD policy designed to encourage voluntary owner participation in the standard voucher program.

Second, even if HUD policy somehow called for encouraging owner participation by denying assisted tenants the more protective local eviction controls enjoyed by their unassisted neighbors (which it does not), HUD's regulation implementing that policy would be invalid to the extent of its purported preemptive effect. Such a preemptive regulation is not reasonable under the Section 8 statute because Congress determined that the proper way to encourage owner participation is to make assisted tenancies as much like unassisted tenancies as possible, and because application of such a regulation in a rent control jurisdiction would lead to the absurd result of making assisted tenants special targets for eviction as landlords seek to raise rents to new tenants through "vacancy decontrol."

Third, and independent of LARSO, the sixteen Tenants who resided at Morton Gardens at the time of the prepayment of the HUD subsidized loan have a federal statutory right to remain in their homes under the enhanced voucher program. Landlord's attempt to evict these sixteen Tenants in order to raise rents beyond the levels permitted by LARSO necessarily violates that right. Otherwise, the federal right for tenants to remain following prepayment of a HUD mortgage would be illusory in rent control jurisdictions.

### **STATEMENT OF JURISDICTION**

Appellee joins in Appellant's Statement of Jurisdiction.

### **STATEMENT OF THE ISSUES**

A. Whether this Court should affirm the District Court's judgment because LARSO's eviction controls do not stand as an obstacle to accomplishment of HUD's policies under its "good cause" eviction regulation, 24 C.F.R. § 982.310(d)(iv)?

B. Whether the District Court correctly held that HUD does not have authority under the Section 8 statute to preempt local eviction controls in order to permit owners to circumvent local rent controls?

C. Whether this Court should affirm the District Court's judgment because Landlord lacked "good cause" under HUD's regulation, and therefore cannot assert preemption of LARSO?

D. Whether the District Court correctly held that the right to remain guaranteed by 42 U.S.C. § 1437f(t)(1) to sixteen of the Tenants is violated by an attempt to evict based on the desire to raise the rent to a new tenant through vacancy decontrol?

E. Whether the District Court properly applied its judgment to Landlord rather than prospectively only?

F. Whether Landlord waived his appeal of the terms of the injunction by failing to object below?

G. Whether the District Court properly awarded attorneys' fees to Tenants?

## STATEMENT OF THE CASE

Appellant joins in the recitation of the nature of the case and course of proceedings set forth in Appellant's Opening Brief.

## STATEMENT OF FACTS

### I. Summary Judgment Record

The record on the District Court's order granting summary judgment consists of the parties' Stipulation of Facts ("Stip.") (ER 144-212.) The undisputed facts, as set forth therein, are as follows:

Tenants are renters at Morton Gardens, a 66-unit apartment complex located in Los Angeles, California. Stip. ¶¶ 2-24 (ER 145-151.) The apartments occupied by Tenants are covered and protected by LARSO, Los Angeles Municipal Code §151.00 *et seq.* Stip. ¶ 28 (ER 152.) Landlord is the owner of Morton Gardens and Tenants' landlord. Stip. ¶ 1 (ER 145.)

Morton Gardens was developed in 1971 as a low-income rental housing project through a federal mortgage-secured loan subsidy program under Section 236 of the National Housing Act, 12 U.S.C. § 1715z-1. Stip. ¶ 25 (ER 151.) Under the Section 236 program, Morton Gardens was subject to a use agreement, recorded in the property's chain of title, that, *inter alia*, required units to be rented only to low-income households and limited the rents that could be charged to HUD-approved levels. Stip. ¶ 26 (ER 151.) However, in January 1998, under applicable federal law, Landlord prepaid the Section 236 loan for Morton Gardens

in advance of the original loan maturity date, and thereby extinguished the use agreement. Stip. ¶ 27 (ER 151.)

Sixteen Tenants (“Enhanced Voucher Tenants”) resided in Morton Gardens at the time of the Section 236 loan prepayment, and therefore were issued enhanced voucher subsidies pursuant to the Fiscal Year (FY) 1998 Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 105-65, 111 Stat. 1351 (1997). Stip. ¶¶ 27, 32-33 (ER 152-154.) These Enhanced Voucher Tenants -- who have lived in their homes for eleven to twenty years, Stip. ¶¶ 2-4, 6-12, 14, 17-20, 23 (ER 145-151.) -- continue to rent their apartments with enhanced voucher subsidies governed by the Unified Enhanced Voucher Authority statute, 42 U.S.C. §1437f(t). Stip. ¶¶ 29, 32-33 (ER 152-154.)

The six remaining Tenants (“Standard Voucher Tenants”) moved into Morton Gardens after the Section 236 loan prepayment. Stip. ¶ 34 (ER 154.) These six Tenants rent their apartments with standard housing choice voucher subsidies governed by 42 U.S.C. §1437f(o). Stip. ¶¶ 29, 34-35 (ER 152, 154.) These Standard Voucher Tenants have lived in their homes for five to ten years. Stip. ¶¶ 5, 13, 15-16, 21-22 (ER 146, 148-151.)

Under both the enhanced voucher and standard housing choice voucher programs, tenants generally pay a percentage of their income, as determined under

federal formulas, towards their rent to their landlords, with the remainder of their rent covered by federal housing assistance payments administered by local public housing authorities. In this case, the Housing Authority of the City of Los Angeles (“HACLA”) administers the Tenants’ enhanced vouchers and housing choice vouchers pursuant to housing assistance payments contracts between HACLA and Landlord. Stip. ¶ 30 (ER 152-53.)

On March 31, 2006, Landlord caused to be served on each of the Tenants a notice stating Landlord’s intention to terminate its housing assistance payments (“HAP”) contract with HACLA, and to charge each Tenant the full market rent set forth in the notice, effective July 1, 2006. Stip. ¶¶ 36-37 & Exs. A1-A22 (ER 154-155, 159-180.) In response, both HACLA and the Los Angeles Housing Department (“LAHD”) sent letters to Landlord advising that, absent the Tenants’ consent, the HAP contracts would only terminate if Landlord evicted Tenants in accordance with State and local law. Stip. ¶¶ 38-39, & Exs. B (2nd & 4th paras.), C (2nd para.) (ER 155, 181-182.) Tenants’ attorney also sent a letter to Landlord seeking rescission of the notices on the grounds that the refusal to except enhanced vouchers violated federal law and the size of the proposed rent increases violated LARSO. Stip. ¶ 40 & Ex. D (ER 156, 184-185.)

On June 30, 2006, Landlord’s counsel sent a letter to LAHD -- with copies to HACLA and Tenants’ counsel -- rescinding the March 31 notices. Stip. ¶ 41

(ER 156.) While conceding that Landlord had to terminate Tenants' tenancy to terminate the HAP contract without their consent, this letter asserted that "the federally enumerated grounds for eviction found in 24 CFR 982.310 preempt conflicting LARSO eviction controls." Stip. Ex. E (3rd & 4th paras.) (ER 186.)

On that same day, Landlord served on each of the Tenants a "Ninety Day Notice to Terminate Tenancy" that purported to terminate their tenancies effective September 30, 2006. Stip. ¶¶ 42-43 & Exs. F1-F22 (ER 156, 191-212.) Each of these June 30 notices stated: "The grounds for termination of your tenancy are based upon paragraph 8 of your housing assistance payments contract and 24 CFR 982.310(d)(iv), which allows the landlord to terminate the rental agreement for a business or economic reason, including but not limited to, the desire to opt-out of the Tenant Based Section 8 Program and or the desire to lease the unit at a higher rental rate. Prior to the service of this notice, the landlord made a business decision to no longer participate in the Section 8 voucher program for your unit." Stip. ¶ 43 (ER 156.)

This lawsuit followed, and the parties stipulated to a preliminary injunction preventing the eviction of Tenants pending trial court proceedings. Stip. ¶ 44 (ER 156-157.)

## **II. Attorneys' Fees Record**

The leases of fifteen Tenants include an attorneys' fee provision stating: "If any legal action or proceeding be brought by either party to enforce any part of this

Agreement, the prevailing party shall recover . . . reasonable attorney fees and costs . . . .” *E.g.*, Decl. of A. Christian Abasto in Support of Plaintiffs’ Motion for Reasonable Attorney’s Fees (“Abasto Declaration”) ¶ 3 (Supplemental Excerpts of Record (SER) 24); Abasto Declaration, Ex. B (lease of Armando Brisendo) ¶ 20 (SER 36); Plaintiffs’ Declarations in Support of Plaintiffs’ Motion for Reasonable Attorney Fees (“Plaintiffs’ Declarations”), Exs. 1, 3-9 ¶ 20 (SER 65, 83, 92, 99, 106, 113, 122, 129). The leases of two other Tenants include a nearly identical attorneys’ fee provision. *E.g.*, Notice of Errata Re: Ex. C of Abasto Declaration, Ex. C (lease of Jin M. Park) ¶ 26 (SER 150); Abasto Declaration ¶ 3 (SER 24). The remaining five Tenants do not have copies of their leases. *See* Abasto Declaration ¶ 3 (SER \_\_\_\_).

## **STATUTORY AND REGULATORY BACKGROUND**

### **I. LARSO’s Eviction Controls**

In the 1970s, rent and eviction control legislation was adopted at the state and/or local level in California and other states. Indeed, in 1973 Congress itself authorized the District of Columbia to adopt such a statute, which it did the next year.<sup>1</sup> LARSO was adopted in 1978 as part of this trend.

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<sup>1</sup> *See, e.g.*, K. Baar, *Rent Control in the 1970s: The Case of the New Jersey Tenants’ Movement*, 28 *Hastings L.J.* 631, 621-41& n.3 (1977).

Under LARSO, landlords and tenants generally remain free to agree on the *initial* terms of tenancy, including the rent amount. *See* Los Angeles Municipal Code (L.A.M.C.) § 151.06C; Civ. Code § 1954.53(a). Thereafter, however, the landlord may only increase rents (absent special circumstances) by 3% to 8% each year (depending upon inflation), *see* L.A.M.C. §§ 151.06(D), .07A(6), and may not impose unilateral changes in the other terms and conditions, *see id.* § 151.09A.2(c).

LARSO specifies twelve permissible grounds for terminating a tenancy. *See id.* § 151.09A. In particular, LARSO permits the landlord to terminate the tenancy if the tenant violates material terms of the lease, damages the property, or engages in or permits criminal or drug activity. *See id.* § 151.09A(1)-(4). So long as the landlord gives the tenant sufficient notice and compensates her for the costs of relocation, the landlord also may terminate the tenancy for certain specifically enumerated business and economic reasons that necessarily require vacating the unit (such as renovation, removal of the unit from the rental market, or placement of a family member or resident manager in the unit). *See id.* § 151.09A(8)-(11), 151.09G. Mere expiration of the lease term, however, is not a legitimate ground for terminating a tenancy. Nor may a landlord terminate a tenancy because he wishes to reset the rent to current market levels with a new tenant, because he wishes to renege on the terms and conditions to which he originally agreed, or

because of any other such “economic” reasons not specifically enumerated in LARSO. *See id.* §§ 151.09A, E. Accordingly, LARSO represents an exception to the general rule in California permitting termination of tenancy without cause on thirty days’ notice in periodic tenancies, or at the end of a fixed lease term. *See, e.g., People v. Lucero*, 114 Cal. App. 3d 166, 174 (Ct. App. 1981).

## **II. The Historical And Current Federal Eviction Controls For The Standard Voucher Program**

From its inception, the Section 8 statute has imposed some form of federal eviction controls to provide a minimum nationwide level of protection for assisted tenants. Owners, however, have objected to having special federal requirements for evicting assisted tenants. Therefore, to promote owner participation, HUD and ultimately Congress have worked to minimize the extent of these additional federal controls, and so to reduce the extent to which evicting an assisted tenant differs from evicting an unassisted tenant. At no time has either HUD or Congress expressed the view that these minimum federal eviction controls should displace more protective local eviction controls. Rather, both HUD and Congress have indicated that assisted tenants should enjoy these additional protections.

### **A. The Original Section 8 Statute’s Eviction Controls**

In 1974, Congress added Section 8 to the Housing Act of 1937 for the purpose “of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing.” 42 U.S.C. § 1437f(a). To accomplish

this goal, the statute provided in pertinent part that assisted tenants could enter into leases with private owners of existing housing and have a portion of their rent paid by a local public housing agency (“PHA”). Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 20 88 Stat. 633 (original § 1437f(b)(1), (c), (d)) (Addendum 2-5)

The original statute further provided that “the [PHA] shall have the sole right to give notice to vacate, with the owner having the right to make representation to the [PHA] for termination of tenancy.” *Id.* (original § 1437f(d)(1)(b)) (Addendum 5) The purpose of this provision was to provide assisted tenants some protection from arbitrary evictions. *Swann v. Gastonia Housing Auth.*, 502 F. Supp. 362, 364-65 (W.D.N.C. 1980), *aff’d in pertinent part*, 675 F.2d 1342, 1345 (4th Cir. 1982).

### **B. HUD’s 1978 Legislative Proposal**

Owners immediately objected to the requirement that the PHA issue the notice to vacate. Therefore, in order to encourage owner participation, HUD proposed in 1978 that Congress eliminate that statutory requirement and permit HUD to conform standards for eviction of assisted tenants to the standards for eviction of unassisted tenants under local law (at least where deemed sufficiently protective by HUD). As HUD explained:

The requirement that a local housing authority have sole right to give notice to vacate has resulted in a high degree of resistance by housing owners who might otherwise be willing to participate in the

Section 8 existing program. *Even though HUD has made every effort to minimize the risk and burden to owners under this provision, many prospective owner-participants fear that the involvement of the PHA will significantly delay eviction proceedings and expose them to unreasonable risk of loss resulting from unpaid rent or physical damage to the premises.*

This change is intended to accomplish the following:

- a. *Broaden participation of owners in the program;*
- b. Eliminate one aspect of government involvement in this program.
- c. *Provide for tenant-landlord relationships that follow state and local regulatory and private market practices insofar as possible. It is HUD's intent, however, to implement repeal of PHA approval of evictions only where the Secretary determines that State or local law governing evictions affords adequate tenant protections.*<sup>2</sup>

Congress rejected this proposal, however, because it was not satisfied that generally applicable state and local law provided sufficient tenant protections:

*“The present law, which requires PHA approval, provides substantial protection for the tenant, such as the opportunity to object if the eviction violates the lease or is without good cause.... In addition, adoption of the proposal would leave section 8 tenants to rely on State and municipal laws for protection, and the committee does not feel that HUD has provided ample information on the extent to which this protection would be sufficient.”*

*Swann*, 502 F. Supp. at 364 (quoting S. Rep., No. 95-871) (italics added).

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<sup>2</sup> “Explanation and Justification of the Housing and Community Development Amendments of 1978,” submitted by HUD Secretary Patricia Harris for record in Hearings Before Subcommittee on Housing and Community Development of the Committee on Banking, Finance and Urban Affairs, U.S. House of Reps., 95th Cong., 2nd Sess. (Mar. 8, 1978) at 66-67 (italics added) (Addendum 147-148)

### C. HUD's 1980 Proposed Rule

As HUD stated to Congress in 1978, it had “made every effort to minimize the risk and burden to owners” from the statutory requirement that the PHA issue the notice to vacate. Thus, HUD’s original implementing regulation authorized the owner to issue the eviction notice if the PHA approved, or if the PHA failed to respond within twenty days to an owner’s request for approval. HUD also called for PHA approval if grounds for termination of the tenancy existed under the lease. *See* 45 F.R. 72697 (Addendum 8.)

In 1980, however, several courts concluded that the rule violated the Section 8 statute in authorizing owners to serve the eviction notice. *See Swann*, 675 F.2d at 1345 & n.2. In response, HUD issued a proposed regulation that eliminated this provision but continued the prior rule’s requirement that the PHA proceed with issuance of the eviction notice so long as grounds for termination existed under the lease. *See* 45 F.R. 72697-99 (Addendum 8-10.) Consistent with its stated desire in 1978 to “[p]rovide for tenant-landlord relationships that follow state and local regulatory and private market practices insofar as possible,” HUD stated in the commentary to its 1980 proposed rule that “[a]fter the notice to vacate has been served by the PHA, the Owner may proceed with the eviction *in accordance with State and/or local law and the provisions of the lease.*” *Id.* at 72697 (italics added) (Addendum 9.)

Shortly after issuing the proposed rule, however, several courts concluded that the statutory provision requiring the PHA to issue the notice to vacate created an independent *federal* requirement of “good cause” for termination of a Section 8 recipient’s tenancy. *See, e.g., Swann*, 502 F. Supp. at 364-65 (good cause required for non-renewal of Section 8 lease at end of term).

**D. HUD’s 1981 Legislative Proposal And The 1981 Amendment To The Section 8 Statute’s Eviction Controls**

Against this backdrop, HUD proposed to Congress that it “clarify” the law<sup>3</sup> by replacing the statutory PHA notice-to-vacate requirement with a provision stating that “the procedural and substantive rights of the tenant with respect to occupancy of the unit shall be determined by the terms of the lease and applicable State and local law.”<sup>4</sup> As HUD explained in its transmittal to Congress, “[b]y *minimizing disturbance of the standard owner/tenant relationship*, this change is expected to encourage more owners to participate in the Section 8 program.”<sup>5</sup>

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<sup>3</sup> *See* HUD Transmittal Letter to Congress for Proposed “Housing and Community Development Amendments of 1981,” and “Section-By-Section Explanation And Justification,” submitted by HUD Secretary Pierce for record in Hearings Before Subcommittee on Housing and Community Development of the Committee on Banking, Finance and Urban Affairs, U.S. House of Reps., 97th Cong., 1st Sess. (Apr. 8, 1981) (“1981 House Hearings”) at 439, 511 (Addendum 13, 16.)

<sup>4</sup> Proposed “Housing and Community Development Amendments of 1981,” submitted by HUD Secretary Samuel Pierce Jr. for record in 1981 House Hearings at 459 (Addendum 15.)

<sup>5</sup> 1981 House Hearings at 439 (*italics added*) (*italics added*) (Addendum 13); *accord* “Section-By-Section Explanation And Justification,” 1981 House Hearings

Secretary Pierce further explained the purpose of this proposal in his prepared testimony to both the House and the Senate:

The Section 8 existing program is intended to *approximate the private landlord and tenant relationship*. This proposal would promote this intent, and encourage greater owner participation in the program.<sup>6</sup>

PHA representatives and the National Association of Housing and Redevelopment Officials (“NAHRO”) supported HUD’s proposal to conform Section 8 evictions to State and local law.<sup>7</sup> Advocates for assisted tenants opposed the HUD proposal, however, because “[t]enant landlord laws in many states provide little or no protection from arbitrary evictions.”<sup>8</sup>

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at 511-12 (“The proposal would assured owners that the procedural and substantive incidents of the assisted tenancy are the same as those applicable to other State-law tenancies. The amendment is expected to encourage more owners to participate.”) (Addendum 16-17.)

<sup>6</sup> 1981 House Hearings at 434 (italics added) (Addendum 12.); *accord* Hearings Before Subcommittee on Housing and Urban Affairs of the Committee on Banking, Housing and Urban Affairs, U.S. Senate, 97th Cong., 1st Sess. (“1981 Senate Hearings”) (Apr. 21, 1981) at 8 (Addendum 22.)

<sup>7</sup> Statement of Philip Kieffer, Executive Director of Secaucus N.J. Housing Authority and President National Leased Housing Association in 1981 House Hearing at 1863 (Addendum 19.); Prepared Statement of Robert Maffin on behalf of NAHRO in 1981 House Hearings at 1897 (Addendum 20.); 7/22/81 Letter from President of National Association of Housing and Redevelopment Officials to the Staff Director of the Senate Housing, Banking and Urban Development Subcommittee (Addendum 25-26.)

<sup>8</sup> Prepared Statement of National Low Income Housing Coalition in 1981 Senate Hearing (Apr. 30, 1981) at 591 (Addendum 24.); Prepared Statement of National Housing Law Project in 1981 House Hearing at 1646-48 (Addendum 28-29.)

The Senate passed the proposal, adopting almost verbatim HUD's "explanation and justification" for the provision:

[The amendment] is intended to minimize disturbance of the private relationship under State law between the unit owner and the tenant. The provision of housing opportunities for assisted families depends on voluntary participation by private owners of existing housing. The proposal would assure owners that the procedural and substantive rights of the assisted tenant are the same as those applicable to non-subsidized tenants. The amendment is expected to encourage more owners to participate in the Section 8 existing housing program.

S. Rep. No. 97-139, *reprinted in* 1981 U.S.C.C.A.N. Vol. 2 at 552, *accord* 1981 House Hearings at 511-12 (HUD "Section-By-Section Explanation And Justification") (Addendum 16-17.) But the House did not follow suit.

At the ensuing House-Senate conference, a compromise was reached.<sup>9</sup> The requirement that the PHA issue the notice to vacate was eliminated, thereby conforming procedural requirements for eviction of assisted tenants to state and local law. On the other hand, a floor for Section 8 evictions was created under federal law: An explicit requirement of substantive good cause for eviction was added to the statute. Thereafter, all leases between owners and Section 8 tenants had to provide that "the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of

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<sup>9</sup> H. Conf. Rep. No. 97-208, *reprinted in* 1981 U.S.C.C.A.N. Vol. 2 at 1053 (Addendum 38.)

applicable Federal, State or local law, or for other good cause.” 47 F.R. 33497 (column 2) (Addendum 33.)

**E. HUD’s 1982 Interim Rule**

Following the 1981 statutory amendment, HUD issued new interim regulations requiring that a Section 8 lease provide that the owner could not terminate the tenancy during the term of the lease, or refuse to renew a lease, except for the reasons stated in the “good cause” statutory provision. *See* 47 F.R. 33498 (column 3) (Addendum 34.) And, because “a provision for termination of the tenancy without cause on thirty days’ notice during the lease term would not be consistent with the new statutory grounds for termination of the tenancy,” HUD withdrew its prior regulation permitting the inclusion of such a provision in Section 8 leases. 47 F.R. 33498 (column 1) (Addendum 34.)

HUD declined to provide guidance regarding application of this new federal “good cause” tenancy termination standard, leaving the issue to case by case determination by the courts in eviction actions. *See* 47 F.R. 33497, 33498 (column 3) to 33499 (column 1) (Addendum 33-35.) However, HUD did explicitly excuse an owner from the “good cause” requirement if it wished to withdraw a unit from the Section 8 program at the end of a fixed lease term. *See* 47 F.R. 33498 (column 3) to 33499 (column 1) (Addendum 34-35.)

## **F. HUD's 1984 Final Rule**

### **1. The Problem Presented**

In 1984, HUD issued final regulations that modified its 1982 interim “good cause” regulation in response to:

[c]omments from PHAs and from the National Association of Housing and Redevelopment Officials emphasize[ing] that operation of the Section 8 Existing Housing Program depends on the voluntary participation of private landlords. The comments state that owner willingness to rent units to Certificate holders will be hurt by elimination of provision for termination by the owner on 30 days notice without cause, and by creation of a “perpetual tenancy” terminable only for cause.

49 F.R. 12231 (columns 1-2) (Addendum 40.)

These comments echoed HUD's own arguments in favor of its 1981 proposal to define the procedural and substantive eviction rights of owners and assisted tenants based solely on state and local law (which, in most jurisdictions, allowed termination without cause on 30-day notice and no automatic renewals), a proposal that PHAs and NAHRO had supported, as discussed above. Thus, with respect to concerns about elimination of termination on thirty days' notice as a result of the 1981 statutory amendment and its implementation in the 1982 interim rule, HUD noted PHA comments “that allowing termination on notice is closer to *local* landlord tenant practice.” 49 F.R. 12231 (column 2) (italics added) (Addendum 40.) And with respect to concerns about the requirement that landlords have good cause for non-renewal, HUD noted PHA comments “that the good cause requirement interferes with *normal* relationships between a landlord

and a tenant,” and that “[t]he regulations should reflect the requirements of the *private* rental market, and should recognize the right of the owner to terminate the tenancy without cause at the end of the lease.” *Id.* (italics added) (Addendum 40.)

HUD agreed that the imposition of a federal good cause requirement through the 1981 statutory amendments (contrary to its recommendations) created disincentives to owners renting to assisted tenants, but considered its options limited:

Public comments on the interim rule present in general a cogent critique of problems which result from the changes in the form of the assisted tenancy under the 1981 amendments and the interim rule. The Department shares the concern that a number of the changes could reduce the desire of private landlords to offer units for rental under the program, and could thus narrow the housing choices of assisted families. However, the program options open to the Department must accord with the 1981 statutory prohibition of a termination of tenancy in Section 8 existing housing other than for statutory good cause grounds.

49 F.R. 12231 (column 3) (Addendum 40.)

## **2. HUD’s Solution**

Unable to eliminate the federal good cause requirement imposed by Congress, HUD reconsidered its decision not to provide any definition of “other good cause.” HUD initially rejected comments suggesting that it require landlords to provide advance written notice of what conduct could constitute federal good cause, as HUD had required in other subsidized housing programs:

Many finders-keepers landlords participate in the program only for a single unit or for a few units. Tenancy requirements should be as

simple as possible, *with minimal demands beyond the normal requirements of an unsubsidized tenancy.*

49 F.R. 12233 (column 3) (italics added) (Addendum 41.)

However, while remaining of the view that “[t]he [statutory] good cause category should remain open to case by case determination by the courts,” HUD also concluded that “there is a critical need to provide explicit regulatory assurance to prospective Section 8 owners that *legitimate owner concerns* will be recognized as grounds for termination of tenancy.” *Id.* (italics added) (Addendum 41.)

Accordingly, the final rule listed among the “examples of ‘other good cause’ . . . a business or economic reason for termination of the tenancy (such as sale of the property, renovation of the unit, desire to rent the unit at a higher rental).” 49 F.R. 12233 (column 3) to 12234 (column 1) (Addendum 41-42.) HUD expressed that its purpose was to minimize the disincentive to owner participation created by the 1981 addition of a federal statutory good cause requirement that took away rights to termination without cause that landlords previously had enjoyed in the private market:

The explicit regulatory statement that a business or economic reason is good cause for termination for tenancy should help PHAs in responding to *owner concern, as described in the public comment, with the good cause requirement for termination of tenancy, and in particular with the elimination of the provision for termination on 30 day notice.* It is likely in most cases where an owner wants to terminate the section 8 existing tenancy there are either good cause grounds relating to behavior of the individual tenant, or good cause business reasons relating to use of the property. Several federal court

decisions have concluded *that statutory “good cause”* would include a business or economic reason.

49 F.R. 12234 (column 1) (italics added) (Addendum 42.)

### **G. The 1990 Amendments To The Section 8 Statute’s Eviction Controls**

In 1990, Congress made two amendments to the Section 8 statute’s eviction controls. First, Congress added a new provision requiring that the assisted lease provide that certain criminal and drug activity shall be grounds for termination of the assisted tenancy. Cranston-Gonzalez Nat’l Affordable Housing Act, Pub. L. No. 101-625 § 546, 104 Stat. 4079 (1990) (Addendum 45.)

Second, Congress added the requirement that the owner provide a written notice to assisted tenants specifying the reasons for any purported termination of tenancy. *Id.* As Congress explained, “[w]ithout notice of the specific factual and legal grounds for termination, the tenant cannot make an informed decision about whether to stay and contest the eviction.” S. Rep. No. 101-316 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5889, 1990 WL 272745 (Addendum 51.)

### **H. HUD’s 1993 Proposed Regulation**

The original Section 8 existing housing program was called the “certificate” program. In 1983 on a demonstration basis, and in 1988 on a permanent basis, a second program called the “voucher” program was added. In 1993, HUD issued a proposed rule designed to unify the regulations govern these two programs to the extent possible. With respect to eviction controls, HUD recognized that the federal

requirement of “good cause” is generally more restrictive of landlords’ eviction rights than the local law applicable to unassisted tenancies:

For all program tenancies, the owner may only terminate the tenancy for statutory good cause grounds, whether during the course of the initial or extended term, or at the end of the initial or any extended term. In this respect, tenancies in the Section 8 tenant-based programs differ from private unassisted tenancies, where the owner may typically evict the tenant *without cause* at the end of the lease term.

58 F.R. 11305 (columns 2-3) (*italics added*) (Addendum 53.) Nonetheless, HUD’s proposed unified rule added no new regulations relating to the good cause requirement.

However, HUD’s proposed unified rule did implement the criminal activity and notice provisions of the 1990 statutory amendments. *id.* (column 3) to 11306 (column 1) (Addendum 53.)

## **I. The 1994 Abt Report And Early Congressional Hearings Thereon**

### **1. The Abt Report**

In March 1994, Abt Associates completed a consulting report commissioned by the National Multi Housing Council and the National Apartment Association. This report, which ultimately became the basis for the amendments creating the federal statutory good cause provision in place today, produced a series of recommendations “aimed at making the Section 8 program more attractive to owners of good-quality properties in the private rental market.” Abt concluded that “[t]he way this should be accomplished is by making the Section 8 process *as similar to regular market operations as possible*,” just as HUD itself had

advocated in 1978 and 1981. Abt Consulting Report, *reprinted in* Hearings Before Subcommittee on Housing and Community Development of the Committee on Banking, Finance and Urban Affairs, U.S. House of Reps., 103rd Cong., 2nd Sess. (Mar.17, 1994) at 978 (italics added) (Addendum 63.)

The report thus recommended, *inter alia*, that the federal “good cause” requirement for non-renewal of a lease should be eliminated. *See id.* at 991, 1005 (Addendum 69, 76.) However, the report also stated that under its proposals “the Section 8 resident *would retain the protections provided to all renters in the local jurisdiction,*” *id.* at 996 (italics added) (Addendum 72), and therefore “Section 8 residents *would have the same legal protections as regular renters in lease terminations and evictions,*” *id.* at 995 (italics added) (Addendum 71.)

## **2. The March 1994 And February 1995 Hearings**

The national landlord groups immediately turned the Abt report’s recommendations into a series of legislative proposals and, at a hearing in March of 1994, urged Congress to pass legislation adopting those proposals, including the specific proposal to eliminate the federal “good cause” requirement for non-renewal of a lease (*i.e.*, the so-called “endless lease” provision). *See* Hearings Before H.R. Subcomm. on Housing and Community Development, 103<sup>rd</sup> Cong., 2d Sess. (1994), at 181 (Mar. 14, 1994 Testimony of Christina Garcia) (Addendum 79.) In particular, the national landlord groups’ representative noted that “[a]lthough different state and local laws apply, owners usually deal with

chronically unacceptable behavior by not renewing a tenant's lease when it expires." *Id.* "This endless lease requirement is alien to the normal market practice," and "[a]n owner should be able to terminate the tenancy at the end of the lease in the same manner as would apply to other nonsection 8 tenants in the property." *Id.* As explained further in the representative's written testimony:

The amendment should clarify that court action would only be required if tenancy is terminated during the term of the lease. "Good cause" would be determined on the same basis as would apply to any non-Section 8 tenant in the property.

*Id.* at 963 (Addendum 58b) . Indeed, the representative explained that all of the Abt proposals being put forth "would permit an owner to deal with Section 8 tenants like any other tenants, with the same rights and responsibilities on both sides." *Id.* at 960 (Addendum 58a) . The Abt report itself was placed into the hearing record. *See id.* at 971 (Addendum 59.)

While the proposal made some progress, it was not enacted in 1994. Hence, in February of 1995 the national landlord groups again pressed for its enactment, including the repeal of the "endless lease" and again put the Abt report into the hearing record. *See Restructuring the Federal Government: Hearing Before Subcommittees of the Committee on Appropriations, U.S. House of Reps., 104th Cong., 1st Sess. (Feb. 9, 1995 Testimony of Ron Ratner), 1995 WL 50642 (F.D.C.H.) (Addendum 81.)*

## **J. HUD's Adoption Of The Abt Report Proposals**

In March of 1995, HUD issued a report announcing its proposals for a complete overhaul of its programs. These proposals included consolidation of the voucher, certificate, and project-based assistance programs into a single "Housing Certificate Fund" that would address perceived weaknesses in existing programs, including the problems identified in the Abt report:

The HCF will eliminate burdensome program requirements that have discouraged landlords from participating in the Section 8 program, such as the "take one, take all" requirement (landlords who accept one recipient must accept all qualified recipients) *and the "endless lease" provision that prohibits landlords from terminating leases except for cause or specific business reasons.*

HUD Reinvention: From Blueprint to Action at 28 (Mar. 15, 1995) (italics added) (italics added) (Addendum 153.) Congress held joint hearings on the HUD proposals shortly thereafter.

## **K. HUD's 1995 Final Regulation Regarding Tenancy Termination**

In July 1995, after receiving comments, HUD issued its final unified "good cause" regulation. Constrained by existing law, this rule was "largely the same as the provisions promulgated by the Department in 1984 for the certificate program." 60 F.R. 34673 (column 2) (Addendum 89.)

In particular, HUD noted that its definition of "other good cause" remained the same. And, while HUD received comments asking for more definition so as to limit what constituted other good cause under the federal rule, HUD quoted its 1984 statements regarding the "critical need to provide explicit regulatory

assurance to prospective Section 8 owners that *legitimate owner concerns* will be recognized as grounds for termination of tenancy,” and that “[t]his assurance may be essential to promote broad participation by owners.” 60 F.R. 34673 (column 2) (italics added) (italics added) (Addendum 89.)

As in 1984, HUD also received comments that the rule requiring good cause for non-renewal provided for a “perpetual lease, and discourages owner participation,” and so should not be adopted. 60 F.R. 34674 (column 1) (Addendum 90.) In response, HUD stated:

In fact, the rule does not undermine existing protections for the tenant or the owner. HUD believes that the rule reflects a reasonable balance between the interest of the assisted tenant and the owner *within the context of existing law*. On the one hand, the lease protects the tenant against arbitrary and ungrounded termination by the owner. On the other hand, the owner is not locked in, but may terminate the tenancy for lease violation or other good cause.

After the initial year, the family may terminate the tenancy on notice to the owner. After the initial year, the owner may terminate the tenancy for other good cause -- specifically including a “business or economic reason” for termination of the tenancy.

60 F.R. 34674 (column 1) (italics added) (italics added) (Addendum 90.) In short, HUD simply continued its 1984 policy.

#### **L. The 1996 Temporary Amendment To Federal Eviction Controls**

In the fall of 1995, the national landlord groups again appeared at Congressional hearings to press for adoption of their legislative proposals based on the Abt report, including repeal of the “endless lease.” Tenant-based Rental

Assistance: Making It Work in the Private Market: Hearing Before the Housing and Community Opportunity Subcommittee of the House Committee on Banking, Finance and Urban Affairs, 1995 WL 602577 (F.D.C.H.) at 3 (Oct. 13, 1995 Testimony of Christina Garcia) (Addendum 93-94.) yyy As part of this lobbying effort, the landlord groups assured Congress that, even without the good cause requirement, Section 8 tenants would continue to enjoy the same rights as unassisted tenants under local tenant protection laws. *See id.* (F.D.C.H.) at 3. By this time NAHRO, PHAs, and numerous other stakeholders joined the national landlord groups in urging adoption of the Abt report recommendations. These groups likewise assured Congress that assisted tenants would continue to receive protections afforded by state and local law, and noted HUD's concurrence with the proposals. Hearings Before the House Subcomm. on Housing and Community Opportunity, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1995) Letter to the Hon. Rick Lazio at 2 (placed in record of Oct. 13, 1995 hearing) (Addendum 156.)

Congress then adopted these proposals on a temporary basis in 1996. *See, e.g.,* Omnibus Consolidated Recission and Appropriations Act of 1996, Pub. L. No. 104-134, § 203(c)(2), 110 Stat. 1321, 1321-281 (1996) (Addendum 99.)

**M. The 1998 Statute Establishing The Current Standard Voucher Program With More Limited Federal Eviction Controls**

**1. The Landlords' Further Testimony Before Congress**

In 1997, the national landlord groups returned to Congress to urge permanent adoption of their various proposals. Their representative once again placed the relevant portions of the 1994 Abt Report into the record,<sup>10</sup> and gave testimony reminding Congress that the study “found that owners of multifamily housing would be more likely to participate in the program if it were amended *to operate as much as possible within the bounds of the private marketplace.*” *Id.*, 1997 WL 165570 (F.D.C.H.) at p. 3 (Apr. 9, 1997) (Testimony of Thomas Shuler) (Addendum 103.) This meant that “Section 8 recipients *should receive the same protections as their nonsubsidized neighbors* but no more.” *Id.* (italics added). Accordingly, while urging Congress to eliminate the “endless lease” provision, the landlord groups assured Congress that this

will in no way deny Section 8 recipients the rights and protections provided to non-subsidized residents. All residents are protected under the Fair Housing Act, the Americans with Disabilities Act, *and state and local resident protection laws.* These laws provide a comprehensive set of protections *for all residents, both subsidized and non-subsidized.*

*Id.* at 4 (italics added) (Addendum 104.)

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<sup>10</sup> See, e.g., Public Housing Reform and Responsibility Act: Hearings Before the Housing Opportunity and Community Development Subcommittee of the Senate Banking, Housing and Urban Affairs Committee at 102, 104-05, 107-08, 117, 1997 WL 165570 (F.D.C.H.) (Apr. 9, 1997).

## 2. The Senate Bill And Committee Report

In September 1997, the Senate passed a bill, S. 462, that combined the old certificate and voucher programs into a single, new voucher program. The Senate bill stated that “a consolidation of the voucher and certificate programs into a single, *market-driven program* will assist in making section 8 tenant-based assistance more successful in assisting low-income families in obtaining affordable housing and will increase housing choice for low-income families.” S. 462 § 2(a)(6), 143 Cong. Rec. S10028, 1997 WL 593560 (1997) (*italics added*) (Addendum 108.) The bill thus permanently eliminated the federal requirement of good cause for non-renewal of the lease, *i.e.*, the “endless lease” rule, and made other changes as requested by the national landlord groups. The bill further provided that even during the lease term the landlord could terminate the tenancy “on the same basis and in the same manner as would apply to a tenant in the property who does not receive assistance,” and that upon such an in-term termination, “any relief shall be consistent with applicable State and local law.” *Id.*, § 201(o)(7)(D)-(E), 143 Cong. Rec. S10040, 1997 WL 593560 (Addendum 113.)

As explained in the accompanying Senate Committee Report, the Senate Committee adopted the landlord groups’ position that the way to encourage landlord participation is to make Section 8 tenancies as much like unassisted tenancies as possible:

The Committee bill recognizes that the lease conditions under the current section 8 programs have deterred private owners from participating in the programs because they require owners to treat assisted residents *differently from unassisted residents*. The Committee bill reforms the lease conditions *to make the new voucher program operate as much like the unassisted market as possible*.

*Id.* at 36, 1997 WL 282462 (italics added) (Addendum 119.)

The Senate Committee also adopted the landlord groups' position that -- even where federal law does not specifically constrain a landlord's actions against Section 8 tenants -- landlords still are properly bound by generally applicable tenant protection laws, including local tenant protection laws:

The Committee recognizes that rules such as . . . the "endless lease" were created to protect assisted households from owner discrimination. The Committee, however, does not anticipate that the repeal of these rules will adversely affect assisted households because protections will be continued *under State, and local tenant laws* as well as Federal protections under the Fair Housing Act and the Americans with Disabilities Act.

*Id.* (italics added).

### **3. The House Bill And Committee Report**

Earlier in 1997, the House also passed a bill, H.R. 2, that combined the old certificate and voucher programs into a single, new voucher program. The House bill stated that it was "recreating the existing rental assistance voucher program so that the use of vouchers and relationships between landlords and tenants under the program *operate in a manner that more closely resembles the private housing market.*" H.R. 2 § 101(6), H.R. Rep. No. 105-76, at 4 (1997), 1997 WL 205589

(1997), (*italics added*). (Addendum 123.) Thus, like the Senate bill, the House bill permanently eliminated the federal requirement of good cause for non-renewal of the lease, *i.e.*, the “endless lease” rule, and made other changes as requested by the national landlord groups. However the House bill, unlike the Senate bill, retained the federal requirement that owners have good cause to terminate an assisted tenancy during the term of the lease, although it did state that any such termination shall be conducted in accordance with State and local law. The House bill, unlike the Senate bill, included the requirement that the lease identify drug and crime activity as a good cause ground for in-term tenancy termination. H.R. 2 §§ 324(2)-25, 642-43, *reprinted in* H.R. Rep. No. 105-76, at 53, 86, 1997 WL 205589 (Addendum 125-126.)

As the accompanying House Committee Report expressly stated, the elimination of the endless lease and certain other changes were made in direct response to and reliance on the Abt report:

[T]he following facts are taken from a report prepared by Abt Associates for the National Multi Housing Council/National Apartment Association:

.....

Owners could not get rid of troublesome tenants by refusing to renew their leases-*an otherwise common practice in the private market*. Rather, owners had to go through time-consuming eviction procedures.

Accordingly, the Committee bill changes the program in response to the findings of the Abt Associates report, and . . . the

“endless lease” provisions are repealed.

H.R. Rep. No. 105-76 at 126, 1997 WL 205589 (italics added). (Addendum 128.)

The House Committee Report likewise made clear that it too accepted the national landlord groups’ position that making the landlord tenant relationship more like a private market relationship, *see id.* at 91 (Addendum 126a-b.), will encourage owner participation, but was unwilling to abandon federal good cause requirements for in – term terminations because of a desire to *protect* tenants:

The Committee believes that these and other revisions contained in H.R. 2 will eliminate some of the most egregious conditions that have caused owner dissatisfaction with choice-based housing, *while retaining needed tenant projection.* [sic] Furthermore, these changes *will encourage other apartment owners to participate in the program,* thereby expanding the universe of affordable housing for low-income families.

*Id.* at 126 (italics added) (Addendum 128.)

#### **4. The Final Bill And The Law Today**

Congress passed a final bill in 1998 that adopted the House position retaining a federal good cause requirement for in-term tenancy terminations. *See* Veterans Affairs and HUD Appropriations Act, Pub. L. No. 105-276, § 545, 112 Stat. 2461, 2599-600 (1998) (Addendum 133-136.) However, the final bill did retain the Senate language that upon such an in-term termination, “any relief shall be consistent with applicable State and local law.” *Id.* It also retained the Senate language describing the purpose of the bill as:

to promote homes that are affordable to low-income families in safe

and healthy environments, and thereby contribute to the supply of affordable housing, by--

. . . .

consolidating the voucher and certificate programs for rental assistance under section 8 of the United States Housing Act of 1937 into a single *market-driven program* that will assist in making tenant-based rental assistance under such section more successful at helping low-income families obtain affordable housing and will increase housing choice for low-income families[.]

*Id.* § 502(b)(6) (italics added) (Addendum 131-132.)

#### **N. HUD's 1999 Conforming Regulations**

In 1999, HUD issued proposed and final regulations for the newly created Housing Choice Voucher Program. The language of HUD's good cause eviction regulation was not changed from the language of the rule governing the prior programs. *See* 24 C.F.R. § 982.310. (Appendum 136-138.)

#### **III. The Federal Eviction Controls In The Enhanced Voucher Program**

In the standard voucher program, the only limitation on the rents an owner can charge assisted tenants is that they “be reasonable in comparison with rents charged for comparable dwelling units in the private, unassisted local market.” 42 U.S.C. § 1437f(o)(10)(A); 24 C.F.R. §§ 982.501, .507. By contrast, the amount of the subsidy that the program provides to assisted tenants is further limited to the difference between the “payment standard” established by the PHA with reference to the Fair Market Rents provided by HUD for the area, and the amount the tenant family is required to contribute from its income. *See* 42 U.S.C. § 1437f(o)(2)(A)-

(B); 24 C.F.R. §§ 982.501, .503, .505. Accordingly, if the market rent for an assisted family's home exceeds the payment standard, the family will either have to contribute even more of its income toward rent or move.

Congress was concerned that this feature of the standard voucher program could cause many elderly, disabled and other vulnerable tenants to lose their homes as the projects in which they lived left programs like the HUD subsidized mortgage program in which Morton Gardens originally participated, as well as other HUD programs, thereby freeing their owners as a matter of federal law to charge market rents. To prevent the forced relocation of tenants in such situations, Congress put in place the enhanced voucher program. *See* Order Re: Plaintiff's Motion for Summary Judgment ("Opinion I") 10-11 (quoting legislative history) (ER 28-29).

In particular, Congress granted to tenants who are in place at the time a project withdraws from another HUD program the right to elect to remain in their homes and to receive a rent subsidy that is not limited by the payment standard, but rather is simply the difference between the reasonable market rent charged by the owner and the tenant's required contribution. *See* 42 U.S.C. § 1437f(t)(1) (Addendum 140.) In this way the enhanced voucher family is not forced to choose between keeping its home or devoting an escalating share of its income toward market rents. By statute, the other features of the enhanced voucher program are the same as those governing the regular voucher program. *See id.*

The importance attached by Congress to the enhanced voucher tenant family's right to remain in its home is highlighted by the history of this provision. Faced with some uncertainty concerning the tenant's right to remain under the language as originally enacted in 1999, Congress acted less than a year later in 2000 to clarify the statute. Confirming that the law protects tenants from displacement after an owner withdraws from a project-based subsidy program, Congress amended the language of 42 U.S.C. 1437f(t)(1)(B)

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

Military Construction Appropriations Act, 2001 Pub. L. 106-246, § 2801, 114 Stat. 511, 569 (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.C.C.A.N. 435, 482. By inserting the phrase "the assisted family may elect to remain," Congress removed any doubt that 42 U.S.C. § 1437f(t) guarantees enhanced voucher tenants an enforceable right to maintain their current residence if they so choose.

HUD has never engaged in notice and comment rulemaking regarding the statutory right to remain, or its relationship to the federal requirement of good cause for an in-term termination of an assisted tenancy. HUD did issue a notice in 2001, PIH 2001-41, which has long since expired by its terms, stating:

A family that receives an enhanced voucher has the right to remain in the project as long as the units are used for rental housing and are otherwise eligible for housing choice voucher assistance (e.g., the rent is reasonable, unit meets HQS, etc.). The owner may not terminate the tenancy of a family that exercises its right to remain except for a serious or repeated lease violation or other good cause.

*Id.* at 26 (Addendum 142) HUD also makes a similar statement in the current guidebook for certain programs that are subject to the enhanced voucher statutory provisions (although not the HUD subsidized mortgage program), and further states:

This protection continues after the first lease term. As long as the property is offered as rental housing, absent good cause to terminate tenancy under Federal, State or local law and provided the PHA continues to find the rent reasonable, owners must continually renew the lease of an enhanced voucher family.

Section 8 Renewal Policy Guidebook, § 11-3 at 4.<sup>11</sup> Thus, while HUD recognizes that the enhanced voucher right to remain is broader than the good cause requirement in the standard voucher program, which is applicable solely to the

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<sup>11</sup> Available at <http://www.hud.gov/offices/hsg/mfh/exp/guide/s8renew.pdf>.

initial lease term, it has not delineated its precise contours (*e.g.*, what constitutes federal good cause in the enhanced voucher program).

### **SUMMARY OF ARGUMENT**

1. To establish conflict preemption, Landlord must produce clear evidence that application of LARSO's eviction controls to prevent his eviction of Tenants significantly frustrates the purposes of the Section 8 program. There is no such evidence here.

Application of LARSO's eviction controls does not conflict with the regular voucher program because the policy behind the less restrictive nature of HUD's good cause eviction regulation is to minimize the added burden federal eviction controls impose on the eviction of assisted tenants, when compared to the local law applicable to unassisted tenants. HUD believes that minimizing the differences between assisted and unassisted tenancies is the proper way to encourage owner participation. LARSO's application of the same, more restrictive eviction controls to both assisted and unassisted tenants does not interfere with this policy.

Application of LARSO's eviction controls does not conflict with the enhanced voucher program for the additional reason that participation in that program is mandatory, making any possible impact of LARSO on voluntary participation irrelevant.

2. HUD's good faith eviction regulation cannot preempt LARSO's

eviction controls in this case even if a conflict existed. A hypothetical HUD policy that permitted the an owner, despite local law, to evict assisted tenants in order to obtain a higher rent from a new tenant in circumvention of local rent control laws is not authorized by the Section 8 statute, and is properly invalidated under *Chevron* step 2 analysis. Such a hypothetical policy would conflict with the congressional determination that the proper way to encourage owner participation in the standard voucher program is to make assisted tenancies as similar to unassisted tenancies as possible. It also would lead to the absurd result of making Section 8 tenants the special targets for eviction in rent control jurisdictions like Los Angeles with vacancy decontrol, in contravention of the overall policy of the Section 8 statute to aid assisted tenants in obtaining a decent home, as well as in contravention of the specific tenant protection policy behind the federal good cause eviction requirement.

3. The HUD good cause regulation cannot preempt LARSO's application to Tenants in this case in any event because Landlord does not have good cause under that regulation. Landlord has admitted that for 19 of the Tenants, state law precludes it from charging a higher rent after eviction to a new tenant.

4. Independent of LARSO, Landlord cannot evict the sixteen Enhanced Voucher Tenants because Congress provided them with a federal statutory right to

remain in their homes even if an owner wishes to raise his rents to market. Any hypothetical HUD policy to permit eviction of the Enhanced Voucher Tenants so that owner can charge higher rents in circumvention of local rent control would be invalid under a *Chevron* step 1 analysis. It also would be invalid under a *Chevron* step 2 analysis because it would render the statutory right to remain illusory in rent control jurisdictions.

5. The judgment in favor of Tenants is properly applied retroactively, as there was neither a HUD statement that its regulation would preempt local eviction controls, or a case finding such preemption, upon which Landlord and other owners could have reasonably relied to their detriment. Denying retroactive application would defeat the very purpose behind LARSO's eviction controls.

6. Landlord's objections to the scope of the injunction should not be considered because they were not raised in the District court.

7. The District Court properly awarded attorneys' fees to Tenants. Landlord's objection that the type of claims asserted do not fall within the attorneys' fees clauses were waived by its failure to raise them below, and in any event lack merit. Landlord's evidentiary and procedural objections lack merit. And Landlord's assertion that Legal Aid cannot receive contractual attorneys fees is not justiciable, was otherwise waived by Landlord's failure to raise it in the District Court, and is wrong.

## STANDARDS OF REVIEW

The District Court's grant of summary judgment is subject to *de novo* review. *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). Affirmance is proper on any ground supported by the summary judgment record. *Valdez v. Rosenbaum*, 302 F.3d 1039, 1043 (9th Cir. 2002).

The District Court's award of attorneys' fees is subject to review for abuse of discretion, with factual determinations subject to review for clear error and legal determinations subject to *de novo* review. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 952 (9th Cir. 2007).

## ARGUMENT

### **I. The Judgment Should Be Affirmed As To All Tenants Because Landlord Violated LARSO**

Landlord cannot and does not dispute that his June 30, 2006 Notices do not comply with LARSO. *See* L.A.M.C. § 151.09B (notices must specify one of twelve permissible eviction grounds). Landlord instead argues on appeal that LARSO is preempted in this case by HUD's explicit recognition of an owner's "desire to lease the unit at a higher rental" as federal good cause to terminate an assisted tenancy. Landlord errs.

**A. LARSO Is Not Preempted Because It Is Not An Obstacle To Accomplishment Of The Purpose Behind HUD’s Good Cause Regulation**

**1. Landlord’s Burden To Establish Conflict Preemption With Clear Evidence**

“In all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ [courts] ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (ellipsis in original) (citations omitted). This same presumption against preemption applies with respect to regulations issued by federal agencies. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715-16 (1985).

A party asserting “conflict” preemption “must thus present a showing . . . of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation . . . can constitutionally coexist with federal regulation.” *Hillsborough County*, 471 U.S. at 716. Absent a claim that it is physically impossible to comply with both federal and state law, “the ‘pertinent question [ ]’ is whether the state law ‘sufficiently injure[s] the objectives of the federal program to require nonrecognition.’” *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065, 1071 (9th Cir. 2003) (brackets in original) (citation omitted). “The mere fact of ‘tension’ between federal and state law is generally not enough to establish an obstacle supporting preemption,

particularly when the state law involves the exercise of traditional police power.” *Madeira v. Affordable Housing Found., Inc.*, 469 F.3d 219, 241 (2nd Cir. 2006), *citing Silkwood v. Kerr-McKee Corp.*, 464 U.S. 238, 256 (1984). Moreover, preemption is not properly found absent “clear evidence of a conflict” of the requisite magnitude.<sup>12</sup> *Geier v. American Honda Motor Co.*, 529 U.S. 861, 885 (2000) (discussing conflict preemption by regulation); *accord Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 488 (9th Cir. 1984) (“[I]f we are left with a doubt as to congressional purpose, we should be slow to find preemption. . . .”).

Because LARSO regulates “in fields of traditional state regulation,” this case is indeed one in which “preemption is even less readily found.” *Independence Park Apartments v. United States*, 449 F.3d 1235, 1243 (Fed. Cir. 2006) (applying this principle in case asserting conflict preemption of LARSO’s rent controls by National Housing Act and HUD regulations). Accordingly, Landlord cannot prevail on its claim of “conflict” preemption unless it provides clear evidence that application of LARSO in this case would so injure federal goals for the Section 8

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<sup>12</sup> This general requirement of clear evidence of a conflict to find preemption is independently reinforced in this case because (1) as the District Court correctly found, *see infra*, adoption by HUD of a policy that preempts local eviction controls so as to permit circumvention of local rent control is unreasonable in light of the Section 8 statute’s purposes and leads to absurd results, and (2) this Court properly should reject such an interpretation of HUD’s regulation unless it is clear that is what HUD intended. *See Sec’y of Labor, Mine Safety & Health Admin. v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990).

program as to require displacement of the traditional police powers of the City of Los Angeles to regulate landlord-tenant relations within its borders. *See Kargman v. Sullivan*, 552 F.2d 2, 6 (1st Cir. 1977) (“Our task on review is to determine whether the [city ordinance] ... so significantly frustrated federal interests in the operation of the [NHA] program that [the city’s] traditionally strong interests in local rent control must yield.”), *quoted in Topa Equities*, 342 F.2d at 1071.

**2. Landlord Produced No Evidence -- Let Alone “Clear Evidence” -- That LARSO Significantly Frustrates HUD’s Policies With Respect To The Standard Voucher Program**

**a. LARSO Does Not Significantly Frustrate HUD’s Policy Of Encouraging Owner Participation In The Standard Voucher Program**

In an effort to meet its burden to establish conflict preemption, Landlord noted below and argues again on appeal that in 1984, and then again in 1995, HUD stated its view that assuring owners that federal eviction controls permit the termination of Section 8 tenancies for legitimate business or economic reasons might be necessary -- and was proper -- to encourage owner participation in the standard Section 8 program. However, as the full review of the content and context of these statements set out above reveals, HUD’s only apparent concern was to encourage owners to participate by providing them the same rights under federal law to effectuate terminations of Section 8 tenancies for economic reasons as local law typically provided them for unassisted tenancies. Put another way, HUD acted to avoid the disincentive to participation that would be created if

federal law gave landlords fewer rights to terminate Section 8 tenancies for economic reasons than local law gave them to terminate unassisted tenancies. Application of LARSO's eviction controls to Section 8 tenants is fully consistent with this HUD policy, as doing so ensures that the same termination standards apply to assisted tenants as apply to their unassisted neighbors.

Landlord would have this Court believe that HUD went further, and determined that owners must have an absolute right to terminate Section 8 tenancies for a business or economic reason -- such as the desire to charge a higher rent to a new tenant -- even if local law precludes the owners from evicting unassisted tenants for this reason. However, Landlord cannot point to any

evidence of such a HUD policy determination, let alone the “clear evidence of a conflict” with local tenant protections required to establish preemption.<sup>13</sup>

On the contrary, the following facts demonstrate that HUD’s policy indeed was limited to minimizing the *additional* burdens imposed by federal eviction controls where local protections were wholly or substantially absent, and did not extend to a concern that *more restrictive* State and local laws might apply equally to assisted and unassisted tenants:

1. HUD has long been aware that certain jurisdictions have rent controls and associated eviction controls. Not only did the District of Columbia adopt such

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<sup>13</sup> For example, Landlord claims preemptive significance for the italicized portion of the following HUD comment, which was made in 1984 when rejecting Legal Aid comments recommending “restoration of the requirement for PHA approval of an eviction” because “judicial review of a termination of tenancy does not give enough protection for the tenant.” 49 F.R. 12234 (column 3) (Addendum 92.):

*The substantive Federal good cause requirements under the statute and the HUD regulation are binding in the State judicial proceeding, and the State judicial proceedings are subject to the due process requirement for a fair hearing under the Fourteenth amendment. To encourage participation by private owners, it is important to minimize the procedural burdens on the owners. The approach in this rule is consonant with the 1981 amendments, which remove the old statutory requirement for PHA participation in eviction (by PHA issuance of the notice to vacate), but which require good cause for termination of the assisted tenancy.*

49 F.R. 12235 (columns 1-2) (italics added) (Addendum 43.) However, as the full context makes clear, HUD was reassuring Section 8 tenants that they would in fact receive the protections afforded by the newly enacted federal “good cause” requirement, and was *not* suggesting that those standards displaced more protective local law requirements applicable to all tenants.

a law in 1974 after Congress passed a statute authorizing it to do so, but HUD was embroiled in litigation at that same time regarding Boston's rent and eviction control statute. *See Kargman*, 552 F.2d at 4-5. Indeed, in 1975 HUD issued a regulation expressly preempting application of certain rent and associated eviction controls to certain federally subsidized projects (such as Morton Gardens when it was subject to the HUD subsidized mortgage) where HUD had a contingent financial liability in the event of mortgage default. *See* 24 C.F.R. § 246.1 *et seq.*

2. Nevertheless, in both 1978 and 1981, HUD proposed that Congress amend the Section 8 statute to assure owners that their rights to evict Section 8 tenants would be governed solely by State and local law. On both occasions HUD asserted that having assisted tenancies thus mirror unassisted tenancies -- *i.e.*, be subject only to state and local eviction protection law, rather than have the added overlay of federal law -- was the way to encourage owner participation. *See* Statutory And Regulatory Background, Part II.B, D above.

3. HUD's 1984 regulation -- confirming that business or economic reasons could constitute federal "good cause" -- came in response to the 1981 addition of a minimum federal statutory good cause requirement, not as an attempt to supersede local eviction controls. PHAs and NAHRO, groups that had supported HUD's 1981 proposal to make State and local law the sole source of eviction rights for assisted tenants, commented to HUD that the 1981 statutory

amendment could deter owner participation by eliminating both the owners' right under "local landlord tenant practice" to evict without cause on 30 days notice, and the owner's "normal" right in the "private rental market" to refuse to renew a lease without cause at the end of its term. HUD responded to these concerns by asserting that federal law should impose "minimal demands beyond the normal requirements of an unsubsidized tenancy," and by assuring owners that federal good cause can be met by a business or economic reason such as a desire to charge a higher rent to a new tenant. *See* Statutory And Regulatory Background, Part II.F above. In other words, as it had when implementing the PHA notice to vacate requirement of the original Section 8 statute, HUD again "made every effort to minimize the risk and burden under this provision" for owners by leaving as much as possible to existing non-federal law. *See* Statutory And Regulatory Background, Part II.C, F above.

4. HUD's 1995 unified regulation did not effect a substantive change. The comments HUD received again spoke only of the impact of the federal good cause requirement (and did not comment on local eviction controls), and HUD simply repeated its 1984 rationale. *See* Statutory And Regulatory Background, Part II.J-K above.

Indeed, shortly before issuing this final regulation, HUD had adopted as its own the Abt report's recommendation that federal good cause be eliminated

altogether, which would not, of course, have preempted any then-existing local eviction protections, but simply would have made them tenants' exclusive protections, leaving assisted tenants with the same rights as their unassisted next door neighbors. Indeed, all major stakeholders agreed with this proposal, and repeatedly assured Congress that its adoption would both leave in place local tenant protections and encourage owner participation. *See* Statutory And Regulatory Background, Part II.I above.

5. As just noted, from early 1994 forward, national landlord groups lobbied Congress to amend the Section 8 statute to adopt the Abt report's recommendation to eliminate the requirement of federal good cause for non-renewal of an assisted lease (if not altogether). The landlord groups asserted -- just as HUD had done in the past -- that the way to encourage owner participation was to amend the program "to operate as much as possible within the bounds of the private marketplace," and that therefore "Section 8 recipients should receive the same protections as their nonsubsidized neighbors but no more." Congress expressly adopted this reasoning when creating the current standard voucher program in 1998 and eliminating the federal good cause requirement for lease renewals.

HUD then readopted without comment its good cause regulation -- now operative only during the lease term -- as consistent with the new standard voucher

program. *See* Statutory And Regulatory Background, Part II.K above. Indeed, at the same time HUD amended its rules to provide that “[n]othing in part 982 is intended to pre-empt operation of State and local laws that prohibit discrimination against a Section 8 voucher-holder because of status as a Section 8 voucher-holder.” HUD thereby expressly approved greater State and local restrictions on owner participation, including State and local requirements that owners commence Section 8 tenancies and renew Section 8 tenancies on the same basis as unassisted tenancies. *See, e.g., Rosario v. Diagonal Realty, LLC*, 8 N.Y.3d 755, 762-64 (2007) (New York City law requiring renewal of all tenancies on same terms and conditions applies to Section 8 tenancies and is not preempted); *Montgomery County v. Glenmont Hills Assocs. Privacy World*, 936 A.2d 325, 335-37 (Md. 2007) (law prohibiting discrimination on basis of Section 8 as source of funds to pay rent is not preempted); *Franklin Tower One, L.L.C. v. N.M.*, 157 N.J. 602 (1999) (same); *Bourbeau v. The Jonathan Woodner Co.*, 549 F. Supp. 2d 78-88 (D.D.C. 2008) (same).

In short, much as this Court found was true with respect to HUD regulations governing the subsidized mortgage program previously in place at Morton Gardens, HUD’s regulation defining federal good cause to include a business or economic reason such as the desire to raise rents guaranteed that owners would be

free of federal eviction controls under those circumstances, not that HUD would abrogate local eviction controls. *Cf. Topa Equities*, 342 F.3d at 1071-72.

**b. The District Court Erred When It Concluded That LARSO Conflicted With HUD’s “Good Cause” Regulation**

Notwithstanding the foregoing, the District Court concluded that LARSO conflicted with HUD’s express recognition in its regulation that “desire to lease the unit at a higher rental” constitutes good cause to evict (although it then concluded that the HUD regulation was invalid to the extent it would thereby preempt LARSO). While the District Court reached the correct conclusion -- that LARSO is not invalidated by the good cause regulation -- Tenants respectfully submit that it did not need to reach the question of whether the good cause regulation was beyond HUD’s authority. As shown below, application of LARSO with respect to the standard voucher program does not “sufficiently injures the objectives of the federal program” as to justify the conclusion that LARSO and the HUD regulation cannot co-exist. *Topa Equities*, 342 F.3d at 1071.

As the District Court recognized, this Court has held that the mere fact that State or local law prohibits conduct that federal law permits is not *in and of itself* sufficient to establish conflict preemption. *Hammond*, 726 F.2d at 498. As the District Court also recognized, the Supreme Court has made clear that the mere fact that federal law permits, but does not require an action likewise is not sufficient *in and of itself* to preclude conflict preemption when State or local law

forbids that same action. *See Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982). Rather, conflict preemption exists when the federal agency has a specific purpose for permitting the conduct at issue *and* the State or local elimination of the federally granted option “has created ‘an obstacle to the accomplishment and execution of the full purposes and objectives’ of the [federal] regulation.” *Id.* at 156.

However, material distinctions between the federal agency policy at issue in *de la Cuesta* and the HUD policy at issue in this case properly should lead to a different conclusion as to whether state or local law undermines federal objectives. In *de la Cuesta*, the Federal Home Loan Bank Board had authorized the banks it regulated to include a “due-on-sale” clause in its mortgage loans, at their option. The Board expressly found that if banks were denied this option, it would threaten their financial stability, cause mortgage interest rates to rise, and restrict the availability of mortgage credit. *Id.* at 146-47. These adverse consequences plainly would flow just as surely from a State or local prohibition on “due-on-sale” clauses as they would from a federal prohibition. Hence, it is not surprising that the Board expressly stated its intention to preempt any differing standards imposed by State or local law, *id.* at 147, and that the Supreme Court found conflict preemption because “[b]y further limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry, the State has created ‘an

obstacle to the accomplishment and execution of the full purposes and objectives' of the due-on-sale regulation." *Id.* at 156.

By contrast, there is no evidence -- let alone the requisite "clear evidence" as was present in *de la Cuesta* -- that HUD sought through its good cause eviction regulation to create maximum flexibility for landlords' to enhance rental profits. Compare 24 C.F.R. § 246.1 (HUD preemption of rent controls and eviction defense based thereon in HUD insured and subsidized projects to protect HUD financial interests). Rather, as discussed above, HUD's concern in granting owners the option under federal eviction controls to evict in order to raise the rent was to avoid the disincentive to participation that would be created if federal eviction controls for assisted tenants were more restrictive of terminations for economic reasons than the local law applicable to unassisted tenants. But, unlike the concern at issue in *de la Cuesta*, this HUD concern is only implicated by the existence of more stringent *federal* regulations, and not by more stringent State or local regulations like LARSO that apply to both assisted and unassisted tenants. Indeed, by making the standards for eviction the same for both assisted and unassisted tenants, LARSO actually furthers HUD's policy of minimizing the differences.

In *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), the Supreme Court considered whether the Coast Guard's decision not to impose a federal regulation

requiring propeller guards on motorboats amounted to a preemptive decision that the area was best left unregulated by anyone. The Supreme Court reviewed carefully the Coast Guard’s articulated rationale for its decision not to impose a universal rule, and found that the stated reasons neither revealed evidence that the agency took “the further step of deciding that, as a matter of policy, the States and their political subdivisions should not impose some version of propeller guard regulation” nor were inconsistent with imposing such a requirement in specific situations. *Id.* at 67 Consequently, the Court rejected a claim of conflict preemption because,” although the Coast Guard’s decision not to require propeller guards was undoubtedly intentional and carefully considered, [it] does not convey an ‘authoritative’ message of a federal policy against propeller guards.” *Id.*

In this case, like *Spreitsma* and unlike *de la Cuesta*, there is neither an articulated decision by HUD to preclude more restrictive local eviction controls, nor a statement of policy that is clearly inconsistent with permitting those more stringent controls so long as they apply to assisted and unassisted tenancies alike. The District Court therefore erred in finding a conflict between LARSO and the HUD good cause regulation.

**3. Landlord Produced No Evidence -- Let Alone “Clear Evidence” -- That LARSO Significantly Frustrates HUD’s Policies With Respect To The Enhanced Voucher Program**

With respect to the sixteen Enhanced Voucher Tenants, there is an additional reason why application of LARSO’s eviction controls does not frustrate HUD’s

policy.<sup>14</sup> As discussed, the only articulated reason for HUD permitting evictions based upon a “desire to lease the unit at a higher rental” is to promote voluntary participation by owners in the standard voucher program.

This policy has no relevance to the enhanced voucher program, because owner participation is mandatory upon an “eligibility event” such as prepayment of a HUD subsidized mortgage. *See* 42 U.S.C. §§ 1437f(t)(1)(B), (2); *Feemster v. BSA Ltd. P’ship.*, 471 F. Supp. 2d 87, 96-97 (D.D.C. 2007); *Estevez v. Cosmopolitan Assocs. LLC*, 2005 WL 3164146 at \*5 (E.D.N.Y. Nov. 28, 2005) at \* \_\_ (E.D.N.Y. Nov. 28, 2005) (“[T]he plain language of § 1437f(t) dictates that plaintiffs must be able to tender enhanced vouchers, and that landlords must be required to accept them as rent”); *Jeanty v. Shore Terrace Realty Ass’n*, 2004 WL 1794496 at \* 3 (S.D.N.Y. Aug. 10, 2004) (“[T]he Court finds that 42 U.S.C. § 1437f(t) obligates [landlord] Shore Terrace to accept Plaintiff’s enhanced vouchers”); PIH 2001-41 at 26; Section 8 Renewal Policy Guidebook, § 11-3 at 4. Therefore, whatever impact LARSO might arguably have on *voluntary* owner participation, its application cannot frustrate the purposes of the enhanced voucher program.

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<sup>14</sup> Because the District Court held that Landlord violated the Enhanced Voucher Tenants’ federal statutory right to remain, it never reached the issue of whether application of LARSO would conflict with the enhanced voucher program.

Nor can application of LARSO to the Enhanced Voucher Tenants conflict with any federal statutory or regulatory policy regarding prepayment of HUD subsidized mortgages. This Court already determined that there is no conflict between application of LARSO and the statutes or regulations regarding prepayment. *See Topa Equities*, 342 F.3d at 1071-72.

**B. LARSO Is Not Preempted Because Congress Did Not Give HUD Express Or Implied Authority Under The In-Term Termination Statutory Good Cause Provision To Preempt More Protective Local Eviction Controls**

While there is no conflict between LARSO and HUD's *actual* policy, there would be a conflict between LARSO and Landlord's hypothetical HUD policy to guarantee owners an absolute right to evict their tenants, irrespective of local law, whenever owners thereby could charge a higher rent to a new tenant. Even under this scenario, however, preemption of LARSO would not follow, because any such hypothetical HUD policy would reflect an impermissible construction of the Section 8 statute.

Under step 2 of the familiar two step analysis mandated by *Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), courts properly invalidate agency regulations "if they construe a statute in a way that is contrary to congressional intent or that frustrates congressional policy." *Akhtar v. Burzynski*,

384 F.3d 1193, 1198 (9th Cir. 2004).<sup>15</sup> The hypothetical HUD policy advocated by Landlord would fall under that test “because it leads to absurd results [and] does not forward Congress' purposes.” *Hawaii v. FEMA*, 294 F.3d 1152, 1159 (2002). Indeed, the District Court so found. Opinion I at 36-41.

In particular, the 1998 amendments clearly demonstrate the congressional intent that the proper way to encourage owner participation in the regular voucher program is to make the terms of assisted tenancies, including the grounds for tenancy termination, as much like unassisted tenancies as possible. Not only was this *expressly* stated in the House, Senate, and final bills as the purpose for creating the new, unified voucher program, but it is precisely what all three bills did by eliminating the federal requirement of good cause for failing to renew a Section 8 tenancy at the end of the lease term (i.e., the “endless lease” rule). *See* Statutory and Regulatory Background Part II. The hypothetical HUD policy advocated by Landlord is directly contrary to this expressed congressional intent.

Moreover, this hypothetical HUD policy would lead to absurd results. HUD has expressly preserved the applicability of local rent control to Section 8

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<sup>15</sup> Under step 1 of the *Chevron* analysis, the Court must determine whether Congress has spoken to the precise question at issue. *Id.* Here, the answer is yes, as the 1998 unified voucher statute for the first time includes in the tenancy termination provision the express requirement that “any relief shall be consistent with applicable State and local law.” 42 U.S.C. § 1437f(o)(7)(E). Eviction of Tenants is not a form of relief consistent with LARSO in this case.

tenancies. *See* 24 C.F.R. § 982.509. A hypothetical HUD policy that permits Section 8 landlord to circumvent LARSO's rent controls by evicting assisted tenants to take advantage of vacancy decontrol would make Section 8 tenants the special targets for eviction among all rent control tenants in Los Angeles, and thereby frustrate both the tenant protection purpose of the statutory "good cause" eviction requirement HUD used as authority for HUD's good cause eviction regulation, and the general goal of Section 8 to help low income individuals obtain a decent place to live. As the Second Circuit stated with respect to a proffered interpretation of the now repealed "take one, take all" provision -- a provision which Congress said had the same purpose of protecting Section 8 tenants from owner discrimination that the statutory good cause termination provision has, and eliminated at the same time it eliminated the "endless lease":

Congress could not have intended in enacting [the "take one, take all" provision] to create incentives for the eviction of the people the law was drawn to protect. That would be an "absurd result" both in terms of the purposes of [the "take one, take all" provision] and the overarching purposes of housing rights statutes in general.

*Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 298 (2d Cir. 1998).

Congress likewise could not have intended for a hypothetical HUD policy to do this either.

Landlord's efforts to undermine these conclusions are wholly without merit.

1. Landlord first argues that Congress both authorized HUD to define “other good cause” under the Section 8 statute, and then ratified HUD’s 1984 definition through reenactment of the statutory language without expressing disapproval of that definition. Landlord’s Opening Brief at 20-24. Landlord’s argument misses the mark, however, because the issue is not HUD’s generic right to define “other good cause”, or even the viability of HUD purportedly defining federal good cause to include an owner’s “desire to lease the unit at a higher rental” in circumvention of local rent control. Rather, the issue is whether Congress authorized HUD *to preempt local eviction controls* based upon an owner’s desire to raise rents through vacancy decontrol. Yet Landlord points to nothing indicating a Congressional intent to authorize any such preemption. And, because there is no evidence that HUD actually interpreted the Section 8 statute as authorizing preemption of more restrictive local law in these circumstances, let alone that Congress could possibly have known of any such interpretation, the doctrine of ratification through reenactment cannot apply with respect to the preemption issue. *See, e.g., U.S. v. Ray*, 375 F.3d 980, 990-91 (9th Cir. 2004) (“the principle of ratification requires that there be a settled interpretation of which Congress could have been aware”), *citing Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 531 (1994); *Rabin v. Wilson-Coker*, 362 F.3d 190, 197 (2d Cir. 2004) (cannot simply assume Congress aware of administrative interpretation that is not part of

notice and comment rulemaking), *cited with approval in U.S. v. Ray*, 375 F.3d at 991 n.14.

2. Landlord next argues that HUD's preemption decision is consistent with Congressional intent to encourage private for profit owners to participate in the program. In particular, Landlord argues that the Fair Market Rent limitation on owner returns is a well known and Congressionally recognized problem that makes it essential to assure owners they can exit from the program when faced with below-market returns. Landlord's Opening Brief at 24-28. However, whatever merit such an argument might once have had under the old certificate program, it is wholly irrelevant to the voucher program because FMRs play absolutely no role in the amount of rent an owner can receive under that program. *Compare* 24 C.F.R. § 982.519 (cited in opening, but only applicable to pre-unification certificate tenancies) *with* 24 C.F.R. § 982.507; *see* 24 C.F.R. § 501(b)-(c) (explaining regulations applicable to each program). Rather, FMRs limit the amount of the subsidy that assisted families can receive from the standard voucher program, and it was the potential negative impact on the assisted tenants that Congress noted in the materials cited by Landlord. *See* Opening at 26.

More fundamentally, Congress has already determined that minimization of differences between the eviction rights of assisted and unassisted tenants is the proper means of encouraging owner participation. As detailed above, the 1998

amendments to Section 8 expressly incorporated this principle. Indeed, the only deviation was to maintain the federal good cause requirement for in-term tenancy terminations, as the House bill had done for the express purpose of *protecting* Section 8 tenants. *See* Statutory and Regulatory Background Part II.M.3. HUD is not free to reject this Congressional judgment.

Furthermore, encouraging owner participation is merely a means to the Section 8 goal of assisting low income Americans obtain a decent home, not a statutory end in and of itself. It therefore cannot justify the absurd result of turning Section 8 recipients in rent control jurisdictions into special targets for eviction.

3. Landlord next argues that the continued existence of federal eviction controls -- despite the various attempts to eliminate them altogether -- shows that Congress intended a uniform federal standard, as various courts purportedly have recognized. Opening at 28-32. However, the comprehensive history set out above shows that the Congressional purpose behind federal good cause eviction controls in general, and the in-term good cause termination provision included in the 1998 amendments in particular, was to protect tenants through nationwide minimum standards, and not to displace more protective local law. Furthermore, the case law cited by Landlord involves findings of preemption only from the historically and textually separate criminal and drug eviction provisions, not from the general good cause eviction provision at issue in this case. Indeed, in *Oakwood Plaza*

*Apartments v. Smith*, 352 N.J. Super. 467 (2002), the only case Landlord cited involving the Section 8 existing housing program at issue here,<sup>16</sup> the Court expressly distinguished another case precisely because it involved an eviction unrelated to drugs or crime. *Id.* at 474.

4. Landlord finally spends time quibbling with individual statements by the District Court divorced from their overall context. For example, Landlord points to two atypical jurisdictions that chose not to include eviction controls along with rent controls. However, Landlord nowhere explains how it could possibly be consistent with Congressional intent for HUD to make Section 8 recipients special targets for eviction in rent control jurisdictions like Los Angeles where unassisted tenants cannot be evicted as a means of escaping rent control. Similarly, Landlord points to the failure of Congress in 1998 to eliminate federal eviction controls altogether, thereby precluding the complete identity of eviction procedures for assisted and unassisted tenants. Yet, Landlord nowhere explains how this changes the clear Congressional statement in connection with elimination of the “endless lease” rule (and other non-market program features criticized in the Abt report) that the proper way to increase owner participation is by making assisted tenancies as much like unassisted tenancies as possible.

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<sup>16</sup> And even this case did not consider the impact of 42 U.S.C. § 1437f(o)(7)(E).

Accordingly, even if HUD had decided to preempt local eviction controls, as Landlord incorrectly alleges, in order to permit owners to evict assisted tenants as a means of circumventing local rent controls, HUD's decision would fail under *Chevron* step 2.

**C. LARSO Is Not Preempted In This Case Because Appellant Did Not Have Good Cause Under HUD's Regulation**

Even if HUD's good cause regulation could preempt LARSO's eviction controls in theory (which it cannot), it does not preempt LARSO in this case unless Landlord can bring its actions within the terms of that regulation. As the District Court correctly concluded, Order Re Defendants' Motion to Reconsider and Amend the Court's Sept. 12, 2007 Order (Opinion II) at 4-6 (ER 4-6), Landlord had the burden to come forward with evidence that its conduct satisfied the regulation, and the sole evidence offered was its desire to raise the rents to market level with new tenants.<sup>17</sup> Indeed, Landlord does not contend otherwise in its Opening Brief.

However, as Landlord itself correctly argued to the District Court, it cannot charge a higher rent to a new tenant after evicting the nineteen of the twenty-two Tenants whose tenancies began before the year 2000. This is because California

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<sup>17</sup> The District Court likewise correctly concluded that neither a bare desire to opt out of the Section 8 program, nor the cost of compliance with the requirements of the program, constitutes potential federal good cause. Opinion II at 16-18 (ER 16-18). Landlord does not challenge these conclusions on appeal.

Civil Code § 1954.53(a)(1)(A) makes it illegal for Landlord to do so. As a “desire to lease the unit for a higher rental” that cannot be fulfilled plainly does not constitute good cause to evict under 24 C.F.R. § 982.310(d)(iv) -- as Landlord affirmatively argued below, *see* Motion for Reconsideration and to Amend Judgment at 8-9 (SER 195-196) -- LARSO’s eviction controls are not preempted with respect to these nineteen Tenants.

**D. The Additional Preemption Arguments Raised By *Amicus Curiae* California Apartment Association Lack Merit**

The California Apartment Association (“CAA”), as *amicus curiae*, first presents dire warnings that a failure to preempt LARSO’s eviction controls will destroy voluntary owner participation in the standard voucher program. Suffice it to say that this unsubstantiated warning is directly contrary to the conclusion reached by the Abt report, the National Apartment Association of which CAA is a member, HUD and Congress that the proper way to encourage owner participation is precisely to apply the same local law to assisted and unassisted tenants.

CAA next argues that Landlord has additional grounds -- the desire to opt out of Section 8 and the costs of complying with program requirements -- that also should constitute federal good cause and preempt LARSO’s eviction controls. Landlord did not assert these grounds on appeal, and this Court properly need not reach the issue. *See, e.g., Swan v. Peterson*, 6 F.3d 1373, 1383 (1993). In any event, the District Court correctly concluded that both of these grounds would

render meaningless the federal requirement of good cause for in-term tenancy terminations, as owners always would have these grounds. Moreover, HUD itself rejected the bare desire to leave the program as federal good cause at the time of the 1984 rulemaking. *See* Statutory and Regulatory Background Part II.F. In any event, these grounds do not change any of the analysis regarding lack of preemption already provided.<sup>18</sup>

## **II. The Judgment Should Be Affirmed As To The Enhanced Voucher Plaintiffs Because Landlord Violated Their Federal Statutory Right To Remain**

The District Court also correctly held that, independent of LARSO's eviction controls, Landlord's attempt to evict the sixteen Enhanced Voucher Tenants based upon a desire to lease their units at a higher rental than LARSO's rent controls currently permit Landlord to charge them violates the Enhanced Voucher Tenants' statutory right to remain under 42 U.S.C. § 1437f(t)(1)(B).

Even if one assumes that HUD actually purported to authorize evictions of enhanced voucher tenants under these circumstances through 24 C.F.R. § 982.310(d)(iv),<sup>19</sup> that authorization is invalid under *Chevron*.

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<sup>18</sup> CAA also argues that California Civil Code § 1954.535 preempts LARSO's eviction controls. This Court accordingly should not reach this issue.

<sup>19</sup> HUD never completed a notice and comment rulemaking regarding the application of 24 C.F.R. § 982.310 to enhanced voucher tenancies after the statutory right to remain language was added in 2000.

First, as the District Court held, any such authorization fails step 1 of the *Chevron* analysis because Congress has spoken directly to the right of enhanced voucher tenants to remain in their homes with federal rental assistance in the face of efforts by the owner to raise rents to market levels. Opinion I at 16-19, (ER 34-37.) As the District court explained, the plain language of 42 U.S.C. § 1437f(t)(1)(B) provides that upon an eligibility event (such as prepayment of a HUD subsidized mortgage) “the assisted family *may elect* to remain in the same project”, and “during *any period* the family makes such an election” it is entitled to a subsidy “determined using a payment standard that is equal to the rent for the dwelling unit (*as such rent may be increased from time-to-time*).” (Italics added). Moreover, the legislative history unequivocally states that the purpose of the enhanced voucher program is to permit tenant families to remain in their homes even as landlords raise the rents to market rates. *See* Written Testimony of Representative Rick Lazio (7/1/99), 1999 WL 492964 (F.D.C.H.) (Addendum 143-145.) Accordingly, as Congress has clearly expressed the intent that an owner’s raising of rents to market rates is the very reason why the tenant family has the right to remain and the right to an enhanced subsidy, HUD cannot turn it into a reason to deprive the tenant family of these rights.

Second, any purported HUD authorization to evict enhanced voucher tenants under the circumstances presented also would fail under step 2 of the *Chevron*

analysis, even if it somehow passed step 1. The only purported Section 8 statutory policy for HUD authorizing evictions based upon a desire to raise the rent to a new tenant is the encouragement of voluntary owner participation. However, as already discussed, it is undisputed and undisputable that this policy has no application in the enhanced voucher program because owner participation is not voluntary. Moreover, this Court already determined in *Topa Equities* that there is no federal policy in connection with the HUD subsidized mortgage program that would justify circumvention of LARSO's rent controls upon prepayment. It therefore cannot be permissible to construe the enhanced voucher statute to authorize the very evictions it was designed to avoid, given that doing so serves no purpose related to the statute. *See Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 845 (1984) (courts will not disturb administrative decisions that “represent[] a reasonable accommodation of conflicting policies *that were committed to the agency's care by the statute*”) (italics added).

In addition, the effect of the proposed construction would be that in rent control jurisdictions subject to vacancy decontrol an owner always would have the right to evict enhanced voucher plaintiffs after the initial lease term, thereby defeating the very purpose of the enhanced voucher statute. Such a construction is simply impermissible.

Landlord's contrary arguments are unavailing. In particular, Landlord argues that the general provision that enhanced vouchers are the same as standard vouchers demonstrates that the special right to remain feature is limited to the initial lease term following the eligibility event, and then no longer modifies the standard voucher tenancy program features. Landlord's Opening Brief at 32-35. This is plainly wrong as (a) the right to remain provision expressly refers to the right to received enhanced voucher assistance "during *any period* the family makes such an election", even as "rents may be increased from time to time," thereby establishing by plain language that this special feature continues past the initial one year lease term, (b) the limited HUD guidance so interprets the statute, *see* PIH 2001-41 at 26, Section 8 Renewal Policy Guidebook § 11-3 at 4, and (c) any other interpretation is inconsistent with the purpose of the program as confirmed by the legislative history -- to keep vulnerable families in their long time homes.

Landlord also asserts that Congress could not have intended to put owners at risk of financial hardship through a robust right to remain. However, Landlord points to no evidence that Congress had any purpose other than to protect the assisted families. And, given that Landlord concedes that the only limit on the rent to owners in the enhanced voucher program is that it is reasonable in comparison to rents in the unassisted market (which in fact is the only limit in the standard voucher program as well), the speculative assertion that forced long term

participation in the enhanced voucher program puts owners at some financial risk that Congress would not sanction is meritless.

### **III. There Is No Basis For Applying The Judgment Prospectively Only**

Landlord next argues that this Court should apply the judgment for Tenants only prospectively. However, with rare and narrowly defined exceptions, judicial decisions are applied retroactively.<sup>20</sup> *See, e.g., United States v. City of Tacoma*, 332 F.3d 574, 581 & n.5 (9th Cir. 2003), *discussing United States v. Donnelly's Estate*, 397 U.S. 286, 295 (1970). Courts typically apply nonretroactivity only when declining to do so would forfeit important procedural rights and result in substantial inequity, such as when a litigant would be denied relief because of his or her justified reliance on an interpretation of a statute of limitation, but even then nonretroactivity is rare. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662-64 (1987) (denying nonretroactivity because, despite contrary lower court precedent, there had been no clearly-established contrary controlling authority on point and parties “are charged with knowledge that [the applicable statute of limitations] was an unsettled question”), *superseded on other grounds by* 28 U.S.C.

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<sup>20</sup> By contrast, retroactive application is the exception with respect to legislative and agency action. Thus, Landlord’s citation to *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), and *Landgraf v. USI Film Productions*, 511 U.S. 244 (1994), is inapposite.

§ 1658 (1990), and *abrogated on other grounds by Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70-71 (1992).

Here, no owner -- including Landlord -- could have reasonably relied on the purported preemption of LARSO by HUD's good cause regulation. HUD never expressed a view that its regulation had preemptive effect, and no court had ever so held. Thus, no inequity will result from granting Tenants relief, while the very purpose of LARSO will be defeated if Tenants are denied relief.

**IV. Landlord Waived Its Right To Challenge The Scope Of The Injunction On This Appeal**

Landlord improperly seeks to challenge the scope of the injunction before this Court, having failed to do so in the District Court. Any such objections are properly directed to the District Court in the first instance. *See Conn. General Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 883 (9th Cir. 2003); *see also Buono v. Kempthorne*, 527 F.3d 758, 778 n.11 (9th Cir. 2008).

**V. The District Court's Award of Attorneys' Fees Was Proper**

**A. Tenants Are Entitled To Fees For Work On Both Causes Of Action**

Landlord argues that the award of fees was improper because neither of Tenants' two causes of action were "on a contract" within the meaning of California Civil Code § 1717. These arguments are waived as Landlord did not raise them below. *See Defendant's Opposition to Plaintiffs' Motion for Attorney*

Fees (“Attorneys’ Fees Opposition”) (SER 153-186.); *A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333, 338 (9th Cir. 1996).

These arguments also are wrong. An action is “on a contract” for purposes of § 1717 if the underlying dispute arises from a contractual relationship that “plays an integral part in defining the rights of the parties” at issue, even where federal statutory issues predominate. *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1335, 1340-41 (9th Cir. 1986) (affirming attorneys’ fee award for motion asserting that an arbitration award had been fraudulently procured and should be vacated under 9 U.S.C. § 10); *see also In re Baroff*, 105 F.3d 439, 442 (9th Cir. 1997). Enhanced Voucher Tenants’ cause of action for violation of the right to remain satisfies this test as it sought to enforce—by means of declaratory and injunctive relief—their right to continued possession of their homes pursuant to their leases. *See, e.g., Baugh v. Garl*, 137 Cal. App. 4th 737, 742 (Ct. App. 2006) (award of contractual attorneys’ fees proper where party sought to enforce contractual rights through injunctive relief). Indeed, the central issue presented was whether Landlord violated the Enhanced Voucher Tenants’ right to remain by seeking to evict them on the basis of the definition of good cause found in 24 C.F.R. § 982.310(d)(iv), which as a matter of law is incorporated into leases in the standard voucher program, *see* 24 C.F.R. § 982.308(f). *See* generally *Lafarge*, 791 F.2d at 1340 n.16 (the phrase “on a contract” in § 1717 is to

be liberally construed); and *Milman v. Shukhat*, 22 Cal. App. 4th 538, 543-45 (1994) (same). *In re Johnson*, 756 F.2d 738 (9th Cir. 1985), upon which Landlord relies, is inapposite. The claim deemed not to be “on a contract” did not involve an adjudication affecting the substantive contractual rights of the parties in any way, but only whether a foreclosure could proceed free of the bankruptcy stay. *See id.* at 740-41.

In any event, Landlord’s threatened eviction actions were clearly actions on the leases in which a successful 42 U.S.C. § 1437f(t) defense would entitle Tenants to attorneys’ fees. *See, e.g., Harbour Landing-Dolfann, Ltd. v. Anderson*, 48 Cal. App. 4th 260, 263 (Ct. App. 1996) (award of contractual attorneys’ fees proper where lessee filed suit seeking declaration that lessor’s demand for rent increase was invalid under the lease).

Appellees’ second cause of action (related to LARSO) was also an action “on a contract.” A suit that is “fundamentally . . . based upon [a] lease” is an “action on a contract” for purposes of § 1717, even if the complaint frames the suit as based on violation of a rent control ordinance that protects the tenant’s rights under the lease. *See Beeman v. Burling*, 216 Cal. App. 3d 1586, 1607-08 (Ct. App. 1990). As with Tenants’ first cause of action, their second cause of action sought to enforce their right under their leases to retain their tenancies and thus to remain in possession of their homes. Accordingly, it was an action “on a contract.”

Landlord's citation to authorities regarding the proper treatment of contractual attorneys' fees in tort suits are irrelevant because this not a tort suit. *Castillo v. Friedman* is inapposite: It was a suit for damages, not to establish rights under a lease, and holds only that a LARSO provision imposing a duty of good faith on landlords creates a private cause of action. 197 Cal. App. 3d Supp. 6, 13-14 (App. Dep't Super. Ct. 1987).

**B. The District Court Neither Erred Nor Abused Its Discretion In Its Evidentiary Decisions**

Landlord next asserts that attorneys' fees are not recoverable because Tenants failed to introduce evidence in support of their claim for fees before entry of summary judgment. However, claims for attorneys' fees are properly made by post-judgment motion unless the substantive law requires those fees to be proved at trial as an element of damages. *See* F.R.C.P. 54(d)(2)(A). California law does not so require. *See, e.g., Port of Stockton v. W. Bulk Carrier KS*, 371 F.3d 1119, 1120-21 (9th Cir. 2004).

Landlord also asserts that the District Court abused its discretion by declining to hold an evidentiary hearing. However, Landlord presented no evidence in its opposition to Tenants' motion for attorneys' fees, only evidentiary objections, and therefore did not create a disputed issue of material fact. Moreover, Tenants' evidence was sufficiently detailed to support the fee award. *See* Order Re: Plaintiffs' Motion for Attorneys' Fees ("Attorneys' Fee Order")

(ER 71 n.2, 74); Opposition to Attorneys' Fee Motion (SER 153-186); Plaintiffs' Declarations, Exs. 1-9 (SER 58-133.) The District Court therefore was not required to hold a hearing. *See Sablan v. Dep't of Fin.*, 856 F.2d 1317, 1322-23 (9th Cir. 1988) (conclusory legal allegations in response to evidence submitted with an attorneys' fee motion are insufficient to create a disputed issue of material fact requiring a hearing).

Landlord further asserts that the District Court erred by failing to apportion fees between Tenants who submitted leases and those who could not. However, allocation of fees incurred in representing multiple parties is not required where the issues litigated are "inextricably intertwined." *Cruz v. Ayromloo*, 155 Cal. App. 4th 1270, 1277 (Ct. App. 2007). That is the case here as the District Court properly found that the leases offered into evidence were sufficient to establish entitlement to fees for some Enhanced Voucher Tenants and some Standard Voucher Tenants, that the issues litigated were identical within each group of Tenants, and that there was no principled way to apportion fees between Tenants who possessed copies of their leases and those who did not. *See Attorneys' Fee Order* (ER 70 n.1.)

**C. The Award Of Fees To The Legal Aid Foundation Should Be Affirmed**

Landlord finally argues that the fee award to LAFLA is improper. This argument is waived as Landlord did not raise it below. *See Attorneys' Fees Opposition* (SER 153-186.)

This argument also is non-justiciable. Pursuant to the comprehensive administrative enforcement procedures governing the Legal Services Corporation (LSC), *see* 45 C.F.R. § 1618.1 *et seq.*, LSC has exclusive jurisdiction to address claims of these types of alleged regulatory violations. *See Dennis v. Chang*, 611 F.2d 1302, 1307-09 (9th Cir. 1980) (citing 45 C.F.R. § 1618.1 in declining to address challenge to receipt of LSC funds because of Appellants' failure to exhaust administrative procedures); *Harris v. Tower Loan of Miss., Inc.*, 609 F.2d 120, 124 (5th Cir. 1980), *superseded by statute on other grounds as stated in Williams v. Homestake Mortg. Co.*, 968 F.2d 1137, 1142 n.8 (11th Cir. 1992); *Peretz v. LAFLA*, 122 Cal. App. 4th Supp. 1, 6, (App. Dep't Super. Ct. 2004).

Finally, this argument lacks merit as the LSC itself recognizes that its regulations permit funding recipients to claim attorney's fees based on contractual attorneys' fees provisions. *See* Legal Servs. Corp., Office of Legal Affairs, External Op. EX-2003-1014, at 3 (Oct. 27, 2003), <http://www.lsc.gov/laws/pdfs/olaeo/EX-2003-1014.pdf>; *see also Peretz*, 122 Cal. App. 4th Supp. at 6-7.

**CONCLUSION**

For the foregoing reasons, this Court should affirm the District Court's judgment.

DATED: August 4, 2008

LEGAL AID FOUNDATION OF LOS ANGELES

NATIONAL HOUSING LAW PROJECT

MUNGER, TOLLES & OLSON LLP

By: Michael E. Soloff / M

Attorneys for Plaintiffs-Appellees

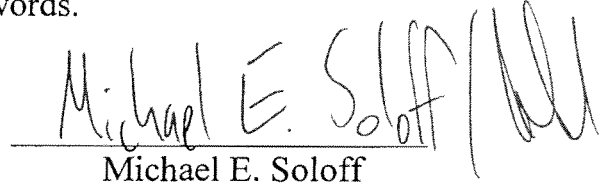
## **STATEMENT OF RELATED CASES**

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

**CERTIFICATE OF COMPLIANCE**

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 17,044 words.

Dated: August 4, 2008

  
Michael E. Soloff



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I declare that I am employed in the office of a member of the bar of  
this court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on August 4, 2008, at Los Angeles, California.

  
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Marsha Oseas