No. 15-1337

In The
Supreme Court of the United States

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES AND RUDOLPH MONTIEL,

Petitioners,

v.

MICHAEL NOZZI, LYDIA PELAEZ, AND THE LOS ANGELES COALITION TO END HUNGER AND HOMELESSNESS,

Respondents.

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

BRIEF OF *AMICI CURIAE* HOUSING AND DEVELOPMENT LAW INSTITUTE, PUBLIC HOUSING AUTHORITIES DIRECTORS ASSOCIATION, COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES, NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, AND HOUSING AUTHORITY RISK RETENTION GROUP, INC. IN SUPPORT OF THE PETITION FOR CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

STATUTES

REGULATIONS AND ADMINISTRATIVE MATERIAL

TABLE OF AUTHORITIES – Continued

INTERESTS OF THE *AMICI CURIAE*[1]

The Housing and Development Law Institute ("HDLI") is the only national nonprofit organization whose mission is to serve as a legal resource to assisted housing providers and managers. Since 1984, HDLI has supported its members with respect to all legal aspects of federal assisted housing law and policy. In addition to serving as *amicus* in cases important to its membership, HDLI provides its more than 200 members with current and timely information concerning the myriad of legal issues relating to affordable and public housing. It does this by publishing legal periodicals, conducting conferences and other educational activities, and providing legal training and individualized counseling, among other services.

The Public Housing Authorities Directors Association ("PHADA") is a nationwide nonprofit advocacy organization formed in 1979 whose membership consists of approximately 1900 executive directors of public housing agencies ("PHAs"). In addition to advocating for better, more efficient administration of the federal affordable housing programs, PHADA conducts a variety of training and educational activities

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[1] In compliance with Rule 37.6 of this Court, *Amici Curiae* state that the counsel named below authored this brief in its entirety, and no party or entity other than the *Amici Curiae* made a monetary contribution to the preparation or submission of this brief. The parties had timely notice of the filing of this brief and have consented to the filing of this brief. The consents are filed contemporaneously herewith.

concerning the development and operation of affordable housing.

The Council of Large Public Housing Agencies ("CLPHA") is a not-for-profit organization whose membership consists of 70 of the largest PHAs in the country. CLPHA members collectively own and manage 40% of the nation's public housing stock. CLPHA's function is to educate and advocate on behalf of its membership before the United States Congress and various government agencies, including the U.S. Department of Housing and Urban Development ("HUD"), and to research and develop policy on matters relevant to the operations and funding of public housing.

The National Association of Housing and Redevelopment Officials ("NAHRO") is a nationwide nonprofit organization dedicated to facilitating local community development and the provision of decent, safe and sanitary housing to low-income families. Formed in 1933, with membership including approximately 2,900 agencies and 16,000 local officials, NAHRO is the oldest and largest national membership organization devoted to affordable housing and community development. NAHRO's member agencies own or manage more than 95% of all public housing in this country. NAHRO has played a key role in the development and implementation of the nation's housing programs since their inception.

The Housing Authority Risk Retention Group, Inc. ("HARRG") is a nonprofit, tax-exempt risk retention group owned by public housing authorities. Operating under the federal Liability Risk Retention Act, it is domiciled in the State of Vermont and was licensed and began operations in 1987. HARRG's membership consists of public housing entities with similar or related liability exposures associated with the provision of residential housing. HARRG and its member PHAs have a particular interest in this matter as an insurer against PHA liability arising out of PHA notices that courts following the Ninth Circuit's lead may deem "incomprehensible."

The organizations comprising the *Amici Curiae* represent PHAs and others responsible for administering and/or managing virtually all of the nation's federal public housing units and tenant-based Section 8 vouchers.[2] The *Amici Curiae* believe that the legal standards governing generalized advisory notices concerning changes to voucher payment standards critically affect the ability of PHAs to manage their housing programs successfully. *Amici Curiae* further believe that, if sustained, the Ninth Circuit Court of Appeals' ("Ninth Circuit") decision under review[3] will have a detrimental effect upon the ability of PHAs

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[2] In its decision the Ninth Circuit describes at length the federal tenant-based Section 8 program. [Petition, Appendix A at 3a-5a].

[3] Petitioners seek review of the decision of the United States Court of Appeals in *Nozzi v. Housing Authority of the City of Los Angeles*, 806 F.3d 1178 (9th Cir. 2015). [Petition, Appendix A].

to meet their legal responsibilities to operate their programs and provide safe and affordable housing to the millions of low income clients that they serve.

SUMMARY OF ARGUMENT

This Court is presented with the case of a PHA that followed *to the letter* HUD regulations addressing the content of a generalized advisory notice sent to Section 8 participants concerning changes to the PHA's Section 8 voucher payment standards.[4] The PHA then went beyond the requirements of the regulations and provided additional public outreach meetings and training sessions to its Section 8 participants regarding those changes.[5] Thereafter, at least 30 days prior to each participating family's second annual reexamination,[6] the PHA sent each family an individualized notice that specified their actual subsidy and rental share under the new payment standard – again, in full compliance with HUD regulations.[7] Nevertheless, the

[4] A voucher "payment standard" is the maximum subsidy payment that a PHA will provide for each type of housing unit in the area. Generally, it must be set between 90 and 110 percent of the Fair Market Rents ("FMRs") for the area. Ninth Circuit Decision [Petition, Appendix at 4a]. 24 C.F.R. §982.505(a).

[5] Ninth Circuit Decision [Petition, Appendix at 29a].

[6] A "reexamination" is the PHA's review of family income, primarily to determine the family's continued program eligibility, subsidy, and rental share, *inter alia*. Ninth Circuit Decision [Petition, Appendix at 61a].

[7] *Id*. [Petition, Appendix at 32a]. 24 C.F.R. §§5.216(e)(ii), 5.615(c)(3), 982.516(a).

PHA now finds itself potentially liable to possibly tens of thousands of Section 8 participants for money damages and/or other relief because the Ninth Circuit decided that the PHA's adherence to HUD regulations was insufficient to provide all participants a "comprehensible" advisory notice.[8] The Ninth Circuit has left unanswered the important question of what comprises a universally "comprehensible" advisory notice, if such a thing can be thought to exist.

This case has national significance. The Ninth Circuit's decision burdens all PHAs to justify that their generalized advisories comply with HUD regulations in the first instance, and then go further to meet the Ninth's Circuit standard that the advisories also be "comprehensible" to every participant. This is an impossible standard to meet, particularly where the Ninth Circuit has not provided a specific template for PHAs to follow.

This decision will affect not only HUD and its housing programs, but all regulatory agencies that issue advisory notices. To the extent that other courts take the Ninth Circuit's lead and begin to create due process rights that exceed any rights derived from agency regulations, where those due process rights directly conflict with existing HUD policy, the decision in this case will be far-reaching and especially troubling.

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[8] The Ninth Circuit's decision states that the PHA's generalized advisory notice "*is incomprehensible to anyone without a relatively sophisticated understanding of the Voucher Program's payment calculations.*" *Id*. [Petition, Appendix at 26a].

Amici Curiae are concerned that the Ninth Circuit's decision creates mass confusion, unnecessarily complicates the existing federally assisted housing scheme, and lays the groundwork for systemic inconsistency across the country. This will undoubtedly result in increased administrative and litigation costs that PHAs will be forced to expend during this era of underfunded housing programs.[9]

The Ninth Circuit's decision also ignores HUD's important role in the federally assisted housing scheme, where the Ninth Circuit more properly should have deferred to HUD's regulation, expertise and judgment in this area. Indeed, HUD has weighed in on the sufficiency of the PHA's advisory notice in this case, and determined that the PHA's notice fully complied with HUD requirements.

Amici Curiae respectfully suggest that individual courts across the country should not impose their own standards concerning generalized advisory notices, when the regulator of the industry, in this case HUD, has provided a standard. Instead, courts should continue the long tradition of deferring to the agency's expertise in this area and not impose their own interpretations of whether an individual advisory notice

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[9] For a discussion of how Section 8 programs have been significantly underfunded over the past several years and how funding for more than 100,000 Section 8 vouchers was sequestered and lost, *see* the Center on Budget and Policy Priorities article titled *Obama Budget Restores Housing Vouchers* (March 23, 2015), available online at: http://www.cbpp.org/research/housing/obama-budget-restores-housing-vouchers.

that meets the regulator's requirements is sufficient or "comprehensible." *Amici Curiae* respectfully urge this Court to reverse the Ninth Circuit's decision.

ARGUMENT

I. THE OUTCOME OF THIS LITIGATION IMPACTS PUBLIC HOUSING AGENCIES NATIONWIDE WHO RELY UPON THE CONSISTENCY OF THE FEDERALLY ASSISTED HOUSING SCHEME.

The outcome of this litigation has far-reaching implications for both the entire federally-assisted housing industry and other non-housing governmental programs. Virtually all PHAs are required to follow uniform management principles as directed through HUD regulations and notices, with the exception of a chosen few PHAs that are part of specialized demonstration programs that permit more entrepreneurial approaches.[10]

The federally-assisted housing scheme is a vast, complex, and heavily-regulated industry, overseen by HUD and administered by approximately 3,891 PHAs

[10] *See*, *e.g.*, HUD's Moving to Work (MTW) program, a demonstration program for select PHAs that provides them the opportunity to design and test innovative, locally-designed strategies. For HUD's description of this program *see* http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/mtw.

across 50 states and four territories.[11] The federal public housing program is administered by approximately 3,340 PHAs that manage 1.120 million dwelling units and serve 1.047 million public housing families.[12] The tenant-based Section 8 housing program is the largest federal program, administered by approximately 2,243 PHAs.[13] Currently, there are 2.447 million vouchers under management, serving 2.231 million Section 8 families.[14]

Since Federal law and HUD policy mandate that PHAs adopt measures to balance their budgets given funding deficits,[15] it is likely that many PHAs administering Section 8 programs will, at some point, consider reducing their voucher payment standards in

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[11] *See* HUD's *Picture of Subsidized Households* (2015), available online at: https://www.huduser.gov/portal/datasets/picture/yearlydata.html.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Notice PIH 2005-9 (HA) titled *Public Housing Agency (PHA) Flexibility to Manage the Housing Choice Voucher Program* states in pertinent part that "*As PHAs must manage their programs within the amounts budgeted for the calendar year, and may have to implement various cost-savings measures . . . PHAs are expected to manage utility costs, decreased tenant contributions and protect the most at-risk families within these budgets.*" Notices PIH 2011-28 (HA) and PIH 2009-44 (HA), both titled *Cost-Savings Measures in the Housing Choice Voucher (HCV) Program* provide the same mandate.

order to keep their voucher programs afloat and avoid having to terminate families from the program.[16]

A. The Form Of An Advisory Notice Concerning Decreases To The Section 8 Voucher Payment Standard Is Addressed In A Reasonable HUD Regulation.

There is no statute that addresses the amount of time between when a decrease in a voucher payment standard is approved and when it goes into effect. Similarly, no statute addresses the form of notice that is required to advise participants about the decrease in the standard. These issues are not addressed in the statute that created the federal Section 8 program.[17] To fill this gap, HUD issued a regulation, 24 C.F.R. §982.505(c)(3), which dictates the procedures a PHA must follow in order to decrease the voucher payment standard during the Housing Assistance Payment ("HAP") contract term.[18]

The first part of the regulation addresses the effective date of the change to the payment standard:

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[16] In April 2004 HUD specifically required HACLA to do this. *See* HUD letter to HACLA dated April 5, 2004 requiring HACLA to reduce expenditures to bring its spending in line with the budget of the department. [Petition, Appendix at 58a-60a].

[17] Section 8 of the U.S. Housing Act of 1937, 42 U.S.C. §1437f.

[18] The "HAP contract" is the annual agreement between a PHA and a Section 8 landlord that dictates, *inter alia*, the amount of rental subsidy that the PHA agrees to pay on the participant's behalf.

> *If the amount of the payment standard schedule is decreased during the term of the HAP contract, the lower payment standard amount generally must be used to calculate the monthly housing assistance payment for the family beginning at the effective date of the family's second regular reexamination following the effective date of the decrease in the payment standard amount*.

24 C.F.R. §982.505(c)(3)(i). This requirement hereafter is referred to as the "One-Year Waiting Period."

Next, by using the word "advise," the second part of the regulation addresses the form of the notice that is required at the advisory stage of the process – that is, when the PHA makes a generalized first attempt to notify all Section 8 participants that there has been a reduction in the payment standard:

> *The PHA shall advise the family that the application of the lower payment standard amount will be deferred until the second regular reexamination following the effective date of the decrease in the payment standard amount.*

24 C.F.R. §982.505(c)(3)(ii).

Thus, by the clear terms of the regulation, advice that the lower payment standard amount will be deferred until the second regular reexamination following the effective date of the decrease is the totality of the notice that the regulation requires at this advisory stage.

This form of advisory notice makes sense and is reasonable because PHAs could not, at least not accurately, provide any more particularized notice with regard to a family's rental share at this point in time. For example, it would be impossible for a PHA to specify what the family's specific rental share would be 12 months in advance of the effective date of the decrease because there are a myriad of factors that PHAs must take into account in determining the family's rental share and the family's information very well may change from year to year.[19]

B. The Ninth Circuit's Decision Creates A New Constitutional Due Process Right Not Required By Statute And Only Derived From A Regulation Addressing A General Advisory Notice. This Far-Reaching Precedent Will Apply To Every HUD Program, As Well As To All Federal, State, And Local Regulatory Bodies, Potentially Creating Grievance Rights At An Early Advisory Stage.

The Ninth Circuit's decision affects every regulatory body – federal, state, and local – which issues advisory notices to program participants. This decision is

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[19] The factors include changes in: household income, household composition, tenant-paid utility allowances, gross rent, unreimbursed medical/disability expenses, unreimbursed child care expenses, assets, HUD's FMRs which may result in PHAs changing their voucher payment standards, etc. *See* HUD's Housing Choice Voucher Program Guidebook, Chapters 5 and 6, is available online at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/forms/guidebook

so far reaching that this Court should grant *certiorari* so that the legal sufficiency and full impact of the Ninth Circuit's decision can be vetted before it becomes settled law.

The Ninth Circuit's decision could provide a new due process right for participants in any type of governmental program, housing or otherwise, who receives a general advisory program notice. This is significant to administrators of HUD programs because, under existing HUD regulations, recipients of advisory notices do not have grievance rights before the consequence of the notice actually is implemented.[20] The same may be true for participants in other governmental programs.

With regard to HUD's Section 8 program, participants have the right to a full informal hearing *to challenge the application of a change in the voucher payment standard to their family*.[21] The informal hearing is conducted by an impartial hearing officer who affords the participant traditional due process rights.[22]

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[20] For instance, in HUD's Section 8 program *see* 24 C.F.R. §982.555 *et seq*.

[21] *See* 24 C.F.R. §982.555(a)(1)(i) which provides "*(a) When hearing is required. (1) A PHA must give a participant family an opportunity for an informal hearing to consider whether the following PHA decisions relating to the individual circumstances of a participant family are in accordance with the law, HUD regulations and PHA policies: (i) A determination of the family's annual or adjusted income, and the use of such income to compute the housing assistance payment*."

[22] 24 C.F.R. §982.555(e)(4).

However, under existing HUD policy and regulations, participants *do not* get an informal hearing to challenge a PHA's discretional administrative determination or general policy issue. HUD regulations state at 24 C.F.R. §§982.555(b)(1) and (2) that *a hearing is not required* when the PHA makes, *inter alia*, discretionary administrative determinations or in the case of general policy issues.

Here, the PHA's reduction of the payment standard was a discretionary administrative decision and/or a general policy decision, where no grievance rights exist for program participants.[23] The Ninth Circuit's decision makes this issue unclear, however. By creating a due process right at the early advisory stage, the Ninth Circuit also may have created a grievance right at this stage – before the family's new subsidy and rental share can even be calculated. This leaves open the question of what participants would be able to challenge at an informal hearing – the form of the notice, the new standard, application of the standard, or something else.

Creation of a right to an informal hearing based upon issuance of a general advisory would wreak administrative havoc on PHAs. In the case of the PHA here, it might have to offer informal hearings to the approximately 45,000 families who received the advisory notice.[24] The Ninth Circuit's decision could have

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[23] 24 C.F.R. §§982.555(b)(1) and (2).

[24] Ninth Circuit Decision [Petition, Appendix A at 8a].

the same effect on other governmental programs with similar rules.

C. The Ninth's Circuit's Legal Standard Is Unworkable And Lays The Groundwork For Inconsistency Across The Country.

Rather than defer to HUD's regulation in this area, the Ninth Circuit below imposed its own standard, and ruled that the PHA's reliance on HUD's regulation was insufficient. It ruled that the PHA's generalized advisory notice was "*incomprehensible to anyone without a relatively sophisticated understanding of the Voucher Program's payment calculations*" and went on to recommend additional components that such a "comprehensible" notice might include, such as defining the term "payment standard," explaining the potential effect of the change, and providing the name, address, or other information that Section 8 beneficiaries could contact for assistance in understanding the advisory's contents.[25] However, rather than provide a full template of a "comprehensible" notice that passes the Ninth Circuit's muster, the Ninth Circuit seems to have merely recommended these additional components.[26]

Essentially, the Ninth Circuit left it up to individual PHAs, and then potentially different courts, to decide what constitutes "comprehensible" notice, on a

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[25] Ninth Circuit Decision [Petition, Appendix A at 26a-27a].

[26] *Id.*

case-by-case basis. This leaves public housing agencies exposed to the real potential of lawsuits challenging their attempts to provide "comprehensible" notices, by persons who may even believe that the Ninth's Circuit's recommendations still leave the notice "incomprehensible."

As PHAs face court challenges as to the sufficiency of their HUD-defined and required notices, this will result in the unnecessary depletion of already-insufficient program funding. This is a recipe for mass confusion and disparate outcomes.

Individual courts in the eight states and two territories that are within the Ninth Circuit[27] could decide, on a case-by-case basis, the proper content of individual advisory notices, and potentially every other type of notice that governmental bodies issue. This situation is ripe for inconsistency when different courts impose different standards. This Court should grant *certiorari* to avoid this result.

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[27] The Ninth Circuit encompasses the states of Alaska, California, Idaho, Montana, Nevada, Oregon, Washington, and Hawaii, and the territories of Guam and the Northern Mariana Islands.

II. CONGRESS HAS VESTED IN HUD OVERSIGHT RESPONSIBILITY FOR MANAGING FEDERALLY ASSISTED HOUSING. THE NINTH CIRCUIT'S DECISION INAPPROPRIATELY IGNORES HUD'S IMPORTANT ROLE IN SETTING POLICY AND ENSURING CONSISTENCY.

A. Congress Has Charged HUD With Regulating And Setting Policy For The Federally-Assisted Housing Industry; Deference To HUD Is Appropriate Here.

This Court repeatedly has held that courts should defer to a federal agency's interpretation of the statutes that it administers and the agency's own regulations when they are rational and reasonable. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984); *Meyer v. Holley*, 537 U.S. 280, 287-88 (2003); *FCC v. Schreiber*, 381 U.S. 279, 290 (1965); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). This is especially true where, as here, the administrative agency is staffed with experts trained in regulating a complex industry, great benefit is derived from the agency's uniform interpretation of laws within its purview and the agency's rules and regulations, and when courts might reach differing results under similar fact situations. *Nelson v. City of Dallas*, 278 S.W.3d 90, 94 (Tex. App. 2009) (deferring to a state governmental agency), quoting *Subaru of Am., Inc. v. Nissan*, 84 S.W.3d 212 (Tex. 2002).

As this Court has recognized, "[j]udges are not experts in the field." *Chevron U.S.A.*, *supra*, 467 U.S. at 842-45. HUD employees are experts in the federally-assisted housing field and Congress has charged HUD with regulating and setting policy for this industry.

Nowhere in the Ninth Circuit's decision does it find that HUD's regulation at 24 C.F.R. §982.505(c)(3) that addresses the content of the generalized advisory notices relevant here, or HUD's specific finding of the sufficiency of the PHA's generalized advisory notice under the regulation, were either "irrational" or "unreasonable." Indeed, *Amici Curiae* find it unusual that the Ninth Circuit barely discussed, and did not appear to really even consider, HUD's important role in setting federal housing policy and PHA operational directives. Similarly, the Ninth Circuit's decision below ignores the important fact that in June 2007 HUD specifically determined that the PHA's generalized advisory notice in this case fully complied with HUD regulations.

As aforementioned, 24 C.F.R. §982.505(c)(3)'s procedure for the content of generalized advisory notices is, indeed, both rational and reasonable, as was HUD's determination in this case that HACLA's advisory notice complied with the regulation. This is because the advisory stage is but the first stage of what, for most families, is a period between 13 and 24 months before the reduction in the payment standard is actually applied to the family's circumstances. HUD's regulation advises the family that "*the application of the lower payment standard amount will be deferred until the*

second regular reexamination following the effective date of the decrease in the payment standard amount." 24 C.F.R. §982.505(c)(3)(ii).

It is especially important to defer to HUD in this case, where HUD staff and officials are housing experts trained in regulating the complex federally assisted housing industry. PHAs across the country should be able to rely upon the consistency of a set of HUD directives concerning the content of advisory notices in their housing programs. This is critically important for consistency in the management of these complex assisted housing programs. And it is especially important with respect to the notice issues in this case, where courts might reach differing results under similar fact situations, dictating different standards from court to court with respect to the same type of notice. *Nelson*, *supra*, 278 S.W.3d at 94.

B. HUD's Office Of General Counsel Reviewed The PHA's Advisory Notice And Found It Fully Compliant With HUD Regulations.

An Assistant General Counsel in HUD's Office of General Counsel in Washington, DC reviewed the PHA's advisory notice in this case, and by letter dated June 7, 2007 opined that the PHA's advisory notice complied with HUD regulations.[28] The letter addressed

[28] The June 7, 2007 letter from HUD to the PHA's attorney Rod Solomon, Esq., is attached hereto as Appendix A.

the scope of notice that HUD's Office of General Counsel believes is warranted at the advisory stage:

> *The sole notification requirement imposed by the regulation is that the PHA advise the family that the application of the lower payment standard amount will be deferred until the second regular reexamination following the effective date of the decrease in the payment standard amount.*[29]

This Court should defer to HUD's regulation, knowledge and expertise in this area, as well as to the legal analysis of HUD's Office of General Counsel. According to HUD regulations and policy and the HUD Office of General Counsel, the PHA's advisory notice was sufficient in this case.

III. FINDING THAT SECTION 8 PARTICIPANTS HAVE A DUE PROCESS RIGHT IN A REGULATORY ONE-YEAR WAITING PERIOD IS INCONSISTENT WITH HUD POLICY THAT EXCLUDES CERTAIN FAMILIES FROM THE WAITING PERIOD ALTOGETHER, THAT SHORTENS THE WAITING PERIOD FOR CERTAIN CLASSIFICATIONS OF FAMILIES, AND THAT PERMITS WAIVERS OF THE WAITING PERIOD.

By way of background, *Amici Curiae* support Petitioner's first argument that, in accordance with this Court's precedent in *Atkins v. Parker*, 472 U.S. 564

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[29] *Id*.

(1972) and its progeny, Section 8 participants do not have any property interest or resulting due process right in the One-Year Waiting Period. This is because the legal basis for the One-Year Waiting Period originates from a HUD regulation at 24 C.F.R. §982.505(c)(3), not by statute. *Amici Curiae* agree with Petitioner that the Ninth Circuit has improperly created a property right out of a regulation, independent of a statutory benefit, in a situation where the regulation was never violated.[30]

However, within the confines of the proper role of *Amici Curiae*, this portion of this brief discusses how the Ninth Circuit's ruling that Section 8 families have a due process right in the One-Year Waiting Period is wholly inconsistent with existing HUD policies that specifically exclude certain families from the waiting period altogether, that shorten the waiting period for certain classifications of families, and that permit waivers of the waiting period.

The Ninth Circuit seemingly misconstrued the purpose of the advisory notice, elevating it to the level of a property interest in the One-Year Waiting Period that was never intended by HUD. If HUD intended for a waiting period to confer such rights, it would not then permit waivers of that right, or permit circumstances where a waiting period is not required. To uphold the Ninth Circuit's finding of a property and due process right here effectively would strike down existing HUD

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[30] Petition at p.15.

policy that HUD has determined is proper for the effective fiscal management of the Section 8 program.

A. HUD Notice PIH 2004-7 (HA) Excludes Certain Families From The Waiting Period Altogether.

Creating a property interest and resulting due process right in the One-Year Waiting Period is inconsistent with existing HUD policy. HUD Notice PIH 2004-7 (HA) titled *Implementation of FFY 2004 Consolidated Appropriations Act Provisions for the Housing Choice Voucher Program* provides that three classes of families are not even entitled to a waiting period before a reduced payment standard is applied to them. The reduction is applicable to them immediately. This Notice states in pertinent part:

> *PHA Actions to Reduce Costs. If the PHA is concerned about increases in its per unit costs (PUC), the PHA is advised to consider the following administrative steps:*
>
> *A. Reduce the payment standard amounts for the program. This action has the most direct impact on controlling the PUC of the PHA program.* ***Any decrease in the payment standard amount is immediately applicable to any applicant voucher family that is searching for a unit (not yet under HAP contract), and any participant family that is moving (the new reduced payment standard amount is used to determine the family's HAP at the new***

> ***unit). The reduced payment standard amount is also immediately applicable for a participant family that is not moving from their current unit at any time that a new HAP contract must be executed for the unit, such as when the owner offers and the family accepts a new lease agreement.***

(Emphasis added).

Therefore, according to Notice PIH 2004-7, three classes of families are not entitled to any waiting period before the reduced payment standard is applied to them (*i.e.*, voucher holders that are not yet under a HAP contract, participants that are moving, and participants that are not moving but are required to execute a new HAP contract for their unit). Therefore, finding that Section 8 participants have a due process right in the One-Year Waiting Period is inconsistent with HUD policy reflected in Notice PIH 2004-7 (HA) that specifically *excludes* three classes of Section 8 participants from the benefit of any waiting period.

B. HUD's Housing Choice Voucher Program Guidebook Shortens The Waiting Period For Certain Families.

The Ninth Circuit's ruling also is inconsistent with HUD policy reflected in HUD's Housing Choice Voucher Program Guidebook that allows a shorter waiting period for decreases in the payment standard

due to family size or composition.[31] Page 7-8 of the Guidebook provides in pertinent part:

> *When the Payment Standard Decreases*
>
> *If the PHA lowers its payment standards, the payment standard in effect on the effective date of the HAP contract will remain in effect until the family moves to another unit, has a change in its family size or composition, or until the second annual reexamination after the PHA decreases its payment standard.* ***Decreases in the applicable payment standard due to changes in family size or composition are effective as of the next regular (annual) reexamination following the change. At that time, the new family size will be used to determine the payment standard.***

(Emphasis added). The HUD Guidebook makes clear that the one-year period does not apply to families with changes in family size or composition; in these cases, the new payment standards are effective as of the next annual reexamination, rather than the second reexamination.

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[31] HUD's Housing Choice Voucher Program Guidebook is available online at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/forms/guidebook

C. HUD Notice PIH 2005-9 (HA) Allows Waivers Of The Waiting Period.

HUD contemplated situations where PHAs would need to put into effect lower payment standards sooner than the second annual recertification, and made provisions for PHAs to seek waivers of the regulatory requirement. HUD Notice PIH 2005-9 (HA) titled *Public Housing Agency (PHA) Flexibility to Manage the Housing Choice Voucher Program in* 2005 states in pertinent part that "*[t]he delayed applicability of a lower payment standard is a regulatory, not statutory, requirement. PHAs experiencing financial difficulties may request HUD to waive this requirement, for good cause. . . .*" Therefore, finding that Section 8 participants have a due process right in a One-Year Waiting Period created by a regulation is inconsistent with HUD policy reflected in Notice PIH 2005-9 (HA) that permits waivers of that requirement.

More recent HUD PIH Notices continue these exceptions to the One-Year Waiting Period. *See* Notice PIH 2011-28 (HA) titled *Cost-Savings Measures in the Housing Choice Voucher (HCV) Program* and Notice PIH 2009-44 (HA) also titled *Cost-Savings Measures in the Housing Choice Voucher (HCV) Program*.

If this Court upholds the Ninth's Circuit's creation of a property right and due process right in the right to notice of a reduction in benefits more than a year in the future, it will be tantamount to striking down the

established HUD policies set forth in the preceding Notices and Guidebook. This would improperly disrupt the Section 8 scheme.

IV. CREATING LIABILITY FOR MONETARY DAMAGES FOR THE ALLEGED DEFECTS IN THIS CASE COULD BE FINANCIALLY DEVASTATING TO THE SECTION 8 PROGRAM AND, IN THE END, SECTION 8-ELIGIBLE FAMILIES COULD LOSE HOUSING OPPORTUNITIES.

This Court should grant *certiorari* to avoid potential damages awards in this case that could cause far-flung financial devastation to HUD's Section 8 program and deny housing opportunities to millions of Section 8-eligible families. These awards could result in the loss of the very savings to the program that could be achieved by the reduced payment standard. The whole cost-saving purpose for allowing PHAs the discretion to lower their payment standards in order to balance their budgets may be completely lost.

Potential damages in this case might include the difference between market rent and subsidized rent for families that may leave the subsidized Section 8 program. Damages also might include relocation costs and noneconomic damages. Multiplied by the number of Section 8 participants that a PHA serves (approximately 45,000 families for the PHA here[32]), assessed over the entire period of time that the family was not

[32] Ninth Circuit Decision [Petition, Appendix A at 8a].

subsidized, the resulting liability could be financially devastating.

Moreover, the administrative costs of implementing any ordered injunctive relief (*e.g.*, re-issuance of the advisory notice), and providing informal grievance hearings will deplete precious funds available to PHAs to operate their housing programs, during a period when Section 8 and other housing programs have been underfunded for the past several years. Finally, the Ninth Circuit's decision opens the flood gates for people to challenge the sufficiency of *any* general advisory notice.

Damages awards, litigation expenses, attorneys' fee awards, and administrative costs resulting from the Ninth Circuit's decision could be calamitous. In the end, PHAs may be forced to terminate families from the rolls, and cut necessary personnel, services, and programming. All of this weighs in favor of this Court granting *certiorari* in this case.

CONCLUSION

In addition to the other arguments advanced in the Petition, if this Court upholds the Ninth Circuit's decision, it will be sanctioning inconsistent treatment in the way that PHAs in the Ninth Circuit provide advisory notices to Section 8 participants concerning changes to voucher standards, as compared with how their counterparts throughout the rest of the country are required to provide such notice.

Without having enunciated a clear standard or template of what constitutes a "comprehensible" advisory notice, the Ninth Circuit has paved the way for piecemeal litigation in the trial courts that will likely result in disparate standards and outcomes. This will cause significant confusion across the industry, where HUD intended a uniform standard as provided in its regulations. PHAs should be entitled to consistent and fair treatment across the country, and should not be put in the position to have to litigate the sufficiency of their advisory notices that fully meet the requirements of HUD rules and regulations.

To find that Section 8 participants have a property right in the One-Year Waiting Period created by a HUD regulation is contrary to this Court's precedent cited by Petitioners in their brief. Finding such a property interest also will contradict existing HUD policy that provides no such property interest or due process right under its regulations. HUD policy enunciated in the Notices and Guidebook referenced herein clearly provides circumstances where certain Section 8 families are only entitled to either a reduced waiting period, or no waiting period at all.

Perhaps an unintended, but nonetheless drastic, consequence of the Ninth Circuit's decision is that creating a property right in the One-Year Waiting Period also may pave the way for rights to informal grievance hearings at the advisory stage, where existing HUD regulations specifically exclude them. PHAs would tax their precious resources to provide informal hearings for recipients of their advisory notices who requested

them. Indeed, the PHA here potentially would have to provide hearings for 45,000 notice recipients. And the issue of what could be challenged at such hearings would remain to be litigated.

Lastly, liability for potential monetary damages and injunctive relief flowing from the Ninth Circuit's decision could be crippling to PHAs, particularly for those serving large numbers of Section 8 families, like the PHA here.

For the foregoing reasons, *Amici Curiae* respectfully request that this Court rule that the Housing Authority of the City of Los Angeles' advisory notice that complied with HUD regulations was sufficient, and reverse the decision of the Ninth Circuit below.

June 1, 2016

Respectfully submitted,

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APPENDIX A

[SEAL] **U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**
WASHINGTON, DC 20410-0500

OFFICE OF
GENERAL COUNSEL

June 7, 2007

Mr. Rod Solomon
Hawkins, Delafield & Wood, LLP
Suite 800 South
601 Thirteenth Street, NW
Washington, DC 20005

Dear Mr. Solomon:

This is in response to your request for a determination of whether the notice the Housing Authority of the City of Los Angeles (HACLA) provided to its Housing Choice Voucher Program (HCVP) participants complied with the regulatory requirement in 24 CFR § 982.505(c)(3)(ii) relating to tenant notification of a reduction in payment standards. In making this determination, we have reviewed the material sent to us on your behalf by Brant Dveirin of Best Best & Krieger, LLP on February 20, 2007.

The regulation at 24 C.F.R. § 982.505(c)(3) outlines the procedures a Public Housing Agency (PHA) must follow in order to decrease the payment standard during the HAP contract term. This subsection provides in part that "If the amount of the payment standard schedule is decreased during the term of the HAP

contract, the lower payment standard amount generally must be used to calculate the monthly housing assistance payment for the family beginning at the effective date of the family's second regular reexamination [of income and composition] following the effective date of the decrease in the payment standard amount." In addition, the regulation states that "The PHA shall advise the family that the application of the lower payment standard amount will be deferred until the second regular reexamination following the effective date of the decrease in the payment standard amount."[1] 24 C.F.R. § 982.505(c)(3)(ii).

The notice HACLA sent to its HCVP participants states, "Effective February 1, 2005, the Housing Authority lowered the payment standards used to determine your portion of the rent. We will not apply these lower payment standards until your next regular reexamination. If you move, however, these new lower payment standards will apply to your next unit."[2]

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[1] Please note that this opinion does not address whether HACLA complied with all of the payment standard requirements in 24 CFR § 982.505(c)(3), including the procedures for determining the payment standard amount for families. The sole issue for purposes of this opinion is whether the notification of the lower payment standard to families complied with 24 CFR § 982.505(c)(3)(ii).

[2] The lower payment standards are listed by bedroom size. In addition, the notification states that "Regardless of its location, the unit's rent can never be higher than the comparable rents determined by the Housing Authority." The latter statement accurately reflects the reasonable rent provisions in 24 CFR § 982.507.

Generally, the HCVP regulations give a PHA broad discretion in determining how to "advise" families about the implementation of a payment standard reduction. This reflects the view that a PHA is in the best position to assess the differing needs of the participants in its program, and to implement a notification policy based on this assessment. The sole notification requirement imposed by the regulation is that the PHA advise the family that the application of the lower payment standard amount will be deferred until the second regular reexamination following the effective date of the decrease in the payment standard amount.

According to Mr. Dveirin, families received the notification of the reduced payment standard either prior to or as part of their annual reexamination. Assuming this to be the case, the notice provided by HACLA complied with the regulatory notification requirement – families were advised that the reduced payment standard would not be effective at the current reexamination, but rather at the next (i.e., second) reexamination.[3] In addition, while not required by the HCVP regulations, the notice accurately stated program requirements by indicating that, if the family moved, the lower payment standards would apply to the new unit. The delay in implementing reduced payment standards only applies during the term of a family's existing HAP contract.

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[3] Our understanding is that, consistent with this reading of the notice language, HACLA did not apply the reduced payment standards until the second regular reexamination of families.

As noted above, the HCVP regulatory provision in question is very narrow in scope, and our sole conclusion in this letter is that the notice provided by HACLA met the minimum standard in 24 C.F.R. 982.505(c)(3)(ii). If you have any questions about this matter, please contact Andrew Lee of my staff at (202) 708-0470.

Sincerely,

/s/ Althea Forrester
Althea M. Forrester
Assistant General Counsel
Assisted Housing Division