No. 15-

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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the recipients of a Section 8 federal rental housing subsidy have a cause of action against a local housing authority administering the program, based on an alleged violation of the recipients' procedural due process rights, where the agency has given notice of an across the board reduction in benefits that will be put into effect more than a year after the notice, on the ground that the notice was not sufficiently "comprehensible" to them, where the statute establishing the program did not require such a notice, and where the notice given complied with the regulations of the Department of Housing and Urban Development ("HUD")?

LIST OF PARTIES TO THIS PROCEEDING

The plaintiffs in the District Court are Michael Nozzi, an individual; Lydia Pelaez, an individual; and the Los Angeles Coalition to End Hunger and Homelessness, a non-profit organization. The named plaintiffs brought suit on behalf of themselves and similarly situated persons many years ago, although no class action has ever been certified.

The defendant Housing Authority of the City of Los Angeles administers the Section 8 program pursuant to section 8(o) of the *United States Housing Act of 1937*, codified, as amended, at 42 *U.S.C.* section 1437(o). Mr. Rudolph Montiel was the Executive Director of the Housing Authority, who was sued in his official capacity.

For decades, the federal rental subsidy program has provided rental assistance to low income, elderly, and disabled families, as noted in the published Ninth Circuit decision, *Nozzi v Housing Authority*, 806 F.3d 1178, 1184 (9th Cir. 2015). As in the Ninth Circuit opinion, both the Housing Authority and Mr. Montiel will be referred to collectively in the singular as the "Housing Authority." 806 F.3d at 1186.

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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). [Appendix A.] The petitioners' petition for rehearing and rehearing *en banc* was denied on January 29, 2016, in an order in which the opinion was modified slightly. [Appendix B.]

In its decision, the Ninth Circuit has reversed the judgment in favor of the defendants of June 12, 2013. [Exhibit C.] The District Court's rationale for granting summary judgment in favor of the defendants is reflected in a detailed minute order and decision dated June 6, 2013. [Exhibit D.] The summary judgment in favor of the defendants followed an earlier memorandum decision of the Ninth Circuit dated March 25, 2011, in which a prior summary judgment in favor of the defendants was reversed, in part. [Exhibit E.]

JURISDICTIONAL STATEMENT

The United District Court for the Central District of California had jurisdiction pursuant to 28 *United States Code* (*U.S.C.*) section 1331, because the case is a civil action arising under the Constitution and laws of the United States. The United States Court of Appeals for the Ninth Circuit had jurisdiction pursuant to 28 *U.S.C.* section 1291, after the plaintiffs filed a timely appeal from the summary judgment in favor of the defendants entered on June 12, 2013.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 *U.S.C.* section 1254. This petition for a writ of certiorari is timely under rule 13(3) of the *Rules of the Supreme Court of the United States*, since it is filed within 90 days of the denial of the petition for rehearing by the Ninth Circuit on January 29, 2016.

CONSTITUTIONAL, STATUTORY PROVISIONS, AND REGULATIONS INVOLVED

In pertinent part, Article III, Section 2, of the *Constitution of the United States* provides that "[t]he judicial Power shall extend to all Cases in Law and Equity arising under this Constitution [and] the Laws of the United States." The Fifth Amendment, in relevant part, establishes that "[n]o person … [shall] be deprived of life, liberty, or property without due process of law." The Fourteenth Amendment states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law."

Section 8(o) of the *United States Housing Act of 1937* is codified, as amended, at 42 *U.S.C.* section 1437(o). The Act is administered by the Department of Housing and Urban Development ("HUD"). The HUD regulations at issue in this case are 24 *C.F.R.* sections 982.201, 982.302, 982.501, 982.503, 982.505, and 982.516.

STATEMENT OF THE CASE

1. The Allegations of the Plaintiffs' Complaint.

The plaintiffs are two individuals and a nonprofit organization who sued as putative class representatives of a group of tenants who received rent subsidies through the Federal Section 8 Housing Choice Voucher Program administered by the defendants. *Nozzi v. Housing Authority of the City of Los Angeles*, 806 F.3d 1178, 1183 (9th Cir. 2015). They alleged that the Section 8 beneficiaries' subsidies were reduced "without providing adequate notice in violation of federal and state law." 806 F.3d at 1183. The plaintiffs claim that the defendants' "failure to provide comprehensible information to Section 8 beneficiaries about the payment standard change and its effect one year in advance of the changes implementation" was a violation of the due process clauses of the United States and California Constitutions as well as violation of California law. 806 F.3d at 1187.

Plaintiff Michael Nozzi alleged that he is totally and permanently disabled, while plaintiff Nidia Pelaez is a single mother with a young daughter. Both of them claim they suffered financial losses because of the change in payment standard. 806 F.3d at 1187. Both individual plaintiffs allege that they did not understand that their Section 8 benefits would decrease and that their own rental obligations would increase until they received notices approximately one year after the original notice, four weeks before the change in the payment standard adversely affected their rent contribution. 806 F.3d at 1187. "Neither recalls receiving the original flyer, and neither could comprehend it when it was later shown to them." 806 F.3d at 1187.

2. The First Summary Judgment in Favor of the Defendants.

The District Court granted summary judgment in favor of the Housing Authority, finding that the plaintiffs did not have a protectable property interest in their Section 8 benefits because the Housing Authority had discretion to reduce the payment standard, restricted only by a HUD regulation, 24 *C.F.R.* section 982.505(c)(3). 806 F.3d at 1188. This regulation required the Housing Authority to provide notice, but did not create a separate property right protected by the Constitution. 806 F.3d at 1188.

3. The Unpublished Ninth Circuit Decision Reversing, in Part, the First Summary Judgment.

The plaintiffs appealed from the original summary judgment, which was reversed in an unpublished memorandum decision, *Nozzi v. Housing Authority*, 425 Fed. App'x 539 (9th Cir. 2011). The Ninth Circuit found that the plaintiffs had a property interest in their Section 8 rent subsidies, which is protected against an abrupt change in benefits. 425 Fed.App'x at 541. The court noted that the sufficiency of due process protection of this right "is controlled by the factors set forth in *Matthews v. Eldridge*, 424 U.S. 319, 335" and ruled that "[u]pon remand, the District Court shall apply the *Matthews* factors to the circumstances presented here." 425 Fed. App'x at 542.

The court further stated that The Due Process Clause of the California Constitution is "identical in scope and purpose" to the federal Due Process Clause, recognizing

that the plaintiffs' claims under state law stand or fall with the federal claims. 425 Fed. App'x at 542. The Ninth Circuit affirmed the District Court dismissal of the plaintiffs' civil rights claim based on 42 *U.S.C.* 1983, noting that "agency regulations cannot create a federal right enforceable" under the Constitution. 425 Fed. App'x at 543.

Although the Ninth Circuit in its memorandum decision recognized a property right in receipt of housing rental subsidy benefits, it did not recognize a separate Constitutionally-recognized property right to the notice of a reduction in benefits more than a year in the future that is required by the HUD regulation. It was undisputed that the Housing Authority had fully complied with that regulation.

As noted by the concurring judge, in the 2011 memorandum decision, "[a]t oral argument, plaintiffs' counsel conceded that plaintiffs who were actually going to have Section 8 benefits reduced were granted notice and a hearing before any reduction in those benefits." For this reason, he concluded, that "[i]f the District court finds that adequate notice and a hearing were offered to every individual prior to actual reduction in benefits, the District Court may find as a matter of law that due process was satisfied." 425 Fed. App'x. at 543. The District Court Judge, George H. Wu, did so on remand.

4. The Second Summary Judgment in Favor of the Defendants.

After hearing oral argument on June 6, 2013, Judge George H. Wu granted the defendants' motion for

summary judgment, for the second time. His reasons for doing so were explained in a detailed decision reviewing the undisputed facts presented to him. [App. 56a-94a.]

Judge Wu noted that, on April 5, 2004, HUD required the Housing Authority to reduce expenditures to bring its spending in line with the budget of the department. [App. 58a-60a.] The Housing Authority therefore reduced the voucher payment standard amount from 110% to 100% and conducted approximately 20 outreach meetings at public housing sites and seven regional meetings which included a slideshow presentation. [App. 59a.]

The court stated that the plaintiffs did not challenge the authority of the Housing Authority to reduce the Section 8 payment standard amount, the propriety of the amount of the reduction, or the procedure under which the Housing Authority adopted the change. [App. 59a-60a.]

The Housing Authority sent a notice that each tenant whose rental subsidy might be reduced after the tenant's annual reexamination, and informed the tenant that the reduction would not take effect for a full year. [App. 60a-66a.] The notice included a chart that listed new payment standard amounts, as well as a notice indicating the existing rental subsidy that would remain in effect for the next year. Finally, the notice informed each tenant that he or she had a right to a hearing if there was any dispute about the action of the Housing Authority, and provided a telephone number to contact within 30 days to request such a hearing. [App. 65a.]

Approximately one year and four weeks later, after the initial notice, the change in the rental subsidy would go

into effect pursuant to the methodology about which each tenant had been informed more than a year earlier. The actual amount reflected the change in payment standard as well as individual factors such as increase or decrease in income, changes in family composition, or changes in disability status.

Judge Wu then proceeded with an extensive analysis of the factors specified in *Matthews v. Eldridge* 424 U.S. 319, 335, as mandated by the Ninth Circuit. [App. 77a-89a.] The court rejected the "myopic approach advocated by the plaintiffs" of limiting the due process analysis to the one year notice. [App. 79a.] Rather, the court concluded that "the entire process preceding the actual reduction of the plaintiffs' Section 8 benefits was constitutionally adequate" because all of the Section 8 recipients, including the plaintiffs, not only received training regarding the ways in which the Housing Authority determined the amount of housing assistance payments, but also were notified of the possibility their benefits would be reduced one year prior to any reduction taking place, and were informed of the availability of a hearing at that point, and were given 30 days notice of the right to a hearing before any deprivation would occur. [App. 87a-88a.] The court found that, while the interest of tenants affected by the change in payment standard was substantial, the risk of erroneous deprivation of the amount of benefits due was minimal, because of the detailed procedural requirements explained by the court. [App. 89a.]

The court also found that the ability of the government to reduce expenditures and bring spending on Section 8 housing assistance payments in line with the HUD budget would be seriously impaired if the plaintiffs prevailed. It

would be very difficult to provide additional procedures to make sure that every beneficiary understood the methodology that would be employed in reducing benefits more than a year later. [App. 89a.]

5. The Published Ninth Circuit Opinion Now Before the Court.

This time in a published opinion, the Ninth Circuit reversed the summary judgment in favor of the defendants again, *Nozzi v. Housing Authority*, 806 F.3d 1178 (9th Cir. 2015). The court ruled that the property right of the plaintiffs not only included the Section 8 benefits that they were entitled to receive by statute, but also the right that the benefits "continue in existence for a period of at least one year after the beneficiary's advice that his benefits may be decreased by a change to the payment standard." 806 F.3d at 1191. As a result, "[t]he tenant can budget for annual leases, plan for any drastic changes, and take steps to avoid his family's eviction, secure in the knowledge that his benefits will not be adversely affected during the extended period his property rights remain in effect." 806 F.3d at 1191. Implicitly, this right included not only notice of the one year delay, but an understandable explanation sufficient for each tenant to calculate that tenant's individual amount of reduction.

In finding a procedural due process violation, the Ninth Circuit pays almost exclusive attention to the one year notice, characterized as the "flyer," which "essentially mirrored the language of 24 *C.F.R.* section 982.205(c)(3)." 806 F.3d at 1194. In spite of the fact that this notice indisputably complied with the regulation, the court found it "incomprehensible to anyone without

a reasonably sophisticated understanding of the voucher program's payment calculations." 806 F.3d at 1194. The court ignored the fact that the "flyer" was accompanied by a notice of review determination that specified the amount that the Housing Authority would pay each landlord or owner on the participant's behalf for the next year, a notice which also described the right to a hearing and "provided a telephone number to contact within 30 days to request such a hearing." [App. 87a-88a.] Obviously, if a recipient knew how the housing subsidy was calculated a year earlier and had a telephone number to call to request a hearing if there was any doubt how the amount would be calculated a year later, then such a recipient could have obtained a clear understanding of the Housing Authority's methodology.

Although the District Court found the procedures of the Housing Authority, considered in context, sufficient to satisfy due process, the Ninth Circuit paid little attention to the District Court's detailed findings with respect to the Housing Authority's procedures, but rather focused on how the court believed the "flyer" should have been written. 806 F.3d at 1195-1198. In other words, the Ninth utilized the approach that the District Court had found "myopic."

Based almost exclusively on its own reading of the several sentences contained in the "flyer," the Ninth Circuit not only reversed the summary judgment in favor of the defendants, but also ordered, *sua sponte*, summary judgment in favor of the plaintiffs, finding a denial of procedural due process, under both federal and state law. 806 F.3d at 1199-1203. This extraordinary result was reached, even though the plaintiffs had not moved for

summary judgment, and even though they had not even requested such relief in their appellate briefs. In addition to the summary *sua sponte* judgment, the Ninth Circuit ordered that, on remand, the case be reassigned to some other judge, disqualifying not only Judge George H. Wu, but also two other judges by name, Manuel L. Real and Otis Wright II. 806 F.3d at 1203-1204.

6. The Urgent Need of Review by This Court on a Writ of Certiorari.

Unless this court grants certiorari, the published decision of the Ninth Circuit in *Nozzi v. Housing Authority*, 806 F.3d 1178 (9th Cir, 2015), will wreak havoc not only on the Housing Authority of the City of Los Angeles, but on all housing authorities in the Ninth Circuit by requiring more carefully drawn notices that are not required by the Housing Act or regulation. If other Circuits follow the decision, housing authorities in every part of the country will face incalculable liabilities, mushrooming litigation, and massive administrative costs. As a result, the funds available to help low income, elderly, and disabled families with rental assistance will be diverted to provide the money required to defend lawsuits, pay judgments, and administer the Section 8 housing program. The Ninth Circuit decision actually harms the people it is intended to benefit, and would have the same effect throughout the Ninth Circuit and perhaps across the country unless it is overturned. Prior to the Ninth Circuit decision, the property right in welfare benefits consisted in what a person was entitled to receive by the terms of a statute. Now, there is a property right found solely in a regulation requiring a year's notice of the change, and a year's notice of the methodology to be employed when the change is

made. Not only that, there is now a property right in making "understandable" the details of the process. No such expansion of property rights is warranted.

LEGAL ARGUMENT

I.

Under This Court's Controlling Decision in *Atkins v. Parker*, 472 U.S. 564 (1972), There Is No Due Process Right to an Individualized Notice of the Effect of an Across the Board Reduction of Welfare Benefits Where the Reduction Has Been Legislatively Mandated or Authorized.

The fundamental requirement of due process of law is the opportunity to be heard at a meaningful time and in a meaningful manner. *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970). In the context of receiving welfare benefits, these principles require that a recipient have timely and adequate notice, detailing the reasons for a proposed termination or reduction in benefits, as well as an effective opportunity to present evidence regarding the factual circumstances justifying the termination or reduction in the particular recipients case. 397 U.S. at 268. In *Goldberg,* this court ruled that a seven day notice period is not necessarily "constitutionally insufficient," but observed that there may be cases "where fairness would require that a longer time be given." 397 U.S. at 268. Here, the plaintiffs were given written notice that there might be a reduction in benefits; that the reduction would not take effect for more than a year; and that the reduction might result from a changed payment standard which would be used in calculating each recipient's rental subsidy.

In order to have a property right protected by procedural due process, a welfare recipient must have "a legitimate claim of entitlement to it." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Generally, the claim of entitlement must be based on an independent source, such as federal or state statutory law, as was the case in both *Goldberg* and in *Board of Regents.* 408 U.S. at 577-578.

Citing the *Board of Regents* decision, the Ninth Circuit in the present case noted that, in any case involving an alleged procedural due process violation, the first step is to determine the nature and extent of the protected property interest of the plaintiff. *Nozzi v. Housing Authority,* 806 F. 3d 1178, 1190-1191. The Ninth Circuit then proceeded to hold that the protected property right of the plaintiff extends beyond the housing subsidies in general, and lies "in housing benefits that continue in existence for a period of at least one year after the beneficiary is advised that his benefits may be decreased by a change to the payment standard." 806 F. 3d at 1191. Thus, a tenant can budget for annual leases and other financial requirements, "secure in the knowledge that his benefits would not be adversely affected during the extended period his property rights remain in effect." 806 F. 3d at 1191. The *Nozzi* court cited the regulation at 24 *C.F.R.* section 982.505(c)(3) for the purported expansion of the plaintiffs' property right, but this regulation only requires an advisal of a one year delay in implementing a decrease payment standard.

The facts of the present case are very similar to those considered by this court in *Atkins v. Parker,* 472 U.S. 115 (1985). In November of 1981, the Massachusetts Department of Public Welfare "mailed a brief, ambiguously dated notice to all food stamp recipients with earned

income advising them that the earned-income deduction had been lowered," a change that "would result in either a reduction or a termination of their [food stamp] benefits." 472 U.S. at 119. On December 10, 1981, a purported class action was filed on behalf of all Massachusetts households that had received the notice, claiming that the notice was inadequate as a matter of law. The defendant department then filed a second notice which was slightly more detailed than the first. It provided that changes in the food stamp program had been made which would result in the recipients benefits being reduced or terminated. 472 U.S. at 121. The notice also advised each recipient of the right to a hearing if the recipient had questions concerning the accuracy of the benefits computation or believed that he or she was not receiving the correct amount of food stamps. 472 U.S. at 122.

Although the plaintiffs in the *Atkins* case prevailed in the District Court and in the First Circuit Court of Appeals, this court ruled in favor of the defendant, rejecting the plaintiffs contention that "they had a constitutional right to advance notice" of the legislative changes "specific impact on their entitlement to food stamps before the statutory change could be implemented by reducing or terminating their benefits." 472 U.S. at 128. The procedural fairness of individual eligibility determinations was not relevant, because Congress had plenary power to define the scope and duration of entitlement to food stamp benefits, and to increase or decrease or terminate benefits. 472 U.S. at 129. In particular, the entitlement to receive food stamps "did not include any right to have the program continue indefinitely at the same level." 472 U.S. at 129 – 130. The court rejected the contention that the plaintiffs "had a constitutional right to better notice of the consequences"

of the Congressional legislation under consideration. 472 U.S. at 130. This is because all citizens are "presumptively charged with knowledge of the law," and it is sufficient to describe the effect of Congressional legislation "in general terms." 472 U.S. at 131.

In *Atkins*, the across the board reduction of the food stamp benefits was mandated directly by Congressional legislation. In this case, the change in housing subsidies was authorized in accordance with the discretion given to the Housing Authority by HUD, which required a reduction in benefits because of budgetary limitations. It is undisputed that the Housing Authority had full authority to make the reductions necessary in accordance with the Housing Act. If there was any constitutional requirement of notice, this requirement was fulfilled when the Housing Authority referred to the method by which each recipient's housing benefit would be calculated a year from the notice, even though the notice was given in rather general terms. There never has been any constitutional requirement that governmental notices be understandable to everyone. This court should grant certiorari and then reverse the Ninth Circuit decision, relying on the *Atkins* case and holding that there has been no procedural due process violation on the part of the defendants here.

One justice in *Atkins* dissented on the ground that any notice would be insufficient unless the recipient was given individualized information that would enable the recipient to adjust his or her household budget. That view has now been adopted by the Ninth Circuit in the present case, in spite of the majority holding in *Atkins.* It should be rejected by this Court.

II.

Although There May Be a Constitutionally Protected Property Right to Receive Federal Welfare Benefits, Such a Right Can Only Be Created by a Statute, Not by an Administrative Regulation.

In finding a property right to a one year delay in implementing an authorized reduction in rental housing subsidies, the Ninth Circuit cites a variety of Supreme Court cases including *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Matthews v. Eldridge,* 424 U.S. 319 (1976); and *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978). All of these cases, however, involve due process protection of rights created by statute. There is no statutory basis here for the purported property right of a one year delay in the implementation of the procedure that might result in a reduction of an individual beneficiary's rent subsidy.

The legal basis cited by the Ninth Circuit as establishing the one year property right is a HUD regulation, 24 *C.F.R.* section 982.505(c)(3). *Nozzi v. Housing Authority*, 806 F.2d 1178, 1191. However, the *Nozzi* court fails to cite any authority for the proposition that a constitutionally protected property right can be based solely on a federal regulation, as distinct from a statute, where there was no deprivation of a statutory right to receive a monetary payment. In effect, the Ninth Circuit has created a property right in a regulation, independent of the statutory benefit, regardless of whether the regulation has been violated.

In *Rosas v. McMahon*, 945 F.2d 1469 (9th Cir. 1991), the Ninth Circuit ruled that the agencies that administered the federal Aid to Families with Dependent Children (AFDC) program were required only to give ten days notice of a decision to suspend or reduce assistance, as allowed by a regulation, and that there was no constitutional right to greater notice. It is difficult to discern how a mere regulation can require something not required by the Constitution or by any statute.

In the present case, the Ninth Circuit distinguished *Rojas,* on the basis of the absence of any regulation requiring more than ten days notice of an adverse change in a welfare benefit. *Nozzi v. Housing Authority*, 806 F.3d 1178, 1191-1192. Moreover, the Ninth Circuit purported to distinguish this court's decision in *Atkins v. Parker,* 472 U.S. 115 (1985) on the same basis. 806 F.3d at 1192. However, this distinction is invalid, especially since it is undisputed that there was no violation of the one year provisions of 24 *C.F.R.* section 982.505(c)(3). This regulation does establish a one year delay period, but does not require any particular type of notice.

In *Save Our Valley v. Sound Transit,* 335 F.3d 932 (9th Cir. 2002), the court considered whether a regulation adopted by a federal department can create an individual federal right. It concluded that a regulation does not create any such right, and thus affirmed a summary judgment in favor of the defendant. 335 F.3d at 934.

The *Save Our Valley* court noted that there is an existing split of authority among the Circuit courts concerning whether an agency regulation can create an individual cause of action under the Constitution.

335 F.3d at 936. In particular, the Third, Fourth, and Eleventh Circuits have ruled that an agency regulation cannot create an individual enforceable claim, while two other Circuit courts, the District of Columbia and Sixth Circuits, have reached the opposite result. In its opinion in *Save Our Valley,* the Ninth Circuit joined the Third, Fourth, and Eleventh Circuits, but has now switched sides, deepening the conflict among the circuits. The *Save Our Valley* court concluded that "[t]he Supreme Court has never addressed this issue [of creating an individual cause of action] directly, so no single Supreme Court precedent controls our decision in this case [*Save Our Valley*]." 335 F.3d at 936-937.

In following the lead of the Third, Fourth, and Eleventh Circuits, the *Save Our Valley* decision found that a private cause of action had to be based not on the language of a regulation, but on the text of a statute. 335 F.3d at 937. Only Congress, by statute, can create a private right of action. 335 F.3d at 937.

In this case, there is no statutory basis for concluding that Congress ever intended to create a property right in a federal agency regulation that merely provides for a delay in changing a welfare benefit. It is therefore submitted that the Supreme Court should grant certiorari and join the better reasoned cases holding that only Congress can create a private cause of action, not a federal agency.

In this case, the Ninth Circuit has attempted to fortify its decision by referring to similarities between federal law and state law, holding that the defendants are liable under both. *Nozzi v. Housing Authority*, 806 F.3d 1178, 1200-1204. However, the *Nozzi* panel failed to cite the

leading California case concerning mandatory duties, *Guzman v. County of Monterey*, 46 Cal. 4th 887 (2009).

In *Guzman,* the plaintiffs sued a county for its failure to review periodic monitoring reports provided by the operator of a public water system, which resulted in failure to inform the public of contamination of drinking water over a period of several years. The state Supreme Court held that the county did not have an implied mandatory duty to inform residents about the report, and thus could not be liable for failure to notify residents under *Government Code* section 815.6. Finding no statutory intent on the part of the legislature to establish a cause of action, the high court rejected the plaintiffs' attempt to rely on *Government Code* section 815.6. It is therefore clear that, if the plaintiffs' federal claims against the Housing Authority are rejected by this Court, so must the state claims under California law.

Although the plaintiffs have a constitutionally protected property right to receive the housing subsidy established by statute, they have no expanded or additional property right based on a mere administrative regulation. There is no property right that can be created solely by a regulation of a federal agency. Although there is an existing split of authority on this issue, this court should grant certiorari, and adopt the holding of the cases in circuits which do not recognize a private cause of action based only on a regulation.

III.

Even if a Protected Property Right Can Be Based Solely on an Administrative Regulation, the Ninth Circuit Erred in Finding That Such a Right Was Violated Here, Because the Notice of Change of the Payment Standard Satisfied Constitutional Requirements, When Considered in Light of Other Notices and Procedures.

As indicated above, the Housing Authority contends that the Supreme Court's controlling decision in *Atkins v. Parker*, 472 U.S. 564 (1972) precludes any constitutional right to an individualized notice of the effect of an across the board reduction of a welfare benefit, as long as the reduction has been legislatively mandated or authorized. Here, it is undisputed that the Housing Authority had the right to institute the method by which certain rental housing subsidies were reduced. Alternatively, the defendants contend that the Ninth Circuit's definition of a property right in a one year delay of reduction is erroneous, since a property right cannot be created by a federal agency regulation that has not even been violated.

The defendants respectfully submit that, even if the plaintiffs have a properly right as defined by the Ninth Circuit, there was no violation of that right. The Ninth Circuit simply misapplied the factors recognized by this Court in *Matthews v. Eldridge*, 424 U.S. 319 (1976), because the court considered only the language of the "flyer," a myopic approach that resulted in an erroneous finding that there was a procedural due process violation. There was no evidence showing that the regulation on which the purported property right was based was

ever violated. In addition, if there was some right to notice of a change in the methodology of determining the housing subsidy that would take effect in a year, the notice that was given complied with all the constitutional due process requirements found in *Atkins v. Parker,* 472 U.S. 115 (1985). Where there is a right to notice, there is no constitutional requirement that the notice be "understandable" to everyone receiving it, as this Court specifically held in *Atkins.*

IV.

The Ninth Circuit Erred in Granting Summary Judgment *Sua Sponte,* Because No Such Relief Was Sought in the District Court or in the Appellant's Opening Brief, Because the Defendants Had No Notice of Such a Possibility on Appeal, and Because the Same Court Had Found Genuine Issues of Material Fact in Its Prior Unpublished Memorandum Decision.

One of the most questionable parts of the Ninth Circuit opinion is that in which the court decides, after reversing the summary judgment in favor of the defendants, to grant summary judgment in favor of the plaintiffs on its own motion. *Nozzi v. Housing Authority*, 806 F.3d 1178, 1199-1200. The result on appeal was purportedly justified by *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014), a criminal case in which the majority of the en banc panel made its own factual findings, which were different from those of the District Court.

In this case, the summary judgment in favor of the plaintiffs rests on the view that the "flyer" can only be

interpreted as constitutionally insufficient on its face. Such a holding is inconsistent with the prior Ninth Circuit memorandum decision in which genuine issues of material fact were found. Even the plaintiffs on appeal, contended that such issues of fact existed. The *sua sponte* summary judgment represents a dangerous precedent procedurally, which would encourage judicial activism based on the subjective opinions of Circuit Court judges. It should not be left undisturbed.

V.

The Ninth Circuit Decision Should Be Reversed, in Order to Establish Clarity and Uniformity in the Law, to Avoid a Multiplicity of Claims Across the Nation, and to Prevent Incalculable Administrative and Financial Burdens on Housing Authorities, Which Would Adversely Affect the People They Serve.

In pertinent part, Rule 10 of the *Rules of the Supreme Court of the United States* provides as follows:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) *a United States court of appeals has entered a decision in conflict with the decision of another United*

> *States court of appeals on the same important matter*; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> …
>
> (c) a state court or *United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.*"

As demonstrated above, there is a direct split of authority among the Circuit Courts on the issue of whether a civil cause of action under federal law can be created by a federal agency regulation, where it has not been created by congressional statute. The question of notice requirements established by procedural due process is a very important one, particularly where the issue arises in the context of a federal welfare benefit. Perhaps most important of all, it appears that the holding of the Ninth Circuit conflicts with a controlling decision of this Court on the question of the contents of a notice issued in accordance with a federal regulation, *Atkins v. Parker*, 472 U.S. 115 (1984).

The importance of the issue presented by this petition is clearly demonstrated by the effects of the Ninth Circuit decision if certiorari is denied. The Housing Authority of the City of Los Angeles will be faced with substantial liabilities and defense costs in this case alone, not to mention future cases. Other housing authorities could face similar massive liabilities, and will be forced to defend lawsuits that will arise, as well as incur increased administrative costs. By depleting the budgets of housing authorities in the Ninth Circuit, and perhaps in other circuits, Section 8 recipients will suffer.

There is also the risk that the holding of the Ninth Circuit will be extended to cover the administration of all types of governmental benefits. It is very easy to allege that a particular notice by a governmental entity is not "understandable" and that, as a result, the notice represents a procedural due process violation that is actionable.

In order to maintain uniformity in federal constitutional law, and to assist the Department of Housing and Urban Development in the administration of Section 8 federal housing subsidies, certiorari should be granted.

VI.

Conclusion.

For all the foregoing reasons, the Housing Authority respectively requests that the Supreme Court of the United States grant this petition, review this matter, and answer the question presented. The requirements of procedural due process should be clarified, for the benefit of governmental agencies across the nation.

Respectfully Submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED NOVEMBER 30, 2015

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13-56223

MICHAEL NOZZI, an individual; NIDIA PELAEZ, an individual; LOS ANGELES COALITION TO END HUNGER AND HOMELESSNESS, a non-profit organization, on behalf of themselves and similarly situated persons,

Plaintiffs-Appellants,

v.

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES; RUDOLPH MONTIEL, in his official capacity,

Defendants-Appellees.

July 10, 2015; November 30, 2015, Filed

Appeal from the United States District Court for the Central District of California.
D.C. No. 2:07-cv-00380-GW-FFM.
George H. Wu, District Judge, Presiding.

Disposition: REVERSED AND REMANDED.

Appendix A

JUDGES: Before: Stephen Reinhardt and Richard R. Clifton, Circuit Judges and Miranda M. Du,* District Judge. Opinion by Judge Reinhardt.

OPINION BY: Stephen Reinhardt

OPINION

REINHARDT, Circuit Judge:

The Section 8 Housing Choice Voucher Program provides rental assistance to the most vulnerable members of our society. For many, especially those in areas with a high cost of living, the continuous receipt of these benefits is the only means through which Section 8 beneficiaries and their families can obtain safe, affordable housing. For those on a fixed income or those living paycheck to paycheck, any unexpected decrease in the subsidy can result in homelessness. For this reason, the program contains procedural protections designed to ensure that beneficiaries have at least a full year to plan for certain changes that may decrease the beneficiary's subsidy and increase the rent that they will have to pay.

Plaintiffs are the putative class representatives of a group of tenants who receive rent subsidies through the Section 8 Housing Choice Voucher Program. They assert that the Defendants, the local administrators of the Voucher Program, reduced the amount of Section 8 beneficiaries' subsidies without providing adequate notice, in violation of federal and state law. We agree. Accordingly,

* The Honorable Miranda M. Du, District Judge for the U.S. District Court for the District of Nevada, sitting by designation.

we reverse the grant of summary judgment in favor of the defendants, direct that summary judgment be entered in favor of the plaintiffs, and remand for further proceedings consistent with this opinion.

I. Statutory and Regulatory Background

A. Overview of the Section 8 Housing Choice Voucher Program

In 1974, Congress created the Section 8 housing program in order to "aid[] low-income families in obtaining a decent place to live" and "promot[e] economically mixed housing." Housing and Community Development Act of 1974, Pub. L. 93-383 § 201(a), 88 Stat. 633, 622-66 (1974) (codified as amended at 42 U.S.C. § 1437f). For over four decades, the program has provided rental assistance to low-income, elderly, and disabled families. *See generally Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1152 (9th Cir. 2011).

The majority of federal housing assistance takes place through the Housing Choice Voucher Program, which subsidizes the cost of renting privately-owned housing units. 42 U.S.C. § 1437f(o). The Voucher Program is funded and regulated by the federal Department of Housing and Urban Development, and it is administered at the local level through "public housing agencies." 24 C.F.R. § 982.1(a).

The public housing agencies determine whether individuals are eligible to participate in the program. 24 C.F.R. § 982.201. When an individual is approved, the public housing agency gives that person a voucher which

entitles him to search for qualifying privately-owned housing. 24 C.F.R. § 982.302. When a voucher-possessing individual finds a qualifying unit, the unit owner and public housing agency will negotiate and enter into a housing assistance payment contract, which *inter alia* specifies the maximum monthly rent that the unit owner may charge. 42 U.S.C. § 1437f(c). After that contract has been formed, the public housing agency will make subsidy payments to the unit owner on behalf of the tenant.[1]

An extensive set of statutory provisions and regulations governs the calculation of the subsidy that must be paid on behalf of each tenant. *See* 42 U.S.C. § 1437f(o); 24 C.F.R. § 982.501 *et seq.* To begin with, the Department of Housing and Urban Development must set the fair market rent for established geographic areas across the United States. 24 C.F.R. § 982.503(a)(1). The public housing agency must use this fair market rent to create a local voucher "payment standard" for each of the areas in its jurisdiction. 24 C.F.R. § 982.503(b)(1)(i). A payment standard is the maximum subsidy payment that the housing agency will provide for each type of apartment in the area. *Id.* It must generally be set between 90 percent and 110 percent of the fair market rent for the area. 24 C.F.R. § 982.503(b)(1)(i).[2]

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1. As the "beneficiaries" at issue in this opinion are those Section 8 recipients who have already secured and are currently leasing apartments that are paid for, in part, by Section 8 subsidies, the terms "beneficiary" and "tenant" are used interchangeably throughout the opinion.

2. The public housing agency must request approval to establish a payment standard outside of this range. 24 C.F.R. § 982.503(b)(2). The Department of Housing and Urban Development may approve such a variance if the public housing agency meets one of the prescribed exceptions. *See* 24 C.F.R. § 982.503(c)-(d).

All tenants are responsible for contributing 30% of their monthly adjusted income or 10% of their gross monthly income, whichever is greater. 42 U.S.C. § 1437f(c)(2)(A).[3] Tenants whose rental units cost more than the payment standard have a higher expected contribution. Such tenants must *also* pay any amount by which their rent exceeds the established payment standard. 42 U.S.C. § 1437f(o)(2)(B).[4] In either case, the subsidy covers the balance of the rent.

B. Procedures for Decreasing the Payment Standard

Practically, the formula for calculating a tenant's expected rent contribution means that a decision by the public housing agency to increase the payment standard will generally yield larger subsidies. By contrast, a decrease in the payment standard will generally decrease subsidies and may increase the rental contribution of a substantial number of tenants.[5]

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3. This calculation must account for any welfare assistance tenants receive that is specifically designated for housing costs. 42 U.S.C. § 1437f(o)(2)(A)(iii).

4. An example helps to illustrate this formula. Abel and Beth both must contribute 30% of their monthly adjusted income, for a total of $100 each. The payment standard for one-bedroom apartments in their area is $400. Abel rents a $400 apartment. He must pay $100 towards his rent and will receive the remaining $300 as a rent subsidy. Beth rents a $500 apartment. She must pay the $100 from her monthly adjusted income, but must *also* pay the amount by which her $500 apartment exceeds the $400 payment standard—another $100, for a total of $200.

5. In the hypothetical above, if the public housing agency lowered the payment standard for a one-bedroom apartment in the

To avoid any hardship caused by this change, the Department of Housing and Urban Development's regulations are designed to ensure that beneficiaries have a one-year period of stable benefits in which to plan for changes to the payment standard that may adversely affect their subsidy amount and rent contribution. Each year, the public housing agency conducts annual examinations of each beneficiary, usually on the anniversary of the beneficiary's entry into the Section 8 program, to verify his continued eligibility for benefits and to calculate his expected rent contribution for the current year. 24 C.F.R. § 982.516. Alterations to a tenant's benefits may occur due to circumstantial changes, such as adjustments to the tenant's income, family composition, or cost to rent his apartment, but the regulations limit the discretion of public housing agencies to lower subsidies based on adjustments to the payment standards. If the public housing agency decides to lower the payment standards, it must provide information about the change to all beneficiaries at their annual reexaminations following the decision, and must further advise these beneficiaries that the change will not go into effect until their following reexamination one year later. *See* 24 C.F.R. § 982.505(c)(3).

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area from $400 to $300, Abel, who is renting a $400 apartment, would now need to pay an additional $100 for a total of $200. Beth, who is renting a $500 apartment, would need to pay an additional $200, for a total of $300. A decrease in the payment standard would not cause an increase in rent when: (1) the total rent for the unit is less than the lower payment standard, (2) the tenant's adjusted income has also decreased, or (3) the public housing agency later raised the payment standard before the decrease went into effect.

This requirement provides some measure of financial stability for vulnerable Section 8 beneficiaries as it protects against sudden decreases in subsidy at the whims of the public housing agency. Absent any changes to a beneficiary's circumstances, he can be assured that his subsidy will renew with, at a minimum, the same terms as the prior year unless he had previously been warned that the public housing agency has taken an action that could adversely affect his subsidy. The regulations cast this warning in terms of the public housing agency's duty to provide information to the beneficiary that the payment standard has been decreased, to be effective at least a year afterward. Thus, under that mandatory procedure, the beneficiary necessarily has an expectation in an unaffected one-year term of benefits following the warning in which to plan for the change's potential adverse impact.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Implementation of the 2004 Payment Standard Decrease

The Housing Authority of the City of Los Angeles ("Housing Authority") administers the Voucher Program for that city.[6] In 2004, the Department of Housing and Urban Development required the Housing Authority to limit spending in order to balance the Department's 2004 budget. To meet the budget constraints, the Housing

6. The plaintiffs in this case also sued the Executive Director of the Housing Authority for the City of Los Angeles. Throughout the opinion, both defendants will be referred to as the "Housing Authority."

Authority's Board of Commissioners reduced the payment standard from 110% of the 50th percentile of rents in Los Angeles County to 100% of the 40th percentile of rents. At the time, the Board estimated that "approximately 45% of its approximately 45,000 Section 8 tenants would be adversely affected by the April 2004 decrease, and would have to pay an average of $104 more in rent each month if they chose to remain in their current units. Of this number, nearly 5,000 were elderly families, and nearly 4,500 were non-elderly, disabled families."[7]

That year, the Housing Authority instructed its staff to attach a copy of a flyer to each Section 8 beneficiaries' "notice of review determination" or "RE-38," which is a form sent annually to all Section 8 beneficiaries at the time of their annual reexamination that confirms their renewed eligibility for benefits and sets forth their rent contribution and subsidy amount for the *current* year. The flyer, which was printed in both English and Spanish, stated:

> HOUSING AUTHORITY OF THE CITY OF LOS ANGELES
>
> NOTICE Effective April 2, 2004 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

7. The Board also provided, for the first time, that every tenant must pay a minimum expected contribution of $50. That change is not at issue in this case.

> lower payment standards will apply to your next unit.

That message was followed by (1) a heading stating "PAYMENT STANDARDS AND TENANT-BASED SHELTER PLUS CARE PAYMENT STANDARDS EFFECTIVE APRIL 2, 2004"; (2) a table listing the new payment standards; and (3) a statement that "Regardless of its location, the unit's rent can never be higher than the comparable rents determined by the housing authority."[8] For simplicity, this will hereinafter be referred to as the "flyer." The attached RE-38 form showed the tenant's subsidy and rent contribution for the current year, a number that was unaffected by the decreased payment standards.

Approximately one year later and only thirty days before the changes to the payment standard were scheduled to be implemented and to adversely affect the tenants' subsidies and rent contributions, the Housing Authority sent out another notice of review determination. This particular notice, which will hereinafter be referred to as the "four-week notice," set forth the tenants' subsidies and rents for the upcoming year using the new, lowered payment standard. This was the first time that tenants were actually notified that the change would affect them personally or that there would be an increase to their rent contributions.

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8. *See* Appendix A.

B. The Impacted Beneficiaries Sue

In 2007, Plaintiffs Michael Nozzi and Nidia Palaez, together with the Los Angeles Coalition to End Hunger and Homelessness, filed an amended class action complaint on behalf of affected Section 8 beneficiaries against the Housing Authority and its Executive Director.[9] They claimed that, as relevant here, the Defendants' failure to provide comprehensible information to Section 8 beneficiaries about the payment standard change and its effect one year in advance of the change's implementation: (1) violated the due process clauses of the United States and California Constitutions, (2) violated California Government Code § 815.6, which governs liability for public entities that breach mandatory duties, and (3) constituted negligence pursuant to California Government Code § 815.2.

Plaintiff Michael Nozzi, a Section 8 beneficiary since December 2003, is totally and permanently disabled under Social Security's standards. As a result of the 2004 change, his expected rent contribution increased 48%—from $231 to $342 per month. Plaintiff Nidia Palaez, a beneficiary since February 2004, is a single mother with a young daughter. She experienced a 177% increase in her portion of the rent as a result of the 2004 change.

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9. Plaintiff Los Angeles Coalition to End Hunger and Homelessness is a non-profit devoted to fighting the causes and effects of homelessness. It advocates for more affordable housing on behalf of low-income individuals in Los Angeles. Its membership includes people who receive Section 8 benefits and who have been negatively affected by the 2004 decrease in the payment standard.

She alleges that this increase has adversely affected her family's quality of life, that she has had difficulty affording suitable school clothes for her daughter, and that she has had to divert money from her food budget to cover her increased rent costs.

Both Nozzi and Palaez allege that they did not understand that their Section 8 benefits would decrease and that their own rent obligations would increase until they received notices approximately one year after the flyer, four weeks before the change in the payment standard adversely affected their rent contribution. Neither recalls receiving the original flyer, and neither could comprehend it when it was later shown to them.

C. The District Court Disposes of Plaintiff's Claims

On November 26, 2007, the district court for the Central District of California dismissed the plaintiff's negligence claim. The court held that the plaintiffs failed to establish an essential element for such claims against a public entity: that a statute imposed a mandatory duty on the entity.[10]

In early 2009, the parties filed cross-motions for summary judgment on the remaining issues. With respect to the due process claims, the Housing Authority argued that the plaintiffs did not have a property interest

10. The district court also dismissed other claims that are not relevant to this appeal.

protected by the due process clauses of the United States or California Constitutions.

Furthermore, the Housing Authority asserted that, even if the plaintiffs had a protected property interest, they received sufficient process because the Housing Authority had sent the flyer and "made significant efforts to increase participants' awareness of the 2004 VPS reduction through public hearings and community outreach." The Housing Authority supported its position with (1) declarations from Housing Authority employees summarily stating that all Section 8 beneficiaries receive instructional training upon entry into the Section 8 program, and (2) minutes of a public meeting and a PowerPoint presentation used at the meeting discussing changes to the Housing Authority's operation, during which a brief discussion occurred regarding the payment standard decrease.

In response, the plaintiffs argued that they had a legitimate expectation in continued and stable Section 8 benefits. They challenged the relevance of the Defendants' purported training sessions and public meetings to the question whether the Housing Authority provided sufficient notice to the affected beneficiaries. Furthermore, the plaintiffs asserted, the only relevant question was whether the flyer was reasonably comprehensible to the average recipient, a question unaffected by the Housing Authority's other actions.

The district court granted summary judgment in favor of the Housing Authority on the due process claims and

the remaining state statutory claim, an alleged violation of § 815.6. According to the district court, the plaintiffs could not have a protectable property interest in their Section 8 benefits because the Housing Authority had complete discretion to reduce the payment standard. The only restriction, the district court wrote, was 24 C.F.R. § 982.505(c)(3), which required the agency to provide notice, but did not create a property interest protectable by the due process clauses.

With regard to the California Government Code § 815.6 claim, the district court held that such a claim required the plaintiffs to show that the Housing Authority had breached a "mandatory duty" imposed by statute. The court reasoned that even if 24 C.F.R. § 982.505(c)(3) or the due process clauses created such a duty, there was no basis on which to conclude that the Housing Authority had breached its obligations under that regulation.

D. *Nozzi I*

On appeal, a different panel of this Court reversed. *Nozzi v. Housing Authority of the City of Los Angeles* ("*Nozzi I*") (mem.), 425 F. App'x 539 (9th Cir. 2011). With regard to the plaintiffs' due process claims, we held that the district court "improperly concluded that plaintiffs' property interest in Section 8 benefits did not require adequate notice that their benefits were subject to the planned reduction." 425 F. App'x at 541. To begin with, the plaintiffs had a "well-settled property interest" in Section 8 benefits because "the statute, in tandem with regulatory requirements 'restrict[ing] the discretion'" of

the Housing Authority, "protected against an abrupt and unexpected change in benefits." *Id.*[11] We remanded for the district court to apply the *Mathews v. Eldridge* balancing test to determine if the Housing Authority's notice was sufficient.[12] *Id.*

As for the California Government Code § 815.6 claim, we noted that the statute permits private individuals to sue public entities when three elements have been met: (1) there is an enactment imposing a mandatory duty, (2) that enactment is intended to protect the individual from the type of injury suffered, and (3) the breach of the mandatory duty was the proximate cause of the injury suffered. *Id.* We held that the "district court incorrectly

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11. In so holding, the prior panel held that the grant of summary judgment in favor of the defendants was inappropriate because there was a material issue of fact as to whether the steps taken by the Housing Authority protected against a sudden change in benefits. The majority did not find it necessary, for purposes of reversing the district court's grant of summary judgment, to address the merits of the plaintiffs' contentions that they had a right to a stable one-year term of benefits and that any steps by the Housing Authority taken less than one year before the change would be insufficient to protect this interest.

12. As described in greater detail below, *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) requires courts, when determining what process is due to protect an interest covered by the due process clause, to examine (1) the private interest that will be affected by an official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute safeguards; and (3) the government's interest, which includes the administrative burdens of additional or substitute procedures. *Id.* at 335.

concluded that the notice provided by defendants satisfied the mandatory duty in § 982.505 to provide one-year notice before implementing the reduced [payment standard]." *Id.* The notice required by the regulation must be, "[a]t a minimum," "sufficiently effective to protect housing benefits recipients from an abrupt and unexpected reduction in benefits." *Id.* Accordingly, this Court remanded the § 815.6 claim for further consideration.[13]

Finally, we held that the district court's dismissal of the plaintiffs' state law negligence claim was "erroneous" because public entities "may be held vicariously liable for the negligent acts of their individual employees" under California Government Code § 815.2. *Id.* This claim was also remanded for further consideration.

E. Remand and the Current Appeal

On remand from *Nozzi I*, pursuant to a jointly agreed upon phased discovery plan, the plaintiffs sought discovery of the identities of Section 8 tenants who had been sent the flyer and whose benefits were ultimately affected by the decreased payment standard. They also sought discovery pertaining to any training sessions and public outreach efforts by the Housing Authority that concerned the payment standard. Before the completion of discovery, the Housing Authority filed a renewed motion for summary judgment. The plaintiffs objected

13. Again, for the purposes of reversing summary judgment in favor of the defendants, the prior panel did not find it necessary to address whether plaintiffs' had a right to a stable one-year term of benefits.

that ruling on summary judgment should be deferred under Federal Rule of Civil Procedure 56(d), which allows the court to defer considering a motion for summary judgment when the nonmovant shows that it cannot yet present facts essential to its opposition. The Housing Authority disagreed, arguing that no further discovery was necessary.

The district court ignored the plaintiffs' request for more discovery and issued a tentative ruling granting summary judgment to the Housing Authority which it later reduced to a final judgment. In that order, the district court determined that, applying the *Mathews* test, plaintiffs received constitutionally adequate process. Specifically, the district court reasoned, the flyer, training sessions, public outreach meetings, and four-week notice provided more than enough notice to Section 8 beneficiaries.

With regard to the California Government Code § 815.6 claim, the district court rejected the plaintiffs' claim that the notice provided was not adequate, and held that the totality of the Housing Authority's efforts protected plaintiffs from an "abrupt" and "unexpected" reduction in their Section 8 benefits. Finally, the court held that the Housing Authority could not be vicariously liable for the conduct of its employees, because its employees did not breach any mandatory duty owed to the plaintiffs. This appeal followed.

III. Standing and Standard of Review

As an initial matter, the Housing Authority claims that the plaintiffs lack standing to bring this action. It is incorrect. To establish standing, plaintiffs must establish that they have: (1) an injury in fact, (2) that is "fairly traceable to the challenged action of the defendant" and (3) that is "likely to be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (quotation marks omitted). Here, the plaintiffs alleged that the Housing Authority decreased the amount of their Section 8 benefits and therefore increased the amount they had to pay in rent without adhering to the protections required by due process and by Voucher Program regulations. As the Supreme Court has held, "[w]hen the suit is one challenging the legality of government action or inaction" and "the plaintiff is himself an object of the action . . . there is ordinarily little question that the action or inaction has caused him injury[.]" *Id.* at 561-62. Plaintiffs request compensatory damages, as well as declaratory and injunctive relief, for uncompensated injuries that were ongoing when they filed their complaint. As a result, they met all three standing requirements.

We review the district court's grant of summary judgment to the Housing Authority for each claim *de novo* and must determine whether, "viewing the evidence in the light most favorable to the non-moving party, there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir.

2002).[14] If we determine that there are no genuine issues of material fact remaining, that the Housing Authority does not prevail, and that it has had a "full and fair opportunity" to present its case, we may consider whether plaintiffs are entitled to summary judgment. *Albino v. Baca*, 747 F.3d 1162, 1176 (9th Cir. 2014) (*en banc)*. Here, we also consider, at the plaintiffs' request, whether to reassign this case to a different district judge, which we may do only when a party can show "personal biases or unusual circumstances," such as when the district judge can be reasonably expected to have substantial difficulty setting aside his previous impressions of the case or when reassignment is desirable in order to preserve the appearance of justice. *Krechman v. Cnty. of Riverside*, 723 F.3d 1104, 1111 (9th Cir. 2013).

IV. Procedural Due Process

A. The Contours of the Plaintiffs' Property Right

The Due Process Clause of the Fourteenth Amendment imposes procedural constraints on governmental decisions that deprive individuals of liberty or property interests. *Mathews*, 424 U.S. at 332 (1976).[15] Thus, the first question

14. Plaintiffs also contend that the district court abused its discretion in denying their motion to postpone consideration of the Defendants' motion for summary judgment until the completion of discovery. Because we hold that granting summary judgment in favor of the defendants was improper for other reasons, and because there is no cause for further discovery on the summary judgment issues following remand, we need not address this contention.

15. The language of Article I § 7 of the California Constitution is "virtually identical" to the Due Process Clause of the United States

in any case in which a violation of procedural due process is alleged is whether the plaintiffs have a protected property or liberty interest and, if so, the extent or scope of that interest. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). The property interests that due process protects extend beyond tangible property and include anything to which a plaintiff has a "legitimate claim of entitlement." *Id.* at 576-77. A legitimate claim of entitlement is created "and [its] dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577. Further, as we have previously held, plaintiffs have a protected property right in public benefits when, as here, a statute authorizes those benefits and the "implementing regulations" "greatly restrict the discretion" of the people who administer those benefits. *See Griffeth v. Detrich*, 603 F.2d 118, 121 (9th Cir. 1979).

Thus, as we held in *Nozzi I*, the plaintiffs here have a property interest in Section 8 benefits to which the procedural protections of the due process clause apply. 425 F. App'x at 541 ("Section 8 participants have a property interest in housing benefits[.]"); *Ressler v. Pierce*, 692 F.2d 1212, 1215-16 (9th Cir. 1982) ("In addition, [the plaintiff]

Constitution, with the caveat that California courts place a higher significance on the dignitary interest inherent in providing proper procedure. *Today's Fresh Start, Inc. v. Los Angeles Cnty. Office of Education*, 57 Cal. 4th 197, 159 Cal. Rptr. 3d 358, 303 P.3d 1140, 1150 (Cal. 2013). Recognizing this difference, we nevertheless address the plaintiffs' federal and state due process claims together, as it is unnecessary to take the additional factor into account in this case.

has a constitutionally protected 'property' interest in Section 8 benefits by virtue of her membership in a class of individuals whom the Section 8 program was intended to benefit."); *see also Roth*, 408 U.S. at 576 ("[A] person receiving . . . benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process."); *Holbrook v. Pitt*, 643 F.2d 1261, 1278 (7th Cir. 1981) ("Courts have held in a variety of circumstances that certified tenants in Section 8 programs have protectable property interests under the due process clause.").

The "dimensions" of the property interest here "are defined by existing rules . . . or understandings that secure certain benefits"—in this case, the Voucher Program statute and regulations. *See Roth*, 408 U.S. at 577. These regulations limit the Housing Authority's discretion to alter tenants' subsidies through changes to the payment standard unless tenants have been advised of the change and notified that the reduced standard will not be implemented for at least a full year afterwards. *See* 24 C.F.R. § 982.505(c)(3); *see also Nozzi I*, 425 F. App'x at 541-42 ("[T]he Section 8 regulations 'closely circumscribe' [the Housing Authority's] discretion—by prohibiting [it] from immediately implementing a reduced [payment standard] and requiring [it] to inform participants that a reduced [standard] will be implemented[.]"). This mandatory one-year postponement is designed to serve as an "equitable . . . safeguard[] against reductions in subsidy." Section 8 Housing Choice Voucher Program; Expansion of Payment Standard Protection, 65 Fed. Reg. 42508-01, 42508 (July 10, 2000).

Thus, plaintiffs' property right extends beyond Section 8 benefits generally. The protected property right is in housing benefits that continue in existence for a period of at least one year after the beneficiary is advised that his benefits may be decreased by a change to the payment standard. The tenant can budget for annual leases, plan for any drastic changes, and take steps to avoid his family's eviction, secure in the knowledge that his benefits will not be adversely affected during the extended period his property rights remain in effect.

The district court and the Housing Authority heavily rely on *Rosas v. McMahon*, 945 F.2d 1469 (9th Cir. 1991) to support the argument that the plaintiffs do not have a protected property interest, but that case is inapplicable. In *Rosas*, the local agency provided notice of a change to welfare benefits 10 days before its implementation, as required by a regulation. *Id.* at 1472. The plaintiffs insisted that they were entitled to an earlier notice about which the statutes and regulations said nothing. *Id.* at 1474. This court rejected the plaintiffs' claim and held that welfare recipients had no right to notice of the "passage of statutes" which reduced their benefits or to a "grace period" before benefits were reduced. *Id.* at 1473-74.

Rosas, however, relied on the fact that there was no "pre-existing regulation intended to forestall the implementation of a congressionally mandated program change until [program participants] were provided with notice of that change." *Id.* at 1475. Where, as here, a pre-existing regulation *does* forestall the implementation of a reduction in benefits for a one year period, it is the plaintiffs' property interest in that term of benefits

that procedural due process protects.[16] Accordingly, the question in this case is not whether the plaintiffs have an interest protected by due process—it is clear that they do—but rather "[w]hat process is due to protect plaintiffs' well-settled property interest." *Nozzi*, 425 F. App'x at 542.

B. The Process Due

Once a substantive right has been created, "it is the Due Process Clause which provides the procedural minimums, and not a statute or regulation." *Geneva Towers*, 504 F.2d at 491 n.13; *Nozzi*, 425 F. App'x at 542 ("Technical compliance with regulatory procedures does not automatically satisfy due process requirements."). For this reason, in analyzing the plaintiffs' due process claim, we do not address whether the Housing Authority complied with the requirements of 24 C.F.R. § 982.505(c)(3), but whether the Housing Authority complied with the requirements of the due process clause. We conclude that it failed to do so, and indeed, that the flyer was totally inadequate for that purpose.

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16. Similarly, as the prior panel noted, the district court and the Housing Authority's reliance on *Atkins v. Parker*, 472 U.S. 115, 105 S. Ct. 2520, 86 L. Ed. 2d 81 (1985) is misplaced. In that case, Congress changed the eligibility standards required for benefits under the Food Stamp Act. There, the Court held that "Congress has plenary power to define the scope and duration of the entitlement to food-stamp benefits" and thus welfare recipients were not deprived of due process by Congress's adjustment. *Id.* at 129. The Housing Authority, however, does not have plenary power to implement a change in the payment standard. Rather its authority is limited to changing the amount of assistance one year or more after it has informed beneficiaries of the change.

Procedural safeguards come in many forms, including, *inter alia*, "timely and adequate notice," pre-termination hearings, the opportunity to present written and oral arguments, and the ability to confront adverse witnesses. *See Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). Which protections are due in a given case requires a careful analysis of the importance of the rights and the other interests at stake. *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). Accordingly, in *Mathews v. Eldridge*, the Supreme Court set forth a three-part inquiry to determine whether the procedures provided to protect a liberty or property interest are constitutionally sufficient. 424 U.S. at 334-35. First, courts must look at the nature of the interest that will be affected by the official action, and in particular, to the "degree of potential deprivation that may be created." *Id.* at 341. Second, courts must consider the "fairness and reliability" of the existing procedures and the "probable value, if any, of additional procedural safeguards." *Id.* at 343. Finally, courts must assess the public interest, which "includes the administrative burden and other societal costs that would be associated with" additional or substitute procedures. *Id.* at 347.[17] Here, plaintiffs request

17. As the district court noted, the Supreme Court applies a streamlined test when the only question to be decided is whether the government has provided sufficient notice and there is no request for further procedural safeguards. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). Under *Mullane*, courts must determine whether the notice given was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an

notice of any intended changes to their housing subsidies provided at least one year in advance of the change.

1. The Private Interest at Stake

First, the private interest at stake in this case and the "degree of potential deprivation," *Mathews*, 424 U.S. at 341, is substantial. The 2004 decrease in payment standards affected Section 8 beneficiaries' rent by an average of $104 per month, a deprivation that could be "very serious to a poor person." *Geneva Towers*, 504 F.2d at 492; *see also Escalera v. New York City Hous. Auth.*, 425 F.2d 853, 864 (2d Cir. 1970) ("[E]ven small charges can have great impact on the budgets of public housing tenants, who are by hypothesis below a certain economic level."). For plaintiffs Nozzi and Palaez, the payment standard yielded 48% and 177% increases in their respective rent obligations. This reduction in a tenant's subsidies and accompanying increase in the cost of housing "could force tenants to forego other perhaps necessary purchases and could even force some tenants to seek other less expensive housing." *Geneva Towers*, 504 F.2d at 491.

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opportunity to present their objections." *Id.* at 314. If we were to review this case *ab initio*, we might simply apply *Mullane* to the facts of this case, as might well be appropriate. *See Dusenbery v. United States*, 534 U.S. 161, 167-68, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002). Because the prior panel instructed the district court to apply *Mathews*, we also conduct our due process analysis in terms of the *Mathews* test. We note, however, that the choice of test is not dispositive here. For reasons that we explain below, the notice afforded to the plaintiffs in this case was insufficient under either test.

Furthermore, for many Section 8 beneficiaries, subsidies from the Voucher Program for a stable and renewable one-year term are the difference between safe, decent housing and being homeless. A tenant's inability to pay for an unexpected increase in his portion of the rent and utilities could result in eviction, which ultimately would require the public housing agency to terminate benefits, U.S. Dep't of Housing & Urban Dev., *Housing Choice Voucher Program Guidebook*, at 15-1, 5, and render it impossible for the tenant to pay for a new unit. This deprivation is especially dire considering the vulnerability of Section 8 recipients, a large portion of whom are elderly or disabled, and many of whom, like Plaintiff Pelaez, have young children.

2. The Risk of Erroneous Deprivation

Turning to the second *Mathews* inquiry, we must examine whether the procedures provided to the plaintiffs risked erroneous deprivation of their right to stable and renewable Section 8 benefits, as well as the value of any additional safeguards. Plaintiffs here simply request fair notice: simple and unadorned, reasonably comprehensible notice provided at least one year in advance of the change. Thus, to determine the fairness and reliability of the safeguards provided by the Housing Association and the probative value of this requested safeguard we look—as the district court did—to *Mullane* and its progeny for guidance.

"[W]hen notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S.

at 314. To be constitutionally adequate, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties . . . with due regard for the practicalities and particularities of the case[.]" *Id.* at 314. The means employed must be "reasonably certain" to "actually inform" the party, *id.*, and in choosing the means, one must take account of the "capacities and circumstances" of the parties to whom the notice is addressed, *Goldberg*, 397 U.S. at 268-69; *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 14 n.15, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978).

The flyer was, without doubt, entirely insufficient to meet this standard. In no respect does it reasonably inform its intended recipients of the changes to the payment standard, the meaning of those changes, or, most important, their effect upon the recipient. Because of this, Section 8 beneficiaries were not meaningfully advised regarding the payment standard and were, accordingly, deprived of their right to a one-year term of stable benefits in which to plan for the impending potential hardship.

To begin with, the flyer, which essentially mirrored the language of 24 C.F.R. § 982.505(c)(3), is incomprehensible to anyone without a relatively sophisticated understanding of the Voucher Program's payment calculations. It uses the term "payment standards" six times without ever defining or explaining the term's meaning. A short and simple explanation, such as "this means that the Housing Authority has reduced the maximum amount it will contribute towards recipients' rent," would have provided at least a small measure of clarity. The absence of such a minimal statement is particularly troublesome because,

to the ordinary Section 8 beneficiary, the flyer might well suggest that the beneficiary's expected rent contribution would decrease. *See* ER 117 ("Effective April 2, 2004 the Housing Authority lowered the payment standards used to determine your portion of the rent."). Moreover, the flyer which stated that the change to the payment standards was "[e]ffective April 2, 2004" was attached to an RE-38 that showed the tenant's expected rent contribution for the current year. This could be confusing to many tenants as that number was unaffected by the change and could give the impression that the change to the payment standard would not affect the tenant's subsidy amount at all—indeed that his subsidy would be higher than the lower payment standard should allow.

Further, the flyer in no way explained the potential effect of the change: that it could potentially increase the tenant's expected rent contribution and decrease his subsidy. Indeed, as the Housing Authority estimated at the time, this change would affect roughly 45% of Section 8 beneficiaries and require them to pay an average of $104 more in rent each month. None of this information, however, was included in the flyer. Finally, the flyer was devoid of any name, address, or other information that Section 8 beneficiaries could contact for assistance understanding the flyer's contents. The totality of these deficiencies makes it is impossible to say that the flyer was reasonably calculated to give notice to the average recipient, or possibly even to the average reasonable jurist.[18]

18. Similarly unavailing is the Housing Authority's reliance on a letter purportedly sent to all beneficiaries on April 19, 2005. The Housing Authority did not assert that this letter is in the record, nor

The Housing Authority relies upon three actions that it asserts correct this failure inherent on the face of the flyer. None does so, singly or collectively. As discussed, absent circumstantial changes such as an increase in income or change in family composition, the plaintiffs had a legitimate expectation in a one-year term of *stable* Section 8 benefits. The first of the Housing Authority's actions that it cites is the four-week notice, which was sent only thirty days before the increase in the tenants' rent contribution was scheduled to be implemented. This notice could not possibly provide notice a full year in advance of the scheduled change.[19]

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is there any evidence of it being so. It is only mentioned in passing in a discussion in the deposition of one of the Housing Authority's employees. That employee declared only that it was "similar to" the flyer. For the reasons already discussed, any letter that was simply "similar to" the flyer would be inadequate to provide the necessary notice for the same reasons as the flyer itself. Furthermore, the letter, like the four-week notice discussed in the next paragraph, was sent too late to have been of any use to many beneficiaries.

19. The Housing Authority relies on *Willis v. United States*, 787 F.2d 1089 (7th Cir. 1986) for the proposition that this Court should consider subsequent steps like the four-week notice. That case is of no relevance. There, a plaintiff claimed that procedures attending the forfeiture of his automobile did not comport with the requirements of due process because he only received a form letter containing nothing more than "legal 'jargon.'" *Id.* at 1093. The Seventh Circuit held that, while there was "no question that the language in the letter Willis received would not be adequate notice in itself," that letter in combination with a second letter enclosed within the same envelope adequately informed Willis of the forfeiture proceedings. *Id.* Unlike *Willis*, however, the Housing Authority's four-week notice was not contemporaneous with the flyer, and therefore could not possibly help Section 8 beneficiaries comprehend the legal jargon in the flyer at the time it was to be read.

The two other actions consisted of general advice offered prior to the receipt of the flyer: the holding of "public outreach meetings" and the conducting of "training sessions." Both fell woefully short of advising the Section 8 recipients of the meaning or effect of the change in the payment standards.

First, the public outreach meetings cannot serve to render the Housing Authority's deficient notice consistent with due process. In 2004, the Housing Authority held several meetings about significant changes to the agency's operations that were open to the public. A number of topics were discussed at these meetings, including the challenges faced by the Housing Authority in implementing the Section 8 program, the use of criminal background and credit checks of Section 8 beneficiaries, the portability of Section 8 benefits across apartments, and the Housing Authority's efforts to stabilize rent in the area. As the Housing Authority noted, "part of the discussion" at these meetings, among the other topics listed, were changes to the payment standard and the impact on Section 8 beneficiaries.

These general meetings, however, are no substitute for notice provided directly to the individual tenants. As *Mullane* established, "[w]here the names and post addresses of those affected . . . are at hand, the reasons disappear for resort to means less likely than the mails to apprise" affected persons. 339 U.S. at 315 (emphasis added). The Housing Authority certainly knew the

names and addresses of the Section 8 tenants for whom it was supplying housing benefits, and indeed sent the flyers directly to the tenants, but it failed to provide an *understandable* notice directly to them at the time it would be relevant to the loss or diminution of their benefits.[20] All things considered, therefore, the public outreach meetings were not "*reasonably certain* to inform those affected" of the change to the payment standard, or the effect of such change. *Mullane*, 339 U.S. at 315 (emphasis added). Indeed, even construed most favorably to the Housing Authority, the outreach meetings when considered along with all the other factors in this case fail to raise a genuine issue of fact as to whether the steps taken by the Housing Authority provided constitutionally adequate notice of the potential change to the plaintiffs' property rights.

Second, the training sessions held by the Housing Authority, even when considered along with all the other factors relied on by the Authority, also cannot have rendered the flyer "reasonably certain to inform" the average Section 8 beneficiary of the potential reduction in benefits to occur one year later. Federal regulations require that the Housing Authority give certain information to beneficiaries when they are first selected to participate in the Voucher Program. 24 C.F.R. § 982.301.

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20. The Housing Authority manages the benefits of approximately 45,000 Section 8 beneficiaries, around 45% of whom were estimated to have been adversely affected by the changes to the payment standards. The Housing Authority's agent did not recall how these beneficiaries were informed of the time and place of these meetings, nor could she recall whether more than 50 people attended the meeting that she attended.

According to declarations from Housing Authority employees, the Authority fulfills this requirement by requiring all new beneficiaries to attend a one hour "Session," during which Housing Authority staff explains to the new beneficiaries how a tenant's rent contribution is calculated, which includes an explanation of the term "payment standard." The Housing Authority argues that this explanation served to give sufficient meaning to the contents of the otherwise incomprehensible flyer.

For many affected beneficiaries, however, this information was provided *years* before the flyer was sent. For others, it may have been only a period of up to twelve months. As *Mullane* makes clear, the fact that the Housing Authority provided tenants with this information "months and perhaps years in advance" of the change to the payment standard does not justify "dispensing with a serious effort to inform [the beneficiaries] personally" of the change to their benefits at a time the information would be directly meaningful. *Mullane*, 339 U.S. at 318.[21]

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21. *Mullane* dealt with the question of what notice was sufficient to apprise beneficiaries of a judicial settlement of accounts in a common trust fund. In that case, when the common trust fund was created, the trust company mailed a notice to every person who might be entitled to a share of the fund's income. That notice included copies of state statutes that explained that a judicial settlement of accounts would periodically occur after the fund's establishment, and that participants would be notified of the settlement through publications in their local newspaper. The Supreme Court held that this procedure failed to comply with the requirements of due process and that the trustee was required to undertake a "serious effort to inform [those affected] personally of the accounting." Most relevant to this case, the Supreme Court held that the trustee could not dispense with

Thus, regardless of whether the term "payment standard" was explained to tenants years or months before the flyer was sent, the Housing Authority was required to send a timely notice that provided meaningful information about the change to the payment standard and the change's potential adverse effect on the tenant's benefits.

Furthermore, the payment standard was far from a primary subject of the Housing Authority's one-hour introductory Session to the Section 8 program. At that Session, information must be provided to new beneficiaries regarding: where they may lease a unit, which landlords may be willing to lease a unit to them, how long they have to find a unit, how they may request an extension, the advantage of choosing to live in an area that does not have a high concentration of low-income families, how to complete the forms required to request approval of a rental unit, 24 C.F.R. § 982.301, how people with disabilities can request a reasonable accommodation, the amount of utilities that a tenant would be allowed to use, and what steps tenants can take to avoid housing discrimination. In that same one hour period, the Housing Authority also attempted to explain how the Voucher Program worked generally, including the formula used to calculate a tenant's portion of the rent and the complicated and convoluted role that the payment standards play in that calculation.

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this effort merely because it had previously provided information to those affected. Instead, the Court held, those affected must be informed, at the time of the impending settlement, "that steps *were being taken affecting their interests*." *Id.* at 318 (emphasis added).

In light of the overwhelming amount of information and the complex and variegated subject matter involved, any data as to the meaning and effect of payment standards would likely not be retained for a number of years or even a number of months by the average Section 8 beneficiary. It certainly could not make the flyer, which was confusing, inadequate, and indeed unintelligible on its face, "reasonably certain" to inform Section 8 beneficiaries of a potential reduction in their subsidies to take place one year after receipt of the flyer. *Mullane*, 339 U.S. at 318.[22] Thus, even when considered along with all the other factors relied on by the Housing Authority, no genuine issue of fact exists with respect to whether the beneficiaries' attendance at a Session renders the otherwise wholly inadequate flyer compliant with due process.

In sum, there can be no genuine dispute of fact as to whether the Housing Authority provided constitutionally adequate notice of the change to the payment standard, or more important, the meaning and effect of the change on the plaintiffs' Section 8 benefits. The Housing Authority simply failed to do so. The simplest means of ensuring adequate notice was the means requested by the plaintiffs: a simple and clear letter, written in plain English (or Spanish), mailed directly to the plaintiffs one year in

22. Although we assume for the purposes of the above analysis that all beneficiaries actually attended one of these required Sessions, we note that some evidence suggests that not all beneficiaries actually did so. Plaintiff Pelaez states, for example, that she did not remember attending a training session, and has no recollection of "ever having the concept of Voucher Payment Standards explained to [her.]"

advance of the date of the change's implementation—a letter that contained an understandable explanation of the change and the effect of that change on Section 8 benefits; in other words, a flyer that met the requirements of due process.

A proper notice would have made plaintiffs aware of the seriousness of the Housing Authority's actions. It might have stated, for example, that the Housing Authority estimated that "approximately 45% of [the] approximately 45,000 Section 8 tenants [would] be adversely affected by the April 2004 [payment standard] decrease, and [would] have to pay an average of $104 more in rent each month if they chose to remain in their current units." It might also have provided beneficiaries with a number to call in case they had questions about the upcoming change or needed help finding a more affordable apartment in light of the change. Instead, the Housing Authority's flyer failed even to achieve the minimum that due process requires: an explanation of the change to the payment standard and its likely effect upon tenants—an explanation that could reasonably be understood by the average Section 8 beneficiary. The failure to do so deprived the plaintiffs of the necessary one-year period of stable benefits in which to seek to avoid any impending hardship, and thus, of due process of law.

3. The Burden of Providing the Requested Procedure

Turning to the third *Mathews* inquiry, affording the procedure requested by the plaintiffs would place

no burden on the Housing Authority. The plaintiffs do not ask for a hearing, an individual meeting, or even an explanation of the precise amount by which their portion of the rent would increase. They ask only for an elementary explanation of what a change to the payment standard means and what effect it has on tenants' rights. The Housing Authority's argument that it could not have sent a more precise notice because it could not have prospectively calculated whether the plaintiffs' rent would increase at the time it sent the flyer stems from a fundamental misunderstanding of the plaintiffs' challenge. The plaintiffs recognize that there are situations in which a tenant's subsidies would not decrease despite the change to the payment standard.[23] The plaintiffs merely seek a uniform notice that adequately explains the effect of the change in payment standard in a manner sufficient to reasonably ensure that plaintiffs knew that they might well have to plan for and adjust to a potential decrease in their subsidy and an accompanying increase in the rent they must pay commencing one year from the time they received the flyer.

Surely this information could be readily incorporated into the standard form without placing any burden on the government's fiscal and administrative resources. There is no reason to conclude, after all, that "printing six paragraphs of information is any more burdensome than printing four paragraphs of information." *Henry v. Gross*, 803 F.2d 757, 768 (2d Cir. 1986). Indeed, the

23. A change in the payment standard would not affect, for example, a tenant whose entire unit cost less to rent than the new, decreased payment standard.

Housing Authority printed a more thorough explanation in letters that it sent to people other than those directly affected by the change. Around the same time that the Housing Authority sent the flyer to the existing tenants, it sent a letter to Voucher Program beneficiaries who had not yet found a unit to rent. That letter explained that the payment standard "is the most the Housing Authority can pay for a unit. If the rent for your unit is higher, you must pay the difference in rent." An even clearer explanation was sent to the Mayor, to members of the Los Angeles City Council, and to the members of the United States Congress from California just before the change in the payment standard was implemented. Those letters explained that the change to the payment standard "means many tenants will soon begin paying more rent or, if they choose, move to a less expensive unit," and that the "average increase is estimated at $100/month."[24] Notably missing from the list of people who received an adequate explanation are the people who needed it most—the same people that due process requires receive adequate notice—those Section 8 beneficiaries whose rent might actually be increased by the change.

Accordingly, all of the *Mathews v. Eldridge* factors weigh in favor of the notice that the plaintiffs seek. The Housing Authority's flyer, with its total absence of any effort to explain the payment standard and its relation to tenants' obligations, was inadequate on its face, and the Housing Authority has not shown that any additional

24. The letters sent to high-ranking officials, unlike the flyer that was sent to the plaintiffs, also provided a list of people who could help the Section 8 beneficiaries with a housing search.

steps were reasonably calculated to actually inform the plaintiffs of the necessary information.[25] Moreover, it is beyond dispute that the Housing Authority could, at no extra cost or expense, have provided the notice that would have afforded the tenants the due process they requested.

The state due process claims are subject to the same analysis, except that under state law there is an additional factor to consider: the "dignitary interest in informing individuals of the nature, grounds, and consequences of the action." *Today's Fresh Start*, 303 P.3d at 1150. This factor strongly favors the plaintiffs. The district court, therefore, erred in granting summary judgment to the defendants on both due process claims.

C. Remedy

Ordinarily, where there has not been a cross-motion for summary judgment, we would reverse and remand to the district court for further factual development. We conclude, however, that even when viewing the facts in

25. We reject the Housing Authority's arguments that (1) there was a minimal risk that plaintiffs would have been erroneously deprived of their property interest because it legally decreased the payment standard and that (2) any error connected with the notice was harmless because the "benefit change would have admittedly been the same." Again, these arguments stem from a misunderstanding of the nature of plaintiffs' protected property interest. While the Housing Authority could lawfully change the payment standard, the plaintiffs have a legitimate expectation in a one-year term of benefits to plan for and adjust to upcoming changes. The Housing Authority's failure to provide adequate notice deprived them of that right.

the light most favorable to the Housing Authority, there is no genuine dispute of material fact for a fact-finder to decide. In this case, therefore, the appropriate remedy is to grant summary judgment in favor of the plaintiffs *nostra sponte*.

"We have long recognized that, where the party moving for summary judgment has had a full and fair opportunity to prove its case, but has not succeeded in doing so, a court [of appeal] may enter summary judgment *sua sponte* for the nonmoving party." *Albino v. Baca*, 747 F.3d 1162, 1176 (9th Cir. 2014) (*en banc*); *see also Gospel Missions of Am. v. City of L.A.*, 328 F.3d 548, 553 (9th Cir. 2003) ("Even when there has been no cross-motion for summary judgment, a district court may enter summary judgment sua sponte against a moving party if the losing party has had a 'full and fair opportunity to ventilate the issues involved in the matter.'" (quoting *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982)). So long as the moving party has "be[en] given reasonable notice that the sufficiency of his or her claim will be in issue," *Buckingham v. United States*, 998 F.2d 735, 742 (9th Cir. 1993), and has therefore had "adequate time to develop the facts on which the litigant [would] depend to oppose summary judgment," *Portsmouth Square v. Shareholders Protective Comm.*, 770 F.2d 866, 869 (9th Cir. 1985), *sua sponte* summary judgment is appropriate. Doing so preserves judicial resources by preventing courts from having to preside over "unnecessary trials" where no genuine issues of fact are in dispute, which is consistent with the overall "objective of [Federal Rule of Civil Procedure 56] of expediting the disposition of

cases." 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2720, at 345 (3d ed. 1998).

The Housing Authority has been afforded ample opportunity to develop the facts on which it would oppose summary judgment. To begin with, "[a]s the movant[] for summary judgment in this case, [the Housing Authority] w[as] on notice of the need to come forward with all [its] evidence in support of this motion, and [it] had every incentive to do so." *Albino*, 747 F.3d at 1177. Moreover, the Housing Authority has had two rounds of litigation in which to develop the facts necessary to oppose summary judgment. The issues here are identical to those litigated before the district court in *Nozzi I*. At that time, the plaintiffs made a cross-motion for summary judgment, and the Housing Authority had a full and complete opportunity to develop facts to oppose it. On remand, the Housing Authority had the opportunity to develop additional facts, but it declined to do so. Instead, it strategically chose to move for a pre-trial disposition before the close of discovery and effectively cut short any additional factual development. In short, the Housing Authority had more than enough notice that the sufficiency of its defense was at issue.

Despite having this opportunity, the Housing Authority has not produced evidence suggesting that there is an issue of material fact that is appropriate for resolution by a fact-finder. As explained in greater detail above, it is beyond dispute that the flyer was constitutionally inadequate. On its face, it was clearly inadequate and

failed to provide notice in a form that Section 8 recipients could comprehend. The Housing Authority's subsequent steps cannot solve the flyer's deficiency as a matter of law, as those steps occurred too late to protect the plaintiffs' legitimate expectation in an unaffected one-year period of benefits in which to plan for any adverse effects of the change.

Additionally, the Housing Authority's reliance on the training sessions and the public outreach meetings fails to raise a genuine issue of material fact appropriate for resolution by a jury. The meetings it held could not, as a matter of law, have been sufficient to afford the plaintiffs the notice that due process requires. The training sessions when beneficiaries first entered the program provided relatively minimal information on the meaning of "payment standard," and this information was provided months or years before the flyer was sent. Thus, the training sessions cannot have served to ensure that the confusing and inadequate flyer was "reasonably certain" to "actually inform" the average beneficiary that he had one year in which to plan for a potential reduction to his benefits. Because there are no genuine issues of material fact as to whether the Housing Authority complied with the requirements of due process, we remand with instructions to the district court to grant summary judgment in favor of the plaintiffs on the merits of their federal and state due process claims.

V. The Other State Law Claims

Next, we turn to the plaintiffs' allegations that the Housing Authority violated various provisions of the California Government Code. California has abolished common law tort liability for public entities. *Miklosy v. Regents of California*, 44 Cal. 4th 876, 80 Cal. Rptr. 3d 690, 188 P.3d 629 (Cal. 2008). Thus, under California law, "'[a] public entity is not liable for an injury,' '[e]xcept as otherwise provided by statute.'" *Eastburn v. Regional Fire Prot. Auth.*, 31 Cal. 4th 1175, 7 Cal. Rptr. 3d 552, 80 P.3d 656, 657-58 (Cal. 2003) (quoting Cal. Gov. Code § 815(a)). Plaintiffs claim that the Housing Authority is liable under two statutes: (1) California Government Code § 815.6 which governs liability for public entities that breach their mandatory duties, and (2) California Government Code § 815.2 which governs vicarious liability for public employees' negligence.

A. California Government Code § 815.6

Under California Government Code § 815.6, a public entity will be liable to a plaintiff for injury "when (1) a mandatory duty is imposed [on the public entity] by enactment, (2) the duty was designed to protect against the kind of injury allegedly suffered, and (3) breach of the duty proximately caused injury," unless the public entity can "establish that it exercised reasonable diligence" in discharging this mandatory duty. *State Dept. of State Hospitals v. Superior Court*, 61 Cal. 4th 339, 188 Cal. Rptr. 3d 309, 349 P.3d 1013, 1018 (Cal. 2015); *see also Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1106-07 (9th Cir.

2014). The "mandatory duty" breached by the public entity must be created by a "constitutional provision, statute, charter provision, ordinance or regulation," Cal. Gov't Code § 810.6, including federal regulations, *id.* § 811.6 (defining "regulation" as including federal regulations).[26] Further, it must be "*obligatory*, rather than merely discretionary or permissive, in its directions to the public entity," and must "*require* rather than merely authorize or permit, that a particular action be taken[.]" *State Dept. Of State Hospitals*, 349 P.3d at 1018-19 (emphasis in original).

We hold that, even taking the facts in the light most favorable to the Housing Authority, there can be no dispute that it is liable under the statute. To begin with, as we have determined above, the Voucher Program regulations create a mandatory duty to advise plaintiffs of the change in the payment standard, the meaning of that change, and its effect upon them. 24 C.F.R. § 982.505(c).[27] The Housing Authority argues that Section 982.505(c) creates only a

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26. *See also Hines v. United States*, 60 F.3d 1442, 1448-49 (9th Cir. 1995) (holding that under California law, federal regulation created a mandatory duty), *abrogated on other grounds by United States v. Olson*, 546 U.S. 43, 126 S. Ct. 510, 163 L. Ed. 2d 306 (2005); *Bowman v. Wyatt*, 186 Cal. App. 4th 286, 111 Cal. Rptr. 3d 787, 808 n.10 (Ct. App. 2010) (noting that jury was instructed that mandatory duty under § 815.6 could be supplied by federal regulation).

27. Notwithstanding the Housing Authority's assertion to the contrary, the fact that there is no *federal* cause of action to enforce directly 24 C.F.R. § 982.505(c)(3) does not defeat plaintiffs' § 815.6 claim. *See Haggis v. City of Los Angeles*, 22 Cal. 4th 490, 93 Cal. Rptr. 2d 327, 993 P.2d 983, 988 (Cal. 2000) ("*It is section 815.6, not the predicate enactment, that creates the private right of action.*" (emphasis in original)).

duty to *send* a one-year notice, with no obligations as to the *form* of that notice. This is incorrect. At a minimum, the information given to the tenants about the change in payment standards and the one-year period that tenants have to prepare for its implementation must be reasonably comprehensible by the intended recipients. A mandatory obligation to provide notice includes the obligation to provide an intelligible notice that can be understood by its average intended recipients and must convey the information required by the regulation.

Next, it is apparent that the regulation was "designed to protect against the kind of injury" the plaintiffs suffered. *Haggis*, 993 P.2d at 987-88. The regulation was created as an equitable "safeguard" for tenants "against reductions in subsidy," that would give Section 8 beneficiaries one year in which to plan for adjustments to the payment standard that could adversely affect their subsidy. Section 8 Housing Choice Voucher Program; Expansion of Payment Standard Protection, 65 Fed. Reg. at 42508. Here, because plaintiffs were not given meaningful information about the change in the payment standard and its meaning and effect, the plaintiffs were deprived of the very one-year stable planning period that the regulation was designed to protect.

Finally, the Housing Authority breached this mandatory duty and this breach was the proximate cause of injury to the plaintiffs. As described earlier, the flyer was totally incomprehensible to anyone without a relatively sophisticated understanding of the machinations of Section 8 subsidy payments. It did not provide the

average recipient with any meaningful information about the change or its potential adverse impact. As with the due process claims, the Housing Authority argues that no injury could have occurred because it had total discretion to decrease the payment standard. Once again, the Authority misunderstands the nature of the plaintiffs' challenge. The question here is not whether the payment standard could be decreased, but whether the manner in which the Housing Authority implemented the decrease breached its mandatory duty to provide advance notice to plaintiffs of the intended action. The answer is that it did, and that plaintiffs, who experienced an unexpected and dramatic increase in their rental obligations, suffered from that breach.

What remains then, is the question whether the Housing Authority "exercised reasonable diligence to discharge the duty." Cal. Gov't Code § 815.6. As described in greater detail above, there are extreme deficiencies in the flyer provided to the plaintiffs. The Housing Authority has had two opportunities to come forward with evidence in support of its motion for summary judgment and a further opportunity to rebut the cross-motion for summary judgment brought by the plaintiffs in *Nozzi I*. Despite this, it has fallen far short of producing evidence sufficient to raise a genuine issue of fact as to whether it made reasonable efforts to provide meaningful information to the plaintiffs about the payment standard change and its adverse effect upon them.

The Housing Authority initially took the position that it was "impossible" to draft a different, more comprehensible

notice, but that position is plainly contradicted by the undisputed evidence. The Housing Authority was clearly capable of explaining the meaning and effect of the payment standard. It provided a comprehensible notice to Voucher Program beneficiaries who had not yet found a unit to rent. Indeed, it provided an even more thorough explanation of the meaning and effect of the change to the Mayor, members of the Los Angeles City Council, and California congressmen.

The Housing Authority produced evidence, in the form of a declaration by the individual who wrote the flyer, purportedly showing that he exercised reasonable efforts. Even construing this declaration in the light most favorable to the defendants, however, it is insufficient to raise a genuine issue of fact as to whether the Housing Authority exercised reasonable efforts to comply with the regulation. The declaration states that the employee drafts all of his notices in language that can be understood by a person with an eighth grade education. This is a conclusion that is belied by the evidence. The flyer unquestionably does not explain the meaning and effect of the change in the payment standard in any terms at all, let alone in terms that can be understood by a person with an eighth grade education. The employee admittedly simply took the flyer's language directly from the regulation, and the Housing Authority did not offer any evidence that he took *any* steps to ensure that the language would provide any meaningful information about the change that would advise the average recipient of its meaning or effect. Nor did the Housing Authority offer any evidence suggesting that the employee considered alternatives to merely

parroting the regulation, such as, *inter alia*, defining payment standard—as did the letters sent to house-hunting Section 8 beneficiaries and to the public officials.

Thus, as with the due process claims, the Housing Authority had ample opportunity to develop facts to support its defense against the state law claims, but failed to do so. Accordingly, we reverse the judgment of the district court and remand with instructions to grant summary judgment in favor of the plaintiffs on the merits of this statutory claim.

B. California Government Code § 815.2

Under California Government Code § 815.2, a public entity is "vicariously liable for its employees' [non-immune] negligent acts or omissions within the scope of employment[.]" *Eastburn v. Regional Fire Protection Authority*, 31 Cal. 4th 1175, 7 Cal. Rptr. 3d 552, 80 P.3d 656, 658 (Cal. 2003). The Housing Authority asserts, and the plaintiffs do not dispute, that plaintiffs theory of negligence is "essentially interchangeable" with its § 815.6 claim discussed in Section V.A above. Indeed, the elements of a vicarious liability claim against a public entity in California are "virtually identical" to the elements of a § 815.6 claim. *Alejo v. City of Alhambra*, 75 Cal. App. 4th 1180, 89 Cal. Rptr. 2d 768, 771 & n.3 (Ct. App. 1999); *see also San Mateo Union High School District v. Cnty. of San Mateo*, 213 Cal. App. 4th 418, 152 Cal. Rptr. 3d 530, 542-544 (Ct. App. 2013). The above discussion of the plaintiffs' § 815.6 claim, therefore, applies equally to their vicarious liability claim and they are entitled to summary judgment on the merits of this claim as well.

VI. Reassignment

Plaintiffs have requested that we use our supervisory power to reassign this case to a different district judge on remand. We reassign a case to a different district judge in "unusual circumstances." *Krechman v. County of Riverside*, 723 F.3d 1104, 1111 (9th Cir. 2013). To determine whether such reassignment is appropriate we look to three factors: (1) whether the original judge could "reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected," (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would "entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Id.* at 1111-12.

On remand from *Nozzi I*, the district judge made a number of statements indicating his strong disagreement with this Court's holding in *Nozzi I*. Then, before ruling in favor of the Housing Authority for the second time, the judge stated, "When you do argue this in the Ninth Circuit, don't make just that argument, because if you do . . . we'll be back here again, and I'll be tearing out my hair and saying I don't understand why this happened the way it did. In fact, let me just indicate that if this case gets reversed, I want it to be like Judge Wright or Judge Real. I want it to go to some other district court judge, because I have spent a lot of time on this case. . . . I pretty much have done all I can."

The district judge's statements constitute a "rare and extraordinary circumstance[]" justifying reassignment. *Krechman*, 723 F.3d at 1112. The judge repeatedly made clear that he would have substantial difficulty setting aside his previous views of the case. Under these circumstances, remand is not only "advisable," *Krechman*, 723 F.3d at 1111, but essential in order to preserve the appearance of justice. Accordingly, we need not consider the third factor. *Krechman*, 723 F.3d at 1112 ("The first two factors are equally important and a finding of either is sufficient to support reassignment on remand."). Regardless whether duplication of effort would be involved, we have no choice but to send the case to a judge whose designation would appear to be consistent with the interests of justice.[28] Lastly, we hold that this case must be reassigned to a district judge other than one of the two judges named by Judge Wu in order to "preserve the appearance of justice." *Id.*

VII. Conclusion

In sum, the district court erred by granting summary judgment to the Housing Authority. There is no genuine dispute of fact as to whether the Housing Authority failed to provide meaningful information to Section 8 beneficiaries about the change to the payment standard and the effect of that change upon the beneficiaries and their property interests. That failure violated both the

28. Although it does not affect our decision, we note that reassignment will not entail more than minimal duplication as there is little, if any, overlap between issues to be resolved on remand and the issues previously considered by the district court.

requirements of the Voucher Program regulations and the requirements of procedural due process. It also resulted in a violation of two state statutes which require public entities to take reasonable efforts to comply with the mandatory duties established by federal regulations. Accordingly, we reverse and remand with instructions for the district court to enter summary judgment in favor of the plaintiffs on the merits of the federal and state law claims at issue on this appeal. In order to preserve the appearance of justice, we order the case reassigned to a different district judge—a judge other than the two identified by the current district judge who himself has declined to hear the case further. On remand, further factual development may be needed to determine the size and validity of plaintiffs' class and to determine the appropriate remedy.

REVERSED AND REMANDED.

APPENDIX A

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES

NOTICE

Effective April 2, 2004 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.

Appendix A

PAYMENT STANDARDS and TENANT-BASED SHELTER PLUS CARE PAYMENT STANDARDS

EFFECTIVE APRIL 2, 2004

Bedroom Size	**Payment Standard**
Mobile H. Space	$463
SRO	$505
0	$674
1	$807
2	$1,021
3	$1,378
4	$1,646
5	$1,892
6	$2,139
7	$2,386

Regardless of its location, the unit's rent can never be higher than the comparable rents determined by the Housing Authority.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 29, 2016, AMENDING OPINION, DATED NOVEMBER 30, 2015, AND DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13-56223

D.C. No. 2:07-cv-00380-GW-FFM

MICHAEL NOZZI, an individual; NIDIA PELAEZ, an individual; LOS ANGELES COALITION TO END HUNGER AND HOMELESSNESS, a non-profit organization, on behalf of themselves and similarly situated persons,

Plaintiffs-Appellants,

v.

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES; RUDOLPH MONTIEL, in his official capacity,

Defendants-Appellees.

January 29, 2016, Filed

Appendix B

Before: Stephen Reinhardt and Richard R. Clifton, Circuit Judges and Miranda M. Du,* District Judge.

ORDER

The opinion filed November 30, 2015, and appearing at 806 F.3d 1178 (9th Cir. 2015), is hereby amended as follows:

1. Slip op. at 47, line 2: after "to 'preserve the appearance of justice'" but before the end of the sentence and the citation *Id.*, insert: "and avoid any suggestion that the district judge originally assigned to the case designated the judge to whom the case is reassigned."

2. Slip op. at 47, line 2: after the *Id.* citation that now follows the above amendment, insert the following footnote: "By this order, we imply no concern that the two judges would be less than fully objective and fair were the case reassigned to them. We are also aware that any assignment would be made in a random manner under the regular procedures of the district court and would in no way be influenced by Judge Wu's suggestion. It is solely the public perception of unfairness that concerns us."

With these amendments, the panel has voted to deny the petition for panel rehearing and the petition for rehearing *en banc*. The full court has been advised of the petition for rehearing *en banc*, and no judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35. The petitions for rehearing and rehearing *en*

* The Honorable Miranda M. Du, District Judge for the U.S. District Court for the District of Nevada, sitting by designation.

banc are **DENIED**. No further petitions for rehearing or petitions for rehearing *en banc* will be entertained.

The petition for leave to file a late, oversized brief of *amicus curiae* on behalf of the Housing and Development Law Institute is also **DENIED**.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, FILED FEBRUARY 21, 2014

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-00380 GW (FFMx)
Judge: Hon. George H. Wu

MICHAEL NOZZI, an individual; NIDIA PALAEZ, an individual; LOS ANGELES COALITION TO END HUNGER AND HOMELESSNESS, a non-profit organization, on behalf of themselves and similarly situated persons,

Plaintiffs,

v.

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES; CITY OF LOS ANGELES; RUDOLPH MONTIEL, in his official capacity; and DOES 1 through 100, inclusive,

Defendants.

JUDGMENT IN FAVOR OF DEFENDANTS THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES AND RUDOLF MONTIEL

Appendix C

JUDGMENT

On June 6, 2013, the Court entered an order granting in its entirety the Renewed Motion for Summary Judgment of Defendants Housing Authority of the City of Los Angeles and Rudolf Montiel, flied on November 19, 2012, as to the operative First Amended Class Action Complaint, filed on November 26, 2007.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that, for the all the reasons stated in this Court's order granting Defendants' Renewed Motion for Summary Judgment, Judgment in the above-captioned case be, and hereby is, entered in favor of Defendants Housing Authority of the City of Los Angeles and Rudolf Montiel, on the one hand, and against Plaintiffs Michael Nozzi, Nidia Palaez, and Los Angeles Coalition to End Hunger and Homelessness, on behalf of themselves and similarly situated persons ("Plaintiffs"), on the other hand. Plaintiffs shall take nothing on their First Amended Complaint.

Defendants are entitled to recover costs.

Dated: June 12, 2013

/s/
Hon. George H. Wu
UNITED STATES DISTRICT JUDGE

APPENDIX D — RENEWED MOTION FOR SUMMARY JUDGMENT IN THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, FILED FEBRUARY 21, 2014

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV07-380-GW(FFMx)

MICHAEL NOZZI, *et al.*

v.

HOUSING AUTHORITY OF THE
CITY OF LOS ANGELES, *et al.*

Date: June 6, 2013

Present: The Honorable GEORGE H. WU,
UNITED STATES DISTRICT JUDGE

Javier Gonzalez
Deputy Clerk

Sheri Kleeger
Court Reporter/Recorder

PROCEEDINGS: DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT BASED ON APPELLATE DECISION (filed 11/19/12)

Appendix D

The Court's Tentative Ruling is circulated and attached hereto. Court hears oral argument. Based on the Tentative Rulings circulated today and on April 22, 2013, and for reasons stated on the record, Defendants' renewed motion is GRANTED in its entirety. Defendants will file a proposed judgment forthwith.

I. Background

A. Factual Background

The facts of this case are familiar to the parties and the Court,[1] although perhaps not to the Circuit Court, for whose convenience the following summary is included.

Plaintiffs in this action are two recipients of federal benefits under the Section 8 Housing Voucher Program (42 U.S.C. § 1437f(o)) and a non-profit advocacy organization. Defendants are Housing Authority of the City of Los Angeles ("HACLA") and, in his official capacity, Rudolf Montiel, formerly HACLA's Executive Director.[2] This case concerns the three separate circumstances relating to housing vouchers under the Section 8 Program administered by HACLA.

1. *See* Docket No. 63 at 1-6 (setting forth Plaintiffs, allegations and legal framework underlying Section 8 housing voucher program) and No. 90 (this Court's earlier ruling on the cross-motions for summary judgment).

2. Montiel was terminated by HACLA at the end of 2011.

Appendix D

(1) HACLA's Lowering of the Section 8 Payment Standard Amount from 110% to 100% of the HUD Published FMRs in 2004

The Department of Housing and Urban Development ("HUD") publishes the fair market rents ("FMR") for each geographic market area in the United States. *See* 24 C.F.R. §§ 888.111, 982.503(a). A public housing authority ("PHA") (such as HACLA) "must establish payment standard amounts for each 'unit size'.... [with u]nit size [being] measured by number of bedrooms ...." *Id.* at § 982.503(a)(1). A PHA has the discretion to "establish the payment standard amount for a unit size at any level between 90 percent and 110 percent of the [HUD] published FMR for that unit size." *Id.* at § 982.503(b)(1); *see also* 42 U.S.C. § 1437f(o)(1)(B). "HUD approval is not required [for a PHA] to establish a payment standard amount in that range ('basic range')." 24 C.F.R. § 982.503(b)(1).

On or about April 5, 2004, HUD required HACLA to reduce expenditures to bring its spending on Section 8 housing assistance payments ("HAP") in line with the HUD budget at the time. *See* Plaintiffs' Separate Statement of Genuine Issues of Material Facts in Opposition to Defendants' Motion for Summary Judgment ("PSSGI") at ¶ 10, Docket No. 76.[3] Previously, HACLA had

3. For purposes of the present renewed summary judgment motion, Defendants have not prepared a new statement of undisputed facts ("SUF") but instead refer to the SUF prepared ln connection with their previous summary judgment motion, originally filed at Docket No. 69. Plaintiffs' statement of genuine issues ("PSSGI") is found at Docket No. 76. The cited paragraphs of the SUF which are

considered using its discretionary authority to take certain actions to reduce HAP expenditures, including lowering the voucher payment standard amount ("VPSA") within the prescribed basic range allowed by the above-cited statute and HUD regulations. *Id.* at ¶ 11. On March 26, 2004, HACLA's Board of Commissioners ("Board") voted to reduce the VPSA from 110% to 100% of the FMRs. *Id.* at ¶ 12. On August 25, 2004, a public hearing, with public comments, was held on HACLA's "Year 2005 Agency Plan" where the Board emphasized that the 2004 VPSA reduction would not take effect until the Spring of 2005. *Id.* at ¶ 14. Prior to the August hearing, copies of HACLA's draft of its 2005 Agency Plan, which included information relating to the VPSA reduction, were made available at all HACLA offices. *Id.* at ¶ 15. In addition, HACLA conducted approximately twenty outreach meetings at public housing sites and seven regional Section 8 meetings which included a slide show presentation detailing the effects of the 2004 VPSA reduction. *Id.* at ¶ 16.

In this case, Plaintiffs do *not* challenge: (1) the authority of HACLA to reduce the Section 8 payment standard amounts from 110% to 100% of the HUD published FMRs, (2) the propriety of the amount of the reduction, or (3) the procedure under which HACLA adopted that reduction, including the notices that were provided to the general public *before* the agency made that decision. *See* HACLA's Reply to Plaintiffs' Separate Statement of Undisputed Facts Responding to the Court's

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not substantially disputed in any pertinent part by Plaintiffs are referenced to the PSSGI which includes both the Defendants' SUF and Plaintiffs' response to it.

Questions to Parties ("HACLA's RPSS") at No. 1, Docket No. 179 at pages 10-11.[4]

(2) HACLA's Initial Notification regarding the Lowering of the Section 8 Payment Standard Amount and the Steps Required under Federal Regulations before HACLA Can Effectuate a Decrease in such Amounts during the HAP Contract Term

42 U.S.C. § 1437f(o)(5)(B) requires:

> Each public housing agency administering [a Section 8] assistance [program] under this subsection shall establish procedures ...

4. After the briefing was completed on Defendants' renewed motion for summary judgment and prior to the hearing on that motion, this Court issued an Order requiring the parties to be prepared to address (and be able to supply the Court with references to the record in support of their answers) ten questions which the Court had in regards to certain relevant issues. *See* Docket No. 171. At the hearing, the Court required the parties to provide further written responses to those questions utilizing an expanded format for statements of material facts as delineated in Local Rule 56-2 (*i.e.* that Defendants would generate an initial set of answers to the Court's questions with references to supporting evidence in the record and to applicable law; the Plaintiffs would respond with their answers plus a statement of genuine issues of material fact as to Defendants' delineations; and the Defendants would submit a reply statement which would include their initial answers, the Plaintiffs' response, and finally the Defendants' counter to any factual or legal disagreements with Plaintiffs' responses). *See* Docket Nos. 173, 174, 176, and 179.

> to ensure that income data provided to the agency . . . by families applying for or receiving assistance from the agency is complete and accurate. Each public housing agency shall, not less frequently than annually, conduct a review of the family income of each family receiving assistance under this subsection.

Yearly conducted review of family income by a PHA is referred to as "reexamination" or "regular reexamination." *See, e.g.,* 24 C.F.R. §§ 5.216(e)(ii), 5.615(c)(3), 982.516(a).

A "payment standard" (which is the maximum monthly subsidy payment) is used to calculate the monthly HAP for a family. *See* 24 C.F.R. § 982.505(a). A PHA is supposed to pay a monthly HAP on behalf of the family that is equal to the *lower* of: (1) the payment standard for the family minus the total tenant payment, or (2) the gross rent minus the total tenant payment. *Id.* at § 982.505(b). The "total tenant payment" is defined in 24 C.F.R. § 5.628(a) generally as the "highest of the following amounts, rounded to the nearest dollar: (1) 30 percent of the family's monthly adjusted income; [or] (2) 10 percent of the family's monthly income[.]" The "payment standard for the family" is the *lower* of: (1) the payment standard amount for the family unit (*i.e.* bedroom) size, or (2) the payment standard amount for the size of the dwelling unit rented by the family. 24 C.F.R. § 982.505(c)(1); *see also* HACLA's RPSS at No. 2, pages 12-16. Because the total tenant payment amount is dependent upon the family's accurate income figure for each year (as established at the yearly reexamination), the actual amount of the monthly

HAP for a Section 8 family cannot be set for more than one year because it is calculated using the family's annual income which is subject to change and verification. *See* HACLA's RPSS at No. 2, pages 12-16.

Persons who apply and are accepted as participants in the Section 8 program are required to attend a "voucher issuance session" ("Session") prior to receiving any benefits. *See* Declaration of Agbor I. Agbor in Support of Defendants' Opposition to Motion for Summary Judgment at ¶ 4, Docket No. 78-4.[5] At the Sessions, HACLA staff explain to participants in detail the requirements of the Section 8 program including: (1) how their portion of rent is calculated, (2) "what the term Voucher Payment Standard ('VPS') means, and how the VPS is used to calculate both the participant's portion of the rent, known as Family Rent to Owner, and HACLA's portion of the rent, known as the Housing Assistance Payment ['HAP'] (also paid to the owner)," and (3) the use of "a HACLA worksheet entitled 'Estimate of Total Rent to Owner' .... which shows an estimated calculation of [the participant's]

5. Plaintiffs object to the Agbor Declaration because it includes purported "inadmissible [and irrelevant] evidence, improper legal opinion, improper expert testimony, lacking foundation," and because Defendants failed to identity Agbor in their initial Rule 26 exchange and Plaintiffs have not been able to depose him. This Court rejects all of those contentions for the reasons delineated in HACLA's RPSS at No. 3, pages 18-21. Additionally, the Court notes that Agbor declares that he has worked at HACLA's Section 8 programs division since 1993 and has risen to the position of Manager, Issuance and Contracting for Section 8 programs. Thus, Plaintiffs' objections based on foundation, relevance and the other evidentiary grounds are not well taken.

actual income, amount of the utility allowance, and the amount of the VPS for a certain size unit." *Id.* at ¶¶ 5-6; *see also id.* at Exhibit Q.

Where there is a decrease in the Section 8 payment standard schedule effectuated by a PHA, that decrease cannot go into effect immediately but, instead, "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) (emphasis added). Additionally, the three steps to be taken by the PHA (and when they are to be taken) in determining the actual payment standard (or amount) for each individual family based upon the decrease in the payment standard schedule is specifically delineated in 24 C.F.R. § 982.505(e)(3)(i)-(iii) as follows:

> (i) Step 1: At the first regular reexamination following the decrease in the payment standard amount, the PHA shall determine the payment standard for the family in accordance with paragraphs (c)(1) and (c)(2) of this section (using the decreased payment standard amount).
>
> (ii) Step 2 (first reexamination payment standard amount): The PHA shall compare the payment standard amount from step 1 to the payment standard amount last used to calculate the monthly housing assistance payment for the family. The payment standard

> amount used by the PHA to calculate the monthly housing assistance payment at the first regular reexamination following the decrease in the payment standard amount is the higher of these two payment standard amounts. 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.
>
> (iii) Step 3 (second reexamination payment standard amount): At the second regular reexamination following the decrease in the payment standard amount, the lower payment standard amount shall be used to calculate the monthly housing assistance payment for the family unless the PHA has subsequently increased the payment standard amount, in which case the payment standard amount is determined in accordance with paragraph (c)(4) of this section.

In the present case, once HACLA adopted the decrease in the payment standard amount, it sent out written notice of the 2004 VPSA reduction ("Reduction Notice") to each Housing Choice Voucher Program participant on or about the date of the participant's annual reexamination, a "full" year before the 2004 VPSA reduction was to go into effect. *See* PSSGI at ¶ 17. The Reduction Notice stated that:

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> Effective April 2, 2004, the Housing Authority lowered the payment standards used to determine your portion of the rent. We will not apply these lower payments standards until your next regular reexamination. If you move, however, these new lower payment standards will apply to your next unit.

Id. at ¶ 18. Additionally, it is not disputed herein that the Reduction Notice also contained a chart that listed the new payment standard amounts (following the reduction) by bedroom size. *Id.* at ¶ 19. The Reduction Notice also included a document entitled "Notice of Review Determination – Change in Tenant Rent &/or HAPP Subsidy" (marked as form. "HAPP RE-38") (henceforth referenced as the "initial RE-38") which showed the amount of rent each participant would be required to pay the landlord/owner and the amount the HACLA would pay the landlord/owner on the participant's behalf for that upcoming year.[6] *Id.* at ¶ 22; *see also* Exhibit J to Appendix of Exhibits in Support of Defendants' Motion for Summary Judgment ("Appendix"), Docket No. 74. The initial RE-38 also informed Section 8 participants that "You have the right to a hearing if you wish to dispute this action" and provided a telephone number to contact within thirty days to request such a hearing. *Id.*

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6. The Court's questions numbers 5 and 6 inquired whether the chart and the initial RE-38 form were familiar to Section 8 participants because they (or reasonable similar documents) had been provided to such participants by HACLA in the past. Defendants responded that the type and format of the chart and the initial RE-38 were standard and had been used by HACLA for years. *See* HACLA's RPSS at Nos. 5 and 6, pages 25-27.

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It is not disputed that neither the Reduction Notice or the initial RE-38 could actually state the amount of the participant's portion of the rent (sometimes referred to as the "family rent to owner") that the Section 8 tenant would have to pay after the 2004 VPS reduction took effect because a number of factors particular to that tenant, other than the VPS decrease, would have to be established and further calculations made. *See* HACLA's RPSS at Nos. 4 and 7, pages 22 and 28-31. As pointed out by Defendants, "the VPS notice [of reduction] is a notice of [the] VPS decrease, and not a notice of rent increase, and until the new lower VPS is applied a year later (when the second RE-38 issues), it is impossible to say how the VPS (lowered a year earlier) will affect participants." *Id.* at page 23.

Approximately one year later and four weeks before the 2004 reduction actually went into effect, each participant received another HAPP RE-38 (henceforth referenced as "second RE-38") which detailed: (1) the change (if any) in the amount of the monthly HAP that HACLA would be paying the landlord/owner and the starting date of that change, and (2) the increase (if any) that the participant would have to pay the landlord/owner as to the monthly rent. PSSGI at ¶ 24; *see also* Exhibit K to Appendix.

(3) HACLA' s Distribution of the Second RE- 38 and Notification of the Availability of Hearings to Challenge Any Actual Increase in the Section 8 Participant's Rent Obligations

24 C.F.R. § 982.555 delineates those situations where a PHA must give a participant family an opportunity for an informal hearing, and those circumstances where such a hearing is not required. Section 982.555 does not specifically deal with the situation where a PHA decides to decrease the Section 8 payment standard amount within the confines of the basic range.

Nevertheless, it is not disputed herein that, when HACLA sent out the second RE-38 notices to the Section 8 participants about four weeks before the 2004 VPSA reductions would go into effect, the participants were correctly informed of the amount of the decrease in the HAP that HACLA would be paying to the landlord/owner on the participant's behalf and the precise increase (if any) in the amount of the rent that the participant family itself would have to pay. *See* HACLA's RPSS at No. 8, page 32. In addition, each participant was informed that: "You have the right to a hearing if you wish to dispute this action." *See* Exhibit K to Appendix. The participant was given 30 days from the date of the second RE-38 notice to contact the agency by phone to schedule a hearing.[7] *Id.*

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7. As noted in Judge Michael M. Mosman's concurrence in *Nozzi v. Housing Authority of the City of Los Angeles,* 425 F. App'x 539, 543 (9th Cir. 2011), "[a]t oral argument plaintiff's counsel conceded that plaintiffs who were actually going to have Section 8 benefits reduced were granted notice and a hearing before any reduction in those benefits." *See also* HACLA's RPSS No. 9, at pages 33-34.

Defendants specifically provided evidence that it is not disputed that the hearings provided by HACLA pursuant to the initial and the second RE-38's are consistent with the provisions of 24 C.F.R. § 982.555. *See* HACLA's RPSS at No. 9, at pages 33-34. Plaintiffs have indicated that they are "not challenging the hearing process." *Id.*

B. Procedural Background

Plaintiffs raised the following five causes of action in the operative First Amended Complaint ("FAC") (Docket No. 49): (1) denial of due process of law under 42 U.S.C. § 1983 "[b]y failing to provide Plaintiff Class clear or meaningful notice of the actions HACLA intended to take and its consequences at the time required by 24 C.F.R. § 982.505(c)(3)(ii), most particularly by failing to meaningfully or effectively advise the Plaintiff Class that their out of pocket share of future rents would be increased ... and by failing to indicate from whom the notice emanated, the legal basis for the action, a phone number for inquiries, or how to protest or appeal the action" (FAC at ¶ 59); (2) "[b]y failing to provide the required notice [set out in 24 C.F.R. § 982.505(c)(3)(ii)], the new payment standard implemented by HACLA was unlawful [and] HACLA, therefore, violated 42 U.S.C. § 1437f(o)(2) by failing to make the required payments under the 'applicable payment standard' [which constitutes a violation of 42 U.S.C. § 1983]" (*Id.* at ¶ 68); (3) by allegedly violating the "Fourteenth Amendment of the United States Constitution; 24 C.F.R. § 982.505(C)(3)-(4); Article I, § 7 of the California Constitution; 42 U.S.C. § 1437f; and California Civil Code § 52.1," the Defendants violated

California Government Code ("Gov't Code") § 815.6 which gives rise to liability for a public entity; (4) violation of Article I, § 7 of the California Constitution by depriving Plaintiffs of their property without due process of law; and (5) negligence under California Civil Code § 1714.

On November 26, 2007, this Court granted Defendants' motion to dismiss Plaintiffs' second and fifth causes of action, namely one of Plaintiffs' claims arising under 42 U.S.C. § 1983, and Plaintiffs' negligence claim. Docket No. 63. On March 8, 2009, this Court granted Defendants' motion for summary judgment as to Plaintiffs' remaining causes of action. *Id.* at No. 90. Plaintiffs timely appealed, and the Ninth Circuit issued a memorandum opinion on March 25, 2011, affirming in part, reversing in part, and remanding "for proceedings consistent with" the panel's written opinion. *See Nozzi v. Housing Auth. of City of Los Angeles,* 425 Fed. App'x 539 (9th Cir. 2011) (the "Ninth Circuit Ruling"). The Honorable Michael W. Mosman, District Court Judge for the District Court of Oregon, sitting on the appellate panel by designation, filed a concurring opinion (the "Ninth Circuit Concurrence"). *Id.* at 543.

The Ninth Circuit held that this Court "did not err in dismissing the plaintiffs' § 1983 claim to enforce the notice requirement in the regulation .... [because] agency regulations cannot create a federal right enforceable under § 1983." *Id.* The Circuit Court did not find that HACLA acted improperly in exercising its discretion to lower the Section 8 payment standard amounts from 110% to 100% of the HUD published FMRs. Nor did the

Circuit Court refer to the undisputed facts in this case that, one year prior to the effectuation of any reduction in the HAP, Section 8 participants were given written notice that: (1) HACLA had lowered the payment standards used to determine the participant's portion of the rent, (2) the new payment standards would be effective on April 2, 2004, but HACLA would not apply these lower payment standards until the participant's next regular reexamination, approximately one year later, and (3) four weeks before the actual application of the lowered payment standards, each individual participant was notified in writing as to the precise changes in the payment amounts and the availability of informal hearings to raise any challenges to the application of the lowered amounts in their cases. Nevertheless, the Circuit Court held that this Court erred in failing to apply the factors established in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), "to the circumstances presented here;"[8] but without specifying

8. The Ninth Circuit in its memorandum decision stated that "the district court incorrectly applied well-established law to conclude that plaintiffs asserted no property interest to which due process attached …. [and] improperly concluded that plaintiffs' property interest in Section 8 benefits did not require adequate notice that their benefits were subject to the planned reduction." *Nozzi,* 425 F. App'x at 541. That conclusion was apparently based on a misreading of (or a failure to have read) this Court's written decisions herein. For example, as noted in the Ruling on Cross-motions for Summary Judgment, this Court observed:

> Defendants argue that, because HACLA had statutory discretion to reduce the VPSA, "the law is clear that there is no property interest for Plaintiffs to assert." To say categorically that Plaintiffs could not have had any property interest in the benefit they were receiving is, at best, an oversimplification. It is clear, in

what exact "circumstances" it was referencing.[9] As noted above, there are three circumstances involved herein:

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the abstract at least, that Plaintiffs can have "a constitutionally protected 'property' interest in Section 8 benefits by virtue of [their] membership in a class of individuals whom the Section 8 program was intended to benefit." *Ressler v. Pierce,* 692 F.2d 1212, 1215 (9th Cir. 1982); *see also Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 320 n.8 (1985) ("this Court has held that a person receiving ... benefits [under a federal statutory program] has a 'property' interest in their continued receipt.").

See Docket No. 90 at page 4.

9. The Circuit Court's memorandum decision in *Nozzi* did not cite to, and appears to be at odds with, *Rosas v. McMahon,* 945 F.2d 1469 (9th Cir. 1991). While Ninth Circuit did not apply the *Mathews* balancing test therein, *Rosas* is so conceptually similar to the instant matter that the Court would find its reasoning persuasive authority to defeat Plaintiffs' argument that they had a constitutional right to notice of a planned, but not yet implemented, reduction in their protected Section 8 benefits. The *Rosas* court summarized its situation as follows:

> The issue in dispute is one of timeliness of notice. The governing federal regulation requires agencies that administer Aid to Families with Dependent Children (AFDC) to mail timely notice of an "intended action" to suspend or reduce assistance "at least 10 days before the date of action, that is, that date upon which the action would become effective." ... The notices in this case were mailed after the effective date of reductions in benefit entitlements but at least 10 days before actual reductions in monthly benefit payments to recipients. The district court held that notice had not been timely.... We disagree and reverse.

945 F.2d at 1472. The Circuit went on to explain its holding:

> [Defendants] DSS and HHS contend that an action to reduce assistance becomes effective when the benefit payment to the recipient is *actually reduced*. The plaintiffs contend that an action to reduce assistance becomes effective when the substantive law reduces the benefit entitlement, and that notice should accordingly be given prior to that time.... The "intended action" of which notice must be given may reasonably be considered action by the state agency to reduce the actual payment to a recipient. The date on which the recipient first finds his or her benefit payments reduced may be viewed as the "date upon which the action would become effective." ... The agency simply cannot give notice before the entitlement is reduced. It can and does, however, give notice before the change in circumstances is reflected in the recipient's monthly AFDC payment....

Id. at 1472-74. Similarly, here, Defendants contend that whether sufficient process was due must be assessed by reference to when the Section 8 benefits were "actually reduced," namely four weeks after the Thirty Day Reduction Notice (the second RE-38), and not by assessing whether sufficient process was provided prior to the time when the "substantive law" that would eventually serve to reduce the benefits was enacted, namely the reduction of the VPS.

Indeed, while the *Rosas* court did not formally apply the *Mathews* balancing test, the Circuit made clear that its holding rested on both its interpretation of the relevant regulations (and the agency's interpretation thereof, which the court afforded deference), and due process principles more generally:

> [T]he effect of *Goldberg v. Kelly* [397 U.S. 254 (1970)] is to preclude the government *from reducing or terminating* benefits before notice and hearing; the status quo is preserved while the question of

(1) the initial decision by HACLA to lower the Section 8 payment standard amount, (2) the steps taken by HACLA as required by 24 C.F.R. § 982.505(c)(3) to notify Section 8 participants of the reduction and to inform them that the reduction would not be effectuated until one year later, and (3) the second RE-38 notice given at least four weeks prior to the effectuation of the reduction which informed the Section 8 participants of the precise changes in the payment amounts (which had to be based on their most recent reexamination and therefore could not be calculated earlier) and which also notified them of the availability of informal hearings.

> entitlements is fought out....Here, the notices sent out by the counties under DSS direction clearly preceded any actual withdrawal of benefits. Those notices served the purposes of *Goldberg v. Kelly* and the notice regulation.

Id. at 1473, 74 (emphasis added). In sum, it is clear that the Ninth Circuit's holding in *Rosas* supports Defendants' position that Plaintiffs' property right to Section 8 benefits does not confer upon them a constitutional right to receive advance notice of when those benefits *might* be reduced at some future juncture. *See also Dowling v. Davis,* 840 F. Supp. 731, 735, 736 n.6 (E.D. Cal. 1992) (rejecting the plaintiffs' claim that their due process right to continued In-Home Supported Services benefits was violated by the state legislature's failure to pass a budget funding the program, noting that plaintiffs' argument "confuses the due process required for decisions as to the *continued participation* of an individual in a government program with that required as to *legislative action* to delay, cancel or modify such a program," and citing *Rosas,* 945 F.2d at 1474-75, as "reject[ing] the grace period argument") (emphasis added)).

The parties have submitted statements as to the impact of the Ninth Circuit Ruling. Docket Nos. 138, 139. Meanwhile, the parties pressed on with discovery (*see, e.g.,* Docket No. 168 (stipulation concerning electronic discovery)), and the Court set a July 18, 2013 hearing date for Plaintiffs' anticipated motion for class certification (*see* Docket No. 160). Presently before the Court is Defendants' "renewed motion for summary judgment as to appellate decision." *See* Def. Mot., Docket No. 158.

II. Legal Standard

Summary judgment shall be granted when a movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In other words, summary judgment should be entered against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Parth v. Pomona Valley Hosp. Med. Ctr.,* 630 F.3d 794, 798-99 (9th Cir. 2010).

To satisfy its burden at summary judgment, a moving party *without* the burden of persuasion - such as Defendants here - "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.,* 210 F.3d 1099, 1102 (9th Cir. 2000); *see also Devereaux v. Abbey,* 263 F.3d 1070,

1076 (9th Cir. 2001) *(en banc)* ("When the nonmoving party has the burden of proof at trial, the moving party need only point out 'that there is an absence of evidence to support the nonmoving party's case.'") (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986), and citing *Fairbank v. Wunderman Cato Johnson,* 212 F.3d 528, 532 (9th Cir. 2000) (holding that the *Celotex* "showing" can be made by "pointing out through argument ... the absence of evidence to support plaintiff's claim")). Further,

> [i]f the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment[, but instead] must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial.

T. W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (internal citations and quotation marks omitted). At the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence, and views all evidence and draws all inferences in the light most favorable to the non-moving party. *See id.* at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986)); *Hrdlicka v. Reniff,* 631 F.3d 1044 (9th Cir. 2011); *Motley v. Parks,* 432 F.3d 1072, 1075 n.1 (9th Cir. 2005)

(en banc); Miranda v. City of Cornelius, 429 F.3d 858, 860 n.1 (9th Cir. 2005).

III. Analysis

After the Ninth Circuit Ruling — which affirmed this Court's dismissal of Plaintiffs' Section 1983 claim to enforce the notice requirement in the regulation — Plaintiffs were left with four remaining claims: (1) the Section 1983 due process claim under the federal constitution; (2) the alleged due process violation of Article I § 7 of the California Constitution; (3) the purported breach of mandatory duty claim under Cal. Gov. Code § 815.6; and (4) negligence under Cal. Civ. Code § 1714. Having carefully considered the Ninth Circuit's instructions on remand and the extensive briefing submitted by the parties, the Court would conclude that there is no genuine issue of material fact with respect to Plaintiffs' remaining claims and would GRANT Defendants' renewed motion for summary judgment.[10]

10. Plaintiffs' argument that Defendants may not bring a renewed summary judgment motion *(see* Docket No. 163 at 1-2) in the present circumstances is unavailing. *See, e.g., Hoffman v. Tonnemacher,* 593 F.3d 908, 911 (9th Cir. 2010) ("In holding that district courts have discretion to permit successive motions for summary judgment, we join at least five of our sister circuits .... a successive motion for summary judgment is particularly appropriate on an expanded factual record.").

Appendix D

A. Applying *Mathews v. Eldridge* the Court Would Conclude that Plaintiffs Received Constitutionally Adequate Process Herein

The Ninth Circuit instructed this Court to apply *Mathews v. Eldridge* on remand to "the circumstances presented here" to determine "[w]hat process is due to protect plaintiffs' well-settled property interest in their Section 8 benefits ...."[11] *Nozzi,* 425 F. App'x at 542 (citing

11. It is not within this Court's authority to state that the Circuit Court was wrong in its holding as to the applicability of *Mathews* to the present case or to ignore or refuse to apply *Mathews* herein after being specifically instructed to do so by the appellate court. However, the Supreme Court in *Dusenbery v. United States,* 534 U.S. 161, 167-68 (2002) observed that:

> The *Mathews* balancing test was first conceived in the context of a due process challenge to the adequacy of administrative procedures used to terminate Social Security disability benefits. Although we have since invoked *Mathews* to evaluate due process claims in other contexts, ... we have never viewed *Mathews* as announcing an all-embracing test for deciding due process claims. Since *Mullane* [*v. Central Hanover Bank & Trust Co,* 339 U.S. 306 (1950)] was decided, we have regularly turned to it when confronted with questions regarding the adequacy of the method used to give notice.

The Supreme Court has characterized *Mullane* as "espous[ing] a more straightforward test of reasonableness under the circumstances." *Id* at 167.

It is noted that if one were to apply the *Mullane* analytical analysis to the present situation, one would reach the same conclusions as delineated herein.

Ressler v. Pierce, 692 F.2d 1212, 1216-22 (9th Cir. 1982)). However, as mentioned above, there are three separate "circumstances" related to the reduction in Plaintiffs' Section 8 benefits: (1) the initial decision by HACLA to lower the Section 8 payment standard amount; (2) the steps taken by HACLA as required by 24 C.F.R. § 982.505(c)(3) to notify Section 8 participants of the reduction and to inform them that the reduction would not be effectuated until one year later; and (3) the second RE-38 notice given at least four weeks prior to the effectuation of the reduction which informed the Section 8 participants of the precise changes in the payment amounts (which had to be based on their most recent examination and therefore could not be calculated earlier) and which also notified them of the availability of informal hearings.

Plaintiffs claim that their lawsuit "was never about challenging the entire procedure" used to reduce their Section 8 benefits, but rather solely the VPSA Reduction Notice "sent [by HACLA] one-year prior to the VPS decrease taking effect." *See, e.g.,* Pl. Opp., Docket No. 163, at 12.[12] Plaintiffs assert that for the purposes of the

12. In light of the fact that reductions in Section 8 benefits were unknowable a year in advance (and, indeed, whether the reduction in the VPSA would definitely result in a concomitant increase in a Section 8 participant's obligated portion of the monthly rent), the connection between the VPSA Reduction Notice and Plaintiffs' ultimate harm (if any) would appear to be too speculative to establish the causation required for standing — assuming that Plaintiffs' true intent in originally bringing this lawsuit was to challenge *solely* the one year advanced notice. In addition, given that Plaintiffs do not "contend that individual hearings are appropriate to challenge an

Mathews analysis directed by the Ninth Circuit, this Court should therefore ignore any procedural safeguards *other than* the initial Reduction Notice HACLA sent one-year prior to the VPS decrease taking effect. Pl. Opp. at 12-13. Plaintiffs argue that "applying the *Mathews* criteria to the claim here, the minimum process due was that, a year before the VPS reduction took effect, adequate notice should have been provided communicating that, in general, HACLA's contribution to Section 8 tenants' rent was going to go down; that, unless some other factor came into play in the individual case, this would mean the tenants' contribution to his/her rent would rise in a year; and that tenants should plan accordingly." *Id* at 13.

The Court would decline Plaintiffs' invitation to undertake such a myopic approach to adjudicating their due process claims. While Plaintiffs indisputably have "a property interest in housing benefits" that is "protected against an abrupt and unexpected change in benefits," *Nozzi,* 425 F. App'x at 541, the Court may not focus on one aspect of HACLA's notification process to the exclusion of all others in determining whether that property interest was sufficiently protected by Defendants. Viewing

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across-the-board VPS change" (HACLA's RPSS No. 9), it is unclear how any requested remedy aimed at the initial VPSA Reduction Notice would be more effective at redressing a challenged injury than the specific hearings that were offered to Plaintiffs both one year before the VPSA reduction was to go into effect and 30 days in advance of the actual reductions—especially because, again, it was simply not possible to calculate the exact reductions a full year in advance, and some participants may not have ultimately paid more each month in rent. *See* Docket Nos. 184 at 7-13, 189 at 7-19.

a single procedural protection or step in isolation — without regard to any other pre-deprivation safeguards implemented by a given governmental entity—would, in fact, contravene the Supreme Court's decision *Mathews* itself. *See Mathews,* 424 U.S. at 334-35 ("We turn first to a description of the procedures for the termination of Social Security disability benefits, and thereafter consider the [*Mathews*] factors bearing upon the constitutional adequacy of these procedures"); *see also Willis v. United States,* 787 F.2d 1089, 1093-94 (7th Cir. 1986) ("There is no question that the language in the letter Willis received would not be adequate notice in itself, but in combination with copies of the applicable statutes, regulations, and public notice, we can reach no other conclusion but that Willis was adequately informed of what would happen if he pursued an exclusively administrative remedy."). Indeed, if *Mathews* were applied in the selective manner sought by Plaintiffs, it is difficult to see how a governmental entity could defeat *any* piecemeal challenge to the constitutional adequacy of its procedures prior to a given deprivation. Litigants claiming that the government provides inadequate process may not simply pretend that significant components of the challenged process do not exist. The VPSA Reduction Notice seized on by Plaintiffs is but one part of the procedures designed to safeguard their Section 8 property interests; the adequacy of the *overall* process due is, as explained by the Ninth Circuit, "controlled by the factors set forth in *Mathews v. Eldridge.*" *Nozzi* 425 F. App'x at 542.[13]

13. This conclusion is further supported by the fact that the Ninth Circuit affirmed this Court's dismissal of Plaintiffs' § 1983 challenge to Defendants' alleged failure to abide by 24 C.F.R.

Appendix D

To determine "the specific dictates of due process" under *Mathews,* a court must consider: **(1)** the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews,* 424 U.S. at 335.

Here, the Court would hold that the entire process preceding the actual reduction of Plaintiffs' Section 8 benefits was constitutionally adequate under *Mathews.* Section 8 recipients (such as Plaintiffs herein): (1) not

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§ 982.505(c)(3) — the regulation requiring Defendants to provide one year notice of the VPS reduction. *See Nozzi,* 425 Fed. App'x at 543 ("The district court did not err in dismissing plaintiffs' § 1983 claim to enforce the notice requirement in the regulation. Under *Save Our Valley v. Sound Transit,* 335 F.3d 932 (9th Cir. 2003), agency regulations cannot create a federal right enforceable under § 1983."). Plaintiffs' suggestion that the Court confine *Mathews* to the VPSA Reduction Notice appears to be an attempt to evade the Ninth Circuit's endorsement of this Court's conclusion that there is no constitutionally protected property interest in receiving *notice of a future potential reduction* in the benefits (in contrast to the undisputed property interest in the *benefits* themselves), notwithstanding the federal regulation mandating such notice be provided to Plaintiffs. *See Nozzi,* 425 Fed. App'x at 541 ("[P]laintiffs' claim does not depend on finding a 'right to notice.'"); *see also Rosas,* 945 F.2d at 1474 (rejecting plaintiffs' argument that government regulations afforded them a due process right to a "period of grace" before their benefits could be reduced).

only received training regarding the ways in which PHS determines the amount of housing assistance payments for families (including instruction on the VPS), (2) they were also notified of the possibility that their benefits would be reduced one year prior to any reduction taking place (and informed of the availability of a hearing at that point), and (3) they were given 30 days notice and again notified of the right to a hearing before any actual deprivation — once calculable on an individual basis — took place.

(1) The Private Interest Affected by the Official Action

First, with respect to the private interest at stake, Defendants concede that any reduction in Section 8 benefits could have a significant impact on Plaintiffs. Def. Mot. at 17-18. This factor thus indicates that substantial process is due to protect that interest.

(2) The Risk of an Erroneous Deprivation of Such Interest Through the Procedures Used and the Value of Any Added Procedural Safeguards

As to the second *Mathews* factor, the Court would find that, in light of the entire process provided to Plaintiffs prior to any reduction in their Section 8 benefits, the risk of an erroneous deprivation was minimal. Initially, it is worth reiterating that the reduction of the voucher payment standard amount was within the prescribed basic range allowed by statute and HUD regulations, and Plaintiffs do not challenge the government's inherent authority to make

that reduction. *See* HACLA's RPSS No. 1 at pages 10-11. In other words, Plaintiffs do not argue that there was a risk that the government might "erroneously" reduce Section 8 benefits across the board. Rather, Plaintiffs argue that due process required HACLA to provide adequate notice that "the tenants' contribution to his/her rent would rise in a year, and that tenants should plan accordingly." Pl. Opp. at 13. However, it is not disputed that it could not be determined at the time of the initial notice of the VPS reduction whether a particular Section 8 participant's portion of the rent would rise and, if so, by what amount. Furthermore, the undisputed facts show that HACLA *did* provide adequate notice — as well as a subsequent opportunity for a hearing. As such, the risk of an individual being erroneously deprived of his or her Section 8 benefits was minimal.

When the VPSA Reduction Notice (which included the initial RE-38) was mailed to participants a full year before the 2004 reduction was to go into effect, it stated that "[e]ffective April 2, 2004, 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." PSSGI at ¶ 18; *see also* Appendix, Exhibit I. The Reduction Notice also included a document informing Section 8 participants that "You have the right to a hearing if you wish to dispute this action" and provided a telephone number to contact within thirty days to request such a hearing. *See* Appendix, Exhibit J.[14] Plaintiffs were also provided with a chart

14. Moreover, Plaintiffs state that they were not entitled to a hearing at this point in time. To the extent Plaintiffs once again

that listed the new payment standard amounts (following the reduction) by bedroom size. PSSGI at ¶ 19; *see also* Appendix, Exhibit I.

The plain language in the VPSA Reduction Notice belies Plaintiffs' argument that the notice was not drafted in a way "that a typical resident would understand." Pl. Opp. at 19-22. Plaintiffs' position is further undermined by the fact that when a family is initially selected for participation in the Section 8 program, it is briefed on "How the PHA determines the amount of housing assistance payment for a family, including: (i) How the PHA determines the payment standard for a family)." *See* 24 C.F.R. § 982.301(b)(2)(i). Plaintiffs further received instruction on the meaning of the term "Voucher Payment Standard" and the payment standard chart contained in the one-year Reduction Notice. *See* Agbor Decl. ¶¶ 4-8; Baldwin Decl., Docket No. 78-5, ¶ 12.[15] Before deciding to undertake the VPSA reduction, HACLA also held a public hearing, with comments, and conducted approximately twenty outreach meetings at public housing sites and seven regional Section 8 meetings which included a slide show detailing the effects of the forthcoming VPSA reduction. PSSGI at ¶¶ 14-16. Thus, Plaintiffs not only received one year's advanced *notice* of the potential for a

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premise their constitutional argument on the regulatory framework (Pl. Opp. at 13), the Ninth Circuit already rejected this argument. *Nozzi,* 425 Fed. App'x at 543 ("agency regulations cannot create a federal right enforceable under § 1983").

15. The Court would find Plaintiffs' objections to the Baldwin Declaration groundless.

future reduction in benefits, they were *trained* on how to understand this notice, interpret the documents therein, and informed of the ways in which Defendants would determine the amount of housing assistance payments for a given family.

Crucially, until the new lower VPS is applied a year later, Plaintiffs admit that it is impossible to determine how the VPS decrease will affect participants. *See* Pl. Opp. at 13 ("Plaintiffs fully recognize that how the VPS reduction would affect any individual had not yet been, and could not be, specifically determined at the time of that notice."). Indeed, a Section 8 participant's rent obligation will not necessarily increase due to a VPS modification unless the resulting VPS is lower than the "Gross Rent" of the unit. *See* Baldwin Decl. at 3:19-5:2.[16] To be sure, some Section 8 participants eventually had their benefits reduced. But, as further explained below, each of these participants received not only the initial VPSA Reduction Notice (at which point it was impossible to determine whether their benefits would actually be reduced), but also the second RE-38 notice and an opportunity for a hearing prior to any actual reduction taking place.[17] There would

16. The Gross Rent is the rent charged by the owner plus the utility allowance given the tenant, which depends on the mix of utilities that the family will pay for or provide (gas for water heating, cooking, heating, general electricity, water, stove, refrigerator, etc.). As long as the Gross Rent is less than the VPS, the family's portion of rent is not affected by a decrease in the VPS. *See* Baldwin Decl. at 3:19-5:2.

17. The second RE-38 notice informed these individuals of the amount of the decrease in the HAP that HACLA would be paying

be minimal value in requiring HACLA to adopt additional procedures (above and beyond those delineated *supra*) to safeguard against an erroneous deprivation of potential future reductions in Section 8 benefits that were, at the time of the one-year VPSA Reduction Notice, incalculable.

Of course, the foregoing steps and initial Reduction Notice were not the only safeguards implemented by Defendants to protect Plaintiffs' property interest in their Section 8 benefits. The second RE-38 notice sent to Plaintiffs four weeks prior to the reduction in benefits – once the specific reductions were calculable on an individual basis – and affording Plaintiffs the right to a hearing, substantially reduced any remaining risk of an erroneous deprivation. In their opposition briefing, Plaintiffs simply state that they "did not dispute the later notice" sent to inform them of the actual reduction and return to their contention that "Plaintiffs were due adequate and effective notice a year in advance [of any actual reduction in benefits]." Pl. Opp. at 6. As discussed above, however, the additional procedural safeguards implemented by Defendants may not be simply disregarded for the purposes of the *Mathews* analysis. Indeed, Plaintiffs would be hard-pressed to argue that the combination of the steps discussed above and the second RE-38 notice prior to the reduction in benefits, along with the opportunity for a hearing, did not constitute sufficient due process to protect their interests in the Section 8 benefits. It is virtually axiomatic that

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to the landlord/owner on the participant's behalf and the precise increase in the amount of the rent that the participant family itself would have to pay. *See* Exhibit K to Appendix.

pre-deprivation notice and a hearing is sufficient process to protect a property interest in continued benefits. *See Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 13 (1978) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") (citing *Mullane,* 339 U.S. at 314) (internal citations omitted); *see also Nozzi,* 425 Fed. App'x at 543 ("In situations analogous to termination of Section 8 benefits, the procedural protection guaranteed by the Constitution is typically pre-deprivation notice and a hearing...I am unaware of any public benefit case requiring more than pre-deprivation notice and a hearing.") (Mosman, J. concurring). This is precisely why the Ninth Circuit Concurrence indicated that "[i]f the district court finds that adequate notice and a hearing were offered to every individual prior to any actual reduction in benefits, the district court may find as a matter of law that due process was satisfied." *Nozzi,* 425 Fed. App'x at 543.[18]

Here, it is undisputed that when HACLA sent out the second RE-38 notices to the Section 8 participants about four weeks before the 2004 VPSA reductions would go into effect, the participants were informed of the amount of

18. Plaintiffs' argument that the concurrence here has "no legal effect" whatsoever (Pl. Opp. at 8-9) oversteps the mark; while they are correct in noting that it would be inappropriate for the Court to rely on the concurrence to the exclusion of the majority opinion, the Court should surely not completely disregard the existence of the concurrence in analyzing the complex issues discussed therein.

the decreases in the HAP that HACLA would be paying to the landlord/owner on the participant's behalf and the precise increase (if any) in the amount of the rent that the participant family itself would have to pay. *See* Exhibit K to Appendix; PSSGI ¶ 24. There is no evidence that such information could have been provided substantially earlier. Participants were also informed that "You have the right to a hearing if you wish to dispute this action" and were provided 30 days from the date of the second RE-38 notice to contact the agency by phone to schedule a hearing. *Id.*[19] At oral argument before the Ninth Circuit, Plaintiffs' counsel "conceded that plaintiffs who were actually going to have Section 8 benefits reduced were granted notice and a hearing before any reduction in those benefits." *Nozzi,* 425 Fed. App'x at 543 & n. 1.[20] It remains undisputed that all Plaintiffs received the second RE-38 notice. PSSGI ¶ 24.

In light of the foregoing, the Court would conclude that the risk of an erroneous deprivation of Plaintiffs' interest in their Section 8 benefits was negligible. Furthermore, given that the precise nature of the individualized deprivations were unknowable at the time of the original

19. Plaintiffs "are not challenging the hearing process" and do not dispute that if a hearing ruling in favor of a participant issues after implementation, any excess paid is refunded. *See* HACLA's RPSS Nos. 9-10 at 33-35.

20. "Because this was merely a representation at oral argument," Judge Mosman noted that "remand is the proper remedy to address this issue of material fact." *Nozzi,* 425 Fed. App'x at 543. The Court would find that the undisputed facts confirm this representation.

VPSA Reduction Notice – and that all Plaintiffs wishing to challenge the ultimate reductions were indisputably afforded an opportunity to do so through a hearing – the Court would find that the probable value of additional or substitute procedural safeguards was likewise negligible.

(3) The Government's Interest

Finally, the Government's interest in the function involved – its ability to reduce expenditures to bring its spending on Section 8 housing assistance payments in line with the HUD budget at the time – is obviously significant. The burden the Government would face in providing procedures beyond the extensive steps outlined above would be substantial, as the Section 8 program is a massive undertaking and, as stated by Defendants (and not contradicted by Plaintiffs), making any "substantive change to its procedures would have a profound and costly impact to HACLA." Def. Mot. at 12. This factor weighs even more heavily in favor of Defendants given that HACLA had the unfettered right to reduce the voucher payment standard amount within the prescribed basic range allowed by statute and HUD regulations, and Plaintiffs do not challenge the government's authority to make this reduction.

(4) Conclusion

In sum, applying *Mathews* to the procedures afforded to Plaintiffs before any actual reduction in their Section 8 benefits took place, the Court would conclude that Defendants fulfilled their due process obligations.

Plaintiffs received instruction on the ways in which Defendants calculated the VPS standards, received an initial Reduction Notice informing them of the possibility of future reductions (at which point it was impossible to determine whether and to what extent benefits would actually be reduced, if at all) and – most importantly – received the second RE-38 notice informing them of the exact amount of the decrease in HAP as well as the opportunity for a hearing to contest the action. The Court would thus find that due process was satisfied as a matter of law. Defendants' renewed motion for summary judgment as to Plaintiffs' first cause of action would thus be GRANTED.

Because the due process provision of the California Constitution, Cal. Const. Art. 1 § 7 is "identical in scope and purpose" to the Due Process Clause of the federal Constitution, *Gray v. Whitmore,* 17 Cal. App. 3d 1, 20 (1971), the Court would similarly GRANT Defendants' renewed motion for summary judgment with respect to Plaintiffs' fourth cause of action.

B. Defendants Did Not Breach a Mandatory Duty Under Cal. Gov. Code § 815.6

In its prior ruling on the parties' cross motions for summary judgment, this Court held that there was no basis for concluding that Defendants' "literal compliance" with the notice requirements under 24 C.F.R. § 982.505 could expose Defendants to liability for a breach of duty under Cal. Gov. Code § 815.6. *See* Docket No. 90 at 11. The Ninth Circuit, however, ruled that "[i]t is a question

of fact whether the 'literal compliance' that occurred here was sufficient to meet § 815.6's requirements" and that, at a minimum, "the notice must be sufficiently effective to protect housing benefits recipients from an abrupt and unexpected reduction of benefits." *Nozzi,* 425 Fed. App'x at 542. While the question of whether HACLA's notification efforts were sufficiently effective to meet § 815.6's requirements is thus one of fact, such a question can be resolved on Defendants' renewed motion for summary judgment if, as here, the material facts are not in genuine dispute. *See* Fed. R. Civ. P. 56(a).

"California Government Code § 815.6 permits private individuals to sue public entities where: (1) an enactment imposes a mandatory duty; (2) it is intended to protect the individual from the type of injury suffered; and (3) the breach of the mandatory duty was the proximate cause of the injury suffered." *See Nozzi,* 425 Fed. App'x at 542 (citing Cal. Gov. Code § 815.6).

Here, the "notice" provision on which Plaintiffs' claim is based provides 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." 24 C.F.R. § 982.505(c)(3)(ii). Plaintiffs argue that Defendants breached the duty imposed by this regulation, suggesting that the duty "require[s] written notice and an actual tenant meeting where, in each case, the change is explained, the tenant is advised how the VPS would affect the tenant's current rent if it were to go into effect at present, and the tenant is further advised

that, all other things remaining the same, that effect will be what will happen at the next annual re-examination." HACLA's RPSS No. 4, at pages 21-22.

The Court would reject this expansive view of the duty imposed by 24 C.F.R. § 982.505(c)(3)(ii), and would find that the notice provided by Defendants was sufficiently effective to protect Section 8 recipients from an abrupt and unexpected reduction in their benefits. As referenced above, Plaintiffs do not dispute that HACLA: (1) conducted a public hearing on August 25, 2004, at which the Board emphasized that the 2004 VPS reduction would not take effect for one year until the Spring of 2005; (2) distributed copies of HACLA's 2005 Agency Plan in English and Spanish at all HACLA offices and family and senior public housing sites; (3) conducted approximately 20 outreach meetings at public housing sites and seven regional Section 8 meetings which included a slide show presentation detailing the effects of the 2004 VPS reduction; and (4) mailed a written Reduction Notice of the 2004 VPS reduction to each Housing Choice Voucher Program participant on or about the date of the participants' annual reexamination, a full year before the 2004 VPS reduction was to go into effect. PSSGI ¶¶ 14-17. Additionally, as previously mentioned, the 2004 VPSA Reduction Notice itself stated that "[e]ffective April 2, 2004, the Housing Authority lowered the payment standards used to determine your portion of the rent" and provided Plaintiffs with a chart that listed the new payment standard amounts (following the reduction) by bedroom size. PSSGI ¶¶ 18-19. Furthermore, Plaintiffs received training on the meaning of the term "Voucher

Payment Standard" and the payment standard chart contained in the one-year Reduction Notice. *See* Agbor Decl. ¶¶ 4-8; Baldwin Decl. ¶ 12. There can be no genuine dispute that the totality of the information provided by Defendants both satisfied due process and was sufficiently effective to protect Plaintiffs from an "abrupt" and "unexpected" reduction in their Section 8 benefits. As such, the Court would conclude that Defendants cannot be held liable under § 815.6, and would GRANT Defendants' renewed motion for summary judgment with respect to this cause of action as well.[21]

C. Plaintiffs' State Law Negligence Claim Also Fails

The Ninth Circuit ruled that this Court erroneously dismissed Plaintiffs' negligence claim because, "while public entities cannot be held liable for their own negligence, they may be held vicariously liable for the negligent acts of their individual employees." *Nozzi,* 425 F. App'x at 542 (citing Cal. Gov't Code § 815.2; *Eastburn v. Reg'l Fire Prot. Authority,* 31 Cal. 4th 1175, 1179 (2003)).[22] The Ninth Circuit thus did not reach the issue of whether

21. The Court would hold that the additional arguments set forth by Defendants in their supplemental briefing on this issue provide independent, alternate bases sufficient to support summary judgment on the § 815.6 and negligence claims as well. *See* Docket No. 184 at 13-24.

22. Section 815.2(a) provides that "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."

the steps taken by Defendants' employees and discussed by the Court extensively throughout this Ruling did, in fact, breach the duty HACLA owed to Plaintiffs. For the reasons already expressed, and because Plaintiffs do not draw any meaningful distinction between their claim for a breach of mandatory duty and their claim for negligence, the Court would hold that summary judgment with respect to the negligence claim is also warranted. To reiterate, the Court would find that the evidence in the record – the multiple notices sent by Defendants coupled with the training Plaintiffs received, as well as the opportunity for hearings and exhaustive outreach efforts following the discretionary decision to lower the VPS – conclusively establishes that HACLA employees did not breach the duty they owed to Plaintiffs to provide "sufficiently effective" notice to guard against an abrupt and unexpected reduction in their Section 8 benefits. Indeed, many of these steps went above and beyond technical compliance with the regulations.

IV. Conclusion

For the above stated reasons, the Court would GRANT Defendants' renewed motion for summary judgment in its entirety.

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-55588

MICHAEL NOZZI, individually and as class representative; *et al.*,

Plaintiffs - Appellants,

v.

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES and RUDOLPH MONTIEL, in his official capacity,

Defendants - Appellees.

December 8, 2010, Argued and Submitted, Pasadena, Claifornia, March 25, 2011, Filed

AFFIRMED in part, REVERSED in part, and REMANDED for proceedings consistent with this disposition. Each party shall bear its own costs.

Before: TROTT and WARDLAW, Circuit Judges, and MOSMAN, District Judge.* Mosman, J., concurring.

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* The Honorable Michael W. Mosman, United States District Judge for the District of Oregon, sitting by designation.

Appendix E

OPINION

MEMORANDUM[**]

Plaintiffs Michael Nozzi and Nidia Pelaez, putative class representatives of recipients of federal housing assistance payments under the Section 8 Housing Voucher Program, 42 U.S.C. § 1437f(o), and the Los Angeles Coalition to End Hunger and Homelessness (collectively "plaintiffs") appeal the district court's dismissal of two claims and grant of summary judgment in favor of defendants Housing Authority of the City of Los Angeles ("HACLA"), which administers the Section 8 Program, and its Executive Director, Rudolph Montiel, on other claims arising from defendants' failure to provide adequate notice of its planned reduction of the voucher payment standard ("VPS"), which is used to calculate plaintiffs' monthly housing assistance payments. Because the district court incorrectly applied well-established law to conclude that plaintiffs asserted no property interest to which due process attached, and because genuine issues of material fact exist as to whether the notice HACLA provided satisfied the requirements of due process, we affirm in part and reverse in part.

1. Perhaps misconstruing plaintiffs' § 1983 due process claim, the district court improperly concluded that plaintiffs' property interest in Section 8 benefits did not require adequate notice that their benefits were subject to the planned reduction. Although the district court

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** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

based this conclusion on its determination that plaintiffs could not claim a property interest in the § 982.505 notice requirement, plaintiffs' claim does not depend on finding a "right to notice." Rather, plaintiffs claim that they are statutorily entitled to benefits under Section 8, and that the statute in tandem with the regulatory requirements "restrict[ing] the discretion" of HACLA, *Griffeth v. Detrich,* 603 F.2d 118, 121 (9th Cir. 1979), creates a property interest in Section 8 benefits to which constitutional due process attaches. *See Perry v. Sindermann,* 408 U.S. 593, 599-603, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) (citing *Bd. of Regents v. Roth,* 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)) (a legitimate claim of entitlement derived from a statute, rule, regulation, or de facto protocol gives rise to a federally protected property interest). Moreover, because it is beyond dispute that "property interests . . . extend well beyond actual ownership," *Roth,* 408 U.S. at 571-72, the district court erred in concluding that plaintiffs "can only [have] a property interest in property." *See, e.g., Ressler v. Pierce,* 692 F.2d 1212, 1215 (9th Cir. 1982) (finding that applicants have a federally protected property interest in receiving benefits); *Griffeth,* 603 F.2d at 121 (same).

The controlling authority establishes that Section 8 participants have a property interest in housing benefits by virtue of their "membership in a class of individuals whom the Section 8 program was designed to benefit." *Ressler,* 692 F.2d at 1215. Because the Section 8 regulations "closely circumscribe" HACLA's discretion – by prohibiting HACLA from immediately implementing a reduced VPS, and requiring HACLA to inform

participants that a reduced VPS will be implemented – plaintiffs' property interest is protected against an abrupt and unexpected change in benefits. *Id.; see also Geneva Towers Tenants Org. v. Romney,* 504 F.2d 483, 490 (9th Cir. 1974) (finding that plaintiffs' protected property interest in low-income housing included an expectation "that rents will be kept as low as economically feasible" where an entity's discretion to increase rent was limited and plaintiffs clearly fell within the category of intended beneficiaries of the federal assistance program).

What process is due to protect plaintiffs' well-settled property interest in their Section 8 benefits is controlled by the factors set forth in *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Upon remand, the district court shall apply the *Mathews* factors to the circumstances presented here. *See, e.g., Ressler,* 692 F.2d at 1216-22 (evaluating the sufficiency of procedural safeguards); *Geneva Towers,* 504 F.2d at 491-93 (same). We note that the district court's conclusion that there is "no reason to look beyond the regulatory language" to determine if HACLA's notice was sufficient is at odds with *Mathews.* Technical compliance with regulatory procedures does not automatically satisfy due process requirements. *See Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) ("'Property' cannot be defined by the procedures provided for its deprivation."). Moreover, given that the district court recognized that "the consequences of a sudden reduction in benefits to a Section 8 participant could be potentially devastating," there exists a genuine issue of

material fact as to whether HACLA's notice sufficiently protected plaintiffs' property interest.[1]

2. For similar reasons, the district court improperly granted summary judgment on plaintiffs' state due process claim. California courts have held that the due process provision of the California Constitution, Cal. Const. art I, § 7, is "identical in scope and purpose" to the Due Process Clause of the federal Constitution. *Gray v. Whitmore,* 17 Cal. App. 3d 1, 20, 94 Cal. Rptr. 904 (1971) (citing *Gray v. Hall,* 203 Cal. 306, 318, 265 P. 246 (1928)).

3. The district court incorrectly concluded that the notice provided by defendants satisfied the mandatory duty in § 982.505 to provide one-year notice before implementing the reduced VPS. California Government Code § 815.6 permits private individuals to sue public entities where: (1) an enactment imposes a mandatory duty; (2) it is intended to protect the individual from the type of injury suffered; and (3) the breach of the mandatory duty was the proximate cause of the injury suffered. Cal. Gov't Code § 815.6. At a minimum, the notice must be sufficiently effective to protect housing benefits recipients from an abrupt and unexpected reduction of benefits. It is a question of fact whether the "literal compliance" that occurred here was sufficient to meet § 815.6's requirements.

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1. The district court's reliance on *Atkins v. Parker,* 472 U.S. 115, 105 S. Ct. 2520, 86 L. Ed. 2d 81 (1985), is misplaced. There, the plaintiffs had no property interest in advance notice of congressional action under the Food Stamp Act, and thus minimal, after-the-fact notice of a legislative change satisfied due process. *Id.* at 125-26, 129-30.

4. The district court's dismissal of plaintiffs' state law negligence claim was erroneous because, while public entities cannot be held liable for their own negligence, they may be held vicariously liable for the negligent acts of their individual employees. *See* Cal. Gov't Code § 815.2; *Eastburn v. Regional Fire Protection Authority,* 31 Cal. 4th 1175, 1179, 7 Cal. Rptr. 3d 552, 80 P.3d 656 (2003).

5. The district court did not err in dismissing plaintiffs' § 1983 claim to enforce the notice requirement in the regulation. Under *Save Our Valley v. Sound Transit,* 335 F.3d 932 (9th Cir. 2003), agency regulations cannot create a federal right enforceable under § 1983.

AFFIRMED in part, **REVERSED** in part, and **REMANDED** for proceedings consistent with this disposition. Each party shall bear its own costs.

Appendix E

CONCUR BY: Mosman

CONCUR

Mosman, J., concurring

I agree with the panel that plaintiffs have a property interest in Section 8 benefits. And I also agree that this property interest is protected by the constitutional guarantee of due process. I write separately only to clarify the question left open for the district court to determine on remand: What process was due?

"[O]nce a substantive right has been created, it is the Due Process Clause which provides the procedural minimums, and not a statute or regulation." *Geneva Towers Tenants Org. v. Federated Mortg. Investors,* 504 F.2d 483, 489 n. 13 (9th Cir. 1974). Regulations like those referenced in the memorandum disposition can be useful in deciding whether or not there is a protected property interest. But they are not the source of the procedural protections. For this reason the district court was correct to find that plaintiffs have no constitutional right to a year's worth of benefits after being told of a change in the VPS. On remand, the district court should determine what process is due by considering the factors in *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), without regard to the procedural protections in the regulations.

In situations analogous to termination of Section 8 benefits, the procedural protection guaranteed by the Constitution is typically pre-deprivation notice and a hearing. *See, e.g., Memphis Light, Gas & Water Div.*

v. Craft, 436 U.S. 1, 12-15, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978) (requiring notice of opportunity to be heard before disconnecting municipal utility service); *Mathews,* 424 U.S. at 339-40 (finding notice and administrative procedures used before discontinuing social security disability benefits constitutionally adequate); *Perry v. Sindermann,* 408 U.S. 593, 603, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) (requiring notice and an opportunity to be heard before terminating employment); *Bell v. Burson,* 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971) (requiring notice and an opportunity to be heard before a driver's license can be revoked); *Goldberg v. Kelly,* 397 U.S. 254, 264, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (requiring notice and a hearing to discontinue welfare benefits). I am unaware of any public benefit case requiring more than pre-deprivation notice and a hearing.

At oral argument plaintiffs counsel conceded that plaintiffs who were actually going to have Section 8 benefits reduced were granted notice and a hearing before any reduction in those benefits. Because this was merely a representation at oral argument, remand is the proper remedy to address this issue of material fact.[1] If the district court finds that adequate notice and a hearing were offered to every individual prior to any actual reduction in benefits, the district court may find as a matter of law that due process was satisfied.

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1. *But see Hilao v. Marcos,* 393 F.3d 987, 993 (9th Cir. 2004) ("A party . . . is bound by concessions made in its brief or at oral argument.").