

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

No. 15-2617

THEODORE HAYES AND AQEELA FOGLE,

Plaintiffs,

v.

PHILLIP E. HARVEY,

Defendant.

***AMICI CURIAE* BRIEF OF THE NATIONAL HOUSING LAW PROJECT AND THE
HOUSING JUSTICE NETWORK IN SUPPORT OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

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I. Statements of Interest

The National Housing Law Project (“NHLP”) is a nonprofit national housing and legal advocacy center established in 1968, whose mission is to advance housing justice for low-income people by increasing and preserving the supply of decent, affordable housing; minimizing involuntary displacement; and ensuring tenants’ rights to fair treatment. NHLP partners with a host of individuals and organizations working in the affordable housing arena, including local and national advocates, tenant and advocacy networks, nonprofit developers, and allied housing organizations. NHLP also provides technical assistance to public housing authorities and other agencies and officials within local and state governments, and to federal policymakers who develop and implement the housing policies affecting our nation’s most vulnerable residents. Through policy advocacy and litigation, NHLP has contributed to many critically important changes to federal housing policy and programs that have resulted in increased housing opportunities and improved housing conditions for low-income people, including tenants with enhanced vouchers and tenants in affordable housing subsidized by the United States Department of Housing and Urban Development (“HUD”).

The Housing Justice Center (“HJC”), formerly the Housing Preservation Project, is a non-profit public interest law firm working in Minnesota and nationally to preserve and expand the supply of affordable housing. Since 1999, HJC has worked on the preservation of over three hundred low-income projects in Minnesota and the nation as a whole, providing technical assistance on preservation programs and financing and litigating a wide variety of issues related to the preservation of low-income housing. HJC has relied on enhanced vouchers to ensure that low-income residents are not displaced from their homes when subsidized mortgages are pre-paid or project-based Section 8 contracts are terminated. In concert with Congress’s intent, HJC

has repeatedly used the statutory right to remain to have project owners accept enhanced vouchers in a variety of circumstances in which the owners would otherwise have displaced low-income residents, and to require local agencies to administer the vouchers so as to assure continued affordable occupancy, as Congress clearly intended. Accordingly, *amici* submit this brief regarding the proper definition of good cause in the context of the enhanced voucher program.

II. Argument

Congress created enhanced vouchers to allow families to remain in their homes as their subsidy status changed. Defendant Harvey seeks an exception that would eviscerate that fundamental protection by giving landlords the authority to evict tenants for business justifications or landlords' personal preferences. This is not what Congress intended nor what the statute says. Rather Congress ensured housing stability by giving tenants a right to remain¹ in a building or housing project—generally constructed or supported with extensive public subsidy—even after an owner opts out of project-based assistance. In establishing this “right to choose to stay that landlords must accept by continually renewing their lease,”² the enhanced voucher program makes clear that it is *tenants'* choices and conduct that determine continued occupancy, not landlords'. Stability for families, rather than the desires of landlords, takes precedence. Thus, contrary to Defendant's argument, good cause in the context of the enhanced voucher program refers to tenant misconduct, just as it does in the project-based programs.

¹ 42 U.S.C. § 1437f(t)(1)(B).

² *Hayes v. Harvey*, 903 F.3d 32, 43 (3d Cir. 2018).

A. The term good cause has different meanings for different HUD programs.

HUD administers many types of subsidy programs, two of which provide relevant context for understanding the enhanced voucher program. First is the tenant-based housing choice voucher program, which is a subsidy connected to a specific tenant to use for whatever qualified private rental market property she chooses. Second are the project-based programs,³ generally for buildings constructed with public assistance, where a subsidy runs with specific buildings or projects, regardless of whether the tenants occupying those units change. The tenant-based housing choice voucher program and project-based programs have different good cause definitions, reflecting the separate goals and structures of each program.

The housing choice voucher program focuses on flexibility for both landlords and tenants by subsidizing tenants who obtain housing on the private rental market.⁴ Tenants rent an approved unit and usually pay a fixed portion of their income toward rent, with the local public housing authority paying the remainder of the rent directly to landlords. The subsidy from the housing choice voucher program is connected to tenants, not to specific units. Tenants have flexibility to move: they can take this voucher, and retain their subsidy, as they move from one unit to another.

³ There are many types of project-based programs administered by HUD or local public housing authorities, including project-based Section 8, project rental assistance contracts, HUD-subsidized direct and insured multifamily mortgages, and project-based vouchers. Unless otherwise specified, these programs are referred to herein collectively as “project-based programs.”

⁴ See, e.g., Linda Couch “Housing Choice Vouchers,” National Low Income Housing Coalition 2015 Advocates Guide (https://nlihc.org/sites/default/files/Sec4.12_Housing-Choice-Vouchers_2015.pdf) (“The Housing Choice Voucher program provides flexibility and options by issuing vouchers to eligible households to help them pay rent in privately owner apartments of the households’ choosing...”).

Landlords have to opt into the housing choice voucher program. To incentivize their participation, Congress and HUD have provided housing choice voucher landlords with a great degree of flexibility. First, housing choice voucher landlords are allowed to terminate a tenancy without cause at the end of a lease term. Congress explicitly repealed the program's "endless lease" provision in the 1990s, clarifying that exiting the housing choice voucher program after the initial lease term was the landlords' choice.⁵ Second, Congress adopted a tiered good cause standard for termination of tenancies in the housing choice voucher context.⁶ During the initial lease term, landlords have good cause to evict only based upon tenant misconduct.⁷ In any subsequent lease term, landlords may terminate the tenancy for a variety of personal or business reasons, including the desire to move a family member into the home or renovate the unit.⁸ Moreover, at the end of an initial or subsequent lease term, housing choice voucher landlords can opt for nonrenewal for any reason or no reason at all.⁹ In sum, the program's focus on flexibility means there are few limits on landlords' ability to exit the housing choice voucher program by evicting tenants, making it low-risk for landlords to participate.

Project-based programs, on the other hand, focus on stability. After generally using public dollars to subsidize construction of units, project-based programs keep units affordable for years *and* ensure tenants enjoy long-term security of tenure in those units. Owners of properties participating in these programs enter into contracts with HUD and rent out units to eligible low-

⁵ *Barrientos v. 1801-1925 Morton LLC*, 583 F.3d 1197, 1206 (9th Cir. 2009) (citing Pub. L. No. 104-134, § 203(c)(2), 110 Stat. 1321, 1321-281 (1996)).

⁶ See 24 C.F.R. § 982.310 (d)(1)(iii-iv).

⁷ See *id.* at § 982.310(d)(2) ("[d]uring the initial lease term, the owner may not terminate the tenancy for 'other good cause' ...based on...a desire to use the unit for personal or family use...or a business or economic reason.").

⁸ *Id.*

⁹ *Barrientos*, 583 F.3d at 1204.

income families.¹⁰ HUD provides rental assistance directly to building owners, with the payments connected to affordable housing units themselves, not to the particular tenants living in them.¹¹ Thus, tenants must remain in a unit to retain their subsidy, incentivizing the stability of a long-term tenancy, without fear of termination for grounds beyond their control.

It is within this latter context that good cause to evict project-based tenants was limited to tenant misconduct. For example, under the regulations, tenants in subsidized multifamily housing projects have an “entitlement . . . to occupancy” and landlords “may not terminate any tenancy in a subsidized project” unless the tenant materially breaches the lease, violates state landlord-tenant laws, participates in criminal activity, or “other good cause.”¹² The next subsection of the regulation makes clear that “other good cause” is related only to tenant misconduct, not landlord preferences: “[t]he conduct of a tenant cannot be deemed other good cause . . . unless the landlord has given the tenant prior notice that *said conduct* shall henceforth constitute a basis for termination.”¹³

Likewise, in Section 8 new construction projects, one of the most common project-based programs, landlords are required to make all units continually available for occupancy, with housing assistance payment contracts limited to HUD approved rent. In other words, business or personal reasons will not suffice as justification for termination, as the unit must remain in the program for the duration of the contract.¹⁴ Thus, only tenant misconduct can serve as a reason for

¹⁰ *Hayes*, 903 F.3d at 36.

¹¹ *Id.*

¹² 24 C.F.R. § 247.3(a).

¹³ *Id.* at § 247.3(b); *see also* 24 C.F.R. § 880.607(b)(1)(iv) and (2).

¹⁴ 24 C.F.R. § 880.504(a).

eviction. The project-based voucher program goes a step further and explicitly excludes renovations or moving family members into the unit as good cause to remove tenants.¹⁵

The definition of good cause in the project-based programs took a separate and distinct path from the good cause definition in the newer tenant-based housing choice voucher program. And for good reason: the two programs prioritize different things. Tenant-based housing choice vouchers encourage flexibility for both tenants and landlords. Project-based programs, however, promote stability in the form of long-term tenancies, in properties where the construction of the unit itself was often subsidized by the government, directly or indirectly. Thus, in the project-based context, tenants can only be evicted for their own misconduct. Because the ability to stay in the building or project is almost entirely within their control, tenants enter into a lease for project-based units knowing they can stay in their home for as long as they fulfill their lease obligations.

B. The enhanced voucher program was created to protect housing stability for tenants living in buildings exiting HUD's project-based programs.

Congress had the stability provided by project-based programs in mind when it created the enhanced voucher program. During the 1980s and 1990s, tenants living in many project-based units faced a crisis that threatened their housing security.¹⁶ Many of the original project-based rent restrictions and assistance contracts between landlords and HUD were expiring, and many landlords were choosing to exit the program altogether. Without the rent restrictions or subsidies provided by the project-based programs, many tenants could not afford to stay in their homes.

¹⁵ 24 C.F.R. § 983.257(a).

¹⁶ See, e.g., *Hayes*, 903 F.3d at 41 for an in-depth discussion on the history of the enhanced voucher program.

Congress took action. First, in the late 1980s, Congress instituted a one-year notice requirement for any landlord wishing to exit the HUD project-based rental assistance program.¹⁷ A decade later, with more tenants facing displacement as the crisis of expiring project-based housing contracts worsened, Congress created the enhanced voucher program in the mid-1990s.¹⁸ While the original statute required higher subsidies for tenants, it was arguably ambiguous about tenants' right to remain in their homes or in the project, should the landlord seek to force them out. Thus, Congress quickly amended the statute in 2000 to eliminate any confusion that this was a right for tenants that was "enforceable against their landlords":¹⁹

"during any period that the assisted family continues residing in the same project in which the family was residing [when the building exited the project-based program]...the assisted family *may elect to remain* in the same project...and if, during any period the family makes such an election and continues to so reside."²⁰

The legislative history was just as clear, with the Chairman of the House Subcommittee on Housing and Community Opportunity testifying that "enhanced vouchers will allow particularly vulnerable populations the ability *to remain in their own homes*."²¹

In sum, Congress created this right to remain specifically for enhanced voucher tenants. It did so to protect tenants facing displacement by providing them the same right to remain, and accompanying housing stability, that they had enjoyed in HUD's project-based programs.²²

¹⁷ See Pub L. No. 100-242, § 262(a), 101 Stat. 1815, 1890 (1988) (codified as amended at 42 U.S.C. § 1437f(c)(8)).

¹⁸ See Pub. L. No. 106-74, §§ 531, 538, 113 Stat. 1047, 1113, 1122 (1999).

¹⁹ *Hayes*, 903 F.3d at 41.

²⁰ Pub. L. 106-246, § 2801, 114 Stat. 511, 569 (July 13, 2000) (codified at 42 U.S.C. § 1437f(t)(1)(b)) (emphasis added).

²¹ *Section 8 Housing: Hearing Before the Sen. Subcomm. On Hous. and Transp.*, 106th Cong. (1999); see also H.R. Rep. No. 106-379, pt. 2 at 9 (1999) (Conf. Rep.).

²² *Hayes*, 803 F.3d at 44 ("Congress[']s . . . purpose for creating enhanced vouchers in the first place [was to]. . . allow[] tenants to continue to maintain their homes where the owners of their rental units have raised rents after rejecting the renewal of project-based contracts.").

C. An expanded definition of good cause encompassing landlords' business or personal justifications would gut tenants' right to remain guaranteed by the enhanced voucher statute.

The Third Circuit, and every appellate court examining the issue, has read the enhanced voucher's right to remain broadly. Specifically, every court has found that the program provides an affirmative right for tenants to stay in their building or project after it converts from the project-based programs.²³ Against this backdrop, Defendant Harvey seeks an exception that would render these protections largely meaningless, arguing that he may evict a tenant for personal or business reasons. Such a definition would turn the statute on its head and create the very dynamic Congress sought to avoid: tenants would remain in their homes for only as long as landlords allowed.

Expanding good cause for enhanced voucher holders to include, for example, landlords' desires to move a family member into the unit or rent the unit on the private market, would transfer the right to remain from the tenant to the landlord. Take, as a practical example, landlords who claim to want to renovate buildings formerly in the project-based programs. Those landlords could send eviction notices to all enhanced voucher tenants, stating that their buildings are set to undergo renovations and therefore all subsidized leases are terminated. Then those same landlords could simply put in some new floors and re-rent the apartments at a similar rate. Thus, they will have done little to upgrade the building yet secured a technical reason to terminate enhanced voucher leases, flouting the spirit of the program.

²³ See *Hayes*, 903 F.3d at 41-47; *Park Village Apartments Tenants Ass'n. v. Mortimer Howard Trust*, 636 F.3d 1150 (9th Cir. 2011); *Barrientos*, 583 F.3d at 1206; *Feemster v. BSA Ltd. P'ship*, 548 F.3d 1063 (D.C. Cir. 2008), *aff'g* in relevant part, 471 F. Supp. 2d 87 (D.D.C. 2007).

Those enhanced voucher holders, who formerly enjoyed the protections of the project-based programs and currently receive a higher subsidy than regular voucher holders, would be forced to leave their homes abruptly. Making matters worse, those tenants would then receive only a regular voucher to move, providing a much smaller subsidy to find alternative housing. Those voucher holders must then find housing in a market where there is a scarcity of landlords who will accept regular vouchers. For example, a single reporter, with a few text searches on Craigslist, found “[h]undreds of properties . . . marked by realtors and landlords who don’t want Section 8 voucher holders,” and where the only section of the city to accept voucher holders without signs of discrimination was North Philadelphia.²⁴ In other words, tenants’ Congressionally-provided right to remain would be eviscerated by decisions made by their landlords, family and neighborhood stability would decrease, all while segregation grows.

Such a result would be in direct conflict with the Third Circuit’s reading of the statute: “[I]f enhanced voucher holders’ right to elect to remain limited property owners’ rights during only the lease term, the first clause of the provision would have no independent meaning. . . . It is . . . well-established . . . that statutes should be read to avoid making any provision superfluous, void, or insignificant.”²⁵ Giving landlords the right to terminate an enhanced voucher tenancy for grounds unrelated to tenant misconduct would render a tenant’s right to remain insignificant, as tenants would have no right to stay in a particular project or building

²⁴ Anna Orso, ‘No Section 8’: The Craigslist practice that could cost landlords big time, BILLYPENN (Nov. 18, 2015, 9:45am), <https://billypenn.com/2015/11/18/no-section-8-the-craigslist-practice-that-could-cost-landlords-big-time/>.

²⁵ *Id.*

once landlords decide to end tenancies for personal or business reasons. In other words, tenants would be “subject to the whim of their landlord.”²⁶

Moreover, the Third Circuit noted that the enhanced voucher program is a hybrid of project-based and tenant-based programs.²⁷ Yet a reading of good cause that includes landlords’ personal or business justifications would simply transfer enhanced voucher tenants completely into the tenant-based assistance world of housing choice vouchers, terminating their right to receive a higher-value voucher to stay in their home. Tenants would have the *flexibility* to take their voucher and find a new home, but would lack the ability to stay in their home if the landlord wants them out. In higher-income neighborhoods like Society Hill, where only “repeated intervention by the federal courts . . . vindicated the Hayes family’s right to their home in the first place,”²⁸ tenants would lose their homes and be displaced from their communities.

This outcome not only conflicts with the Third Circuit’s reasoning, it is also not what Congress intended when it created the enhanced voucher program. The mission of the enhanced voucher program is to provide “particularly vulnerable populations the ability *to remain in their own homes.*”²⁹ While Congress placed the enhanced voucher program amongst the regulations for housing choice vouchers to avoid replicating pages of identical requirements, it articulated three explicit exceptions: enhanced voucher holders have (1) an increased subsidy, (2) the right to remain in their homes, and (3) a minimum rent payment generally equal to what the tenant had

²⁶ *Hayes*, 874 F.3d at 124, (Greenaway, J., dissenting), reh’g *en banc* granted, judgment vacated, 878 F.3d 446 (3d Cir. 2017).

²⁷ *Id.* at 38.

²⁸ *Hayes v. Harvey*, 874 F.3d 98, 124 (3d Cir. 2017) (Greenaway, J., dissenting), reh’g *en banc* granted, judgment vacated, 878 F.3d 446 (3d Cir. 2017).

²⁹ *Section 8 Housing: Hearing Before the Sen. Subcomm. On Hous. and Transp.*, 106th Cong. (1999); *see also* H.R. Rep. No. 106-379, pt. 2 at 9 (1999) (Conf. Rep.).

been paying in the project-based program.³⁰ The first two emphasize Congress’s desire to retain the tenant stability feature of the project-based program. The third illustrates the Congressional intent to carry over the required tenant rent contribution from the project-based context to the enhanced voucher program. Adopting the project-based features makes perfect sense, as they further Congress’s intent to preserve the rights and housing stability of former project-based tenants facing displacement from their homes.

Contrary to the arguments of Defendant, a proposed but never-enacted regulation cannot erase Congress’s directive. In December of 2016, HUD sought public comment on proposed regulations that would have adopted the housing choice voucher standard for good cause for the enhanced voucher program.³¹ In response, advocates submitted comments noting that such a reading would render the right to remain meaningless.³² Three years later, HUD has still taken no action on that proposed rule. Needless to say, proposed rules not yet adopted do not have the force of law.³³ Unless and until HUD issues and adopts guidance that is consistent with the enhanced voucher statute’s plain language and intent, there is no legal basis for interpreting good cause in the enhanced voucher context to include landlords’ personal or business reasons.³⁴

³⁰ 42 U.S.C. § 1437f(t).

³¹ Tenant-Based Assistance: Enhanced Vouchers. 81 Fed. Reg. 74372 (Proposed Oct. 26, 2016) (to be codified at 24 C.F.R. § 982).

³² See, e.g., National Housing Law Project, “Re: Docket No. FR 5585-P-01: ‘Tenant-Based Assistance: Enhanced Vouchers,’” (Dec. 23, 2016) (accessed at <https://www.nhlp.org/wp-content/uploads/NHLP-HJN-Enhanced-Voucher-proposed-rule-comments-final-12.16.pdf>).

³³ See *Tedori v. United States*, 211 F.3d 488, 492 (9th Cir. 2000) (“proposed regulations carry no more weight than a position advanced on brief”); *In Re Appletree Markets, Inc.*, 19 F.3d 969, 973 (5th Cir. 1994) (“proposed regulations are entitled to no deference until final”).

³⁴ Similar to proposed rules, footnote assertions put forth in an agency’s brief carry no force of law. See, e.g., *Price v. Stevedoring Servs. Of Am.*, 697 F.3d 820, 830 (9th Cir. 2012) (“Without a basis in agency regulations or other biding agency interpretations, there is...no justification for attributing to an agency litigation position ‘the force of law’...[D]eferring to agencies litigating positions...would create a danger that agencies would avoid promulgating regulations altogether...[W]e join all other circuits that have addressed the issue.”).

D. Good cause to evict an enhanced voucher tenant is limited to instances of tenant misconduct, as in HUD’s project-based programs.

There is a simple way to reconcile the plain language of the enhanced voucher statute and decades of Congressional intent with the other good cause rationales available to landlords: adopt the definition of good cause already used in HUD’s project-based programs. The plain language of the enhanced voucher statute compels a reading of good cause that relates to tenant misconduct. As the Third Circuit noted, the statute created “a right that is enforceable against...landlords such that tenants may be evicted only for cause, even at the end of a lease term.”³⁵ To support this claim, the *en banc* majority wrote:

Importantly, § 1437f(t)(1)(B)'s first clause is written from the tenant's perspective, and it includes two verbs. The first is “elect,” which means “to choose (a course of action) [especially] by preference.” Webster's Third New International Dictionary 731 (1976). The second is “remain,” meaning “to stay in the same place or with the same person or group.” *Id.* at 1919. This right to “choose . . . by preference” to “stay in the same place” is not limited to any particular time period, and it is not directed to only HUD or any other specific party. Thus, the assisted family's right necessarily limits the ability of the property owner to evict. *If a landlord could simply ignore an eligible family's choice to stay and force them to leave, the statutory right would be meaningless.*³⁶

The very same reasoning supports a definition of good cause limited to tenant misconduct. If landlords could simply conjure a business or personal reason for removing tenants from a unit, *the statutory right would be meaningless.* In order for the right to remain to have any substance, the decision on whether to vacate a unit must stay with the tenant, not the landlord.

Moreover, this interpretation would be consistent with decades of Congressional action and intent. The enhanced voucher program was explicitly created to protect project-based

³⁵ *Hayes*, 903 F.3d at 41.

³⁶ *Id.* at 42 (emphasis added).

tenants and “allow them to remain in their homes.”³⁷ As discussed earlier, the project-based program encouraged housing stability, and Congress intended to preserve this stability by explicitly mandating a right to remain for tenants. This right is consistent with Congress’s efforts to promote tenant stability in project-based housing -- efforts that are most clearly seen in the definitions of good cause limited to tenant misconduct in the project-based programs.³⁸ Congress wanted to protect project-based tenants facing involuntary displacement from their homes. Adopting a good cause definition that preserves their right to stay in their homes and communities would be consistent with that intent.

III. Conclusion

The statute’s language and Congress’s intent tell the same story: good cause to terminate an enhanced voucher tenancy should match the project-based definitions that are limited to tenant misconduct. Such a definition would protect families like the Hayes’ from displacement from their long-term homes and communities, just as Congress intended.

Dated: December 4, 2019

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³⁷ *Section 8 Housing: Hearing Before the Sen. Subcomm. On Hous. and Transp.*, 106th Cong. (1999); H.R. Rep. No. 106-379, pt. 2 at 9 (1999) (Conf. Rep.).

³⁸ *See* 24 C.F.R. §§ 247.3(b) and 880.607(b).

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