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NOTE

BARRIENTOS V. 1801-1825 MORTON LLC: STRIVING FOR BALANCE – THE IMPACT OF FAIR MARKET RENT ON LOW-INCOME RENTERS AND LANDLORDS IN THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM

VERONICA KONTILIS*

“The most important single central fact about a free market is that no exchange takes place unless both parties benefit.”¹

INTRODUCTION

Imagine that you and your significant other are an elderly couple, renting an apartment in a metropolitan area. You have lived in this same apartment for nearly four decades; you raised your children in this apartment, you watched the city evolve from this apartment – this apartment is your home. Over the years, you have been able to afford rent and remain in your apartment because of the Section 8 Housing Choice Voucher (HCV) program. However, times have changed, and you recently received a 90-day eviction notice from your landlord citing a “business or economic” reason for the eviction. This will enable the landlord to charge higher rent to the succeeding tenants. You know that your apartment is subject to the local rental ordinance’s eviction protections,

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¹ *Milton Friedman Quotes*, BRAINYQUOTE.COM, <http://www.brainyquote.com/quotes/quotes/m/miltonfrie173375.html> (last visited Oct. 15, 2015).

but you are unsure as to the validity of the eviction notice. You begin frantically searching for a new apartment, but to no avail. If the eviction notice is valid, you cannot remain in your current apartment, yet you have no viable alternatives. Your greatest fear is coming true – being stuck with no place to call home.

In its simplest form, *Barrientos v. 1801-1825 Morton LLC*² is a housing law dispute between a landlord and numerous tenants. Morton LLC is the landlord of an apartment complex subject to the Los Angeles Rental Stabilization Ordinance (LARSO).³ The tenants live in Morton LLC's units and receive Section 8 assistance from the federal government.⁴ The dispute arose when Morton LLC served eviction notices to the Section 8 tenants, citing a "business or economic" reason for the eviction as allowed by a federal regulation.⁵ The tenants filed suit, arguing that the eviction notice violated LARSO's eviction protections.⁶ The United States Court of Appeals for the Ninth Circuit concluded that the local rental ordinance's eviction protections were not preempted by the federal regulation,⁷ therefore making the no-fault, "business or economic" reason an impermissible way to evict the Section 8 tenants from their units.

While the Ninth Circuit's holding properly resolved the facial issue in the case, the holding merely scratched the surface of the underlying conflict. Philosophically, the crux of the controversy is the balance of a landlord's right to profit in the free market economy and low-income tenants' rights to affordable housing. Practically, the conflict is between what a landlord could be earning at actual market rent from non-subsidized tenants and what a landlord is earning from Section 8 tenants, whose subsidies are based on Fair Market Rent (FMR) estimates. Thus, the Ninth Circuit's decision in *Barrientos* was a victory for low-income, Section 8 tenants, but also foreshadowed an intensifying struggle between landlords and tenants surrounding the issue of escalating rents in a market economy, exceeding that which can reasonably be paid through the Section 8 program.

In the Background section, this Case Note will begin by providing foundation and context for understanding the conflict in *Barrientos*. First, this Note will emphasize three specific parts of the Section 8 Housing Choice Voucher (HCV) program: the program's purpose, contract

² *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197 (9th Cir. 2009).

³ *Id.* at 1201–02.

⁴ *Id.* at 1206.

⁵ *Id.* at 1206 (citing 24 C.F.R. § 982.310(d)(1)(iv) (2010)).

⁶ *Id.* at 1206.

⁷ *Id.* at 1217.

structure, and subsidy payment system.⁸ Next, this Note will outline the facts, procedural history, and relevant case law before explaining the Ninth Circuit’s analysis and holding.

Following the Background section, this Case Note will analyze the *Barrientos* decision by examining the FMR arguments raised in the parties’ appellate briefs. To supplement this discussion, this Note will use San Francisco, California as an example to illustrate the discrepancy between FMR estimates and actual market rent. Finally, this Note will discuss the implications of undervalued FMRs for landlords and tenants in the current market, and will suggest a possible solution to ensure the Section 8 HCV program remains effective for low-income renters.

I. BACKGROUND

A. THE SECTION 8 HOUSING PROGRAM

The Section 8 housing program evolved from the United States Housing Act of 1937 (“Housing Act”), which established the first project-based, public housing program in the United States.⁹ Congress later amended the Housing Act through the Housing and Community Development Act of 1974 to formally create the Section 8 housing program.¹⁰ Congress’s purpose in creating the Section 8 program was to “ai[d] low-income families in obtaining a decent place to live and . . . promot[e] economically mixed housing. . . .”¹¹ Congress carried out the program’s purpose by attaching the federal funds to the tenant rather than the rental unit, allowing tenants to use the vouchers in a portable manner.¹² With new mobility and freedom, renters were no longer limited to project-based housing; they could now contract with private landlords, thus improving housing options for low-income renters both qualitatively and quantitatively.¹³ The value and importance of the Housing Choice Voucher (HCV) program is evident – the HCV program remains the

⁸ *Barrientos* discusses two types of federal aid: standard housing choice vouchers and enhanced vouchers. *Barrientos*, 583 F.3d at 1206. This Case Note will focus only on housing choice vouchers and not on enhanced vouchers.

⁹ Zachary Bray, *The New Progressive Property and the Low-Income Housing Conflict*, 2012 BYU L. REV. 1109, 1127–28 (2012).

¹⁰ *Id.* at 1128.

¹¹ 42 U.S.C.A. § 1437f(a) (West 1999).

¹² Katie R. Jones, *Section 8 Housing: Safety Net or Tangled Web? An Overview of Section 8 Tenancy Termination and Related Due Process Issues*, 23 NO. 2 MILLER & STARR, REAL ESTATE NEWSALERT1, Nov. 2012, at 1, 2012 WL.

¹³ Bray, *supra* note 9, at 1130–32.

largest federal rental assistance program in the United States today, servicing roughly 2.1 million households.¹⁴

The HCV program is structured between three contracting parties: the renter, the federal government via Public Housing Authorities (PHAs), and the private landlord. First, the renter must locate a private landlord in the market willing to accept the Section 8 renter as a tenant.¹⁵ Once the renter locates a landlord willing to participate, the county's PHA oversees the contracting process.¹⁶ After the PHA determines that the unit is habitable and the unit's rent is reasonable compared to other similar unassisted units, the PHA will sign a Housing and Assistance Payment (HAP) contract with the landlord.¹⁷ The HAP contract outlines various obligations and rights of the landlord, including how the landlord can terminate the tenancy, which will be addressed more extensively in the discussion of *Barrientos*. Finally, the renter will sign a lease with the private landlord.¹⁸ Thus, in order for the renter to utilize the voucher to secure housing, all three parties must willingly and unequivocally assent to contract.

Due to the HCV program structure, rental payments are made in a segmented manner. First, the Department of Housing and Urban Development (HUD) will administer the housing subsidy to the landlord via the PHA.¹⁹ The value of the housing subsidy is calculated using Fair Market Rent (FMR) estimates set by HUD. The FMR is the "40th percentile of gross rents for typical, non-standard rental units occupied by recent movers in a local housing market."²⁰ This estimate includes the cost of rent and utilities, excluding the cost of telephones.²¹ Each PHA has some flexibility in setting the local payment standard based on the FMR estimate, and may set the standard from 90 to 110 percent of the

¹⁴ *United States Fact Sheet: The Housing Choice Voucher Program*, CTR. ON BUDGET AND POL'Y PRIORITIES 1, http://www.cbpp.org/sites/default/files/atoms/files/3-10-14hous-factsheets_us.pdf (last visited Oct. 16, 2015).

¹⁵ *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/about/fact_sheet (last visited Oct. 16, 2015) [hereinafter *Housing Choice Vouchers Fact Sheet*] (occurring after the renter meets the Section 8 program eligibility requirements).

¹⁶ *Id.*

¹⁷ *Id.*; *Public Housing, HUD, Sect. 8*, HOUS. RIGHTS COMM. OF SF, <http://www.hrcsf.org/SubHousing/subhsngindex.html> (last visited Sept. 12, 2015).

¹⁸ *Housing Choice Vouchers Fact Sheet*, *supra* note 15.

¹⁹ *Id.*

²⁰ U.S. Housing Market Conditions Summary, *Fair Market Rents*, U.S. DEP'T OF HOUS. & URBAN DEV. (Feb. 1999), <http://www.huduser.org/periodicals/ushmc/winter98/summary-2.html>

²¹ U.S. Housing Market Conditions Summary, *Fair Market Rents for the Section 8 Housing Assistance Payments Program*, U.S. DEP'T OF HOUS. & URBAN DEV. (Oct. 13, 1995), https://portal.hud.gov/hudportal/documents/huddoc?id=DOC_8402.pdf

FMR established by HUD.²² If the payment standard does not cover the full cost of rent, the tenant is responsible for paying the difference.²³ Voucher tenants will usually pay “30-40%” of their monthly income to cover the remaining rental balance.²⁴

In conclusion, readers should extrapolate three key points from this concentrated glimpse at the Section 8 program. First, Congress created the Section 8 program to assist low-income families, and intended for the portable voucher to be the means for achieving that end. Second, the Section 8 HCV program will operate only if all three parties, the renter, the landlord and the PHA (federal government), agree to participate. Third, while PHA’s can increase the housing subsidy value to some degree, the FMR estimate is the base calculation for rent and tenants are expected to pay any difference between the housing subsidy value and the actual cost of rent.

B. *BARRIENTOS*: FACTS, PROCEDURAL HISTORY, CASE LAW

1. *Facts and Procedural History*

The dispute in *Barrientos* is between Morton LLC and twenty-two Section 8 voucher tenants.²⁵ Morton LLC manages the Morton Gardens apartment complex, which is subject to the Los Angeles Rental Stabilization Ordinance’s eviction protections because the complex was built prior to 1979.²⁶ The twenty-two voucher tenants residing in the units are comprised of six housing choice voucher tenants and sixteen enhanced voucher tenants.²⁷

The conflict began when Morton LLC issued 90-day eviction notices to the twenty-two tenants.²⁸ The eviction notices asserted “a business or economic reason, including but not limited to, the desire to opt-out of the Tenant Based Section 8 Program and or the desire to lease the unit at a higher rental rate,”²⁹ as the reason for the eviction. The HAP contract

²² Housing Choice Voucher Guidebook, *Chapter 7: Payment Standards*, U.S. DEP’T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_35617.pdf (last visited Oct. 16, 2015).

²³ *Housing Choice Vouchers Fact Sheet*, *supra* note 15.

²⁴ HOUS. RIGHTS COMM. OF SF, *supra* note 17.

²⁵ *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1206 (9th Cir. 2009).

²⁶ *Id.* at 1205–06.

²⁷ *Id.* at 1206. Enhanced vouchers are a separate type of federal rental assistance. The discussion of enhanced vouchers relevant to *Barrientos* will be deemphasized for this Case Note.

²⁸ *Id.*

²⁹ *Id.* Although the eviction notice cited two reasons for the eviction, the Ninth Circuit determined that Morton LLC’s sole reason for evicting the Section 8 tenants was to raise rent. *Id.* at 1207 n.4.

between Morton LLC and the Housing Authority of the City of Los Angeles (HACLA) enumerated this eviction provision as one landlords may use to evict Section 8 HCV tenants.³⁰

Upon receiving the eviction notices, the tenants filed a lawsuit in the Central District of the United States District Court in California seeking declaratory judgment and an injunction barring their eviction.³¹ The tenants next filed a motion for summary judgment, arguing that LARSO does not allow tenants living in units subject to LARSO's eviction protections to be evicted for a "business or economic" reason, and that LARSO is not preempted by federal law.³² Though Morton LLC opposed the motion, the district court ultimately granted the motion in favor of the tenants.³³ The court found that, although LARSO and 24 C.F.R. § 982.310(d)(1)(iv) actually conflict, HUD exceeded its authority by defining "good cause" as to include evictions based purely on a desire to raise rent.³⁴ The court held that a "business or economic" reason does not constitute "good cause" sufficient for eviction, and is not consistent with the purpose of the statute.³⁵ Morton LLC appealed to the Ninth Circuit, and numerous amicus curiae briefs were filed in support of and in opposition to the district court's ruling. Perhaps the most important amicus brief submitted was that of the United States, which assisted in interpreting HUD's "other good cause" regulation.³⁶ The United States' amicus brief will be discussed in the Analysis portion of this Note.

2. *Housing Law – Federal: U.S. Housing Act of 1937 and 24 C.F.R. § 982.310(d)(1)(iv) v. Local: Los Angeles Rent Stabilization Ordinance*

In *Barrientos*, the Ninth Circuit addressed the preemption question of whether federal or local eviction law prevailed. The case drew upon two sources of federal law: the United States Housing Act of 1937 ("Housing Act") and 24 C.F.R. § 982.310, a federal regulation promul-

³⁰ *Id.* at 1206.

³¹ *Id.*

³² *Barrientos v. 1801-1825 Morton LLC*, No. CV 06-6437 ABC (FMOx), 2007 WL 7213974, at *4 (C.D. Cal. Sept. 11, 2007).

³³ *Barrientos*, 583 F.3d at 1207. The motion for summary judgment was also granted on behalf of the enhanced voucher tenants for other specific reasons, but that discussion is omitted for the purposes of this Case Note.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See Brief for the United States as Amicus Curiae Supporting Affirmance of the District Court's Judgment, *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197 (9th Cir. 2009) (No. 07-56697). This Brief can be located on the National Housing Law Project's website. See *Barrientos v. 1801-1825 Morton, LLC*, NATIONAL HOUSING LAW PROJECT, <http://nhlp.org/files/Barrientos,%20United%20States%20Amicus%20Brief.pdf> (last visited Oct. 24, 2015).

gated by the Department of Housing and Urban Development (HUD). The case also involved LARSO, the local rental ordinance that contains specific eviction protections for tenants residing in subject units.

a. Preemption

The U.S. Constitution prescribes that under the Supremacy Clause, state or local law cannot stand in conflict with federal law.³⁷ Federal law will preempt state or local law when a federal law contains express preemptive language, or when the intent of Congress to preempt state law is inferred, otherwise known as implied preemption. Implied preemption occurs in two main variants: field preemption and conflict preemption. *Field preemption* occurs when federal regulation in an area is “so pervasive” that no room remains for state regulation.³⁸ *Conflict preemption* occurs when compliance with federal and state law is an actual or physical impossibility³⁹ or when the state law is an obstacle or impediment to achieving the federal law.⁴⁰ To determine whether federal law preempts state law, the court will examine legislative history, Congressional intent, statutory language, and other indicia of preemption.

b. Federal Law

The federal laws at issue in *Barrientos* are the Housing Act and 24 C.F.R. §982.310(d)(1)(iv). The Housing Act provides that “during the term of the lease, the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for *other good cause*.”⁴¹ The HUD regulation created to implement the Section 8 voucher program contains the same three avenues for eviction as the U.S. Housing Act, including “other good cause.”⁴² However, HUD’s regulation expanded the Housing Act’s “other good cause” provision, holding that it “*may include*, but is not limited to . . . [a] business or economic reason for termination of the tenancy (such as sale of the property, renovation of the unit, or *desire to lease the unit at a higher rental*) [rate].”⁴³

³⁷ U.S. CONST. art. VI, cl. 2.

³⁸ *Arizona v. U.S.*, 132 S. Ct. 2492, 2501 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

³⁹ *Id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

⁴⁰ *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁴¹ 42 U.S.C.A. § 1437f(o)(7)(C) (West 2011) (emphasis added).

⁴² 24 C.F.R. § 982.310(a) (West 2010).

⁴³ 24 C.F.R. § 982.310(d)(1)(iv) (West 2010) (emphasis added).

Thus, under federal law, a landlord can evict a tenant for an “other good cause – business or economic reason.”

c. Local Law

The local law pertinent to *Barrientos* is the Los Angeles Rent Stabilization Ordinance. Pursuant to LARSO, a landlord can assert any of the fourteen enumerated eviction provisions to evict a tenant living in a unit subject to the ordinance.⁴⁴ Significantly, LARSO does not include a “business or economic” reason, such as when the landlord desires to lease the apartment at a higher price, as a permissible reason for eviction.⁴⁵ Therefore, because LARSO does not enumerate a “business or economic” reason as a possible ground for eviction, a landlord may not evict a tenant living in a subject unit for that reason.

C. NINTH CIRCUIT REASONING AND CONCLUSION

The Ninth Circuit affirmed the grant of summary judgment to the tenants, finding that LARSO did not conflict with or impede the purpose of 24 C.F.R. § 982.310 and therefore was not preempted by federal law.⁴⁶ The court’s reasoning was guided by several sources of information, including the statutory language and history of the “other good cause” reason, the amicus brief of the United States, and a Public and Indian Housing (PIH) notice released by HUD.⁴⁷ Thus, because federal law did not preempt LARSO, the court concluded that the Section 8 HCV tenants could not be evicted from their units for a “business or economic reason,” such as the desire to raise rent.⁴⁸

1. “Other Good Cause” Language and Legislative History

First, the court examined the language and legislative history of the “other good cause” provision in deciding that HUD did not intend for LARSO to preempt local eviction law.⁴⁹ Though HUD implemented “other good cause” to make subsidized tenancies as similar to the private market as possible, HUD still intended for local courts to make final,

⁴⁴ L.A., CAL., MUN. CODE § 151.09A (1980), [http://www.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:losangeles_ca_mc](http://www.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:losangeles_ca_mc)

⁴⁵ L.A., CAL., MUN. CODE § 151.09A.

⁴⁶ *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1215 (9th Cir. 2009).

⁴⁷ *Id.* at 1214–15.

⁴⁸ *Id.* at 1215.

⁴⁹ *Id.* at 1209–10.

individualized decisions as to what constitutes good cause.⁵⁰ As evident from the permissive “may include” language of the “other good cause” provision, the examples of “other good cause” are merely an illustrative list from which local courts can either find or not find good cause.⁵¹ The court noted that if the federal “other good cause” regulation was intended to preempt local eviction controls, this would conflict with other federal regulations and produce illogical results.⁵² For example, the court referenced a federal regulation subjecting Section 8 rent determinations to local rent control standards, and stated that landlords could circumvent these rent control protections using the “other good cause” eviction measure if federal law preempted local eviction controls.⁵³ Thus, HUD did not intend for the “other good cause” provision to preempt local eviction protections.⁵⁴

Additionally, the court found that federal and local law did not actually conflict, and local law was not an obstacle to implementing federal law.⁵⁵ The court found that the laws did not actually conflict because both aim to “to increase the availability and affordability of housing.”⁵⁶ While state courts cannot control all Section 8 evictions, state courts have authority to determine “good cause.”⁵⁷ For this reason, the “good cause” regulation merely represents a floor, below which protections for Section 8 tenants must not fall.⁵⁸ This prevents states from eliminating the “good cause” protection for tenants, but does not prevent states from increasing protections, i.e., finding that examples of other “good cause” do not apply.⁵⁹

The court also found local law was not an obstacle to implementing federal law because LARSO merely eliminated “an exception (termination to increase the rent permissible) to a federal prohibition (no termination without good cause).”⁶⁰ The court analogized *Barrientos* to another Ninth Circuit case, *Chevron U.S.A., Inc. v. Hammond*,⁶¹ where a state law eliminated “an exception (clean discharge permissible) to a federal

⁵⁰ *Id.* at 1209.

⁵¹ *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1209 (9th Cir. 2009) (quoting 60 F.R. 34660-01 (1995) later codified at 24 C.F.R. § 982.310(d) (2010)).

⁵² *Barrientos*, 583 F.3d at 1209–10.

⁵³ *Id.*

⁵⁴ *Id.* at 1210.

⁵⁵ *Id.*

⁵⁶ *Id.* (contrasting *Barrientos* with 42 U.S.C.A. § 1437f(a) (West 2014); L.A., CAL., MUN. CODE § 151.01).

⁵⁷ *Id.* at 1209.

⁵⁸ *Id.* at 1207, 1211.

⁵⁹ *Id.* at 1210.

⁶⁰ *Id.* at 1212.

⁶¹ 726 F.2d 483 (9th Cir. 1984).

prohibition (no discharge),” and distinguished *Barrientos* from a Supreme Court case, *Fid. Fed. Sav. and Loan Ass’n v. de la Cuesta*,⁶² where a “federal agency permitted an action . . . that the state forbade.”⁶³ The Ninth Circuit’s decision in *Hammond* that a finding of preemption based on the state’s elimination of a federal exception would be “inappropriate” helped guide the Ninth Circuit’s decision in *Barrientos*.⁶⁴ Thus, the court found LARSO did not conflict with, and was not an obstacle to, federal law.⁶⁵

2. *United States’ Amicus Curiae Brief*

Second, the court gave deference to the United States’ amicus curiae brief. The United States affirmed that LARSO’s eviction protections are not “an obstacle to the accomplishment and execution of the full purposes and objectives of HUD’s regulation”⁶⁶ To support its conclusion, the United States pointed to three excerpts of relevant statutory language. First, the United States offered several examples of federal, state, and local law operating interdependently, including 42 U.S.C. § 1437f(o)(7)(E) which holds that “HAP contract[s] ‘shall provide’ that ‘any relief [from termination] shall be consistent with applicable State and local law.’”⁶⁷ Next, the United States emphasized the permissive “may include” wording used in 24 C.F.R. § 982.310(d)(1), which states “[o]ther good cause’ for termination of tenancy by the owner *may include*, but is not limited to, any of the following examples.”⁶⁸ Finally, the

⁶² 458 U.S. 141 (1982).

⁶³ *Id.* at 1210 (comparing *Barrientos* with *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 498 (9th Cir. 1984) and *Fid. Fed. Sav. and Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 175 (1982)).

⁶⁴ *Id.*

⁶⁵ The court also referenced two prior LARSO cases in its obstacle analysis. Although the cases involved different federal housing statutes, both cases involved a question of whether LARSO conflicted with federal law. In both cases, the court concluded that LARSO was not an obstacle to federal objectives. *Barrientos*, 583 F.3d at 1212–13 (analogizing *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065, 1067 (9th Cir. 2003); *Independence Park Apartments v. U.S.*, 449 F.3d 1235, 1243–44 (Fed. Cir. 2006)).

⁶⁶ *Barrientos*, 583 F.3d at 1213 (citing Brief for the United States as Amicus Curiae Supporting Affirmance of the District Court’s Judgment, *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197 (9th Cir. 2009) (No. 07-56697)). The Brief for the United States as Amicus Curiae can be located on the National Housing Law Project’s website. See *Barrientos v. 1801-1825 Morton, LLC*, NATIONAL HOUSING LAW PROJECT, <http://nhlp.org/files/Barrientos,%20United%20States%20Amicus%20Brief.pdf> (last visited Oct. 24, 2015).

⁶⁷ *Barrientos*, 583 F.3d at 1213 (citing Brief for the United States as Amicus Curiae Supporting Affirmance of the District Court’s Judgment, *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197 (9th Cir. 2009) (No. 07-56697)) (emphasis added).

⁶⁸ *Id.* at 1213 (citing Brief for the United States as Amicus Curiae Supporting Affirmance of the District Court’s Judgment, *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197 (9th Cir. 2009) (No. 07-56697)) (emphasis added).

United States stressed that the wording in 24 C.F.R. § 982.310(d)(1) is very general and in no way “gives a landlord an unqualified ‘right’ to terminate a Section 8 tenancy because he wants to raise the rent.”⁶⁹ Thus, the United States determined that federal law does not preempt LARSO.⁷⁰

3. HUD’s Public and Indian Housing (PIH) Notice

Finally, the court gave deference to a Public and Indian Housing (PIH) notice released by HUD to help resolve the preemption question.⁷¹ To explain HUD’s position, the PIH notice also emphasized the use of “may include” in the federal regulation, but provided a clearer definition of the phrase.⁷² The “may include” language is permissive, meaning “may include” in some instances but “may not include” in others.⁷³ When a state or local jurisdiction allows evictions for a “business or economic” reason, then the “business or economic” reason constitutes “other good cause” sufficient to evict the HCV tenant.⁷⁴ However, when a state or local jurisdiction prohibits evictions for a “business or economic” reason, then the “business or economic” reason does not constitute “other good cause” necessary for an eviction.⁷⁵ Thus, the PIH notice affirmed the Ninth Circuit’s and the United States’ position.

In conclusion, the court affirmed the grant of summary judgment to the tenants because the court’s analysis, the United States’ amicus brief, and the PIH notice elucidated that LARSO’s eviction protections do not frustrate the purpose of, or actually conflict with, the HUD regulation.⁷⁶ Thus, because LARSO does not permit evictions of tenants for a “busi-

⁶⁹ *Id.* (citing Brief for the United States as Amicus Curiae Supporting Affirmance of the District Court’s Judgment, *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197 (9th Cir. 2009) (No. 07-56697)).

⁷⁰ *Id.* at 1214 (citing Brief for the United States as Amicus Curiae Supporting Affirmance of the District Court’s Judgment at 26, *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197 (9th Cir. 2009) (No. 07-56697)).

⁷¹ *Barrientos*, 583 F.3d at 1214 (citing Paula O. Blunt, *Notice PIH 2009-18 (HA)*, DEP’T OF HOUS. & URBAN DEV. (2009), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_9019.pdf).

⁷² *Id.* (citing Paula O. Blunt, *Notice PIH 2009-18 (HA)*, DEP’T OF HOUS. & URBAN DEV. (2009), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_9019.pdf).

⁷³ *Id.* (citing Paula O. Blunt, *Notice PIH 2009-18 (HA)*, DEP’T OF HOUS. & URBAN DEV. (2009), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_9019.pdf).

⁷⁴ *Id.* (citing Paula O. Blunt, *Notice PIH 2009-18 (HA)*, DEP’T OF HOUS. & URBAN DEV. (2009), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_9019.pdf).

⁷⁵ *Id.* (citing Paula O. Blunt, *Notice PIH 2009-18 (HA)*, DEP’T OF HOUS. & URBAN DEV. (2009), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_9019.pdf).

⁷⁶ *Barrientos*, 583 F.3d at 1215, 1217.

ness or economic” reason, Morton LLC’s attempt to evict the tenants was contrary to law.

II. ANALYSIS OF *BARRIENTOS* DECISION & IMPLICATIONS

A. *BARRIENTOS* DECONSTRUCTED

1. *Analyzing the Decision*

Barrientos strengthened protections for low-income, Section 8 HCV renters by precluding landlords from evicting them for a “business or economic” reason when that eviction reason is not enumerated in the local rental ordinance. However, the decision simultaneously foreshadowed an intensifying struggle between landlords and low-income, Section 8 HCV renters surrounding the issue of escalating rents in a market economy, exceeding that which can reasonably be paid with Section 8 vouchers, based on Fair Market Rent estimates.

While this Note’s critique and solution is directed more towards HUD, San Francisco Housing Authority (SFHA), and local government than the Ninth Circuit, this Note will use *Barrientos* as a vehicle to address the FMR issue because the parties raised the issue in their appellate briefs. Morton LLC’s discussion of the FMR issue in its appellate brief⁷⁷ elucidates Morton LLC’s impetus for evicting the tenants for a “business or economic” reason – a justification that has become even more pronounced in the interim of *Barrientos* and today. The Ninth Circuit’s decision and HUD’s input show that Section 8 tenants’ interests must be prioritized.⁷⁸ However, the decision also forecasted that failing to address the FMR argument and give weight to the landlords’ interests could further diminish housing opportunities for Section 8 HCV renters.

2. *Parties’ FMR Arguments Raised in Appellate Briefs*

Although the FMR issue was not expressly addressed by the Ninth Circuit, both parties discussed the issue in their appellate briefs as part of each respective preemption argument. Morton LLC raised the FMR issue in support of an argument that HUD’s regulation is “consistent with Congress’ intent to promote for-profit, owner participation in the provision of decent, economically-mixed, affordable housing.”⁷⁹ Morton LLC argued

⁷⁷ Brief of Appellant at 33-34, *Barrientos v. 1801 Morton LLC*, 583 F.3d 1197 (9th Cir. 2009) (No. 07-56697), 2008 U.S. 9th Cir. Briefs LEXIS 670.

⁷⁸ *Barrientos*, 583 F.3d at 1210.

⁷⁹ Brief of Appellant, *supra* note 77, at 37.

that, but for the landlord's voluntary participation in the program – which Morton LLC argued is contingent upon receiving a fair return on investment – Congress could not fulfill its purpose for renters.⁸⁰ In support of this argument, Morton LLC referenced a House Report from the Committee on Banking and Financial Services stating, “Despite its best efforts, HUD’s FMRs do not always accurately reflect actual market rents for certain areas and submarkets within broadly defined areas. In fact, the description most often made of FMRs is that they are neither fair nor market.”⁸¹ Thus, Morton LLC argued that the “business or economic” eviction measure protects landlords against below-market FMRs, which in turn promotes landlord participation in the program.⁸²

The tenants responded to Morton LLC’s argument by clarifying which party FMRs limit, and by emphasizing the purpose of the Section 8 HCV program. First, the tenants asserted that FMRs limit the subsidy a family can receive, but do not limit the amount of rent an owner can receive.⁸³ In other words, though the subsidy may not be enough to cover the cost of rent, HCV tenants can personally pay the difference between the subsidy and cost of rent. Additionally, the tenants reaffirmed that the purpose of the Section 8 program is to assist low-income families, not to encourage owner participation in the program.⁸⁴ According to the tenants, Congress has attempted to serve the interests of owners by making assisted and unassisted tenancies as similar as possible; however, the primary focus is, and always has been, on the tenants, so their interests should be served first.⁸⁵ Thus, the tenants were not convinced by Morton LLC’s argument and believed it was misplaced.⁸⁶

B. ILLUSTRATION: SAN FRANCISCO, CALIFORNIA

1. *Housing Subsidies and FMRs*

To examine Morton LLC’s Fair Market Rent (FMR) argument in a more concrete manner, San Francisco, California will be used as an example. The following calculations are based on several hypothetical variables: (1) a family of three living in the Extremely Low (30 percent)

⁸⁰ *Id.* at 35–36.

⁸¹ *Id.* at 34–35 (citing H. REP. NO. 104-461, at 100-101 (1996)).

⁸² *Id.* at 35.

⁸³ Brief of Appellees’ at 80, *Barrientos v. 1801 Morton LLC*, 583 F.3d 1197 (9th Cir. 2009) (No. 07-56697), 2008 U.S. 9th Cir. Briefs LEXIS 674.

⁸⁴ *Id.* at 81.

⁸⁵ *Id.* at 80.

⁸⁶ *Id.* at 81.

Income Limit Category;⁸⁷ (2) a one-bedroom apartment, which is not a studio;⁸⁸ and (3) a unit with utilities included, i.e., the family must pay only rent.

First, for San Francisco's 2014 fiscal year, a family of three living in the "30% Area Median Income (AMI)" bracket made a gross annual income of \$29,900,⁸⁹ averaging to roughly \$2,492 per month. For a one-bedroom apartment in the San Francisco, CA HUD Metro FMR Area, FMR is set at \$1,551.⁹⁰ Based on HUD's FMR, the San Francisco Housing Authority (SFHA) set its payment standard at \$1,473, which is 95 percent of HUD's FMR.⁹¹ As of August 2014, the median asking rent in San Francisco for a one-bedroom apartment was \$3,100.⁹² Because the maximum subsidy SFHA can pay is only \$1,473, the family would need to pay \$1,627 to match actual market rent – approximately 65 percent of the family's monthly income.

Similarly for the 2015 fiscal year, a family of three living in the "30% AMI" bracket made a gross annual income of \$31,650,⁹³ averaging around \$2,638 per month. For a one-bedroom apartment in the San Fran-

⁸⁷ This means the family's income "do[es] not exceed the greater of 30 percent of the median family income for the area or the federal poverty guidelines" established by the Department of Health and Human Services. The Extremely Low category was selected because Public Housing Authorities must give 75 percent of its vouchers to individuals and families in this income category. *FY 2015 HUD Income Limits Briefing Materials*, U.S. DEP'T OF HOUS. & URBAN DEV. (Mar. 10, 2015), http://www.huduser.org/portal/datasets/il/il15/IncomeLimitsBriefingMaterial_FY15_Rev_2.pdf.

⁸⁸ The smallest unit a family of three can live in based on Section 8 occupancy limits is a one bedroom apartment. *Housing Choice Voucher Program Administrative Plan*, SAN FRANCISCO HOUS. AUTH., 148 (2015) <http://www.sfha.org/ca001b01.pdf>.

⁸⁹ U.S. DEP'T OF HOUS. & URBAN DEV., Final FY 2014 FMRs, *HUD Income Limits Documentation System* (2014), HUD.GOV, http://www.huduser.gov/portal/datasets/il/il14/index_il2014.html (follow "Click Here for Final FY2014 IL Documentation" link; then search "San Francisco, CA HUD Metro FMR Area" for a FY 2014 HUD Metropolitan Fair Market Rent/Income Limits Area (HMFA); then follow "Select HMFA Income Limits Area" link).

⁹⁰ U.S. DEP'T OF HOUS. & URBAN DEV., Final FY 2014 FMRs, *HUD Fair Market Rent Documentation System* (2014), HUD.GOV, <http://www.huduser.gov/portal/datasets/fmr/fmrs/docsys.html?data=fmr14> (follow "Click Here for Final FY2014 FMRs" link; then search "San Francisco, CA HUD Metro FMR Area" for a FY 2014 HUD Metro Fair Market Rent Area; then follow "Select HUD FMR Area" hyperlink).

⁹¹ *2014 Maximum Monthly Rent By Unit Type* (Jan. 1, 2014), SAN FRANCISCO MAYOR'S OFFICE OF HOUS. AND CMTY. DEV., <http://sf-moh.org/modules/showdocument.aspx?documentid=7572>

⁹² Tanguy Le Louarn, *Introducing – Zumper Monthly Rent Report: August 2014*, ZUMPER.COM (Sept. 16, 2014), <https://www.zumper.com/blog/2014/09/us-average-rent-august-2014>.

⁹³ U.S. DEP'T OF HOUS. & URBAN DEV., FY 2015 Income Limits, *HUD Income Limits Documentation System* (2015), HUD.GOV, http://www.huduser.org/portal/datasets/il/il15/index_il2015.html (follow "Click Here for FY 2015 IL Documentation" link; then search "San Francisco, CA HUD Metro FMR Area" link for a FY 2015 HUD Metropolitan Fair Market Rent/Income Limits Area (HMFA); then follow "Select HMFA Income Limits Area" link).

cisco, CA HUD Metro FMR Area, FMR is set at \$1,635.⁹⁴ Based on HUD's FMR, SFHA set its payment standard at \$1,798 for a one-bedroom apartment, which is 110% of HUD's FMR.⁹⁵ As of August 2015, the median asking rent in San Francisco for a one-bedroom apartment was \$3,500.⁹⁶ SFHA's maximum subsidy is only \$1,798, meaning the family would need to pay \$1,702 to match actual market rent – which, again, is over 60 percent of the family's monthly income.

2. *Impact on Landlord and Tenant & Solutions Moving Forward*

As evidenced by San Francisco's statistics, a discrepancy exists between the FMRs set by HUD, the subsidy value set by SFHA, the actual market cost of rent, and the remaining balance tenants must pay. Undervalued FMRs and payment standards place a unique burden on tenants and landlords, which calls for a creative solution to meet each party's needs.

For low-income families seeking new housing in San Francisco, the burden falls on each family to pay the additional out-of-pocket cost in order to secure new housing and afford rent. Even if tenants could pay the full amount to match actual market rent, SFHA may not approve the housing if the families' portion exceeds the 40 percent maximum initial rent burden set by HUD.⁹⁷ While the tenants' appellate brief argued that FMRs do not limit the amount of rent a landlord can receive from HCV tenants because tenants can pay the difference in cost, this argument becomes problematic when compared against the exorbitant rents in San Francisco. If low FMRs preclude Section 8 tenants from securing housing, this diminishes the Section 8 program's effectiveness in creating housing opportunities for low-income renters.

For landlords who rented to Section 8 tenants prior to San Francisco's dramatic rental appreciation, the burden falls on landlords to house tenants paying rents far below market. As stated by Morton LLC in its appellate brief, “[b]y its very nature, the Section 8 program limits

⁹⁴ U.S. DEP'T OF HOUS. & URBAN DEV., Final FY 2015 FMRs, *HUD Fair Market Rent Documentation System* (2015), HUD.GOV, <http://www.huduser.org/portal/datasets/fmr/fmrs/docsys.html&data=fmr15> (follow “Click Here for Final FY2015 FMRs” link; then search “San Francisco, CA HUD Metro FMR Area” for a FY 2015 HUD Metro Fair Market Rent Area; then follow “Select HUD FMR Area” hyperlink).

⁹⁵ *Fair Market Rents/Payment Standards* (2015), SAN FRANCISCO HOUS. AUTH., http://www.sfha.org/2015_FMR_Payment_Standard_Chart.pdf.

⁹⁶ Devin O'Brien, *Zumper National Rent Report: August 2015*, ZUMPER.COM (Aug. 5, 2015), <https://www.zumper.com/blog/2015/08/zumper-national-rent-report-august-2015/>.

⁹⁷ Housing Choice Voucher Guidebook, *Chapter 6: Calculating Rent and HAP Payments*, U.S. DEP'T OF HOUS. & URBAN DEV. http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11750.pdf (last visited Aug. 30, 2015).

investment return. Every year Section 8 owners must request rent increases from their PHA, which must be supported by market comparables.”⁹⁸ In other words, landlords cannot simply raise rent at their discretion; they must request rent increases from SFHA, which are only certain, set percentages. While landlords may be inclined to evict tenants for a “business or economic” reason, *Barrientos* reminds us that this avenue is unavailable to landlords with properties subject to the rent ordinance’s eviction protections. This is relevant to landlords in San Francisco because just like LARSO, the San Francisco Residential Rent Stabilization and Arbitration Ordinance fails to enumerate a “business or economic” reason as a possible ground to evict tenants living in units subject to the ordinance.⁹⁹ Therefore, as market rent increases, landlords are bound to the rent fixed below market with minimal, periodic rent increases. If the market continues to grow in favor of the landlords, this could result in fewer landlords entering and remaining in the program, thereby decreasing the housing supply for tenants.

Thus, in San Francisco, tenants and landlords are both burdened by undervalued FMRs. A solution is needed in order to harmonize landlord-tenant interests and ensure the Section 8 program remains effective and in place to serve tenants. The clear solution is to demand more money from HUD through increased FMRs, thereby increasing the value of payment standards set by PHAs. However, this solution is implausible considering the 2.1 million HCV households HUD serves,¹⁰⁰ and the reality that not all localities are facing the same housing crisis as San Francisco. A more plausible solution is for San Francisco to pass progressive, innovative legislation to protect tenant interests while finding better ways to incentivize landlords to enter and remain in the program. Ideally, the legislation should be aimed at mitigating the disparity between actual market rent and FMRs. While it may not be realistic for San Francisco to affirmatively pay landlords additional funds, new legislation could accomplish similar goals by creating tax rebates or tax credits for landlords renting to Section 8 tenants.

Passing legislation with a dual function of protecting tenants and incentivizing landlords is consistent with *Barrientos*. First, *Barrientos* makes clear that Section 8 tenants are entitled to strong protections. As the Ninth Circuit emphasized in its discussion of the “other good cause” provision, states and localities can enhance protections for tenants be-

⁹⁸ Brief of Appellant, *supra* note 77, at 35.

⁹⁹ See S.F. ADMIN. CODE § 37.9 (1980), http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco_ca

¹⁰⁰ CTR. ON BUDGET AND POL’Y PRIORITIES, *supra* note 14.

yond those afforded by HUD.¹⁰¹ Additionally, the Section 8 program has the explicit purpose of helping low-income families secure safe, affordable housing.¹⁰² However, legislation aimed at incentivizing landlords is also consistent with the Ninth Circuit's and HUD's position in *Barrientos*. Although the Section 8 program is designed to help tenants rather than landlords, private landlords are identified as the means for effectuating the Section 8 program.¹⁰³ While the Section 8 program could always employ other means to fulfill the program's ends, a simpler solution would be to give some weight to the landlord's interest in light of the bleak housing options for tenants and highly profitable market for landlords. Thus, a more practical, balanced approach would only improve housing opportunities for tenants.

CONCLUSION

Barrientos is significant in many ways. First, the case resolved the preemption issue of whether a landlord can evict a Section 8 tenant from a unit subject to the local rental ordinance for an "other good cause – business or economic" reason when the ordinance fails to enumerate that reason as a possible ground for eviction. The Ninth Circuit was correct in concluding that the HUD regulation does not preempt LARSO, therefore landlords cannot evict Section 8 tenants for a "business or economic" reason when the ordinance fails to enumerate the reason. Second, the case exposes the underlying issues surrounding FMRs and actual market rent, and the rights of landlords to participate in the free market versus the rights of tenants to affordable housing.

The Ninth Circuit's decision echoes the beliefs of Congress and HUD in stating that "owner participation [is] an important means to the ultimate end of providing housing, but not a goal in itself,"¹⁰⁴ meaning the primary focus is on "the availability and affordability of housing" for tenants.¹⁰⁵ While the focus is rightfully on the welfare of low-income tenants, this Note also raised the concern that Morton LLC's unacknowledged FMR argument might have long-term, negative effects on low-income renters. This is true especially, since as discussed in the Section 8 Background section, private landlords are needed to contract with Section 8 HCV tenants. The "business or economic" reason was intended to increase affordable housing opportunities for families, but in the current

¹⁰¹ See *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1210 (9th Cir. 2009).

¹⁰² See 42 U.S.C.A. § 1437f(a) (West 2014).

¹⁰³ See *Barrientos*, 583 F.3d at 1210.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

rental market, could begin to contribute to diminished housing opportunities for Section 8 tenants. Thus, a more balanced approach to the Section 8 program is needed to ensure long-term support for Section 8 HCV renters.