No. A166606

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

California Department of Housing and Community Development and Gustavo Velasquez,

Petitioners,

v.

The Superior Court of the State of California for the County of Alameda,

Respondent,

Alliance of Californians for Community Empowerment (ACCE) Action; PolicyLink; Strategic Actions for a Just Economy (SAJE),

Real Parties in Interest.

Alameda County Superior Court Case No. 22CV012263
The Honorable Frank Roesch, Judge

PRELIMINARY OPPOSITION TO PETITION FOR EXTRAORDINARY WRIT OF MANDATE

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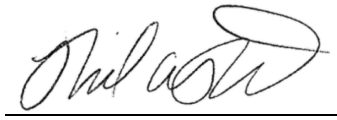
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS INITIAL CERTIFICATE

Pursuant to Rules 8.208 and 8.488 of the California Rules of Court, real parties in interest certify that there are no interested entities or persons that must be listed in this certificate under Rule 8.208.

Respectfully submitted,

DATED: December 5, 2022

WESTERN CENTER ON LAW & POVERTY

By: 

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INTRODUCTION

The Department of Housing and Community Development (HCD) denies statutory emergency rental assistance to tens of thousands of California tenants without providing any real explanation for why the denials were issued, and without permitting those tenants to see the documents HCD has relied on for the denials. When, as in many instances, the documents have been submitted to the Department by adversarial landlords, the tenants have no way of knowing how to contest decisions that will lead to their evictions and homelessness. And HCD's denial notices merely check a box indicating the category in which a denial falls without any attempt to explain the factual reason for the individual denial. HCD thus denies tenants a meaningful opportunity to appeal the Department's adverse decision. As the trial court concluded when denying HCD's motion to dissolve the preliminary injunction, "I just can't understand how anybody could think that that comports with due process of law."

HCD has filed a petition for extraordinary relief, arguing that its appeal system is essentially perfect, never leading to erroneous denials of rental assistance. But declarations from organizations which collectively have assisted thousands of tenants paint a different picture. Tenant advocates uniformly have testified that applications for rental assistance are often erroneously denied; neither the denial notice nor any other HCD procedure provides tenants with sufficient information for a meaningful opportunity to appeal; and only those tenants who

can find assistance from an experienced advocate are able to navigate the process. Considering these facts, the trial court correctly held that HCD has violated the due process clause of the California Constitution. That decision should be upheld.

The Department claims that it is seeking emergency relief because it is running out of money, a claim belied by the four months that have passed since the issuance of the injunction and HCD's acknowledgement that operational funds will last until August 2023. And HCD received an additional $212 million for the rental assistance program *since the filing of the motion to dissolve the injunction*. There is no emergency. The petition for extraordinary relief should be denied.

STATEMENT OF THE CASE

A. With significant federal funding, the Legislature enacts the Emergency Rental Assistance Program, providing rental assistance to tenants who meet specified eligibility standards.

Recognizing that the COVID-19 pandemic caused millions of Americans to fall behind on their rent and face eviction, Congress established the Emergency Rental Assistance Program. Federal law dictates that ERAP funds be distributed for assistance with rent, rental arrears, utilities, and other enumerated housing expenses. 15 U.S.C. §§ 9058a(c)(2)(A), 9058c(d)(1)(A). California initially received $5.2 billion, most of it administered by HCD. Pet. at 17, ¶ 6. The stated purpose of the program is "stabilizing households and preventing evictions." Health & Safety Code § 50897.6.

Both state and federal law specify tenant eligibility requirements. Health & Safety Code §§ 50897.1(e)(1)-(e)(2) (tenants must meet federal requirements); 15 U.S.C. § 9058c(f)(2) (tenants must have lost income or receive unemployment benefits; face threat of homelessness; and qualify as low income). For tenants who meet these eligibility requirements, "[a]ssistance for rental arrears shall be set at compensation of 100 percent of an eligible household's unpaid rental debt accumulated on or after April 1, 2020." Health & Safety Code § 50897.1(d)(1).

B. The Department adopts an application procedure resulting in denials of rental assistance without meaningful explanation and without permitting tenants to see the documents used against them.

Tenants seeking rental assistance complete a detailed online application on an HCD website. Pet'rs App., Volume 3 at 584-622 (3 A. 584-622). The application and the website were developed by a private contractor, Horne LLP, that HCD contracted with to run the rental assistance program. Tenants using Horne's application are required to upload supporting documents establishing their identity, income, tenancy, and rental debt. Landlords can separately initiate an application that requires parallel information. An omission or a mistake on even a minor detail can be potentially fatal to an application. *See*, *e.g.,* 1 A. 173 (Decl. of Joshua Kramer, ¶ 22) (application denied for failure to list the landlord's email address).

HCD denies a large number of applications. As of July 22, 2022, 29% of reviewed applications had been denied. National Equity Atlas, *State of Denial: Nearly a Third of Applicants to California's Emergency Rent Relief Program Have Been Denied Assistance*, https://nationalequityatlas.org/CARentalAssistance (last visited Dec. 5, 2022). These denials occurred even though 93% of denied applicants met the program's income criteria. *Id.* The Department states that it currently plans to deny an additional 100,000 pending applications. Pet. at 14.

The Department uses a form denial notice. While the form has changed during the course of this litigation, three aspects of

the form and the appeal procedure remain unchanged. *First*, tenants are forbidden access to the documents relied upon for denial of assistance, even when, as in many cases, the documents were provided by their landlords. *See, e.g.,* 1 A. 188 *(*Decl. of Jackie Zaneri, ¶ 26).

Second, the form only identifies a single phrase as the purported basis for denial. HCD's contractor checks a box selecting one of several denial categories. For example, under the current form, albeit not in use because of the preliminary injunction, an application could be denied on the ground that "[i]nconsistent or unverifiable information has been provided by the applicant and cannot be substantiated by the program in section(s) (Insert Section(s))." 2 A. 422; *see also* 2 A. 631 (HCD's proposed revised form). In neither the current nor the Department's proposed revised form is there room for further explanation by the HCD contractor.

Third, tenants have 30 days to appeal a denial of assistance. They can do so only through a password-protected online portal by uploading documents and writing in a single text box. HCD does not tell tenants that they will have no other opportunity to tell their side of the story to the decision-maker beyond this procedure.

C. Plaintiffs file suit, and the trial court issues a preliminary injunction halting rental assistance denials.

Plaintiffs are tenant advocacy organizations, Alliance of Californians for Community Empowerment ("ACCE") Action,

PolicyLink, and Strategic Actions for a Just Economy ("SAJE"). On June 6, 2022, they filed suit in Alameda County Superior Court, naming as Respondents HCD and its Director in his official capacity. The petition, among other relief, seeks a writ of mandate compelling HCD to implement an appeal process that complies with the due process clause. 1 A. 1-25.

Plaintiffs moved for a preliminary injunction, 1 A. 39 *et seq.*, and following a hearing on July 7, 2022, Alameda County Superior Court Judge Frank Roesch granted the motion. The injunction, issued July 14, prevents the Department from denying pending rental assistance applications, and orders HCD to stop the clock on denials that would otherwise become final. 2 A. 471-74. But at the same time, the court specified that the injunction did not prevent the Department from approving applications or from asking for further information from tenants with pending applications. 2 A. 474.

D. Trial court denies HCD's motion to dissolve the injunction.

On September 13, 2022, more than two months after the preliminary injunction hearing, HCD moved to dissolve or modify the injunction. 3 A. 493. The motion proposed two revised documents: the first, a notice requesting additional information, and the second, a revised denial notice. The proposed "request for further information" notifies tenants facing denial on certain grounds what categories of documents they need to submit to fix their applications. But the form does not say why the application is deficient or why additional documents are needed. 3 A. 627-29.

The proposed denial notice revises some of the categories for denial. But tenants who believe they have complied with a request for additional documents can be still be denied on the ground that "[t]he Program was unable to verify your eligibility because the accuracy and/or authenticity of the documents provided in response to the Request for Further Information Form could not be independently verified." 3 A. 631. Neither that checked box—nor any other part of the form—is ever accompanied by a narrative explanation, nor does either form identify what specific document is being rejected, or why.

After considering extensive briefing from the parties, supported by declarations on both sides, the trial court denied the motion to dissolve the injunction from the bench on October 20. After summarizing some of the defects in the denial process, the court stated: "I just can't understand how anybody could think that [the Department's process] comports with due process of law." 5 A. 1132-33. The court issued its Minute Order denying the motion on October 21, 2022. 5 A. 1148. HCD filed its petition with this Court on November 18, more than four months after the issuance of the preliminary injunction.

ARGUMENT

I. The trial court did not abuse its discretion in denying HCD's motion to dissolve or modify the injunction.

This court may disturb the trial court's order upholding the preliminary injunction only if it finds that the court abused its

discretion. *People v. Uber Techs., Inc.*, 56 Cal. App. 5th 266, 282 (2020). This is a high bar that must be demonstrated by a clear showing: "An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice." *Espejo v. The Copley Press, Inc.*, 13 Cal. App. 5th 329, 378 (2017); *see also Ryland Mews Homeowners Assn. v. Munoz*, 234 Cal. App. 4th 705, 711 (2015) ("[T]he burden rests with the party challenging the injunction to make a clear showing of an abuse of discretion"). The Department has failed to make any showing—much less a clear one—that the lower court abused its discretion, or that would otherwise justify granting the extraordinary remedy of an appellate writ.

Indeed, far from abusing its discretion, for the reasons below, the trial court correctly held that the due process clause applies to ERAP, that HCD's current and revised procedures for denying rental assistance fail to comport with due process, and that to comply with due process, HCD must provide adequate explanations for denials and access to the documents that form the basis for the denial decision.

A. As rental assistance payments are important statutory benefits, HCD cannot deny them without providing due process protections.

Article I, § 7 of the California Constitution prohibits the State from depriving any person of "life, liberty, or property, without due process of law . . . ." Denial of emergency rental assistance must comport with this due process requirement. 1 A.

55. HCD attempts to cast doubt on the applicability of the due process clause to the ERAP process by pointing to the fact that the Department has statutory rule-making authority. Pet. at 38 ("[a]ssuming that due process applies even where the Legislature has given HCD broad discretion to fashion rules"), 43. As a matter of law, the Department is wrong that, merely because it has rule-making authority, it need not comply with constitutional due process requirements.

Statutory authorization to promulgate regulations does not immunize those regulations from challenge. *Webb v. Swoap,* 40 Cal. App. 3d 191, 197 (1974) (holding that while three different statutes authorized the state welfare agency to make rules and regulations, none of them authorized the agency's regulation at issue, which the court invalidated). Nor does legislative permission to bypass the rule-making procedures of the Administrative Procedure Act—a commonplace occurrence[1]—give the Department *carte blanche* to violate constitutional rights.

Contrary to HCD's implicit assumption, a litigant need not prove infringement of a statutory *entitlement* or property interest to invoke due process protections under the California Constitution. *People v. Ramirez*, 25 Cal. 3d 260, 266-69 (1979). Rather, a claimant need only "identify a statutorily conferred benefit or interest of which he or she has been deprived to trigger procedural due process under the California Constitution . . . ."

[1] *See, e.g.,* Welf. & Inst. Code § 14005.40(e)(1).

Gresher v. Anderson, 127 Cal. App. 4th 88, 105 (2005).[2] *See, e.g., Saleeby v. State Bar of Cal.,* 39 Cal. 3d 547, 557 (1985) (holding that applicants for payments from a State Bar-administered fund were entitled to due process protections despite a State Bar rule providing that "[a]ll payments from the fund shall be a matter of grace and not of right and shall be in the sole discretion of the State Bar of California.").

The rental assistance involved here qualifies as a "statutorily conferred benefit." That is the end of the matter. The fact that the Department has discretion, in appropriate cases, to deny entitlement to that benefit is of no consequence as to whether due process applies as a threshold matter. And in fact, HCD has much less discretion in implementing ERAP than it claims. As discussed above, state and federal statutes set out eligibility criteria. Once a household meets that criteria, Health & Safety Code § 50897.1(d)(1) provides: "Assistance for rental arrears shall be set at compensation of 100 percent of an eligible household's unpaid rental debt accumulated on or after April 1, 2020." *See also* Pet. at 20, ¶ 17 (a "tenant is considered an 'eligible household' if the household meets three criteria . . ."). In other words, the Department does not have unfettered discretion to deny rental assistance where a tenant meets the eligibility criteria. As such, denial of the valuable statutory benefit of rental assistance triggers due process protections.

[2] This brief will omit internal citations and quotation marks unless otherwise stated.

B. The revised denial notices HCD presented to the trial court are constitutionally insufficient, because they merely check a categorical denial box without explaining why an individual's case fits within the denial category.

"Notice and an opportunity to be heard are the fundamental hallmarks of due process . . . ." *People v. Silva*, 72 Cal. App. 5th 505, 523 (2021). HCD's proposed procedures deny tenants constitutionally adequate notice, thereby rendering meaningless any opportunity to be heard.

Simply notifying tenants that they will not receive rental assistance and that they can appeal is not enough. "Notice sufficient to enable a meaningful response is an indispensable element of due process." *Gresher*, 127 Cal. App. 4th at 109. HCD's current and revised denial notices, and its denial process more generally, fail this test for several reasons.

First, the Department's denial notice (even as revised) is insufficiently clear. *Gresher* is instructive. There, the statutes at issue prohibited employment in community care facilities for persons with certain criminal records unless the Department of Social Services granted an exemption. In reviewing employment applications, the Department notified affected individuals that it had "received criminal history" about them, and asked those seeking an exemption to explain the circumstances of the convictions, along with what they had done to prevent re-occurrences. *Id.* at 104. The Court of Appeal held that these notices were constitutionally deficient because "due process requires the Department to tell individuals what convictions they

must address to obtain an exemption." *Id.* at 110; *accord Doe v. Saenz*, 140 Cal. App. 4th 960, 997 (2006) ("Appeal rights are meaningless if an applicant has no notice of the basis for a determination that he or she is ineligible to work in a community care facility.").

Similarly here, merely placing an applicant's application into a denial category box does not explain *why* a particular tenant actually fits into that category. As in *Gresher*, without more, tenants are left in the dark as to how to effectively appeal a denial.

This is especially so because some of the categorical reasons for denial are bewildering and facially unclear. For instance, a tenant may be denied on the basis that "[t]he applicant is not a qualified resident of the applied property or unit." 1 A. 116 (denial notice at the time Plaintiffs filed suit); 3 A. 631 (HCD's proposed revised denial notice). But a self-represented tenant or even an experienced attorney could not possibly understand what it means to be a "qualified resident," much less how to refute the agency's determination that the tenant is not one.

Moreover, even when the category seems clear on its face, failure to explain a denial can render appeal rights meaningless. For example, one of the grounds for denial is: "You do not have any documented need for rental and/or utility assistance for the eligible period and do not have any unpaid rents and/or utilities for the period starting April 1, 2020 through March 31, 2022." Pet. at 47. But what if the reason for that conclusion is that a page was missing from a lease the tenant submitted, or the rental

ledger submitted was illegible? Instead of simply stating "page 4 of the lease you submitted is missing" or "we could not read the ledger you sent," HCD contractors just check a box, leaving the tenant to wonder about the actual grounds for denial and whether there is a viable basis for appeal. Likewise, where that box is checked because the landlord submitted documents that mistakenly or intentionally misrepresent a lack of rental debt, the checkbox gives no indication that the landlord's submission led to denial, leaving the tenant completely in the dark. 1 A. 116; 3 A. 631.

Second, in some instances, HCD provides no notice of denial at all to the tenant-applicants, depriving them entirely of the opportunity to appeal. For example, if HCD determines that a tenant's application is a "duplicate" of another tenant application, that application will be folded in with the earliest filed application or removed from the system—*without any notice to the applicant at all.* 4 A. 1029-31(Dep. of Jessica Hayes Vol. 2). This means that, if the conclusion that an application is a duplicate is mistaken, an eligible applicant will be denied rental assistance without any formal notice.

Third, the Department's process fails to provide sufficient notice for tenants whose applications are partially granted. Those tenants receive a confusing approval notice that does not alert them that their claim for the full amount sought has been denied. Instead, the applicant merely receives notice that some funds have been granted, with no explanation for why the balance was not. The Department treats these applications as "approved,"

meaning tenants who receive partial funds are left confused about how to appeal that partial denial. See, e.g., 3 A, 727-29 (Decl. of Abdelwahab Bechiri).

Fourth, even more troubling, HCD has sought, in some instances, to claw back funds already disbursed, again without providing any adequate explanation for the so-called "recapture" of funds. Indeed, tenant advocates have been made aware of cases where, after HCD paid rental assistance, its contractors determined that the payment was supposedly in error, and thereafter informed tenants that they needed to repay the money—money they may have already paid over to their landlord. 1 A. 124-25 (Decl. of Amber Twitchell, ¶¶ 12-22). In some cases, these recapture notices provide tenants with no opportunity to appeal. 4 A. 1005 (Dep. of Jessica Hayes Vol. 2).

For all of these reasons, the Department's denial process cannot pass constitutional muster. Fundamentally, the Department's denial notices—when provided at all—state the ultimate reasons for denial, but fail to show the numbers or other information that support that conclusion. *See, e.g.*, 3 A. 631 (proposed denial notice stating that "Your household earns an income above the eligible Area Median Income range for the family size . . .", "The monthly rental amount requested exceeds the local fair market rent cap set by the Program"). This is insufficient under well-established precedent governing the denial or reduction of public benefits, which is essentially what the ERAP program is. *See, e.g., Ortiz v. Eichler*, 794 F.2d 889, 893 (3d Cir. 1986) (affirming an order requiring than an agency's

denial or reduction of Aid to Families with Dependent Children, Food Stamps, or Medicaid include "a statement of the calculations used by the agency," a "requirement . . . amply supported by a formidable array of case law."); *Dilda v. Quern*, 612 F.2d 1055, 1057 (7th Cir. 1980) (invalidating on due process grounds a notice used to deny or reduce welfare benefits that "states the ultimate reason for the reduction or cancellation of benefits," but "fails to provide the recipient with a breakdown of income and allowable deductions."); *Perdue v. Gargano*, 964 N.E.2d 825, 831 (Ind. 2012) (invalidating a public benefits denial notice which, like HCD's notice, specifies "the code(s) with the corresponding standardized explanation of the reason(s) for the adverse action" but "does not provide any additional explanation of the reasons for the denial.").

The failure to provide adequate notice of the basis for an adverse decision has meaningful consequences: HCD's contractor staff, like all of us, make mistakes. *See, e.g.,* 3 A. 767-68 (Decl. of Juan Rubalcava, ¶¶ 7-8) (describing an HCD denial based on the monthly rental amount exceeding the cap when in fact it did not). But unless denial notices reveal calculations and reasoning, there is no way for a tenant to spot errors. For example, while the over-income category may seem straightforward, HCD's contractor may be miscalculating area median income for the applicant's family size or counting income not actually available to the household.

As the Seventh Circuit explained, "there is a human tendency, . . .to assume that an action taken by a government

agency in a pecuniary transaction is correct." *Vargas v. Trainor*, 508 F.2d 485, 490 (7th Cir. 1974). But unless affected individuals "are told why their benefits are being reduced or terminated, many of the mistakes that will inevitably be made will stand uncorrected, and many [of those individuals] will be unjustly deprived of the means to obtain the necessities of life." *Id*. To prevent that result, HCD must explain its reasoning before denying rental assistance, not just check a box.

C. Denying tenants immediate access to documents relied upon for denying rental assistance violates due process.

The Department's failure to provide immediate access to the documents relied upon for rental assistance denials is unconstitutional, as illustrated by *In re Winnetka V.*, 28 Cal. 3d 587 (1980), and other cases. In *Winnetka*, the Supreme Court held that a when a prosecutor makes an informal request for rehearing of a juvenile court referee's decision, a judge may not order the rehearing until the minor, among other due process protections, has been "supplied with a copy (including exhibits and other attachments), [and] given access to all materials it brings to the court's attention other than those already in the record . . . ." *Id.* at 595.

Similarly, in *People v. Ramirez*, 25 Cal. 3d at 275, the Court held that the due process clause entitled a patient-inmate to respond to grounds for exclusion from a treatment program. To "make such an opportunity meaningful, the patient-inmate must be given . . . access to the information that the Director

considered in reaching his decision . . . ."). *See also In re Head*, 147 Cal. App. 3d 1125, 1133 (1983) (Department of Corrections violated the due process rights of prisoners seeking work furloughs when the inmates "have no access to the information used by the Department and thereby are unable to challenge the basis of the decision denying the work furlough."); *Melnik v. Dzurenda,* 14 F.4th 981, 985 (9th Cir. 2021) (withholding documents from a prisoner faced with a disciplinary charge denied due process guarantees because "[w]ith no access to the evidence that will be presented against him, a prisoner could neither build a defense nor develop arguments and evidence to contest the allegations at the disciplinary hearing.").

The only case HCD cites in support of its position that documents need not be provided is *Gresher v. Anderson*, 127 Cal. App. 4th 88, which supports plaintiffs, not the Department. In *Gresher*, the applicants for statutory exemptions were told they could obtain their criminal records, but the Court of Appeal still found due process violations, noting that the applicants "are ordinarily unable to obtain an arrest record from the Department of Justice within the time period allowed for requesting an exemption." 127 Cal. App. 4th at 108.

As HCD notes, the *Gresher* court also stated that when providing applicants with their relevant criminal history, the "entire 'rap sheet' need not be transcribed . . . ." *Id.* at 109, cited by Pet. at 44. This makes sense: for an applicant facing denial of an exemption because of a felonious assault conviction, records of the applicant's traffic misdemeanors would be irrelevant. But in

this case, HCD continues to deny rental assistance while refusing to produce documents the Department *actually relies on* for the denials, and refusing to even specify the factual basis for denial that appears in the withheld documents. Plaintiffs do not seek access to *other* documents that have no tether to the basis for denial; their position is thus entirely consistent with *Gresher*.

HCD acknowledges that denials of rental assistance can be based solely on documents provided by landlords that tenants are not permitted to see. Pet. at 46. This can be particularly problematic when the landlord and tenant are in an adversarial relationship. For example, especially in a jurisdiction with rent control in place, landlords may falsely claim no rent is due in an effort to evict a tenant and re-let the tenant's apartment for a much higher rent. Yet HCD takes the landlord's word as gospel in every single case. 4 A. 866, Decl. of Hayes ¶7 ("If the landlord declares under penalty of perjury that no rental debt is owed, then there is no need for assistance, and the tenant will be denied on the basis that he or she does not have a documented need for rent.").

It is no answer for HCD to assert that sufficient notice is provided by the categorical denial "[y]ou do not have any documented need for rental and/or utility assistance for the eligible period and do not have any unpaid rents and/or utilities for the period starting April 1, 2020 through March 31, 2022." Pet. at 47. In many instances, for example, the landlord's submission includes a rent ledger. 4 A. 866. Tenants need to see those ledgers and any other documents submitted by landlords to

determine their accuracy, and to make specific responses when appropriate. Otherwise, tenants are shooting in the dark in challenging the adverse decision.

D. The Department's procedural objections to the trial court's preliminary injunction order are baseless.

HCD argues that the trial court erred by failing to expressly apply the due process balancing test discussed in *People v. Ramirez*, 25 Cal. 3d at 269, Pet. at 37-39. HCD confuses a general statement of the law with an ironclad requirement for trial courts.

As an initial matter, the *Ramirez* Court simply stated that "identification of the dictates of due process *generally* requires consideration of" four factors: 1) the importance of the private interest at stake; (2) the risk of erroneous deprivation through the procedures employed and the "probable value . . . of additional or substitute procedural safeguards"; (3), the "dignitary interest in enabling individuals" "to present their side of the story before a responsible governmental official", and (4) the governmental interest and burdens the additional process would entail. *Ramirez*, 25 Cal. 3d at 269 (emphasis added).

Thus, HCD confuses a trial court's undisputed duty to weigh all the evidence and apply the applicable law—which the trial court here did[3]—with a non-existent duty to issue decisions

[3] *See, e.g.*, 5 A. 1132-33, 1134-35 (Reporter's Transcript of October 20, 2022 Hr'g on Mot. to Dissolve or Modify Prelim. Inj., "[M]y reading of the papers leads me to the point that … I have to deny this application.", "I read those portions of that deposition that were submitted.")

in the specific manner demanded by HCD. Neither the *Ramirez* Court, nor any other decision of the Supreme Court, has held that trial courts must issue written decisions expressly discussing the four factors.

Indeed, in other contexts, courts have uniformly rejected arguments similar to HCD's. For example, in *People ex rel. Becerra v. Huber*, 32 Cal. App. 5th 524 (2019), a party appealing a permanent injunction, like HCD here, argued that "nothing in the trial court's order granting the permanent injunction . . . indicates that it actually engaged in the required weighing of interests under [relevant case law]." *Id.* at 548-49 n.19. The Court of Appeal responded: "There was no trial in this case, and courts have held that a statement of decision ordinarily is not required in connection with a ruling on a motion, even if the motion involves an extensive evidentiary hearing." *Id.*; *accord*, *Oiye v. Fox* , 211 Cal. App. 4th 1036, 1049 (2012) ("a hearing on a preliminary injunction is not a trial of a question of fact within the meaning of [Code of Civil Procedure] section 632, so no statement of decision is required, even on request.").

And critically, far from requesting a statement of decision focusing on the *Ramirez* balancing test, HCD's motion to dissolve the injunction did not even mention *Ramirez* at all. 2 A. 493-512. At no time did the Department urge the trial court to discuss the *Ramirez* factors. Indeed, *plaintiffs* were the only parties below who applied the *Ramirez* test. 1 A. 58-62 (briefing in support of the motion for preliminary injunction). "An appellate court will not consider procedural defects or erroneous rulings where an

objection could have been, but was not, raised in the court below." *Steven W. v. Matthew S.*, 33 Cal. App. 4th 1108, 1117 (1995). And there is simply no basis for the Department to argue that the trial court abused its discretion in failing to consider an objection never raised. HCD's procedural argument should be rejected.

E. The procedures sought by Plaintiffs—reasoned explanations for denials and access to documents—are justified by the *Ramirez* factors.

As stated above, the trial court was not required to issue a decision expressly considering and applying each of the *Ramirez* factors in evaluating the Department's motion. But considering those factors only further supports that the trial court did not abuse its discretion in upholding the injunction, and that plaintiffs' requested relief is necessary to comply with due process.

1. As to the **first *Ramirez* factor**, the private interests at stake—thousands of dollars and the ability of tenants to keep their homes—are enormous. On monetary terms alone, assistance for repayment of rental debt can amount to thousands, even tens of thousands of dollars for each tenant.

The personal stakes are even higher. Both state and federal courts have recognized the critical importance of government assistance and the harm caused by denials. An "eligibility controversy" "*may deprive an eligible recipient of the very means by which to live while he waits.* Since he lacks independent

resources, his situation becomes immediately desperate." *Boehm v. Cnty. of Merced*, 163 Cal. App. 3d 447, 454 (1985).

Indeed, once a denial of rental assistance becomes final, a landlord is free to proceed with an eviction. Health & Safety Code § 50897.3(e)(2). *See, e.g.,* 1 A. 149 (Decl. of Ivy Hong, ¶ 10) ("Many of the tenants I assisted are in dire circumstances. If they do not get rental assistance, I am worried they will end up getting evicted and living on the street."). Such a loss of home constitutes a serious and irreparable harm. *See Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1159 (9th Cir. 2011) ("It is well-established that the loss of an interest in real property constitutes an irreparable injury."); *La Raza Unida v. Volpe*, 337 F. Supp. 221, 233 (C.D. Cal. 1971) ("One who is forced to vacate his chosen neighborhood or city, to sever long-standing friendships, to confront a tight and possibly discriminatory housing market, and to incur other indignities that are likely to be present here suffers severe and irreparable injury."). Simply put, the private interests at stake could not be higher.

2. As for the **second *Ramirez* factor**—the risk of erroneous deprivation and the probable value of additional safeguards—HCD primarily makes two arguments: (1) plaintiffs needed to quantify how many incorrect rental assistance denials have been issued (Pet. at 40-41); and (2) plaintiffs have failed to show that there have been any errors. *Id.* at 8. The former argument is legally erroneous, and the latter contention is contradicted by substantial evidence in the record.

a. Neither *Ramirez* nor its progeny impose arbitrary quantification requirements on due process claimants.

HCD's legal argument finds no support in *Ramirez*. The second *Ramirez* factor is "the risk of an erroneous deprivation of [the private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards . . . ." 25 Cal. 3d at 269. This is a call for a reasoned evaluation of the likelihood of errors, not a command for quantification. In neither *Ramirez* nor any other case has the Supreme Court required a quantitative analysis to determine the risk of an erroneous deprivation. *See, e.g., id.* at 274-75; *In re Winnetka V.*, 28 Cal. 3d at 594; *Cal. Tchrs. Ass'n v. State of Cal.*, 20 Cal. 4th 327, 349 (1999).

The Department's reliance on *Marquez v. Department of Health Care Services*, 240 Cal. App. 4th 87 (2015) (Pet. at 40-41), is misplaced. In *Marquez*, the Court of Appeal rejected a due process challenge seeking notice and a hearing when the Department of Health Care Services changed Medi-Cal recipients' eligibility codes to indicate that the recipients had other health care coverage and may not have been eligible to receive services. While the Court of Appeal did point to a lack of evidence of the percentage of coding changes that were erroneous, *id.* at 113, the court relied on several other factors that are not applicable to this case. Among them: the *Marquez* petitioners sought full-fledged hearings, *id.* at 113, and additional notices to hundreds of thousands of recipients who may not have needed them, *id.* at 114, in contrast to the modest changes sought by

plaintiffs here; coding errors resulted in delay, but not denial of health care, *id.* at 112, while this case involves outright denial of assistance, leading to evictions and homelessness; and coding errors could be fixed with a phone call "normally handled within 24 hours," *id.* at 114, which is certainly not the case here.

More fundamentally, to impose a quantification requirement on due process challenges would unjustifiably confer blanket immunity on state agencies. Those agencies, not low-income benefit recipients, either have the information needed to quantify erroneous benefit denials, or, as in this case, could determine the extent of erroneous denials but choose not to.

Indeed, here, a day after the issuance of the preliminary injunction back in July, plaintiffs' counsel requested that HCD conduct an audit of denied applications to determine the frequency of errors. 3 A. 675 (Howard Decl., ¶ 3). HCD ignored the request and has not taken any steps that plaintiffs are aware of to evaluate its past denials, even though the Department *does* conduct audits to determine whether applications are complete. 3 A. 703-05 (Dep. of Jessica Hayes); *see also* 1 A. 124 (Decl. of Amber Twitchell, ¶ 12) (HCD contractors have sought to recapture rental assistance funds believed to have been mistakenly paid). Indeed, HCD does not even keep copies of its denial notices. 3 A. 676. Thus, HCD has no knowledge of—and apparently no interest in learning—how often it erroneously denies rental assistance, even as it takes affirmative steps to double-check for possible erroneous *approvals*. To reward HCD for that double standard would be an injustice.

Marquez should be confined to its facts. *See Harris v. Cap. Growth Invs. XIV*, 52 Cal.3d 1142, 1157 (1991) ("the language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts."). This Court, like the overwhelming majority of appellate courts, should construe the *Ramirez* second factor as it is written, and not impose a requirement that due process claimants could never meet. Plaintiffs need only show a likelihood of erroneous denials that would be reduced by inclusion of factual explanations and access to documents relied upon.

b. **The record demonstrates that erroneous denials are frequent and can only be rectified through the intervention of experienced advocates.**

In any event, Plaintiffs have met the *Ramirez* standard, despite HCD's repeated contention that none of its rental assistance denials have been erroneous. *See, e.g.,* Pet. at 8. This assertion of government infallibility—or more accurately here, the infallibility of temporary employees of a government contractor—is demonstrably false.

Plaintiffs submitted evidence below from advocates who collectively have assisted literally thousands of tenants with rental assistance applications. 1 A. 184 (Decl. of Jackie Zaneri, ¶ 10 (personally assisted some 50 tenants and plaintiff ACCE has assisted more than 1,000 tenants)); 1 A, 140 (Decl. of Edna Monroy, ¶¶ 2-3 (plaintiff SAJE helped 320 tenants as of June

2022)); 1 A. 123, 125 (Twitchell Decl., ¶¶ 6, 16 (assisted 363 applicants and 28 tenants faced with attempts to recapture rental assistance funds previously paid to them)); 1 A. 161 (Decl. of Jeffrey Isaacs (helped more than 300 applicants)); 1 A. 148 (Decl. of Ivy Hong, ¶ 2 (assisted 31 tenants)).

These advocates uniformly affirmed that (1) many denials are erroneous; and (2) denials can be successfully appealed only with the assistance, and often persistence, of experienced advocates. *See, e.g,* 1 A. 143 (Monroy Decl., ¶ 26) ("[I]t is very frustrating that so many tenants that have received a decision were initially denied rental assistance because all of them were actually eligible for assistance. They just needed a lot of advocacy because the agency denies people even when they have submitted all of the information and doesn't explain the reason for the denial. All the appeals that I have helped with have been approved"); 1 A. 188 (Zaneri Decl., ¶ 28) ("I can usually get these denials reversed by emailing senior HCD staff until I can figure out what actually happened, and then submitting documents to address the issue in an appeal. It would not be possible for my clients to do this without help, since many of them have no access to email or limited English proficiency, or just do not know why they were denied.")

Other evidence further confirms the likelihood of denial errors. As of July 22, 2022, 29% of reviewed applications had been denied, even though 93% of those applicants were income-eligible for the program. National Equity Atlas, *State of Denial: Nearly a Third of Applicants to California's Emergency Rent*

Relief Program Have Been Denied Assistance, https://nationalequityatlas.org/CARentalAssistance (last visited Dec. 5, 2022). And in late June 2022 HCD staff admitted to Petitioner ACCE that tenants were denied for being "non-responsive," even while they were actively submitting requested documents due to a flawed automated system. App. of Real Parties in Int. at 17, Decl. of Jackie Zaneri in Supp. of Reply (HCD Section Chief Lorrie Blevins informed advocates that "HCD recently instituted a system to pull applications that are slated for denial if there had been a recent document submission so that someone at HCD would review them before a denial is issued. She did not indicate that tenants who were already denied for being non-responsive despite submitting requested documents would receive any assistance.")

Despite this evidence, to bolster its argument that plaintiffs have not demonstrated a risk of erroneous deprivation, HCD contends that none of the ten applicants identified by name in plaintiffs' declarations were erroneously denied rental assistance. Pet. at 41, 55, citing Decl. of Jessica Hayes, ¶ 8. Leaving aside the propriety of introducing evidence outside the record that could have been submitted in the proceedings below,[4] HCD's representation is misleading, at best.

[4] Appellate courts are split on whether litigants in writ proceedings may introduce evidence outside of the trial court record. *Compare McCarthy v. Superior Ct.*, 191 Cal. App. 3d 1023, 1031 (1987) (permitting such evidence) *with People v. Superior Ct. (Lavi)*, 4 Cal. 4th 1164, 1174 (1993) (declining to consider extra-record evidence). HCD's analysis of some of plaintiffs' declarations was not presented to the trial court and should have no weight in considering whether the court abused

For example, HCD's claim that four of the applicants were approved for full funding omits the critical adverb "eventually." In the context of emergency rental assistance, where every delay increases a tenant's risk of eviction, "eventually" receiving assistance after months of waiting does not cut it, and will not protect the tenant from losing their home. For example, one applicant was approved, but only after waiting a year and navigating a Kafkaesque process with substantial assistance from an attorney. 3 A. 752-56 (Decl. of Gabrielle Hoffman). This tenant was denied on the grounds of inconsistent or unverifiable information, with no further explanation, and then, on appeal, was given just four days to complete a task that turned out to be unnecessary for granting her application. 3 A. 754-56. Her application was granted only after her attorney engaged the help of plaintiffs' counsel to contact HCD. 3 A. 756, ¶10.

Another applicant who was facing an eviction eventually received full funding, but her application initially was denied without notice. 1 A. 167-75 (Decl. of Joshua Kramer). Her attorney later learned from the HCD call center that the application was denied for omitting the landlord's email address; even though the attorney had been "in nearly constant communication" with HCD prior to the denial, HCD never notified him that that was the information that was needed. 1 A. 173-74, ¶ 22-26. The denial was ultimately reversed as the result

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its discretion. Ms. Hayes also has provided new testimony on HCD's current finances. Plaintiffs have found it necessary to submit limited extra-record evidence—primarily a U.S. Treasury document—to refute that new testimony.

of advocacy by the tenant's attorney with a senior HCD official. 1 A. 175, ¶ 29. Without the concerted efforts of their attorneys, these applicants likely never would have known the reason for their denials, let alone prevailed to receive full funding.

Similarly, HCD characterizes two of the applicants identified in plaintiffs' declarations as having filed untimely appeals when, in fact, HCD compounded its erroneous denials of both applicants by refusing to consider their meritorious appeals. One of the applicants never even received a denial notice, which would have notified him of his right to appeal. It was only after contacting HCD with an attorney that the tenant learned that, when HCD had preliminarily approved part of his application, it also had made the inexplicable decision to deny the remainder of his application. With the attorney's assistance, the tenant immediately submitted an appeal to the HCD email address designated for appeals. HCD then responded that the appeal was untimely. 3 A. 727-29 (Decl. of Abdelwahab Bechiri). Thus, although HCD's partial denial was apparently meritless, the tenant was without recourse because HCD failed to notify him of the denial.

Another tenant was denied because his rent purportedly exceeded the maximum rent cap, even though it plainly did not. This tenant submitted a timely appeal of this clearly erroneous decision via email after he was blocked from accessing HCD's online portal. Despite following up numerous times, the tenant received an email stating that his appeal was too late. 3 A. 767-69 (Decl. of Juan Rubalcava, ¶¶ 6-15).

In short, the risk of erroneous deprivation of tenants' interests is demonstrably high. And that risk could be substantially reduced if tenants received explanations for full and partial denials, beyond the mere checking of a box, as well as access to the documents relied on for the denials. Tenants armed with actual knowledge of the reasons for a denial and relevant documents, could submit well-targeted appeals and receive prompt favorable decisions.

3. As to the **third *Ramirez* factor**—the dignitary interests at stake—denying a tenant's application for assistance without explanation, or even letting the tenant see the documents the Department relied on to rule against them, robs that tenant of any dignity. Indeed, "[f]or government to dispose of a person's significant interest without offering him a chance to be heard is to risk treating him as a nonperson, an object, rather than a respected, participating citizen." *Ramirez*, 25 Cal. 3d at 267-68.

That is precisely the effect of what the Department is doing in this case. Refusing to provide actual explanations and supporting documents tells tenants, in effect, "we don't trust you." This can only have a devastating effect on tenants, regardless of whether the denials are correct or not. *See id.* at 268 ("even in cases in which the decision-making procedure will not alter the outcome of governmental action, due process may nevertheless require that certain procedural protections be granted the individual in order to protect important dignitary values."); *see also* 1 A. 197 (Decl. of Longji Guan, ¶ 29

("The inability to communicate with Housing is Key about our application has caused my family and I undue stress and financial uncertainty.")); 1 A. 205 (Decl. of Norma Soria, ¶ 23 (ERAP applicant with an active eviction case was "still very worried that I could lose my home" despite being approved because of delays in payment)); 1 A. 227 (Decl. of Tina Martin, ¶ 24 ("The denial of the rental assistance and threat of eviction has caused me a great deal of stress.")); 1 A. 152 (Decl. of Ivy Hong, ¶ 29 ("When I spend so much time with tenants applying for government assistance and they are not able to get it, I feel that their trust in government is lowered.")); 1 A. 212 (Decl. of Naomi Sultan, ¶ 13 ("The process of applying to an assistance program, waiting seven months, being denied for a vague reason, and having to appeal that decision is exacerbating [my client's] stress.")). Tenants' dignitary interests weigh heavily in favor of affirming the trial court's order.

4. Finally, as to the **fourth *Ramirez* factor**—the governmental interests and burdens associated with additional process—the Department has failed to identify *any* viable governmental interest or burden that would justify its due process violations.

First, there is no conceivable governmental interest in withholding from tenants actual explanations for rental assistance denials and relied-upon documents. Below, HCD attempted to justify denying tenants access to documents because they might reveal landlords' Social Security numbers or other private information. The trial court rightly and swiftly rejected

that purported concern, correctly pointing out that the Department could "redact the part that protects third parties[']privacy interests" before providing the necessary documentation. 5 A. 1148.

Beyond that, the Department does not argue that providing the basic due process protections plaintiffs seek would impose undue administrative burdens. *Cf. People v. Ruiz*, 59 Cal. App. 5th 372, 383 (2020) (failing to advise a parolee why he was denied less restrictive supervision and how he could remedy that violated his due process rights, the court noting that "the cost of modifying the notice given when an individual is released from prison would likely be de minimus."); *see also Propert v. Dist. of Columbia*, 948 F. 2d 1327, 1335 (D.C. Cir. 1991) ("while cost to the government is a factor to be weighed in determining the amount of process due, it is doubtful that cost alone can ever excuse the failure to provide adequate process.").

Instead, HCD relies entirely on the claim that keeping information from tenants is necessary for fraud prevention. Pet. at 41-42. The Department states, "HCD does not provide applicants with any third-party documents that HCD may rely on in its review of the application, i.e., explicitly identifying a particular document as having been identified as fraudulent creates material risk that fraudsters will share that information with others to aid evasion of fraud detection methods." Pet. at 22, ¶ 25; 42. This rationale makes little sense for at least two reasons.

First, sharing information with "others" will not help those "others" file future fraudulent applications. As the Department is well aware, HCD closed the rental assistance program for new applications on March 31, 2022. Pet. at 18, ¶ 10.

Nor is there a realistic prospect of others using information to file fraudulent appeals. One would expect fraud to work best in the dark, i.e., when applications are automatically approved without examination. As HCD acknowledges, dishonest applicants who receive denial notices will know that they are facing individual scrutiny, so intuitively, it would be time for a purported fraudulent applicant to move on to easier targets. 3 A. 646 (Hayes Decl., ¶ 11) ("in HCD's experience, individuals attempting fraud stop participating in the program after they are denied while potentially viable applicants will frequently use the appeal option.").

Second, HCD misstates the issue when it claims as a risk "explicitly identifying a particular document as having been identified as fraudulent . . . ." Pet. at 22, ¶ 25. A primary issue in this lawsuit is whether HCD violates the due process clause when it denies tenants access to documents the Department *relies upon* to deny rental assistance. These are documents, *e.g.*, landlord declarations and ledgers, that HCD has concluded are accurate, not fraudulent.

Equally important, the Department cites no authority for the proposition that the interest in fraud prevention could ever justify denying constitutionally adequate notice to *all* tenants, regardless of whether they are suspected of fraud. *See, e.g.*,

Nelson v. Bd. of Supervisors, 190 Cal. App. 3d 25, 31 (1987) (while preventing welfare fraud is a legitimate government interest, "regulations may be invalid if they are more restrictive than necessary and extend not only to claimants suspected of fraud but also to nonsuspect claimants."); *Robbins v. Superior Ct.* 38 Cal.3d 199, 216 (1985) (policy that required "single, employable" General Relief beneficiaries to live in a county facility in lieu of receiving cash benefits did not further goal of fraud prevention because it was arbitrarily imposed on beneficiaries, none of whom were alleged to have committed fraud, and was not "the least restrictive way to ensure honest claims."); *Collier v. Menzel*, 176 Cal. App. 3d 24, 34-35 (1985) (refusal to register individuals who listed their address as a public park was unjustified by interest in preventing voter fraud where there was no evidence that unhoused individuals would be more likely to commit voter fraud, and there were other statutes to deter such fraud). In other words, the purported existence of or potential for fraudulent claims cannot justify denying to the vast majority of honest tenants the information they need to cure gaps in their applications, the mistakes of their landlords, or HCD's mistakes.

In summary, HCD has premised its operation of the rental assistance program on the notion that the greatest good will be achieved by hiding just the right amount of information from tenants. But as the trial court correctly stated, "You can't make it impossible for somebody to participate in an adjudication by continuing to put the burden on them and hiding the ball about

the reason that the answer is no. You just can't do that. That's not fair, and in legal terms, it doesn't satisfy due process of law." 5 A. 1137.

II. The injunction is not overbroad.

HCD's claim that the preliminary injunction is overbroad, Pet. at 48-51, is based on misconstruing plaintiffs' position and the trial court's conclusions. Contrary to HCD's claim, at no time did plaintiffs or the trial court agree that checking a box to deny assistance could ever satisfy due process guarantees. *See* 3 A. 664-66 (plaintiffs' opposition to motion to dissolve expressly refuting HCD's claim); 5 A. 1138 (Rep.'s Tr. of Oct. 20, 2022 Hr'g on Mot. to Dissolve or Modify Prelim. Inj. ("[W]hen you say, no, you need to tell them why[.]. . . You can't just say it's not good enough in this area.")).

While some categories for denials may be clearer than others, HCD must still explain the *basis* for concluding that the application fits into the category. Gilberto Camacho's experience illustrates the point. Mr. Camacho was denied rental assistance for the apparently straightforward reason that his rent exceeded the fair market rent cap. 3 A. 767-68, (Rubalcava Decl., ¶¶ 7-8). But the denial notice did not say what the fair market rent cap was, why the Department concluded that his rent exceeded it, or otherwise provide access to the information or documents used in making the decision. *Id.*; 3 A. 771 (screenshot of denial notice).

Similarly, HCD lists "the applicant is not a resident of the rental unit" as an example of a denial that "clearly provide[s] the

applicant sufficient notice of the reason for the denial and enough information for the applicant to appeal the decision." Pet. at 49-50. But the notice does not explain the basis or underlying documentation for that conclusion. And the actual proposed denial notice states: "The applicant is not a *qualified* resident of the applied property or unit." 3 A. 631 (emphasis added). As previously noted, there is zero explanation for how an applicant may be a resident, but not a "qualified" resident, making a successful appeal virtually impossible.

Regardless of the categorical reason for a denial, HCD must explain and document the reason. The injunction is not overbroad.

III. HCD's claims of irreparable harm are unsupported by the evidence and are undercut by the $212 million the Department has received since filing the motion to dissolve the injunction.

A. HCD's claims of an emergency are undermined by the slow pace of its litigation.

HCD's litigation tactics contradict its claim that it faces a sudden financial crisis. On July 7, 2022, the trial court announced from the bench its decision to grant a preliminary injunction, and followed that announcement with a July 14 written order. 2 A. 438-70; 2 A. 471-74. HCD disagreed with that injunction from the outset. But the Department did not appeal the injunction order, or seek an appellate writ. Instead, HCD waited two months before filing its motion to dissolve the injunction on September 13, 2022. 2 A. 493-515.

The trial court denied that motion from the bench on October 20, followed by a minute order issued the next day. 5 A. 1128-46, 1147-49. HCD then waited another month before filing this petition on November 18, *more than four months* after the issuance of an injunction that is supposedly creating an emergency crisis.

To justify this four-month delay, HCD cannot claim an unanticipated contingency, such as a sudden increase in applications for rental assistance, as the Department has barred new applications since March 31, 2022. Pet. at 18, ¶ 10. Meanwhile, back in the trial court, HCD has not demanded, as one would expect, a speedy resolution of all claims. Instead, the Department has requested a postponement of a hearing on the merits of plaintiffs' writ petition on the ground that discovery must first be completed. Most recently, HCD requested that plaintiffs stipulate to move the merits hearing back to April 2023. Howard Decl. ¶2.

In short, none of HCD's actions during the past four months warrant issuance of the emergency relief the Department seeks.

B. HCD has ample funds, including $212 million received since the filing of the motion below.

HCD's assertion that it is on the brink of being forced to shut down the rental assistance program is not credible.

The Department has been allocated more than $212 million in additional federal funds since it filed its motion to dissolve the preliminary injunction. Howard Decl. ¶ 3 Ex. 1 (U.S. Treasury

Spreadsheet dated September 26, 2022: ERA1 Reallocation Round 3- General Pool, reflecting allocation to the State of California of $99,287,362.61, an amount HCD's petition and supporting declaration do not acknowledge); Pet. at 18, ¶¶ 11-12 (describing October allocation of $52.1 million and November allocation of $60.1 million).

This is sufficient funding. Ms. Hayes, an HCD Official, testified on October 11 (before the Department received the two most recent allocations) that the remaining funds left for rental assistance would cover the needs of all remaining applicants. 4 A. 1011 (Dep. of Jessica Hayes Vol. 2) ("we have obligated enough in rental assistance to meet what we are projecting"); 4 A. 1036-1037 (testifying that $102 million remains for rental assistance after consultation with Horne during deposition break).

C. HCD's evidentiary showing on financial harm is unpersuasive, as it lacks either a knowledgeable witness or supporting documents.

HCD's only factual support for its claimed financial hardship is the declaration of Ms. Hayes, an official who disclaimed direct knowledge of program finances in deposition testimony and stated that accounting for program balances is not part of her job description. 4 A. 1020 (Dep. of Jessica Hayes Vol. 2 ("I worked with the accounting team to get the final balance. I do not have access to the State's accounting systems. It's not part of my job description.")). Though she is the sole source in this petition for the program's financial condition and administrative

expenses, in her October 11 deposition, Ms. Hayes did not know how much of the contracted $277 million in administrative costs had been paid to HCD contractor Horne or whether any monthly invoices remained outstanding. 4 A. 1017. She did not know and could not estimate the amount of funds left for rental assistance. 4 A. 1010-1011; 4 A. 1036-1037.

HCD's primary declarant's lack of knowledge is particularly troubling given that the Department provides no documents to support its contentions regarding program finances. For example, the Department has not provided the trial court or this Court with copies of the biweekly financial reports HCD submits to the Department of Finance regarding program funding and has not shared any documentation of financial conditions with either court. *See* 4 A. 1021-1022 (Dep. of Jessica Hayes Vol. 2 describing HCD's regular reporting to the Department of Finance).[5]

D. HCD has produced no reliable evidence showing that the injunction has increased program expenses, as program spending exactly matches the Department's contract with Horne and changes in staffing are an intrinsic part of ERAP.

Documents produced by HCD directly contradict the Department's claim of harm from the injunction. Ms. Hayes alleges in her declaration that HCD incurred excess costs due to the injunction (4 A. 962-63), and testified in deposition that HCD "ran out of money to pay for the services provided under the

[5] We recognize that the parties' discovery disputes are not in the record and are outside the purview of this Court's review. Suffice it to say that plaintiffs lack these documents as well.

contract in September" but when pressed admitted that she did not know how much Horne had actually been paid. 4 A. 1017. While Ms. Hayes testified that "[w]e have incurred substantially more cost than we intended to over the months of August and September, and we have exhausted funding," the detailed 60-page long monthly Horne invoices through August 2022 match the contract's estimated invoice amounts exactly. *See* 4 A. 953 (Estimated Invoice Schedule); 4 A. 1018 (Dep. of Jessica Hayes Vol. 2) (referring to the contract's estimated invoice schedule and explaining that there are actual invoices that were not provided to Plaintiffs at the time of the deposition); Howard Decl. ¶4. And the Department has failed to produce September invoices. Thus there is no evidence to support HCD's claim of tens of millions of dollars in increased expenses that would lead to program shut-down.

HCD's claims regarding the projected costs of continuing the program are also flawed because they are based on the false premise that the Department must go through mass layoffs and rehiring due to the injunction. Pet. at 13. Putting aside the fact that nothing is stopping the Department from continuing to approve applications while the injunction is in place, the "fixed staff costs" for the program are limited by design, and the injunction is not leading to layoffs as HCD represents. *See* Pet. at 9. The contract with Horne demonstrates that throughout the life of the program Horne has drastically reduced and increased staff from one month to the next, including dropping 540 staff from one month to the next, and growing from 300 to 1775 staff in

another month, then dropping back to 1150 in another month. 4 A. 927 (4th Amendment to Contract between HCD and Horne, staffing level chart.). In other words, changes in hiring and re-hiring are an intrinsic part of program implementation, not a harm caused by the preliminary injunction.

E. HCD understates the amount of funding available for program administration.

HCD overstates the effect of program rules that limit administrative spending to 15% of total spending for some funding sources and 10% for others. Pet. at 18-19, ¶¶ 11, 12. In her September 29 declaration in support of HCD's motion to dissolve the injunction, Ms. Hayes attested that, for previous federal funding reallocations, "HCD approved the full reallocations for rental assistance without administrative set-aside" and that "HCD only budgeted for the funding that it thought it would actually need in program administration"—suggesting HCD has ample leeway to use additional administrative funds from the most recent reallocations, if needed. 4 A. 873, ¶ 25; 4 A. 872 ¶22. Ms. Hayes further attested in her September 29 declaration that HCD had "$54.5 million in unobligated funding" available for additional administrative costs to operate the program—beyond the $277 million in administrative funding already earmarked for the Horne contract in effect through March 31, 2023. 4 A. 873; 4 A. 902. And this $54.5 million figure does not appear to incorporate the federal reallocation of $99,287,362.61 to HCD that was announced 3 days earlier on September 26; this allocation is not mentioned in Ms.

Hayes's declaration and is also omitted from HCD's writ petition. Howard Decl. ¶2, Ex. 1 (U.S. Treasury Spreadsheet dated September 26, 2022: ERA1 Reallocation Round 3- General Pool, reflecting allocation to the State of California of $99,287,362.61); Pet. at 18, ¶¶11-12.

Even in the unlikely event that administrative spending threatened to exceed one of the caps, it does not follow that the rental assistance program would have to be shut down. HCD could begin by renegotiating its contract with Horne, which failed to process rental assistance applications before critical eviction protections expired in June; had Horne timely processed applications, the Department would not be in its current predicament and thousands of tenants could have avoided eviction. 4 A. 910 (contract with Horne requiring the contractor to "augment case management staffing levels to process all applications by June 30, 2022" in light of eviction protections expiring on that date); 4 A. 1024 Dep. of Hayes Vol. 2 (discussing program delays that pre-existed the injunction). Furthermore, Congress, the federal executive branch, and the Legislature designated these billions of dollars to "to provide financial assistance and housing stability services to eligible households" (15 U.S.C. § 9058a(c)(1)); they want ERAP to succeed. They could ensure that result through a waiver of program rules regarding administrative caps or, as has occurred most recently, an additional allocation. Where there is political will, there is a way.

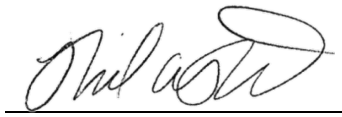
CONCLUSION

HCD cannot evade its constitutional obligations by exaggerating a fiscal crisis largely of its own making. The Court should deny the petition for extraordinary relief.

DATED: December 5, 2022

Respectfully submitted,

WESTERN CENTER ON LAW & POVERTY

By: 

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that the text of this brief contains 11,739 words, including footnotes. In making this certification, I have relied upon the word count of Microsoft Word, used to prepare the brief.

DATED: December 5, 2022

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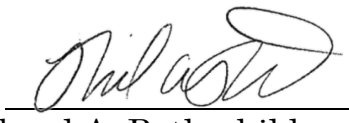
By: 

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