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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

ALLIANCE OF CALIFORNIANS FOR COMMUNITY EMPOWERMENT (ACCE) ACTION; POLICYLINK; STRATEGIC ACTIONS FOR A JUST ECONOMY (SAJE), Petitioners, v. THE CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT and GUSTAVO VELASQUEZ, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, Respondents.	Case No. 22CV012263 *(Assigned for all purposes to the Honorable Fred Roesch, Dept. 17)* **PETITIONERS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** Hearing Date: July 7, 2022 Time: 3:30 pm Dept.: 17 Reservation ID: 924029170488 Action Filed: June 6, 2022 Trial Date: None set

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INTRODUCTION

Respondents' Opposition[1] is more significant for what it omits than for what it says. The Department of Housing and Community Development neither disputes nor seeks to justify that it denies rental assistance needed to stave off evictions without permitting tenants to view the documents which underlie the denials.

Nor does HCD dispute that all of its denial notices merely check a box informing the tenant in one boilerplate sentence what category the denial fits in, without further explanation. When the Department bases a denial on "inconsistent or unverifiable information," its recent direction to staffers to identify the section of an application at issue does little to assist tenants when the tenant is unable to review the application they submitted, or worse yet, when the denial is based on the landlord's submission, which the tenant can never see.

The Opposition's fatal omissions apply to the law as well as the facts. HCD refuses to acknowledge that California due process jurisprudence changed 43 years ago, when the Supreme Court decided *People v. Ramirez*, 25 Cal. 3d 260 (1979). Litigants seeking to vindicate their due process rights need not demonstrate a deprivation of a property interest; when, as here, potentially erroneous denials deny an important statutory benefit, courts must decide how much process is due under a four-part test. Petitioners have shown that application of that test justifies the relief sought in this motion. Pet. Mem.[2] at 15-19. Respondents make no attempt at rebuttal.

Finally, the Department ignores the appellate opinion most closely on point: *Gresher v. Anderson*, 127 Cal. App. 4th 88 (2005). In *Gresher*, the Court of Appeal held that the government denies due process to an applicant for a statutory benefit when, as here, the government merely informs the applicant, without further explanation or timely access to the underlying documents, of a categorical reason for denying the benefit. Pet. Mem. at 13-14, 15. Respondents are unable to distinguish *Gresher*, so make no attempt to do so.

Petitioners have made a strong showing for a preliminary injunction. Respondents' silence

[1] Respondents' Opposition to Petitioners' Motion for a Preliminary Injunction, filed July 1, 2022.
[2] Memorandum of Points and Authorities in Support of Petitioners' Motion for Preliminary Injunction, served June 20, 2022.

cannot defeat it.

ARGUMENT

I. Petitioners are likely to prevail on the merits, as Respondents continue to violate due process rights in violation of their ministerial duties.

A. The Department must provide due process protections.

The Department argues that it need not provide any due process to tenants, claiming that tenants lack a "property interest" in rental assistance benefits. Opp. at 14-15. But as pointed out in our opening brief, a litigant making a due process claim under the California Constitution need not demonstrate a property interest; and every person "has a due process liberty interest both in fair and unprejudiced decision making and in being treated with respect and dignity." *People v. Ramirez*, 25 Cal.3d at 268. All Petitioners must show is that rental assistance is a "statutorily conferred benefit." Pet. Mem. at 12-13.

The Department denies that rental assistance is such a benefit because applicants who otherwise meet eligibility standards "will still be denied assistance once the funds are depleted." Opp. at 14. But not one of the 157,000 application denials issued so far has been based on lack of funding. As long as any funding remains for the program, the Department has no more right to deny tenants due process protections than it would to proclaim that "due to limited funding, no Catholics need apply." *Cf. Ass'n for Retarded Citizens v. Dep't of Developmental Servs.*, 38 Cal. 3d 384, 395 (1985) (faced with a budget shortfall, an agency director could ask the Legislature for an additional appropriation, but could not legally provide fewer benefits than required by statute).

HCD's contention that due process does not apply because of the discretionary nature of the rental assistance program, Opp. at 14-15, ignores relevant case law. As previously discussed, California appellate courts have upheld due process rights under statutory schemes providing the decision-maker with considerable discretion. Pet. Mem. at 13.

Equally important, rental assistance is **not** a discretionary program. To be sure, HCD had discretion – within limits established by state and federal statutes – in setting up the program, including implementing the prioritization scheme set out in state law. Opp. at 15, n.3. But once the

program was operational, there are clear eligibility criteria, as the Department itself summarizes. Opp. at 9. Either an individual tenant qualifies for rental assistance under those criteria, or the tenant does not. The decision in each instance is factual, not discretionary. That there may be close cases, Opp. at 14-15, does not change the nature of the inquiry, or minimize tenants' due process rights.

Contrary to the Department's argument, Opp. at 15, this case is not analogous to *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152 (1996). In *Clark*, the Court of Appeal rejected a federal constitutional challenge to a City Council's rejection without prejudice of a development permit based on considerations of building height and lack of open space. As the court noted, under the applicable ordinance, the Council "'shall order the ... permit be granted, denied or modified *subject to such conditions or limitations that it may impose.*'" *Id.* at 1182 (emphasis added by the court). Here, if funding is available, HCD is not free to deny or reduce assistance to an applicant who meets the eligibility criteria or to impose conditions. Indeed, for tenants who meet 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). Respondents must provide due process protections.

B. The Department continues to violate tenants' due process rights by denying access to documents relied upon for denials and failing to provide notices explaining the reasons for denials.

As previously shown, Respondents violate the due process clause by denying tenants access to the documents HCD has relied on for application denials; and failing to provide adequate notice of the reasons for denials. Pet. Mem. at 14-15. The Department has failed to contradict either claim. Nor does the Department deny that it retroactively denies tenants who have already been approved for assistance and received payment (Dec. of Amber Twitchell, ¶¶ 7-36) or that many tenants do not receive notice of their denial at all unless they happen to check the website at the right time, or learn about it from their landlord. Dec. of Jeffrey Isaacs ¶¶10-12.

1. Denying tenants immediate access to documents violates their due process rights, a claim the Department has not disputed.

Respondents do not deny that they deny tenants access to the documents relied upon for application denials. Nor do they dispute that this denial renders appeal rights meaningless in many

cases, thus violating tenants' due process rights. Pet. Mem. at 15. Indeed, HCD says nothing at all on this subject. Its silence effectively concedes that Petitioners are likely to prevail on the merits.

2. In violaton of the due process clause, the Department continues to deny applications by checking a box on a template with a one-sentence boilerplate rationale that fails to provide tenants with enough information to file a meaningful appeal.

The Department contends that it has "refined" its process so that "all applicants are now given notice of the reasons for their denial." Opp. at 16. But the purported proof for this claim serves to refute it. HCD's Deputy Director Geoffrey Ross acknowledges that HCD denies rental assistance applications by checking a box on a template. Ross Decl., ¶ 5. Each box is accompanied by one sentence specifying the category the denial fits into, with no space for providing tenants with information relevant to their individual cases. Ex. 1 to Ross Decl. Mr. Ross does not claim that any tenant ever receives a denial notice with greater detail, and neither Petitioners nor their counsel have seen one. *See* Supp. Decl. of Madeline Howard, ¶ 8; Supp. Decl. of Amber Twitchell, ¶¶ 4-7, Ex. 1-2 (Examples of denial notices with and without section specified, neither of which provides any supplemental detail). Supp. Decl. of Jackie Zaneri, ¶¶ 4-5, Ex. 1-2 (Examples of denial notices for "inconsistent or unverifiable information" and nonresponsiveness, neither of which provides any supplemental detail).

One of the boxes that can be checked is "Inconsistent or unverifiable information has been provided by the applicant and cannot be substantiated by the program in section(s) . . ." *Id.* As multiple declarants have testified and HCD does not deny, this rationale for denials is common. Pet. Mem. at 14. Since this boilerplate does not tell the tenant which information is inconsistent or unverifiable, or whether the information was submitted by the tenant or the landlord, the Department does not attempt to defend the rationale.

Instead, the Department claims that due process is satisfied because in such cases "HCD identifies the section of the application that is deficient." Opp. at 16. But when, as in many instances, the application has been submitted by the landlord, identifying the problematic section of the application provides the tenant with no information at all; tenants are denied access to all documents, including the landlord's application. Zaneri Decl. ¶ 26. And even when the tenant has

submitted the application, the cryptic rationale at best narrows the tenant's burden to finding the proverbial needle in a quadrant of the haystack. Tenants must ask themselves, "did I mistype an address?" "Did I calculate my rental debt incorrectly?" "Did my landlord submit something that contradicted my application?" Merely identifying the section of application continues to keep tenants in the dark, rendering their appeal rights meaningless. Supp. Decl. of Amber Twitchell, ¶7-9, Ex. 2; Supp. Decl. of Jackie Zaneri, ¶¶ 3-4, Ex. 1.

As discussed in our opening brief, the notices at issue here are even more uninformative than the notices held constitutionally deficient in *Gresher v. Anderson*, 127 Cal. App. 4th 88 (2005) (invalidating notices that required applicants for a statutory exemption to explain their "criminal history" without informing the applicants what "history" was problematic). Pet. Mem. at 13-14.

These constitutionally deficient notices cannot be justified by Respondents' fear that providing any detail for a denial "would enable a person to bypass HCD's fraud prevention procedures." Opp. at 10, 16-17. This argument is inconsistent with the Department's claim that a tenant can obtain more information by contacting a Call Center, and "reengage with the process." Opp. at 10. If, despite concerns over fraud prevention, tenants theoretically can find out the actual reasons for denials by making a telephone call, why not put the information in writing? HCD's suggestion that the Call Center can address any notice concerns is also undermined by the fact that it is extremely difficult for tenants to get through to anyone at HCD on the phone. Supp. Decl. of Jackie Zaneri ¶¶ 8-9.

More fundamentally, 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."). The possibility that a handful of tenants or their landlords may make fraudulent claims cannot justify denying to the vast majority of honest tenants information needed to cure their own mistakes, the mistakes of their landlords, or HCD's mistakes.

The Department's reliance on *Bergeron v. Department of Health Services*, 71 Cal. App. 4th 17 (1999) (cited Opp. at 16, 17) is misplaced. In *Bergeron*, the Department of Health Services temporarily withheld payments to a dentist following a search of her offices pursuant to a fraud investigation. The Court of Appeal held that due process did not require a detailed explanation of the allegations to justify a temporary withholding of payments to those "believed to be engaged in fraudulent billing practices until there can be a criminal investigation . . . ." *Id.* at 27. *Bergeron* bears no relationship to this case, where the deprivation is permanent, not temporary, and is imposed not just on the handful of tenants believed to be engaged in fraud, but on *all* tenants. The interest in fraud prevention does not justify HCD's constitutionally deficient notices.

Finally, the Department claims that requiring an opportunity for tenants to testify orally would impose an increase in administrative costs. Opp. at 17, 18. The simple answer is that Petitioners have ***not*** sought the opportunity for oral testimony in this motion for preliminary injunction. Respondents have not contended that the changes which would satisfy due process requirements for purposes of this motion – access to documents and constitutionally adequate explanations for assistance denials -- would impose more than minimal additional costs.

The Department cannot justify denying tenants access to documents or adequate notice. HCD continues to violate Article I, § 7 of the California Constitution.

C. Mandate is appropriate to enforce the Department's ministerial, non-discretionary duty to comply with the due process clause.

The Department argues that mandate is inappropriate because Petitioners are attacking quasi-legislative decisions, not failure to perform ministerial duties. Opp. at 13. Petitioners, however, are not challenging the general rules governing the rental assistance program. At issue instead are the Department's violation of due process guarantees in implementing that program. Respondents have not denied, nor can they, that they have a ministerial duty to comply with the due process clause. *Accord, Gresher v.Anderson,* 127 Cal. App. 4th at 114, n. 7.

Similarly, the Court should reject the Department's claim that a writ of mandate would improperly interfere with HCD's discretion by changing the denial and appeal process. Opp. at 18.

All that a writ will do is prohibit the Department from denying rental assistance applications without providing basic due process protections.

Conlan v. Bonta, 102 Cal. App. 4th 745 (2002), is instructive. There, the Court of Appeal, after deciding that the Department of Health Services was violating federal law, held that a writ of mandate should be issued requiring compliance. The court reasoned that the "manner in which the Department chooses to meet its obligations is within the discretion of the Department. . . .we decide only that ignoring the recipients' rights and doing nothing is not an option." *Id.* at 764. Here too, HCD does not have discretion to ignore tenants' rights and do nothing to protect them.

And even to the extent the Department has some discretion, Respondents have acknowledged that "a constitutional violation would constitute an abuse of discretion . . ." Opp. at 15, n.4. HCD has abused its discretion by violating the due process clause.

Finally, Respondents rely on the absence of any specific direction in the Health & Safety Code to provide adequate denial notices and access to documents. Opp. at 13. The Legislature did give HCD broad authority to establish a rental assistance program. But it would be a giant leap to infer that the Legislature intended to permit the Department to deny constitutionally required due process protections to tenants. Nor did the Legislature have such power.

The Department has a ministerial, non-discretionary duty to provide tenants with due process protections. That duty can be enforced by mandate. Petitioners are likely to prevail on the merits.

II. Respondents have failed to cast doubt on Petitioners' right to a preliminary injunction.

A. Petitioners seek an order halting illegal denials, a prohibitory injunction.

Preliminarily, the Department argues that Petitioners seek a mandatory injunction, which is rarely issued. Opp. at 12. Even if this argument were valid, Petitioners would prevail, as the strength of their due process arguments readily meets the test for a mandatory injunction.

But in fact the relief Petitioners seek is prohibitory: a temporary halt to illegal denials of rental assistance. The Department could comply by simply stopping denials and stopping the 30 day clock on initial denials already issued. That the Department could also comply by making documents accessible to tenants and providing informative denial notices does not make the proposed injunction mandatory. The "character of a prohibitive injunction [is] not transformed and made mandatory

because it incidentally involved the doing of an affirmative act." *Daly v. San Bernardino Cnty. Bd. of Supervisors*, 11 Cal. 5th 1030, 1047 (2021) (citation and internal quotation marks omitted);

The status quo for the tenants who would be affected by the proposed relief is that they remain in their homes and will not receive a final denial of rental assistance. The injunction Petitioner seek would preserve that status quo and is therefore prohibitory.

B. A preliminary injunction could still prevent irreparable harm for many tenants despite recent changes in the law.

The Department does not dispute Petitioners' contention that the loss of one's home through eviction constitutes serious and irreparable harm. Pet. Mem. at 20. Rather, Respondents argue that since the Legislature has eliminated eviction protections for tenants with pending rental assistance applications, that harm can no longer be prevented. Opp. at 19.

Regardless of how legally free landlords might be to initiate an eviction, a landlord with a realistic prospect of repayment of thousands of dollars of rental debt is likely to think twice before doing so. Zaneri Supp. Decl.,¶ 10 (senior attorney at Petitioner ACCE testifies that "landlords I deal with tell their tenants they won't start the eviction process as long as the ERAP money is coming eventually… the potential for a tenant to receive rental assistance has allowed tenants I have assisted to negotiate with their landlord for more time"). Conversely, the end of some eviction protections makes irreparable harm to tenants *more* likely, not less, as the harm caused by an erroneously denied application will be immediate.

In addition, important tenant protections remain in place. It is true that Code of Civil Procedure § 1179.11 – which prohibited courts from issuing summons for unlawful detainers -- is no longer in effect. But under § 1179.13, which remains in effect, a court *must* restore a tenancy if the tenant's rental assistance application is approved and the landlord has been paid in full. And contrary to Respondent's assertion, Opp. at 19, Health and Safety Code § 50897.3(e)(2) continues to protect tenants from eviction if their landlord has a pending rental assistance application; the statute is not limited to federal rental assistance funding but by its terms applies to "rental assistance or other financial compensation from any other source." All of the tens of thousands of tenants whose

denials have not become final could still be protected from eviction if Petitioner's requested relief is granted. *See* Supp. Decl. of Madeline Howard ¶12.

Finally, even leaving aside the prospect of evictions, an erroneous denial of assistance will saddle a tenant with massive debt from which the tenant may never recover. And "[v]iolation of a constitutional right in, and of itself, constitutes irreparable injury." *Napa Valley Publ'g Co. v. City of Calistoga*, 225 F. Supp. 2d 1176, 1182 (N.D. Cal. 2002), and cases cited there.

Respondents' claim that the purported delay in filing this motion negates irreparable harm, Opp. at 19-20, misstates the legal significance and extent of the delay, and who is responsible. "Usually, delay is but a single factor to consider in evaluating irreparable injury; courts are 'loath to withhold relief solely on that ground.' " *Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014). And as Petitioners' lead counsel Madeline Howard points out, Petitioners are not guilty of unreasonable delay. HCD issued almost no denials until March 2022. Supp. Howard Decl., ¶ 3. The Department delayed providing Public Records Act responses about its appeal process that could have provided Petitioners with the information needed to bring this suit. *Id.*, ¶ 4. In response to a demand letter, HCD asked for more time and a meeting to resolve due process issues, and Petitioners agreed. *Id.*, ¶¶ 6-7. Petitioners filed this suit just six days after the Department at that May 31 meeting refused to change its practices. *Id.*, ¶¶ 8-9. Petitioners scheduled the motion for the earliest open date Respondents' counsel was available, and, when HCD announced its plans to speed up application decisions, successfully asked the Court for an earlier briefing schedule and hearing date. *Id.* at 9-11.

C. Denial of preliminary relief would not be justified as providing an opportunity for tenants to cure application mistakes, as current denial notices provide no such opportunity.

Lastly, the Court should reject the Department's claim that delaying denials somehow would prevent tenants from curing defects in their applications. Opp. at 20. HCD already has the ability to explain to tenants problems with applications before denying them, and indeed claims, albeit without evidence, that it already does so. Ross Decl., ¶ 9. As we have shown, the denials themselves provide no such opportunity, and the Department denies tenants for being "nonresponsive" days after they

have submitted requested documents. Supp. Zaneri Decl. ¶¶ 6-7.

In *Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974), the court rejected a government claim that an otherwise inadequate welfare termination/reduction notice was sufficient because it "advised the recipient that he could learn the reason for the proposed reduction or termination of benefits by inquiring of his caseworker." *Id.* at 489. "Under such a procedure only the aggressive receive their due process right to be advised of the reasons for the proposed action." *Id.* at 490. Here, where the notice does not specify anybody to contact and those who try to reach someone at HCD cannot get through, only the aggressive and the very persistent receive the information needed for an effective appeal. Without an attorney or sophisticated advocate, the vast majority of tenants "remain in the dark and suffer their benefits to be [denied] without knowing why the Department is taking that action." *Id.* Due process cannot rest on such slim a reed.

CONCLUSION

For the foregoing reasons and the reasons stated in the opening papers, the Court should should grant Petitioners' motion for a preliminary injunction.

Dated: July 5, 2022

Respectfully submitted,

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