Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

2001

Brief for Amici Curiae AARP et al., United States Department of Housing and Urban Development v. Rucker et al., Nos. 00-1770 & 00-1781 (U.S. Dec. 20, 2001)

Peter B. Edelman
Georgetown University Law Center

Docket Nos. 00-1770 & 00-1781

This paper can be downloaded free of charge from:
http://scholarship.law.georgetown.edu/scb/7

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: http://scholarship.law.georgetown.edu/scb

 Part of the Housing Law Commons, and the Legislation Commons

Nos. 00-1770 and 00-1781

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER
v.
PEARLIE RUCKER, ET AL., RESPONDENTS

OAKLAND HOUSING AUTHORITY, ET AL., PETITIONERS
v.
PEARLIE RUCKER, ET AL., RESPONDENTS

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

BRIEF FOR AMICI CURIAE AARP, ENPHRONT, ISLAND TENANTS ON THE RISE, MASSACHUSETTS UNION OF PUBLIC HOUSING TENANTS, CARMELITOS TENANTS ASSOCIATION, & PUBLIC HOUSING RESIDENT COUNCIL, IN SUPPORT OF RESPONDENTS PEARLIE RUCKER, ET AL.

CATHERINE M. BISHOP
Counsel of Record
JAMES R. GROW
National Housing Law Project
614 Grand Ave., Ste. 320
Oakland, CA 94610
(510) 251-9400

PETER B. EDELMAN
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9074

LEWIS YELIN
DEBRA GARDNER
Public Justice Center
500 East Lexington Ave.
Baltimore, MD 21202
(410) 625-9409

JAMES M. MCCREIGHT
RICHARD M.W. BAUER
Greater Boston Legal Services
197 Friend St.
Boston, MA 02114
(617) 371-1234

JULIE E. LEVIN
Legal Aid of Western Missouri
1125 Grand Blvd., Ste. 1900
Kansas City, MO 64106
(816) 474-6750

SUSANNE BROWNE
Legal Aid Foundation of Los Angeles
110 Pine Ave., Ste. 420
Long Beach, CA 90802
(213) 640-3897

TABLE OF CONTENTS

Page

TABLE OF CONTENTS, Cont.

TABLE OF AUTHORITIES

Cases

Page

Cases, cont.

Page

Cases, cont.

Statutes and Regulations

Page

Statutes and Regulations, cont.

Page

Miscellaneous

Page

Miscellaneous, cont.

Page

Miscellaneous, cont.

In the Supreme Court of the United States

No. 00-1770

UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT, PETITIONER
v.
PEARLIE RUCKER, ET AL., RESPONDENTS

No. 00-1781

OAKLAND HOUSING AUTHORITY, ET AL., PETITIONERS
v.
PEARLIE RUCKER, ET AL., RESPONDENTS

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

BRIEF FOR AMICI CURIAE AARP, ENPHRONT, ISLAND TENANTS ON THE RISE, MASSACHUSETTS UNION OF PUBLIC HOUSING TENANTS, CARMELITOS TENANTS ASSOCIATION, & PUBLIC HOUSING RESIDENT COUNCIL, IN SUPPORT OF RESPONDENTS PEARLIE RUCKER, ET AL.

INTERESTS OF THE AMICI CURIAE[1]

Amici Curiae include AARP and tenant organizations representing many thousands of public housing residents in most jurisdictions throughout the nation. Their members, and the communities in which they reside, are directly affected by the eviction policies at issue here.

Amicus AARP is a nonprofit membership organization of 35 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. Over 1.7 million households, headed by a person 62 years of age and older, live in federally subsidized rental housing. AARP's interest in housing extends to the rights of those older residents, including those who are raising their grandchildren, some of whom reside in public housing covered by the eviction policies at issue in this case.

Additional Amici are tenant organizations representing public housing residents in communities around the nation. Each of these tenant organizations has an interest in ensuring that this Court maintain and enforce clear and long-standing congressional policies that protect innocent, law-abiding tenants from unjust evictions.

Amicus ENPHRONT—Everywhere and Now Public Housing Residents Organizing Nationally Together—is a resident-led organization with members and affiliates in 46 states, in addition to Puerto Rico and the District of Columbia, that advocates for the preservation, improvement and development of public housing through coordinated local and

---

[1] Amici Curiae have obtained the written consent of Petitioners United States Department of Housing and Urban Development (HUD), Oakland Housing Authority (OHA), and Harold Davis, as well as the written consent of Respondents Pearlie Rucker, et al. to file this brief with the Court.

Pursuant to Supreme Court Rule 37(6), Amici Curiae note that counsel for Amici wrote the entirety of this brief and that no person or entity, other than the Amici Curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

national action. The organization also works to educate residents about the laws and policies affecting their lives, including those governing evictions.

Amicus Massachusetts Union of Public Housing Tenants (Mass Union), a membership organization including individual residents and local tenant organizations, represents thousands of tenants statewide. It seeks to advance safe and secure public housing through responsible behavior by both tenants and housing authorities. Mass Union believes that while housing authorities should act vigilantly to protect families from crime and violence through eviction of tenants that do not live responsibly, residents should not have to fear that their entire families will become homeless as the result of one bad act which the head of household had no reason to anticipate, and innocent tenants should keep their homes if they take reasonable steps to exclude wrongdoers.

Amicus Island Tenants on the Rise is a Hawai'i statewide nonprofit organization of elected public housing tenants from five islands. Formed in 1996, it represents the interests of over 2000 families. It provides training and counseling to residents with respect to evictions and issues related to crime, security, and maintenance in their homes, and advocates for its members with respect to the policies of the state housing authority.

Amicus Public Housing Resident Council (PHRC) is the city-wide organization of all public housing tenant leaders in Kansas City, Missouri. Its membership consists of 55 elected officers of the various public housing developments, representing over 1,800 public housing families and households. Established in 1994, it is recognized by the Housing Authority of Kansas City (HAKC) as the Resident Advisory Board and as the city-wide organization of resident leaders. The PHRC negotiated a lease with the HAKC, which includes protection for innocent tenants, which, in conjunction with other crime and security measures, has proven effective in

reducing crime in HAKC public housing communities, while protecting tenants against arbitrary loss of their homes.

Amicus Carmelitos Tenants Association, in existence for more than 25 years and incorporated in 1994, is the recognized representative of the more than 500 residents of the Carmelitos housing development in Long Beach, California. It publishes a monthly newsletter to inform and educate its members, has negotiated and commented on revisions to leases, represents tenants in grievances, and counsels tenants on eviction-related issues.

SUMMARY OF ARGUMENT

Section 1437d(*l*)(6) of the United States Housing Act provides that Public Housing Authorities (PHAs) that receive federal assistance shall use leases that "provide that any . . . drug-related criminal activity on or off [public housing] premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." 42 U.S.C. § 1437d(*l*)(6) (Supp. V 1999).

HUD has interpreted this section to require PHAs to use leases that contain provisions obligating a public housing tenant

> [t]o assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in . . . [a]ny drug-related criminal activity on or near [public housing] premises. Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. § 966.4(f)(12)(i)(B) (2000). In promulgating this regulation, HUD explained that it understood section 1437d(*l*)(6) as requiring that PHAs use leases imposing upon public housing tenants the obligation to warrant against illicit drug activity. Public Housing Lease and Grievance Proce-

dures, 56 Fed. Reg. 51,560, 51,567 (Oct. 11, 1991) ("The tenant should not be excused from contractual responsibility by arguing that the tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.").

While Amici fully support Respondents' argument that Congress intended to create, as a matter of federal law, an innocent tenant[2] defense to eviction under the lease provision required by section 1437d(*l*)(6), Amici here argue in the alternative that the text of section 1437d(*l*)(6) is silent as to the existence of affirmative defenses and that HUD's interpretation of the section, precluding an innocent-tenant defense, is an unreasonable construction of the statute. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *id*. at 844 (noting that where a "legislative delegation to an agency on a particular question is implicit rather than explicit" the question for the court is whether the agency's interpretation is reasonable).[3]

---

[2] Throughout this brief, Amici will use the term "innocent tenant" to mean a public housing tenant who did not know, and had no reason to know, of the drug-related criminal activity that is the basis for a PHA's eviction action against the tenant.

[3] Petitioners OHA and Davis imply that HUD interpreted section 1437d(*l*)(6) pursuant to express congressional delegation and that, therefore, HUD's regulations should be given "'controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" OHA Brief 26 (quoting *Chevron*, 467 U.S. at 843–44). OHA's implication is mistaken: Congress did not expressly delegate authority to HUD to promulgate legislative regulations to give effect to section 1437d(*l*)(6). *Cf.* 42 U.S.C. § 1437d(*q*)(5) (1994 & Supp. V 1999) ("The Secretary shall, by regulation, establish procedures necessary to ensure that information provided under this subsection to a public housing agency is used. . . as required under this subsection."). HUD's authority to interpret section 1437d(*l*)(6) arises under Congress' grant of general rule-making power, as HUD itself notes. *See* 24 C.F.R. pt. 966 (2000) (citing 42 U.S.C. § 3535(d) (1994)). Thus the inquiry for the Court is whether

Section 1437d(*l*)(6) indisputably requires PHAs to use leases that create a cause for termination of tenancy. But under basic principles of landlord-tenant law, the existence of a cause for termination is not incompatible with the existence of affirmative defenses to eviction. Federally assisted public housing is an amalgam of state and federal law, and the existence of federal protections against eviction do not preempt protections available under state law, as HUD has expressly acknowledged. Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560, 51,565 (Oct. 11, 1991). The text of section 1437d(*l*)(6) is silent as to the existence of any affirmative defenses. Congress enacted section 1437d(*l*)(6) against a backdrop of landlord-tenant law under which affirmative defenses may be asserted in response to a cause for termination. Thus, the text's silence regarding affirmative defenses cannot be taken as an indication of congressional intent to preclude an innocent-tenant defense.

HUD's interpretation of Congress' silence is unreasonable.

1. HUD has previously tried to curtail tenants' rights to present legal and equitable defenses to eviction. When it did so, Congress interceded and asked HUD to reconsider. Petitioners argue that because there is no express language in section 1437d(*l*)(6) creating an innocent-tenant defense, the Court should conclude that Congress did not intend to permit one. In light of this history, however, the opposite presumption should hold. Absent clear statutory language that eliminates defenses, the Court should conclude that section 1437d(*l*)(6) leaves in place any affirmative defenses to eviction that exist under state or federal law.

2. Congress requires PHAs to use leases that do not contain any unreasonable terms or conditions. 42 U.S.C.

HUD's regulations implementing section 1437d(*l*)(6) are reasonable. *United States v. Mead Corp.*, 121 S.Ct. 2164, 2172 (2001); *Chevron*, 467 U.S. at 844.

§ 1437d(*l*)(2) (1994 & Supp. V 1999). HUD argues that this requirement has no bearing on the proper interpretation of section 1437d(*l*)(6) because, by enacting the section, Congress has decided that the exclusion of an innocent-tenant defense is reasonable. But this argument begs the question, for it assumes that the section precludes an innocent-tenant defense. The proper question is whether Congress' prohibition against unreasonable terms suggests anything about whether, in enacting section 1437d(*l*)(6), Congress intended to prohibit the innocent-tenant defense. If there are reasons for believing that the exclusion of such a defense would be unreasonable, then the prohibition against unreasonable terms suggests that section 1437d(*l*)(6) should not be interpreted as prohibiting the defense.

There are at least two reasons for believing that the exclusion of an innocent-tenant defense would be unreasonable. The first is that it undermines the central policy goal it purports to further. HUD argues that strict liability gives public housing tenants an incentive to determine whether their household members or guests are engaging in drug-related activity and to prevent such activity from occurring. However, the preclusion of an innocent tenant defense almost ensures that tenants will not seek the assistance of public housing authorities or the police to address the illicit behavior because such a request could easily result in the tenant's eviction.

Second, the preclusion of an innocent tenant defense is inconsistent with Congress' endorsement of the good cause eviction requirement in public housing. The good cause requirement was first recognized by the courts in the 1950s, was developed by HUD in the 1960s and 1970s, and was endorsed by Congress and made part of the Housing Act in 1983. Underlying the good cause requirement is the idea that, because of the importance of the benefit involved, a public housing tenant should not be deprived of his or her home in the absence of serious misconduct for which the ten-

ant can fairly be held responsible. Permitting the eviction of innocent tenants is inconsistent with this long-standing principle and so is unreasonable.

3. There is little extant legislative history that is relevant to the question of an innocent tenant defense. Most of the history on which Petitioners and their Amici Curiae rely does not speak to the issue of whether a tenant, faced with possible eviction for alleged breach of the lease provision mandated by section 1437d(*l*)(6), may assert any affirmative defenses. The one piece of legislative history that directly bears on the questions presented supports the conclusion that, in enacting section 1437d(*l*)(6), Congress not only did not intend to preclude affirmative defenses but intended to protect innocent tenants. The Senate committee report accompanying legislation amending section 1437d(*l*)(6) states that the section does not create good cause to evict innocent family members. The report also explicitly states that eviction courts are to exercise discretion in considering whether to evict under the required lease provision. This is weighty evidence that Congress believed that a tenant could present affirmative defenses, including innocence, to the eviction court. If the section precluded defenses, the only issue for the eviction court to decide would be the existence of a cause for termination, and the court would have no occasion to exercise its discretion.

4. When a statute is silent about some issue, deference to agency regulations is appropriate when the agency's regulations apply the statute's general policies to specific circumstances that Congress may not have considered. This is not a case in which Congress expected HUD to fill a statutory gap. A public housing tenancy is an amalgam of federal and state law. The distinction between causes for eviction and affirmative defenses is basic to state landlord-tenant law. Moreover, public housing tenants routinely assert state-law defenses in eviction proceedings. In enacting section 1437d(*l*)(6), Congress was well aware of the hybrid nature of the public housing leasehold interest and the use of state-law

defenses to eviction. Through section 1437d(*l*)(6), Congress required PHAs to use leases that create a specific cause for termination. The availability of affirmative defenses to eviction is a central element of the public housing tenancy. Had Congress intended to eliminate affirmative defenses, one would expect Congress to have done so explicitly. Congress' silence on the availability of affirmative defenses is an indication of its intent not to disrupt the status quo.

ARGUMENT

THE TEXT OF SECTION 1437d(*l*)(6) IS SILENT AS TO THE EXISTENCE OF AN INNOCENT TENANT DEFENSE; HUD'S INTERPRETATION OF THE SECTION IS UNREASONABLE AND THEREFORE INVALID

I. THE TEXT OF SECTION 1437d(*l*)(6) IS SILENT AS TO THE EXISTENCE OF AN INNOCENT TENANT DEFENSE

Under Petitioners' interpretation of the plain language of section 1437d(*l*)(6), Congress requires PHAs to use leases that permit them to terminate the tenancy of a public housing tenant and evict the tenant if a member of the tenant's household, a guest, or other person under the tenant's control engages in specified drug-related activity, regardless of whether the tenant knew, or had reason to know, about the drug-related activity. *See, e.g.*, Brief for the United States Department of Housing and Urban Development (HUD Brief) 14, 18; Brief for Petitioners Oakland Housing Authority and Harold Davis (OHA Brief) 17–18, 28.

Petitioners primarily base their interpretation on two premises. The first is what HUD describes as the "expansive" language used in section 1437d(*l*)(6): The provision makes "any" drug-related criminal activity a ground for termination. HUD Brief 20; *see also id.* at 23; OHA Brief 27. The second is that the section contains no express language

limiting the required lease provision to drug-related activity of which the tenant was, or should have been, aware. HUD Brief 19; OHA Brief 29. From these premises, Petitioners conclude that Congress intended to permit PHAs to hold tenants strictly liable for the conduct of their household members, guests, and others over whom they have control. HUD Brief 20; OHA Brief 29.

As Amici will demonstrate, Petitioners' conclusion is simply a non sequitur. From the fact that the section unambiguously requires PHAs to use leases that create an unqualified cause for termination, it does not follow that the section prohibits affirmative defenses to the cause. The section is silent as to the existence of such defenses.

As HUD correctly notes, "'[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole.'" HUD Brief 18 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). HUD concedes that section 1437d(*l*)(6) "does not expressly address the tenant's level of personal knowledge, in the sense that it does not expressly condition eviction on any state of personal knowledge." *Id*. at 23. HUD nonetheless concludes that the section's use of "any" and the absence of express defenses precludes an innocent-tenant defense.

HUD's argument ignores "the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341. When basic elements of typical state landlord-tenant law are considered—elements upon which Congress has relied since it created federally-assisted public housing in 1937[4]—it becomes apparent that the fact that section 1437d(*l*)(6) provides a ground for termi-

[4] The 1937 act recognized state "civil and criminal jurisdiction in and over" federally owned public housing projects and explicitly preserved "the civil rights under the State or local law of the inhabitants on such property." United States Housing Act of 1937, Pub. L. No. 75-412, § 13(b), 50 Stat. 888, 895.

nation does not preclude the existence of affirmative defenses to that ground.

HUD has long recognized that a public housing tenancy is defined, in part, by state landlord-tenant law. *See, e.g.*, Tenancy and Administrative Grievance Procedure for Public Housing, 53 Fed. Reg. 33,216, 33,257 (Aug. 30, 1988) ("[T]he procedural and substantive law affecting a tenancy in the public housing program is compounded of elements established by both Federal and State law."). In announcing its final rule concerning eviction for drug-related activity following the passage of the Cranston-Gonzales National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (1990), HUD emphasized that a public housing tenancy should be understood as a creature of "normal landlord-tenant law." Public Housing Lease and Grievance Procedures, 56 Fed. Reg. at 51,567.

It is a basic principle of "normal landlord-tenant law" that the existence of a statutory or contractual cause for termination of a tenancy is not incompatible with the existence of affirmative defenses to termination on that ground. Thus, for example, in most if not all states, nonpayment of rent is a ground for eviction.[5] However, in most states, a tenant may raise the landlord's breach of the implied warranty of habitability as an affirmative defense to eviction for nonpayment of rent.[6] The defense is available notwithstanding the fact that

---

[5] *See, e.g.*, Cal. Civ. Proc. Code § 1161(2) (West 1982 & Supp. 2001); Or. Rev. Stat. § 105.115 (1999); Tex. Prop. Code Ann. ch. 24 (Vernon 2000).

[6] By 1979, the doctrine of implied warranty of habitability had obtained majority status in the United States, having been adopted by 41 states and the District of Columbia. *See Pugh v. Holmes*, 405 A.2d 897, 902 & n.2 (Pa. 1979) (collecting cases and statutes). Most courts to have considered the issue have held that breach of the implied warranty of habitability is an affirmative defense to eviction for nonpayment of rent. *See* Robert S. Schoshinski, American Law of Landlord and Tenant § 3:22 n.4 (1980 & Supp. 2001) (collecting cases); *see also* Restatement (Second) of Prop.: Landlord and Tenant § 5.1 n.7a (1977 & Supp. 2001) (collecting cases).

the statutes making nonpayment of rent a ground for eviction typically do not explicitly provide for affirmative defenses.[7] Similarly, many courts have refused to evict when they found that the tenants should not be held responsible for the offending conduct.[8] Moreover, many states have recognized an innocent-tenant defense to for-cause evictions.[9]

---

[7] For a discussion of the common law development of the implied warranty of habitability, see Schoshinski, *supra* note 6, § 3:16. Some states have created the implied warranty by statute, *id*. § 3:31, and many have recognized assertion of the implied warranty as an affirmative defense to eviction, *id*. § 3:32 n.83.

[8] *See, e.g., Brown v. Hous. Opportunities Comm'n*, 714 A.2d 197 (Md. 1998) (upholding authority of trial court to refuse to evict tenant for demonstrated breach of lease involving off-premises fight and drug possession of household member); *Hodess v. Bonefont*, 519 N.E.2d 258 (Mass. 1988) (holding that thefts committed by sons not sufficient reason to evict tenant), *Investors Diversified Prop. Mgmt., Inc. v. Brown*, No. 87-360-II, 1988 WL 102781 (Tenn. Ct. App. Oct. 7, 1988) (holding that single, unforeseeable assault by child on playmate not sufficient for eviction of tenant); *Moundsville Hous. Auth. v. Porter*, 370 S.E.2d 341 (W.Va. 1988) (holding that beating of tenant by boyfriend was not sufficient reason to evict).

[9] *See, e.g.*, Conn. Gen. Stat. § 47a-15 (1991); Mass. Gen. Laws ch. 121B, § 32 (Supp. 2001); *Hous. Auth. of Norwalk v. Harris*, 625 A.2d 816 (Conn. 1993); *Williams v. Hawai'i Hous. Auth.*, 690 P.2d 285 (Haw. Ct. App. 1984); *Am. Apt. Mgmt. Co. v. Phillips*, 653 N.E.2d 834 (Ill. App. Ct. 1995); *Boston Hous. Auth. v. Bell*, 697 N.E.2d 130 (Mass. 1998) (reaffirming *Spence v. Gormley*, 439 N.E.2d 741 (Mass. 1982)); *Charlotte Hous. Auth. v. Patterson*, 464 S.E.2d 68 (N.C. Ct. App. 1995); *Hous. Auth. v. Thomas*, 723 A.2d 119 (N.J. Super. App. Div. 1999); *Allegheny County Hous. Auth. v. Hibbler*, 748 A.2d 786 (Pa. Commw. Ct. 2000); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504 (Tenn. 2001), *cert. denied*, 122 S.Ct. 59 (2001), *Wessington House Apts. v. Clinard*, No. M 1999-01029-COA-R3-CV, 2001 WL 605105 (Tenn. Ct. App. June 5, 2001); *cf.* 7 C.F.R. pt. 1930, subpt. C, Ex. B ¶ XIV(A)(2)(c) (2000) (Rural Housing Service (RHS) regulation providing that, for RHS-administered housing, drug-related grounds for eviction do not extend to uninvolved household members, or to cases in which tenant takes reasonable steps to prevent or control or remove the offender). For a discussion of various states' experiences with drug-eviction policies and the inno-

It is indisputable that section 1437d(*l*)(6) requires PHAs to use leases that make the commission of certain criminal and drug-related activity a cause for termination of tenancy. But Petitioners are mistaken in arguing that the creation of a broad cause for termination and the absence of any express language creating an affirmative innocent-tenant defense demonstrates that Congress intended to impose a lease provision requiring the tenant to warrant that no drug-related activity will occur on or off public housing premises, regardless of the tenant's knowledge. *See* HUD Brief 23; OHA Brief 29. While section 1437d(*l*)(6) requires PHAs to use leases that contain a certain cause for termination of tenancy, the statute is silent as to the existence of any affirmative defenses to that cause.[10]

---

cent-tenant defense see David B. Bryson & Roberta L. Youmans, *Crime, Drugs, and Subsidized Housing*, 24 Clearinghouse Rev. 435 (1990); Diana A. Johnston, *Drugs and Public Housing: A Connecticut Case Study*, 24 Clearinghouse Rev. 448 (1990).

[10] HUD argues that Congress' subsequent passage of the Quality Housing and Work Responsibility Act of 1998 (Quality Housing Act), Pub. L. No. 105-276, § 577, 112 Stat. 2639, 2640–41 (codified at 42 U.S.C. § 13662(a) (Supp. V 1999)), provides additional evidence that, in enacting section 1437d(*l*)(6), Congress intended to preclude an innocent tenant defense. *See* HUD Brief 21 n.7, 42 n.16. That section of the Quality Housing Act requires PHAs or owners of federally assisted housing to establish standards or use leases with provisions that "allow the agency or owner . . . to terminate the tenancy or assistance for any household with a member . . . who the public housing agency or owner determines is illegally using a controlled substance." 42 U.S.C. § 13662(a). However the Quality Housing Act provision provides no support for HUD's position. Like section 1437d(*l*)(6), section 13662(a) creates a cause for termination without explicitly creating or prohibiting affirmative defenses to the cause. As demonstrated in the text, under typical landlord-tenant law, the existence of a cause for termination of tenancy is not in itself evidence of the absence of any affirmative defenses to termination on that ground.

II. HUD'S CONSTRUCTION OF SECTION 1437d(*l*)(6) IS UNREASONABLE

A. HUD previously attempted to eliminate public housing tenants' legal and equitable defenses to eviction and was rebuffed by Congress; the Court should not assume that Congress has implicitly eliminated a defense to eviction

Generally, when a PHA decides to terminate a tenant's lease, the tenant first has a right to contest the PHA's decision at an administrative grievance proceeding before defending against the eviction in court. 42 U.S.C. § 1437d(*k*) (1994 & Supp. V 1999) (directing HUD to promulgate regulations that require PHAs to provide administrative grievance procedures through which a tenant affected by an adverse PHA action may contest the PHA's determination that such action is merited); *see* 24 C.F.R. §§ 966.51(a)(1), 966.53(a) (2000) (implementing section 1437d(*k*)). If the eviction is based on the occurrence of drug-related criminal activity, Congress permits PHAs to bypass grievance proceedings so long as the state in which the PHA is located requires a judicial hearing prior to eviction and such court hearings "provide the basic elements of due process." 42 U.S.C. § 1437d(*k*); *see* 24 C.F.R. § 966.51(a)(2) (2000).

Congress requires HUD to make the determination whether state-court eviction proceedings satisfy due process. 42 U.S.C. § 1437d(*k*). Since 1975, HUD has defined the "elements of due process" to include the "[o]pportunity for the tenant . . . to present any affirmative legal or equitable defense which the tenant may have." 24 C.F.R. § 966.53(c)(3) (2000); *see* Public Housing Lease and Grievance Procedures, 40 Fed. Reg. 33,402, 33,407 (Aug. 7, 1975).

In 1988, HUD published a final rule which would have eliminated, among other things, the opportunity to present legal and equitable defenses as an element of due process.

Tenancy and Administrative Grievance Procedure for Public Housing, 53 Fed. Reg. at 33,290–33,293, 33,304 (announcing, inter alia, adoption of proposed 24 C.F.R. § 966.2). Shortly thereafter, a congressional conference committee report on legislation to amend the McKinney Act specifically questioned the adequacy of the criteria HUD planned to use in making its due process determinations. H.R. Conf. Rep. No. 100-1089, at 102 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4395, 4486. When it enacted the legislation recommended by the conference report, Congress directed HUD to treat the regulations announced in its final rule as having only interim effect and to entertain additional public comments on the rules. Stewart B. McKinney Homeless Assistance Amendment Acts of 1988, Pub. L. No. 100-628, § 1013, 102 Stat. 3224, 3269 (1988). Subsequently, a federal court enjoined implementation of the regulations, *Nat'l Tenants Org. v. Pierce*, No. 88-3134, 1989 U.S. Dist. Lexis 18348, *9 (D.D.C. Jan. 25, 1989), and HUD withdrew the proposed regulations, reinstating the prior regulations, which contained the right to present legal and equitable defenses as an element of due process, Tenancy and Administrative Grievance Procedure for Public Housing, 54 Fed. Reg. 6,886 (Feb. 15, 1989).

When it next proposed changes to public housing grievance procedures, HUD retained the opportunity to present legal and equitable defenses as an element of due process. Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 6,248, 6,252 (Feb. 14, 1991). As HUD explained, this requirement "signifies that the tenant must be able to raise in the proceeding any defense which would defeat the landlord's eviction claim for possession as a matter of substantive law." *Id*. When HUD promulgated the final regulations, it announced that, with an exception not relevant here, it had adopted "verbatim" the definition of due process elements contained in the original 1975 regulations. Public Housing

Lease and Grievance Procedures, 56 Fed. Reg. 51,560, 51,573 (Oct. 11, 1991).

When HUD attempted to limit tenants' grievance rights and, in establishing criteria for finding that state judicial eviction procedures satisfy due process, sought to eliminate the requirement that tenants have the right to present legal and equitable defenses, Congress stepped in and asked HUD to reconsider. Petitioners suggest that, because there is no express language in the statute creating an innocent-tenant defense, the Court should conclude that none exists. HUD Brief 19, OHA Brief 29. In light of HUD's previous attempt to eliminate tenants' defenses and Congress' intercession, Petitioners reverse the burden. The Court should not construe section 1437d(*l*)(6) as eliminating a tenant's defense to eviction absent clear statutory language expressly doing so.

B. Interpreting section 1437d(*l*)(6) as precluding an innocent-tenant defense is unreasonable in light of the prohibition in section 1437d(*l*)(2) of lease provisions that contain unreasonable terms and conditions

In considering whether HUD's preclusion of an innocent-tenant defense squares with congressional intent, the Ninth Circuit construed section 1437d(*l*)(6) in light of section 1437d(*l*)(2), which requires PHAs to use leases that do not contain unreasonable terms and conditions. Appendix to Petition for Writ of Certiorari in No. 00-1770 (Pet. App.) 13a–14a. The Ninth Circuit concluded that the eviction of innocent tenants would not further the policy objectives HUD identified and would lead to irrational results. For that reason, the court decided that a lease provision that prohibited an innocent tenant defense would be unreasonable. Pet. App. 14a–15a. Thus, the Ninth Circuit concluded, interpreting section 1437d(*l*)(6) to prohibit an innocent-tenant defense would be to construe the section as requiring PHAs to use leases that contain an unreasonable term, in conflict with the

prohibition against such terms in section 1437d(*l*)(2). *Id.* In order to read the sections harmoniously, the court construed section 1437d(*l*)(6) as permitting an innocent-tenant defense. *Id*.

HUD argues that the Ninth Circuit erred in interpreting section 1437d(*l*)(6) in light of section 1437d(*l*)(2)'s prohibition against unreasonable lease terms or conditions. HUD Brief 15 ("Congress's decision in Section 1437d(*l*)(6) to *require* inclusion of a lease term authorizing eviction of a tenant for a household member's drug-related criminal activity necessarily shows that Congress decided that such a term is *not* unreasonable . . . ."). But HUD begs the question, for it assumes what is to be proven, namely, whether section 1437d(*l*)(6) precludes an innocent-tenant defense.

The Ninth Circuit's interpretive methodology is sound. This Court has only recently explained that

> [i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (internal quotation marks and citations omitted). If there are independent reasons for believing that the elimination of an innocent-tenant defense would be unreasonable, then section 1437d(*l*)(6) should be interpreted as requiring the recognition of, or at least not precluding, that defense.

There are, indeed, reasons for believing that precluding an innocent-tenant defense would be unreasonable. First, HUD's interpretation of section 1437d(*l*)(6) undermines the central policy goal it purports to further. As HUD recognizes, Congress enacted section 1437d(*l*)(6) as a means to combat the use and sale of illegal drugs in public housing and the violence and other criminal behavior associated with the

drug problem. HUD Brief 3–4 (quoting policy provisions of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5122, 102 Stat. 4181, 4301). HUD argues that the imposition of strict liability on public housing tenants creates "the maximum incentive [for tenants] to find out whether household members or guests are engaging in drug-related criminal activity, to warn them of the serious consequences of their activity, and to take whatever other steps are necessary to protect the security of the housing project." HUD Brief 35; *see also, e.g.*, Public Housing Lease and Grievance Procedures, 56 Fed. Reg. at 51,563.

It is a matter of common sense that, without assistance from the authorities, a tenant who discovers that a household member or guest is engaging in illegal drug-related activity will often not be able to prevent the individual from subsequently engaging in that behavior or permanently to remove the individual from the lease or from public housing property.[11] *See* Restriction on Representation in Certain Eviction Proceedings, 61 Fed. Reg. 63,756, 63,757 (Dec. 2, 1996) ("[I]nnocent family members often need legal protection from the drug abuser.") (explaining final rules of the Legal

---

[11] This is especially true of the large population of public housing tenants who are elderly or have disabilities. In 1998, 36% of public housing tenants were 62 years of age or more. HUD, A Picture of Subsidized Households (1998), http://www.huduser.org/datasets/assthsg/statedata98/descript.html. In 1998, over a third of public housing tenants over 62 had disabilities, as did one-fifth of those under 62. *Id*. Congress is acutely aware that elderly Americans are especially vulnerable to abuse and exploitation. *See, e.g.*, 42 U.S.C. §§ 3027(a)(15)(E), 3030d(a)(15), 3058i (1994) (providing for federal funding for and assistance in creating state elder protective services); S. Rep. No. 98-467 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2974, 2989 (noting the "growing evidence of significant levels of elder abuse in this country") (report on proposed amendments to the Older Americans Act of 1965, 42 U.S.C. §§ 3001–3058ee (1994)). It is difficult to believe that Congress intended to permit the eviction of elderly public housing tenants who have been exploited by household members or guests, especially where the tenants knew nothing of the household member or guest's illicit activity.

Services Corporation). But since it would permit eviction whether the tenant knew or had reason to know of the illicit activity, HUD's interpretation of section 1437d(*l*)(6) gives tenants a *disincentive* to report serious drug problems to public housing authorities or the police.[12] Because tenants will know that if they seek the assistance of the authorities they will be subject to eviction, tenants will be less likely to take the "other steps [that] are necessary to protect the security of the housing project." HUD Brief 35; *see* Nelson H. Mock, Note, *Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties*, 76 Tex. L. Rev. 1495, 1516–17 (1998). HUD's interpretation thus squarely conflicts with the central purpose underlying section 1437d(*l*)(6).[13]

---

[12] Indeed, HUD took the position before the Ninth Circuit that section 1437d(*l*)(6) permits the eviction of tenants who did everything possible to prevent the illicit activity. *See, e.g.*, Pet. App. 22a.

[13] HUD also argues that strict-liability is required in order to give PHAs "bargaining power" over tenants that is necessary to get them to agree to bar the individual engaged in drug-related criminal activity. HUD Brief 36. The idea that PHAs need strict liability in order to have bargaining power over tenants resembles the notion that one needs a hand grenade to kill a fly. The vast majority of tenants evicted from public housing cannot afford housing in the private market. The median income of public housing tenants in 1999 was $7,631. HUD, Recent Research Results, New Facts About Households Assisted by HUD's Housing Programs (October 2000), http://www.huduser.org/periodicals/rrr/rrr_10_2000/1000_6.html. That makes for a median monthly income of $636. The median national rent for a two-bedroom apartment in 1999 was $596. United States Department of Commerce, Census Bureau, American Housing Survey for the United States: 1999, at 226 (October 2000), *available at* http://www.huduser.org/datasets/ahs/ahs_1999.pdf. Even if an innocent-tenant defense is available, public housing tenants must establish the factual basis for this defense in order to avoid eviction. This is no easy task, especially for the many public housing tenants who are unrepresented in eviction proceedings. Moreover, courts in jurisdictions that recognize an innocent-tenant defense do not hesitate to evict when the tenant fails to convince the court that he or she reasonably lacked knowledge of the illicit activity that was the cause for termination. *See, e.g., Williams v.*

Second, HUD's interpretation of section 1437d(*l*)(6) as prohibiting an innocent-tenant defense is inconsistent with Congress' endorsement of the good cause eviction requirements in public housing that were first developed in the courts and later codified by HUD and Congress. Congress has itself for nearly two decades required PHAs to use leases that provide "that the public housing agency may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause." 42 U.S.C. § 1437d(*l*)(5) (1994 & Supp. V 1999).

The good cause standard evolved first as a matter of case law. During the McCarthy Era, a number of PHAs required tenants to sign loyalty oaths as a condition of their continued tenancy. When tenants refused to sign, the PHAs attempted to evict them. A number of courts held that the tenants' refusal was not good cause to evict, because eviction on that ground had no rational relationship to the purposes of public housing. *See, e.g., Hous. Auth. v. Cordova*, 279 P.2d 215 (Cal. App. Dep't Super. Ct. 1955); *Chicago Hous. Auth. v. Blackman*, 122 N.E.2d 522 (Ill. 1954).

In the mid-1960s, HUD began administrative implementation of the good cause standard. HUD first urged and then required PHAs to provide tenants with the reasons for the proposed termination of their leases. *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 272–63 & n.8, 275 (1969) (discussing HUD circulars). Thereafter, it limited the sorts of reasons PHAs could give to terminate tenancies, forbidding PHAs to evict tenants except for "violation of the terms of the lease or other good cause." HUD, Consolidated Annual

---

Hawai'i Hous. Auth., 690 P.2d 285 (Haw. Ct. App. 1984); *Spence v. Gormley*, 439 N.E.2d 741 (Mass. 1982); *Romero v. Martinez*, 721 N.Y.S. 2d 17 (N.Y. App. Div. 2001). Thus, the simple threat of eviction—and the likely homelessness or substandard housing that would result—gives PHAs substantial bargaining power over tenants, even if they have recourse to an innocent-tenant defense.

Contributions Contract, Part II, HUD Form No. 53011, § 203(B) (Nov. 1969). HUD then included the good cause requirement when it promulgated its first regulations on PHA leases and grievance procedures. Lease and Grievance Procedures, 40 Fed. Reg. at 33,405. In 1983, Congress incorporated the good cause requirement into the Housing Act. Housing and Urban Renewal Recovery Act of 1983, Pub. L. No. 98-181 § 204, 97 Stat. 1155, 1179 (codified as amended at 42 U.S.C. § 1437d(*l*)(5) (1994 & Supp. V 1999)).

The good cause doctrine is built upon the principle that, because of the importance of the benefit, a public or federally subsidized housing tenant should not be deprived of his or her home in the absence of serious misconduct for which he or she is responsible. *See, e.g., Maxton Hous. Auth. v. McLean*, 328 S.E.2d 290 (N.C. 1985); *Messiah Baptist Hous. Dev. Fund Co. v. Rosser*, 400 N.Y.S.2d 306 (N.Y.City Ct. 1977); *Moundsville Hous. Auth. v. Porter*, 370 S.E.2d 341 (W.Va. 1988). Permitting the eviction of persons who bear no culpability for the illicit activity that is the basis for the eviction action is flatly inconsistent with this principle. It is a "basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972). Evicting innocent tenants offends that basic concept and so is unreasonable. In any case, had Congress intended to erode what is now a cornerstone of the public housing tenancy, it would not have done so by implication.

C. The legislative history of section 1437d(*l*)(6) evinces Congress' intent to permit tenants to assert an innocent-tenant defense during judicial eviction proceedings

There is little legislative history directly relevant to the questions presented in this case. What exists supports the conclusion that Congress did not intend to foreclose tenants'

ability to present an innocent-tenant defense at a judicial eviction hearing.

1. The predecessor to what is now section 1437d(*l*)(6) was originally enacted as part of the Anti-Drug Abuse Act of 1988, § 5101, 102 Stat. at 4300. There exists no conference committee report for this act.

The sole contemporaneous legislative history concerning the provision making drug-related criminal activity a cause for termination are the two sentences that appear in each of the Senate and House sponsor's section-by-section description. Both sponsors simply paraphrase the statutory text of section 1437d(*l*)(6). 134 Cong. Rec. 32,692, 33,148, 33,149, 33,186 (1988). HUD notes the Senate sponsor's statement that the statutory provision "'codifies current HUD guidelines granting public housing agencies authority to evict tenants if they, their families, or their guests engage in drug-related criminal activity.'" HUD Brief 38 (quoting 134 Cong. Rec. at 33,186) (alteration omitted). HUD suggests that the regulations to which the Senate sponsor referred were those promulgated by HUD on August 30, 1988, *id*. at 38, and that Congress "specifically adopted the approach of the HUD regulations," *id*. at 38–39.[14]

The regulation in question required PHAs to use leases that provide that the tenant "[s]hall not engage in criminal activity in the dwelling unit or premises, and shall prevent

---

[14] HUD notes the regulations promulgated on August 30, 1988 were subject to a temporary restraining order, that Congress directed HUD to treat the regulations as interim rather than final and to reopen notice and comment, that the court that issued the restraining order thereafter preliminarily enjoined implementation of the regulations, and that HUD ultimately withdrew the regulations. HUD Brief at 39 n.13. But HUD fails to mention that the congressional conference committee report for the legislation that directed HUD to reconsider the regulations expressed serious reservations about HUD's elimination from among the "elements of due process" the opportunity to present legal and equitable defenses—such as breach of the warranty of habitability—during judicial eviction hearings. *See supra* Part II.A.

criminal activity in the unit or premises by guests, visitors, or other persons under control of Household members." Tenancy and Administrative Grievance Procedure for Public Housing, 53 Fed. Reg. at 33,227. While HUD would like the Court to infer that the regulation, and the predecessor to section 1437d(*l*)(6), unequivocally permitted the eviction of tenants who did not know and had no reason to know of the drug-related criminal activity, this is not how HUD understood its regulation in 1988. HUD explained that under the lease provision required by the regulation "[t]he tenant has a positive duty to 'prevent' the prohibited activities by third parties. The tenant does not escape responsibility if the tenant and household *passively condone* prohibited acts. Instead, the tenant and household must do what is necessary to 'prevent' the prohibited acts." *Id*. at 33,229 (emphasis added).

At the very most, HUD's explanation of its regulation simply does not speak to the question of whether eviction is permitted under the regulation when the tenant did not know and had no reason to know of the prohibited activity. However, HUD's explanation of the purpose of the regulation—that it is meant to prevent a tenant from escaping responsibility if he or she passively condones illicit activity—demonstrates that in 1988 HUD believed that the regulation only applied to tenants who knew of the illicit activity.

2. Amici Council of Large Public Housing Authorities et al. argue that the 1989 enactment and subsequent repeal of a statutory provision protecting the rights of tenants "not involved" in drug-related activity is further evidence that, in enacting the predecessor to section 1437d(*l*)(6), Congress intended to prohibit the assertion of an innocent-tenant defense. Brief for Amici Council of Large Public Housing Authorities et al. (CLPHA Brief) 12–14.

As discussed above, if a PHA decides to evict a tenant for drug-related criminal activity, the PHA may bypass the administrative grievance process if the PHA is located in a jurisdiction in which HUD finds that judicial eviction proce-

dures satisfy the elements of due process. *See supra* Part II.A. The statute the CLPHA brief discusses directed HUD not to authorize a waiver of administrative grievance procedures in cases involving eviction for drug-related criminal activity unless the jurisdiction seeking waiver, in addition to satisfying HUD's due process standard, ensured that the eviction of a household member involved in drug-related activity did not "'affect the right of any other household member who is not involved in such activity to continue tenancy.'" CLPHA Brief 13 n.23 (quoting Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. No. 101-45, § 404(b), 103 Stat. 97, 128).

The CLPHA brief suggests that the subsequent repeal of this provision evinces Congress' intent to preclude an innocent-tenant defense.[15] However, as the District Court in this case concluded, the statutory provision that was repealed simply does not speak to the issue central to this case:

> The temporary extra "protection" [provided by the statute] applied to household members who were not *personally involved* in the criminal activity, but who may have had knowledge or a reason to know of the drug-related criminal activity. The statute says nothing about tenants who did not know, and had no reason to know, of the criminal activity.

Pet. App. 150a.

3. The only piece of legislative history that speaks directly to the questions presented is a report from the Senate Committee on Banking, Housing, and Urban Affairs that accom-

---

[15] Section 404 of the Supplemental Appropriations Act was repealed by the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1990, Pub. L. No. 101-144, 103 Stat. 839, 853.

panied 1990 legislation amending section 1437d(*l*)(6).[16] In that report, the committee stated that it

> anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.

S. Rep. No. 101-316 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941; *see also id.*, *reprinted in* 1990 U.S.C.C.A.N. at 5889 ("[T]he Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exi[s]t." (discussing similar provision for the Section 8 program)).[17]

HUD describes this passage as "merely recogniz[ing] that PHAs . . . have discretion in deciding whether, if at all, to evict tenants who have violated the Section 1437d(*l*)(6) lease provision, and urg[ing] the importance of a wise use of that discretion." HUD Brief 43. But HUD's characterization is only half the story. The committee did not merely exhort PHAs to use their wise discretion. It also stated that the question whether to evict "require[s] the wise exercise of humane judgment by the PHA *and the eviction court*," and that eviction courts should exercise their discretion to prevent

---

[16] The legislation was the Cranston-Gonzales National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4185 (1990).

[17] HUD attempts to undermine the relevance of the committee report by arguing that the report discussed a Senate bill different from the one that was enacted. HUD Brief 43. But the ways in which the Senate bill differed from the final legislation, documented by HUD in its brief, are wholly irrelevant to the question of Congress' intent concerning an innocent-tenant defense because the changes relate only to the scope of the cause for termination. *See id*. at 43.

the eviction of innocent tenants. S. Rep. No. 101-316, *re-printed in* 1990 U.S.C.C.A.N. at 5941 (emphasis added). If the committee did not intend for judges to consider tenants' claims of reasonable lack of knowledge, then it would make no sense for it to state that eviction courts should exercise "humane judgment." This is because, if tenants do not have available an innocent-tenant defense, then the only thing for an eviction court to decide is whether there is a cause for eviction (e.g., whether the drug-related activity occurred); in that event, the court would have no occasion to exercise its "humane judgment."[18]

The only legislative history that bears directly on the issue before the Court demonstrates that Congress intended to permit tenants to assert innocence as a defense to eviction under the required lease provision and that HUD's contrary interpretation is unreasonable.

---

[18] Indeed, this is HUD's misguided view of the role of eviction courts. Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28776, 28782 (May 24, 2001) ("The statute does not authorize courts to exercise this same type of discretion. Courts determine whether a violation of the lease has occurred and whether the lease provides that such a violation is grounds for eviction of the persons whom the PHA seeks to evict."). HUD's current interpretation is flatly inconsistent with the committee's statement that eviction courts will use their discretion in deciding these public housing eviction cases. Note that this is not how HUD previously viewed the role of the eviction court. In its notice to public housing directors explaining President Clinton's "One Strike and You're Out" policy, HUD informed public housing agencies that if they "do seek eviction" of household members not directly involved with the drug-related activity, "PHAs should be prepared to persuade a court that eviction is justified." HUD, Office of Public and Indian Housing, "One Strike and You're Out" Screening and Eviction Guidelines for Public Housing Authorities, Notice PIH 96-16 (HA), at 8 (April 12, 1996).

D. Since Congress enacted section 1437d(*l*)(6) against a background of state landlord-tenant law in which there exist affirmative defenses to causes for termination, had Congress intended to eliminate such defenses, it would have said so

The Court has explained that where a statute fails to speak to an issue, deference to agency regulations is appropriate under *Chevron* when the issue involved requires the application of the statute's general policies to specific circumstances. In that case, "the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms." *United States v. Haggar Apparel Co.*, 526 U.S. 380, 393 (1999). However, this case does not involve a situation in which Congress could not "anticipate all circumstances in which a general policy must be given specific effect." *Id*. at 392.

In establishing federally-assisted public housing, Congress created a property interest that is an amalgam of federal and state law. As HUD has explained,

> the procedural and substantive law affecting a tenancy in the public housing program is compounded of elements established by both Federal and State law.
>
> State laws are binding without incorporation in a Federal rule, or in the Federally-required lease requirements. State tenant protections may be enforced through the State courts or other procedures available under State law, without any need to create a Federal right to State law protections.

Tenancy and Administrative Grievance Procedure for Public Housing, 53 Fed. Reg. at 33,257; *see also* Tenancy and Administrative Grievance Procedure for Public Housing, 56 Fed. Reg. at 51,565 ("The Federal law defines minimum protections for the Federally assisted public housing tenant, but does not preempt additional protections or rights provided by the State which do not violate the Federal law."). When en-

acting and amending section 1437d(*l*)(6), Congress was well aware of the hybrid nature of the public housing leasehold interest. More specifically, it was aware that public housing tenants could and routinely do assert state-law defenses to eviction from public housing. *See e.g.*, *supra* notes 4, 14.

The distinction between causes for termination of tenancy and possible defenses to such causes is well established in landlord-tenant law. *See supra* Part I. Indeed, various states have recognized an affirmative innocent-tenant defense to for-cause evictions. *See supra* note 9. Congress specifically chose to require PHAs to use leases that create a specified cause for termination. Had Congress intended to eliminate a central element of the public housing tenancy, one would have expected Congress to have stated so explicitly.[19] *See* Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("A court may . . . ask whether the legal question is an important one. Congress

---

[19] HUD itself recognized that Congress intended to leave in place any state-law defenses to eviction. In announced proposed regulations implementing the 1990 amendments to the predecessor to section 1437d(*l*)(6), HUD stated that the proposed regulations would have no federalism implications under Executive Order No. 12,612. Public Housing Lease and Grievance Procedures, 56 Fed. Reg. at 51,575; *see also* Exec. Order No. 12,612, 52 Fed. Reg. 41685, § 4(a) (October 26, 1987) ("Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute."), *revoked by* Exec. Order No. 13,083, 63 Fed. Reg. 27,615 (May 14, 1998). Similarly, in promulgating its most recent regulations implementing section 1437d(*l*)(6), HUD expressly stated that the regulations do not preempt state law within the meaning of Executive Order No. 13,132. Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. at 28,791; *see also* Exec. Order No. 13,132, 64 Fed. Reg. 43,255, § 4(a) (Aug. 14, 1999) (containing language substantially similar to Exec. Order No. 12,612 § 4(a)).

is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."); *cf.* 42 U.S.C. § 1437d(*l*)(7) (1994 & Supp. V 1999) (requiring that PHAs use leases providing tenants the right to examine "documents, records, or regulations" directly related to the PHA's decision to evict, "notwithstanding any State law" to the contrary).

This is not a case in which Congress expected HUD to "fill in the statutory gaps." *Brown & Williamson*, 529 U.S. at 150. In light of the hybrid nature of public housing tenancies, Congress' silence on the viability of affirmative defenses to eviction under the lease provision mandated by section 1437d(*l*)(6) is an indication of its intent to permit tenants to continue to avail themselves of all defenses otherwise available to them as a matter of substantive law, including that of innocence.

CONCLUSION

The two questions on which the Court granted certiorari differ in a slight but important respect. The question in No. 00-1770 is whether "the *lease clause* provided for in 42 U.S.C. [§] 1437d(*l*)(6) (Sup. V 1999) is *violated* by drug-related criminal activity of household members, regardless of whether it can be shown that the tenant knew, or had reason to know, of the drug-related activity." HUD Brief I (emphasis added). The question in No. 00-1781 is whether "42 U.S.C. § 1437d(*l*)(6) *permits termination of a tenancy* if a tenant did not know, or have reason to know, that a household member or guest engaged in drug-related criminal activity." OHA Brief i (emphasis added).

Amici have argued that while section 1437d(*l*)(6) requires the use of leases that create a cause for termination when a household member engages in drug-related criminal activity, the existence of this cause is fully consistent with the existence of an affirmative innocent-tenant defense to eviction.

For this reason, Amici urge the Court to answer the question in No. 00-1770 "Yes, but . . . ." Yes, the lease clause is violated by the drug-related criminal activity of a tenant's household members, regardless of the tenant's knowledge, but the tenant may assert an innocent-tenant defense at a judicial eviction hearing. For the same reason, Amici urge the Court to answer the question in No. 00-1781 "No," because section 1437d(*l*)(6) permits public housing tenants to assert reasonable lack of knowledge as a defense in a judicial eviction proceeding.

Because the judgment of the Court of Appeals is consistent with these answers, it should be affirmed.

Respectfully submitted,

CATHERINE M. BISHOP
Counsel of Record
JAMES R. GROW
National Housing Law Project

PETER B. EDELMAN

LEWIS YELIN
DEBRA GARDNER
Public Justice Center

JULIE E. LEVIN
Legal Aid of Western Missouri

JAMES M. MCCREIGHT
RICHARD M.W. BAUER
Greater Boston Legal Services

SUSANNE BROWNE
Legal Aid Foundation of Los Angeles

December 20, 2001