Nos. 00-1770, 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 OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the lease clause mandated by 42 U.S.C. § 1437d(*l*)(6) authorizes public housing authorities to terminate tenancies on the basis of drug-related criminal activity by household members or guests irrespective of the tenants' knowledge of, or control over, the drug-related criminal activity.

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INTERESTS OF THE AMICI CURIAE

The Washington Legal Foundation (WLF)[1] is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to the support of government efforts to ensure that law-abiding citizens can feel safe while in their homes and walking in their neighborhoods. In particular, WLF has appeared before this court as well as other federal and state courts to support government efforts to control the sale of illegal drugs and the violence necessarily attendant to such sales. *See, e.g., City of Chicago v. Morales,* 527 U.S. 41 (1999); *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646 (1995); *Earls v. Bd. of Education,* 242 F.3d 1264 (10th Cir. 2001), *cert. granted*, ___ U.S. ___, No. 01-332 (U.S., Nov. 8, 2001); *Housing Opportunities Comm'n v. Lacey*, 332 Md. 56 (1991).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici believe that those who suffer the most from the drug trade and associated violence are those, such as occupants of government-subsidized housing, who cannot afford housing in areas away from the center of drug activity. *Amici* believe that the government should take

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

every available step to provide all law-abiding citizens -- regardless of income -- with housing that is not ravaged by the effects of drug dealing.

Amici submit this brief in support of Petitioners with the consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT

In the interest of brevity, *amici curiae* incorporate by reference the Statement contained in the brief of Petitioner United States Department of Housing and Urban Development ("HUD").

The Statute. In short, public housing in this country has been devastated by an epidemic of drug-related criminal activity. Congress responded to this crisis by passing the Anti-Drug Abuse Act of 1988. Pub. L. No. 100-690, § 5122, 102 Stat. 4301 (codified at 42 U.S.C. § 11901 (1994 & Supp. IV 1998)).

At issue here, one of the statute's key weapons was the requirement that leases used by public housing authorities (PHA) shall:

> (5) provide that a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.

42 U.S.C. § 1437d(*l*)(5) (1989).

This section has been amended several times since its enactment. In 1990, the Cranston-Gonzalez National Affordable Housing Act substituted the more specific "criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises" for the introductory language generally related to criminal and drug activity. Pub. L. No. 101-625, § 504, 104 Stat. 4185 (codified at 42 U.S.C. § 1437d(*l*)(5) (1994)). In 1996, the statute's reach was extended by replacing the phrase "on or near such premises" with the phrase "on or off such premises." Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9(a)(2), 110 Stat. 836 (codified at 42 U.S.C. § 1437d(*l*)(6) (Supp. IV 1998)). Finally, in 1998 subsection (*l*)(5) was redesignated (*l*)(6).

As currently codified, the statute requires that public housing leases shall:

> (6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such 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.

Id. (1998).

HUD's Regulations. In 1991 HUD promulgated regulations implementing the statute. In the process of doing so, HUD received comments urging that the regulations include

an element of fault, knowledge, or foreseeability on the part of the tenant. HUD rejected these pleas, concluding that "[t]he 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." Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560, 51,567 (Oct. 11, 1991).

As enacted, the HUD regulations closely tracked the pre-1996 statutory language:

> To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or
>
> (B) Any drug-related criminal activity on or near such premises.
>
> Any criminal activity in violation of the preceding sentence shall be cause for the termination of tenancy, and for eviction from the unit.

24 C.F.R. § 966.4(f)(12)(i). The regulations have since been revised to take into account the 1996 statutory amendment, substituting the phrase "on or near such premises" with "on or off such premises." See 66 Fed. Reg. at 28,802-28,803 (promulgating 24 C.F.R. § 966.4(f)(12)(ii)(B) and 24 C.F.R. § 966.4(*l*)(5)(i)(B)).

Importantly, HUD's regulations do not require PHAs to evict tenants for every drug infraction, but instead authorize PHAs to exercise discretion "to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity." 24 C.F.R. § 966.4 (*l*)(5)(i).

The Proceedings Below. This case arose when, in late 1997 and early 1998, Petitioner Oakland Housing Authority instituted separate eviction proceedings against four tenants pursuant to the lease clause mandated by 42 U.S.C. § 1437d(*l*)(6). The tenants, in turn, sought an injunction against their eviction in the United States District Court for the Northern District of California. The district court granted the tenants a preliminary injunction. Pet. App. 138a-166a.

A panel of the Ninth Circuit reversed the district court and vacated the preliminary injunction. Pet. App. 68a-137a. The panel based its decision on the plain language of the statute, which it held "makes any drug-related criminal activity engaged in by a tenant, household member, or guest cause for termination regardless of whether the tenant knew of such activity." *Id.* at 107a.

On rehearing en banc, the Ninth Circuit affirmed the district court's decision by a 7-4 vote. Reviewing the proper interpretation of § 1437d(*l*)(6) *de novo*, the majority held that "if a tenant has taken reasonable steps to prevent criminal activity, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a

household member or guest, § 1437d(*l*)(6) does not authorize the eviction of such a tenant." *Id.* at 26a.

The majority found that the language of § 1437d(*l*)(6) "does not expressly address the level of personal knowledge or fault that is required for eviction, or even make it clear who can be evicted," and concluded that this silence rendered the statute ambiguous. Pet. App. 12a. The majority then examined related statutory provisions and the legislative history of § 1437d(*l*)(6) and concluded that "Congress had an intention on the precise question at issue that is contrary to HUD's construction." Pet. App. 11a. Accordingly, the majority held that "HUD's interpretation is not entitled to deference" under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In reaching this conclusion, the majority looked to 21 U.S.C. § 881(a)(7) (1982 ed. Supp. V 1987), a civil forfeiture statute that includes an "innocent owner" defense precluding forfeiture "by reason of any act or omission established by th[e] owner to have been committed or omitted without the knowledge or consent of that owner." The majority noted that Congress in 1988 amended 21 U.S.C. § 881(a)(7) specifically to include leasehold interests among the property that was subject to forfeiture if used to commit or facilitate a drug-related offense, the same year Congress first enacted what is now § 1437d(*l*)(6). See Anti-Drug Abuse Act of 1988, § 5105, 102 Stat. 4301. The majority "presume[d] Congress meant [the forfeiture provision and § 1437d(*l*)(6)] to be read consistently." Pet. App. 17a.

The majority also relied on the legislative history of the 1990 amendment to § 1437d(*l*)(6). The committee report on the Senate version of the bill stated:

> The committee 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. 316, 101st Cong., 2d Sess. 179 (1990). Rejecting HUD's argument that the report underscores "Congress's intent to confer wide discretion on HUD and the local PHAs" (Pet. App. 20a), the majority held that the "reports are very clear that such evictions *would not* be appropriate, and that in such circumstances good cause to evict *would not* exist." *Id.* at 21a (emphasis in original).

The majority also believed that HUD's interpretation of the statute should be rejected because it would lead to "absurd results" and conflict with § 1437d(*l*)(1)'s prohibition on "unreasonable" lease terms. Pet. App. 21a. The majority speculated that the statute would permit eviction, for example, "if a tenant's child was visiting friends on the other side of the country and was caught smoking marijuana" or for "a drug crime years earlier." *Id.* at 22a.

Finally, the majority concluded that the principle of constitutional avoidance supported its result, because "[p]enalizing conduct that involves no intentional wrong-

doing by an individual can run afoul of the Due Process Clause." Pet. App. 24a. Without discussing any issues concerning the allocation of the burden of proof, the majority stated that "OHA remains free to proceed with evictions for off-premises drug activities when *it can prove* the tenant knew or should have known of the activity." Pet. App. 28a (emphasis added); see also *id*. at 29a and n.10.

The en banc dissent concluded that the statutory language was "clear on its face" in permitting evictions without regard to the tenants' knowledge. *Id*. at 33a. Although the dissent believed the statutory language was dispositive, the dissent went on to examine the statutory context and legislative history, concluding that both supported HUD's construction of the statute. For example, the dissent argued that Congress's inclusion of express "innocent owner" language in the forfeiture statute merely underscored the significance of Congress's omission of any similar language in § 1437d(*l*)(6). Pet. App. 42a-44a. See also *id*. at 40a-42a (discussing 42 U.S.C. § 1437d(c)(4)(A) (1994)).

The dissent disputed the majority's contention that permitting the eviction of tenants who were ignorant of the drug-related conduct would violate § 1437d(*l*)(1)'s ban on "unreasonable" lease terms. In the dissent's view, "[t]he ignorant tenant eviction provision rationally addresses" Congress's concerns about the serious problems caused by drug crimes in public housing projects, because it gives the public housing authority "a credible deterrent against criminal activity" and because "requir[ing] proof of knowledge on the part of the tenant of the criminal activity of a guest is impractical" in any case in which the tenant was

not himself found in the presence of the offender during the drug-related criminal activity. Pet. App. 51a. Moreover, the dissent stated that the provision empowers other tenants to report drug-related activity, and thereby to help clean up their own projects, "without fearing the possibility of retaliation" from drug dealers. *Id.* at 53a. The dissent observed that "a provision permitting the eviction of unknowing tenants because of the wrongdoing of their household members or guests is a common and enforceable provision in leases between private owners of property and their tenants" and that fact "attests to [its] reasonableness." *Id.* at 54a.

Finally, the dissent concluded that § 1437d(*l*)(6) is constitutional without an "innocent tenant" exception. The dissent explained that "[t]he failure to distinguish between the knowing and unknowing tenant need survive only minimal scrutiny," especially in light of the fact that "Congress must draw distinctions 'in order to make allocations from a finite pool of resources.'" Pet. App. 60a (quoting *Lyng v. International Union, UAW*, 485 U.S. 360, 373 (1988)). The dissent asserted that § 1437d(*l*)(6) easily satisfies minimal scrutiny as it "facilitates the eviction of truly culpable tenants, creates incentives for all tenants to report drug-related criminal activity, and provides a credible deterrent against criminal activity." *Id.* at 61a. And "[b]ecause the eviction provision is discretionary, the provision also motivates tenants to accept remedial actions short of eviction." *Ibid.*

The Court granted review in Case No. 00-1770 on September 25, 2001 and in Case No. 00-1781 on October 1, 2001 and consolidated the cases.

SUMMARY OF ARGUMENT

The severity of the epidemic of drug-related criminal activity in public housing cannot be overstated. Millions of law abiding citizens are hostages in their own homes. They live in constant terror of gangs, shootings, and violence, intimidated into silence and inaction.

Recognizing the gravity of the problem, Congress enacted § 1437d(*l*)(6) of the Anti-Drug Abuse Act of 1988 to provide PHAs a potent weapon to combat the scourge of drugs. In doing so, Congress unambiguously provided that PHAs may terminate tenancies for drug-related criminal activity of those on public housing premises at the tenant's behest regardless of whether the tenant knew of the drug activity or had the ability to prevent it.

The Ninth Circuit majority opinion below wholly eviscerates § 1437d(*l*)(6) and thwarts its intended effect. The vast majority of criminal activity in public housing is perpetrated by non-residents. By relieving tenants of strict accountability for the criminal elements they invite onto public housing, the Ninth Circuit has effectively rendered PHAs powerless to improve the safety of their residents. Moreover, by assigning PHAs the burden of proof concerning the tenants' knowledge, the Ninth Circuit has made it virtually impossible for PHAs to evict even those tenants who do know of the criminal activity of their household members and guests.

The Ninth Circuit majority committed two fundamental errors in reaching its conclusion. First, it erred in looking beyond the plain statutory language where that language was

unambiguous. Second, it improperly concluded that Congress intended to impose a knowledge or control requirement. The statutory scheme and legislative history of § 1437d(*l*)(6) belie that conclusion. Thus the Ninth Circuit erred in refusing to defer to HUD's reasonable interpretation of the statutory language.

ARGUMENT

I. Drug-Related Criminal Activity In Public Housing Is a Serious Epidemic and Cannot Be Effectively Addressed Without Holding Tenants Strictly Accountable for Bringing Drug Criminals onto Public Housing

The dire consequences of the drug epidemic in public housing are well-known and beyond dispute. In enacting the Anti-Drug Abuse Act of 1988, Congress found in pertinent part:

> (2) public housing projects in many areas suffer from rampant drug-related crime;
>
> (3) drug dealers are increasingly imposing a reign of terror on public housing tenants;
>
> (4) the increase in drug-related crime not only leads to murders, muggings, and other forms of violence against tenants, but also to deterioration of the physical environment that requires substantial government expenditures. . .

Pub. L. No. 100-690, § 5122, 102 Stat. 4301 (codified at 42 U.S.C. § 11901 (1994 & Supp. IV 1998)).

These findings are equally, if not more, pertinent today. In a rare point of agreement, both the majority and dissent below acknowledge the continuing scourge. *See* Pet. App. 2a (majority opinion, "many of our nation's poor live in public housing projects that, by many accounts, are little more than illegal drug markets and war zones. Innocent tenants live barricaded behind doors, in fear for their safety and the safety of their children."); Pet. App. 32a (dissenting opinion, noting the "devastating and worsening epidemic of drug related crime and violence in public housing").

The Ninth Circuit opinion below effectively ensures the perpetuation of the crisis. The vast majority of criminal acts in public housing are committed by non-residents. *See* Department of Housing and Urban Development, *A Promise Being Fulfilled, The Transformation of America's Public Housing, A Report to the President*, Chapter 5 (July 2000) (77 percent of the arrests in public housing in Macon, Georgia in 1997 were non-residents); Torry and Ifill, *HUD Drug Ruling is Played Down; Streamlining Evictions Process May Not Aid Cities Much, Experts Say*, Wash. Post. Apr. 1. 1989 at A4 (more than 85 percent of arrests on public housing grounds in San Francisco during study period involved non-residents); Drugs in Federally Assisted Housing: Hearing on S. 566 before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 101st Cong., 1st Sess. 11 (1989) (statement of Vincent Lane) (approximately 80 percent of the crime in Chicago's public housing during study period was attributed to non-residents); Drug

Problems and Public Housing: Hearing Before the House Select Comm. on Narcotics Abuse and Control, 101st Cong., 1st Sess. 6 (1989) (testimony of Secretary Kemp). Quite simply, inviting drug criminals onto public housing increases the likelihood of drug crimes on site. The Ninth Circuit's imposition of a barrier to the eviction of tenants responsible for bringing a criminal element on site renders PHAs powerless precisely where they need the strongest weapons.

Moreover, by arguably assigning the burden of proof concerning the tenant's knowledge of, or control over, the wrongdoer to the PHA (*see* Pet. App. 28a), the Ninth Circuit has made it unlikely PHAs will be able to evict even those tenants who *do* have knowledge of their household members' or guests' drug activity, parties who all sides agree should be evicted. Faced with the possibility of eviction, and terrorized by the fear of retribution, the tenant has every incentive to deny knowledge or control. Witnesses will likewise be frightened into silence. And the household member or guest engaged in the criminal activity has every incentive to confirm the tenant's denial. It will be all but impossible for PHAs to prove otherwise in these circumstances, particularly given that PHAs do not enjoy prosecutorial investigative powers such as grand jury subpoenas and wiretaps.

The end result of the Ninth Circuit's decision is to make it easier for PHAs to evict a tenant for not paying rent than for posing a serious threat to the health and safety of the other residents. Compounding this untenable result, by opening the door to excuses for tenants' professed lack of knowledge, the majority undermines tenants' motivation to eradicate drug activity from public housing.

Ironically, while the objection of the Ninth Circuit and others to the eviction of so-called "innocent tenants" is clearly motivated by notions of equity and fairness (*see* Pet. App. 22a-23a), the Ninth Circuit's decision begets inequity and unfairness. Those who object to the eviction of "innocent tenants" are concerned with the hardship to the evicted tenant and household members. Protecting the "innocent tenant" and household members, however, sacrifices the interests of the many (the law abiding tenants victimized by drugs and crime) to the interest of the few (the evicted tenants and household members). Given that demand for public housing exceeds supply, it also necessarily displaces other equally needy families on the waiting list. Therefore, the Ninth Circuit's opinion cannot be justified on equity or fairness grounds.

II. The Statutory Language Unambiguously Provides for Termination of Tenancy Regardless of the Tenant's Knowledge of, or Control Over, the Offending Criminal Activity

Section 1437d(*l*)(6) is unmistakably clear. It provides, "any drug-related criminal activity on or off such 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." It contains no mention of a requirement that the tenant must have knowledge of, or control over, the drug-related criminal activity of household members or guests in order to support eviction.

Basic rules of grammar dictate that the statute is not susceptible to a reading that imposes a control requirement

with respect to household members and guests. The statute contemplates four categories of individuals whose drug-related criminal activity can be cause for eviction: (i) the tenant, (ii) members of the tenant's household, (iii) the tenant's guests, and (iv) other persons under the tenant's control. The control requirement modifies only the fourth category. It has no applicability to the first three.

To justify its resort to extra-statutory materials, the majority contends that the statutory language is ambiguous. This conclusion runs afoul of several basic precepts of statutory interpretation. First, contrary to the majority's assertion (*see* Pet. App. 12a), the fact that the statute does not expressly state the level of knowledge or fault required, does not render it ambiguous. To hold otherwise, ignores the plain meaning of the term "any" in the phrase "any drug-related criminal activity" can be cause for termination of a tenancy. As stated by the Ninth Circuit panel, "A statute covering 'any drug-related criminal activity' has the same exact scope as one covering 'any drug-related criminal activity *including that of which the tenant is unaware*' or 'any drug-related criminal activity *regardless of the tenant's knowledge thereof.'*" *See* Pet. App. 87a. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (*quoting Webster's Third New International Dictionary* 97 (1976)).

Further, the claim of ambiguity flouts the import of the disjunctive "or" preceding the phrase "other person." The "or" serves to differentiate "other persons" -- who must be "under the tenants control" -- from the first three categories (the tenant, members of the household, guests) for whom no

similar limitation is applicable. Reading the "or" entirely out of the statute in order to support the assertion that the phrase "under the tenant's control" modifies each of the four categories, impermissibly renders the enumerated categories superfluous. *Bailey v. United States*, 516 U.S. 137, 145 (1995) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 140-141 (1994)) ("we read [the statute] with the assumption that Congress intended each of its terms to have meaning. 'Judges should hesitate ... to treat [as surplusage] statutory terms in any setting.'").

In the face of this unambiguous statutory language, the majority erred in looking beyond the statute. "Where there is no ambiguity in the words, there is no room for construction." *United States v. Gonzales*, 520 U.S. at 8 (quoting *United States v. Wittberger*, 18 U.S. (5 Wheat.) 76 (1820)).

III. The Statutory Context and Legislative History Also Support Termination of Tenancy Irrespective of the Tenant's Knowledge of, or Control Over, the Offending Criminal Activity

Even assuming, arguendo, that resort to extra-statutory language was appropriate, the Ninth Circuit erred in refusing to defer to HUD's interpretation of § 1437d(*l*)(6). The framework for analyzing the deference due HUD is set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* If the statute is silent or ambiguous, the court must defer to the

agency's interpretation unless its is arbitrary or capricious. *Id.* at 842-843 & n.9.

The majority found that Congress "had an intention on the precise question at issue" -- namely, that PHAs are not permitted to evict so-called "innocent tenants." Pet. App. 10a-11a. Accordingly, the majority concluded that HUD's interpretation was not entitled to deference. *Id.* These findings are contrary to the statutory scheme surrounding § 1437d(*l*)(6), the legislative history of the statute, and Congress's treatment of it since its enactment, all of which indicate that Congress intended to permit discretionary eviction of those who invite a criminal element onto public housing, irrespective of their culpability.

A. Related Statutory Provisions

1. 42 U.S.C. § 1437d(c)(4)(A)(iii)

As it stood until 1996, 42 U.S.C. § 1437d(c)(4)(A)(iii) prohibited individuals or families who had been evicted from public housing because of drug-related activity from receiving a statutory housing preference for three years, but exempted anyone who did not participate in or have knowledge of the criminal activity. The distinction in § 1437d(c)(4)(A)(iii) between evicted tenants who had knowledge of the drug-related activity and those who did not have such knowledge would be unnecessary surplusage if "innocent tenants" could not be evicted under § 1437d(*l*)(6). Under the well-established principle that statutes are to be construed so as to give meaning to each word, 42 U.S.C. § 1437d(c)(4)A)(iii) indicates that Congress intended the

eviction of "innocent tenants" under § 1437d(*l*)(6). *Bailey v. United States*, 516 U.S. at 145.

2. 21 U.S.C. § 881(a)(7)

21 U.S.C. § 881(a)(7) makes leasehold interest used to commit drug-related criminal activities subject to forfeiture, but includes an explicit exemption for "innocent owners." "[N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of the owner." *See* 21 U.S.C. § 881(a)(7). The inclusion of the express "innocent owner" exception in the civil forfeiture statute evidences Congress's ability to separately provide for "innocent tenants" when it wishes to do so.

Moreover, because § 881(a)(7) was amended to include leasehold interests as property subject to forfeiture concurrently with the original passage of § 1437d(*l*)(6) as part of the Anti-Drug Abuse Act of 1988, canons of statutory construction call for the disparate inclusion and exclusion of an "innocent tenant" exception to be presumed intentional and given effect. "[W]here Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

While the parties and lower courts can and do dispute the wisdom of Congress's distinction between forfeiture and

eviction, that dialogue has no impact on the effect to be given Congress's words.

3. 42 U.S.C. § 1437d(*l*)(1)

Section 1437d(*l*)(1) bars PHAs from including unreasonable terms and conditions in their leases. The majority makes a normative judgment that evicting "innocent tenants" is unreasonable and thus concludes that § 1437d(*l*)(6) cannot be read to authorize the eviction of "innocent tenants" without conflicting with § 1437d(*l*)(1). Pet. App. 13a-15a.

To the contrary, eviction of "innocent tenants" is rationally related to the PHAs' legitimate end of eradicating drugs from public housing. By removing the insuperable obstacle of proving tenants' knowledge, strict accountability serves as a credible deterrent against drug-related criminal activity and enables public housing residents to reclaim the safety of their homes without fear of retribution. *See* Pet. App. 49a-55a. Also, it is eminently reasonable for HUD to assume that public housing will be safer if PHAs evict tenants whose household members and guests have been engaging in drug activity, regardless how "innocent" of wrongdoing those tenants may be.

Moreover, it is commonplace for conventional leases to hold tenants liable for the activities of their household members and guests. The "contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and is a valuable tool for the management of the housing." 56 Fed. Reg. 51560, 51566 (Oct. 11, 1991). This entirely reasonable and prudent assignment of responsi-

bility does not become unreasonable merely because the government is the landlord.

B. Legislative History of 1437d(*l*)(6)

The only legislative history concerning § 1437d(*l*)(6) is a statement by the Senate Banking, Housing and Urban Affairs Committee made in connection with the 1990 amendment of the statute. It provides:

> The Committee 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, at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941.[2] On its face, this language could arguably support either side.

However, viewed in the broader context of the United State Housing Act's declared purpose to "vest in local public housing agencies . . . the maximum amount of responsibility and flexibility in program administration," (*See* 42 U.S.C.

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2 Notably, this Committee report is silent concerning the eviction of household members. This silence further weakens the majority's finding that Congress had an intent on the precise question at issue, a finding necessary to render HUD's allegedly contrary construction of the statute impermissible.

§ 1437 (Declaration of Policy)), the committee report bolsters the conclusion that Congress intended to provide PHAs the widest discretion. A Senate committee's precatory suggestion that eviction of an "innocent tenant" would not be appropriate is but one consideration to be factored by PHAs, with the ultimate decision delegated to the more experienced judgment of the PHA. Were the committee's suggestion meant to be dispositive, there would be no need for PHAs to exercise their "humane judgment."

C. Congress Failed To Amend § 1437d(*l*)(6) To Include an "Innocent Tenant" Defense

Congress's failure to amend § 1437d(*l*)(6) in the 13 years since its passage attests to Congress's intent to provide for strict accountability for those who bring drug criminals onto public housing. Congress was well aware of the criticism directed at the "innocent tenant" eviction provision. Such criticism was expressed directly to Congress. *See e.g.*, Drugs in Federally Assisted Housing: Hearings on S.566 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs, S. Doc. No. 101-234, at 90-91 (1989) (associate director of the American Civil Liberties Union argued to Congress: "PHAs should be restrained from imposing the sanction of eviction unless they can prove that a tenant had knowledge and actual control over the actions of a household member or third party."). Criticism was also voiced to HUD in connection with its adoption of implementing regulations. *See* 56 Fed. Reg. at 51,566 (1991) ("Comment by legal aid and by tenant organization... alleges that tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal

conduct, . . . or if the tenant has done everything 'reasonable' to control the criminal activity.").

Despite this criticism, and despite twice otherwise amending § 1437d(*l*)(6) since its enactment, Congress declined to amend the "innocent tenant" eviction provision. This inaction is at least some evidence that Congress intended for, and was satisfied with, the eviction of "innocent tenants."

D. The Eviction of "Innocent Tenants" Does Not Beget "Absurd Results"

The majority contends that § 1437d(*l*)(6) cannot be read to authorize the eviction of "innocent tenants" because such reading would lead to "absurd results," and proffers a few extreme, worse-case hypothetical in support. *See* Pet. App. 21a-23a. It is well-settled that hypothetical application of statutory language is not a valid consideration in statutory construction. *FCC v. Pacifica Foundation*, 438 U.S. 726, 743 (1978) ("We will not now pass upon the constitutionality of these regulations by envisioning the most extreme application conceivable, [citations omitted] but will deal with these problems if and when they arise."); *Lindsey v. Normet*, 405 U.S. 56, 65 (1972) ("[P]ossible infirmity in other situations does not render [a statute] invalid on its face.").

Further, as discussed above, the results obtained if "innocent tenant" evictions are permitted are not absurd. To the contrary, they are necessary to protect the health and safety of vulnerable citizens who are precluded from helping

themselves by the very threat of violence § 1437d(*l*)(6) is designed to address.

CONCLUSION

For the foregoing reasons the judgment of the U.S. Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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