No. 05-CV-207

DISTRICT OF COLUMBIA COURT OF APPEALS

SANTOSHA SCARBOROUGH,

Appellant,

v.

WINN RESIDENTIAL L.L.P./ATLANTIC TERRACE APARTMENTS,

Appellee.

On Appeal from the Superior Court of the District of Columbia,
Civil Division, Landlord And Tenant Branch

BRIEF AMICI CURIAE OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, BREAD FOR THE CITY, AND WASHINGTON LEGAL CLINIC FOR THE HOMELESS SUPPORTING REVERSAL

Patricia Mullahy Fugere (#384796)
Antonia K. Fasanelli (#481856)
Amber W. Harding (#484130)
Washington Legal Clinic for the Homeless
1200 U Street., N.W., Third Floor
Washington, DC 20009
PH: (202) 328-5502

Vytas Vergeer (#447121)
Rebecca Lindhurst (#478623)
Bread for the City
1525 Seventh Street, N.W.
Washington, D.C. 20001
PH: (202) 265-2400

Barbara McDowell (#414570)
Julie H. Becker (#471080)
Legal Aid Society of the District of Columbia
666 Eleventh Street N.W., Suite 800
Washington, D.C. 20001-4589
PH: (202) 628-1161

Counsel for Amici Curiae

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INTEREST OF THE AMICI

The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Legal Aid By-Laws, Art. II, Sec. 1. Legal Aid is the oldest general civil legal services program in the District of Columbia. Housing law is among Legal Aid's principal practice areas.

Bread for the City is a private, non-profit organization that offers free food, clothing, medical care, social services, and legal assistance to impoverished residents of the District. On a monthly basis, its various programs serve more than 8,000 people, many of whom are homeless or at risk of losing their homes.

The Washington Legal Clinic for the Homeless is a private, non-profit legal services and advocacy organization concerned with the needs of persons who struggle with homelessness and poverty. An integral part of its work is assisting clients in securing and retaining stable housing.

Amici have represented many low-income tenants of public and subsidized housing who have been threatened with eviction on the basis of criminal activity committed on the premises, not by the tenants themselves, but by household members or guests. Although the tenants may be willing and able to take measures to prevent a recurrence of the illegal activity -- such as permanently barring the perpetrator from the property -- landlords have nonetheless proceeded with eviction without affording the opportunity to cure ordinarily required under District law. The question whether such tenants may invoke the right to cure -- or whether that right is preempted by federal law -- has important ramifications for preserving housing for the District's lowest-income residents. This case also presents other important questions that amici encounter in their representation of low-income tenants, such as the specificity with which landlords must inform tenants of the provision of the lease or the law that they are accused of violating, as well as the

reviewability of the landlord's choice to proceed against tenants whose eviction will not leave the building any safer and will leave innocent household members homeless.

STATUTORY AND REGULATORY BACKGROUND

The parties to this case are participants in the project-based Section 8 program, a federally subsidized housing program for low-income persons administered by the Department of Housing and Urban Development (HUD). The Section 8 program was established "[f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing." 42 U.S.C. § 1437f(a). Under the project-based Section 8 program, the landlord, such as appellee Winn Residential, receives subsidy payments from the United States government for renting affordable housing to low-income tenants.

I. THE FEDERAL LAW ADDRESSING EVICTION FOR CRIMINAL ACTIVITY

In 1988, in response to concerns about drug activity in federally assisted housing, Congress enacted the first provisions specifically addressing eviction for such activity. The Anti-Drug Abuse Act of 1988, which applied only to the public housing program, prohibited drug or other criminal activity on or near public housing property. See Pub. L. No. 100-690, 102 Stat. 4181. In 1990, the Cranston-Gonzales Affordable Housing Act extended the prohibition to the project-based Section 8 program. See Pub. L. No. 101-625, § 546, 104 Stat. 4079, 4221 (codified at 42 U.S.C. § 1437f(d)(1)) ("1990 Act").

From the outset, Congress has chosen to enforce the prohibition on criminal activity through a mandated provision in the tenant's lease. The 1988 Act required that any public housing "lease shall [p]rovide 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." 102 Stat. 4181, 5101 (amending 42 U.S.C. § 1437d(*l*)). Subsequent amendments have retained that approach. See,

e.g., 42 U.S.C. § 1437d(*l*)(5) (1990); 42 U.S.C. § 1437d(*l*)(5) (1996); 42 U.S.C. § 1437d(*l*)(7) (2000). The provisions applicable to the project-based Section 8 program employ the same enforcement mechanism -- the tenant's lease -- to combat crime on or near the premises. See 42 U.S.C. § 1437f(d)(1)(B) (requiring that criminal activity be grounds for termination of tenancy).

HUD's implementing regulations explain how landlords are to employ the federally mandated lease provision. The "general" rule for project-based Section 8 housing advises landlords that "[y]ou are authorized to terminate tenancy of tenants, in accordance with your leases and landlord-tenant law." 24 C.F.R. § 5.851(b). The landlord is instructed that "the lease must provide that drug-related criminal activity engaged in on or near the premises . . . is grounds for you to terminate tenancy," and that "[t]he lease must provide that the owner may terminate tenancy for . . . [a]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by [other residents]." 24 C.F.R. §§ 5.858, 5.859(a) (emphasis in original).

HUD characterized those lease provisions as providing housing authorities and subsidized landlords with contractual "tools for adopting and implementing fair, effective, and comprehensive policies for both crime prevention and enforcement." Proposed Rule Regarding One-Strike Screening and Eviction for Drug Abuse and Other Criminal Activity, 64 Fed. Reg. 40,262, 40,262 (July 23, 1999). In particular, HUD explained that criminal activity was to be made a violation of the lease, thereby enabling landlords to proceed under local landlord-tenant law against those involved in such activity. See Final Rule, Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28,776, 28,776 (May 24, 2001); see also Final Rule, Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560 (Oct. 11, 1991) (observing that "the potential for a [housing authority] to exercise eviction as a contractual sanction against criminal behavior by unit occupants will promote the welfare of public housing residents in general") (emphasis added). HUD's Occupancy Handbook for subsidized projects similarly

treats the lease as the tool for combating crime, stating that "[o]wners are expected to enforce program requirements under the terms of the lease." HUD Handbook 4350.3 REV-1, Occupancy Requirements of Subsidized Multifamily Housing Programs ("HUD Handbook"), Ch. 8, at 1.[1]

Congress's choice to address criminal activity through the lease, rather than as a free-standing basis for termination of federal housing benefits, has two significant consequences. First, it makes eviction for criminal activity, like any other eviction, subject to local landlord-tenant law, as HUD has recognized. See HUD Handbook, Ch. 8, at 15 (Drug Abuse and Other Criminal Activity: Key Requirements) ("The authority to terminate tenancy of tenants is in accordance with the HUD model leases and state or local Landlord and Tenant Act(s)."); id. at 13 (Procedures for Terminating Tenancy and Providing Notice) ("To terminate tenancy, an owner must establish that the basis for the termination is consistent with . . . [a]pplicable state and local laws."). While the lease clause prohibiting criminal activity is federally mandated, determining whether the tenant has breached that clause -- as well as whether eviction is warranted as a result -- is ultimately a question of state law to be decided in state landlord-tenant proceedings. See Department of Housing and Urban Dev. v. Rucker, 535 U.S. 125, 135-36 (2002) (noting that enforcement of the lease prohibition on criminal activity "will occur in the state court where [the landlord] brought the unlawful detainer action").

Second, Congress's choice to address criminal activity through the lease leaves landlords with discretion whether to seek eviction. As HUD has observed, "[t]he fact that statutorily required lease provisions would allow [landlords] to terminate tenancy under certain circumstances

[1] Attachment A reproduces relevant portions of the HUD Handbook. The entire Handbook is available at www.hudclips.org. The Handbook describes occupancy requirements and procedures governing subsidized housing programs and addresses "the rights and responsibilities of in-place tenants and property owners." HUD Handbook, Ch. 1, at 1. The Handbook represents HUD's interpretation of the rules governing the project-based Section 8 programs and, as such, is entitled to deference as an agency's "interpretation[] of [its] own regulations." Booker v. Edwards, 99 F.3d 1165, 1168 (D.C. Cir. 1996).

does not mean that [landlords] are required to do so in each case where the lease would allow it." Final Rule, Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. at 28,782; accord Rucker, 535 U.S. at 133-34. The federal scheme thus leaves it to landlords to decide whether to invoke the lease provision against a particular tenant, and leaves it to state courts to decide whether the landlord has established a lease violation warranting eviction.

In short, the federal law does not fundamentally alter the landlord-tenant relationship under state law for participants in the project-based Section 8 program. To prevail in an eviction action, even one involving alleged criminal activity, the landlord still must satisfy all relevant requirements of state landlord-tenant law.

II. TENANTS' NOTICE AND CURE PROTECTIONS UNDER DISTRICT OF COLUMBIA LAW

In the District of Columbia, eviction cases are governed by the Rental Housing Act, which confines landlords to specified grounds for terminating a tenancy, including nonpayment of rent, violation of a lease agreement, and certain events relating to the status and use of the building. See D.C. Code § 42-3505.01.

In all eviction cases not based on nonpayment of rent, the Rental Housing Act requires the landlord to give a written notice before bringing suit. See D.C. Code § 42-3505.01(a). The content of that notice varies depending on the landlord's basis for eviction. With respect to lease violations, the Act states that "a housing provider may recover possession of a rental unit where the tenant is violating an obligation of tenancy and fails to correct the violation within 30 days after receiving from the housing provider a notice to correct the violation or vacate." D.C. Code § 42-3505.01(b). The regulations implementing the Act elaborate upon this requirement. See 14 D.C.M.R. §§ 4301.1, 4301.2 (1991) ("If a housing provider seeks to recover possession of a rental unit on the grounds that the tenant is violating an obligation of the tenancy, the housing provider shall first serve the tenant with a notice to correct the violation . . . . and shall specify

what actions need to be taken by the tenant to avoid an eviction.").

ARGUMENT

The trial court erred in three distinct respects in granting a judgment of eviction in this case. First, because the federal law requiring that criminal activity be made a lease violation does not conflict with the local law giving tenants an opportunity to cure lease violations, the court erred in excusing the landlord from its obligation under District law to afford the tenant an opportunity to prevent a recurrence of the violation, such as by barring the individual who committed the criminal act. Second, because both federal law and local law require that notices to quit be specific and detailed, the court erred in sustaining the notice here, which referred vaguely to violations of "your lease" and "HUD regulations," without identifying which provision of the lease or the regulations might be at issue. Finally, the court erred in not requiring the landlord to show that its choice to evict the tenant and her six young children -- none of whom was implicated in any crime -- was a permissible exercise of its discretion as constrained by federal law.

I. A TENANT IS ENTITLED TO AN OPPORTUNITY TO CURE A VIOLATION OF THE FEDERALLY MANDATED LEASE PROVISION THAT PROHIBITS CRIMINAL ACTIVITY ON THE PREMISES.

Nothing in federal law deprives tenants of federally assisted housing of their right under local law to cure a violation of their lease and thereby avoid eviction. The trial court held that federal law, in requiring that leases for such housing prohibit criminal activity, "superseded" the District law that provides an opportunity to cure. (2/23/05 Tr. at 16.) In effect, the court ruled that the federal law preempted local tenant protections.[2]

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[2] The trial court declined to use the term "preemption," stating that it was "more comfortable" with the word "supersede." (2/23/05 Tr. at 16-17.) Nonetheless, its substantive holding that "[t]he federal regulation precludes the application of this particular right which is secured to a tenant under local law" is unmistakably a preemption ruling, and warrants review in accordance with the rules governing federal-state preemption. See, e.g., Wisconsin Pub. Intervenor v. Mor-

That ruling is incorrect. As a general matter, "[h]ousing is an area where Congress intended . . . two complementary systems of regulations to supplement each other with local law providing the general background law and federal law intervening only where federal involvement is deemed necessary." Rowe v. Pierce, 622 F. Supp. 1030, 1033 (D.D.C. 1985). There is every reason to conclude that Congress intended the federal and local laws at issue here to operate in that complementary manner. When Congress and HUD directed that federally subsidized landlords include in their leases a prohibition against criminal activity, they did not expressly preempt state laws allowing lease violations to be cured. Nor do such state laws conflict with the federal regulatory scheme so as to undermine its objectives. To the contrary, the state laws advance Congress's overarching purpose of providing affordable housing to needy families, so long as they and their guests refrain from criminal activity on the premises.

A. The Federal Law Requiring That Leases For Federally Assisted Housing Include A Prohibition Of Criminal Activity Does Not Preempt The D.C. Law Providing Tenants A Right To Cure.

In any context, "preeemption is not to be lightly presumed." California Federal Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987). In the housing context, "the intent to preempt must be particularly 'clear and manifest,'" because "landlord-tenant law is an area traditionally left to the states." Rowe, 622 F. Supp. at 1033; see Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). There is no indication, much less a "clear and manifest" one, that Con-

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tier, 501 U.S. 597, 605 (1991) (equating "preempt" with "supersede"); Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982) (same).

gress intended preemption here.

A court may find that federal law preempts, rather than supplements, state law only in three limited circumstances: (1) when Congress has explicitly expressed its intent to displace state law, (2) when federal law so "occupies the field" that it leaves no room for state regulation, or (3) when federal law "actually conflicts" with state law such that compliance with both is impossible or the state law stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." California Federal, 479 U.S. at 280-81; accord, e.g., Crosby v. National Foreign Trade Council, 530 U.S. 363, 372-73 (2000).

Neither of the first two varieties of preemption is even arguably present in this case. Congress has not expressed any intent to preempt state eviction law. Nor does federal law "occupy the field" so as to leave no room for state law in evictions from federally subsidized housing. See Rowe, 622 F. Supp. at 1033. The only variety of preemption at issue here, and the only one on which the trial court focused, is conflict preemption. Interpreting the federal law as mandating that criminal activity "justifies a termination that cannot be cured," the court ruled that the District's cure opportunity "would be a contradictory procedural protection that would undercut and . . . effectively gut this particular provision of the federal scheme." (2/23/05 Tr. at 15, 16.) In so ruling, the court misapprehended the purposes and scope of the federal scheme.

1. No conflict exists between the federal law requiring landlords to include a "criminal-activity" prohibition in leases for federally subsidized dwellings and state law providing tenants an opportunity to cure.

In adopting the federal law at issue here, Congress acted with the purpose of combating crime in federally subsidized housing through a variety of actions, including ones short of evicting innocent tenants in each and every case of unlawful activity on the premises by a resident or guest. That purpose is fully compatible with allowing tenants to invoke their right under state law to cure violations of the criminal-activity provisions of their leases.

As noted, Congress amended the statute governing the project-based Section 8 program in 1990 to require that leases specify that drug or other criminal activity on the premises would be grounds for eviction. See 1990 Act, § 546 (codified at 42 U.S.C. § 1437f(d)(1)). Significantly, Congress titled that section of the Act "Tenant Protections," which reflects a focus on making federally subsidized housing safe for its tenants, not on punishing tenants with the severe sanction of eviction whenever a crime is committed there by a household member or guest.

It is telling that Congress elected to combat crime in subsidized housing -- as it had earlier elected to combat crime in public housing -- through a lease provision, as distinguished from an independent (and absolute) termination of federal housing assistance. In so doing, Congress would have understood that the newly mandated lease provision would be enforced in state eviction proceedings, and thus would be subject to a preexisting body of state statutory, regulatory, and common law. Indeed, the Senate committee report on the 1990 Act expressly acknowledged, and approved, the role played by state courts in criminal-activity evictions from public housing. See S. Rep. No. 101-316 (1990), reprinted in 1990 U.S.C.C.A.N. 5763, 5945. And, because "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law," Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979), Congress would also have known that many states give tenants the right to avoid eviction by promptly curing lease violations.[3] Having chosen to proceed through the state eviction process, and not expressly to preempt the cure protections (or other state-law protections) available to tenants through that process, Congress must have perceived those state-law protections as consistent with the new federal law. For that very reason, the Washington Supreme Court held that the analogous public housing provisions did not preempt the state-law requirement of a ten-day notice and opportunity

[3] See, e.g., Cal. Code Civ. Proc. § 1161(3) (West 2005); N.Y. Real Prop. Law § 81.753(4) (McKinney 2005); N.J. Stat. Ann. § 2A:18-61.1(d) (West 2005); Wash. Rev. Code § 59.12.030(4) (2005).

to correct a lease violation, explaining that, "in leaving eviction proceedings to the states for enforcement, Congress necessarily relied upon existing state substantive law." Housing Auth. v. Terry, 789 P.2d 745, 749 (Wash. 1990).

Allowing subsidized housing tenants to cure lease violations based on illegal activity serves the overarching goals of federal housing policy, as articulated by Congress in the same legislation that required lease provisions of the sort at issue in this case. In Title I of the 1990 Act, Congress declared that "[t]he objective of national housing policy shall be to reaffirm the long-established national commitment to decent, safe, and sanitary housing for every American by strengthening a nationwide partnership of public and private institutions," which could, inter alia, "ensure that every resident of the United States has access to decent shelter or assistance in avoiding homelessness" and "help make neighborhoods safe and livable." 1990 Act, § 102 (codified at 42 U.S.C. § 12702). If crime in subsidized housing can be prevented by means less onerous than evicting innocent tenants from the only homes they can afford, Congress's goals of preventing homelessness and promoting safe neighborhoods are both advanced, without the necessity of subordinating one to the other. Indeed, HUD itself recognizes that, in appropriate circumstances, crime in public or subsidized housing may be adequately addressed by, for example, barring the perpetrator from the premises while allowing other members of the household to remain. See HUD Handbook, Ch. 8, at 17.

2. HUD has authoritatively construed the federal criminal-activity provisions as not preempting state law.

HUD, the expert agency charged with implementing and construing the federal laws governing public and subsidized housing, has recognized that those laws do not displace state evic-

tion protections.[4] In promulgating rules implementing the statutory provisions regarding criminal activity, HUD expressly acknowledged that the requirement that subsidized housing leases prohibit criminal activity "does not . . . preempt State law within the meaning of Executive Order 13132." Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28776, 28791 (May 24, 2001).[5]

HUD's regulations, which reflect the agency's authoritative construction of the underlying statute, contemplate that tenants may invoke additional protections under state law. The regulation governing evictions from federally subsidized housing provides that "[a] tenant may rely on State or local law governing eviction procedures where such law provides the tenant procedural rights which are in addition to those provided by" the federal law, "except where such State or local law has been preempted under Part 246 of this chapter or by other action of the United States." 24 C.F.R. § 247.6. By its terms, the regulation preempts District law on only a narrow set of matters: those involving rent control -- the subject matter of 24 C.F.R. part 246 -- and those on which Congress has taken specific preemptive action.[6]

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[4] HUD's regulations regarding eviction for criminal activity, first adopted in 1991, are "entitled to deference as a valid interpretation of the statute." Wright v. Roanoke Redevelopment & Housing Auth., 479 U.S. 418, 430 (1987); see Final Rule, Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51560 (Oct. 11, 1991). That Congress has amended the criminal-activity law several times since 1991, without altering HUD's preemption analysis, supports the conclusion that the analysis accurately reflects congressional intent. See Rucker, 535 U.S. at 133 (citing Lorillard v. Pons, 434 U.S. 575, 580 (1978)).

[5] Executive Order 13132 provides that state law is preempted "only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute." 64 Fed. Reg. 43,255, 43,257 (Aug. 4, 1999).

[6] In its preemption ruling, the trial court found that the right to cure is not "procedural" and therefore is not preserved to the tenant under 24 C.F.R. § 247.6. (2/23/05 Tr. at 17-18.). The distinction between "procedural" and "substantive" rights, however, is irrelevant to the question of preemption. As discussed above, the critical inquiry regarding preemption is whether the state

The regulations and HUD Handbook repeatedly refer to state eviction procedures, reflecting an understanding that those procedures are not preempted, but instead are to be used to enforce the federal rule. See 24 C.F.R. § 247.3(a)(2) (authorizing termination for violations of a "state landlord and tenant act"); id. § 247.6(a) ("The landlord shall not evict any tenant except by judicial action pursuant to State and local law"); HUD Handbook, Ch. 8, at 1 (requiring landlords to "follow HUD and state/local procedures" in terminating tenancy); id. at 10 ("Owners must be in compliance with applicable federal, state, and local requirements when pursuing termination of tenancy."); id. at 13 ("To terminate tenancy, the owner must establish that the basis for the termination is consistent with . . . [a]pplicable state and local laws."). As the Handbook notes, "[m]ost state and local laws are more restrictive than HUD's minimum requirements; therefore, an owner should be aware of state and local laws governing terminations." Id. at 13.

Moreover, in the parallel context of public housing, HUD has observed that state law may provide defenses to eviction beyond those provided by federal law. For example, when HUD promulgated a set of rules in 1988 to govern public housing evictions and lease terminations, HUD explained:

> [The] [f]ederal statute and regulation governing lease rights and termination of tenancy in the public housing program [are] not a comprehensive scheme that precludes other State regulation concerning this subject. To the contrary, it is assumed that the procedural and substantive law affecting a tenancy in the public housing program is compounded of elements established by both Federal and State law.

Final Rule, Tenancy and Administrative Grievance Procedure for Public Housing, 53 Fed. Reg. 33,216, 33,257 (Aug. 30, 1988). Three years later, in promulgating regulations delineating due process requirements in criminal-activity evictions, HUD equated due process with "the ability to raise in the proceeding any defense which would defeat the landlord's eviction claim for pos-

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law, substantive or procedural, is inconsistent with the intent of Congress as reflected in the statutory text, structure, or purposes. There is no such inconsistency here.

session as a matter of substantive law." Proposed Rule, Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 6248, 6252 (Feb. 14, 1991) (emphasis added); see Final Rule, Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560, 51,573 (Oct. 11, 1991) (noting that a due process determination depends on the "legal requirements for eviction under state or local law"). Additionally, in establishing a rule regarding eviction for criminal activity, HUD pointed to the state eviction process to ameliorate concerns about the rule's overbreadth, noting that state judicial procedures, along with basic due process requirements, would ensure that the rule was applied fairly. See Final Rule, Termination of Tenancy for Criminal Activity, 61 Fed. Reg. 47,380, 47,381 (Sept. 6, 1996). HUD stated that making criminal activity a lease violation would give landlords "a valuable tool for fighting crime and drugs in assisted housing communities while maintaining requisite due process protections for the residents." Id.

For purposes of eviction for criminal activity, the public and assisted housing rules are the same: Although they allow landlords to seek eviction in state court based on illegal activity on or near the premises, they also allow the tenant to raise state-law defenses to defeat eviction. The regulations not only decline to preempt such defenses, but also explicitly enshrine them as part of the eviction proceeding.

In sum, the purpose of the federal law requiring leases for federally subsidized dwellings to include a prohibition of criminal activity -- to protect the residents of such dwellings from crime -- is not frustrated by state laws that permit tenants to cure lease violations, including those involving criminal activity. So long as the cure is prompt and effective -- and only such a cure may suffice under local law to avoid eviction -- the congressional purpose of deterring crime is fully served. The trial court's conclusion to the contrary was in error.

B. D.C. Law Requires A Cure Opportunity Even In Cases Of Criminal Activity.

The trial court erred in permitting the landlord to evict Ms. Scarborough without giving

her an opportunity to cure her lease violation. Absent any basis to find federal preemption, the cure requirements of the D.C. Rental Housing Act apply in this case.

The Rental Housing Act permits eviction without a right to cure in a very limited set of circumstances, none of which applies here. In particular, when a tenant or other resident has been convicted of a crime on the premises, the landlord may issue a notice to quit with no opportunity for cure. See D.C. Code § 42-3505.01(c).[7] Here, however, the landlord did not proceed under D.C. Code § 42-3505.01(c) or any similar statute. Rather, this case falls squarely within D.C. Code § 42-3505.01(b), which addresses evictions based on violation of a lease. Under that provision, the landlord must proceed through a notice to correct or vacate, and may obtain possession only by showing that the tenant failed to cure the problem within 30 days.[8]

Had the trial court given Ms. Scarborough a chance to demonstrate that she had cured the violation, she well might have prevailed by, for example, showing that Desmond Barr, the offending individual, was incarcerated following the incident in question and subsequently barred from the property. The evidence at trial also demonstrated that there had been no other similar incidents involving Ms. Scarborough's apartment and that the problem had ended once Mr. Barr was removed from her home. (10/25/04 Tr. at 61, 64). This is precisely the type of cure that HUD contemplated in construing the illegal-activity prohibition. See HUD Handbook, Ch. 8, at 17 ("A tenant may be required to exclude a household member . . . [who] has participated in, or

[7] Similarly, the Residential Drug-Related Evictions Act (RDEA) removes the cure requirement by explicitly exempting landlords from the Rental Housing Act. See D.C. Code § 42-3602(a) ("Notwithstanding any provision of . . . § 42-3505.01(a), a housing provider may commence an action . . . to evict a tenant or occupant in a rental unit."). Like the provision regarding criminal convictions, the RDEA targets conduct so serious -- the operation of a "drug haven" -- that the Council specifically dispensed with any requirement that a tenant be allowed to cure a violation.

[8] The landlord may argue that, by definition, a tenant cannot "cure" illegal activity because the activity has already taken place by the time the tenant receives a notice to quit. That feature, however, does not distinguish illegal activity from any number of other lease violations warranting notice and an opportunity to cure.

is responsible for, an action . . . that warrants termination."). It also serves the statutory goal of eliminating the criminal activity from the tenant's unit.

Indeed, the landlord acknowledged at trial that, "[o]bviously, if the police take the guns out then [the violation is] cured on the spot." (11/19/04 Tr. at 28.) Accordingly, the landlord "conced[ed] that if the opportunity to cure is required then we don't make our case." Id. Because Ms. Scarborough was entitled to the opportunity to cure the violation of her lease, the landlord's claim for possession fails, and the trial court's judgment should be reversed.

II. THE TRIAL COURT ERRED IN NOT REQUIRING THAT THE NOTICE TO QUIT BE DRAFTED WITH THE SPECIFICITY DEMANDED BY FEDERAL AND LOCAL LAW.

Both federal law and local law establish standards for the content of the notice that a landlord of a federally subsidized building must serve on a tenant before suing for eviction based on a lease violation. Those standards require that the notice state with specificity the bases for the landlord's claim that the tenant violated the lease. Such specificity serves to ensure that the tenant has sufficient information to explain to the landlord that no violation occurred, or to correct the violation in a timely manner, or to defend herself in court if the landlord proceeds with eviction. Although the notice in this case may have adequately identified the incident for which the landlord sought eviction, the notice was deficient in other respects: It did not specify which provision of the lease or the law the tenant was alleged to have violated. Nor did it specify what the tenant could do to correct the situation to preserve her home.

A. Tenants Of Federally Subsidized Buildings Are Entitled To Clear Notice Of Why They Are At Risk Of Eviction.

As explained above, a tenant who is threatened with eviction from federally subsidized housing is entitled not only to the protections provided by federal law, but also to any additional protections provided by local law. See 24 C.F.R. § 247.6(c) ("A tenant may rely on State or lo-

cal law governing eviction procedures where such law provides the tenant procedural rights which are in addition to those provided by this subpart.") (emphasis added).

As a matter of federal law, HUD has promulgated regulations governing the termination notice that must precede any eviction from federally subsidized housing. See 24 C.F.R. § 247.4. Among other requirements, the tenant must be provided with a written notice that "state[s] the reasons for the landlord's action with enough specificity so as to enable the tenant to prepare a defense." Id. § 247.4(a)(2). The notice must be comprehensive because, "[i]n any judicial action instituted to evict the tenant, the landlord must rely on grounds which were set forth in the termination notice," id. § 247.6(b), and not grounds advanced for the first time in the complaint for possession. Termination notices have been found to be insufficient under federal law if, for example, they "contain only one sentence," or "are written in 'vague and conclusory' language," or "fail to set forth a factual statement of the reason for termination." Associated Estates Corp. v. Bartell, 492 N.E.2d 841, 846 (Ohio Ct. App. 1985) (citing cases).

As a matter of District law, the Rental Housing Act provides that "no tenant shall be evicted from a rental unit for any reason other than nonpayment of rent unless the tenant has been served with a written notice to vacate." D.C. Code § 42-3505.01(a). All such notices "shall contain a statement detailing the reasons for the eviction." Id.; see Campbell v. Helm, 287 F. 985, 988 (D.C. 1923) (recognizing under prior law that "[i]t is required that the notice [to quit] to the tenant shall contain a full and correct statement of the facts and circumstances upon which the same is based"). The regulations, which construe the Act's notice requirements, further delineate the content of the notice, including that the notice "shall specify what actions need to be taken by the tenant to avoid an eviction." 14 D.C.M.R. § 4301.2. Service of a valid notice is "a condition precedent to a landlord's suit for possession." Moody v. Winchester Mgmt. Corp., 321 A.2d 562, 563 (D.C. 1974).

The requirement that the notice inform the tenant of the landlord's grounds for eviction in "detail[]," D.C. Code § 42-3505.01(a), and with "specificity," 24 C.F.R. § 247.4, enforces the tenant's constitutional right not to be deprived of a property interest without due process of law. See generally Frank Emmett Realty v. Monroe, 562 A.2d 134, 137 (D.C. 1989) (recognizing that adequacy of notice in private landlord-tenant proceedings "has significant constitutional overtones"). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). In order to satisfy due process, such notice must be sufficient "to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1978) (emphasis added).[9]

B. A Notice Is Deficient If It Fails To Direct The Tenant To The Particular Provision Of The Lease Or The Law That She Is Alleged To Have Violated.

A notice that does not identify the specific provision of the lease or the law that a tenant is accused of violating does not satisfy the federal and local standards discussed above. A tenant's ability to defend against eviction may be equally impaired whether the notice fails to spec-

[9] Courts have recognized in the context of public and subsidized housing that adequacy of the notice to quit implicates issues of constitutional dimension. See, e.g., Moon v. Spring Creek Apartments, 11 S.W.3d 427, 433-34 (Tex. Ct. App. 2000) (holding, in the context of eviction of a tenant from federally subsidized housing, that "due process requires a timely and adequate notice detailing the reasons for the proposed termination," and that the notice was inadequate when it "was framed in vague and conclusory language," "fail[ed] to set forth a factual statement to justify termination," and "merely parrot[ed] the broad language of the regulations") (citations omitted); Associated Estates Corp. v. Bartell, 492 N.E.2d 841, 846 (Ohio Ct. App. 1985) (holding, in a similar context, that a notice was insufficient to satisfy due process when it merely stated the grounds for eviction as "serious, repeated damage to unit" and "[r]epeated disturbance"); Housing Auth. of Kings County v. Saylors, 578 P.2d 76, 79 (Wash Ct. App. 1978) (holding that a "vague and conclusory notice" sent to a public housing tenant violated due process because it was "inadequate to provide the required opportunity to prepare for argument").

ify the factual basis or the legal basis on which the landlord purports to rely.

Such specificity is essential because the notice often constitutes the sum total of the landlord's pre-trial obligation to inform the tenant of the nature of the eviction claim. Under the Rules of Civil Procedure for the Landlord and Tenant Branch, the landlord must file a form complaint, which neither requires nor permits the pleading of any case-specific information about the tenant's alleged lease violation. See Super. Ct. L&T R. 3 (requiring "a complaint, verification, and prepared summons, in the form prescribed in Landlord and Tenant Form 1."). Under those Rules, discovery is not available as a matter of right, see Super. Ct. L&T R. 10(A) ("There shall be no discovery without leave of court[.]"); in our experience, judges typically allow little, if any, discovery by tenants. Accordingly, if the notice to quit does not specify the legal as well as factual grounds on which the landlord intends to rely, a tenant may not learn of those grounds until trial, which may well be too late to mount an effective defense.

An inadequate notice places yet another burden on a defendant population that already faces numerous burdens in opposing suits for eviction. The defendants in the Landlord and Tenant Branch disproportionately are persons with limited means, limited education, limited English proficiency, and physical or mental disabilities. See generally Richard H. Chused, Saunders (a.k.a. Javins) v. First National Realty Corporation, 11 Geo. J. Poverty L. & Pol'y 191, 243-47 (2004); Lynn E. Cunningham, Legal Needs for the Low-Income Population in Washington, DC, 5 U.D.C. L. Rev. 21, 34-38 (2000); Final Report of the D.C. Bar Public Service Activities Corporation Landlord Tenant Task Force 5, 10-12 (1998) ("Task Force Report"). A tenant, such as Ms. Scarborough, who is being evicted from a federally subsidized building almost necessarily has one or more of those characteristics. Primarily for economic reasons, fewer than one percent of tenants have counsel, whereas 86 percent of landlords have counsel. Task Force Report 5. As the Landlord Tenant Task Force found, "many pro se litigants" in the Landlord and Tenant

Branch -- the vast majority of whom are tenants -- "either do not understand their legal rights and obligations, or encounter difficulty in asserting their rights, or both." Id.

Such individuals would be at an even greater disadvantage if they were left to guess at which of the potentially numerous provisions of a lease agreement they are accused of having violated. (In this case, for example, the lease itself encompassed ten single-spaced pages, to which other documents were appended.) A notice, such as the one here, that states that certain conduct of the tenant "violates the terms of your lease" -- without identifying the "terms" at issue -- is too "vague and conclusory," Associated Estates, 492 N.E.2d at 846, to enable the tenant adequately to defend against eviction. Similarly inadequate is a notice, such as the one here, that states that the tenant's conduct has violated "HUD regulations," without specifying which of the hundreds of such regulations is at issue.

Courts in other jurisdictions have expressly recognized, as a matter of their own local law, that a notice to quit is inadequate if it fails to identify the specific provisions of the lease that the landlord claims to have been violated by the tenant. See, e.g., Chinatown Apts., Inc. v. Lam, 412 N.E.2d 1312, 1314 (N.Y. 1980); Invest II v. Southern Ct. Mental Health Center, No. SBPR 9510-30624, 1995 Conn. Super. LEXIS 3655, at *9 (Ct. Super. Ct. Dec. 6, 1995) ("Housing Session cases have required . . . that allegations of nuisance and/or lease violations must contain specific facts and lease clause reference."). This Court has itself indicated that including such information in the notice enhances its clarity. See, e.g., District of Columbia v. Willis, 612 A.2d 1275, 1276 n.1 1279 (D.C. 1992) (observing that a notice to quit "clearly informed [the tenant] of . . . the reasons for termination of her tenancy," when the notice stated that, inter alia, the tenant's failure to pay rent and to submit recertification forms rendered her "in breach of Section(s) 1 & 6(d) of your dwelling lease"); cf. 14 D.C.M.R. § 4302.1 (requiring that a notice to quit for reasons other than lease violations "shall . . . include[e] references to the specific provisions of

[the Rental Housing Act] on which the claim for eviction is grounded.").[10]

III. THE TRIAL COURT ERRED IN NOT ENGAGING IN ANY INQUIRY INTO WHETHER THE LANDLORD ACTED WITHIN THE LIMITS ON ITS DISCRETION UNDER FEDERAL LAW IN MOVING TO EVICT AN INNOCENT TENANT AND HER FAMILY.

As explained above, the landlord of a federally subsidized building has discretion to permit a tenant and her family to remain in a unit in which illegal activity has occurred when, as here, the tenant did not take part in the activity, she has taken measures to prevent its recurrence, and eviction would render her and other innocent persons homeless. A trial court has an obligation to ascertain whether the landlord understood that it had such discretion and acted within the permissible scope of its discretion in proceeding with eviction. No such inquiry occurred here.[11]

A. Federal Law Permits, But Does Not Require, Eviction Of An Innocent Tenant of A Federally Subsidized Dwelling When Illegal Activity Has Occurred Within Her Unit.

Nothing in federal law requires the landlord of a federally subsidized building to seek the eviction of each and every tenant whose home has been the site of illegal activity. To the contrary, landlords are directed that, "[c]onsistent with the application of your . . . eviction standards, you may consider all of the circumstances relevant to a particular . . . eviction case." 24 C.F.R. § 5.852(a). Those circumstances are identified as including "[t]he seriousness of the offending action," "[t]he extent of participation by the leaseholder in the offending action," "[t]he effect of . . . termination of tenancy on household members not involved in the offending action," and "[t]he extent to which the leaseholder has shown personal responsibility and taken all rea-

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[10] A notice is also inadequate if it leaves leave the tenant to guess at how the alleged lease violation may be cured. See 14 D.C.M.R. § 4301.2 (stating that the notice "shall specify what actions need to be taken by the tenant to avoid an eviction"). Here, because the landlord proceeded on the erroneous premise that an illegal activity violation cannot be cured (see Section I, supra), the notice contains no cure provision. It is thus inadequate in that respect as well.

[11] We assume, consistent with this Court's order of May 27, 2005, that the tenant adequately preserved a challenge based on the trial court's failure to make such an inquiry.

sonable steps to prevent or mitigate the offending action." Id. § 5.852(a)(1), (3), (4), and (6).

The similar discretion of public housing authorities figured prominently in the Supreme Court's decision in Rucker. In sustaining the federal "one-strike" law that allows a tenant to be evicted from public housing when a family member or guest has engaged in drug activity without the tenant's knowledge, the Court emphasized the landlord's discretion not to pursue such evictions. The Court explained that "[t]he statute does not require the eviction of any tenant," but instead "entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from 'rampant drug-related or violent crime,' 'the seriousness of the offending action,' and 'the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action.'" 535 U.S. at 134 (quoting 42 U.S.C. § 11901(2); 66 Fed. Reg. 28,776, 28,803 (May 24, 2001)). Because the housing authority could, and presumably often would, allow tenants to remain in their homes when such considerations militated in their favor, the Court held that the statute would not lead to "absurd" results. Id. Plainly, then, the Court understood that housing authorities would exercise their discretion based on the circumstances of each case, and would not automatically commence eviction proceedings without weighing the considerations identified in the regulations.

That understanding is also reflected in HUD's official pronouncements. For example, shortly after the Supreme Court decided Rucker, the Secretary of Housing and Urban Development urged public housing authorities "to be guided by compassion and common sense" in applying the one-strike law, so that eviction would be "the last option explored, after all others have been exhausted." Letter from Secretary Mel Martinez to Public Housing Directors, April 16, 2002 (Attachment B). The Assistant Secretary for Public and Indian Housing subsequently reiterated that public housing authorities "are not required to evict an entire household -- or for

that manner, anybody -- every time a violation of the lease clause [prohibiting illegal activity by household member or guests] occurs," adding:

> PHAs remain free, as they deem appropriate, to consider a wide range of factors in deciding whether, and whom, to evict as a consequence of such a lease violation. Those factors include, among many other things, the seriousness of the violation, the effect that eviction of the entire household would have on household members not involved in the criminal activity, and the willingness of the head of household to remove the wrongdoing household member from the lease as a condition for continued occupancy. The Secretary and I urge you to consider such factors and to balance them against the competing policy interests that support the eviction of the entire household.

Letter from Assistant Secretary Michael M. Liu to Public Housing Directors, June 6, 2002 (available at http://www.hud.gov/offices/pih) (Attachment C).

B. A Federally Subsidized Landlord May Be Required To Satisfy A Court That The Decision To Seek Eviction Against An Innocent Tenant Reflects An Appropriate Exercise Of Its Discretion.

Because the regulations discussed above contemplate that evictions from federally subsidized housing under the "one-strike" law are not to be automatic, courts have required the landlord to demonstrate that its decision to seek eviction was the product of a "suitable weighing of positive and negative factors." Oakwood Plaza Apartments v. Smith, 800 A.2d 265, 270 (N.J. App. Div. 2002); see Hampton Houses, Inc. v. Smith, L&T 83367/021, at 4 (N.Y. Civ. Ct., Mar. 4, 2003) (finding, in a one-strike eviction case, that "a determination as to whether a landlord exercised its discretion properly, if at all, must be made") (Attachment D).

In Oakwood, for example, a tenant of federally subsidized housing was arrested for drug activity and vacated the premises, leaving behind her three children and the person to whom their legal custody had been transferred. When the landlord sued to evict the tenant, the custodian intervened, arguing that she and the children were entitled to remain in the unit. The appellate court explained that "[t]he federal statutory framework," while permitting evictions when criminal activity has been engaged in by residents of federally subsidized housing, "does not permit a

Section 8 landlord to act in an arbitrary or capricious fashion." 800 A.2d at 270. The appellate court explained that, in the absence of any administrative forum to address these issues before the filing of an eviction suit, "the responsibility lies with the [trial] court in the first instance to determine whether a Section 8 landlord has exercised its discretion in a manner consistent with federal [law]." Id. Because the existing record "did not permit that determination to be made, since it did not reflect a weighing process over which the court could have asserted its power of review," the case was remanded for further development of the record. Id.

Similar requirements have been imposed on public housing authorities. See, e.g., Housing Auth. v. Williams, 784 A.2d 621, 627 (Md. Ct. App. 2001) (ruling that a decision to evict must consider "all of the relevant circumstances"); Allegheny County Housing Auth. v. Hibbler, 748 A.2d 786, 790 (Pa. Comm. Ct. 2000) (refusing to allow eviction because the housing authority did not "consider all circumstances under 24 C.F.R. 966.4(l)(5) when deciding whether to evict"); Bennington Housing Auth. v. Davis, No. 203-6-02, at 5 (Vt. Super. Ct., Jan. 14, 2003) (barring eviction because the housing authority "improperly abdicated its responsibility to weigh various factors bearing on the eviction determination") (Attachment E). [12]

That inquiry serves several important purposes. It enables the court to ascertain that the landlord understands that it does, in fact, have discretion as to whether to pursue eviction -- or, in other words, that the landlord is not operating under the erroneous assumption that federal law mandates eviction in all such cases. It also enables the court to ascertain that the landlord's decision to seek eviction was neither arbitrary nor based on impermissible considerations, such as the tenant's race, family responsibilities, income source, or invocation of her legal rights against the

[12] HUD's general counsel, rejecting the Oakwood reasoning, has taken the position that no exercise of discretion is required by the landlord of public or subsidized housing. See Letter from Carole W. Wilson, HUD Associate General Counsel, to Charles J. Macellaro (Aug. 15, 2002) (available at www.hud.gov/offices/pih).

landlord, or the landlord's potential profit if the unit were transferred to a new tenant who could be charged a higher rent. As the court put it Oakwood, "the federal statutory framework . . . does not permit a Section 8 landlord to act in an arbitrary or capricious fashion." 800 A.2d at 270; cf. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981) (observing that "the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria") (emphasis added). And the inquiry assures that, when a needy family's continued tenancy poses no threat of further criminal activity (e.g., because the only person involved in such activity has been removed), eviction is not employed in a manner that undermines the other objectives of federal housing policy, such as assuring that "every resident of the United States has access to decent shelter or assistance in avoiding homelessness." 42 U.S.C. § 12702. See Section I, supra.

To be sure, the regulations speak of mitigating circumstances that landlords "may consider," not that landlords "must consider." But that does not compel the conclusion that the inquiry is merely permissive. See, e.g., LO Shippers Action Comm. v. ICC, 857 F.2d 802 (D.C. Cir. 1988) ("recogniz[ing] that the context of a particular usage may at times require the construction of 'may' as mandatory or 'shall' as permissive"). In view of the Rucker Court's reliance on landlords' discretion not to evict innocent tenants as a reason to sustain the "one-strike" statute, as well as HUD's own oft-expressed preference for the exercise of such discretion in meritorious cases, the regulations should be understood as circumscribing landlords' authority to evict tenants under lease provisions prohibiting criminal activity. At a minimum, therefore, a court may inquire whether a landlord understood that it had the discretion not to pursue an eviction suit and whether, in declining to exercise that discretion, the landlord considered only appropriate factors of the sort enumerated in the regulations.

Here, the record does not indicate that the landlord understood that it had discretion to

allow Ms. Scarborough and her children to remain in their home, much less that it evaluated the costs and benefits of allowing them to do so. For that reason, as well, the judgment cannot stand.

CONCLUSION

The judgment of the trial court should be reversed.

Respectfully submitted.

Patricia Mullahy Fugere (#384796)
Antonia K. Fasanelli (#481856)
Amber W. Harding (#484130)
Washington Legal Clinic for the Homeless
1200 U Street., N.W., Third Floor
Washington, DC 20009
PH: (202) 328-5502

Vytas Vergeer (#447121)
Rebecca Lindhurst (#478623)
Bread for the City
1525 Seventh Street, N.W.
Washington, D.C. 20001
PH: (202) 265-2400

Barbara McDowell (#414570)
Julie H. Becker (#471080)
Legal Aid Society of the District of Columbia
666 Eleventh Street N.W., Suite 800
Washington, D.C. 20001-4589
PH: (202) 628-1161

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief Amici Curiae Of The Legal Aid Society Of The District Of Columbia, Bread For The City, And Washington Legal Clinic For The Homeless Supporting Reversal to be delivered by first-class mail, postage prepaid, the fifth day of August, 2005, to:

Nathan Neal, Esq.
Ann Marie Hay, Esq.
D.C. Law Students in Court
806 Seventh Street, N.W.
Suite 300
Washington, D.C. 20001

Counsel for Appellant

Philip Felts, Esq.
Schuman & Felts, Chartered
4804 Moorland Lane
Bethesda, MD 20814

Counsel for Appellee

_____
Barbara McDowell