

IN THE SUPREME COURT OF THE UNITED STATES

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DEPARTMENT OF HOUSING AND :
URBAN DEVELOPMENT, :
Petitioner :

v. : No. 00-1770

PEARLIE RUCKER, ET AL.; :
and :
OAKLAND HOUSING AUTHORITY, :
ET AL., :
Petitioners :

v. : No. 00-1781

PEARLIE RUCKER, ET AL. :

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Washington, D.C.

Tuesday, February 19, 2002

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:13 a.m.

APPEARANCES:

JAMES A. FELDMAN, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Federal Petitioners.
GARY T. LAFAYETTE, ESQ., San Francisco, California; on
behalf the private Petitioners.

1 PAUL A. RENNE, ESQ., San Francisco, California; on behalf
2 of the Respondents.
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(11:13 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 00-1770, the Department of Housing and Urban Development v. Pearlie Rucker and a related case.

Mr. Feldman.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE FEDERAL PETITIONERS

MR. FELDMAN: Mr. Chief Justice, and may it please the Court:

Confronted with the problem, an undisputed problem, of severe violence and drug crimes and other crimes in public housing, Congress enacted the statute at issue in this case. The statute provides that public housing leases must provide that any drug-related criminal activity 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 sets forth the conditions by which the household may possess and occupy Government property, property that is largely financed by the Federal Government.

HUD has construed that statute, in accordance with its terms, to authorize termination of the tenancy when the drug-related criminal activity by one of the

1 named persons occurs without regard to the tenant's
2 knowledge or control.

3 QUESTION: Do you have any question about the
4 respondent's standing to contest the provisions that -- of
5 a lease that's made between HUD and the housing --

6 MR. FELDMAN: The -- what happened in the
7 district court in this case, if I can just answer it this
8 way, is there was a -- we suggested that the court should
9 abstain, and this whole thing should be litigated in the
10 local courts in the unlawful detainer action. The court
11 refused to do so on the ground that this was in part an
12 administrative procedure action against HUD and that HUD
13 wouldn't have been a party in the local court. That issue
14 wasn't raised further on appeal and we didn't raise it in
15 our petition for cert.

16 I'm not sure if that answers the question or
17 not, but -- in any --

18 QUESTION: Is the -- is the issue jurisdiction?

19 MR. FELDMAN: No, I don't -- I don't think it is
20 jurisdictional. The question about whether there's a
21 cause of action under the APA, for example, is not -- is
22 not a jurisdictional issue, nor is abstention.

23 Anyway, HUD has construed the statute in
24 accordance with its terms, to authorize termination of the
25 tenancy when there's drug-related criminal activity

1 regardless of the tenant's knowledge or control. The
2 court of appeals read into the statute a limitation that
3 is nowhere expressed or implied with any of the words that
4 Congress used, that a tenancy may only be terminated when
5 the tenant knew or had reason to know of the drug-related
6 criminal activity.

7 The question --

8 QUESTION: We read scienter requirements into
9 criminal statutes with some regularity, don't we?

10 MR. FELDMAN: Yes. But there's no -- but this
11 is a civil -- this is a contract. It's a civil -- it's a
12 civil case. It's a civil contract. And the law of
13 contracts historically has been that contractual terms can
14 be violated without regard to any inquiry into the state
15 of mind of the contracting parties.

16 QUESTION: What -- what about other civil
17 forfeiture actions? Are you familiar with any -- any
18 others of those that don't contain a scienter requirement?

19 MR. FELDMAN: I'm not sure -- well, under
20 Federal law, I'm not sure. There is now generally a
21 Federal knowledge -- ignorant owner defense under the
22 Federal forfeiture statute.

23 QUESTION: Was that --

24 MR. FELDMAN: State -- in the United States --
25 in Bennis against Michigan, I don't think there was such a

1 -- there was such a provision.

2 But I think the key point is this is completely
3 different from forfeiture. Forfeiture involves someone
4 who has a property interest that the Government had -- has
5 nothing to do with and the Government is given the right
6 to take that property interest. This is a case where the
7 tenants never had a property interest in occupancy of
8 their -- of their apartment in violation of the lease.
9 And this is a case in which the Government is saying this
10 is our property and we're going to let you use it under
11 certain -- use and occupy it under certain circumstances.

12 QUESTION: Is it your position that the
13 Government can place any terms and conditions whatever on
14 leases as long as it doesn't violate some other
15 constitutional provision like the First Amendment?

16 MR. FELDMAN: Yes, I think that is our position.

17 QUESTION: And so this is a condition that the
18 Government has the right to impose. Is that your basic
19 position?

20 MR. FELDMAN: That's right. And --

21 QUESTION: Then you don't need reliance on
22 Bennis at all.

23 MR. FELDMAN: No, no. Our position is this is
24 fundamentally different from forfeiture. Forfeiture
25 involves tens of millions of leasehold and fee interests

1 throughout the country. This involves a -- a much
2 narrower slice of property interests in -- of -- of --

3 QUESTION: Whether it involves a narrower or a
4 broader slice really doesn't make any difference. It's
5 just a different kind of relationship.

6 MR. FELDMAN: Right. It's a fundamentally
7 different kind of relationship. This is the Government's
8 property to start off with. It is saying, you can use the
9 property subject to certain conditions.

10 QUESTION: I guess I'm still -- I guess I'm
11 still puzzled by why a tenant can sign a lease and then
12 challenge it. I mean, what's the -- is -- is he saying
13 that Federal law that binds the housing authority is
14 somehow invalid? And how does he have standing to do that
15 if the housing authority agrees?

16 MR. FELDMAN: I think that the tenant's position
17 -- I suppose the tenant -- you'd have to ask my opponent,
18 but I think the tenant's position here is that this lease
19 provision which embodies the -- the HUD rule of -- the
20 rule that Congress enacted concerning that there was no
21 innocent owner defense, that that is itself not authorized
22 by Federal law or not permitted by Federal law and
23 therefore was an invalid condition. I assume that that's
24 what their position is.

25 QUESTION: The position of the Government in --

1 in saying that any misuse by any guest, whether on or off
2 the premises, will result in a forfeiture does seem to
3 operate in a rather draconian fashion in some of the
4 examples we've been given in the briefs. And one wonders
5 why the Government wants to take such a -- an extreme
6 position even though it lawfully could.

7 MR. FELDMAN: I think most -- I would say that
8 most of the examples that are given in -- that are given
9 in the amicus briefs supporting respondent are ones that
10 are based on third-hand hearsay, and I'm not sure that
11 they're accurate accounts of those events, but --

12 QUESTION: Well, but if they are, they sound
13 pretty draconian.

14 MR. FELDMAN: I think the underlying point is
15 that Congress was facing a very serious problem, and it
16 had essentially three choices. It could have said, we are
17 going to have a Federal zero tolerance policy and that's
18 all. It could have done what it did, which is vest local
19 public housing authorities with this tool, a contractual
20 provision that permits them to get people out when there's
21 a serious problem or -- or when -- when it's necessary to
22 ensure the peaceful enjoyment of the premises by the other
23 tenant. Or it could have adopted a code of under what
24 circumstances you can and can't evict, and then left it up
25 to the -- it would be leave -- left up to the courts to

1 see whether the particular facts satisfy that code or
2 don't satisfy that code.

3 I think Congress took the only course that was
4 workable. If they -- if Congress had gone farther and if
5 Congress had enacted the statute that the court of appeals
6 thinks it enacted, then it would not be much of a tool for
7 public housing authorities because in each case, the
8 question, for example, of the tenant's knowledge would be
9 litigated. The tenant would likely deny knowledge. The
10 household members would deny knowledge. The whole thing
11 wouldn't --

12 QUESTION: Mr. Feldman, how can you say that's
13 so when the district court -- the injunction was he's
14 drawing a line between on premises and off premises. And
15 the injunction doesn't cover anything that happens on the
16 premises. As far as that's concerned, the eviction holds.
17 So, it's only the cases where the third person does a drug
18 deal or whatever off premises. And we had one case in the
19 parking lot, another case in a bar. But as far as inside
20 the premises, there is no case being made. There's --
21 nobody is saying that -- at least as I understand it, that
22 the district judge didn't go far enough.

23 MR. FELDMAN: That -- that's correct. But the
24 problem is that in fact drug-related criminal activity
25 that occurs, for example, in the parking lot of a housing

1 project can be more threatening to the peaceful enjoyment
2 of the premises by the other tenants than what would --
3 might occur in the apartment. And the same with conduct
4 that occurs nearby.

5 I think the point is that Congress was faced
6 with it and public housing authorities were faced with the
7 problem of very serious violence that the court of appeals
8 said that public housing projects in many areas had become
9 war zones and drug markets. And they wanted a -- a
10 practical, effective way to be sure that public housing
11 authorities can take those households that are causing the
12 problem and remove them and replace them with other
13 households of the many, many households who are on the
14 waiting list and who wouldn't cause the problems.

15 QUESTION: But you say this is -- a housing
16 authority may not must.

17 MR. FELDMAN: That's correct.

18 QUESTION: And I think in your brief, as well as
19 in Judge O'Scannlain's opinion for the original panel,
20 there was a suggestion that the housing authority should
21 be equitable in the way it administers it, that it
22 shouldn't evict every time it theoretically could. And my
23 question to you is, in recommending that kind of equitable
24 discretion to be exercised, do you envision that to be an
25 unreviewable discretion or would there be court review of

1 the housing authority's determination, say, in these cases
2 not to exercise equitable discretion?

3 MR. FELDMAN: I don't think there would be
4 because I think Congress -- the way the scheme works is
5 this is a provision in a lease which is a sort of
6 contract. And there is -- the law of contracts is that a
7 contracting party may enforce its lease -- its lease
8 provisions -- Congress was surely aware of that -- when it
9 wants. And ordinarily whether it's a Federal contract, a
10 government contract, or a private contract, the court
11 doesn't inquire into what are the reasons why you're
12 enforcing your -- your lease provision here. They just
13 inquire -- or your contractual provision. They just
14 inquire has the contract been breached or has it not been
15 breached. And I think again that that was the only
16 workable way for this scheme to work.

17 Now, in some instances, there may be a public
18 housing authority faced with some of the really extreme
19 conditions that came out in congressional hearings and
20 that are discussed throughout the papers here that may
21 decide that a zero tolerance policy is the only way to
22 assure that this -- the drugs are going to be cleaned out
23 of the housing unit and that the housing -- the households
24 that are causing the problem are going to be replaced with
25 some of the other ones on the waiting list that won't

1 cause the problem.

2 QUESTION: Do I understand --

3 MR. FELDMAN: There -- there might be other
4 cases where that's not appropriate.

5 QUESTION: But you did take the position that
6 here and now with this, that the housing authority should
7 not evict automatically, that they should do it on a case-
8 by-case basis. Or am I wrong in saying --

9 MR. FELDMAN: I think what -- well, you know, I
10 hesitate to say yes to that because I think what -- our
11 position is that the housing authority has the discretion
12 to enforce these provisions or not, and there may be cases
13 where zero tolerance policy is necessary or required, in
14 which case that's what they should do.

15 QUESTION: But the discretion is unreviewable
16 and in the -- in the final analysis, as I understand your
17 argument, it doesn't have to exercise any discretion at
18 all. It can zero tolerance across the board.

19 MR. FELDMAN: They -- it could say zero
20 tolerance across the board.

21 QUESTION: And if -- if you say it's reviewable
22 by the courts, talk about an unworkable system. That
23 would be it.

24 MR. FELDMAN: That's correct because you -- with
25 respect to the particular issue of knowledge that's at

1 issue here, as I said, it's going to be very hard for a
2 housing authority, which is not a criminal prosecution
3 agency -- they're in the business of running housing --
4 housing developments, not prosecuting crimes -- to prove
5 who had exactly what state of mind or who had what level
6 of control.

7 Indeed, both respondents in the court of appeals
8 suggest that if the tenant -- even if the tenant knew, if
9 the tenant couldn't control the drug-related activity,
10 that that would also be a defense. Well, that would, in
11 some cases, allow exactly the families and the households
12 that are causing the biggest problem for the -- for their
13 -- for their neighbors and for the truly innocent tenants
14 to remain, and there would be nothing the public housing
15 authority could do.

16 But I think, in general, what Congress wanted
17 was to give public housing authorities a tool that would
18 be actually useful in remedying the very serious problem
19 of not only drug -- drug-related criminal activity but
20 other criminal activity in public housing units.

21 The underlying principle really is one of
22 household-wide responsibility. No one -- no one suggests
23 that if the -- everybody agrees, let me put it that way,
24 that if the tenant is -- engages in drug-related criminal
25 activity, that the whole household can be removed from the

1 unit. But in a very real sense, although the legal
2 relationship is between the housing authority and the
3 tenant, the practical relationship is they're giving that
4 whole household the right to occupy the Government
5 premises. And it's just the very same rule. It's whoever
6 in that household has used -- has engaged in criminal
7 drug-related activity, that person is liable to be removed
8 from the tenancy because it -- that person violated a
9 lease term.

10 QUESTION: Mr. Feldman, how do you answer that
11 the statute doesn't say anything about the duration of
12 time or the place? I mean, the hypothetical that the --
13 let's say the grandson could have dealt with drugs 5 years
14 ago or could have done it in L.A. and this housing project
15 is in Massachusetts.

16 MR. FELDMAN: In terms of time, I think that
17 there -- generally the statute doesn't say anything about
18 time, and I think it would be open to HUD to fill in a --
19 in a gap, although certainly a very broad period of time
20 would be -- would be suggested. It wouldn't be a very
21 short --

22 QUESTION: But you're saying the part of the
23 unreviewable discretion is it could be 5 years ago.

24 MR. FELDMAN: That's -- that's correct, but that
25 -- that -- it was not -- the issue of time and place --

1 and let me say place is addressed in the statute because
2 Congress -- originally it said on or near, and Congress
3 amended in 1996 to say on or off. So, the one thing we do
4 know is that place is not something that was relevant.

5 And again -- actually if I can turn to place for
6 a second, you could have a drug crime that occurs 3,000
7 miles away, and ordinarily -- and I think it would never
8 be -- I don't know of any case where anyone has been tried
9 to be evicted. It's a very theoretical possibility that
10 anybody would be. But if that crime was that that person
11 was trying to import drugs and bring them to that person's
12 unit in the housing complex, it would be highly relevant.
13 And what Congress intended was that public housing
14 authorities have the tool to take care of the problems
15 that they saw. They're not evicting people who are -- who
16 are engaged in drug crimes 3,000 miles away or 20 years
17 before.

18 Respondents rely and the court of appeals relied
19 on the forfeiture provision. I've already said that the
20 forfeiture raises a completely different issue. And the
21 fact that -- it is true that Congress added leasehold
22 interest to the forfeiture statute in it -- when it --
23 when it rewrote this statute in 1990, although it didn't
24 substantively change the terms of the statute. But I
25 think the -- it's very express innocent owner defense

1 that's in the lease -- in the forfeiture statute contrasts
2 very sharply with the absence of not only any such defense
3 but even any word that suggests such a defense in this
4 statute.

5 The doctrine of *in pari materia*, which they
6 appeal to, can sometimes be used where you have a
7 particular term in a statute that in a closely related
8 statute is either defined or, by context, has a very clear
9 meaning and the same meaning then is -- is imported. It's
10 quite a different thing here where -- this is a -- the
11 forfeiture statute is entirely different from --

12 QUESTION: Well, it runs up against expressio
13 unius too, doesn't it --

14 MR. FELDMAN: Right.

15 QUESTION: -- as a --

16 MR. FELDMAN: Right, and -- and I think in this
17 case where there's no word in this statute that requires
18 that -- that requires interpretation and the context that
19 you're trying to take the meaning from is quite a -- an
20 entirely different context, I don't think that that *in*
21 *pari materia* is soundly applied. In fact, I think just
22 the contrast between the statutes clearly points out
23 Congress' -- what Congress intended.

24 The -- the -- you know, I'd add that this --
25 this -- the rationale of this statute ensures not only

1 that there's the maximum incentive for tenants in public
2 housing to ensure that their household members and they
3 themselves are not engaged in drug-related activity and to
4 find out about that activity rather than remaining
5 ignorant, but in the end, it ensures that households in
6 Government subsidized housing who are a threat to their
7 neighbors or who may be a threat to their neighbors in the
8 view of the public housing authority, that they are
9 removed and that -- and replaced with others of the many
10 families who are on the list who would not pose such a
11 threat.

12 Finally, the court of appeals also relied on the
13 doctrine of constitutional avoidance, but this statute is
14 clear and there's no warrant for applying that doctrine.
15 And in any event, there isn't any serious constitutional
16 problem with interpreting it as HUD has. Although the
17 tenants have a property interest in their lease, that is
18 -- that entitles them to the right to the full procedural
19 due process protections before the lease is terminated,
20 but it doesn't govern what the substantive terms of the
21 lease are.

22 QUESTION: They can litigate that in the
23 unlawful detainer action.

24 MR. FELDMAN: That's right, and they have the
25 right to litigate all of the issues that would come up in

1 the unlawful detainer action, but it doesn't -- the -- the
2 fact that they have a property interest in their lease
3 doesn't, in turn, give them a property interest in acting
4 in ways substantively that are contrary to the terms of
5 their lease.

6 If there are no further questions, I'd like to
7 reserve the balance of my time.

8 QUESTION: Very well, Mr. Feldman.

9 Mr. Lafayette, we'll hear from you.

10 ORAL ARGUMENT OF GARY T. LAFAYETTE

11 ON BEHALF OF THE PRIVATE PETITIONERS

12 MR. LAFAYETTE: Mr. Chief Justice, and may it
13 please the Court:

14 In response to Congress' enactment of
15 1437d(1)(6) and HUD's regulations, the Oakland Housing
16 Authority revised its lease to properly reflect the
17 changes that had taken place with regard to the HUD
18 regulations. And it specifically did that in three
19 instances. It revised the lease at paragraph 9(m) and it
20 revised the occupants' responsibility statement, and then
21 it revised what is known as the tenant agreement to
22 maintain a drug-free environment.

23 In each instance, it -- it advised each tenant
24 and requested each tenant to sign a statement
25 acknowledging that they clearly understood that if this

1 type of conduct took place within their apartment or off
2 housing authority property, that they could be subjected
3 to a lease cancellation.

4 In this case, we came forward with four
5 individuals whose leases were canceled because of this
6 particular type of activity. And the housing authority's
7 position is it was necessary for it to take the action
8 with regard to each one of these particular individuals
9 because of the conduct that they were participating in or
10 the conduct of individuals in their households were
11 participating in, which conduct which posed a significant
12 risk of injury to other members of the housing authority
13 and to the community in which these particular
14 developments are located.

15 QUESTION: Mr. Lafayette, how big a problem is
16 this in this housing authority?

17 MR. LAFAYETTE: It's a -- it's a significant
18 problem. One of the things that we've pointed out in our
19 moving -- in -- in our merits brief was that this is a
20 housing authority that has approximately 8,000 individuals
21 who are scattered in 3,308 low income to moderate income
22 housing units. From 1998 until November of this past
23 year, there were 700 felony arrests for drug-related
24 criminal activity in or near Oakland Housing Authority
25 property. Significantly, between January 1, 2001 and

1 November 6, 2001, the number of felony arrests was 250 for
2 drug-related activity. That's a significant sum.

3 One of the things that I think is also
4 significant is that this is a housing authority that does
5 not necessarily have large housing development complexes.
6 A number of its developments are smaller units. For
7 example, in the Hill and Lee cases, those are individuals
8 who resided in -- in a development that is approximately
9 eight units, eight units in a neighborhood that is
10 comprised almost exclusively of single family dwellings.
11 When these individuals participate in this drug activity
12 in the front of that unit, it is not only affecting the
13 members of the housing authority community itself, it is
14 affecting the general community at large and all the
15 individuals there.

16 And significantly we need to point out that we
17 responded there not because we happened to be driving by,
18 but the response was -- was premised on a complaint being
19 made. And that's part of the record. So, what's
20 happening is this housing authority is responding to
21 complaints made by residents, and one of the things that
22 we point out is this housing authority has been subjected
23 to litigation by -- being made by its residents demanding
24 that the housing authority take more affirmative action
25 and steps to address these issues of drug and drug-related

1 activity.

2 In -- it seems to me -- to me that there is no
3 issue that in each one of these particular cases there was
4 just cause for the housing authority to go forward and --
5 and to exercise this discretion reasonably and that it did
6 so. And one of the things that -- that seems to appear is
7 the question of whether or not it is exercising
8 discretion, and we always point the Court to the case of
9 Pearlie Rucker because that's a case where the housing
10 authority initially proceeded with termination of that
11 lease and, in the process of doing so, came to understand
12 that the individual in the household who was participating
13 in the drug activity, Gelinda Rucker, was a person who had
14 actually become incarcerated and therefore no longer posed
15 a risk of injury to the remainder of the housing authority
16 or the community. Realizing that, the agency at that
17 point discontinued its efforts to dismiss that -- to
18 terminate that lease. And at the time this lawsuit was
19 actually filed, there was no longer a pending dispute
20 between the housing authority and Pearlie Rucker who was
21 the -- who was the tenant responsible for that lease.

22 QUESTION: But that was not required of the
23 housing authority, and if they had gone and said, well, we
24 don't care that circumstances have changed, out you go,
25 that would be unreviewable.

1 MR. LAFAYETTE: That would be unreviewable. And
2 the reason for that is the housing authority needs the
3 discretion to act where it believes it is necessary for it
4 to act. And in each one of these instances, this housing
5 authority has come forward with that position. And
6 without that discretion, a housing authority would be
7 strapped to look for and to document events that require
8 it to move or compel it to move or would set some -- would
9 meet someone else's satisfaction of when it should move.
10 And those things may not be present from the information
11 that it might have before it.

12 The -- and one of the things we think that --
13 that Congress recognized, that housing authorities are not
14 as well equipped as are the Federal Government in order to
15 respond to these types of issues, particularly with regard
16 to the loss of additional funds to cities. With that in
17 mind, it is significant that this housing authority has
18 responded in the way that it has responded.

19 We -- we have -- have listened to the Solicitor
20 General's discussion this morning, and we are in accord
21 with regard to the position that he has taken with regard
22 to what Congress intended and how Congress went about
23 evaluating the various needs of residents of public
24 housing.

25 One of the things that I think that needs to be

1 clearly stated is that the housing authority itself does
2 not benefit from a statute like this because the housing
3 authority is only going to take that apartment unit and to
4 re-lease that apartment unit out to someone else who is in
5 need of low income public housing. The housing authority
6 has this provision in its lease because, one, there --
7 it's required by the HUD regulations, and number two, it
8 needs to be able to provide its residents with safe and
9 decent housing, which is what this is really all about, is
10 how it goes about providing safe and decent housing.

11 QUESTION: Do you take the position that you
12 could have this provision in the lease even without the
13 Federal statute?

14 MR. LAFAYETTE: There is nothing that restrains
15 us from putting this provision in this lease before that.
16 And in fact, prior to -- though not part of the record,
17 prior to this provision being enacted by Congress, there
18 was a similar provision in the lease itself. It just did
19 not embrace the concept of activity off of housing
20 authority property. The provision was amended after the
21 -- after Congress acted.

22 QUESTION: That -- that in premises has not --
23 has never been an issue in this case, I take it.

24 MR. LAFAYETTE: In premises has not, but in
25 premises alone does not address the problem with regard to

1 this type of activity in public housing. It's not
2 unforeseeable that individuals who participate in this
3 conduct off premises may not lead those who have issues
4 with them onto housing authority property and thereby
5 jeopardize the interest and the -- the right to enjoyment
6 of the other residents.

7 With that, I'll reserve the rest of my time
8 for --

9 QUESTION: May I ask one question, if you're
10 through? Is there any procedure at all to -- I'm pointing
11 -- I'm referring to the fact that the housing authority
12 has such broad discretion. They can not only make
13 charges, but they can decide to waive them. Is there any
14 procedure at all to be sure that that power isn't abused
15 by waiving it in cases of all Democrats but enforcing it
16 for all Republicans or something like that?

17 MR. LAFAYETTE: There -- there isn't a procedure
18 in place for anyone to review these decisions based on
19 some arbitrariness standard. No, there isn't.

20 QUESTION: Well, but I mean, in the precise
21 instance that Justice Stevens gave you, that would be a
22 constitutional violation, wouldn't it?

23 MR. LAFAYETTE: If --

24 QUESTION: And you -- you would have judicial
25 review for -- for violation of some constitutional

1 provision.

2 MR. LAFAYETTE: It's foreseeable if there is a
3 constitutional issue. If, for example, this -- this
4 policy is only being used against people of a particular
5 race --

6 QUESTION: Of course.

7 MR. LAFAYETTE: -- then those issues could be
8 reviewable.

9 QUESTION: Right.

10 MR. LAFAYETTE: But --

11 QUESTION: What? In a 1983 action against the
12 housing authority? Is that what -- what would -- how
13 would it be?

14 MR. LAFAYETTE: That could be and it could be a
15 1983 violation against the housing authority.

16 QUESTION: Well, wouldn't it have to be on your
17 view? Wouldn't it have to be in a separate 1983 action on
18 the -- on the view that you take?

19 MR. LAFAYETTE: It could be -- landlord-tenant
20 disputes in California are summary proceedings which
21 particularly dovetail into the issues in dispute, and it
22 probably would be a separate action as a 1983 claim. But
23 one of the things we don't have here is a claim that says
24 that these individuals are being singled out for lease
25 cancellation because of their race or some other suspect

1 classification.

2 Thank you.

3 QUESTION: Thank you, Mr. Lafayette.

4 Mr. Renne, we'll hear from you.

5 ORAL ARGUMENT OF PAUL A. RENNE

6 ON BEHALF OF THE RESPONDENTS

7 MR. RENNE: Mr. Chief Justice, may it please the
8 Court:

9 In this case, as we've heard in -- in the
10 argument of HUD is that HUD says, by reason of this lease
11 provision, which Congress mandated in section 1437d(1)(6),
12 it is the judge and jury as to whether or not innocent
13 tenants, such as the -- the respondents who are before
14 this Court, whether they can be summarily evicted from
15 their homes.

16 QUESTION: Well, that doesn't really differ from
17 the role of any landlord in a landlord-tenant situation,
18 does it?

19 MR. RENNE: Yes, Your -- Chief Justice, it does
20 because what they're saying is that there can be no
21 defenses raised in the eviction proceeding other than an
22 attack on whether or not there was a drug-related
23 violation.

24 QUESTION: Well, but as the Chief Justice points
25 out, that's true in -- I've drafted many leases and we

1 have clauses --

2 QUESTION: Absolutely.

3 QUESTION: -- that this premises is used for
4 commercial purposes.

5 QUESTION: Regional eighths.

6 QUESTION: The lease is void and that's -- and
7 that's it. Now, you may say that -- you can argue about
8 whether or not the -- the provision itself was violated,
9 but I know of no authority where it says where the lessor
10 can't exercise this option.

11 MR. RENNE: Justice Kennedy, under most State
12 laws, the eviction court has a right to make a
13 determination whether under all the facts and
14 circumstances to -- to terminate the lease would be, for
15 example, a forfeiture because of the violation not being
16 sufficient or the circumstances such as -- that don't
17 bring it under those terms.

18 Now, what -- and interesting enough, we heard
19 nothing about it, but Congress also mandated --

20 QUESTION: We just don't have before us a
21 question in which you're contesting that the drug activity
22 occurred.

23 MR. RENNE: Yes, but the Congress mandated that
24 in any action taken to evict, HUD, or the Oakland Housing
25 Authority in this case, had to provide some grievance

1 mechanism of an independent evaluation whether eviction
2 should occur. However, it said that HUD can grant due
3 process exemptions under the circumstances where HUD makes
4 an affirmative determination that the eviction court
5 provides due process to the tenant.

6 QUESTION: This wasn't the basis of the Ninth
7 Circuit's decision, was it?

8 MR. RENNE: Yes. The -- the Ninth Circuit talks
9 in terms of the -- of the opportunity to present defenses.

10 Now, what the Ninth Circuit was going on, it was
11 saying that there's nothing in the statute -- and it was
12 Congress' intent not to take away an innocent tenant
13 defense. And that would be presented to the eviction
14 court. And Congress has provided for the eviction court
15 to have a right to hear all legal and equitable defenses.

16 QUESTION: Well, this doesn't sound to me like
17 the Ninth Circuit's reasoning at all. Perhaps I'm
18 mistaken.

19 MR. RENNE: Well, it -- it is, Your Honor, if
20 you look at what the Ninth Circuit is saying. The Ninth
21 Circuit is saying that that section does not take away an
22 innocent tenant defense.

23 QUESTION: Where does it come from in the first
24 place?

25 QUESTION: Well, where did -- exactly. Where

1 did it come from in the first place?

2 MR. RENNE: The innocent tenant defense?

3 QUESTION: Yes.

4 MR. RENNE: From the -- the statute which
5 provides that in eviction proceedings, the eviction court
6 shall provide an opportunity for the tenant to present all
7 legal and equitable defenses.

8 QUESTION: Yes, but the question is whether or
9 not this is a legal defense.

10 QUESTION: Yes.

11 QUESTION: That's the only question before us.

12 MR. RENNE: That's correct. And, Your Honor, it
13 is our position that it is a legal defense that is
14 recognized in most State court proceedings.

15 QUESTION: But it's not recognized in the
16 Federal statute or in the regulations. That's the
17 problem. This is manufactured by the Ninth Circuit. It
18 isn't there.

19 MR. RENNE: The -- the statute doesn't say
20 anything about defenses. The statute is only saying
21 here's a lease provision that you shall put into the
22 lease. HUD's own regulations say, if you want to enforce
23 it, you have to go to an eviction court, and the eviction
24 court has a right to consider all equitable legal
25 defenses.

1 QUESTION: But these tenants didn't let it get
2 to that stage. They preempted it and filed some kind of a
3 suit to get an injunction before there had ever been a
4 proceeding.

5 MR. RENNE: That's correct. And that was on the
6 point that it was a violation of the -- of what power
7 Congress had given HUD to interpret the statute which is
8 totally silent. It says nothing about defenses. And when
9 you look at what happened at the same time when Congress
10 enacted that particular provision in 1988, it was the same
11 time in which it took public housing leases, put them
12 under the forfeiture statute, and said under forfeiture
13 statutes, you must provide an innocent tenant defense.

14 QUESTION: Why didn't it say that here? I mean,
15 you -- this suggests that when Congress said nothing about
16 the defense here, it meant the defense didn't exist.
17 Where it wanted the defense --

18 QUESTION: It put it in.

19 QUESTION: -- it specified it. And you say they
20 say nothing about it. They say nothing about it because
21 it didn't exist.

22 MR. RENNE: I -- I submit the reason why they
23 didn't is because landlord-tenant law is a -- in public
24 housing is a amalgamation of Federal and State law, and
25 that's well recognized in all the cases. They knew, at

1 the time that they passed section 1437d(1)(6), that there
2 was also the provisions that said legal and equitable
3 defenses may be presented. They were not -- they were not
4 focusing on what defenses are available.

5 QUESTION: These provisions are -- that say
6 legal and equitable defense can be presented are -- appear
7 in Federal law or in State law?

8 MR. RENNE: They appear in HUD's regulations.
9 In the -- they can only grant a due process exemption if
10 they find that the State eviction court gives the tenant
11 an opportunity to present legal and equitable defenses.

12 Congress, when it was passes -- passing section
13 1437 --

14 QUESTION: And you think this is an
15 authorization for all sorts of defenses?

16 MR. RENNE: Absolutely. Whatever defenses are
17 recognized by the eviction court.

18 QUESTION: Then you are going considerably
19 beyond where the district court left off. And the
20 district court made a distinction between on premises and
21 off premises, and it didn't give any injunction with
22 respect to on premises. Your argument doesn't have that
23 limitation. Your argument is equitable defense of
24 innocence; I didn't know. And it doesn't draw any line at
25 all between in and off premises. So, you are asking this

1 Court to take -- to state a rule of law that would go
2 considerably beyond the district court injunction that was
3 then reviewed by the Ninth Circuit. You're asking us, in
4 -- in effect, to reverse the district court because it
5 didn't go far enough, if I understand your argument.

6 MR. RENNE: I believe you are correct, Justice
7 Ginsburg, that we believe that that defense of a totally
8 innocent tenant should be available whether the offense
9 occurred off or on the premises just as it does in the
10 forfeiture statute.

11 QUESTION: Did you object in the Ninth Circuit
12 because the district court didn't go far enough?

13 MR. RENNE: I don't believe so, Your Honor.

14 QUESTION: A very odd procedural posture you're
15 in. You're trying to overturn your victory in the
16 district court.

17 MR. RENNE: I'm not trying to overturn it, Your
18 Honor, I suggest, but I would be perfectly happy if this
19 Court addressed just the off premises, which is what the
20 district court held. But the whole --

21 QUESTION: But you say there's no logical line
22 that one could draw. On your -- if your theory is
23 innocent tenant is a defense, then how can you defend that
24 defense for off premises only?

25 MR. RENNE: The -- the Ninth Circuit didn't draw

1 that line either. The Ninth Circuit took the position
2 that the innocent tenant defense was not precluded and in
3 fact was preserved under that --

4 QUESTION: I thought the Ninth Circuit affirmed
5 the district court's judgment.

6 MR. RENNE: That is correct.

7 QUESTION: And the district court said the --
8 there is no problem with on premises. Off premises is
9 what's unreasonable.

10 MR. RENNE: What the district court said is, I'm
11 not going to issue an injunction for on premises. Might I
12 respectfully submit what the court was saying there was
13 that the balancing and the clearness of the likelihood of
14 prevailing was not necessarily clear as he felt it was at
15 the -- at the off premises, so that in the context of a
16 preliminary injunction, he did not make a ruling as a
17 matter of law at the end of the day that that -- that he
18 would adhere to the position that he was taking for
19 purposes of the injunction.

20 QUESTION: But you said there's no difference at
21 all. So, it would be just as arbitrary. I mean, if -- if
22 you say innocent -- innocence is the defense, the innocent
23 tenant, then whether it's preliminary injunction or
24 permanent injunction, it's a line that you say cannot
25 logically stand.

1 MR. RENNE: On the facts that were before the
2 district court judge, all he had to deal with, for
3 purposes of the injunction, was the -- the off premises.
4 And I respectfully submit it's not a final judgment that
5 he was addressing. He was addressing what's the
6 likelihood of success.

7 Admittedly -- and I don't -- I think we all
8 recognize that if there's an offense on the premises, the
9 likelihood of a innocent tenant defense being successful
10 is far less, but in the case where you have someone, like
11 the three female respondents in this case who are long-
12 time tenants who have had no problems -- and certainly the
13 Oakland Housing Authority is not arguing they had problems
14 with them -- and you have a grandson who smokes cigarettes
15 in the parking lot, and HUD takes a position -- and
16 Oakland Housing Authority takes a position that we can
17 apply some kind of collective guilt because, regardless of
18 what the Government wants to say and characterize it as a
19 contract action, the end result to these three respondents
20 and the innocent -- innocent members of the household is
21 to throw them into the streets.

22 QUESTION: You think it's irrelevant that the
23 tenants signed a contract which specifically provides this
24 in the -- in the rider. It's at page 69a of the appendix.
25 You think that that's just irrelevant.

1 MR. RENNE: No, Justice Kennedy, it's not
2 irrelevant. The --

3 QUESTION: I -- I frankly don't understand your
4 -- your standing to contest the housing authority's
5 interpretation of a HUD regulation anyway. You just
6 signed a lease that -- that HUD gave you and that's it.

7 MR. RENNE: The -- the question is -- and I
8 think the contract question is way circular, that if -- if
9 Congress did not mandate that it's an automatic eviction
10 with no opportunity to present any kind of a defense, if
11 Congress didn't mandate it, the fact that it's in the
12 lease doesn't change it. You still have to get to -- the
13 question is did section 1437d(1)(6) -- did it mandate?
14 And it would be the only section of the lease.

15 QUESTION: Well, but I'm not sure you're correct
16 in your argument there, Mr. Renne, because perhaps you --
17 if you had a prohibition against that sort of a thing in
18 the statute, certainly HUD would be bound by it. But with
19 no -- no provision one way or the other, certainly that's
20 something that HUD is entitled to interpret, and it has
21 interpreted it by its regulations.

22 MR. RENNE: The -- but it's also, in its
23 regulations, said that the tenant has a right in the
24 eviction court to present equitable and legal defenses.

25 QUESTION: But as Justice O'Connor said, you

1 never let it get to the eviction court. The -- it wasn't
2 litigated as to whether the lease should be revoked or
3 not. All that was litigated was whether HUD had a right
4 to put this provision in its lease.

5 MR. RENNE: I respectfully submit, Mr. Chief
6 Justice, that is not what they litigated. They litigated
7 that they did not have a right to terminate -- to
8 terminate an innocent tenant, not to put that in their
9 lease. That -- there's nobody saying that they can't put
10 the provision in their lease. The question is -- and --
11 and nobody is disputing that there is a serious problem of
12 drugs in public housing, and we aren't -- we aren't
13 suggesting anything to the contrary. But I suggest that
14 the respondents and the way they're being treated by the
15 Oakland Housing Authority are making them victims as well.

16 QUESTION: Well, but they're being treated in
17 accordance with the provisions of their lease. And you
18 ordinarily can't come into a court and say, gee, you know,
19 you're putting these tenants out on the street if in fact
20 they've breached their lease in a way that permits the
21 landlord to do that.

22 MR. RENNE: But again, with all due respect,
23 that's assuming the answer, and that is that the lease
24 does say that you can't present an innocent tenant
25 defense. And again I go back to --

1 QUESTION: Well, that's a different -- now that
2 Ninth -- that's -- finally you're talking about something
3 the Ninth Circuit talked about, and it seems to me that
4 that's just absolutely dead wrong. Page 69 of the
5 appendix has a rider, a supplemental provision of some
6 kind, which makes it crystal clear that there is no
7 innocent defense.

8 MR. RENNE: But the -- if you are suggesting
9 that the tenant has any choice in a public housing
10 situation in which the -- the only choice of housing they
11 have is public housing, to say that somehow or other they
12 have agreed to a provision which Congress didn't require.

13 QUESTION: Well, but -- but now -- now you're
14 skating away from the point where we were finally at
15 issue. You said the lease doesn't provide this, and --
16 but now your answer is, well, even if it did, it
17 shouldn't. I mean, that's just -- that's just not
18 responsive to my point.

19 MR. RENNE: My -- Justice Kennedy, what I was
20 saying is that section 1437 of the -- of the statute
21 didn't require the language that they are putting in.

22 QUESTION: But under -- under your theory, you
23 have to show not just that it didn't require it, but that
24 HUD could not, as an administrative agency, interpret it
25 to allow that.

1 MR. RENNE: And I believe --

2 QUESTION: It seems to me your argument -- when
3 -- when you have to argue that point, the argument, as I
4 regard the Ninth Circuit opinion, is just extremely weak.

5 MR. RENNE: I address that in three ways. One
6 is that I believe that when you look at the circumstances
7 under which that section was passed in conjunction with
8 881, the forfeiture statute, you look at the -- what
9 little comments were made by any committees that were
10 addressing it, and when you look at the alleged rationale,
11 none of them support HUD. But even more basic, if you
12 accept HUD's interpretation, we respectfully submit that
13 it raises serious constitutional issues.

14 QUESTION: And precisely what are those issues?

15 MR. RENNE: The due process issues, Your Honor,
16 in that what they are threatening to do is to attach
17 punishment and collective guilt, and in American
18 jurisprudence, we always put individual --

19 QUESTION: If you're -- you're saying if you're
20 -- if you're evicted from a tenant -- as a tenant from a
21 public housing, you are, A, punished, and B, you're found
22 collectively guilty?

23 MR. RENNE: You are certainly being punished,
24 and Rucker being thrown out in the street is certainly
25 being punished.

1 QUESTION: Well, then -- then every eviction
2 proceeding in the country punishes the tenant. Every
3 successful eviction proceeding.

4 MR. RENNE: And it's because the tenant has
5 supposedly violated and the eviction court has found,
6 based upon all the evidence that it hears, that eviction
7 is appropriate.

8 QUESTION: Well, we're just going in circles,
9 Mr. --

10 QUESTION: You -- as I understand the provision
11 that you object to, it -- it says, in effect, the -- the
12 tenant who signs the lease is going to be the guarantor
13 that there will be no drug activity in the apartment or by
14 other people who are -- are inhabitants or even people who
15 come to the apartment, going to be a guarantor. Are you
16 saying that that kind of a guarantee provision is simply
17 forbidden by the Constitution?

18 MR. RENNE: Under these circumstances, yes.

19 QUESTION: Why?

20 MR. RENNE: In -- for the same reason that I
21 believe this Court has at least indicated in -- in dicta,
22 that when you are essentially seizing what is property,
23 particularly somebody's home, you must afford them due
24 process including --

25 QUESTION: Well, we're -- now, you're talking

1 about procedural due process, and there's no claim here,
2 as I understand it, that the tenants were denied
3 procedural due process. I understand your argument to be
4 that substantive due process forbids this kind of a
5 guarantee provision, and when I say why, I'm asking you
6 why substantively does due process forbid.

7 MR. RENNE: And substantively is that you are --
8 you are punishing without any guilt and without allowing
9 the tenant to establish that he or she is innocent.

10 QUESTION: So, no one can be made the guarantor
11 under a contract for the conduct of a third person.

12 MR. RENNE: Not in public housing --

13 QUESTION: -- from the Government. Is that --
14 is that --

15 MR. RENNE: In the public housing situation.

16 QUESTION: Is that your position?

17 MR. RENNE: That is correct.

18 QUESTION: Then you're challenging something
19 that you have, as I see it, no standing to raise in this
20 Court because I looked back at the district court's
21 opinion, and what it said as to conduct occurring in the
22 tenant's union -- unit -- it didn't say, well, we just
23 won't extend it preliminarily. It said, eviction under
24 such circumstances appears rationally related to a
25 legitimate public housing goal and constitutional. It was

1 a ruling on the merits that as far as the in premises
2 setting is concerned, it was constitutional. And you're
3 arguing that that's not the case, and I don't see how you
4 can argue that when you haven't filed any cross appeal
5 ever.

6 MR. RENNE: Well, with all due respect, Justice
7 Ginsburg, the cases in this Court have said that
8 respondents are entitled to rely on anything that would
9 affirm the judgment below.

10 QUESTION: But the judgment below that's being
11 affirmed deals only with off premises.

12 MR. RENNE: It's the Ninth Circuit judgment that
13 is being attacked, and the Ninth Circuit does not limit
14 itself in terms of the arguments that it raises and it --
15 conclusions it reached --

16 QUESTION: Are you not making a distinction
17 between a judgment and an opinion? I mean, what was
18 affirmed was the judgment of the district court.

19 MR. RENNE: What was affirmed was the
20 preliminary injunction.

21 QUESTION: Yes, and that preliminary injunction
22 was only with respect to off premises activity, and that's
23 all that the Ninth Circuit affirmed.

24 MR. RENNE: Yes, I don't disagree with that at
25 all.

1 But the rationale of the Ninth Circuit opinion
2 applies with equal force because the only thing they had
3 before them is whether or not the district court had
4 abused its discretion in the grant of preliminary
5 injunction.

6 But continuing to address the -- the due process
7 is that all we are saying is that these tenants have a
8 right to establish that they should not be punished by
9 reason of somebody else's conduct without a showing --

10 QUESTION: Well, I -- I realize that's your
11 position, but in order to maintain that position on a
12 substantive due process basis, you've got to say, I
13 suppose, that there's no reasonable relationship between
14 this kind of guarantor of conduct provision and the kind
15 of drug problem which I presume it is conceded the
16 Government can deal with. And it seems to me that there's
17 a pretty obvious substantial relationship between them and
18 that's why your argument doesn't seem to have any sort of
19 intuitive plausibility to it. Can you address that?

20 MR. RENNE: Well, I don't think that -- when you
21 say it seems to be obvious, with all due respect again, I
22 would say they talk about deterrent. It seems to me that
23 Ms. Pearlie Rucker who took steps to assure that there
24 were no violations, told her daughter there were no --
25 what the problems were, and as far as she knew, knew

1 nothing about what happened three blocks away from the
2 apartment.

3 QUESTION: Well, she didn't take enough steps
4 under the lease. Under the lease she assured the housing
5 authority that her premises would not be the site of drug
6 activity nor would anybody who brought drug activity into
7 the housing -- into the environs of the housing authority
8 be residing in her --

9 MR. RENNE: And --

10 QUESTION: Now, she could do that, and you're
11 saying she was blameless. Well, perhaps she was
12 blameless, but she didn't do what she had committed to do,
13 and that is to make sure that nobody in her apartment
14 caused that place to be a drug area.

15 There seems to me nothing unconstitutional about
16 that, saying we're going to let you in here if you assure
17 us that no one who resides in the -- in the premises that
18 we're giving you under this program will be the source of
19 a drug problem. What's unconstitutional about that?

20 MR. RENNE: I suggest that we took -- we take --
21 compare it to the forfeiture statute where we have
22 specifically -- Congress has mandated that in the
23 forfeiture situation where the drug offense can be -- on
24 the premises can be horrible, it can be a very serious
25 drug offense, and they cannot forfeit the tenancy.

1 QUESTION: Congress has said that. You think
2 Congress had to say that?

3 MR. RENNE: Yes.

4 QUESTION: My goodness. I -- there are many
5 instances under State law where you forfeit an automobile
6 which is being used for contraband even if you do not know
7 that it's being used. It's your responsibility to make
8 sure your car is not used for contraband. That's
9 unconstitutional?

10 MR. RENNE: And the -- the -- it's not -- this
11 Court has held it is not --

12 QUESTION: Not --

13 MR. RENNE: -- if there's a nexus either because
14 the automobile was used --

15 QUESTION: It's your car. And -- and what the
16 State says is when you have a car, it's your
17 responsibility to make sure it's not used for contraband,
18 and if it is, we take it away. That's not
19 unconstitutional. Why is this any different? In fact,
20 this is a good deal less because it's not even her
21 premises. It is a condition of giving her this benefit.

22 MR. RENNE: Well, I -- I think the courts
23 recognized that it is her premises. It's her home
24 regardless of the fact that it's a public housing or it's
25 private. And as I believe that this Court has commented

1 in opinions that you don't forfeit a house if somebody
2 smokes one marijuana cigarette in it --

3 QUESTION: But --

4 MR. RENNE: -- even though it may have occurred
5 on the premises.

6 QUESTION: -- forfeiture suggests the Government
7 coming in from the outside and taking the property because
8 of criminal activity. Here the Government isn't coming in
9 from the outside. The Government is the owner of the
10 property. It is the landlord. And so, you're not talking
11 about the same sort of forfeiture at all.

12 MR. RENNE: Well, 881 talks specifically about
13 public housing leases as being subject to forfeiture. So,
14 you are -- in those contexts you're talking about the
15 identical situation that under the forfeiture statute
16 somebody could come in to Ms. Rucker, if she violated some
17 criminal law -- could come and try to forfeit it. But
18 it's much easier. Let's get the Oakland Housing Authority
19 to come in here and we don't have to show she knew
20 anything about it. She could be perfectly innocent, and
21 that is, we submit is fundamentally unfair.

22 QUESTION: Does the landlord have some duty to
23 provide a secure -- a secure premises, i.e., secure from
24 drug use?

25 MR. RENNE: Yes. And I -- and I submit that

1 easily enough to do as they said -- as -- as counsel said
2 with Ms. Rucker. They said, we withdrew the unlawful
3 detainer action, although I might say they didn't withdraw
4 the eviction notice, but they withdrew the unlawful
5 detainer action when the individual who was involved was
6 separated from the premises. That's what we respectfully
7 submit is -- that's the easy problem in the innocent
8 tenant case, is to go to that tenant or to have the tenant
9 come to HUD and say, look, I've got a problem. My son is
10 -- is into marijuana and he won't listen to me. I want
11 him removed. Take him off the household list.

12 Now, is she going to do it confronted with the
13 fact that HUD could say or Oakland Housing Authority could
14 say, well, sorry, Ms. Rucker, rather than ask your
15 daughter to go off, we're going to throw you out? Why
16 would she ever go there?

17 QUESTION: The housing authority wants to put
18 the responsibility on her.

19 MR. RENNE: Right.

20 QUESTION: It wants to put the responsibility on
21 the tenants to make sure that they are not being the cause
22 of a drug problem in the facility. It seems to me
23 perfectly reasonable, and if she -- if she has been at
24 fault in not doing that or even in all innocence hasn't
25 done it properly, nonetheless, she hasn't fulfilled her

1 obligation under the lease, which is to make sure that
2 nobody on her premises is a source of a problem.

3 MR. RENNE: And -- and the best way for -- to
4 make sure that that doesn't happen, that is, that no one
5 on her household violates a drug law or -- remember, the
6 statute doesn't just relate to drugs. It relates to
7 criminal activity. And as the amicus briefs point out,
8 there -- and -- that there are spouses who are being
9 evicted by reason of the fact that they're subject to
10 spousal abuse which violates the criminal law. And -- and
11 all we're saying is they have to have a chance to go to
12 the eviction court and present that to the eviction court
13 so that the eviction court has a right to deal with
14 whether or not there is good cause.

15 And it's interesting in the -- in the statute
16 we're talking about there is a -- in section 5, it talks
17 about repeated, constant violations and other good cause.
18 When you get to 6, it only talks about shall be a cause
19 for eviction. Good cause is the thing the eviction court
20 should have a right to deal with, and there's nothing that
21 said the State law was being preempted.

22 I'm suggesting that if -- if what HUD wants is
23 to have voluntary cleanup by good people like Ms. Rucker
24 and Ms. Hill, Ms. Lee, they should encourage them to say,
25 give us help to make sure that we can live with that

1 because I think we all know in the real world you're
2 talking about teenage grandsons, people who you don't know
3 exactly what they're doing from time to time, and for --
4 for a grandmother to be told the only way you can assure
5 yourself is make sure nobody else lives here, it's the
6 only way that -- that these people can assure themselves
7 that they aren't going to get thrown out --

8 QUESTION: Well, you're hypothesizing an
9 exercise of discretion by HUD that's just not in the
10 record.

11 MR. RENNE: All right. Thank you.

12 QUESTION: Thank you, Mr. Renne.

13 Mr. Feldman, you have 3 minutes remaining.

14 REBUTTAL ARGUMENT OF JAMES A. FELDMAN

15 ON BEHALF OF THE FEDERAL PETITIONERS

16 MR. FELDMAN: Thank you.

17 I'd first like to add that the -- the people --
18 the people who had committed the drug offenses in this
19 case were between ages 20 and 44 years old. They weren't
20 teenagers.

21 The question of -- as to the relationship of --
22 of Federal law and the -- the Federal law that waives --
23 that permits HUD to waive the grievance procedure in the
24 housing authority and say you can just go to the eviction
25 court -- and that law does provide that HUD has to -- it

1 can only permit that if it can ensure -- assure that the
2 eviction court gives you full due process rights to
3 litigate whatever issues there are. And in that sense,
4 Federal law does guarantee you the right to have all of
5 your defenses litigated in the eviction proceeding if HUD
6 is going to grant such a waiver, which it's done in 47
7 States.

8 QUESTION: And the eviction proceeding is in the
9 State court?

10 MR. FELDMAN: Yes, but what Federal law doesn't
11 do is say that there's any particular defenses. As the
12 question of what the defenses are that you have to have
13 the full right to litigate, that's a question of -- of
14 substantive Federal law.

15 Now, in this case, the statute makes clear I
16 think that serious -- that drug-related criminal activity
17 is cause for termination of tenancy, and HUD has construed
18 it to mean that.

19 Now, the question then about -- the only
20 possible source for a defense would be State law, and the
21 question about for State law defense would be does that
22 conflict with either the Federal statute or the purposes
23 Congress was trying to achieve. It wouldn't be possible
24 for a State court to disagree with the balance that
25 Congress struck when it -- when it passed the statute.

1 So, the only question would be, therefore, if you have any
2 State law defenses, they would have to be ones that don't
3 conflict with the judgment that Congress made that
4 eviction under 1437d(1)(6) is for serious -- it's for drug
5 -- drug-related criminal activity by a household member.

6 I'd like to add just one other point which is in
7 42 U.S.C., section 1437, which is kind of the statement of
8 policy right at the beginning of the United States Housing
9 Act, it says, it is the policy of the United States -- and
10 it names a bunch of things, which I'm not going to read.
11 And it says, to vest in local public housing agencies the
12 maximum amount of responsibility in the administration of
13 their housing programs. It was those local public housing
14 agencies that know what the conditions are, and that -- it
15 is consistent with that that HUD has construed the statute
16 and Congress in fact enacted the statute to give them the
17 discretion with this clause, as with enforcement of rent
18 clauses or any other clause, to decide when they should be
19 enforced and when they should be enforced. That's not a
20 role for the eviction court.

21 Thank you.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
23 Feldman.

24 The case is submitted.

25 (Whereupon, at 12:13 p.m., the case in the

1 above-entitled matter was submitted.)

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