Nos. 00-1770, 00-1781

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

- and -

OAKLAND HOUSING AUTHORITY, *et al.*,

Petitioners,

v.

PEARLIE RUCKER, *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* THE COALITION TO PROTECT PUBLIC HOUSING, THE UNITED COMMUNITY HOUSING COALITION, THE PUBLIC HOUSING RESIDENT NETWORK, COMMUNITY ALLIANCE OF TENANTS AND NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF RESPONDENTS

MICHAEL S. FELDBERG
YOCHEVED COHEN
ALIX S. PUSTILNIK
MATTHEW L. CRANER
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10022
(212) 756-2000

KIRSTEN D. LEVINGSTON
Counsel of Record
E. JOSHUA ROSENKRANZ
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
Twelfth Floor
New York, NY 10013
(212) 998-6730

(Additional Counsel for Amici Curiae listed on inside cover)

GEOFFREY A. BOEHM
MARTHA F. DAVIS
NOW LEGAL DEFENSE
AND EDUCATION FUND
395 Hudson Street
Fifth Floor
New York, NY 10014
(212) 925-6635

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Cited Authorities

Page

Other Authorities:

Cited Authorities

INTERESTS OF THE *AMICI CURIAE*[1]

The Coalition to Protect Public Housing ("CPPH") is a Chicago-based advocacy group comprising public housing residents, community-based organizations, religious institutions, businesses, and non-profit organizations. Members include the Community Renewal Society, Chicago Coalition for the Homeless, Jewish Council on Urban Affairs, and Metropolitan Tenants Organization. Through public education and demonstration, collaboration with an interfaith network, and direct negotiation with officials at the Chicago Housing Authority and the United States Department of Housing and Urban Development ("HUD"), CPPH seeks to protect the rights of Chicago public housing residents and to ensure the future of public housing. Since its creation by public housing residents in 1996, the CPPH has sought to ensure the fair treatment of residents by government agencies that develop and administer public housing policies.

The United Community Housing Coalition ("UCHC") in Detroit, Michigan is a charitable, non-profit housing advocacy organization with a membership composed primarily of low-income tenants and homeowners. Since 1974, the UCHC has advocated on behalf of housing-needy, homeless, and low-income households to eliminate and prevent homelessness, and to protect the rights of poor tenants and homeowners, often on the brink of eviction and homelessness. In an effort to prevent homelessness, the UCHC provides advice and counsel to indigent defendants in eviction proceedings, assisting thousands of tenants annually. In addition to direct representation and

---

[1] The parties have consented to the filing of this brief. The consents have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amici curiae* The Coalition to Protect Public Housing, The United Community Housing Coalition, The Public Housing Resident Network, Community Alliance of Tenants and NOW Legal Defense and Education Fund state that the counsel named below authored this brief in its entirety, and no party or entity other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief.

counseling, the UCHC has acted as a class action plaintiff in a case that successfully challenged HUD's vacant single-family inventory practices, *Lee v. Pierce*, 698 F. Supp. 332 (D.D.C. 1988), and as *amicus* in several Michigan cases relating to tenants' rights, including *Pittsfield Village, Inc. v. Riester*, 434 Mich. 910 (1990), *Hovanesian v. Nam*, 213 Mich. App. 231, 539 N.W.2d 557 (1995) and *De Bruyn Produce Co. v. Romero*, 202 Mich. App. 92, 508 N.W.2d 150 (1993), *appeal denied*, 447 Mich. 994, 525 N.W.2d 455 (1994). UCHC is dedicated to protecting the rights and property interests of low-income tenants.

The Public Housing Resident Network ("PHRN") is a statewide resident organization that assists residents of public housing in Connecticut. The PHRN provides training to strengthen resident associations, raises awareness of new laws and regulations among residents, and assists residents in becoming active participants in the decision making of their local housing authority. Founded in 1996, the PHRN is open to participation by any public housing resident — whether elected leadership or interested citizen. The PHRN is committed to enabling public housing residents to have a voice in the policies that affect them.

The Community Alliance of Tenants ("CAT") in Portland, Oregon is a tenant-controlled membership organization. Its mission is to educate and empower tenants to promote affordable, stable and safe rental homes. Recognizing that there is a growing shortage of affordable housing in Oregon, the CAT seeks to improve low-income renters' bargaining power with landlords. In particular, the CAT brings tenants together to organize and collectively work for fair and equal protection in housing policy and practice, providing a forum for low-income renters to take leadership in identifying and solving the problems faced by Portland's community of low-income tenants. The CAT is committed to ensuring fair treatment of all tenants, including those who live in public housing.

NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that for over thirty years has used the power of the law to define and defend women's rights. NOW Legal Defense has frequently appeared as counsel before this Court. *See, e.g.*, *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001); *United States v. Morrison*, 529 U.S. 598 (2000). NOW Legal Defense has litigated to protect the rights of survivors of domestic and sexual violence and eliminate policies that discriminate against them in housing, government benefits, and employment. *See, e.g.*, *Roe v. Anderson*, 966 F. Supp. 977 (E.D. Cal. 1997), *aff'd*, 134 F.3d 1400 (9th Cir. 1998), *aff'd sub nom. Saenz v. Roe*, 526 U.S. 489 (1999); *Valdez v. Truss Components, Inc.*, No. 98-310-RE, slip op. (D. Or. Aug. 19, 1999); *United States & Alvera v. C.B.M. Group, Inc.*, No. 01-857-PA (D. Or. filed June 8, 2001); *Apessos v. Memorial Press Group*, No. PLCV2001-01474 (Mass. Super. Ct. filed Dec. 10, 2001). NOW Legal Defense has a long-standing commitment to eliminating discrimination in all places of public accommodation including housing.

SUMMARY OF THE ARGUMENT

A leitmotif running through petitioners' briefs is the discretion to do justice that Congress vested in PHAs ("PHAs"). For example, petitioners argue that the one-strike provision codified in 42 U.S.C. § 1437d(l)(6) is perfectly rational, even without an innocent tenant defense, because PHAs will exercise their discretion not to evict truly innocent tenants. The crux of this argument is that discretion works; it allows PHAs to achieve the desired result of keeping public housing crime-free, while at the same time protecting public housing tenants against unfair treatment.

Amici attest otherwise. As numerous cases demonstrate, law-abiding tenants of public housing routinely get evicted through no fault of their own. PHAs have invoked the one-strike policy to evict tenants who were the victims of crimes committed in their homes by uninvited guests. They have often relied on the one-strike policy to evict a tenant because of the misdeed of

a family member even though the tenant had taken all precautions to keep that family member out of her home. PHAs have often used the one-strike policy to evict a family for the unpredictable and uncharacteristic act of a child, even when it is unlikely that the act will be repeated. They have even used the one-strike policy to evict tenants for minor infractions committed by someone beyond their control. This record of draconian enforcement belies petitioners' argument that discretion works. Discretion, as applied by PHAs nationwide, provides little comfort to public housing tenants who live in fear that they will be evicted for actions committed by others. The humane judgment on which petitioners build their case is theoretical at best.

The zealousness with which PHAs have been pursuing eviction of innocent tenants is undoubtedly attributable, to some degree, to the incentives that HUD has developed. Both HUD's rhetoric and philosophy and the structures by which HUD allocates certain funds reward PHAs for the number of one-strike evictions they successfully pursue.

In the end, only an innocent tenant defense will save the one-strike provision from yielding results that are absurd and unjust.

ARGUMENT

HUD's Rejection Of An Innocent Tenant Defense Cannot Be Justified By The Repeated Argument That PHAs Theoretically Have The Discretion To Decline To Evict Innocent Tenants And Have No Incentive To Evict Them.

One theme pervades petitioners' briefs more than any other: Discretion. At almost every turn in their statutory construction arguments, HUD and the Oakland Housing Authority ("OHA") resort to some version of the argument that 42 U.S.C. § 1437d(l)(6) — the "one-strike" provision — is not nearly as draconian as it seems. After all, the discretion argument goes, every PHA has the discretion not to evict an innocent tenant in the interest of justice. The theme rears its head frequently enough, and with sufficient primacy, to confirm that petitioners

view this discretion argument as a lynchpin of their case, or (to use OHA's phrase) as "critical." Yet, the actual practice of PHAs nationwide, as evidenced by numerous eviction proceedings, belies petitioners' position on this central argument. Whether because PHAs have internalized HUD's message that the one-strike provision is meant to set a level of zero tolerance or because HUD has developed structural incentives to encourage PHAs to evict innocent tenants, the end result is clear: The one-strike provision without an innocent tenant defense yields results that are unjust and so absurd as to raise doubts that Congress could ever have intended such a reading.

A. Petitioners Have Erected Their Case Around The "Critical" Proposition That PHAs Typically Exercise Their Discretion Not To Evict Truly Innocent Tenants.

One need look no further than the first substantive sentence of HUD's Summary of Argument to appreciate the central role the theme of discretion plays in HUD's position. After quoting the statute's one-strike language, the brief observes that "HUD has interpreted that provision to authorize *(but not to require)* PHAs to terminate the tenancy" of so-called innocent tenants. Brief for the Department of Housing and Urban Development (hereinafter "HUD Br.") at 14 (emphasis added). HUD follows up on the theme by devoting the second subsection of its statutory construction point to proving that "Section 1437d(l)(6) Does Not *Require* A Public Housing Authority To Seek Eviction For A Lease Violation, But *Instead Vests It With Discretion* Whether To Invoke The Lease Termination Clause." *Id*. at 20 (capitalization in original; emphasis added). The subsection observes, for example, that "HUD has consistently made clear that '[t]he fact that statutorily required lease provisions would allow PHAs to terminate tenancy under certain circumstances does not mean that PHAs are required to do so in each case where the lease would allow it.' " *Id*. at 21 (*quoting* 66 Fed. Reg. 28,776, 28,782 (May 24, 2001)). HUD then proceeds to quote a regulation listing factors that might justify a PHA's decision not to evict an innocent tenant. *Id*. at 21-22 & n.7.

OHA, for its part, devotes an entire section of its brief to the proposition that "Eviction Is Not Mandatory But Discretionary," emphasizing, for example, that "[i]t is critical to note that the eviction provision at issue here is not mandatory. Indeed, PHAs are authorized to use discretion and encouraged to use their humane judgment when looking at each case and deciding each on its independent merits." Brief for the Oakland Housing Authority (hereinafter "OHA Br.") at 45 (capitalization in original).

Why is this resort to discretion so "critical" to both petitioners? There are several related reasons. To start with, the veil of discretion makes the one-strike provision seem less draconian. Don't worry, petitioners essentially assure this Court, truly innocent tenants do not really get evicted, because PHAs exercise their discretion to do justice.

That device, in turn, gives petitioners more traction in rebutting the argument that their interpretation of the one-strike provision yields absurd results that Congress could not possibly have contemplated. "The fact that the court could speculate about potentially harsh results in some isolated instances in which a PHA could invoke the lease clause in no way suggests that Section 1437d(l)(6) would lead to such 'absurd results'. . . ." HUD Br. at 45 (citation omitted). So, petitioners essentially paint both the Ninth Circuit and the public housing tenants who brought this case as alarmists who have let their imaginations run wild to conjure up a parade of horribles that would never materialize in real life. As HUD observes, these horribles include "eviction of tenants who in fact could not keep their household member from committing drug offenses [or] whose household member committed drug offenses at a place far removed from the public housing project." *Id.* at 44. These "results about which the court of appeals was concerned," HUD assures us, "are unlikely to occur," for

> [a] PHA would have little incentive, given its statutory mission, to evict a tenant who it believed is truly not culpable — at least if it would be harsh

> to do so — unless it concluded in the end that that course was justified by the other benefits that Section 1437d(l)(6) was intended to produce for the security of the housing complex and its tenants generally.

Id. at 45.

Petitioners employ the same device to try to blunt the complaints of each of the named public housing tenants in this case. As sympathetic as the plaintiffs in this case are, both petitioners are quick to point out that OHA "voluntarily ceased its effort to evict tenant Rucker, presumably based on a consideration of the factors enumerated by HUD." HUD Br. at 22; *see also* OHA Br. at 45. Putting aside for the moment the absence of any reason to believe OHA's decision not to put Pearlie Rucker out on the street was motivated by anything other than smart litigation tactics, petitioners' arguments boil down to this: Behold, the system works. Mrs. Rucker is a success story about a PHA's merciful exercise of discretion.

B. PHAs Exercise Their Discretion Against Leniency for Innocent Tenants.

Petitioners' heavy reliance on the discretion argument in its various permutations — and the incentive structures under which PHAs make these discretionary judgments — cry out for closer examination. Perhaps, as petitioners suggest, the Ninth Circuit is a modern-day Chicken Little sounding alarms where none are warranted. Maybe the horribles it described are "unlikely to occur," and the Ruckers of the world do not get evicted. If so, it should be hard to find examples of actual horror stories. But as organizations immersed in the field, *amici* can attest that "absurd results" do occur, and truly innocent tenants like Mrs. Rucker face eviction under HUD's interpretation of the statute. If PHAs are "encouraged to use their humane judgment" and to decide each case "on its independent merits," that humanity and proportionate justice is often difficult to discern in their decisions.

To assert broadly that many innocent tenants garner no benefit from PHAs' supposed sense of justice barely begins to

capture the level of injustice that is meted out in the name of HUD's one-strike policy. To demonstrate the pervasiveness and the wide variety of absurd results and to give this Court more of a sense of just how harsh the one-strike rule turns out to be in practice, we present a sampling of representative cases. Each involves a law-abiding tenant struggling against great odds to provide for his or her family. Each fact pattern is unique, but they fall into four main themes: (1) the family evicted for minor infractions unexpectedly committed by someone beyond their control; (2) the family evicted for the misconduct of an adult family member despite extraordinary efforts to ensure that the actor stayed away the moment he began to stray; (3) the victim of violence evicted because of the crime committed against her in her own home; and (4) the family evicted for the uncharacteristic act of a child with an otherwise unblemished record.

1. The family evicted for the minor infraction unexpectedly committed by a non-family member beyond its control.

Perhaps the most egregious one-strike horror stories are those in which a tenant who has a fleeting connection to the alleged perpetrator of a crime is put at risk because of conduct that only the most paranoid or clairvoyant tenant could possibly have foreseen.

Nena Allen, Marietta, Georgia. Nena Allen is such a case. Ms. Allen is a 20-year-old single mother of two young children, Trequan, 3, and Marquez, 1.[2] They live in the Johnny Walker Homes public housing complex in Marietta, Georgia, which is run by the Marietta Housing Authority ("MHA"). Ms. Allen moved to public housing in August 2000 in the hope of providing some stability for her children. Ms. Allen has been working at a

[2] The facts set forth below are drawn from the Findings of Fact and Conclusions of Law, *Housing Auth. for the City of Marietta v. Allen*, Case No. 01-E-2070 (Magis. Ct. Cobb County Ga. Nov. 14, 2001), and from information provided by Legal Aid of Cobb County, counsel for Ms. Allen.

Blockbuster video store since moving into public housing and currently earns $800 a month. She and her children also receive approximately $190 a month in food stamps.

In April 2001, the MHA notified Johnny Walker residents that the complex was being condemned and that they would have to move by year-end. Residents were offered a choice between transferring to other public housing in the area or receiving a Section 8 housing choice voucher. The Section 8 program is a federally subsidized housing program under which low-income families enter into leases for privately owned rental units, and local housing authorities, like the MHA, subsidize the rent. *See* 42 U.S.C. § 1437f. Ms. Allen opted for the Section 8 voucher because she believed it would allow her to find a safer, more suitable environment for her children. She received the voucher in September and by the end of the month had located a rental and paid a $250 deposit to hold it until the MHA's Section 8 program could inspect it. She and her family were well on the way toward the stability she craved.

But that stability was illusory. The next month, Ms. Allen was shocked to receive a three-day notice to vacate her apartment, advising her that "[o]n July 25, 2001," more than three months earlier, "Marietta Police Officers found a Marijuana seed inside your apartment." To make matters worse, a week later the MHA rejected her Section 8 application "based upon the termination of your assistance under the Public Housing Program for drug possession."

Ms. Allen knew nothing about a police visit to her apartment and the marijuana seed was a mystery. She was sure that there had been some mistake. It was only after talking to MHA staff and reconstructing her own activities on July 25 that she figured out what had happened. She was the victim of an unscrupulous acquaintance who evidently had used her apartment — exactly once — for an illicit purpose.

The scenario that led to such disastrous consequences is familiar to any working mother. Ms. Allen was dropping off her children at daycare that morning, when she realized she had

left their diaper bag at home. Ms. Allen had been transferred to a new Blockbuster store barely a month earlier and was afraid that she would be late for work if she returned home for the diaper bag. Instead, she left her apartment key at the daycare center and, after she arrived at work, telephoned a friend to ask her to pick up the key and retrieve the bag. The friend was not home when Ms. Allen called, but a mutual acquaintance, Angel Harris, answered the telephone and agreed to help Ms. Allen by picking up the key, retrieving the diaper bag, and returning both to the daycare center. Ms. Harris delivered the diaper bag to the daycare center at about 11:00 a.m.

Contrary to Ms. Allen's instructions, Ms. Harris did not return the key to the daycare center when she returned the diaper bag, a fact Ms. Allen discovered when she returned to pick up her children. But Ms. Allen thought nothing of it, because she found the key under her doormat when she returned home.

What Ms. Allen did not know, and did not learn until three months later when she received the eviction notice, was that Ms. Harris allegedly had been up to some mischief that day. Ms. Harris violated Ms. Allen's instructions and returned to the apartment after dropping off the diaper bag at the daycare center. According to an unsigned police report, a police officer, who was also employed as an MHA security guard, had stopped to "check a subject" sitting outside Ms. Allen's building. The subject, who turned out to be Ms. Harris, was talking to "her boyfriend." Ms. Harris walked around the building when the officer first approached. The officer asked the boyfriend where Ms. Harris lived, and the boyfriend pointed to Ms. Allen's apartment. According to the officer's report, he approached the apartment and "could smell a strong odor of marijuana inside." The apartment's screen door was shut, but not locked, and the main door was open. He decided to enter the apartment and found Ms. Harris. He searched the apartment and, as he reported, "I was unable to find the marijuana cigarette, [but] I did find a marijuana seed which was placed into evidence."

Ms. Harris did not mention the incident to Ms. Allen. Nor did the officer or the MHA, which evidently kept a copy of the police report in Ms. Allen's file. Although Ms. Allen did not know Ms. Harris especially well, she had known her and her family for some time and there was nothing in her past behavior that would have led her to suspect that she might do anything at all untoward in Ms. Allen's apartment.

The MHA pursued Ms. Allen with a vengeance, filing an immediate eviction proceeding in court. Citing the one-strike provision, the court upheld Ms. Allen's eviction for "drug-related criminal activity in her apartment." Findings of Fact and Conclusions of Law, *Housing Auth. for the City of Marietta v. Allen*, Case No. 01-E-2070, at 3 (Magis. Ct. Cobb County Ga. Nov. 14, 2001). Ms. Allen's appeal is pending.

Technically, Ms. Allen is entitled to remain in her apartment while her appeal is pending, but, with the complex about to be condemned and all the other residents being relocated, that technical right offers her no consolation. In the meantime, MHA has informed Ms. Allen that the Section 8 program's "denial of assistance under the Housing Choice Program stands," regardless of any pending appeals.[3]

---

[3] Christina Mabanag is another public housing tenant against whom a PHA brought eviction procedures because of the unforeseeable actions of her guest. Ms. Mabanag, who lived with her three children in a one-bedroom apartment in a public housing project in San Francisco and who worked two jobs, was evicted by the San Francisco Housing Authority after a family friend staying for the weekend was arrested for drug possession. Ms. Mabanag was not home, said she did not know her friend used drugs, had no criminal record, and had never had problems at the project. Ms. Mabanag was able to save her home only by winning a jury verdict after San Francisco's Volunteer Legal Services Program took her case for free and challenged the eviction in court. Emily Cruz Lat, *If A Guest Uses Drugs, Out You Go*, The San Francisco Examiner, Aug. 24, 1998, at A-8; *see also Syracuse Hous. Auth. v. Boule*, 265 A.D.2d 832, 701 N.Y.2d 541 (4th Dept. 1999) (eviction of tenant upheld even though she was not aware of drug-related activity engaged in by her child's father, called in as an emergency babysitter).

2. The family evicted for the misconduct of an adult family member despite extraordinary efforts to banish him at the first sign of criminal conduct.

Sometimes the illegal activity for which a PHA chooses to evict a tenant is not that of a mere acquaintance, but of an adult family member who does not live in the apartment. If a family member engages in illegal activity in the apartment, or if the family is aware of his crimes, it might be just to evict the whole family. It might even serve the ends of justice to evict the unwitting family if it did not exercise enough diligence in ferreting out the criminal behavior or in setting stringent ground rules. But an eviction is manifestly unjust when the head of the household has set the ground rules, no one else in the family had a clue that one of the family members was involved in illegal conduct, and the head of the household has taken extraordinary steps to banish the perpetrator once his improper conduct was suspected.

That's what Terri Wells, Mildred Heard, and Flora O'Day thought. But the PHAs saw it differently.

Terri Wells, Ann Arbor, Michigan. Terri Wells' family was evicted from public housing, even though she had no knowledge of the activities that led to her eviction and had thrown her brother — who had been living with her temporarily — out of her apartment the moment she suspected that he might be involved in criminal activity.

Ms. Wells was the working mother of four young children: Christina, 13; Lakisha, 7; Lanisha, 6; and David, 4.[4] The family lived in a public housing unit she had rented from the Ann Arbor Housing Commission ("AAHC") since 1991. By 1996, Ms. Wells had worked her way off welfare and was earning $235 a

[4] The facts set forth below are drawn from *Ann Arbor Hous. Comm'n v. Wells*, 240 Mich. App. 610, 618 N.W.2d 43 (Ct. App. 2000), *appeal denied*, 463 Mich. 993, 625 N.W.2d 782 (2001), and information from the record provided by the Michigan Clinical Law Program, counsel for Ms. Wells.

week at a local Boston Market. Ms. Wells began her employment with Boston Market when it opened in late 1995, and by February 1996 had been promoted to supervisor. Ms. Wells loved her job and felt great about her ability to support herself and her children. But with her promotion came additional responsibility and increased hours. Ms. Wells arrived at work between 2:00 and 3:00 p.m. and stayed there to clean up until well after the restaurant closed at 9:00 or 10:00 p.m. Child care was a constant problem. Ms. Wells could not afford day care and, although a neighbor was sometimes able to watch her children, that arrangement was less than perfect since her neighbor had numerous children of her own.

In the spring of 1996, Ms. Wells learned that her brother, Carl White, was living in a homeless shelter. Ms. Wells saw a potential solution to her childcare problems. She would give her brother temporary lodging until he found a home of his own, and he, in return, would care for her children when she was at work. Carl agreed to the arrangement, and Ms. Wells set down clear rules: No visitors, and no drugs. Period.

Unbeknownst to Ms. Wells, her brother broke the rules. Neither Ms. Wells nor her neighbors noticed anything suspicious. There were no drug paraphernalia or drugs in her apartment, and her brother did not appear to have extra money. She had no reason at all to suspect that, in April 1996, Carl would make two drug sales to undercover police. Neither transaction was in Ms. Wells' apartment, and, of course, she did not witness them. Ms. Wells knew nothing of her brother's activities and, throughout April and May 1996, neither the police nor the AAHC told Ms. Wells about her brother's illegal conduct.

Then, in June, a friend of Carl's made a drug sale to undercover police on the grounds of the public housing project in which Ms. Wells and her children lived. Ms. Wells had never heard of this friend. That night the police raided Ms. Wells' apartment, evidently believing that Carl was in some way involved. Ms. Wells had just returned from her daughter Christina's junior high graduation, and her younger daughters

Lakisha and Lanisha were in the bathtub. The police found no evidence suggesting that drug-related activity was taking place in Ms. Wells' apartment; they found no cocaine, no guns, no money, no diluting materials, no scales, no pagers.

Carl White was not present when the raid occurred, and the police told Ms. Wells they were looking for *Cedric* White. Cedric was Ms. Wells' oldest son who was in prison, and had been for the previous two years. Although the police made no reference to Carl, Ms. Wells, in an abundance of caution, immediately ordered him out, and he left soon thereafter.

The police returned to Ms. Wells' apartment a month later and told her they were looking for Carl. The police did not tell Ms. Wells that Carl was wanted for selling drugs, but the next time Ms. Wells saw Carl, she told him that the police wanted to talk to him and urged him to call the police. Carl turned himself in to the police shortly thereafter, and was later sentenced to prison for selling cocaine.

In November 1996, five months after the police raided her apartment, Ms. Wells received a 30-day termination notice. When she did not leave, the AAHC filed an eviction proceeding against her in court under the one-strike provision. The case was tried to a jury in April 1997. The AAHC presented no evidence that Ms. Wells knew about the criminal activity or that she failed to take reasonable steps to stop it the moment she learned that Carl might be involved with drugs. The court denied Ms. Wells' request to instruct the jury that the AAHC had to prove that she knew or should have known of the illegal activity, or at least that she failed to take reasonable steps to stop it. During deliberations, the jury repeatedly asked questions of the court indicating that it was confused about the legal standard it must apply. But all the court did was reread the one-strike provision.

The jury deliberated for over thirteen hours before returning a verdict in favor of the AAHC, and Ms. Wells' appeal — which challenged the absence of an innocent tenant defense — was unsuccessful. *See Ann Arbor Hous. Comm'n v. Wells*, 240 Mich.

App. 610, 612, 618 N.W.2d 43, 45 (Ct. App. 2000), *appeal denied*, 463 Mich. 993, 625 N.W.2d 782 (2001).

Ms. Wells and her children stayed in her apartment until she exhausted all of her appeals. During that time no other trouble emanated from Ms. Wells or her apartment. The family is now out of public housing because of the offsite conduct of a brother, even though Ms. Wells had no reason to suspect his criminal activity; at the first whiff of untoward behavior, she evicted him; and, thanks to Ms. Wells, he turned himself in and no longer presents any threat to anyone.

Mildred Heard*, *Atlanta*, *Georgia. Mildred Heard faces the same prospect under similar circumstances, but in her case the perpetrator did not even live with her. Ms. Heard has been a tenant in public housing managed by the Atlanta Housing Authority ("AHA") for nearly 40 years.[5] For the past fourteen years she has lived in an apartment in Grady Homes Apartments. Ms. Heard lives with two of her children, Quantae, 20, and Tameshia, 22, and with Tameshia's 2-year-old son Da-Montez. Ms. Heard's adult son, Demond Heard, does not live with them, but Ms. Heard cares for Demond's children and several other grandchildren during the day in her apartment.

Ms. Heard appreciates the importance of safety as much as any tenant. In 1993, one of Ms. Heard's daughters, an innocent bystander in a drive-by shooting, was shot and killed at Grady Homes Apartments. Since then, Ms. Heard has suffered extreme depression, post-traumatic stress disorder, and a variety of other psychological problems for which she is taking medication and undergoing counseling with the Grady Community Health System. Ms. Heard, unable to work because of her disabilities, has recently applied for social security disability benefits.

Ms. Heard had always warned all of her children explicitly that she had a zero tolerance for any contact with drugs

---

[5] The facts set forth below are drawn from publicly filed pleadings in *Heard v. Atlanta Hous. Auth. et al.*, Civ. Act. 1:01-CV-2029-JTC (N.D. Ga. filed Jul. 18, 2001).

anywhere, and particularly in her apartment. In November 1999, while her son Demond was visiting, Ms. Heard noticed a change in his behavior. Without any particular evidence, she suspected possible drug use. When Ms. Heard confronted Demond with her suspicions, he categorically denied that he was using drugs. Ms. Heard warned her son that she would not tolerate drug use by him or anyone who visited her home and told him not to even visit her if he had any contact with drugs. Despite Demond's assurances, Ms. Heard decided to take extra precautions. Ms. Heard told her son he was not welcome in her apartment, and ordered him to stay away except to drop off and pick up his children. Even then, Ms. Heard urged Demond to have his girlfriend shuttle the children back and forth whenever possible. Ms. Heard also warned Demond that if she ever had reason to believe that he was involved with illegal drugs, she would banish him from the apartment entirely.

For over a year, Ms. Heard kept close watch, but in Demond's limited visits, she saw no reason to take the more drastic step she had threatened. Then, on February 23, 2001, without Ms. Heard's permission or invitation, Demond barged into her apartment through the unlocked front door, slammed the door behind him, and tried to block it. Seconds later, the Atlanta police were at the door. They had been chasing Demond from the street, and arrested him for possession of crack.

Ms. Heard's daughter Tameshia was standing outside the apartment when the police rushed to the door. She too tried to enter the apartment, but the police handcuffed her to a fence and arrested her for obstruction, charges that a court ultimately dismissed.

Two months later, the AHA notified Ms. Heard that it was terminating her lease, effective the following week, because of the arrests of Tameshia and Demond. In an appeal of the decision, Ms. Heard promised to keep Demond away from her apartment. She even obtained a criminal trespass warrant, a court order keeping Demond off all AHA property.

Ms. Heard's appeals fell on deaf ears. In June 2001, the AHA confirmed the lease termination, specifically stating that it was the AHA's policy to enforce HUD's one-strike policy vigorously. Ms. Heard tendered her rent in June and July, but an AHA employee rebuffed her each time on the ground that her lease had been terminated. In July, the AHA filed an eviction proceeding against Ms. Heard in court. Ms. Heard filed a federal lawsuit seeking to enjoin the AHA from evicting her. The parties are negotiating to put the federal court proceedings on hold pending the outcome of this case.

Apart from emphasizing its lack of tolerance for crime, the AHA has never explained how it is increasing safety by evicting an entire law-abiding family for the offsite criminal conduct of a non-tenant son who barged into the apartment without invitation — and in violation of a directive to stay away — and who is now permanently barred from the home.

Flora O'Day, Ypsilanti, Michigan. Flora O'Day would have been another victim of HUD's one-strike policies, were it not for a procedural mistake by the Ypsilanti Housing Commission ("YHC") which was trying to evict her. What distinguishes Ms. O'Day's story from Ms. Wells' and Ms. Heard's is that the daughter whose conduct triggered the eviction proceeding committed her crime nowhere near the O'Day residence, and indeed she had virtually no relationship to Ms. O'Day.

Ms. O'Day is a mentally disabled grandmother whose sole source of income is social security disability.[6] Ms. O'Day suffered a severe head injury in an accident. As a result, her sense of time is muddled. Ms. O'Day cannot read. She cannot handle her own money, and relies on her sister to pay her rent and other bills. Ms. O'Day and her 12-year-old grandson Michael live in a two-bedroom unit in a public housing complex in Ypsilanti, Michigan. Ms. O'Day cares for three other

[6] The facts set forth below are drawn from *Ypsilanti Hous. Comm'n v. O'Day*, 240 Mich. App. 621, 618 N.W.2d 18 (Ct. App. 2000), and from information from the record provided by the Michigan Clinical Law Program, counsel for Ms. O'Day.

grandchildren while their parents work. Her adult son, Paul Wilson, comes by between 10:30 and 11:00 every evening to check in on her.

Ms. O'Day knew that one of her adult children — her 28-year-old daughter, Marcia — had drug problems. A court took away Marcia's children in 1990, and they had lived with Ms. O'Day for a while. By 1995, Marcia's children were living with their father. Marcia had been in prison, but as soon as she got out she was back on the street.

Marcia did not live with Ms. O'Day and rarely visited except to beg for money or steal from her. Ms. O'Day did not know Marcia's whereabouts at any given moment, and heard news of her only from her other children. Ms. O'Day acknowledged an obligation to keep her home crime-free. No one ever suggested that Ms. O'Day — or Marcia, for that matter — did anything to endanger anyone else in the housing complex.

In June 1998, Marcia was arrested for the sale of two rocks of crack cocaine for $20 to an undercover police officer. The sale did not take place in Ms. O'Day's apartment or even in the public housing complex where she lived. It occurred on property that was not owned by the YHC, three-quarters of a mile away from Ms. O'Day's home. At the time, Ms. O'Day did not know that her daughter was selling crack.

The next month, the YHC served Ms. O'Day with an eviction notice under the one-strike provision. The YHC insisted on punishing Ms. O'Day for Marcia's conduct even though Marcia did not live with her, barely visited, and had not engaged in any criminal activity on public housing property, much less in Ms. O'Day's apartment. The YHC had grounds to pursue Ms. O'Day's eviction under HUD's one-strike policies because Ms. O'Day had never bothered to take Marcia's name off the lease. To be sure, Ms. O'Day recertified and signed the lease annually. But Ms. O'Day could not read the lease, and Marcia never signed it.

Nevertheless, the YHC insisted on rushing to court to evict Ms. O'Day immediately, before the expiration of the 30 days it

was legally required to wait. The case was tried to a jury. The jury specifically found that Marcia was not under Ms. O'Day's control, but it also found that Marcia had been a guest, and (presumably, because she was on the lease) that she had been a resident and a member of the household. Based on those findings, the district court granted judgment for the YHC.

In the end, Ms. O'Day kept her apartment. But it was not because of the YHC's humanity or sense of justice. It was because, in its rush to get Ms. O'Day out of the apartment, the YHC committed a procedural error, rushing to a summary eviction proceeding without the statutorily required 30-days' notice.[7]

---

[7] There are numerous cases in which innocent tenants are evicted because of drug charges against relatives or visitors to their homes. The Winter Park Housing Authority sought to evict Mary Dowdell, a 69-year-old diabetic with chronic renal failure because her 25-year-old son pleaded guilty to possession of three grams of marijuana. Ms. Dowdell challenged the eviction in a lawsuit. Sherri M. Owens, *Under a Federal Policy For Public Housing, A Winter Park Woman May Lose Her Home Because of Her Son's Shenanigans*, The Orlando Sentinel, Jul. 21, 1999, at D1; *see also* Marilyn McCraven, *In Public Housing, One Strike And You're Out On Street*, Baltimore Sun, Nov. 18, 1996, at 1B (Housing Authority of Baltimore City was trying to evict 67-year-old Lillie Scott, apparently a model public housing tenant, because her 27-year-old granddaughter was arrested for possession of cocaine a few blocks from Ms. Scott's apartment and told police she lived with her grandmother); Michael Casey, *Paterson Using Drug Law to Evict Tenants, Some Say Unfairly*, Bergen Record, Jan. 25, 2001, at S1 (Monica Rogers, 21-year tenant in Alexander Hamilton Housing Development in Paterson, evicted because her son was charged with drug possession).

Even *past* drug activity of visitors can trigger eviction of a law-abiding tenant. For example, the Osceola Public Housing project in Arkansas threatened to evict hospital worker Kimberly Scott if her long-time boyfriend came to the apartment to babysit their two-year-old child because the boyfriend had spent six months in a Missouri boot camp years earlier on a drug charge, and because of a couple of complaints from neighbors that he caused a disturbance. Andrew A. Green, *Get-Tough Public Housing Rule Stirs Gripes*, Arkansas Democrat Gazette, Aug. 31, 1998, at A1.

3. The victim of violence evicted because of the crime committed against her in her own home.

Read literally, the one-strike policy authorizes a PHA to evict a tenant if a visitor, say her boyfriend, commits the crime of beating her in her own home. After all, the abuser is a "guest" who has engaged in "criminal activity that threatens the health, safety, or right to peaceful enjoyment by" a tenant — the victim. One would think that a PHA would never resort to such a tortured reading of the statute to punish the victim of domestic violence — at least not a PHA that feels duty bound to exercise its discretion in a way that yields humane and just results.

But as Sandra May has learned, PHAs sometimes exercise their discretion to evict innocent victims of domestic violence.

Sandra May, Chicago, Illinois. The Chicago Housing Authority ("CHA") did everything it could to cast Sandra May and her three children into the street because her boyfriend brutalized her and damaged her home.[8] A single mother, Ms. May and her children live in a CHA townhouse. One evening, Ms. May's boyfriend stormed into her home, accused her of lying, and beat her with a broomstick until it broke in half. He also punched holes in her walls, tore down closet doors, and ripped shelves out of the linen closet. The rampage stopped only when the police arrived in response to a neighbor's call, and rushed Ms. May to the hospital. When Ms. May returned home from the hospital, the CHA presented her with an eviction notice and a warning to fix the damage.

---

[8] The facts set forth below were provided by the Legal Assistance Foundation of Metropolitan Chicago, which represented Ms. May in the eviction proceedings. Sandra May is a pseudonym. Ms. May's real name has been withheld to protect her privacy. Upon request of the Court or counsel for petitioners, *amici* will furnish contact information for her lawyer. These events took place in 1993, before President Clinton announced the "one-strike and you're out" initiative to enforce 42 U.S.C. § 1437d(l)(6) more vigorously, but this story demonstrates that PHAs had been producing harsh results even before the government embarked on its strict enforcement mission.

Ms. May, for her part, did everything she could to ensure that her abuser would never return to the housing unit for a repeat performance. She did not just break up with her ex, she secured a court order of protection prohibiting him from coming within 100 yards of her. Notwithstanding its discretion, the CHA proceeded with its eviction. Not content to await the formal proceeding, the CHA took the extra step of locking Ms. May and her children out of their home.

Ms. May ultimately was not evicted, but not because of any discretion exercised by the CHA. Rather, in an ironic twist, CHA's inhumanity is what saved her and her family from homelessness. It turns out that lock-outs are strictly prohibited under Illinois law, and the violator is subject to stiff penalties. So Ms. May countersued, exposing the CHA to enough downside liability that it acceded to a settlement dismissing the eviction proceeding, forgiving Ms. May the cost of repairing her unit, and paying her $1,000. Justice was served, but the CHA's discretion had nothing to do with it.[9]

4. The family punished for a child's uncharacteristic and unforeseeable act.

While some innocent tenants are victims of crimes, others are victims of unforeseen circumstances beyond their control. One need not be a tenant of public housing to be familiar with the scenario. Parents and grandparents who have worked hard to instill the right values in their children and grandchildren and have been vigilant for any signs that they might have gone astray are sometimes caught by surprise. Despite all their

---

[9] For another example in which a PHA chose to evict a tenant under the one-strike policy where the only underlying criminal conduct was violence *against* the tenant or her guest, see Edward C. Fennel, *Family Ordered Out Of Home After Shooting Death*, Post and Courier, Sept. 27, 1997, at B1 (North Charleston, South Carolina Housing Authority ordered Rose Marie Grandison to vacate her apartment because her boyfriend was murdered there, even though Ms. Grandison neither caused nor took part in the murder).

precautions, one day the child does something that runs counter to everything she has been taught.

Any parent who has faced this circumstance feels some sense of responsibility. And at times, the child's irresponsible act imposes burdens on the rest of the family. But it seems unduly harsh, and inconsistent with any sense of justice, to put the entire family out of its home — at least when the child presents no further risk of danger.

PHAs do not always see it that way. When it came to judging Karen Jones, Dorothy Springer, and Beulah Wilkins, the PHAs had no trouble visiting their children's isolated sins on their parents, and on the rest of the family.

Karen Jones*, *New York*, *New York. Karen Jones was a young woman in 1957 when she moved into her current apartment in Douglas Houses.[10] The housing complex run by the New York City Housing Authority ("NYCHA") had just opened, and she was the first tenant in her apartment. Today, Ms. Jones, a 68-year-old widow, is facing eviction from the place she has called home for the past 44 years. The eviction stems from an incident involving Ms. Jones' grandson, an honors student who now attends college more than 400 miles away from home.

Before retiring in 1999, Ms. Jones worked as a secretary for 13 years at Harlem Hospital, and before that as a customer service operator at Simon & Schuster. Ms. Jones now lives on social security and a pension from Harlem Hospital. She has been an active member of the Southern Baptist Church for more than 40 years. She is a diabetic, and suffers from both high blood pressure and hearing difficulties.

---

[10] The facts set forth below were provided by the Neighborhood Defender Service of Harlem, which represented Ms. Jones in the eviction proceedings. Karen Jones and Michael Jones are pseudonyms. Their real names have been withheld to protect their privacy. Upon request of the Court or counsel for petitioners, *amici* will furnish contact information for Ms. Jones' lawyer.

Although he was not listed on the lease, Michael Jones, Ms. Jones' grandson, was raised in large part by his grandmother in Douglas Houses and spent significant time with her there. Michael, who is now 19, excelled academically under his grandmother's attentive watch. She paid most of his tuition at a private catholic school. While in high school, Michael worked at the Children's Aid Society and held a summer position at Chase Manhattan Bank as a clerk. After graduation, Michael enrolled at Norfolk State University in Virginia, where he has a partial scholarship from the Children's Aid Society and some university financial aid. Beyond that, Ms. Jones pays Michael's college tuition.

In January 2000, Michael was charged with armed robbery of a delivery man in Douglas Houses. Because Michael was a minor when the alleged incident occurred, he was treated as a youthful offender, and he was not — nor has he ever been — convicted of a crime. Now in his third semester at Norfolk State University, Michael works part-time at a Sears Roebuck & Co. near campus.

While Michael has moved on with his life, his grandmother cannot. As a result of Michael's arrest, NYCHA brought a one-strike eviction proceeding against Ms. Jones, a model tenant who spent years sacrificing for Michael and striving to instill in him values of hard work and decency. NYCHA alleges that Ms. Jones' continued presence at Douglas Houses "constitutes a danger to the health and safety of [her] neighbors." NYCHA has never explained how that could be with Michael 400 miles away and living a productive and law-abiding life.

Dorothy & Arthur Springer, Broward County, Florida. Dorothy and Arthur Springer got a double of dose of what Ms. Jones went through — with the isolated lapses of two separate children.[11] The difference is that in their case neither child's lapse occurred on public housing property. Nevertheless,

[11] The facts set forth below are drawn from Roger Williams, *One Strike and You're Out on the Street*, New Times Broward-Palm Beach, June 15, 2000.

the Broward County Housing Authority ("BCHA") evicted Mr. and Mrs. Springer, along with their five children, under HUD's zero-tolerance policies.

Mr. Springer has a weak heart and had suffered a stroke in 1998. Mrs. Springer also suffers from health problems, including a birth defect that left her with only four fingers on one hand and a history of operations for chest tumors. Since neither parent is able to work, the family subsists on social security and disability payments. The family has no other source of income and cannot afford market rents.

The Springer family's one-strike nightmare began with isolated and unprecedented lapses by two of their teenage boys. Seventeen-year-old Jeremy Springer had never been in any trouble with the police when, in July 1999, a Broward Sheriff's deputy noticed him driving slowly down the road and stopped him because of this suspicious behavior. A search of the car yielded cocaine. Jeremy was arrested and sentenced to probation, and has not strayed again.

On the basis of Jeremy's arrest, the BCHA began proceedings directed at evicting the Springers. The BCHA refused to accept the rent checks the Springers tendered. Nevertheless, Mrs. Springer saved the back rent in an account, prepared to pay it at a moment's notice, and embarked on negotiations in the hopes of saving their home.

Those negotiations were put in jeopardy four months later, when Jeremy's 14-year-old brother Jermaine was caught, together with a few friends, vandalizing a portable classroom on the grounds of the school he used to attend. The police arrested Jermaine and the incident ultimately yielded a penalty of community service. Jermaine has not been in trouble with the law since.

A few days after the school incident, a Broward Sheriff's deputy came to the Springers' home to deliver an eviction notice. Upon hearing the news, Mr. Springer had a heart attack.

The Springers desperately tried to save their home. They proffered their back rent from the summer, which

Mrs. Springer continued to squirrel away in an account. They even considered ejecting their 14-year-old son from their home, but they could not bring themselves to do it. Their efforts failed and the BCHA evicted them, without ever explaining what more the Springers should have done to prevent their children from straying or how they presented any continuing threat to their neighbors.

Beulah Wilkins**, **New York**, **New York. Like the Springers, Beulah Wilkins faces a one-strike eviction because of the single lapse of a child nowhere near home. The lapse, though far more tragic, was no more foreseeable. If NYCHA gets its way, it will put Ms. Wilkins and her extended family of eleven on the street.

Ms. Wilkins, 47, has lived for the past 28 years in the same federally subsidized apartment in Amsterdam Houses, a public housing complex run by NYCHA.[12] She is asthmatic and anemic and has back problems. Ms. Wilkins currently lives in a three-bedroom apartment with two of her four biological children; six grandchildren and three adopted children — two of her cousin's biological children and one of her brother's biological children — all of whom she is raising and supporting. Until the events described below, she was also raising and supporting a fourth adopted child — her brother's daughter, Chavonda. Ms. Wilkins' adopted children began living with her in 1989. Ms. Wilkins communicated loud and clear that she had no tolerance for criminality within her household. When one of her sons was alleged to have committed a crime, Ms. Wilkins banished him from her apartment.

But no one, not even Ms. Wilkins, could have foreseen the conduct of Chavonda. Chavonda's biological mother and father are both crack addicts who abandoned Chavonda when she was only a few months old. Chavonda, who lived with Ms. Wilkins since she was a young child, is mentally retarded and has been assessed with an IQ of only 66. She has been in special education

[12] The facts set forth below were provided by the Neighborhood Defender Service of Harlem, which represents Ms. Wilkins in the eviction proceedings.

since the second grade and Ms. Wilkins has made sure that Chavonda has participated in a series of courses offering a comprehensive career life skills program.

Last year, when Chavonda was 17, she became pregnant, and gave birth to a baby in a privately owned building several miles from Amsterdam Houses. No one in her family knew she was pregnant. Immediately after giving birth, Chavonda threw her newborn baby out the window of the building, tragically killing the baby. Chavonda, who had never been in trouble with the law before, pled guilty to first degree manslaughter, and was sentenced to five years in prison.

Although Chavonda, now incarcerated, presents no threat to anyone at Amsterdam Houses or anywhere else, NYCHA has instigated a one-strike eviction proceeding to put the entire Wilkins family out on the street. NYCHA informed Ms. Wilkins that one of the reasons it decided to commence an eviction proceeding was that the incident had occurred two blocks from another property owned by NYCHA, although it was nearly five miles from Amsterdam Houses. But NYCHA has never explained what safety purpose is served by evicting a family of 12 from their home of 28 years when none of them knew anything about Chavonda's pregnancy, much less could have anticipated the horrifying act of this retarded child.

C. PHAs Exercise Their Discretion To Evict Even The Most Blameless Of Tenants Because HUD Has Erected A System Of Incentives To Evict.

No one with any sense of justice could conclude that all of these tenants and their families deserved to be evicted. And many more stories of this sort are unfolding across the country. If, as petitioners insist, PHAs have the discretion to let the families stay in the interest of justice — to yield humane results that reflect sober and individualized assessments of blame — one wonders how it is possible for PHAs to reach such unthinkable results. The answer undoubtedly can be traced to the formal and informal incentive structure HUD has adopted to encourage

one-strike evictions, coupled with the bureaucratic culture in which PHAs operate.

In their repeated references to discretion, petitioners try to portray PHAs as neutral arbiters eager to reach just results. They would have us believe that "[a] PHA would have little incentive, given its statutory mission, to evict a tenant who . . . is truly not culpable." HUD Br. at 45. But quite the opposite is true; PHAs are under pressure to churn out one-strike evictions without regard to the equities. From the moment President Clinton unveiled his vision of beefed up enforcement of the one-strike provision, the federal government has made no bones about its intention to thrust on PHAs an exceedingly harsh interpretation of the law. *See* President William J. Clinton, Address Before a Joint Session of Congress on the State of the Union (Jan. 23, 1996), in I Pub. Papers 1996, at 83; *see also* Remarks Announcing the "One Strike and You're Out" Initiative in Public Housing, 32 Weekly Comp. Pres. Doc. 582, 584 (Apr. 1, 1996) ("If you break the law, you no longer have a home in public housing, one strike and you're out. That should be the law everywhere in America."). The President then publicly directed the Secretary of HUD to "issue guidelines to public housing and law enforcement officials to spell out with unmistakable clarity how to enforce" the one-strike policy. *Id.* Specifically, he declared that "many PHAs have not fully understood the scope of their legal authority," and derided those PHAs for whom "enforcement frankly has not been a priority." *Id.* The President specifically directed a mechanism of rewards and punishments to hold PHAs accountable to tally up more one-strike evictions: "Under the new rules HUD will propose, . . . there will actually be penalties for housing projects that do not fight crime and enforce 'one strike and you're out.' " *Id*. Conversely, PHAs that "live up to their responsibilities" to rack up one-strike evictions "will improve their chances for increased funding and for greater flexibility." *Id*.

The President demanded "unmistakable clarity" on that score, and that is what HUD delivered. HUD's first directive on the one-strike initiative escalated the rhetoric to "zero tolerance" and declared that "HUD will provide incentives for PHAs to aggressively implement One Strike policies, through . . . HUD's management evaluation system for housing authorities." HUD Initiative 96-16, *"One Strike and You're Out" Screening and Eviction Guidelines for PHAs* (April 12, 1996), *available at* http://www.hudclips.gov/offices/pih/publications/notices/96/pih96-16.pdf. "Under such a performance evaluation system," HUD continued, "a high-scoring, high-performing PHA would receive less federal oversight and may be eligible to receive additional formula funds . . . ; a PHA with a failing . . . score would be ineligible for such additional funding and could ultimately face a HUD takeover of its management." *Id*.

In keeping with this promise, HUD has developed a scoring system that rewards PHAs for pursuing one-strike evictions. HUD's formula for determining the amount of money to be allocated annually to PHAs for capital improvements rewards individual PHAs based on "[t]he extent to which the [PHA] . . . implements effective screening and eviction policies and other anticrime strategies." 42 U.S.C. § 1437d(j)(1)(I)(i).

HUD has developed a similar incentive structure in allocating operating funds to PHAs. Under that structure, one of the factors that HUD evaluates in allocating funds is the security provided by a PHA, which, in turn, is measured by, among other things, a PHA's adoption and implementation "of screening and resident eviction policies and procedures." 24 C.F.R. § 902.43(a)(5)(i); *see* HUD Real Estate Assessment Center, *Quick Reference Guide For PHAs*, Appendix B (Sept. 2001). HUD's instructions to PHAs emphasize the importance of lease enforcement criteria in securing funding and, again, HUD evaluates nothing in this category but the PHA's slavish adherence to the one-strike policy. *See* HUD Real Estate Assessment Center, *Instruction Guidebook for Completing Public Housing Assessment Systems Management Operations*

Certification Form HUD-50072 at 30-31 (Oct. 2001). HUD explicitly emphasizes that funding decisions will be based in part upon a PHA's ability to document that current eviction screening procedures result in the eviction of residents who meet the one-strike criteria and the total number of evictions as a result of the enforcement of one-strike criteria.[13] *See also* 24 C.F.R. § 902.67(a)(1) (a PHA with a particularly high score is also rewarded with greater autonomy and relief from certain onerous reporting requirements).

Under these funding formulas, every one-strike eviction increases a PHA's chances of securing funds, while a decision to excuse an innocent tenant garners no reward. Just as we would be skeptical of the quality of justice meted out by a court whose funding is linked to its judges' conviction rates, we can take scant consolation in the discretion of a PHA whose funding is linked to the sheer number of one-strike evictions it pursues.

In light of this incentive structure, it is not at all surprising that PHAs routinely enforce the one-strike provision against innocent tenants without much regard for the particular facts presented by each case. In this regard, PHAs are no different from other "street-level bureaucracies," which are often notoriously indifferent to the equities of the cases before them. Michael Lipsky, *Street-Level Bureaucracy* (1980); *see* Evelyn I. Brodkin, *Inside the Welfare Contract: Discretion and Accountability in State Welfare Administration*, Soc. Serv. Rev., Mar. 1997, at 1, 5. Facing "inadequate resources, few controls, indeterminate objectives, and discouraging circumstances," bureaucracies like PHAs "develop routines and simplifications," Lipsky, *supra*, at 82-84 — in essence powerful default modes that dominate even when they might undermine the agency's broader objectives. In other words, a PHA that has elevated the one-strike precept to the axiomatic level will not

[13] HUD notes that "A PHA should not be penalized because none of its residents met the One-Strike criteria," but that does not change the fact that a PHA is affirmatively rewarded for evicting any tenant — innocent or guilty — under the one-strike rule.

be particularly receptive to requests for exceptional treatment. And as long as that is true, a PHA's discretion is no protection against absurdly unjust results.

CONCLUSION

As the narratives set forth above demonstrate in different ways, a PHA's latitude to abandon a one-strike eviction provides little protection from injustice. Victims of domestic violence, elderly grandparents, committed parents — all are vulnerable to the very kinds of absurd results that petitioners dismiss as "unlikely." Never mind that the tenant took proactive steps to prevent crime, or even that she took the heart-wrenching step of kicking out the offending household member. Never mind that the crime occurred offsite or that no parent could have foreseen the child's acting out. Never mind that the eviction would do nothing to enhance safety in the housing complex. None of that matters in the practical reality where HUD has developed incentives to encourage evictions under any circumstances and PHAs are, therefore, disposed to evict uncritically. The only rational interpretation of 42 U.S.C. § 1437d(l)(6) is one which includes an innocent tenant defense.

Respectfully submitted,

KIRSTEN D. LEVINGSTON
Counsel of Record
E. JOSHUA ROSENKRANZ
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas
Twelfth Floor
New York, NY 10013
(212) 998-6730

MICHAEL S. FELDBERG
YOCHEVED COHEN
ALIX S. PUSTILNIK
MATTHEW L. CRANER
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10022
(212) 756-2000

GEOFFREY A. BOEHM
MARTHA F. DAVIS
NOW LEGAL DEFENSE
AND EDUCATION FUND
395 Hudson Street
Fifth Floor
New York, NY 10014
(212) 925-6635

Attorneys for Amici Curiae

December 20, 2001