No. 00-1770

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

PEARLIE RUCKER, ET AL.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-16322, 98-16542

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE; BARBARA HILL, PLAINTIFFS-APPELLEES

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY, DEFENDANTS

AND

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT-APPELLANT

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE; BARBARA HILL, PLAINTIFFS-APPELLEES

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY, DEFENDANTS-APPELLANTS

AND

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT

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Filed Jan. 24, 2001

Before: SNEED, SCHROEDER, PREGERSON, REINHARDT, FERNANDEZ, T.G. NELSON, HAWKINS, SILVERMAN, MCKEOWN, GOULD, and PAEZ, Circuit Judges.

Opinion by Judge MICHAEL DALY HAWKINS; Dissenting by Judge SNEED

MICHAEL DALY HAWKINS, Circuit Judge:

Many of our nation's poor live in public housing projects that, by many accounts, are little more than illegal drug markets and war zones. Innocent tenants live barricaded behind doors, in fear for their safety and the safety of their children. What these tenants may not realize is that, under existing policies of the Department of Housing and Urban Development ("HUD"), they should add another fear to their list: becoming homeless if a household member or guest engages in criminal drug activity on or off the tenant's property, even if the tenant did not know of or have any reason to know of such activity or took all reasonable steps to prevent the activity from occurring ("innocent tenants"). Today we examine the statutory basis behind HUD's "One Strike and You're Out" policy, and hold that Congress did not intend to authorize the eviction of innocent tenants.

I. *BACKGROUND*

It is undisputed that serious criminal activity, especially drug-related activity, has created a dangerous environment in many public housing projects. Officially recognizing that "public and other federally assisted low-income housing in many areas suffers from rampant drug-related crime," Congress sought to address the problem with the Anti-Drug Abuse Act of

1988. 42 U.S.C. § 11901(2). Congress required each public housing agency to utilize leases which:

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

42 U.S.C. § 1437d(*l*)(5) (1989). Congress altered the language of this provision slightly in 1990, to require leases that:

> (5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, or any drug related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

Id. (1991). In 1996, Congress replaced the phrase "on or near such premises" with "on or off such premises." *Id.* (1997). Finally, in 1998, the section was unchanged, but redesignated as subsection (*l*)(6), which is how we refer to it in this opinion. *Id.* (1999).

In 1991, HUD issued regulations implementing subsection (6), which track the pre-96 statutory language very closely. HUD required local public housing

authorities ("PHAs") to impose a lease obligation on tenants:

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

24 C.F.R. § 966.4(f)(12)(i). When issuing these regulations, HUD made it clear that it interpreted the statute (and its own regulations) as giving local PHAs the authority to evict a tenant whose household members or guests are involved in drug activity, whether the tenant knew or should have known of the activity or tried to prevent the activity. Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560, 51,567 (Oct. 11, 1991) ("The tenant should not be excused from contractual responsibility by arguing that the tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.").

Initially, HUD encouraged PHAs to use discretion in deciding whether to evict:

> In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circum-

> stances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit.

24 C.F.R. § 966.4(*l*)(5)(i). However, a directly conflicting message was sent to the PHAs in 1996 when President Clinton announced the "One Strike and You're Out" policy for combating crime in public housing, which encourages evictions regardless of circumstances and ties federal funding to increased crime-related evictions. John F. Harris, *Clinton Links Housing Aid to Eviction of Crime Suspects*, Washington Post, March 29, 1996, Section A, *available at* 1996 WL 3071468.

II. *FACTS AND PROCEDURAL BACKGROUND*

Because of the increased enforcement under the "One Strike" policy, we are now beginning to see exactly how far-reaching HUD's interpretation of § 1437d(*l*)(6) can be. In the case before us, the Oakland Housing Authority ("OHA") commenced separate unlawful detainer actions in Alameda County Municipal Court against four tenants—Pearlie Rucker, Willie Lee, Barbara Hill and Herman Walker—for violation of the lease provision obligating tenants to "assure that tenant, any member of the household, or another person under the tenant's control, shall not engage in . . .

[a]ny drug-related criminal activity on or near the premises. . . ."

Pearlie Rucker is a sixty-three-year-old woman who has lived in public housing since 1985. She lives with her mentally disabled daughter, her two grandchildren and one great-granddaughter. OHA sought to evict Rucker because her daughter was found in possession of cocaine three blocks from the apartment. Rucker asserts that she regularly searches her daughter's room for evidence of alcohol and drug use and has never found any evidence or observed any sign of drug use by her daughter. Willie Lee, seventy-one, has been a public housing resident for over twenty-five years and Barbara Hill, sixty-three, has been a public housing resident for over thirty years. Lee and Hill currently live with their grandsons. OHA sought to evict Lee and Hill because their grandsons were caught smoking marijuana together in the apartment complex parking lot. Lee and Hill contend they had no prior knowledge of any illegal drug activity by their grandsons.

The fourth tenant, Herman Walker, presents a slightly different situation. He is a disabled seventy-five-year-old man who has lived in public housing for approximately ten years. He is not capable of living independently and requires an in-home caregiver. On three instances within a two-month time frame, Walker's caregiver and two guests were found with cocaine in Walker's apartment. Each time, Walker was issued a lease violation notice; with the third notice, OHA terminated the lease and initiated an unlawful detainer action. Shortly thereafter, Walker fired his caregiver.

In response to OHA's actions, the tenants filed the present action in federal district court under the Administrative Practices Act, 5 U.S.C. §§ 701-706 (the "APA"), arguing that 42 U.S.C. § 1437d(*l*)(6) does not authorize the eviction of innocent tenants. They also argued that if the statute does authorize such evictions, then the statute is unconstitutional. Plaintiff Walker also alleged that his eviction would violate the Americans with Disabilities Act ("ADA").

The tenants sought a preliminary injunction enjoining the unlawful detainer actions against them in state court and enjoining the enforcement of HUD's regulation and the corresponding provision in the OHA lease against innocent tenants. To obtain a preliminary injunction, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised, and the balance of hardships tips sharply in favor of the moving party. *Roe* v. *Anderson*, 134 F.3d 1400, 1401-02 (9th Cir. 1998). Applying this standard, the district court found that the tenants had raised serious questions on their claim that HUD's interpretation of § 1437d(*l*)(6) violated the APA. Weighing the plaintiffs' loss of their homes against the delay in OHA's eviction proceedings, the district court found the balance of hardships tipped decisively in the tenants' favor, and enjoined OHA from "terminating the leases of tenants pursuant to paragraph 9(m) of the 'Tenant Lease' for drug-related criminal activity that does not occur within the tenant's apartment unit when the tenant did not know of and had no reason to know of, the drug-related criminal activity." The court also found that plaintiff Walker had raised a serious question with respect to whether his eviction violated

the ADA and enjoined OHA from evicting Walker on the basis of his caregiver's illegal drug use.

On appeal from the preliminary injunction, a panel of this court reversed the district court, holding that § 1437d(*l*)(6) authorized the eviction of innocent tenants, that HUD's interpretation was consistent with the statute, and that the statute, so interpreted, was not unconstitutional. *Rucker v. Davis*, 203 F.3d 627 (9th Cir. 2000). We granted review en banc and vacated the panel opinion. *Rucker v. Davis*, 222 F.3d 614 (9th Cir. 2000). We now affirm the district court's grant of the preliminary injunction.

III. *STANDARD AND SCOPE OF REVIEW*

This appeal presents the opportunity to clarify our standard and scope of review for preliminary injunctions, in particular, regarding when it is appropriate to reach the "merits" of the underlying case.

In general, we review a grant or denial of a preliminary injunction for abuse of discretion. *Gorbach* v. *Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc). The district court, however, necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999); *Roe*, 134 F.3d at 1402. Thus, if the district court is alleged to have relied on an erroneous legal premise in reaching its decision to grant or deny a preliminary injunction, we will review the underlying issue of law, and we do so de novo. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996).

The scope of our review is likewise normally very narrow. We review whether the court employed the appropriate legal standards governing the issuance of a preliminary injunction and whether the district court correctly apprehended the law with respect to the underlying issues in the case. *California Prolife Council v. Scully*, 164 F.3d 1189, 1190 (9th Cir. 1999); *Gregorio T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995). We typically will not reach the merits of a case when reviewing a preliminary injunction. *Roe*, 134 F.3d at 1402; *Gregorio T.*, 59 F.3d at 1004. By this we mean we will not second guess whether the court correctly *applied* the law to the facts of the case, which may be largely undeveloped at the early stages of litigation. "As long as the district court got the law right, 'it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.'" *Id.* at 1004 (quoting *Sports Form, Inc. v. United Press Int'l*, 686 F.2d 750, 752 (9th Cir. 1982)).

Of course, there will be cases in which the district court's interpretation of the law with respect to the underlying issues is challenged, and the resolution of such a legal question will be dispositive. If a district court's ruling rests solely on a legal question, and the facts are established or of no controlling relevance, then we may undertake a plenary review of the decision to grant a preliminary injunction. *Gorbach*, 219 F.3d at 1091 (citing *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 755-57, 106 S. Ct. 2169, 90 L.Ed.2d 779 (1986), *overruled in part on other grounds*, *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992)).

In this case, neither party suggests that the district court applied the wrong preliminary injunction standard. HUD and OHA, however, do assert that the district court misapprehended the law with respect to the breadth of § 1437d(*l*)(6). They contend the district court therefore based its decision on an erroneous legal interpretation, thereby abusing its discretion. Accordingly, we must turn to the proper interpretation of § 1437d(*l*)(6), a question of law which we review de novo. *See, e.g.*, *Foti v. City of Menlo Park*, 146 F.3d 629, 634-35 (9th Cir. 1998); *Does 1-5*, 83 F.3d at 1152.

IV. *SECTION 1437d(l)(6)*

The parties agree that in interpreting § 1437d(*l*)(6), we apply the framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). Under *Chevron*, the first question is whether Congress has directly spoken to the precise question at issue. *Id.* at 842, 104 S. Ct. 2778. To determine whether Congress has spoken on the question at issue, we employ the traditional tools of statutory construction; if Congress had an intent on this issue, that intent is the law and must be given effect. *Id.* at 843 n.9, 104 S. Ct. 2778.

In this case, a number of statutory construction principles lead us to conclude that Congress has spoken on the issue and that HUD's interpretation is contrary to congressional intent. In determining whether Congress has specifically addressed the question at issue, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, ——, 120 S. Ct. 1291, 1300, 146 L.Ed.2d 121 (2000). Rather, the "the words of a statute must be read in

their context and with a view to their place in the overall statutory scheme." *Id.* at ——, 120 S. Ct. at 1301 (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L.Ed.2d 891 (1989)). When the proper interpretation of a statute is not clear from the language of the text or the broader context of the statute as a whole, the legislative history offers valuable guidance and insight into Congressional intent. *United States v. Hockings*, 129 F.3d 1069, 1071 (9th Cir. 1997). We will not assume that Congress intended a statute to create odd or absurd results. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69-70, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994) (citing *Public Citizen v. Dept. of Justice*, 491 U.S. 440, 453-455, 109 S. Ct. 2558, 105 L.Ed.2d 377 (1989)). Finally, because we cannot presume Congress intended an unconstitutional result, whenever possible, statutes should be construed to avoid serious doubts as to their constitutionality. *Id.* at 78, 115 S. Ct. 464.

Because we find that Congress had an intention on the precise question at issue that is contrary to HUD's construction, HUD's interpretation is not entitled to deference. *See Chevron*, 467 U.S. at 843 n.9, 104 S. Ct. 2778. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* Thus, we do not reach the question under *Chevron* of whether an administrative interpretation is reasonable or permissible, for "[i]f the intent of Congress is clear, that is the end of the matter." *Id.* at 842, 104 S. Ct. 2778.

A. Textual Interpretation

We begin with the text of the statute. Section 1437d(*l*)(6) provides that "any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." HUD essentially argues that "any" means "all," asserting that if a drug-related crime occurs by any of the enumerated individuals, then the statute clearly permits eviction of all tenants under the lease, regardless of personal involvement in or knowledge of the crime. The language of the statute, however, does not appear as plain as HUD would like it to be. The statutory provision does not expressly address the level of personal knowledge or fault that is required for eviction, or even make it clear who can be evicted. Although the statute permits "termination of tenancy," it does not answer the question of *whos*e tenancy. In situations with multiple tenants, does the statute authorize eviction of the offending party only, or all persons on the lease?

The parties debate the significance that should be attributed to the use of the phrase "under the tenant's control." HUD argues that this phrase modifies only the term "other person" and that "control" means only that this other person has the tenant's consent to be in the tenant's unit. The tenants contend that "control" involves the "exercise of a restraining or directing influence" over another, and that this applies to all of the words in the group, i.e., household members, guests *and* other persons. The tenants further argue that it is implicit from the use of this wording that Congress intended tenants to be held accountable for the actions

of those persons who are subject to their control, but that the statute does not impose sanctions on tenants who have taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically be expected to exercise control over the conduct of another.

The text of subsection (6), viewed in isolation, does not compel either party's interpretation. We therefore turn to the specific context in which the language is used and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997).

1. Section 1437d(*l*)

In examining the language of the statute, we must look to its place in the overall statutory scheme and "fit, if possible, all parts into a harmonious whole," *Brown & Williamson*, 529 U.S. at ——, 120 S. Ct. at 1301 (quoting *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 389, 79 S. Ct. 818, 3 L.Ed.2d 893 (1959)). First established in 1937, the public housing program was a response to an acute shortage of "decent and safe dwellings for low-income families." 42 U.S.C. § 1437. Understanding that these low income tenants face grave adversity if evicted, Congress has put a number of protections in place that limit the ability of local PHAs to evict. In § 1437d(*l*) itself, the local PHAs are prohibited from using leases with unreasonable terms and conditions. Another subsection also provides that the leases must not permit the PHA to terminate tenancies except for "serious or repeated violation of the terms or conditions of the lease or for other good cause." § 1437d(*l*)(5). We believe reading section (*l*) as a "harmonious whole," requires us to presume that Congress also intended

subsection (6) to be construed as a reasonable lease term and to permit eviction only if there is good cause.

It is, of course, our task to determine the meaning of subsection (6) and not its wisdom. Our task is to examine HUD's construction of subsection (6) in light of and in relation to the other provisions of section (*l*). There is undisputedly a significant problem with crime and drugs in public housing. The goal of providing safe and drug-free public housing is well served by permitting the local PHAs to evict tenants who engage in the proscribed criminal activities. It is also furthered by imposing a duty on tenants to take reasonable steps to control the drug or criminal activity of family members and guests or face eviction. There is no dispute that the eviction of tenants who personally engage in drug activity or of tenants who turn a blind eye to the activities of household members or guests falls squarely within the language of the statute under either party's reading.

While the policy considerations pointed out by the dissent may apply to the eviction of culpable tenants [Dissent at 1128 - 42], we do not believe they support the eviction of innocent ones. Imposing the threat of eviction on an innocent tenant who has already taken all reasonable steps to prevent third-party drug activity could not have a deterrent effect because the tenant would have already done all that tenant could do to prevent the third-party drug activity. Likewise, evicting the innocent tenant will not significantly reduce drug-related criminal activity in public housing, since the tenant has not engaged in any such activity personally or knowingly allowed such activity to occur. HUD's construction of subsection (6) would allow such

irrational evictions, and thus would require PHAs to include an unreasonable term in their leases and permit eviction without good cause. Read in the context of the overall statutory scheme and in light of the legislative history (discussed below), we cannot say Congress intended such a result.

2. Forfeiture Provision

Another amendment enacted at the same time as the original version of § 1437d(*l*)(6) also leads to the conclusion that Congress did not intend to allow the eviction of innocent tenants. In the same chapter and subtitle of the Anti-Drug Abuse Act of 1988, Congress passed both the original version of subsection (6) and also amended a pre-existing civil forfeiture provision of the Controlled Substances Act, 21 U.S.C. § 881(a). The two statutes at issue were enacted together as parts of a single legislative scheme to combat drug abuse in public housing. The legislative history indicates how Congress envisioned the statutes working together:

> Chapter 1 of this subtitle codifies current HUD guidelines granting public housing agencies authority to evict tenants if they, their families or their guests engage in drug-related criminal activity. It also allows the federal government to seize housing units from tenants who violate drug laws by clarifying that public housing leases are considered property with respect to civil forfeiture laws.

134 Cong. Rec. S17,360-02 (Nov. 10, 1998) *available at* 1988 WL 182529 (Cong. Rec.).

The forfeiture provision was amended by inserting the phrase "(including any leasehold interest)" into the text of the pre-existing statute. The amended statute then read in relevant part:

> The following shall be subject to forfeiture to the United States. . . .
>
> . . . .
>
> (7) All real property, including any right, title and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter . . . *except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.*

21 U.S.C. § 881(a) (emphasis added).[1]

HUD suggests we should place no importance on the availability of what clearly was an innocent owner

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[1] The "innocent owner" defense which then appeared in 21 U.S.C. § 881(a)(7) is now codified at 18 U.S.C. § 983(d) as part of the general rules for civil forfeiture procedures. In enacting § 983(d), Congress clarified that an "innocent owner" is one who "(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property." 18 U.S.C. § 983(d)(2)(A). This continues to be consistent with our reading of § 1437d(*l*)(6).

defense in the forfeiture provision, pointing to the differences between civil forfeiture and lease eviction proceedings. Although different animals, the Supreme Court instructs that the meaning of one statute may be illuminated by the language of another. *Brown & Williamson*, 529 U.S. at —— - —— , 120 S. Ct. at 1300-01. When dealing with two different statutes which not only govern the same subject matter but were also enacted at the same time in the same chapter of the same Act, we presume Congress meant them to be read consistently. HUD correctly points out that the forfeiture provision deals with forfeitures of the leasehold to the federal government, while § 1437d(*l*)(6) deals with eviction by local PHAs. Although different processes, the purpose of both is the same. Moreover, the result is the same: the tenant loses the leasehold interest, which is taken over by a governmental entity. It makes little sense to provide protections for the innocent tenant from the federal government but not from local housing authorities.[2]

HUD and the dissent also argue that the forfeiture provision illustrates that Congress knows how to provide an innocent tenant defense when it wants to,

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[2] The dissent attempts to distinguish the provisions by arguing that Congress must have decided to provide substantive protections to owners that it did not provide to tenants. [Dissent at 1132]. Yet, § 881(a)(7) specifically applies to leasehold interests, and the legislative history indicates Congress was specifically thinking of public housing leases when it added this provision. We cannot agree with an interpretation of § 881(a)(7) that would not apply the innocent owner defense contained therein to the owners of leasehold interests. Congress's recent clarification of the innocent owner defense confirms our interpretation. 18 U.S.C. § 983(d)(6)(A).

and that since it did not use the very same language in § 1437d(*l*)(6), it must not have intended for one to be available. [Dissent at 1132]. We agree that the innocent tenant defense in § 881(a)(7) was more clear; it was also drafted by a different Congress than the one which enacted § 1437d(*l*)(6), which significantly weakens HUD's argument. *Cf. Lindh v. Murphy*, 521 U.S. 320, 330, 117 S. Ct. 2059, 138 L.Ed.2d 481 (1997) (negative implication argument is strongest when different provisions were joined together and considered simultaneously when the language giving rise to the implication was inserted). The concurrent amendment of § 881(a)(7) did not touch the previously drafted innocent owner defense; it merely extended the forfeiture provision to include leasehold interests.

We are unpersuaded by the negative implication argument. To say Congress could have drafted the defense more explicitly in § 1437d(*l*)(6) is not to say it did not do so at all.

3. Section 1437d(c)(4)(A)(iii)

HUD asserts that its interpretation of § 1437d(*l*)(6) is reinforced by a version of § 1437d(c)(4)(A)(iii) which was in effect until 1996. This version prohibited individuals or families who were evicted because of drug-related criminal activity from receiving a statutory housing preference for three years, but exempted "any member of a family of an individual" who the agency determined "clearly did not participate in and had no knowledge of such criminal activity." HUD argues that if innocent tenants could not be evicted under § 1437d(*l*)(6), there would have been no need for such an exemption, which would have rendered § 1437d(c)(4)(A)(iii) surplusage.

The language HUD relies on is no longer part of the statute. We are therefore hesitant to even address an argument for harmonious interpretation when there is no longer a provision to harmonize. We do, however, note that even as originally drafted, § 1437d(c)(4)(A)(iii) was not entirely inconsistent with the tenants' interpretation of § 1437d(*l*)(6). For example, an entire family, including minor children, can be evicted under § 1437d(*l*)(6) if the parent engages in drug-related activities. These children, upon reaching the age of eighteen, would become eligible for public housing. The prior version of § 1437d(c)(4)(A)(iii) would have waived the three-year disqualification period for such children if they were not participants in the criminal activity which caused the family to be evicted, which means that this provision would not have been surplusage under the tenants' interpretation.

4. Summary

Section 1437d(*l*)(6) is not a picture of clarity and may be subject to varying interpretations. When read in conjunction with the remainder of § 1437d(*l*) and other provisions enacted at the same time, however, it appears that Congress did not intend subsection (6) to apply to the eviction of innocent tenants. Any doubts that persist about Congress's intentions, however, are firmly resolved by the legislative history and the principles of statutory construction we discuss below.

B. Legislative History

If the intent of Congress is not clear from the language of the statute and the broader context of the statute as a whole, we consult the legislative history. *Hockings*, 129 F.3d at 1071. In doing so, we place par-

ticular emphasis on the committee reports accompanying the statute. *Garcia v. United States*, 469 U.S. 70, 76, 105 S. Ct. 479, 83 L.Ed.2d 472 (1984).

No House or Senate reports accompanied the original version of § 1437d(*l*)(6), which was enacted as part of the Anti-Drug Abuse Act of 1988. In 1990, however, Congress amended the provision in question, and the legislative history specifically addressed the issue before us. The Senate Report explains:

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

S. Rep. No. 101-316, at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941. The report also addressed an identical passage in the Section 8 housing assistance program: "The Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exist." *Id.* at 5889.

HUD contends the legislative history indicates Congress's intent to confer wide discretion on HUD and the local PHAs. It focuses on the statement that "each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court." It is true that the PHAs have discretion in deciding whether to initiate an

eviction action under the statute, but this is true whether the statute authorizes eviction of innocent tenants or not. In other words, this passage suggests that even in a case involving a "culpable" tenant, the case must be looked at on its individual merits, which may counsel against eviction, even though eviction is clearly authorized by the statute.[3]

In these reports, however, Congress specifically rejects the notion that the PHAs' discretion is so broad that it extends to the eviction of innocent tenants. These reports are very clear that such evictions *would not* be appropriate, and that in such circumstances good cause to evict *would not* exist. The latter statement is also consistent with our discussion above that § 1437d(*l*)(6) must be read in conjunction with the good cause requirement of § 1437d(*l*)(5). Accordingly, we reject HUD's interpretation as contrary to the clearly expressed intent of Congress. *Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778.

C. Absurd Results

Even if we did not find that the legislative history supports the tenants' interpretation, a number of other

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[3] HUD took the position at oral argument that an eviction court could only consider whether or not the lease term was violated, and could not review the PHAs' decision that the violation warranted eviction. This issue is not before the court today, but we note that the quoted passage suggests that eviction courts *do* have a role to play in evictions under § 1437d(*l*)(6) and that the PHAs' discretion does not appear to be unchallengeable. *See, e.g.*, Robert Hornstein, *Mean Things Happening in This Land: Defending Third Party Criminal Activity Public Housing Evictions*, 23 S.U.L.Rev. 257 (1996) (discussing abuse of discretion defense in PHA eviction cases).

statutory interpretation tools would lead us to the same result. It is well established that we will not assume Congress intended an odd or absurd result. *X-Citement Video*, 513 U.S. at 69-70, 115 S. Ct. 464; *Public Citizen*, 491 U.S. at 453-55, 109 S. Ct. 2558.

We need look no further than the facts of this case for an example of the odd and unjust results that arise under HUD's interpretation. HUD conceded at oral argument that there was nothing more Pearlie Rucker could have done to protect herself from eviction, but argued that the statute authorized her eviction nonetheless. HUD has also taken the position that the statute would apply and permit eviction of an entire family if a tenant's child was visiting friends on the other side of the country and was caught smoking marijuana, even if the parents had no idea the child had ever engaged in such activity and even if they had no realistic way to control their child's actions 3,000 miles away.[4] HUD also asserted the provision would apply and authorize eviction if a household member had been convicted of a drug crime years earlier, arguing that the local PHA would have the discretion to determine if eviction were warranted in such circumstances.

Although the dissent contends the Supreme Court frowns on consideration of hypothetical applications of statutes [Dissent at 1130], the Court itself has clearly looked beyond the facts of individual cases to the

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[4] We should note that the HUD regulation employs language from an earlier version of the statute, and requires that the drug activity be "on or near" the premises, thus restricting the geographical reach of the provision. 24 C.F.R. § 966.4(f)(12)(i). HUD acknowledges, however, that under the amended statute, there is no such geographic limitation.

broader ramifications of a given interpretation when evaluating whether such interpretation creates absurd results. *See*, *e.g.*, *X-Citement Video*, 513 U.S. at 69, 115 S. Ct. 464. The absurdity and unjustness of the potential results in this case confirms that HUD has missed the mark in discerning Congress's intent.

The dissent also argues that because Congress has not amended § 1437d(*l*)(6) to more clearly address the innocent tenant issue, this must mean that Congress intended these results, even if we may think them odd. [Dissent at 1134]. Congress's inaction, however, may cut both ways. To the extent Congress may be aware of how HUD and some courts have interpreted this provision, it must have also been aware that other courts were refusing to evict innocent tenants. *See*, *e.g.*, *Charlotte Hous. Auth. v. Patterson*, 120 N.C.App. 552, 464 S.E.2d 68, 72 (N.C. App. 1995); *Richmond Tenants Org., Inc. v. Richmond Redev. and Hous. Auth.*, 751 F. Supp. 1204, 1205-6 (E.D. Va. 1990). And yet, Congress did not clarify the statute. Furthermore, the One Strike policy, which has led to increased enforcement and less exercise of discretion by the PHA's, was only announced in 1996, the same year as the last substantive amendment to the section. Only now are cases beginning to surface which illustrate the breadth of HUD's interpretation and which may attract enough attention to merit reconsideration or clarification of the statute by Congress.

D. Constitutional Avoidance

It is also a settled principle of statutory interpretation that whenever possible, a statute should be construed to avoid substantial constitutional concerns. *X-Citement Video*, 513 U.S. at 69, 115 S. Ct. 464. HUD's

interpretation of § 1437d(*l*)(6), however, would raise serious questions under the Due Process Clause of the Fourteenth Amendment.

Penalizing conduct that involves no intentional wrongdoing by an individual can run afoul of the Due Process Clause. *Scales v. U.S.*, 367 U.S. 203, 224-25, 81 S. Ct. 1469, 6 L.Ed.2d 782 (1961); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490, 35 S. Ct. 886, 59 L.Ed. 1419 (1915). Public housing tenants have a property interest in their tenancy. *Greene v. Lindsey*, 456 U.S. 444, 451, 102 S. Ct. 1874, 72 L.Ed.2d 249 (1982); *Geneva Towers Tenants Org. v. Federated Mortgage Investors*, 504 F.2d 483, 488-89 (9th Cir. 1974). HUD's interpretation would permit tenants to be deprived of their property interest without any relationship to individual wrongdoing.

HUD contends that the Supreme Court's decision in *Bennis v. Michigan*, 516 U.S. 442, 116 S. Ct. 994, 134 L.Ed.2d 68 (1996), forecloses any argument that depriving an innocent owner of a property right violates due process. In *Bennis*, a woman's husband used their jointly owned car to engage in sexual activity with a prostitute. *Id.* at 443, 116 S. Ct. 994. The car was forfeited and the wife contested the forfeiture on due process grounds. *Id.* at 446, 116 S. Ct. 994. In a 5-4 decision, the Court upheld the forfeiture, but did so narrowly on facts which are easily distinguishable from the instant case.

The *Bennis* Court pointed out that the proceeds from the sale did not exceed the costs of the sale so there was "practically nothing left" for Mrs. Bennis. *Id.* at 445, 116 S. Ct. 994; *id.* at 456, 116 S. Ct. 994 (Thomas, J., concurring); *id.* at 458, 116 S. Ct. 994 (Ginsburg, J., con-

curring). The Court also noted the equitable nature of the Michigan forfeiture proceeding, and that the state court had taken special note of the fact the Bennises had a second automobile. *Id.* at 445, 116 S. Ct. 994; *id.* at 458, 116 S. Ct. 994 (Ginsburg, J., concurring). In this case, there is much more at stake than a negligible financial interest in a family's second car: these families risk losing their entire property interest in their homes.

Most important, in *Bennis*, the Court suggested that the fact that the property was used in criminal activity was decisive; the Court held that the spouse's due process claim was defeated by "a long and unbroken line of cases hold[ing] that an owner's interest in property may be forfeited *by reason of the use to which the property is put* even though the owner did not know that it was to be put to such use." *Bennis*, 516 U.S. at 446, 116 S. Ct. 994 (emphasis added); *see also id.* at 450, 116 S. Ct. 994 (discussing the requirement that the property be an "instrumentality" of crime). In this case, with the exception of Plaintiff Walker's caregiver, the illegal activities took place off the premises leased by the plaintiffs. Thus, the leasehold interest was *not* used in connection with the crime.

Justice Thomas's concurring opinion in *Bennis* expanded on the Court's statement that the forfeiture was justified because the property in question was an instrumentality of the crime by strongly suggesting that a due process claim exists if there has been a forfeiture of property that was not used in the commission of a crime and the owner of the property had no knowledge of the illegal activity. *Id.* at 455-56, 116 S. Ct. 994 (Thomas, J., concurring); *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90, 94

S. Ct. 2080, 40 L.Ed.2d 452 (1974). Therefore, we believe HUD's interpretation of § 1437d(*l*)(6), which would permit the deprivation of a tenant's property interest when the property was not used in the commission of a crime and when the tenant did not know of the illegal activity, would raise serious due process questions.[5]

It is not necessary, however, to reach this constitutional issue if there is a construction of § 1437d(*l*)(6) which avoids the question and is "not plainly contrary to the intent of Congress." *X-Citement Video*, 513 U.S. at 78, 115 S. Ct. 464. The tenants have proposed such a construction, by reading the use of the term "control" as a limitation on the breadth of the provision. Today we adopt that interpretation and hold that if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(*l*)(6) does not authorize the eviction of such a tenant. *Cf. id.* (reading "knowing" requirement of one criminal element as applying to second criminal element to avoid serious constitutional doubts); *Ma v. Reno*, 208 F.3d 815, 828 (9th Cir. 2000) (finding reasonable time

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[5] Several legal commentators have also recognized the potential due process problems with HUD's interpretation. *See, e.g.*, Lisa Weil, *Drug-Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 Yale L. & Pol'y Rev. 161, 179 (1991) (vicarious liability makes HUD eviction policy both distressing and constitutionally suspect); Nelson H. Mock, Note, *Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties*, 76 Tex. L.Rev. 1495, 1522-24 (1998) (noting due process problems because no relationship between liability and the action of the tenant).

limitation implicit in statute to avoid serious due process concerns).

V. *PRELIMINARY INJUNCTION*

A. APA Claim

The district court granted a preliminary injunction on the tenants' APA claim because it found that the tenants had raised serious questions and that the balance of hardships tipped sharply in their favor, since they could lose their homes if OHA's actions were not halted. The district court enjoined OHA from pursuing its unlawful detainer actions against Lee and Hill.[6] The district court also enjoined OHA from terminating any other leases for off-premises drug-related activity in which the tenant did not know of or have reason to know of the criminal activity.

Reviewing the interpretation of § 1437d(*l*)(6) de novo, we have concluded that HUD's interpretation is inconsistent with Congressional intent and must be rejected. *Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778. The question remains whether the district court properly enjoined OHA from evicting innocent tenants pursuant to paragraph 9(m) of the OHA lease. This provision was required by HUD regulations (24 C.F.R. § 966.4(f)(12)(i)), which were, as discussed above, premised on HUD's erroneous interpretation of § 1437d(*l*)(6).

Paragraph 9(m) is not an ordinary term found in residential leases and should not be treated as such.

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[6] OHA dismissed the unlawful detainer proceeding against Rucker.

There is certainly no bargained-for-exchange in public housing leases. The form of public housing leases is almost entirely dictated by HUD. This lease provision was required by the very HUD regulations we have invalidated, and is simply the embodiment of the erroneously broad interpretation of § 1437d(*l*)(6). As we discussed in section IV.A. above, such a provision would be unreasonable, and including an unreasonable term in a public housing lease is prohibited under § 1437d(*l*), as are evictions without good cause.[7]

Accordingly, we find that the district court properly granted the preliminary injunction generally enjoining OHA from pursuing evictions under paragraph 9(m) to the extent it seeks to do so for off-premises drug-related activity in which the tenant did not know of or have reason to know of the criminal activity.[8] OHA remains free to proceed with evictions for off-premises drug activities when it can prove the tenant knew or should have known of the activity.[9] Likewise, the district court specifically permitted OHA to pursue evictions of tenants when the drug-related activity

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[7] There are also substantial constitutional considerations associated with enforcing this provision, as discussed in Section IV.D., above.

[8] We undertake plenary review of this portion of the injunction because it presents a situation in which the legal issues underlying the injunction are dispositive, and the facts of the individual claims are of no controlling relevance. *Gorbach*, 219 F.3d at 1091.

[9] The district court's injunction does not address the issue of whether tenants who have knowledge of off-premises drug activities by household members may be evicted if they attempt in good faith to prevent their household members from engaging in such activity, but are unable to do so. Accordingly, we do not consider that question here.

occurs within the tenant's apartment, creating a rebuttable presumption that a tenant controls what occurs in his or her unit.[10] These directives are perfectly consistent with our interpretation of "control" in § 1437d(*l*)(6). We therefore affirm this portion of the injunction.

With respect to the portion of the injunction which enjoins OHA from pursuing its unlawful detainer actions against Lee and Hill, the facts of the underlying cases come into play. OHA, however, has not contested the assertions of Lee and Hill that they did not know or have reason to know of their grandsons' drug use. Assuming these facts are true, Lee and Hill qualify as innocent tenants. On the facts before it, the district court did not abuse its discretion by enjoining their unlawful detainer actions.

B. Walker's ADA Claim

Plaintiff Walker presents a different situation, since the illegal drug activity occurred within his apartment, and, at least after the first violation notice, he had knowledge of the criminal activity. The district court ultimately decided to enjoin Walker's unlawful detainer action, finding that Walker had raised a serious question with respect to whether the eviction violated the ADA, and that the balance of hardships weighed in favor of permitting him to remain in his home until the ADA claim was fully litigated.

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[10] This presumption should assuage some of the dissent's concerns about the burden of proof placed on the local PHA. [Dissent at 1136]

The district court noted that Walker alleged he required an in-home caregiver because of his disability and that he alleged he was not physically able to search persons entering his apartment. The district court concluded that the ADA might require some form of accommodation in the eviction policies for his situation, citing an Oregon case which required the housing authority to modify its "no dogs" policy for a hearing impaired tenant. *Green v. Hous. Auth. of Clackamas County*, 994 F. Supp. 1253, 1257 (D. Or. 1998). Although OHA asserted that there could be no reasonable accommodation in Walker's case because the only alternative would be a "blanket exemption" from the drug policy, the district court found that, based on the allegations of the complaint, it could not rule as a matter of law that no reasonable accommodation exists.

Walker's ADA claim is replete with factual questions, including whether the guests in the apartment were Walker's or the caregiver's, and whether Walker's disability prevented him from being able to search his caregiver or her guests. There are no answers to these questions at this stage of the proceedings. The district court's decision to grant the injunction on the ADA claim turns on the application of law to the facts of Walker's case. The district court applied the proper standard for issuing a preliminary injunction, and appears to have correctly apprehended the law of the ADA. We will not reverse simply because we might reach a different result on the limited facts before us. *Gregorio T.*, 59 F.3d at 1004. A factfinder may ultimately determine that Walker cannot state a claim under the ADA or that OHA provided Walker with a reasonable accommodation by giving him two warnings and two months to find a new caregiver. On the facts

before the district court at the time it made its decision, however, the district court did not abuse its discretion in entering the preliminary injunction with respect to Walker's ADA claim.

VI. *CONCLUSION*

We find that Congress did not intend § 1437d(*l*)(6) to permit the eviction of innocent tenants. Thus, HUD's contrary interpretation must be rejected. The district court therefore properly enjoined OHA from pursuing evictions based on the erroneous interpretation of § 1437d(*l*)(6) as embodied in the OHA lease. On the limited factual record before it, the district court did not abuse its discretion in enjoining Walker's eviction with respect to his ADA claim. The grant of the preliminary injunction is AFFIRMED.

SNEED, Circuit Judge, with whom Judges FERNANDEZ, T.G. NELSON, and SILVERMAN, Circuit Judges, join, dissenting:

In 1988, faced with a devastating and worsening epidemic of drug related crime and violence in public housing, Congress granted to local public housing authorities ("PHAs") a new tool in the struggle to provide decent and safe low income housing. 42 U.S.C. § 1437d(*l*)(6) mandated that every lease entered into by a PHA include a provision permitting termination of tenancy when "a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control" engaged in "drug-related criminal activity on or near public housing premises."

In mandating this lease provision and thereby granting additional discretion to local housing authorities, Congress used unmistakably clear statutory language based on reasonable findings that such legislation was necessary and would be effective. The majority's decision reads into this statute a defense that the legislative branch rejected. Nothing in the Constitution prohibits the government from entering into reasonable lease provisions necessary to maintain the safety and structural soundness of its property. "The increase in drug-related crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures." 42 U.S.C. § 11901(4). Indeed, if the government is to act as a landlord, the Constitution must permit it to act as a prudent one.

STANDARD OF REVIEW: CHEVRON DOCTRINE

Congress authorized a tenant's eviction from public housing when that "tenant, any member of the tenant's household, or any guest or other person under the tenant's control" engages in "any drug-related criminal activity, on or off such premises." The question here presented is whether this language permits local PHAs to evict tenants who were ignorant of their household members' or guests' drug use ("ignorant tenants"). The answer to this question should be that it does permit such evictions.

The Department of Housing and Urban Development (HUD), the agency charged with administering public housing, properly concluded that the statute did authorize the eviction of ignorant tenants. 24 C.F.R. § 966.4(*l*)(1)(B); *Public Housing Lease and Grievance Procedures*, 56 Fed. Reg. 51,560, 51,567 (October 11, 1991). If this interpretation is a "permissible construction of the statute," then this court may not substitute its own judgment for that of HUD. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). Because the statute is clear on its face, HUD's interpretation is the only permissible construction of the statute.

The majority points out that the statute is silent on the question of a tenant's required knowledge. This alters the relevant inquiry only slightly. The majority must explain why the regulation that tracks the precise language of the statute is not reasonable. *Id.* at 844, 104 S. Ct. 2778. In short, whether one accepts our contention that the statutory language is clear or the majority's argument that the language is silent, application of the *Chevron* test to the present controversy

leads to the same conclusion. HUD's regulation permitting the eviction of ignorant tenants whose household members or guests engaged in drug related criminal activity on or off public housing premises is valid and enforceable.

The majority avoids the dictates of *Chevron* by finding that "Congress had an intention on the precise question at issue that is contrary to HUD's construction." *Maj. Op.* at 1119. The majority's evidence, howver, is wholly insufficient to support this conclusion. We will discuss the evidence in greater detail below, but note here the gap between what the majority purports to prove and what it has in fact shown. According to the majority, the language of the statute is ambiguous. *Maj. Op.* at 1120.[1] The legislative history noted by the majority is equally ambiguous. It simultaneously provides discretion to local PHAs and suggests how that discretion should be exercised. "It is well established that legislative history which does not demonstrate a clear and certain congressional intent cannot form the basis for enjoining regulations." *Rust v. Sullivan*, 500 U.S. 173, 189-190, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991).

The remainder of the majority's congressional intent argument flows from its holding that permitting the eviction of ignorant tenants is "unreasonable" and "absurd." This holding, however, is directly contrary to HUD's interpretation of the statute. In such a circumstance, this court should defer to HUD's judgment. It is HUD, after all, that has experience and expertise in

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[1] Indeed, the doctrine of constitutional doubt, on which the majority relies, is only applicable when a statute is ambiguous.

the management of public housing. It is HUD, and not this court, that can best determine what is reasonable in the context of the public housing drug crisis.

If the majority believes HUD's construction of the statute is unconstitutional, it should say so. This court must step in when other branches of government exceed their constitutional authority. However, when this court rewrites legislative enactments and ignores the considered judgment of executive agencies—based on nothing more than the majority's understanding of what is "reasonable" or "absurd"—it is this court that has overstepped its constitutional limits.

DISCUSSION

I. The Language, Legislative History, and Statutory Context of 42 U.S.C. § 1437d(*l*)(6) All Show that The Eviction Provision Applies to Ignorant Tenants.

A. *The Plain Language of the Statute Authorizes the Eviction of Ignorant Tenants Under 42 U.S.C. § 1437(d)(l)(6)*

"Where there is no ambiguity in the words, there is no room for construction." *United States v. Gonzales*, 520 U.S. 1, 8, 117 S. Ct. 1032, 137 L.Ed.2d 132 (1997) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96, 5 L.Ed. 37 (1820)). In the present case, the statute authorizes eviction when a "public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control" engages in "any drug related criminal activity." The majority reads into this statute the requirement that the tenant must be able to "realistically exercise

control" over a household member or guest before eviction proceedings may begin. We do not believe the statute includes such a requirement. Rather, the obvious reading of the statute is to the contrary.

Under § 1437d(*l*)(6) there are four categories of individuals whose drug related criminal activity on or near public housing property will result in the tenant's eviction. First, the tenant is responsible for his or her own drug use. Second, criminal drug activity by the tenant's household members is cause for termination.[2] Third, the tenant's guests may not engage in criminal drug activity.[3] Fourth, criminal drug activity by other persons under the tenant's control is also cause for eviction.

The structure of the statute suggests that tenants, household members, and guests are *per se* under the tenant's control and, therefore, the drug related criminal activity of anyone in one of these categories is cause for eviction. The tenant exercises "control" over these individuals when he or she permits them to reside in or visit the premises. No additional level of "control" is necessary. Congress's use of the disjunctive connector "or" followed by the phrase "other person" shows it intended a fourth category of "other persons" who did not fall into the three enumerated categories, but whose drug activity could nevertheless result in eviction.

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[2] HUD defines "members of the household" as those individuals who are listed as such by name on the lease. 24 C.F.R. § 966.4(a)(2).

[3] HUD defines a "guest" as "a person in the leased unit with the consent of a household member." 24 C.F.R. § 966.4(d)(1)

The majority's reading of the statute requires that the drug user fall into two of the categories—a drug user must be both a household member/guest *and* under the tenant's control. *See Maj. Op.* at 1119-20. But, the statute does not say this. The majority's reading renders the enumerated categories (tenants, household members, guests) superfluous. "We read [the statute] with the assumption that Congress intended each of its terms to have meaning. 'Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting. . . .'" *Bailey v. United States*, 516 U.S. 137, 145, 116 S. Ct. 501, 133 L.Ed.2d 472 (1995) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 140-141, 114 S. Ct. 655, 126 L.Ed.2d 615 (1994)).

The majority justifies its tortured reading of the statute on the grounds that enforcement of the plain language of § 1437d(*l*)(6) would lead to absurd results. Specifically, both the district court and the majority note that the statute contains neither temporal nor geographic limitations on the drug related criminal activity. Therefore, a tenant could be evicted if that tenant's guest used drugs "five years earlier on the other side of the country." The district court reasoned that the possibility of any absurd result (even one not presented by the actual controversy) rendered the statutory language ambiguous.

This approach is untenable. It would permit the judiciary to nullify any legislative act amenable to a single absurd hypothetical construction. This approach is inconsistent with the traditional role of a court to adjudicate the specific controversy before it and to avoid speculative and general pronouncements. The Supreme Court has repeatedly rejected judicial review

of hypothetical applications of statutory language. *FCC v. Pacifica*, 438 U.S. 726, 743, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978) ("We will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, [citation omitted] but will deal with those problems if and when they arise."); *Lindsey v. Normet*, 405 U.S. 56, 65, 92 S. Ct. 862, 31 L.Ed.2d 36 (1972) ("[P]ossible infirmity in other situations does not render [a statute] invalid on its face."); *Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America v. Wisconsin Employment Relations Board*, 315 U.S. 740, 746, 62 S. Ct. 820, 86 L.Ed. 1154 (1942) (court will not "assume in advance that a State will so construe its law as to" make it unenforceable). The issue before the court is not whether Congress legislated a temporal nexus between the guest's drug-related criminal activity and the eviction.[4] This court must limit its review to the controversy actually presented.

The Supreme Court, in *Atlantic Mut. Ins. Co. v. Comm'r of Internal Revenue*, 523 U.S. 382, 118 S. Ct. 1413, 140 L.Ed.2d 542 (1998), was asked to determine the meaning of the term "reserve strengthening" as used in the 1986 Tax Reform Act. Petitioner contended that the agency interpretation of the term was unreasonable because "in theory, it produces absurd results." *Atlantic Mut. Ins. Co.*, 523 U.S. at 389, 118 S. Ct. 1413. In support of this position, petitioner presented to the court a hypothetical example where application of the agency definition would result in manifest error. The

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[4] Were that the issue, we might be required to analyze this case under the second prong of the *Chevron* doctrine (i.e. determine if HUD's interpretation of this provision is reasonable).

Court refused to find the agency interpretation unreasonable. *Id.* at 390, 118 S. Ct. 1413. It held that, despite the possibility of future error, the agency interpretation of the statute should control.

In this case, the plain meaning of the statute is not absurd. In fact, as we discuss below, *see infra*, the eviction of ignorant tenants whose guests engage in drug-related criminal activity is supported by a reasonable rationale based on sound public policy. It is our obligation to read the statute as it was written even while "acknowledg[ing] the reality that the reach of a statute often exceeds the precise evil to be eliminated." *Brogan v. United States*, 522 U.S. 398, 403, 118 S. Ct. 805, 139 L.Ed.2d 830 (1998).

We assume the legislative purpose is expressed by the ordinary meaning of the words used. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S. Ct. 1534, 71 L.Ed.2d 748 (1982). The statute says "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." The majority asserts that in writing this language, Congress *meant* to say that drug related criminal activity engaged in by any person under the tenant's control shall be cause for termination of tenancy. There is simply no support in the language for this interpretation.

B. *Related Statutory Provisions and Legislative History Reveal Congressional Intent to Omit an Innocent Tenant Defense*

1. *Related Statutory Provisions*

Two related statutory provisions further reinforce the conclusion that § 1437d(*l*)(6) authorizes the eviction of public housing tenants who are ignorant of their guests' drug-related criminal behavior.

a. *42 U.S.C. § 1437d(c)(4)(A)(iii)*[5]

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[5] 42 U.S.C. § 1437d(c)

(4) the public housing agency shall comply with such procedures and requirements as the Secretary may prescribe to assure that sound management practices will be followed in the operation of the project, including requirements pertaining to—

(A) . . . the establishment of tenant selection criteria which—

(i) . . . give preference to families that occupy substandard housing (including families that are homeless or living in a shelter for homeless families), are paying more than 50 percent of family income for rent, or are involuntarily displaced . . . at the time they are seeking assistance under this chapter.

. . .

(iii) *prohibit any individual or family evicted from housing assisted under the chapter by reason of drug related criminal activity from having a preference under any provision of this subparagraph for 3 years* . . . except that the agency may waive the application of this clause under standards established by the Secretary (which shall include *waiver for any member of a family of an individual prohibited from tenancy under this clause who the agency determines clearly did not participate in and had no knowledge of such criminal activity* . . .). (emphasis added)

42 U.S.C. § 1437d(c)(4)(A), as it stood through 1996, mandated that PHAs fulfill three independent duties. First, under subsection (i), PHAs were required to allocate available housing units based on congressionally determined "preferences." Preferences were given, for example, to the homeless, to those paying more than 50% of their income in rent, and to those who had recently been displaced from housing.

Second, under § 1437d(c)(4)(A)(iii), an individual or family otherwise eligible for preferential placement in available housing was disqualified from receiving a preference for a period of three years if evicted from public housing because of drug-related criminal activity.

Finally, the final clause of § 1437d(c)(4)(A)(iii) specifically required that local PHAs waive the three year disqualification period for those individuals who "clearly did not participate in and had no knowledge of such criminal activity." These provisions 1) established preferential tenant selection criteria; 2) disqualified those evicted because of drug activity from the established preferences for a period of three years; and 3) exempted from disqualification those evicted who "clearly did not participate in and had no knowledge of the criminal activity."

Thus, the statutory mandate imposed by § 1437d(c)(4)(A) required PHAs to differentiate two classes of tenants evicted from public housing for drug-related criminal activity. The first class, to repeat, consisted of those who participated in or had knowledge of the criminal activity. These individuals were disqualified from preferential placement in available public housing units for a period of three years. The second

class consisted of those individuals evicted for drug-related criminal activity who did not participate in or have knowledge of that activity. These individuals were eligible to receive preferential treatment if they satisfied one of the other criteria listed in § 1437d(c)(4)(A)(i).

The distinction, between evicted tenants who "participated in" or "had knowledge of" drug-related criminal activity and those who did not have such knowledge, makes sense only if an ignorant public housing tenant could be evicted for the drug-related criminal activity of their household members or guests. Were that not so, there would have been no need for Congress to write a statute specifically waiving the applicability of the three-year prohibition period to the ignorant tenant.

b. *21 U.S.C. § 881(a)(7) ("Forfeiture Statute")*

This statute, 21 U.S.C. § 881(a)(7), also supports a plain language interpretation of § 1437d(*l*)(6). It is a civil forfeiture statute that makes leasehold interests subject to forfeiture when used to commit drug-related crimes.[6] 21 U.S.C. § 881(a)(7) was amended *con-*

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[6] 21 U.S.C. § 881(a)(7) provides:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the

currently with the passage of § 1437d(*l*)(6) as part of the Anti-Drug Abuse Act of 1988. Section 881(a)(7) *specifically includes a knowledge requirement.* Under it, no property otherwise subject to forfeiture may be seized if the owner establishes that the property was used in drug-related criminal activity "without the knowledge or consent of that owner."

The canons of statutory interpretation provide: "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L.Ed.2d 17 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Congress clearly perceived that *forfeitures* of leaseholds under 21 U.S.C. § 881(a)(7) were to function differently from *evictions* under 42 U.S.C. § 1437d(*l*)(6) and legislated different regimes to govern the two. Specifically, Congress recognized that the forfeiture statute permitted the government to seize property without providing any procedural protections to the owner of the property. 134 Cong. Rec. E1965-02 (1988) (use of seizure rather than eviction "cut[s] through the usual drawn-out process of first notifying the drug dealers that they would be evicted and then battling them in courts, sometimes for years, before they could be removed.") Owing to the lack of procedural protections, Congress recognized that additional substan-

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extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

tive protections are needed to prevent the use of this weapon against undeserving parties.

Similarly, in a 1989 emergency supplemental appropriations measure, Congress directed the Secretary of HUD to issue waivers of certain administrative grievance procedures "as long as evictions of a household member involved in drug-related criminal activity shall not affect the right of any other household member who is not involved in such activity to continue tenancy." *Dire Emergency Supplemental Appropriations and Transfers*, Pub. L. No. 101-45, § 404, 103 Stat. 97 (1989). This measure, like the forfeiture statute, permits the taking of property without any pre-deprivation procedural protection. Congress, therefore, included a substantive protection for ignorant tenants. A similar substantive right, however, was not provided to tenants who received the full procedural protections offered by HUD and local PHAs.

Thus, the "innocent" owner exception in both 21 U.S.C. § 881(a)(7) and Pub. L. No. 101-45, § 404 reflected distinctly different congressional judgments about the proper tradeoff between procedural and substantive protections. Owners were provided substantive protections not available to tenants. Congress concluded that the forfeiture statute should not be applied to owners who did not know of or consent to the illegal use of their property. However, Congress did not afford innocent tenants the same protection. Congress determined that local PHAs should have greater discretion to evict than federal agents have to seize property of innocent owners used in drug-related criminal activity.

2. *Legislative History*

Having discounted the plain language of the statute, the majority next examines the scant legislative history of § 1437d(*l*)(6). This endeavor is both unnecessary, *see supra*, and unhelpful. Official legislative history consists almost entirely of a single statement in a 1990 Senate Report. The report reads in pertinent part:

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

S. Rep. No. 101-316, at 179 (1990). Both parties make much of this statement. The government emphasizes the committee's deference to the PHA's "humane judgment," while the tenants rely on the suggestion that eviction of ignorant tenants "would not be the appropriate course."

The committee report should be read in a manner consistent with the language of the remainder of the statute and the purposes of the Act. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997) ("the specific context in which that language is used and the broader context of the statute as a whole" relevant to determining meaning of statutory language). It is a declared purpose of the United States Housing Act "to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." 42 U.S.C. § 1437

(Declaration of Policy).[7] Evidence exists that § 1437d(*l*)(6) was intended to further this purpose. During floor debate on the measure, one member of the House of Representatives commended the eviction provision as an "additional tool to enhance HUD's and the Nation's public housing managers' ability to deal with the problem of drugs in public housing." 134 Cong. Rec. 33,148 (1988) (statement of Rep. Wylie).

Read in the context of an unambiguous legislative declaration of policy, and its consistent implementation throughout the Act, the Senate committee report supports the proposition that Congress intended to provide local housing authorities with *wide* discretion to evict tenants connected with drug-related criminal behavior. By permitting the eviction of ignorant as well as knowledgeable tenants, Congress deferred to the judgment of local officials who would possess a more extensive understanding of the individualized circumstances. Any suggestion by the committee as to when eviction would or would not be appropriate is properly seen as just that—a suggestion. The language is precatory and the "humane judgment" of the local agencies should control.

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[7] This policy judgment is reflected throughout the Act. Local authorities, for example, have the responsibility to determine the public housing needs in their community. 42 U.S.C. § 1437c(e). *See also*, 42 U.S.C. § 1437d(c)(4)(A).

3. *Congress Failed to Amend § 1437d(l)(6) to Include an Innocent Owner Defense.*

Congressional treatment of § 1437d(*l*)(6) since its initial passage in 1988 makes clear that Congress meant what it said. Long before this litigation began, concerns about the eviction provision's applicability to ignorant tenants were expressed. In a 1989 congressional hearing, for example, the associate director of the American Civil Liberties Union (ACLU) argued that "PHAs should be restrained from imposing the sanction of eviction unless they can prove that a tenant had knowledge and actual control over the actions of a household member or third party." *Drugs in Federally Assisted Housing: Hearings on S.566 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, S. Doc. No. 101-234, at 90-91 (1989). In that hearing, the ACLU brought to the attention of the committee several instances where ignorant tenants were subjected to eviction proceedings. S. Doc. No. 101-234, at 86-87; Davidson, *Public Housing Aides Push to Evict Drug Users, Sometimes Violating the Rights of other Tenants*, Wall St. J., Jul. 6, 1989 at A12. Congress did not respond favorably. Subsequent to this hearing, Congress amended the eviction provision, but failed to include an innocent owner exception. *National Affordable Housing Act*, Pub. L. 101-625, § 504, 104 Stat. 4079 (1990) (substituting provisions relating to criminal activity threatening health, safety or peaceful enjoyment of other tenants for provisions relating to criminal activity generally).

Likewise, as part of the notice and comment procedure necessary for implementing its regulations, HUD

received substantial criticism of the applicability of § 1437d(l)(6) to ignorant tenants. "Comment by legal aid and by tenant organizations . . . alleges that the tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, . . . or if the tenant has done everything "reasonable" to control the criminal activity." 56 Fed. Reg. at 51,566 (1991). HUD nevertheless interpreted § 1437d(*l*)(6) to grant discretion to PHAs to evict ignorant tenants. 56 Fed. Reg. at 51,567.

Subsequent to these comments and subsequent to implementation of the HUD regulations, Congress once more amended the eviction statute—and again failed to include an innocent owner exemption.[8] These inactions of Congress are highly significant. "As a matter of statutory construction, we 'presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.'" *United States v. Hunter*, 101 F.3d 82, 85 (9th Cir. 1996) (quoting *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185, 108 S. Ct. 1704, 100 L.Ed.2d 158 (1988)). In *Hunter*, this court presumed Congress was aware of judicial decisions interpreting a criminal statute when it amended that statute many years after its initial passage. "Accordingly, the only reasonable interpretation of Congress omission of language . . . is that Congress intended [the judicial interpretation to control]." *Hunter*, 101 F.3d at 85.

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[8] In fact, in the 1996 amendment to § 1437d(*l*)(6), Congress expanded the provision such that an ignorant tenant could be evicted for drug-related criminal activity that took place "on or off" public housing premises, rather than simply "on or near" the premises as the legislation had previously read. Pub. L. No. 104-120, § 9(a)(2), 110 Stat. 836 (1996).

Likewise, in this instance, Congress was aware that the administrative agency charged with implementing the eviction provision construed it to permit eviction of ignorant tenants. This interpretation had been challenged on both policy and constitutional grounds before Congress and in HUD's notice and comment procedures. Congress itself has shown its concern for ignorant tenants by protecting them with specific language in *other* legislative enactments. *See supra.*[9] Congress, however, did not provide an exemption for ignorant tenants when it amended § 1437d(*l*)(6) in 1996. This court does not have the power to amend the statute. Congress clearly intended HUD's interpretation of the eviction statute to prevail.

II. Section 1437d(*l*)(6), Properly Interpreted, Does Not Conflict with 42 U.S.C. § 1437d(*l*)(1) Prohibiting Public Housing Leases that Contain Unreasonable Terms and Conditions.

Section 1437d(*l*)(6) is part of a comprehensive program of legislative initiatives aimed at the public housing drug crisis. *See Anti-Drug Abuse Act of 1988*, Pub. L. No. 100-690, §§ 5101-5105 (1988); *Dire Emergency Supplemental Appropriations and Transfers*, Pub. L. No. 101-45, § 404 (1989); 42 U.S.C. § 1437d(c)(4)(A) (1990). The district court held that one aspect of the legislative response was "unreasonable"

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[9] 21 U.S.C. § 881(a)(7) protects owners from forfeiture when they did not know nor consent to the illegal use of their property. 42 U.S.C. § 1437d(c)(4)(a)(iii) protected ignorant public housing tenants from disqualification from future placement. Pub. L. No. 101-45, § 404 provided ignorant tenants with additional procedural protections not available to those tenants who were aware of the drug-related criminal activity of their guests.

because it was "on its face . . . irrational." The majority opinion echoes this holding. Both the district court and the majority misconceive the rationale behind the law and ignore a considered policy judgment on the part of Congress. Section 1437d(*l*)(6) *permits*, but does not mandate, eviction for all tenants whose household members or guests engage in drug-related criminal activity. It grants discretion to PHAs to make this determination on a case-by-case basis. This was a reasonable decision on the part of Congress.

Local PHAs, it must be remembered, operate "with tax funds provided from federal as well as from state sources. The State . . . has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses." *Wyman v. James*, 400 U.S. 309, 318-19, 91 S. Ct. 381, 27 L.Ed.2d 408 (1971). The district court properly defined a reasonable lease term:

> The lease term must be rationally related to a legitimate housing purpose. In applying this term, the crucible of reasonableness will be defined by the particular problems and concern confronting the local housing authority. Lease provisions which are arbitrary and capricious, or excessively overbroad or under-inclusive, will be invalidated.

citing *Richmond Tenants Org., Inc. v. Richmond Redevelopment and Hous. Auth.*, 751 F. Supp. 1204, 1205-06 (E.D. Va. 1990).

Congress confronted two interrelated problems when it passed § 1437d(*l*)(6) permitting the eviction of ignorant tenants. First, it faced increasing drug related

crime in the nation's public housing. Ample testimony before Congress demonstrated that drug use had rendered many public housing complexes unsafe and, in several instances, unlivable. 42 U.S.C. § 11901(3) ("drug dealers are increasingly imposing a reign of terror on public and other federally assisted low income housing tenants.")[10] Second, Congress was confronted with increasing and understandable reluctance on the part of public housing tenants to cooperate with efforts of local PHAs to address the drug problem. "Our inability to get pushers out of the buildings rapidly enough has caused tenants to think the Housing Authority has been working against them rather than with them." 134 Cong. Rec. E1965-02 (June 14, 1988). Housing authorities were increasingly seen as "paper tigers" unable or unwilling to take decisive action against drug use in public housing. 134 Cong. Rec. at E1965-02.

The ignorant tenant eviction provision rationally addresses both of these concerns. The power to evict an unknowing tenant provides the PHA with a credible deterrent against criminal activity. To require proof of knowledge on the part of the tenant of the criminal activity of a guest is impractical. Proper authorities would seldom, if ever, discover the tenant seated with

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[10] One resident of public housing described living conditions in the following terms.

"At night, when people are trying to rest, hallways are being used [for smoking crack], stairwells are being slept in, elevators are being mutilated with people using them for personal bathrooms. . . . There is crack being sold openly."

Just Saying No is not Enough: HUD's Inadequate Response to the Drug Crisis in Public Housing, H.R. Rep. No. 100-702, at 4 (1988).

the drug using guest or while the latter engaged in other drug-related criminal acts. Absent this rare factual situation, the housing authority would be forced to rely on evidence consisting of hearsay, gossip and rumor. Moreover, the lengthy public housing eviction procedure permits a culpable tenant to intimidate or threaten potential witnesses. "When suspected drug dealers were notified that eviction proceedings against them had been started, they sought to punish tenants who might have identified them." 134 Cong. Rec. E1965-02. These tactics against housing tenants have furthered the public housing drug epidemic.

In this case, for example, members of plaintiffs' household engaged in drug-related criminal activity outside the tenant's apartment.[11] Since the tenant was not with the drug-user at the time of detection, evidence that the tenant knew of the drug related criminal activity must come from either the tenant, the drug user, or other residents. Only the latter, if available, would be a reliable source of such information. For obvious reasons, PHAs will rarely secure statements from either the drug user or the tenant.

Based on substantial and credible evidence, Congress concluded that other residents were equally unlikely to present the necessary testimony. "Tenants are frightened. They are scared for themselves and their children. They are afraid to report drug incidents to the PHA management and to the police because usually nothing is done by either agency." *The Drug Problem and Public Housing: Hearings Before the House Select*

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[11] Mr. Walker's guest was found in possession of drugs inside of Walker's apartment.

Comm. on Narcotics Abuse and Control, H.R. Rep. No. 101-1019, at 66 (1989) (summary of testimony of Nancy Brown, Chairperson, State of Connecticut Task Force on Public Housing and Drugs); "The fear of retaliation makes it almost impossible to provide normal police protection." H.R. Rep. No. 101-1019, at 69 (summary of testimony of Vincent Lane, Chairman, Chicago Housing Authority).

By granting PHAs the authority to evict tenants without proving the tenant knew of the drug-related criminal activity, Congress passed reasonable legislation designed to address these well-documented obstacles to effective law enforcement. Residents of public housing are empowered by § 1437d(*l*)(6) to monitor and report drug activity without fearing the possibility of retaliation. This will reduce the need for residents to confront drug dealers in court in order to prove the tenant knew of the drug-related criminal activity and secure their eviction. "Once tenants realize that they can rejoin the fight against drug dealers without fear of retaliation, we will have achieved an important victory." 134 Cong. Rec. E1965-02 (article written by Emmanuel P. Popolizio, Chairman, New York City Housing Authority).

Much of the public housing drug eradication program was aimed at obtaining the cooperation and support of public housing tenants. HUD Secretary Jack Kemp, for example, recommended that PHAs establish anonymous 'drug tip' hotlines "so that residents can anonymously report drug activity in their area." H.R. Rep. No. 101-1019, at 64 (testimony of Jack Kemp, Secretary of HUD). Like the anonymous hotline, § 1437d(*l*)(6) was a reasonable response to the legitimate housing

objective of reestablishing tenant control of drug-ridden public housing units. Mayor James P. Moran Jr. of Alexandria, Virginia argued before a Senate subcommittee that the eviction provision was critical to "giv-[ing] a sense of control back to the tenant leadership within the communities." *Drugs in Federally Assisted Housing: Hearings on S. 566 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, S. Doc. No. 101-234, at 27 (1989).

Furthermore, a provision permitting the eviction of unknowing tenants because of the wrongdoing of their household members or guests is a common and enforceable provision in leases between private owners of property and their tenants. *Shepard v. Dye*, 137 Wash. 180, 242 P. 381 (1926) (eviction upheld even though lessee neither knew of nor consented to the gambling activity engaged in by sublessee); *Minnesota Public Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (1999) ("A lease is a form of contract. Unambiguous contract language must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh." [citations omitted]); 56 Fed. Reg. at 51,566 (Oct. 11, 1991) (The "ability of PHA or other landlord to enforce covenants relating to acts of unit residents . . . is a normal and ordinary incident of tenancy.") The regular use and enforcement of these provisions among private parties attests to their reasonableness.

The fact that one of the parties to this particular lease was a government agency does not render an

otherwise prudent provision unreasonable.[12] Frequently, governments impose liability on individuals without requiring that the individual had actual knowledge of the wrongdoing. *See* Conn. Gen. Stat. § 52-572 (imposing tort liability on "ignorant" parents for actions of their children); 42 U.S.C. § 9607 (property owner liable for environmental cleanup when waste was legally deposited by a previous owner without current owner's knowledge or consent).

Thus, it must be acknowledged that the congressional imposition of liability without fault on individuals is not, per se, unreasonable. Such liability, furthermore, is frequently negotiated between private landlords and tenants. Congress, by enacting § 1437d(*l*)(6), determined that the safety and security of public housing tenants justified the potential eviction of ignorant tenants. *Housing Lease and Grievance Procedures*, 56 Fed. Reg. at 51,567 ("Congress has determined that drug crime and criminal threats by public housing household members are a special danger to the security and general benefit of public housing residents warranting special mention in the law.") This determination was entirely reasonable.

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[12] Whether the lease provision is "reasonable" within the meaning of § 1437d(*l*)(1) is a separate question from whether the constitution permits the government to include it in every public housing lease. We deal with the constitutional questions below.

III. The Constitution Does Not Prohibit the Eviction of Ignorant Tenants from Federally Subsidized Housing.

Section 1437d(*l*)(6) is not proscribed by the Constitution. In evicting Walker, Lee and Hill[13] for the actions of their household members and guests, the Oakland Housing Authority was exercising its right to terminate tenancy because of a violation of the lease. As noted above, this is not an unusual provision.[14] The fact that the landlord in this case was a government agency should not transform an otherwise proper eviction into a constitutional question.

A. *Constitutional Doubt*

The majority does not reach the constitutional issues raised by the tenants in this case. Rather, applying the doctrine of "constitutional doubt," the majority instead imposes its own construction on the statute. The majority, however, has misapplied this doctrine. "The 'constitutional doubt' doctrine does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious." *Almendarez-Torres v. United States*, 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998). The doctrine is to be applied only when 1) the statute is "genuinely susceptible to two constructions" and 2) there is a "serious likelihood" that the statute will be held uncon-

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[13] In an exercise of its "humane judgment," the OHA has decided not to seek the eviction of plaintiff Rucker.

[14] "Were we dealing with the same lease provision in a lease between private parties we could have affirmed the [eviction] in one short paragraph relying solely on the lease provision." *Hous. Auth. of New Orleans v. Green*, 657 So.2d 552, 555 (La. App. 1995).

stitutional. *Id.* at 238, 118 S. Ct. 1219; *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S. Ct. 658, 60 L.Ed. 1061 (1916) (Holmes, J.) (statute must be construed so as to avoid "grave doubts" as to its constitutionality). We have already articulated the reasons we do not believe the statute is susceptible to multiple interpretations. We would also hold that the statute, as written by Congress and implemented by HUD, is constitutional.

B. *Due Process*

Government plays many parts. When it acts in one of its many proprietary roles (employer, purchaser, or landlord, to name a few), it must be able to enforce reasonable and germane conditions. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587-588, 118 S. Ct. 2168, 141 L.Ed.2d 500 (1998) ("[T]he Government may allocate competitive funding according to criteria that would be impermissible were direct regulation . . . or a criminal penalty at stake.") A government employer, for example, may impose restraints on employee speech that would violate the First Amendment if imposed on an ordinary citizen. *Pickering v. Bd. of Educ. Of Township High School Dist. 205, Will County, Illinois*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968) (applying intermediate rather than strict scrutiny to dismissal of public school teacher for exercising First Amendment rights). Likewise, when the government acts to subsidize a purchase of certain services but not others, there may be no constitutional implications. *Maher v. Roe*, 432 U.S. 464, 475, 97 S. Ct. 2376, 53 L.Ed.2d 484 (1977) (subsidizing childbirth, but not abortion "does not interfere" with a fundamental right, but merely "encourages" childbirth).

When managing a public housing complex, the government's role is not unlike that of an employer or purchaser. The constitution does not require the government to provide decent and safe housing to its citizens. *Lindsey*, 405 U.S. at 74, 92 S. Ct. 862 (there is no "constitutional guarantee of access to dwellings of a particular quality.") The rights provided in the Housing Act of 1937 and its subsequent amendments arise from congressional notions of sound policy not constitutional necessity. In furtherance of such policy, Congress should be accorded considerable flexibility in fixing the necessary rules with which beneficiaries must comply.

In this case, Congress has limited the right to reside in public housing to those individuals who agree to accept responsibility for the drug-related criminal activity of their household members and guests. It has granted to PHAs the authority to withdraw this benefit from those who will not or cannot prevent their guests from engaging in such activity. So long as this condition is relevant to the government's underlying interest as a landlord, it is constitutionally permissible. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987) (if governmental purpose is sufficient to justify outright refusal of benefit, it is sufficient to justify conditions on that benefit). *See also Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L.Ed.2d 491 (1970).

In *Lyng v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of America, UAW* ("*UAW*"), 485 U.S. 360, 108 S. Ct. 1184, 99 L.Ed.2d 380 (1988), the Supreme Court upheld the denial of food stamps to an entire household because a single member of that household was on strike. Like the tenants in the

present case, the appellees in *UAW* argued that the statute unconstitutionally burdened the right to association because it "impermissibly directs the onus of the striker's actions against the rest of the family." *UAW*, 485 U.S. at 363, 108 S. Ct. 1184.

The denial of food stamps undoubtedly imposed a hardship on "innocent" family members. So long as non-striking family members continued to share their household with a striker, they were prohibited from enjoying a government benefit to which they were otherwise entitled. Although the Court recognized that associational rights were implicated by the food stamp statute, it held that the "withdrawal of a government benefit" did not pose a significant danger to the exercise of that constitutional right. *Id.* at 367 n.5, 108 S. Ct. 1184.

In *UAW*, the Court also acknowledged that the means used by Congress in addressing this objective were imperfect because the "statute works at least some discrimination against strikers and their households." *Id.* at 371-72, 108 S. Ct. 1184 ("in terms of the scope and extent of their ineligibility for food stamps, § 109 is harder on strikers than voluntary quitters.") Nevertheless, the Court deferred to the congressional view of "what constitutes wise economic or social policy" and upheld the statute. *Id.* at 372, 108 S. Ct. 1184 (quoting *Dandridge v. Williams*, 397 U.S. at 486, 90 S. Ct. 1153.)

Similarly, in *Lipscomb v. Simmons*, 962 F.2d 1374 (9th Cir. 1992) (en banc), this court upheld a state's foster care funding scheme against a constitutional challenge. The court noted that it must defer to the legislatively determined allocation of scarce child care

subsidies. "Because Oregon has no affirmative obligation to fund plaintiffs' exercise of a right to maintain family relationships free from governmental interference, we decline to apply heightened scrutiny." *Lipscomb*, 962 F.2d at 1379. Because the allocation of welfare payments is a legislative function, a court may not strike down such schemes on the basis of "seemingly arbitrary consequences in some individual cases." *Id.* at 1382 (quoting *Califano v. Jobst*, 434 U.S. 47, 53, 98 S. Ct. 95, 54 L.Ed.2d 228 (1977)). Rather, when confronted with a facial challenge to a statutory determination of eligibility, the *Lipscomb* court limited its inquiry to "only whether there is a rational basis for the program viewed as a whole." *Id.* Consequently, despite the potential for "unfavorable results in the cases of individual plaintiff[s]," the statutory scheme was constitutional because it was rationally related to the government's interest in "maximizing the amount of money available" for the program as a whole. *Id.* at 1380, 1381.

In this case, the government has interrelated interests. Both reclaiming public housing from an epidemic of drug related crime and violence and empowering public housing residents to assist in this effort are indisputably legitimate objectives. The failure to distinguish between the knowing and unknowing tenant need survive only minimal scrutiny. In determining who may reside in federally subsidized housing, Congress must draw distinctions "in order to make allocations from a finite pool of resources." *UAW*, 485 U.S. at 373, 108 S. Ct. 1184. *See also Wyman v. James*, 400 U.S. 309, 91 S. Ct. 381, 27 L.Ed.2d 408 (1971) (holding that the government may condition welfare payments

on a recipients agreement to permit warrantless homevisits by agency personnel).

Section 1437d(*l*)(6) facilitates the eviction of truly culpable tenants, creates incentives for all tenants to report drug-related criminal activity, and provides a credible deterrent against criminal activity. Because the eviction provision is discretionary, the provision also motivates tenants to accept remedial actions short of eviction. *HUD, One Strike and Your Out Policy in Public Housing*, 8 (March 1996).[15] The statute is, therefore, rationally related to Congress' legitimate objectives. No more is required. *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 491, 97 S. Ct. 1898, 52 L.Ed.2d 513 (1977) (statute that "provides only rough justice . . . is [nevertheless] far from irrational.")

The majority opinion ignores the discretionary nature of the benefit at issue and instead focuses on the property rights of those who currently reside in federally subsidized housing. The majority finds "grave doubt" as to the constitutionality of 1437d(*l*)(6) because the statute authorizes eviction "without any relationship to individual wrongdoing." The majority's analysis flounders, however, because the Supreme Court has repeatedly held that "the innocence of the owner of property subject to forfeiture has almost uniformly

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[15] Even though the "one strike" policy was implemented eight years after the passage of § 1437d(*l*)(6) it still may offer a legitimate rationale for the passage of the statute. *Atonio v. Wards Cove Packing Co.*, 10 F.3d 1485, 1494 (9th Cir. 1993) ("A rational basis need not be one that actually motivated Congress. It is enough that plausible reasons for Congress' action exist." [citations omitted])

been rejected as a defense." *Bennis v. Michigan*, 516 U.S. 442, 449, 116 S. Ct. 994, 134 L.Ed.2d 68 (1996) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683, 94 S. Ct. 2080, 40 L.Ed.2d 452 (1974)); *See also*, *J.W. Goldsmith, Jr. Grant Co. v. United States*, 254 U.S. 505, 41 S. Ct. 189, 65 L.Ed. 376 (1921); *Van Oster v. Kansas*, 272 U.S. 465, 47 S. Ct. 133, 71 L.Ed. 354 (1926).

The majority argues that this unbroken line of authority is factually distinguishable from the present case. Specifically, the majority hangs its constitutional argument on the fact that two tenants face eviction for drug related criminal activity that took place on public housing premises but not in the tenant's apartment. This is a thin reed on which to hang "grave doubts" as to the constitutionality of § 1437d(*l*)(6). The "cases authorizing [forfeiture of the property of innocent owners] are 'too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.'" *Bennis*, 516 U.S. at 452, 116 S. Ct. 994. (quoting *Goldsmith-Grant*, 254 U.S. at 511, 41 S. Ct. 189). The facts of this case present no reason to create a new constitutional rule. Those who engaged in drug-related criminal activity were on the premises with the consent of the tenants. No additional nexus among the tenant, property, and the drug use is constitutionally required.

C. *Excessive Fines*

The tenants' contention that the lease provision permitting eviction of ignorant tenants is an excessive fine proscribed by the Eighth Amendment is without

merit.[16] No court has held that government enforcement of a valid lease provision constitutes an excessive fine. To do so would be to "federalize the substantive law of landlord-tenant relations." *Lindsey*, 405 U.S. at 68, 92 S. Ct. 862. Excessive fines analysis is limited to those circumstances where "the government . . . extracts payments, whether in cash or in kind, 'as punishment for some offense.'" *United States v. Bajakajian*, 524 U.S. 321, 328, 118 S. Ct. 2028, 141 L.Ed.2d 314 (1998) (quoting *Austin v. United States*, 509 U.S. 602, 609-610, 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993)).

The eviction of a tenant for violation of a valid lease provision is distinguishable from a cash payment to the government. In *Kim v. United States*, 121 F.3d 1269 (9th Cir. 1997), a grocery store owner sought review of his permanent disqualification from participation in the federal food stamp program. The basis for the disqualification was that an employee—without plaintiff's knowledge or consent—illegally exchanged cash for food stamps. *Id.* at 1271. The owner insisted that permanent disqualification constituted an excessive fine in that there was no evidence of individual wrongdoing on his part. The court rejected this argument. "Permanent disqualification . . . is not an excessive fine prohibited by the Eighth Amendment because it is not cash or in kind payment directly imposed by, and payable to, the government." *Id.* at 1276.

Eviction from publicly subsidized housing is comparable. Eviction is the return of a possessory right to its

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[16] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const., amend. 8.

original owner, the government. The government then transfers the possessory right to another citizen under the same conditions as it was held by the original tenant. The purpose behind the excessive fines clause—to limit the government's power to enrich itself by punishing its citizens—is absent in the case of eviction from public housing. *See Browning-Ferris Industries of Vt. Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264-268, 109 S. Ct. 2909, 106 L.Ed.2d 219 (1989). Evictions cannot properly be characterized as "cash or in kind payments" and should not be subject to excessive fines analysis.

Moreover, evictions in these circumstances are not punitive. They are remedial. A civil sanction is punitive when it serves "either retributive or deterrent purposes." *Austin*, 509 U.S. at 610, 113 S. Ct. 2801. Eviction serves the classic purpose of a contractual remedy—it returns the parties to "as good a position as that occupied . . . before the contract was made." *Corbin on Contracts* § 996. The remedy of eviction alone is not punitive. Therefore, the Eighth Amendment prohibition of excessive fines is inapplicable in this case.

IV. The ADA Does Not Prevent the Eviction of Mr. Walker.

In addition to the statutory and constitutional claims raised by all tenants, one tenant, Mr. Walker, raises an additional claim under the Americans with Disabilities Act ("ADA") 42 U.S.C. § 12101, *et seq.* Walker argues that the ADA prevents his eviction despite the fact that his caretaker and other guests engaged in drug-related criminal activity in his apartment and on the premises on at least three occasions.

The district court enjoined the unlawful detainer proceedings against Walker. The court held that the eviction provision of the lease placed Walker "at more risk for forfeiture of his tenancy than other tenants who do not require in home care." While non-disabled tenants can comply with the lease provision simply by "choosing not to have any household members or guests," Mr. Walker—because of his disability—does not have that choice. He requires an in home caretaker. Consequently, the district court concluded that the ADA may require the OHA to provide some accommodation exempting Walker from responsibility for the drug-related criminal activity of his caretaker.

The district court erred, however, because the OHA did not seek to evict Mr. Walker based solely on the drug-related criminal activity of his caretaker. Whether there is a "reasonable accommodation" that would permit Mr. Walker to engage the services of a drug-using caretaker without risk of eviction was not presented by the facts of this case. Consequently, although the district court applied the appropriate standard to a request for preliminary relief, it "misapprehend[ed] the law with respect to the underlying issues in litigation." *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (1982). This constitutes reversible legal error.

The unlawful detainer complaint against Mr. Walker alleged three separate incidents of drug-related criminal activity in Mr. Walker's apartment and/or by his guests. Only one of those incidents involved Mr. Walker's caretaker. On August 7, 1997, the OHA contends that it stopped and searched a guest of Mr. Walker on OHA premises. The guest was in possession

of crack cocaine. Mr. Walker does not claim that this guest was employed as his caretaker. After arresting Walker's guest, officers went to Walker's unit where Walker consented to a search. There officers met Eleanor Randle. Ms. Randle had a cocaine pipe pinned inside her jacket. She was arrested for possession of narcotics paraphernalia. Mr. Walker alleges that Ms. Randle is his caretaker. Officers also found a cardboard box containing crack cocaine pipes and "suspected rock cocaine chips." OHA did not ascertain the ownership of these drugs found in Walker's apartment. Mr. Walker denied knowledge of all criminal drug activity that took place in his apartment.

On August 12, 1997 officers found a cocaine pipe inside a bag of hair rollers inside Walker's apartment. Walker's alleged caretaker, Eleanor Randle, was not present at the time, although another guest was.

On October 11, 1997 officers again found a cocaine pipe in Walker's apartment. Walker's guest at the time was cited for possession of narcotics paraphernalia. Walker does not allege that this guest was his careaker.

Under § 1437d(*l*)(6) any one of these incidents, if proven, is sufficient justification for Mr. Walker's eviction. Under the district court's reasoning, Mr. Walker requires a "reasonable accommodation" only because he cannot, like a non-disabled resident, choose not to have guests. He must permit a caretaker to enter his apartment. This reasoning cannot sustain an accommodation that exempts Walker from eviction for the drug-related criminal activity of non-caretaker guests. There are two alleged incidents of such conduct.

On appeal of a preliminary injunction, we do not accept the housing authority's allegations as true. The accuracy of these allegations should be determined through the normal adjudication of the pending unlawful detainer action. We only believe that even assuming Mr. Walker is disabled and assuming that a reasonable accommodation could be found that would prevent the eviction of Mr. Walker because of the drug-related criminal activity of his caretaker, Mr. Walker could still be evicted based on the drug possession of his other guests who were not his caretakers. Mr. Walker's ADA claim should therefore be rejected.[17]

CONCLUSION

It is obvious that when Congress authorized the eviction of innocent tenants, the potential for individual unfairness existed. Congress granted to local PHA's the power to evict and trusted that the "humane judgment" of PHA officials and the procedural protections of the Act would prevent the abuse of this power. Congress struck a balance. It did so in the face of a drug crisis and the ineffectiveness of traditional law enforcement. It bestowed upon the PHAs the authority challenged in this case. That authority does not violate the Constitution. This legislation should be interpreted as it was written.

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[17] We also note that the OHA did accommodate Mr. Walker by not attempting to evict him until after the third drug-related criminal offense committed by one of his guests. OHA is not required by the ADA to provide Walker with an accommodation that is not reasonable. *Memmer v. Marin County Courts*, 169 F.3d 630, 633-634 (9th Cir. 1999). A request to waive applicability of § 1437d*(l)*(6) to a tenant's caretaker is not reasonable.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-16322, 98-16542

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE; BARBARA HILL, PLAINTIFFS-APPELLEES

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY, DEFENDANTS

AND

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT-APPELLANT

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE; BARBARA HILL, PLAINTIFFS-APPELLEES

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY, DEFENDANTS-APPELLANTS

AND

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT

Filed Aug. 18, 2000

Before: HUG, Chief Judge.

ORDER

Upon the vote of a majority of nonrecused regular active judges of this court,[1] it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

[1] Judges Wardlaw and Fisher were recused.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-16322, 98-16542

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE; BARBARA HILL, PLAINTIFFS-APPELLEES

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY, DEFENDANTS

AND

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT-APPELLANT

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE; BARBARA HILL, PLAINTIFFS-APPELLEES

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY, DEFENDANTS-APPELLANTS

AND

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT

Filed Feb. 14, 2000

Before: SNEED, O'SCANNLAIN, and W. FLETCHER, Circuit Judges.

Opinion by Judge O'SCANNLAIN; Dissent by Judge W. FLETCHER.

O'SCANNLAIN, Circuit Judge:

We must decide whether a local public housing agency may evict a tenant on the basis of drug-related criminal activity engaged in by a household member on or near the premises regardless of whether the tenant was personally aware of such activity.

I

Established in 1937, the first public housing program was intended to assist states and localities in providing affordable housing to low-income families. *See* Pub. L. No. 75-412, 50 Stat. 888 (1937). The Housing Act of 1937 vested responsibility for managing, maintaining, and operating public housing developments in local public housing agencies ("PHAs") rather than in the federal government. *See* 42 U.S.C. § 1437. Over 3,192 local PHAs currently oversee the 1,326,224 public housing units that are home to over 3 million people. *See* U.S. Dep't of Hous. & Urban Dev., *"One Strike and You're Out": Policy in Public Housing* 3 (1996); Office of Policy Dev. & Research, U.S. Dep't of Hous. & Urban Dev., *A Picture of Subsidized Households, Volume 11, United States: Large Projects & Agencies* 14, 72 (1996); Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60 U. Chi. L.Rev. 497, 499-522 (1993). In exchange for monetary assistance for the construction and operation of low-income housing, local PHAs agree to abide by federal regulations promulgated by the Department of Housing

and Urban Development ("HUD") under the United States Housing Act. *See generally* 42 U.S.C. § 1437 *et seq.*; *see also Hodge v. Department of Hous. & Urban Dev.*, 862 F.2d 859, 860-61 (11th Cir. 1989) (discussing the relationship between HUD and PHAs); *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 20 (1st Cir. 1991); *Thomas v. Chicago Hous. Auth.*, 919 F. Supp. 1159, 1163 (N.D. Ill. 1996).

Intended as a sanctuary for low-income families, *see* Office of Policy Dev. & Research, *supra*, at 72 (reporting that public housing residents have an average total household income of $8,500 per year), many public housing projects—primarily the larger ones located in urban areas—have been transformed into havens of crime, with severe and tragic social and physical distress resulting for residents and for the surrounding neighborhoods generally. *See* U.S. Dep't of Hous. & Urban Dev., *supra*, at 3; Schill, *supra*, at 500-01. A White House report states: "Public housing has become a staging area for the distribution of drugs and the violence related to drug trafficking and consumption." Office of Nat'l Drug Control Policy, Executive Office of the President, *National Drug Control Strategy* 64 (1991); *see also* D. Saffran, "Public Housing Safety Versus Tenants' Rights," 6 *The Responsive Community* 34-35 (Fall 1996) (discussing the problem of drugs and crime in public housing).

In 1988, Congress took decisive steps towards improving living conditions in public housing, attacking the problem of drugs and crimes, in particular, in the Anti-Drug Abuse Act of 1988. Beginning with the premise that "the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal

drugs," and that "public and other federally assisted low-income housing in many areas suffers from rampant drug-related crime," 42 U.S.C. § 11901(1)-(2),[1] Congress sought to create an effective and efficient mechanism for ridding public housing of those who sell or use drugs. More specifically, Congress required that:

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

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[1] Congress made three other related findings:

> The Congress finds that—
>
> . . . . .
>
> (3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants;
>
> (4) the increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures; (5) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reductions in Federal aid to cities. . . .
>
> *Id.* § 11901(3)-(5).

42 U.S.C. § 1437d(*l*)(5) (1989).[2] In 1990 and in 1996, Congress altered the language of the statute, but left its effect unchanged in relevant part:

> Each public housing agency shall utilize leases which-
>
> . . . . .
>
> (5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy. . . .

Id. § 1437d(*l*)(5) (1991). Congress amended this statute further in 1996, replacing the phrase "on or near such premises" with "on or off such premises." *Id.* (1997).[3]

In 1991, HUD issued regulations implementing section 1437d(*l*)(5). One such regulation, 24 C.F.R. § 966.4(f)(12)(i)(B), provides:

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[2] The term "drug-related criminal activity" was defined as "the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 802 of Title 21)." *Id.* § 1437d(*l*).

[3] In 1998, section 1437d(*l*)(5) was redesignated as subsection (*l*) (6), but the language was left unchanged. We will continue to refer to this provision as (*l*)(5).

§ 966.4 Lease requirements.

> A lease shall be entered into between the PHA and each tenant of a dwelling unit which shall contain the provisions described hereinafter.
>
> . . . . .
>
> (f) *Tenant's obligations*. The lease shall provide that the tenant shall be obligated:
>
> . . . . .
>
> (12)(i) To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> . . . . .
>
> (B) Any drug-related criminal activity on or near such premises.
>
> Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. § 966.4(f)(12)(i)(B). Another regulation similarly provides:

> Either of the following types of criminal activity by the tenant, any member of the household, a guest, or another person under the tenant's control, shall be cause for termination of tenancy:
>
> . . . . .
>
> (B) Any drug-related criminal activity on or near such premises.

Id. § 966.4(*l*)(2)(ii)(B).

In formulating these regulations, HUD considered comment by legal aid and by tenant organizations that tenants "should not be required to 'assure' the non-criminal conduct of household members, or should have only a limited responsibility to prevent criminal behavior by members of the household" and "that the tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, if the tenant did not participate, give consent or approve the criminal activity, or if the tenant did everything 'reasonable' to control the criminal activity." 56 Fed. Reg. 51560, 51566 (Oct. 11, 1991). Ultimately, however, HUD decided not to accept these suggestions, instead choosing to grant local PHAs the discretion to evict a tenant whose household members or guests use or sell drugs on or near the public housing premises regardless of whether the tenant knew or should have known of such activity. *See id.* at 51566-67. HUD stated quite explicitly: "The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit." *Id.* at 51567.

HUD offered several reasons for its decision. First, the "contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and is a valuable tool for management of the housing. The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit." *Id.* at 51567. Second, HUD feared that allowing a tenant to escape eviction by claiming a lack of knowledge "would allow a variety

of excuses for a tenant's failure to prevent criminal activity by household members" and "would thereby undercut the tenant's motivation to prevent criminal activity by household members." *Id.* Third, PHAs may often have difficulty proving in court that the leaseholder had knowledge or control over the offending person, thus making it time-consuming, costly, and otherwise cumbersome to evict households causing drug-related problems in public housing. *See id.* Finally, HUD noted that "a family which does not or cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project." *Id.*

Importantly to this case, although HUD unequivocally *authorizes* eviction whenever a household member or guest sells or uses drugs on or near the apartment premises, it does not *mandate* or even encourage across-the-board evictions whenever there is cause to evict. Instead, its regulations recognize the importance of giving each case individualized consideration in light of the equities of the tenant's particular situation and examining whether some remedial measure other than eviction of the tenant may be appropriate even when there is clearly cause to evict the tenant. *See infra* Part IV-C; 24 C.F.R. § 966.4(*l*)(5)(i).

II

Pursuant to section 1437d(*l*)(5) and HUD regulations, the Oakland Housing Authority ("OHA") includes in its leases a provision obligating tenants to "assure that tenant, any member of the household, or another person under the tenant's control, shall not engage in . . . [a]ny drug-related criminal activity on or near the

premises (e.g., manufacture, sale, distribution, use, possession of illegal drugs or drug paraphernalia, etc.)." It is this lease provision—which OHA interprets as authorizing the eviction of a tenant on the basis of a household member's or guest's drug-related criminal activity regardless of whether the tenant knew or reasonably should have known of such activity—that has given rise to the present controversy.

OHA commenced separate unlawful detainer actions in the Alameda County Municipal Court against Pearlie Rucker, Willie Lee, Barbara Hill, and Herman Walker (collectively "Tenants") after discovering a household member or guest of each Tenant engaging in drug-related criminal activity on or near the public housing premises. The relevant facts regarding the first three Tenants are quite similar. Rucker's daughter was found in possession of cocaine and drug paraphernalia three blocks from Rucker's apartment. Lee's grandson was caught using marijuana in the housing development's parking lot, as was Hill's grandson. All three Tenants claim to have been unaware of their household member's drug-related criminal activity.

The fourth Tenant, Walker, presents a somewhat different case. Walker is partially paralyzed and incapable of living independently. OHA served him with a notice of termination of tenancy after the third instance in which drugs or drug paraphernalia were found in his apartment. On the first occasion, officers found cocaine chips and cocaine pipes in Walker's bedroom as well as a cocaine pipe in the jacket of Eleanor Randle, Walker's care-giver.[4] Randle was arrested for possession of nar-

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[4] Walker consented to this search, as well as to the subsequent searches.

cotics paraphernalia, and OHA issued Walker a lease violation notice. OHA officers and the housing manager conducted a follow-up check of Walker's apartment five days later and found another rock cocaine pipe, at which point Walker was issued another lease violation notice. Two months later, drug paraphernalia was found in Walker's apartment yet again. In addition to issuing a third lease violation notice, OHA served Walker with a notice of termination and initiated an unlawful detainer action after he refused to vacate. It was not until after Walker received his third lease violation notice that he fired his drug-using care-giver.

In response to OHA's unlawful detainer actions, Tenants filed the present action in the United States District Court for the District of Northern California against HUD, OHA, and OHA's director Harold Davis in December 1997. Tenants argued that 42 U.S.C. § 1437d(*l*)(5) does not authorize the eviction of what they termed an "innocent tenant"—namely, a tenant who did not know of and had no reason to know of a household member's or guest's drug dealing or drug use. Tenants argued further that, if it does, the statute is unconstitutional. In addition, Walker alleged that his eviction would violate Title II of the Americans with Disabilities Act ("ADA"). *See* 42 U.S.C. § 12132, *et seq.*[5]

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[5] Rucker also presented an ADA claim, which the district court dismissed because she did not allege a disability. Rucker does not appeal this ruling, so only Walker's ADA claim is before us.

Tenants sought a preliminary injunction against their eviction, and the parties agreed to stay Lee's, Hill's, and Walker's state court proceedings pending the resolution of the present case.[6] "To obtain a preliminary injunction, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor." *Big Country Foods, Inc. v. Board of Educ. of Anchorage School Dist.*, 868 F.2d 1085, 1088 (9th Cir. 1989). The district court concluded that Tenants had established a "fair chance of success" on their claim that HUD's interpretation of section 1437d(*l*)(5) was inconsistent with the statute itself and thus violated the Administrative Procedure Act ("APA"), *see* 5 U.S.C. §§ 701-706. The court determined further that HUD's interpretation raised substantial concerns with respect to Tenants' First Amendment right to freedom of association. Finding that the balance of hardships tipped decisively in Tenants' favor, the district court preliminarily enjoined the eviction of any public housing tenant for "drug-related criminal activity that does not occur within the tenant's apartment unit when the tenant did not know of, or have reason to know of, the drug-related criminal activity."[7] HUD, OHA, and Davis appeal this injunction.

In addition, the district court held that Walker had established a fair chance of success on his ADA claim, reasoning that, because Walker's disability prevents

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[6] The unlawful detainer action against Rucker was dismissed in February 1998. Rucker continues to reside in OHA housing.

[7] In addition, the court specifically enjoined OHA from prosecuting its state court eviction proceedings against Hill, Lee, and Walker.

him from living without a care-giver, he is at greater risk for termination of tenancy than tenants who do not require in-home care. Finding that the balance of hardships weighed in Walker's favor, the court enjoined OHA from evicting Walker on the basis of his care-giver's drug-related criminal activities. OHA and Davis appeal this ruling.

III

Before turning to the merits, a word on the standard of review is in order. We review the district court's grant of preliminary injunctive relief for an abuse of discretion. *See Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1045-46 (9th Cir. 1999). Because a district court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law, however, we review the legal issues underlying a preliminary injunction de novo and may rule on the merits of the controversy if legal issues are dispositive. *See, e.g., id.* at 1046 (citing cases); *Foti v. City of Menlo Park*, 146 F.3d 629, 634-35 (9th Cir. 1998); *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996); *see also Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 757, 106 S. Ct. 2169, 90 L.Ed.2d 779 (1986), *overruled in part on other grounds by Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992); *Planned Parenthood v. Camblos*, 155 F.3d 352, 359-60 (4th Cir. 1998), cert. denied, 525 U.S. 1140, 119 S. Ct. 1031, 143 L.Ed.2d 40 (1999).

IV

The first question before us is whether HUD in its applicable regulations has adopted a permissible interpretation of 42 U.S.C. § 1437d(*l*)(5), or, more precisely, whether HUD's interpretation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The parties agree that we resolve this issue by applying the familiar framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). *Chevron* instructs us to begin our analysis by determining whether "Congress has directly spoken to the precise question at issue." *Id.* at 842-43, 104 S. Ct. 2778. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* If, and only if, the language is silent or ambiguous on the precise question at hand do we proceed to step two, which is to defer to the agency unless its interpretation is arbitrary or capricious. See *id.* at 842-43 & n.9, 104 S. Ct. 2778; *see also Young v. Community Nutrition Inst.*, 476 U.S. 974, 981, 106 S. Ct. 2360, 90 L.Ed.2d 959 (1986) ("This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency]." (internal quotation marks and citation omitted)); *Jang v. Reno*, 113 F.3d 1074, 1076 (9th Cir. 1997).

HUD argues that section 1437d(*l*)(5) and the broader statutory context evince a clear congressional intent authorizing the eviction of any tenant whose household member or guest engages in drug-related criminal activity on or near the public housing premises even if the tenant did not know of such activity. Tenants maintain that the unambiguously expressed intent of Congress is to the contrary. The district court disagreed with both and instead concluded that the public housing lease statute is silent with respect to the issue before us.

In adjudicating among these conflicting views, we look to traditional tools of statutory construction for guidance. *See Chevron*, 467 U.S. at 843 n.9, 104 S. Ct. 2778. More specifically, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997).

A

We begin, as we must, with the express language of the statute. "Where there is no ambiguity in the words, there is no room for construction." *United States v. Gonzales*, 520 U.S. 1, 8, 117 S. Ct. 1032, 137 L.Ed.2d 132 (1997) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96, 5 L.Ed. 37 (1820)). Section 1437d(*l*)(5), as amended, provides that "any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." 42 U.S.C. § 1437d(*l*)(5). The plain statutory language thus makes clear that Congress

intended that there be cause for termination of tenancy when three conditions are met: there is (1) drug-related criminal activity, (2) on or off the public housing premises, (3) engaged in by the tenant, any household member, or any guest or other person under the tenant's control.

That each of Tenants' cases involved *drug-related criminal activity* as defined in section 1437d is not contested; similarly undisputed is the fact that the conduct in question occurred *on or near the public housing premises*. The only real dispute concerns the third prong—whether the activity was 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." *Id.*

Focusing on the statutory term "control," Tenants argue that cause for termination exists only if the tenant could realistically exercise "control" over the drug-dealing or drug-using household member or guest. Where, for example, a teenage son rarely heeds his mother's instructions and is generally uncontrollable, Tenants contend that OHA lacks authority to evict the entire household on the basis of the son's conduct—even if he is selling drugs out of the apartment—because the mother does not have "control" over her son.

Applying basic principles of grammar, we conclude that this construction of the public housing lease statute is untenable. The clause at issue—"public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control"—includes three separate categories of people: (1) the tenant, (2) any household member, and (3) any guest or other person under the tenant's control. The

phrase "under the tenant's control" has no relationship whatsoever to either of the first two categories—tenant or household member.

With respect to the third category, implicit in the phrase "any guest or other person under the tenant's control" is that guests are *per se* under the tenant's control. "Control" is a legal concept; tenants have control over their guests. Just as a tenant cannot escape liability for damage to a neighbor's apartment caused by a drunken guest by arguing that the guest was drunk and thus out of control, a tenant cannot avoid the import of section 1437d(*l*)(5) by arguing that, because his guests are stronger than he, he could not physically prevent them from selling drugs in his apartment. *See*, *e.g.*, *Housing Auth. v. Green*, 657 So.2d 552, 554 (La. Ct. App. 1995) ("[W]here . . . the lease refers to 'a guest or other person under the tenant's control' it means that the tenant 'controls' who has access to the premises. The lease makes the tenant responsible for the drug activities of those persons given access to the apartment by the tenant. 'Control' as used in the lease in no way implies that the tenant knew or should have known of the drug activity. . . .").

Because the conduct for which OHA is attempting to evict Tenants unquestionably was committed by a household member or a guest, we conclude that the third, and final, prong of section 1437d(*l*)(5) is satisfied as well. Accordingly, the plain statutory language authorizes the termination of Tenants' tenancy. More generally, the express statutory language—which, to repeat, provides that "[(1)] any drug-related criminal activity [(2)] on or off such premises, [(3)] 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" is cause for eviction—evinces a clear congressional intent to authorize termination of tenancy regardless of whether the tenant was aware that his household member or guest was selling, manufacturing, distributing, or using drugs. Thus, the statute makes clear that even purportedly "innocent tenants" may be evicted.[8]

B

Notwithstanding the fact that the statute makes *any* drug-related criminal activity by a household member or guest cause for termination of tenancy, the district court concluded that section 1437d(*l*)(5) is silent as to whether Congress intended to authorize the eviction of "innocent tenants" because it fails to address explicitly the situation of "innocent tenants." In the district court's view, a statute contains a clearly expressed congressional intent on an issue only if it *explicitly* addresses that issue. The district court appears to have placed great emphasis on the fact that Congress could have provided, for example, that "any drug-related criminal activity by a household member or guest

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[8] Only a handful of other courts have addressed this precise issue, and they have reached conflicting conclusions. *Compare City of South San Francisco Hous. Auth. v. Guillory*, 41 Cal. App. 4th Supp. 13, 18-19 (Cal. App. Dep't Super. Ct. 1995) (concluding that "drug-related activity by any member of a tenant's household is cause *per se* for termination of the lease where . . . the housing authority receives federal funds"), *with Charlotte Hous. Auth. v. Patterson*, 120 N.C. App. 552, 464 S.E.2d 68, 72 (1995) ("With no mention of personal fault, the statute and lease at issue in this case provide that criminal activity by a member of a tenant's household is cause for ending a tenancy. However, as noted above, the legislative history reveals a clearly expressed legislative intent that eviction is appropriate only if the tenant is personally at fault for a breach of the lease. . . .").

including that of which the tenant is unaware " or "any drug-related criminal activity by a household member or guest *regardless of the tenant's knowledge thereof*" is cause for eviction.

The district court's failure to appreciate the implications of Congress's use of the term "any" when it made "*any* drug-related criminal activity [by a tenant, household member, or guest] . . . cause for termination" does violence to the plain language rule. 42 U.S.C. § 1437d(*l*)(5) (emphasis added). A statute covering "any drug-related criminal activity" has the exact scope as one covering "any drug-related criminal activity *including that of which the tenant is unaware*" or "any drug-related criminal activity *regardless of the tenant's knowledge thereof*." These italicized hypothetical clauses are mere surplusage—they add nothing of substance. Just as section 1437d(*l*)(5) covers drug-related criminal activity on weekends even though the statute does not explicitly refer to "any drug-related criminal activity *including that which occurs on weekends*," the statute covers conduct that the tenant does not know of even though it does not explicitly refer to "any drug-related criminal activity *including that of which the tenant is unaware*." The hypothetical "including" clauses merely enumerate subsets of cases already covered by the statute as actually written.

We have no reason to think that Congress meant anything other than "any" when it used the term "any." "Read naturally, the word 'any' has an expansive meaning, that is, 'one of some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 4, 117 S. Ct. 1032, 137 L.Ed.2d 132 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). We suppose that Congress could have included an

additional sentence stating "Yes, we really do mean '*any*.'" Even without such a statement, binding precedent instructs that, just as "no" means "no," "any" really does mean "any."[9]

Tenants marshal policy arguments why we should restrict the scope of "any." Even if were we to agree, we cannot avoid the fact that Tenants' interpretation contradicts the express statutory language. We can limit section 1437d(l) (5)'s scope as Tenants request only by reading into the statute words that Congress did not see fit to include. This we refuse to do. Indeed, we may not so alter the statute's effect. As judges, we are interpreters, not authors, of the law.

C

Notwithstanding the expansiveness of the statutory language, Tenants strenuously attack the propriety of evicting "innocent tenants" and claim that a monumental injustice will result from the wholesale eviction of any and all tenants who have a household member or guest who uses drugs. What Tenants either fail to recognize—or attempt to obscure—is that the question

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[9] The dissent argues that a broad reading of the term "any drug-related criminal activity" is untenable because it leads to "absurd result [s]." Dissenting Op. at 651. This argument might be more persuasive if not for the fact that other language within section 1437d(*l*)(5) places limits upon the otherwise expansive scope of "any drug-related criminal activity."

Although the dissent is correct to point out that the statute does not explicitly state what illegal drug-related activity constitutes cause for eviction, the relevance of such observation to this case is unclear. Any metaphysical ambiguity in the statutory language has no bearing on the task at hand: determining whether HUD's regulations constitute a permissible interpretation of section 1437d(*l*)(5).

of whether there is *cause* to evict is wholly separate from whether the PHA will actually evict. Section 1437d(*l*)(5) merely requires that local PHAs make drug-related criminal activity "cause for termination of tenancy." 42 U.S.C. § 1437d(*l*)(5). Where there is cause for termination, a PHA *may* evict, but it is *not required* to evict in all instances in which there is cause to do so.

The public housing lease statute, although it authorizes eviction in a broad range of cases, is notably silent as to when termination of tenancy is required. By structuring the statute in this way, Congress implicitly conveyed discretion to HUD and to PHAs to make termination decisions in individual cases. This discretion is consistent with the Housing Act's long-established statement that "[i]t is the policy of the United States . . . to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public." *Id.* § 1437(a)(1)(C); *see also Newbury Local Sch. Dist. Bd. of Educ. v. Geauga County Metro. Hous. Auth.*, 732 F.2d 505, 509 (6th Cir. 1984) (noting that the Housing Act is "structured to place the 'maximum amount of responsibility' of administration on the local public housing agencies"); *Gholston v. Housing Auth.*, 818 F.2d 776, 781 (11th Cir. 1987) ("[T]he Housing Act gives local housing authorities discretion to . . . manage the day-to-day affairs of the subsidized housing projects.").[10]

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[10] Congress recently reaffirmed its desire to leave discretion in the hands of PHAs when it enacted 42 U.S.C. § 13662. Like section 1437d(*l*)(5), section 13662 requires PHAs to include a lease provision that allows the PHA to terminate the tenancy of any household with a member whose drug use threatens the health or

Leaving individual eviction decisions to HUD and local PHAs makes much sense. Eviction is a drastic remedy, and individualized consideration of the equities in a particular tenant's case is appropriate. Difficult cases will inevitably arise. It would be exceedingly difficult to enumerate *a priori* which tenants should be evicted, and Congress did not attempt to do so. With respect to "innocent tenants," for example, some tenants are more "innocent" than others. Should a tenant whose son deals drugs at the public housing development unbeknownst to the tenant be evicted? What about a tenant whose grandson uses drugs in the parking lot unbeknownst to her?

These are difficult policy questions. We see arguments on both sides, but how we judges might weigh competing policy considerations is simply irrelevant. Congress entrusted these questions to HUD and to individual PHAs, not to the federal judiciary. Congress charged HUD, the agency generally responsible for regulating and overseeing public housing, with formulating general principles to guide eviction determinations; it assigned local PHAs the responsibility for deciding how to proceed in individual cases.

HUD has provided some general guidance for dealing with individual cases, but largely leaves eviction decisions to PHAs. Of particular relevance to the case at hand is 24 C.F.R. § 966.4(*l*)(5)(i):

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safety of others, but explicitly makes clear that a PHA may consider other factors in deciding whether actually to evict on this basis. *See* 42 U.S.C. § 13662.

> (5) *Eviction for criminal activity*-(i) *PHA discretion to consider circumstances.* In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit. A PHA may require a family member who has engaged in the illegal use of drugs to present evidence of successful completion of a treatment program as a condition to being allowed to reside in the unit.

24 C.F.R. § 966.4(*l*)(5)(i). Quite sensibly, HUD does *not* advocate the eviction of all "innocent tenants," but instead counsels PHAs to handle cases on an individualized basis and to consider alternative remedies. This policy is further embodied in a HUD publication entitled "*One Strike and You're Out": Policy in Public Housing*:

> The lease language mandated by federal law imposes on tenants an affirmative obligation to assure that neither they nor any member of their household or guest or other person under their control will engage in prohibited drug-related or other criminal activities. PHAs can generally enforce this obligation by terminating leases and evicting entire households when a household member or guest commits a crime in violation of lease provisions. A promise is a promise. Where the tenant has pro-

> mised in a lease to ensure a crime-free household, the tenant is responsible for the household, regardless of whether he or she was personally engaged in the prohibited drug or other criminal activity.

PHAs retain the flexibility to handle these cases on an individualized basis, and they should exercise reasonable discretion in light of all of the relevant circumstances. In particular, when a tenant has taken all reasonable steps to prevent the criminal activity, eviction may not always be warranted or proper. To ensure both humane results and success in court, PHAs should undertake a case-by-case analysis before proceeding with eviction. If they do seek eviction, PHAs should be prepared to persuade a court that eviction is justified. In some instances, eviction of an entire household may not be appropriate as a means of protecting the health, safety and welfare of the public housing community. In others, alternative approaches may be appropriate, such as allowing a household to remain in occupancy on the condition that the offending member move and agree not to return. This latter approach does not always lead to effective long-term removal of the offending individual. PHAs, therefore, should consider the likelihood of success in each particular case and their ability under local law to take action if an agreement is violated. In some cases, trespass laws and restraining orders may also help to keep former residents away from remaining household members. Office of Policy Dev. & Research, U.S. Dep't of Hous. & Urb. Dev., *supra*, at 8.[11]

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[11] Under section 1437d(*l*)(5) and the applicable HUD regulations, eviction of a household is not the only possible response to cases involving drug-related criminal activity; PHAs have the discretion to utilize a wide range of alternative remedies in such

Leaving PHAs with discretion is sensible in light of the fact that local PHAs, being most closely associated with the tenants themselves and having the most knowledge about the local situation, are best situated to give individualized consideration to each case. *See* 42 U.S.C. § 1437(a)(1)(C); *see also Gholston*, 818 F.2d at 781 ("The administration of local housing authorities is a difficult task. . . . Consequently, the scope of judicial review of a local housing authority's policies and practices is limited, and we will not view its actions as a violation of the Housing Act or HUD regulations unless it abused its discretion." (citations omitted)).

D

Our conclusion that section 1437d(*l*)(5) authorizes termination of tenancy regardless of the tenant's knowledge of the drug-related criminal activity is reinforced by two related statutory provisions.

1

First, 42 U.S.C. § 1437d(c)(4)(A)(iii), which was in effect through 1996, prohibited any individual or family who was evicted because of a household member's or guest's drug-related criminal activity from receiving a statutory preference in applying for public housing, but exempted from this three-year prohibition period any member of a family of an individual who "the agency determines clearly did not participate in and had no knowledge of" the activity that formed the basis of the

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cases. In challenging HUD's interpretation of the statute, the dissent places significant emphasis upon the existence of such remedies. *See* Dissenting Op. at 652. That alternative remedies are available does not mean, of course, that they are the *only* options open to PHAs under the statute.

original eviction. 42 U.S.C. § 1437d(c)(4)(A)(iii).[12] If an "innocent tenant" could not have been evicted in the first place, there would have been no need for Congress to write a statute specifically waiving the three-year prohibition period for them. Adhering to the well-established "principle that statutes should not be construed to make surplusage of any provision," *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996), we must interpret section 1437d(*l*)(5) as authorizing the eviction of "innocent tenants." This is especially so in light of the fact that Congress enacted the three-year prohibition period of

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[12] The statute reads in relevant part:

> (4) [T]he public housing agency shall comply with such procedures and requirements as the Secretary may prescribe to assure that sound management practices will be followed in the operation of the project, including requirements pertaining to—
>
> (A) . . . the establishment of tenant selection criteria which—
>
> (iii) prohibit *any individual or family evicted from housing assisted under the chapter by reason of drug-related criminal activity* from having a preference under any provision of this subparagraph for 3 years unless the evicted tenant successfully completes a rehabilitation program approved by the agency, except that the agency may waive the application of this clause under standards established by the Secretary (which shall include waiver for *any member of a family of an individual prohibited from tenancy under this clause who the agency determines clearly did not participate in and had no knowledge of such criminal activity or when circumstances leading to eviction no longer exist*). *Id.* (1996) (emphases added). Congress significantly revised this statute in 1996 and again in 1998. *See id.* (1999); *id.* (1997).

section 1437d(c)(4)(A)(iii) in 1990, the same year it made amendments to section 1437d(*l*)(5).[13]

2

The second statute that lends credence to our interpretation of the public housing lease statute is a civil forfeiture statute which, *inter alia*, makes leasehold interests subject to forfeiture when used to commit drug-related criminal activities. *See* 21 U.S.C. § 881(a)(7).[14] In sharp contrast to section 1437d(*l*)(5),

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[13] With respect, the dissent's reading of section 1437d(c)(4)(A)(iii) does not make sense. The dissent essentially argues that the statutory waiver applies to applicants for public housing regardless of whether such applicants had ever been evicted from such housing. What the dissent overlooks is that only an "individual or family *evicted* from [public] housing by reason of drug-related criminal activity" would ever *need* a waiver, because only such evicted former tenants would be subject to the three-year prohibition period in the first place. 42 U.S.C. § 1437d(c)(4)(A)(iii) (emphasis added). Thus the waiver would be utterly irrelevant to someone who had never lived in nor been evicted from public housing. As a matter of simple logic, one must be a *tenant* of public housing before one can be *evicted* from public housing for drug-related activity. In other words, the scope of the *waiver* of the prohibition period cannot be any broader than the scope of the prohibition itself.

[14] Section 881(a)(7) provides:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> > (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of

this civil forfeiture statute includes an explicit exception for "innocent tenants": "no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted *without the knowledge or consent of the owner*." *Id.* (emphasis added). This civil forfeiture provision makes abundantly clear that Congress knows how to legislate an "innocent tenants" exception. The absence of similar language in section 1437d(*l*)(5) indicates that Congress did not intend to create such an exception with respect to public housing evictions.[15]

Tenants interpret section 881(a)(7) quite differently. They argue, for the first time in supplemental briefing filed after oral argument, that Congress understood the "innocent tenant" exception of section 881(a)(7) to be a constitutionally mandated requirement such that it must have wanted to incorporate the same exception into the public housing lease statute. We find this reasoning unpersuasive. That there may be a constitutional bar to *forfeiture* of property when the property owner is uninvolved and unaware of the wrongful

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any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner. *Id.*

[15] The dissent argues that "Congress must have meant [section 1437d(*l*)(5) and amended section 881(a)(7)]—passed as part of the same chapter of the same Act—to be interpreted consistently." Dissenting Op. at 654. But the dissent's recommended course of action—giving these two provisions the *same* meaning, despite their clearly *different* language—is surely no recipe for consistent interpretation. *Cf.* Dissenting Op. at 657 ("The fact that Congress chose to use different language in similar situations tends to show it intended a different meaning.").

activity that formed the cause for forfeiture, *see Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S. Ct. 2080, 40 L.Ed.2d 452 (1974), does not mean that there is a similar bar in the distinct context of *eviction* proceedings.

The statute governing civil forfeitures differs in many respects from the public housing lease statute. First, forfeiture under section 881(a)(7) involves the transfer of private property to the federal government,[16] which raises concerns of misdirected incentives. *See Bennis v. Michigan*, 516 U.S. 442, 456, 116 S. Ct. 994, 134 L.Ed.2d 68 (1996) (Thomas, J., concurring) (noting that if abused, "forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners"); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 81-82, 114 S. Ct. 492, 126 L.Ed.2d 490 (1993) (Thomas, J., concurring in part and dissenting in part); Michele M. Jochner, *Illinois Bar Journal*, 87 Ill. B.J. 78, 79 (1999) ("[T]he relative ease with which the government can seize and forfeit property, when measured against the disproportionately punitive nature of some forfeitures, has caused concern that the considerable revenue added by the forfeited assets to the government's coffers may spur overzealous prosecution." (footnote omitted)). The concerns raised by allowing the federal government to fill its coffers through seizures of property for minor offenses, *see United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 2032, 141 L.Ed.2d 314 (1998) (government seized $357,144 in cash that Bajakajian attempted

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[16] Forfeiture proceedings involve suits by the federal government against the property. *See, e.g., United States v. 1 Parcel of Real Property, Lot 4, Block 5 of Eaton Acres*, 904 F.2d 487, 490 (9th Cir. 1990).

to leave the country with without complying with federal reporting requirements); *Calero-Toledo*, 416 U.S. at 668 n.4, 693, 94 S. Ct. 2080 ($20,000 yacht forfeited based upon the discovery of one marijuana cigarette), simply do not arise under section 1437d(*l*)(5), since PHAs do not reap a financial windfall when they evict tenants.

Second, to seize property under the forfeiture provision, the federal government need only show *probable cause* that the property was used for prohibited purposes, with the burden then shifting to the leaseholder to establish, by a preponderance of the evidence, lack of knowledge or consent. *See United States v. 1 Parcel of Real Property, Lot 4, Block 5 of Eaton Acres*, 904 F.2d 487, 490 (9th Cir. 1990). Probable cause is, of course, a lower standard of proof than the preponderance of evidence test typically required in civil proceedings. *See United States v. All Right, Title & Interest in Real Property & Bldg. Known as 303 West 116th Street, New York, New York*, 901 F.2d 288, 291 (2d Cir. 1990); *United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1281 (9th Cir. 1983). Third, summary seizure procedures are available to the federal government in forfeiture cases. *See* 21 U.S.C. § 881(b). The ability to seize a leaseholder's property using such procedures—without proof that it is more likely than not that the resident engaged in, or permitted, drug-related criminal activity—is an awesome power, which both Congress and the Supreme Court have seen fit to rein in. *See id.* § 881(a)(7) (incorporating "innocent tenant" exception and allowing seizure of property only where the drug offense is punishable by more than one year imprisonment); *Bajakajian*, 118

S. Ct. at 2031 (holding that forfeitures may violate the Eighth Amendment Excessive Fines Clause).[17]

Congress sensibly limited forfeiture to the more reprehensible violations of our drug laws—specifically, drug offenses punishable by more than one year and committed with the knowledge or consent of the leaseholder. *See* 21 U.S.C. § 881(a)(7). Congress did not see the need to limit eviction by PHAs in a similar fashion. Thus, the "innocent tenants" exception contained in section 881(a)(7) applies only to that section, and not to section 1437d(*l*)(5).[18]

E

Tenants rely heavily on another related statutory provision, 42 U.S.C. § 1437d(*l*)(1), which prohibits PHAs from including "unreasonable terms and conditions" in their leases. 42 U.S.C. § 1437d(*l*)(1).[19] Tenants argue that there is no sensible reason for evicting a tenant who does not know of a household member's or

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[17] Although eviction under California law has been denominated a "summary proceeding," Dissenting Op. at 634 n.4, a landlord seeking to evict a tenant still has to prove the existence of a ground for eviction by a preponderance of the evidence. *See Western Land Office, Inc. v. Cervantes*, 175 Cal. App. 3d 724, 220 Cal. Rptr. 784, 797-98 & 797 n. 10 (1985).

[18] At times the dissent appears to argue that the anti-forfeiture provision of section 881(a)(7), in addition to reflecting certain general constitutional concerns, applies *directly* to the termination of tenancies as authorized under section 1437d(*l*)(5). *See* Dissenting Op. at 654-55. If this is in fact the dissent's argument, it is untenable, because the anti-forfeiture provision by its terms governs only forfeitures made "under this paragraph," i.e., forfeitures to the federal government pursuant to section 881(a)(7).

[19] In 1998, this provision was recodified as section 1437d(*l*)(2). As do the parties, we will continue to refer to this subsection as (*l*)(1).

guest's drug-related criminal activity and thus that any lease provision authorizing the eviction of an "innocent tenant" violates section 1437d(*l*)(1)'s reasonableness requirement. We cannot agree.

As an initial matter, Tenants' argument contravenes the canon of statutory interpretation that a general statutory provision typically cannot be used to trump a specific provision. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524-26, 109 S. Ct. 1981, 104 L.Ed.2d 557 (1989); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 444-45, 107 S. Ct. 2494, 96 L.Ed.2d 385 (1987). "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S. Ct. 1989, 48 L.Ed.2d 540 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51, 94 S. Ct. 2474, 41 L.Ed.2d 290 (1974)).

Moreover, crime in public housing—much of which finds its roots in drugs[20]—is a severe problem. Authorizing the eviction of households with drug-dealing and drug-using members is a reasonable step towards achieving Congress's self-declared "duty to provide public housing that is decent, safe, and free from illegal drugs." *Id.* § 11901. By making a household member's or guest's drug-related criminal activity grounds for the tenant's eviction, Congress created a

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[20] That Congress viewed *drug-related* criminal activity as especially pernicious is evidenced by the fact that, with respect to non-drug-related criminal activity, only that which "threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants" is cause for termination of tenancy, whereas this limiting provision does not apply to drug-related criminal activity, which is *per se* cause for eviction. *See* 42 U.S.C. § 1437d(*l*)(5).

strong incentive for public housing tenants to refrain from inviting drug dealers and drug users to their premises and to ensure that household members and guests do not sell, manufacture, distribute, use, or possess controlled substances. *See* 56 Fed. Reg. 51560, 51566-67. Congress was reasonably concerned with preventing tenants from turning a blind eye to the conduct of a household member or guest.

Requiring PHAs to prove that a tenant knew or reasonably should have known of a household member's or guests's drug-related criminal activities in order to evict would hamstring their efforts to rid public housing of the crime and violence with which low-income families must cope on a daily basis. *See id.* Congress could reasonably have decided not to create an "innocent tenant" exception to avoid transforming efficient unlawful detainer actions into fact-based and potentially costly and lengthy legal cases. At present, a PHA can evict a tenant simply by showing that the tenant, a member of his household, or his guest used, sold, distributed, manufactured, or possessed a controlled substance on or near the public housing premises. Such proof is relatively easy to obtain, since a PHA can offer arrest or conviction records to prove the drug-related criminal activity, leaving little room for factual disputes. Significant delays would ensue if PHAs were required to expend time and effort litigating what the tenant actually knew or what he should have known. These are inherently factual issues which will often boil down to credibility determinations, the resolution of which will almost always require an actual trial.[21]

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[21] This would be so even if the knowledge factor were incorporated as an affirmative defense with the burden of proof on the tenant to show his "innocence."

PHAs might well agree that, the faster a drug-dealing or drug-using household is evicted, the better. Moreover, it may often be difficult to secure admissible proof of what the tenant knew or should have known. Even if everyone in the apartment building knows who the drug dealers and drug users are, few, if any, may be willing to testify in court—or even to go on the record—against a tenant with gun-toting, drug-dealing household members or friends. Witness intimidation is a very real problem. *See* 18 U.S.C. § 1512.

The decision not to include an "innocent tenant" exception also reasonably helps to keep down litigation costs. It is all too easy to belittle this problem, but we must remember that PHAs already lack adequate funding. OHA, for example, stated before the district court that it does not even have enough funds to maintain a full-time security staff at each of its housing developments. Forcing OHA and other PHAs to utilize more of their already scarce funds in litigation will deprive them of money needed to fund other important activities such as security. To avoid this result is eminently reasonable. *See Phillips Neighborhood Hous. Trust v. Brown*, 564 N.W.2d 573, 575 (Minn. Ct. App. 1997) ("[T]here is a strong public policy interest in eliminating drugs from subsidized housing. Evicting those who violate the lease by having controlled substances in their apartments is [the landlord's] most effective, if not its only effective, means of eliminating drugs and providing a safe environment.").

The reasonableness of making drug use by household members and guests a ground for eviction from public housing is supported by the fact that leases for privately-owned housing often hold tenants liable for the activities of their household members and guests. The "contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and is a valuable tool for management of the housing." 56 Fed. Reg. 51560, 51566 (Oct. 11, 1991). Thus, a private tenant can often be evicted if his children or other household members cause significant damage to property, harass neighbors, or engage in illegal activities. The fact that private landlords include these provisions in their leases even though they are not obligated by law to do so shows that it is sensible to make a third party's drug activities cause for termination of tenancy.[22]

We note that "no fault" liability is routinely imposed in related contexts. For example, many states hold parents vicariously liable for the intentional torts of their children regardless of whether the parents knew, or should have known, that their children would cause bodily injury or property damage. *See*, *e.g.*, Conn. Gen. Stat. § 52-572; Kan. Stat. Ann. § 38-120; Or. Rev. Stat. § 30.765(1). The rationale underlying making "innocent

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[22] A Minnesota statute provides that: "In every lease or license of residential premises, whether in writing or parol, the lessor or licensor and the lessee or licensee covenant that . . . neither will . . . unlawfully allow controlled substances in those premises or in the common area and curtilage of the premises." Minn. Stat. § 504.181, subd. 1. In Minnesota, a tenant is liable for activities that breach the lease even if the tenant did not participate in or control the conduct. *See Phillips Neighborhood Hous. Trust*, 564 N.W.2d at 575.

parents" liable for their children's actions—to encourage parents to oversee the behavior of their children—is essentially the same as that underlying Congress's decision to impose a "no-fault" eviction policy—to encourage tenants to monitor the conduct of their household members and guests. Just as states reasonably impose liability even on "innocent parents," Congress reasonably may authorize the eviction of "innocent tenants." Such "no fault" liability is not limited to parent-child cases. In the environmental context, a property owner can be held liable for the costs of cleaning up waste on his property even if the waste was legally deposited by a previous property owner. *See* 42 U.S.C. § 9607. Thus, even an "innocent property owner" can be subjected to substantial liability under the Superfund laws.

Any conclusion to the contrary is squarely foreclosed by the recent enactment of 42 U.S.C. § 13662(a)(1), which provides:

> Notwithstanding any other provision of law, *a public housing agency* or an owner of federally assisted housing (as applicable), *shall establish* standards or *lease provisions* for continued assistance or occupancy in federally assisted housing that allow the agency . . . *to terminate the tenancy* or assistance for *any household* with a *member*—(1) who the public housing agency or owner determines is *illegally using a controlled substance* . . . .

42 U.S.C. § 13662(a) (emphases added). Congress, in passing this statute expressly allowing the eviction of any household with a drug-using member, declared its view that it is reasonable to evict a tenant on the basis of another's crimes. Unless we are so bold as to say that a policy decision reflected in legislation enacted

with the votes of 409 Representatives and 96 Senators is not rationally related to a legitimate housing purpose, we must conclude that HUD's interpretation of section 1437d(*l*)(5) is indeed reasonable.[23] Keeping in mind that PHAs have discretion in deciding whether to evict in individual cases, we hold that it is not unreasonable for Congress to obligate all public housing tenants to ensure that their household members and guests refrain from engaging in drug-related criminal activities or other activities that threaten the health or safety of other public housing tenants.[24]

F

Although both parties present arguments based upon the legislative history, we conclude that there is no need to examine it in the present case. Where, as here, the language of the statute is plain and unambiguous, resort to legislative history is unnecessary. *See United States v. Gonzales*, 520 U.S. 1, 6, 117 S. Ct. 1032, 137 L.Ed.2d 132 (1997); *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998) ("[W]here statutory command is straightforward, 'there is no reason to resort to legislative history.'" (citation omitted)), *cert.*

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[23] We realize, as does the dissent, that section 13662 was not in existence when this lawsuit was commenced. Nevertheless, the policy decisions reflected in that provision shed light upon the reasonableness of HUD's interpretation of section 1437d(*l*)(5).

[24] The scattered case law on point generally supports our conclusion. *See Green*, 657 So.2d at 555; *cf. Coleman v. City of Yonkers Mun. Hous. Auth.*, 254 A.D.2d 482, 679 N.Y.S.2d 624, 624-25 (N.Y. App. Div. 1998) (affirming eviction of tenant on the basis of son's actions); *City of South San Francisco Hous. Auth.*, 41 Cal.App. 4th Supp. at 16-20. *But see Richmond Tenants Org. v. Richmond Redevelopment & Hous. Auth.*, 751 F. Supp. 1204, 1206 (E.D. Va. 1990) (concluding that it is unreasonable to evict a tenant for any conduct that occurs off-premises).

denied, 527 U.S. 1022, 119 S. Ct. 2367, 144 L.Ed.2d 771 (U.S. 1999). We have warned that: "Reliance on such history is particularly suspect when it is inconsistent with the ordinary understanding of the words in the statute and an otherwise reasonable agency interpretation." *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1070 (9th Cir. 1998); *see also id.* ("[T]he use of legislative history as a tool for statutory interpretation suffers from a host of infirmities: not only is legislative history 'not passed by both houses of Congress and signed into law by the President,' but it also 'need not be written with the same care, or scrutinized by those skeptical of the statute with the same care, as statutory language.'" (citations omitted)).

In any event, even if we were to resort to it here, the relevant legislative history is ambiguous. Both HUD and Tenants focus on the following statement by the Senate Banking, Housing and Urban Affairs Committee ("Committee"):

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

S. Rep. No. 101-316, at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941. Tenants contend that the Committee's statement that "eviction would not be the appropriate course" indicates that section 1437d(*l*)(5) does not authorize the eviction of tenants with no knowledge of the drug-related criminal activities. HUD, focusing on a different part of the same passage,

emphasizes that the Committee explicitly entrusted individual eviction decisions to the "wise exercise of humane judgment" of the local PHA, reasoning that, had Congress not intended to give PHAs discretion to evict tenants with no knowledge of the drug-related criminal activity, it would not have talked about the exercise of "humane judgment" by PHAs since there would be no "judgment" to exercise. Whether the legislative history bolsters HUD's position or Tenants' is unclear. There are strong arguments on both sides. To the extent that legislative history is ever helpful, it is not of value in the present case.

V

Having concluded that the plain language of 42 U.S.C. § 1437d(*l*)(5), considered both by itself and in light of the broader statutory context, makes any drug-related criminal activity engaged in by a tenant, household member, or guest cause for termination regardless of whether the tenant knew of such activity, we must decide whether this statute is consistent with the United States Constitution. Tenants maintain that the public housing lease provision violates their Fourteenth Amendment right to intimate association as well as the Eighth Amendment prohibition against excessive fines. Before turning to these challenges, we consider whether section 1437d(*l*)(5) violates the First Amendment, since it was under this provision that the district court concluded that the statute, as we have concluded it must be interpreted, would be unconstitutional.

A

According to the district court, the only rational objective served by authorizing the eviction of "innocent tenants" is to discourage household members and guests from using drugs because they know their conduct can lead to the tenant's eviction. In the district court's view, this objective violates the First Amendment guarantee of freedom of association. This conclusion, however, is foreclosed by the Supreme Court's decision in *Lyng v. International Union, UAW*, 485 U.S. 360, 108 S. Ct. 1184, 99 L.Ed.2d 380 (1988).

Lyng involved a freedom of association challenge to a statute providing that no household would become eligible to receive food stamps if any household member were on strike. Although the statute could be seen as an attempt to discourage workers from striking because of the resulting costs that would be imposed upon the entire household, the Supreme Court rejected this argument on the basis that the statute did not "order" individuals not to associate with one another, nor did it "directly and substantially interfere with family living assignments." *Id.* at 364-65, 108 S. Ct. 1184 (quoting *Lyng v. Castillo*, 477 U.S. 635, 638, 106 S. Ct. 2727, 91 L.Ed.2d 527 (1986)). Similarly here, section 1437d(*l*)(5) does not order individuals not to associate with one another, nor does it directly and substantially interfere with family living arrangements. Just as it does not violate the Constitution to deny an entire household food stamps on the basis of one member's decision to participate in a strike, it is not unconstitutional to evict an entire household on account of one member's drug use.

Our conclusion comports with that of the Fifth Circuit, which has held that evicting a tenant on the

basis of his son's drug-related criminal activity does not interfere with constitutionally protected associational rights. *See Chavez v. Housing Auth. of El Paso*, 973 F.2d 1245, 1247-48 (5th Cir. 1992). Similar constitutional challenges have been rejected by other courts as well. *See, e.g.*, *City of South San Francisco Hous. Auth.*, 41 Cal. App. 4th Supp. at 19-20 (rejecting a tenant's substantive due process challenge to eviction based on drugs found in his son's room where there was no evidence that the tenant knew or had reason to know of his son's illegal conduct). Tenants, quite simply, are not being evicted because of their association with drug users. Instead, OHA is terminating their tenancy because of their failure to comply with a lease provision by which they agreed to abide.

B

We turn then to the right to intimate association under the Fourteenth Amendment. Tenants contend that any statute that imposes an "undue burden" upon a constitutionally protected privacy right is subject to strict scrutiny, *see Planned Parenthood v. Casey*, 505 U.S. 833, 874, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992), and that section 1437d(*l*)(5) unjustifiably burdens Tenants' right to intimate association under the Fourteenth Amendment.

Although "the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships," *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 544, 107 S. Ct. 1940, 95 L.Ed.2d 474 (1987), OHA's no-fault eviction policy serves the reasonable objective of deterring drug-related criminal activity. *Casey*, on which Tenants rest their argument, states that "[t]he fact that a law which

serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Casey*, 505 U.S. at 873-84, 112 S. Ct. 2791. The purpose of the public housing lease statute is *not* to burden tenants' intimate association rights, but to promote the weighty governmental interest of providing a safe, drug-free environment for low-income families. Because Tenants have not shown that enforcement of the lease "burdens a fundamental right by 'directly and substantially' interfering with family living arrangements," *Chavez*, 973 F.2d at 1248 (quoting *Lyng*, 477 U.S. at 638, 106 S. Ct. 2727), we conclude that section 1437d(*l*)(5) does not impose an undue burden and thus does not violate tenants' freedom of intimate association.

C

Tenants raise an excessive fines challenge to section 1437d(*l*) (5). The Eighth Amendment's Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Bajakajian*, 118 S. Ct. at 2033 (quoting *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993) (emphasis deleted)).

A punishment is not, however, subject to excessive fines analysis if it is "not cash or in kind payment directly imposed by, and payable, to the government." *Kim v. United States*, 121 F.3d 1269, 1276 (9th Cir. 1997). In rejecting an excessive fines challenge to a punitive damages award, the Supreme Court explained that "the history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines *directly imposed by, and payable*

to, the government." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268, 109 S. Ct. 2909, 106 L.Ed.2d 219 (1989) (emphasis added); *see also id.* at 265, 109 S. Ct. 2909 ("[W]e think it significant that at the time of the drafting and ratification of the Amendment, the word 'fine' was understood to mean a payment *to a sovereign* as *punishment* for some offense." (emphases added)). The Supreme Court has made clear that the Excessive Fines Clause applies only when the government, acting with *punitive* intent, extracts a payment *to itself*. *See Bajakajian*, 118 S. Ct. at 2033 ("Forfeitures—payments in kind—are thus 'fines' [subject to Eighth Amendment scrutiny] if they constitute punishment for an offense."); *Austin*, 509 U.S. at 609-10, 113 S. Ct. 2801 ("The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'").

The purported "punishment" in the present case—termination of tenancy—is neither a cash nor an in-kind payment imposed by and payable to the government. Accordingly, it is not subject to analysis as an excessive fine. Seeking to overcome this hurdle, Tenants cite cases involving excessive fines challenges to civil forfeitures. Civil forfeitures *do* involve a payment to the government—in the case of leaseholds, the government assumes the property right in the tenancy (e.g., if the tenant in a private apartment building has paid rent for the year, the federal government acquires the tenant's rights in that apartment for the remainder of the year and can utilize that apartment for the remainder of the year without having to pay additional rent)—and thus may be subject to excessive fines analysis under the Eighth Amendment. *See, e.g.*,

United States v. 3814 NW Thurman, 164 F.3d 1191, 1197 (9th Cir. 1999), *amended by* 172 F.3d 689 (9th Cir. 1999). These civil forfeiture cases are, however, inapposite to the present case because we are not dealing with an attempt by the federal government to seize Tenants' property under the civil forfeiture laws. *See supra* Part IV-D-2.[25]

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[25] The dissent appears to view our rejection of Tenants' excessive fines challenge as based upon a belief that the Excessive Fines Clause does not apply to the states. We need not, and do not, express any view on such issue. As previously discussed, an eviction from public housing based upon breach of a lease provision relating to drug-related criminal activity simply does not implicate civil forfeiture laws, be they state or federal in origin.

Treating an eviction authorized by section 1437d(*l*)(5) as a forfeiture, the dissent expresses its view that HUD's regulations, insofar as they permit eviction of "innocent tenants," may violate the Fourteenth Amendment's Due Process Clause. Even assuming that such an eviction could be treated as a forfeiture, we cannot agree. The dissent relies most heavily upon the concurring opinions of Justice Thomas and Justice Ginsburg in *Bennis v. Michigan*, 516 U.S. 442, 116 S. Ct. 994, 134 L.Ed.2d 68 (1996). While these opinions are quite interesting, the opinion of the Court—which both Justice Thomas and Justice Ginsburg joined in full— controls. The *Bennis* Court upheld, as *consistent* with due process, the forfeiture of Bennis's entire interest in a car that she co-owned with her husband—even though she had no knowledge that he would use the car to engage in illegal sexual activity with a prostitute. In rejecting Bennis's "innocent owner" defense, the Court made clear that "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." *Id.* at 446, 116 S. Ct. 994. *Bennis* simply cannot support the dissent's analysis.

VI

Having resolved the APA and constitutional issues, we now turn to Walker's ADA claim. The district court held that, as a result of Walker's disability which renders him incapable of living alone, the burden imposed by 42 U.S.C. § 1437d(*l*)(5) to ensure that guests do not engage in drug-related criminal activity weighs more heavily on him than on others. While a tenant without Walker's disability can choose not to invite guests over, Walker does not have this option because he requires the constant assistance of a care-giver. The district court held that OHA cannot evict him on the basis of his care-giver's drug-related criminal activity.

It is not disputed that OHA must provide reasonable accommodations to disabled tenants. *See*, *e.g.*, *Green v. Housing Authority*, 994 F. Supp. 1253, 1255-56 (D. Or. 1998). The ADA specifically provides that the failure to provide disabled persons with reasonable modifications constitutes discrimination:

> [Discrimination includes] a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. § 12182(b)(2)(A)(ii). A HUD regulation similarly focuses on the need to provide disabled persons with reasonable accommodation:

> For all aspects of the lease and grievance procedures, a handicapped person shall be provided

> reasonable accommodation to the extent necessary to provide the handicapped person with an opportunity to use and occupy the dwelling unit equal to a non-handicapped person.

24 C.F.R. § 966.7(a).

Walker needs a care-giver; he does not, however, need a *drug-using* care-giver. OHA *did* accommodate Walker by not attempting to terminate his tenancy until after the third time that drugs or drug paraphernalia were found in his apartment. On each occasion, OHA issued Walker a lease violation notice, thus giving him ample notice of the fact that his care-giver was using drugs within his apartment. Facing two strikes, Walker chose to retain his care-giver even though she persisted in using drugs in his apartment.[26] OHA is not required by the ADA to provide Walker with accommodation that is not reasonable, *see Memmer v. Marin County Courts*, 169 F.3d 630, 633-34 (9th Cir. 1999); *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1048-51 (9th Cir. 1999), and we hold that a request to waive applicability of section 1437d(*l*)(5) to a tenant's care-giver is not reasonable (at least where it has not been shown that only a care-giver who uses drugs can provide the tenant with "an opportunity to use and occupy the dwelling unit equal to a non-handicapped person"). 24 C.F.R. § 966.7(a).

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[26] Walker did fire his care-giver after the issuance of the third lease violation, but has not offered any reason why he did not take this step earlier.

VII

With no likelihood of success on the merits of their claims, Tenants are not entitled to a preliminary injunction. *See Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 710-11 (9th Cir. 1997). We accordingly vacate the preliminary injunction and remand to the district court for further proceedings consistent with this opinion.

The order granting the preliminary injunction is REVERSED, and the preliminary injunction is VACATED.

W. FLETCHER, Circuit Judge, dissenting:

This case involves the attempted eviction of four tenants and their families from public housing in Oakland, California. Appellee Pearlie Rucker is a 63 year-old woman who has lived in public housing for 13 years. She currently lives with her mentally disabled daughter, her two grandchildren, and her great-grandchild. Appellants assert as a ground for her eviction that Ms. Rucker's mentally disabled daughter possessed cocaine three blocks from her apartment. Ms. Rucker regularly searches her daughter's room for evidence of drug activity and has warned her and others that drug activity in the apartment could result in their eviction. Appellee Willie Lee is a 71 year-old man who has lived in Oakland public housing for 25 years. He currently lives with his grandson. Appellants assert as a ground for his eviction that Mr. Lee's grandson possessed marijuana in a parking lot of the housing complex. Appellants do not allege that Mr. Lee had any knowledge of his grandson's marijuana possession. Appellee Barbara Hill is a 63 year-old woman who

has lived in the same public housing apartment for 30 years. Like Mr. Lee, she currently lives with her grandson. Appellants assert as a ground for her eviction that her grandson possessed marijuana in the parking lot of the housing complex. Appellants do not allege that Ms. Hill had any knowledge of her grandson's marijuana possession.

Appellee Herman Walker is a disabled 75 year-old man who has lived in "senior" public housing for eight years. He is not capable of living independently and requires an in-home caregiver. Appellants assert as a ground for Mr. Walker's eviction that his caregiver and his caregiver's guests possessed cocaine and drug paraphernalia in his apartment. Appellants do not allege that Mr. Walker himself engaged in drug-related activity.

Appellants contend that 42 U.S.C. § 1437d(*l*)(5), part of the National Housing Act, authorizes eviction of public housing tenants and their families if any member of the household engages in any drug-related criminal activity (including possession of marijuana) on or near the public housing premises, whether or not the tenant had any knowledge of, or ability to control, that activity. Under appellants' construction of the statute, a parent who disapproves of drugs and diligently tries to keep her children off drugs, but who has an adolescent child who experiments with marijuana, is subject to eviction. Needless to say, this law, as construed by appellants, is not the standard under which American families are permitted to remain in private homes. If families were permitted to remain in their private homes only on condition that no family member had ever used or possessed illegal drugs in or near the

home, many American families would be made homeless.

The district court preliminarily enjoined the evictions as not authorized under 42 U.S.C. § 1437d(*l*)(5), and the majority reverses. Because I believe that the majority misconstrues the applicable law, I respectfully dissent.

Discussion

I will first discuss the attempted eviction of appellees Ms. Rucker, Mr. Lee, and Ms. Hill. I will then discuss the attempted eviction of appellee Mr. Walker, whose case presents an additional issue concerning the Americans with Disabilities Act.

I. *Eviction of Appellees Ms. Rucker, Mr. Lee, and Ms. Hill*

The central issue in this case is whether tenants without knowledge of, or ability to control, off-premises drug-related activity of household members may be evicted from public housing. If appellants had sought only to evict the household member engaged in drug-related activity, we would not be here today. However, appellants seek to evict not only the offending member of the household, but also the innocent head-of-household and other innocent family members.

A. *The Lease Provision*

The directly governing statutory provision in this case was originally passed as part of the Anti-Drug Abuse Act of 1988, Public Law 100-690, 102 Stat. 4300, now amended and codified at 42 U.S.C. § 1437d(*l*). In its current form, it provides, in relevant part:

> Each public housing agency shall utilize leases which—
>
> (1) do not contain unreasonable terms and conditions; [and]
>
> * * *
>
> (5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy[.]

1. *Plain Meaning of the Statute*

The district court found that the express language of the lease provision is silent as to the treatment of "innocent tenants." An examination of the text of the statute and the arguments of the parties reveals that the district court was correct.

Appellant HUD argues, and the majority agrees, that Congress meant to provide for the eviction of innocent tenants because the language "*any* drug-related criminal activity on or near such premises . . . shall be cause for termination of tenancy" (emphasis added) means that no one, even an innocent tenant, is excluded. The majority thus equates Congress' silence as to whether a tenant is required to know about, or be able to control, the drug-related criminal activity with Congress' specific intent that the statute be applied to innocent tenants.

The majority reaches its conclusion by construing "any drug-related criminal activity" to mean "all" such activity without limitation. But such an all-encompassing reading leads to absurd results. If "any" truly means "all," without limitation, Congress must also have specifically intended that the drug-related criminal activity could occur at any time and still be cause for termination of the lease, since the statute is silent as to when the drug-related criminal activity must occur. In other words, such a reading leads to the conclusion that Congress specifically intended that if a family member engaged in drug-related activity five years ago, or if the tenant invites a guest into her apartment and the guest engaged in such activity five years ago, the drug-related criminal activity of the family member or guest would be cause for termination, regardless of whether the tenant had any knowledge of that activity.

Congress could not have intended such an absurd result. *See Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, & SF Ry. Co.*, 520 U.S. 510, 516, 117 S. Ct. 1513, 137 L.Ed.2d 763 (1997). Contrary to the reading adopted by the majority, the only reasonable interpretation of the statute is that Congress did not mean "any" in the most all-encompassing sense possible. *See Lewis v. United States*, 523 U.S. 155, 158-160, 118 S. Ct. 1135, 1139, 140 L.Ed.2d 271 (1998) (an all-encompassing reading of the words "any enactment" "is not a sensible interpretation of this language [since such a reading] would dramatically separate the statute from its intended purpose."). HUD itself has rejected an all-encompassing interpretation of the word "any." In adopting its regulation implementing § 1437d(*l*)(5), HUD limited the words "any drug-related criminal

activity" to mean any such activity taking place at the time a wrong-doer is a guest, 56 Fed. Reg. 51562 (1991), even though HUD does not contend this limitation to "any" is in the statute. While HUD's reading of when "any" activity must take place is the only reasonable construction of the statute, it is contrary to the "plain meaning" of that same statute as found by the majority.

Moreover, no matter how broadly "any" is read, the statute is ambiguous as to whose tenancy may be terminated. Section 1437d(*l*)(5) allows for "termination of tenancy" but does not explain whether such termination applies to the tenancies of all members of the household or only to the tenancy of the tenant engaged in the drug-related criminal activity. As I read the statute, Congress contemplated that a termination under this section might be applied only to a tenant engaged in drug-related activity, or to a tenant in a position to know about and control such activity. In support of this reading, I note, for example, that § 1437d(n) specifically provides for notification of the local post office when "a public housing agency evicts *an individual* or family from a dwelling unit for engaging in criminal activity, including drug-related criminal activity[.]" (emphasis added). Congress thus foresaw cases where only an individual, rather than an entire family, would be evicted, and the district court did not err in finding that the plain language of the statute did not necessarily require the eviction of innocent tenants.

The district court concluded that any lease term must be reasonable under 42 U.S.C. § 1437d(*l*)(1). There is nothing remarkable about the court's conclusion since the actual language of 42 U.S.C. § 1437d(*l*)(1) provides:

> Each public housing agency shall utilize leases which—
>
> (1) do not contain unreasonable terms and conditions;
>
> * * *

Since all the subparagraphs specifying lease requirements under § 1437d(*l*) are joined with the connector "and" rather than "or," any construction of subparagraph (5) of § 1437d(*l*) must also be "reasonable" under subparagraph (1) of that same section. The majority contends that if there is some conflict between their construction of subparagraph (5) and the reasonableness requirement of (1), subparagraph (5), the more specific, controls over subparagraph (1), the more general. I believe that this is a method for reading the reasonableness requirement out of the statute rather than for reading the two provisions consistently. Where a construction can eliminate potential conflict between the two sections, that construction must prevail. *Hellon & Associates, Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992).

The majority contends that appellants' construction is reasonable because giving protection to innocent tenants would "hamstring" efforts to fight drugs in public housing. In so concluding, the majority relies on facts that are not in the record. The district court found, on the record before it, that the evidence showed that eviction of persons who did not know, could not foresee, and could not control the conduct of others does nothing to further the battle against drugs in public housing. By contrast, where the district court did find that a tenant could do something to assure drug activity would not occur, the court did not extend injunctive

relief to protect such a tenant (even if she was not personally involved in the drug-related activity).[1]

The majority further contends that evicting innocent tenants is reasonable because barring innocence as a defense holds down litigation costs. There are many ways to hold down litigation costs, not all of them reasonable or appropriate. I am confident that the majority does not believe that a public housing authority should be allowed to skip the eviction process altogether and just change the locks. Nor should it believe that it is reasonable to punish the innocent along with the guilty because it is cheaper to litigate under that standard than under a standard that protects the innocent.

Finally, the majority compares eviction from public housing to eviction from private rental property. I find this comparison unhelpful. Suffice it to say that good cause is *always* required for eviction from public housing, 42 U.S.C. § 1437d(*l*)(4), whereas, absent such a provision in the lease, a similar requirement of good cause is generally not required in private residential leases. *See*, *e.g.*, *S.P. Growers Ass'n v. Rodriguez*, 17 Cal.3d 719, 730, 131 Cal. Rptr. 761, 552 P.2d 721 (1976).

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[1] For example, the court refused to extend protection of innocent tenants to situations where drug activity occurred in the apartment. "A tenant may control what occurs in her unit by ensuring that no one is present when she is not and searching her apartment and perhaps, her guests and household before they enter. In other words, terminating the lease of a tenant for her failure to maintain a drug-free environment in her apartment holds the tenant responsible for something over which she has some control. Eviction under such circumstances appears rationally related to a legitimate public housing goal." Only where a tenant has no ability at all to prevent the drug-related criminal activity did the district court find that the tenant's eviction is unreasonable.

2. *Legislative History*

Since the plain language of the lease provision does not compel either party's interpretation, this court may properly look at legislative history to determine Congress' intent. I believe that the legislative history supports the tenants' interpretation.

The original version of 42 U.S.C. § 1437d(*l*)(5) was enacted as part of the Anti-Drug Abuse Act of 1988. No House or Senate Reports accompanied this legislation, and none of the committee reports had anything to do with the provisions affecting HUD. However, in 1990, Congress revisited termination of tenancy for drug-related activity and effectively rewrote subparagraph (*l*)(5) into its present form. Public Law 101-625. The legislative history indicates that Congress did not intend for innocent family members to be evicted. The Senate Report[2] specifically stated that eviction would not be appropriate "if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity." 1990 USCCAN 5941. Likewise, the Conference Report said of an identical passage in the Section 8 housing assistance program: "[T]he Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exist." *Id.* at 5889.

It is well established in this circuit that "the official committee reports provide the authoritative expression of legislative intent" when examining legislative

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[2] The Senate version of this amendment was adopted in the final statute. 1990 USCCAN 6123.

history.[3] *See In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988). The majority opinion attempts to explain these comments as evidence that Congress granted HUD and the public housing authorities (PHAs) discretion not to evict in these situations. However, Congress did not appeal only to the PHAs; it appealed to the "wise exercise of the humane judgment by the PHA *and the eviction court*." 1990 USCCAN 5941 (emphasis added). If Congress had meant to leave the discretion solely with the PHAs, the judgment of the courts would never come into play. Further, the Committee Reports were very clear that these evictions "would not" be appropriate, not that they might not. *Id.* Congress thus left no room for the unchallengeable discretion the majority would grant the government.

B. *The Anti-Forfeiture Provision*

In the Anti-Drug Abuse Act of 1988, Congress both passed the original version of the lease provision (just discussed), which amended the National Housing Act, and amended a pre-existing anti-forfeiture provision of the Controlled Substances Act. Both the lease provision and the amendment to the anti-forfeiture provision were part of Chapter 1 of Subtitle C of Public Law 100-690 (Preventing Drug Abuse in Public Housing). The anti-forfeiture provision was amended by inserting the phrase "(including any leasehold

[3] In an attempt to show a contrary intent, HUD has only quoted isolated statements from witnesses and legislators rather than committee reports. Such statements "cannot be attributed to the full body that voted on the bill." *See In re Kelly* at 912 n.3. Further, even taken at face value, these statements only go to the problem of drugs, a problem all parties as well as the district court acknowledge as serious, not to the question of whether innocent tenants should be evicted.

interest)" into the text of the pre-existing statute. As a result of the amendment, the Controlled Substances Act now provides, in relevant part:

> (a) Subject property
>
> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * *
>
> (7) All real property, including any right, title, and interest (*including any leasehold interest*) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a) (emphasis added: italics indicate material added in 1988; underlined text was already in the statute).

We are faced with a more specific task than merely understanding the lease provision of the National Housing Act and the anti-forfeiture provision of the Controlled Substances Act. We must understand, and make consistent, section 5101 (the lease provision) and section 5105 (the amendment to the anti-forfeiture provision) of Public Law 100-690, which amended these two Acts. It is axiomatic that Congress must have

meant these provisions—passed as part of the same chapter of the same Act—to be interpreted consistently. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570, 115 S. Ct. 1061, 131 L.Ed.2d 1 (1995). The majority argues that the amendment of the anti-forfeiture provision simultaneously with the enactment of the lease provision supports its position. It concludes that Congress (implicitly) intended to deprive innocent tenants of protection under section 5101 of PL 100-690 at the same time it (expressly) intended to protect tenants who had no "knowledge" of, and had not given any "consent" to, drug-related activity under section 5105 of that same law.

In order to conclude that Congress intended the forfeiture of the leasehold interest of an innocent tenant, the majority distinguishes between forfeiture to the federal government and forfeiture to a local government agency. The majority is correct in pointing out that the anti-forfeiture provision deals with forfeitures to the federal government and that the lease provision deals with forfeitures to local housing authorities. The majority recognizes that there "may be a constitutional bar to forfeiture of property when the property owner is uninvolved and unaware of the wrongful activity," *ante* at 642, and it argues that the explicit incorporation of that bar into the anti-forfeiture provision alleviates that constitutional concern when forfeitures to the United States are at issue. But the majority assumes that Congress' awareness of, and intent to alleviate, that same concern somehow disappeared when forfeitures to a public housing authority were at issue. I disagree. To the extent that a reading of a forfeiture statute is driven by a concern to avoid an unconstitutional construction, that concern should be

equally present whether the forfeiture is to the federal government or to a local governmental authority.

The majority distinguishes between forfeitures to the federal government and forfeitures to local authorities based on a hypothesized congressional conclusion that tenants need more protection from the federal government because of the federal government's temptation to enrich itself through forfeiture proceedings. This hypothesis is unsupported by the text, context, or history of the legislation, and I view it as an inappropriate attribution to Congress of a base view of the motivations of federal authorities in forfeiture cases.

The majority further argues that a forfeiture proceeding—whether conducted by the federal government or by a local housing authority—is sufficiently different from an eviction proceeding that the anti-forfeiture provision should in any event not apply to evictions. The most obvious problem with the majority's argument is that leasehold interests are typically terminated by eviction, and that the 1988 Act specifically added "leasehold interests" to the anti-forfeiture provision. *See, e.g., United States v. The Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015 (E.D.N.Y. 1991) (applying the anti-forfeiture provision, 21 U.S.C. § 881(a), to forfeiture of a leasehold).

The majority argues, finally, that a forfeiture under the statute is available on a lower standard of proof than an ordinary eviction, and that an eviction is therefore not included in the anti-forfeiture provision. But what is at issue in this case is not the burden of proof but the substantive liability of a person who did not and could not know of the criminal activity of another. For purposes of determining whether the statute allows eviction of a person concededly without knowledge, the

burden of proof for demonstrating knowledge is not relevant.[4]

I am unwilling to assume that the constitutional concerns that appear to have motivated Congress when considering forfeiture to the federal government were irrelevant to Congress when considering forfeiture to local governments. Congress made its intent explicit as to the federal government by adding four words to a pre-existing drug-related forfeiture statute applicable to the federal government. There was (and is) no comparable federal drug-related forfeiture statute applicable to local governments that Congress could have amended with comparable ease; indeed, there may even be some question about the scope of Congress' constitutional power to enact such a general statute. It is therefore not surprising that Congress did not put into the Drug Control Act of 1988 an explicit anti-forfeiture provision applicable to local governments. But the absence of such a provision in the Act does not mean that Congress had no concern about the constitutionality of forfeitures of the leaseholds of innocent tenants to local governments. And it certainly does not mean that Congress intended that the lease provision enacted as part of the same Act should be construed to allow forfeitures to local governments that it explicitly forbade to the federal government.

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[4] A related misapprehension in the majority opinion is that innocent tenants need more protection in a forfeiture action but less in an eviction action because forfeiture is a summary proceeding. First, as noted above, the nature of the proceeding has nothing to do with the substantive defenses available. Second, under California law eviction is *itself* a summary proceeding. *Nork v. Pacific Coast Medical Enterprises*, 73 Cal. App. 3d 410, 413, 140 Cal. Rptr. 734 (1977).

C. *Language in Related Statutory Provisions*

1. *Waiver of Disqualification Period for Preferences*

The majority points to an earlier version of 42 U.S.C. § 1437d(c)(4)(A)(iii) in support of its reading of § 1437d(*l*).[5] The version of the statute that existed until 1996—and upon which the majority relies—provided for a three-year disqualification period for "preferences" that would otherwise be available to those applying for tenancy in public housing. Preferences were given, for example, to the homeless, to those paying more than 50% of their income in rent, and to those who had recently been displaced from housing. *See*, *e.g.*, § 1437d(c)(4)(A)(i). The three-year disqualification for such preferences period applied to "any individual or family" evicted from public housing "by reason of drug-related activity."[6] However, the statute specifically required that there be a waiver of the disqualification period for "any member of a family of an individual prohibited from tenancy under this clause who the agency clearly determines did not participate in and had no knowledge of such criminal activity[.]"

The majority contends that the statutory waiver for an innocent family member must mean that such a family member could have been evicted in the first

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[5] The statutory language relied upon by the majority was superceded in 1996. The majority's argument is not available under the language of the current statute.

[6] The statutory reference to an "individual or family" evicted for drug-related activity does not imply that innocent family members could be evicted. An entire family could be evicted if all the members of the family either themselves engaged in drug-related activity, or knew about and failed to control drug-related activity.

place, for otherwise that innocent family member would not be re-applying for public housing. According to the majority, "If an 'innocent tenant' could not have been evicted in the first place, there would have been no need for Congress to write a statute specifically waiving the three-year waiting period for them." The majority has read into the statute a limiting concept that was not there. The statute nowhere used the word "re-apply" or its equivalent. Rather, the statute gave its preferences to all those applying—not merely those re-applying—for public housing; and it similarly imposed its three-year disqualification for preferences on all those applying—not merely those reapplying—for public housing.

Once one understands that the statute covered anyone applying for public housing, the statute made perfect sense. The waiver provision of the statute ensured that applicants for public housing who were entitled to preference did not lose that preference because of the sins of a family member. So long as the applicants had not participated in and had had no knowledge of the drug-related activities of their family member, they were not subject to the three-year disqualification period. Far from supporting the majority's argument, the statute showed Congress' concern that innocent applicants for public housing not suffer because of their family member's drug-related activities.

2. *The Veterans Affairs Act of 1999*

The majority also relies on § 577 of the Veterans Affairs Act of 1999 (codified at 42 U.S.C. § 13662) for its view that Congress plainly meant to evict innocent tenants. The Act was not in effect at the time the case was argued to us, was never presented to the district

court, and has major textual interpretation issues of its own. I do not believe that we should be analyzing this statute at this stage of the litigation, in part because of the obvious hazards inherent in attempting to resolve complex questions of statutory interpretation under a statute that has not been the focus of the parties or the district court, and in part because appellants have not sought to use this statute to evict the tenants in this case. Under the circumstances, I will simply point out that the language of § 577 of the Veterans Affairs Act is different from that of the lease provision of the National Housing Act, and that there is no indication that Congress intended these two provisions to have the same interpretation. The fact that Congress chose to use different language in similar situations tends to show it intended a different meaning. *See Florida Telecommunications Ass'n v. FCC*, 54 F.3d 857, 860 (D.C. Cir. 1995). I do not read § 577 as supporting the wholesale eviction of innocent tenants, for it addresses households with a member who is a drug user, rather than households with a member engaged in unspecified and off-premises drug-related activity, and it addresses rehabilitation of the offending member. Further, and in any event, "the views of a subsequent Congress form a hazardous basis for inferring intent of an earlier one." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S. Ct. 789, 139 L.Ed.2d 773 (1998).

D. *Avoiding Substantial Constitutional Questions*

A statute that can be construed to avoid substantial constitutional questions should be so construed. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994). The construction adopted by the majority raises substantial consti-

tutional questions both under the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Since the statute is clearly capable of a construction that will avoid these questions, I believe we should adopt that construction.

1. *Excessive Fines*

The Excessive Fines Clause provides: "Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishment inflicted." U.S. Const., amend. 8 (emphasis added). Relying on *Kim v. United States*, 121 F.3d 1269, 1276 (9th Cir. 1997), the majority contends that the forfeiture of a leasehold interest is not subject to the clause because it only applies to "'cash or in kind payment directly imposed by, and payable to, the government.'" *Ante* at 648. However, *Kim* holds only that an administrative disqualification is not subject to the Excessive Fines Clause. It does not hold that a forfeiture of a property interest is not subject to the clause. Indeed, *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993), on which *Kim* relies, 121 F.3d at 1276, is directly to the contrary, holding squarely that forfeiture of property is covered by the Excessive Fines Clause, 509 U.S. at 622, 113 S. Ct. 2801.[7]

The majority further contends that the Excessive Fines Clause is inapplicable "because we are not

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[7] *Austin* also suggests that a determination of whether a forfeiture violates the Excessive Fines Clause depends on the facts of the case. *Austin* at 622, 113 S. Ct. 2801. Even if this court did need to reach the issue of whether HUD's application of its regulation to appellees violated the Excessive Fines Clause, the proper procedure would be to remand to the district court for such a determination. *See id.* at 622-23, 113 S. Ct. 2801.

dealing with an attempt by the federal government to seize Tenants' property under the civil forfeiture laws." *Ante* at 649, referring to its earlier discussion of the anti-forfeiture provision, 21 U.S.C. § 881(a). It is, of course, true that the forfeiture in this case is sought by a local government rather than the federal government, but it is a forfeiture nonetheless. Although the question is not entirely settled, it is very likely that the Excessive Fines Clause applies to the states. As Justice O'Connor wrote in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282, 284, 109 S. Ct. 2909, 106 L.Ed.2d 219 (1989) (O'Connor, J., concurring), "[T]he Cruel and Unusual Punishments Clause [of the Eighth Amendment] has been regularly applied to the States. . . . In addition, the Court has assumed that the Excessive Bail Clause of the Eighth Amendment applies to the States. . . . I see no reason to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation, and would hold that the Excessive Fines Clause also applies to the States." The majority does not argue that Justice O'Connor is wrong about the incorporation of the Excessive Fines Clause through the Fourteenth Amendment. Indeed, it does not discuss the incorporation issue and Justice O'Connor's opinion at all. But if the majority were to engage in such a discussion, it would have to concede, at the very least, that the incorporation of the Excessive Fines Clause and the application of the Clause to the forfeiture of appellees' leasehold to a local government pose substantial constitutional questions.

2. *Due Process*

The forfeiture of a tenant's leasehold interest under the circumstances presented in this case also raises substantial questions under the Due Process Clause. It is undisputed that tenants of public housing have a property interest in their tenancy. *See Geneva Towers Tenants Org. v. Federated Mortgage Inv.*, 504 F.2d 483, 488-89 (9th Cir. 1974). The holding of the Supreme Court in *Bennis v. Michigan*, 516 U.S. 442, 116 S. Ct. 994, 134 L.Ed.2d 68 (1996), and the discussion in the concurring opinions of Justices Thomas and Ginsburg in that case, strongly suggest that forfeiture of property violates due process if the property has not been used in the commission of the illegal activity in question, and if the owner of the property did not know about, could not foresee, and could not control that activity.

In *Bennis*, a man was arrested for sexual activity with a prostitute in a car co-owned with his wife, and the car was forfeited as a public nuisance. His wife brought suit for the value of her ownership interest in the forfeited car. In a 5-4 decision, the Court held that an innocent owner is subject to forfeiture of her property "by reason of the use to which the property was put even though the owner did not know that it was to be put to such use." *Id.* at 446, 116 S. Ct. 994. Justice Thomas, the fifth vote for the majority, wrote a separate concurring opinion in which he expressed a belief that the result in *Bennis* was ordained by centuries of forfeiture law.[8] However, Justice Thomas also

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[8] *See also Austin* at 615, 113 S. Ct. 2801 for an examination of the principles underlying forfeiture. The theories supporting the forfeiture of an innocent person's property are limited to situations where the property to be forfeited was itself misused or where

expressed a grave concern that forfeiture not be extended beyond cases where the property itself is used for a crime. *Id.* at 456, 116 S. Ct. 994 (Thomas, J., concurring); *see also id.* at 458, 116 S. Ct. 994 (Ginsburg, J., concurring) (the government "has not embarked on an experiment to punish innocent third parties. . . . Nor do we condone any such experiment.")

In the present case, the majority allows forfeiture of the leasehold of innocent tenants for drug-related activity that did not involve the use of the leasehold property and of which the tenants were unaware. This forfeiture thus deprives innocent people of property that was not involved in any crime and punishes innocent people for crimes that they did not commit and could not prevent.[9] I believe that under *Bennis* this is likely a violation of the Due Process Clause.

II. *Eviction of Mr. Walker*

Mr. Walker's case contains an element not present in the cases of Ms. Rucker, Mr. Lee, and Ms. Hill. He contends that the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq*., protects him from eviction despite the use of drugs in his apartment by his caretaker and his caretaker's guests. As the majority opinion correctly observes, Mr. Walker unquestionably has a right under the ADA to a live-in caretaker, but he does not have a right under the ADA to have a live-in

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"the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence." *Id.*

[9] The district court refused to extend the injunctive relief to situations where the property to be forfeited, the leasehold interest, is directly involved in the drug-related criminal activity. That is, if drugs are found in the apartment, the leasehold is forfeited, regardless of the actual knowledge of the tenants.

caretaker who violates the drug laws. If deciding the case *de novo* on the current record, I might conclude that Mr. Walker had both knowledge of his caretaker's activities and the ability to replace the caretaker. However, this court is not at liberty independently to reweigh the evidence presented to the district court. The district court's findings of fact must be reviewed under the clearly erroneous standard. *Roe* v. *Anderson*, 134 F.3d at 1400, 1402 n. 1 (9th Cir. 1998). Although Mr. Walker clearly had knowledge of his live-in caretaker's drug-related activity after she was initially found to be keeping drugs and drug paraphernalia on the premises, the district court could reasonably have believed that Mr. Walker was, because of his disability, powerless to stop her or find a replacement any sooner than he did.

Mr. Walker claims that his disability prevented him from complying with the anti-drug policy without a reasonable accommodation. The evidence about the extent of Mr. Walker's disability and the degree to which it prevented him from complying with the anti-drug policy is disputed, with both sides presenting conflicting declarations. The majority ignores this dispute and simply adopts appellants' version of the facts as it own. Appellants may be able to establish their version of the facts at trial, but on the record now before us the district court did not abuse its discretion in finding that Mr. Walker's claim was sustainable.

Accepting for present purposes that Mr. Walker may have been prevented from complying with the anti-drug policy by his disability, the question then becomes whether a reasonable accommodation can be made that will bring Mr. Walker into compliance with his lease agreement. Appellants maintain that a blanket waiver

of the anti-drug policy is not a reasonable accommodation. I agree. The district court's order, however, does not require such a waiver. Rather, the district court specifically rejected appellants' claim that a blanket waiver was the only possible accommodation, and held that, based on the complaint, Mr. Walker may be able to show that another accommodation is reasonable. While the district court may ultimately decide in favor of appellants once the record is developed further, the district court did not abuse its discretion by finding that, on the record before it, Mr. Walker had a fair chance of sustaining his claim under the ADA.

Conclusion

For the foregoing reasons, I respectfully dissent from the majority's construction of this statute.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C 98-00781 CRB

PEARLIE RUCKER, ET AL., PLAINTIFFS

v.

HAROLD DAVIS, ET AL., DEFENDANT

June 19, 1998

MEMORANDUM, ORDER AND PRELIMINARY INJUNCTION

BREYER, J.

This action arises from defendant Oakland Housing Authority's termination of plaintiffs' public housing leases on the ground that a member of each plaintiff's household engaged in drug-related criminal activity, even though such activity allegedly occurred without the knowledge of each plaintiff. Defendants Oakland Housing Authority ("OHA"), Department of Housing and Urban Development ("HUD"), and Harold Green, the Director of OHA, have moved to dismiss the first amended complaint and plaintiffs have moved for a preliminary injunction. After carefully considering the papers submitted by the parties, and having heard oral argument on June 2, 1998, the Court concludes that the motions to dismiss should be DENIED in part and

GRANTED in part, and that a preliminary injunction should issue.

BACKGROUND

A. *The Statute, Regulations and Lease.*

> Congress has directed that every public housing agency utilize leases which provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity *on or off such premises,* engaged in by a public housing tenant, *any member of the tenant's household,* or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. § 1437d(1)(5) (emphasis added).

In reliance on this statute, HUD has issued a regulation requiring public housing leases to contain the following provision:

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

24 C.F.R. 966.4(f)(12)(i). In accordance with this regulation, OHA includes in its leases the obligation that a tenant must

> assure that tenant, any member of the household, or another person under the tenant's control, shall not engage in
>
> (i.) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other public housing residents or threatens the health and safety of the housing authority employees. . . , or (ii) Any drug-related criminal activity on or near the premises (e.g., manufacture, sale distribution, use, or possession of illegal drugs or drug paraphernalia, etc.).

OHA Lease ¶ 9(m).

HUD interprets the statute, 42 U.S.C. § 1437d(1)(5), and its regulation as permitting termination of the lease even when the tenant "did not know, could not foresee, or could not control behavior by other occupants of the unit." *Public Housing Lease and Grievance Procedures*, 56 Fed. Reg. 51560, 51567 (1991). In their papers, and at oral argument, the plaintiffs referred to the termination of leases under such circumstances as holding the tenant "strictly liable" for the conduct of her household members. *See also Charlotte Housing Authority* v. *Patterson*, 120 N.C. App. 552, 554, 64 S.E.2d 68, 70 (1995) (describing the tenant as being held "strictly liable" for acts committed by her son outside her presence). As defendants note, however, such a term is a misnomer because the tenant is not being held liable, rather, the tenant forfeits her interest in the leasehold. The term is also imprecise because under the law a person is strictly liable for something the person

did. For example, if a person runs a red light she is held "strictly liable" for her conduct even if she did not intend to run the red light. Here, however, the tenant is not alleged to have done anything herself.

The Court will refer to the termination of tenancies under such circumstances as the termination of the lease of an "innocent" tenant as it is conceded that the tenant is innocent of the drug-related criminal activity which is the cause of the lease termination and it is alleged that the tenant is also innocent of any knowledge of the drug-related criminal activity.

B. *The Allegations of the Complaint.*

1. The Plaintiffs.

Plaintiff Pearlie Rucker is 63 years old and has lived in public housing for 13 years. She shares her apartment unit with her daughter Gelinda, who is mentally disabled, two grandchildren and one great-granddaughter. (First Amended Complaint ("FAC") ¶ 5.) OHA served Rucker with a 3-day notice of termination of her tenancy. Rucker did not vacate her apartment as OHA ordered. OHA subsequently filed (and then dismissed) an unlawful detainer action against her in Alameda County Municipal Court, No. 012528. The unlawful detainer complaint alleged that Rucker had violated paragraph 9(m) of her lease, and in particular, that her daughter Gelinda had possessed cocaine three blocks from Rucker's apartment and that her adult son had possessed cocaine eight blocks away. (*Id.* ¶¶ 7-8.) Rucker's son does not reside with her. (*Id.* ¶ 6.) Rucker had no knowledge of Gelinda's drug activity; regularly searches her room for evidence of alcohol and drug activity; and has warned her mentally disabled daughter

and others that any drug activity on the premises can result in eviction. (*Id.* ¶¶ 9-10.)

Plaintiff Herman Walker is 75 years old and disabled. He is no longer capable of living independently and requires an in-home caregiver. He has lived in "senior" public housing for eight years. (FAC ¶¶ 11-12.) OHA served Walker with a three-day notice of termination of his tenancy and when he did not vacate his apartment unit OHA filed an unlawful detainer action against him in Alameda County Municipal Court, No. 011040. The unlawful detainer complaint alleges, among other things, that Walker violated paragraph 9(m) when his caregiver, and caregiver's guests, possessed cocaine in Walker's apartment. It does not allege that Walker engaged in the drug activity or was aware of such activity. (*Id.* ¶ 12-14.)

Plaintiff Willie Lee is 71 years old and has resided in OHA housing for 25 years. (FAC ¶ 16.) Plaintiff Barbara Hill is 63 years old and has lived at her apartment for 30 years. (*Id.* ¶ 21.) OHA served both Lee and Hill with three day notices to vacate. When they did not vacate their apartments, OHA filed unlawful detainer actions against them on the ground that they had violated paragraph 9(m) of their lease. In particular, the actions allege that Lee's and Hill's grandsons, who reside with them, possessed marijuana in a parking lot of the housing complex. (*Id.* ¶¶ 17-18, 22-23.) There is no allegation that Lee or Hill had any prior knowledge of their grandsons' drug-related activity or that they engaged in any drug-related activities themselves. (*Id.* ¶¶ 19, 21.) Both Lee and Hill had warned their household members that any drug use or

criminal activity on the premises can result in eviction. (*Id.* ¶ 20, 24).

2. Plaintiffs' Claims.

Plaintiffs allege that HUD's regulation, and more precisely, its interpretation of the regulation as permitting termination of the leases of "innocent" tenants, is unlawful under the Administrative Procedures Act ("APA"). In particular, plaintiffs contend that the regulation violates the APA because it is not permitted by, and in fact contradicts, the authorizing statute, 42 U.S.C. § 1437d, or, in the alternative, because it violates Congress's mandate that public housing leases not contain unreasonable terms. *See* 42 U.S.C. § 1437d(a). They also argue that terminating the leases of "innocent" tenants violates due process and the first amendment right to freedom of association, and that the attempted evictions of plaintiffs Rucker and Walker violate the Americans with Disabilities Act ("Act"). Plaintiffs also contend that the lease provision at issue here is unenforceable under state contract law.

DISCUSSION

I. DEFENDANTS' MOTIONS TO DISMISS.

A. *Standing.*

Defendants contend that the action must be dismissed because plaintiffs do not have standing to challenge their eviction notices and HUD's regulation. To have standing a plaintiff must establish three elements:

> First, the plaintiff must point to a concrete injury which the plaintiff personally has suffered or with

> which it is imminently threatened (an "injury in fact"). . . . Second, the plaintiff must show that the alleged injury is "fairly traceable" to the defendant's action. . . . Third, the plaintiff must demonstrate that a favorable decision is likely to redress that injury.

Yesler Terrace Community v. Cisneros, 37 F.3d 442, 445 (9th Cir. 1994). In addition, when a plaintiff challenges an agency action under the APA she must show that "the interests she seeks to protect "are arguably within the zone of interests to be protected by the statute in question." *Id.* Defendants argue that none of the plaintiffs has suffered an injury, or is imminently threatened with an injury, because none has forcefully been evicted yet. They contend that unless and until the unlawful detainer actions are resolved against plaintiffs, plaintiffs will not have been injured and thus have standing to contest HUD's regulation and OHA's lease.

Defendants ignore that OHA has served each plaintiff with a three-day notice to quit. The notice itself terminated each plaintiff's tenancy and ordered each plaintiff to vacate the premises. *See* Cal. Code Civ. Pro. § 1161.3 (a tenant is guilty of unlawful detainer upon service of a three-day notice). Plaintiffs were thus injured at the time OHA served each with the notice. It was only because plaintiffs did not vacate as ordered to do so that OHA filed the unlawful detainer actions. If plaintiffs had vacated, thus eliminating the need for an unlawful detainer action, they would still have standing to sue since they would have suffered an injury—the loss of their apartments. In *Tyson v. New York City Housing Authority*, 369 F. Supp. 513

(S.D.N.Y. 1974), for example, the court considered plaintiffs' challenge to a housing authority's finding that plaintiffs were ineligible to continue residing in public housing even though court proceedings had not been initiated to evict plaintiffs from their apartment. *See id.* at 517; *see also Chavez v. Housing Authority of the City of El Paso*, 973 F.2d 1245, 1247 (5th Cir. 1992) (federal court complaint filed before housing authority filed unlawful detainer in county court). The service of the three-day notice, and thus OHA's determination that plaintiffs' tenancies are over, created a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 85 L.Ed. 826 (1941).

OHA's dismissal of the unlawful detainer action does not eliminate Rucker's standing. *See United States v. W.T Grant Co.*, 345 U.S. 629, 632, 73 S. Ct. 894, 97 L.Ed. 1303 (1953); *Yesler Terrace Community*, 37 F.3d at 446. Rucker has shown that she has a reasonable expectation that she will again be subject to the challenged policy. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660, 75 L.Ed.2d 675 (1983). OHA has not rescinded the eviction notice. Moreover, OHA dismissed the unlawful detainer against Rucker *without prejudice*. Finally, paragraph 9(m) is still included in Rucker's lease.

Walker also has standing even though one of grounds on which OHA terminated his lease is not related to paragraph 9(m). OHA is still seeking to have him forcefully removed from his apartment on the ground that he violated paragraph 9(m). Walker, like the others, has been injured.

b. *Younger Abstention.*

Defendants also contend that the Court should dismiss this action based on the *Younger* abstention doctrine. Under that doctrine, federal courts must abstain where state court proceedings (1) are pending when the federal action is filed; (2) implicate important state interests; and (3) provide adequate opportunity to raise the federal claims. *See Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 431, 102 S. Ct. 2515, 73 L.Ed.2d 116 (1983); *Dubinka v. Judges of Superior Court*, 23 F.3d 218, 223 (9th Cir. 1994). Such abstention is inappropriate here because the second and third criteria are not present. Defendants have not identified what important state interests are implicated by an unlawful detainer action which involves federally subsidized housing and the interpretation and constitutionality of a lease provision mandated by federal regulations. Moreover, the state unlawful detainer actions will not provide plaintiffs with an adequate opportunity to raise their federal APA claims as HUD is not a party to those actions and the federal courts have exclusive jurisdiction of such claims. *See Aminoil U.S.A., Inc. v. California State Water Resources Control Bd.*, 674 F.2d 1227, 1233 (9th Cir. 1982). Accordingly, the Court has jurisdiction to adjudicate this action.

C. *The APA Claim.*

Under the APA a court must invalidate an administrative regulation which conflicts with an authorizing statute. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447-48, 107 S. Ct. 1207, 94 L.Ed.2d 434 (1987) ("[t]he judiciary is the final authority on issues of statutory construction and must reject administrative construc-

tions which are contrary to clear congressional intent") (citation omitted). If Congress has addressed the precise question at issue in an APA action challenging an agency interpretation of a statute, a court is bound by the intent of Congress. If, however, Congress has not addressed the precise question, and "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether" the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984).

Defendants assert that plaintiffs' APA claim fails as a matter of law because Congress expressly authorized the termination of leases of "innocent" tenants. The authorizing statute provides that "any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control" shall be cause for termination of the lease. 42 U.S.C. § 1437d(1)(5). Defendants infer from Congress's silence as to the tenant's required knowledge of the drug-related criminal conduct or the tenant's ability to control the drug activity that Congress specifically intended that a tenant could be evicted for the drug conduct of another even if she is not aware, and has no reason to be aware, of such conduct or if the tenant does not have the ability to control the wrong-doer's conduct.

The Court concludes that Congress has not addressed the question of whether a housing authority may terminate the lease of an "innocent" tenant. The statute is silent as to whether a tenant must have

knowledge of, or the ability to control, the drug-related criminal activity of a household member, guest or other person in order for that other person's conduct to be cause for terminating the tenant's lease. Defendants insist that by its silence Congress specifically intended that no knowledge or ability to control is required. Under that reasoning, however, Congress must also have specifically intended that the drug-related criminal activity could occur anywhere and at anytime in order to be cause for termination of the lease since the statute is silent as to when the drug-related criminal activity must occur and as to what is meant by "off-premises." In other words, such reasoning leads to the conclusion that Congress specifically intended that if the tenant invites a guest into her apartment and the guest engaged in drug-related criminal activity five years earlier on the other side of the country, the drug-related criminal activity of the guest could be cause for termination, regardless of whether the tenant had any knowledge or reason to know of the activity. The Court doubts that Congress specifically intended that a tenant could be terminated under such unreasonable circumstances. It is more likely that Congress did not address in the statute when the drug-related criminal activity must occur in relation to the termination of the lease just as it did not address whether a tenant must have knowledge of, or the ability to control, the wrong-doer's conduct in order for such conduct to be grounds for terminating the tenant's lease.

The legislative history is inconclusive as to whether Congress intended to permit the termination of "innocent" tenants' leases. Plaintiffs have cited legislative history that suggests Congress specifically did not intend to allow evictions under such circumstances. *See*

S. Rep. No. 316, 101st Cong., 2d Sess. 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941 ("eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity"); S. Rep. no. 316, 101st Cong., 2d Sess. 179 (1990) reprinted in 1990 U.S.C.C.A.N. 5763, 5889 ("The Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exit [sic]"); *see also Charlotte Housing Authority v. Patterson*, 120 N.C. App. 552, 464 S.E.2d 68 (1995) (holding that 42 U.S.C. § 1437d(1)(6) is silent as to the requirement of personal fault of the tenant and that the legislative history "reveals a clearly expressed legislative intent that eviction is appropriate only if the tenant is personally at fault for breach of the lease, i.e., if the tenant had knowledge of the criminal activities, or if the tenant had taken no reasonable steps under the circumstances to prevent the activity").

Defendants respond that the authors of the Senate reports cited by plaintiffs simply did not prevail in their attempts to include language in the statute which would have protected "innocent" tenants. They cite authority which suggests Congress did intend to permit the termination of leases of "innocent" tenants. For example, in an expired emergency supplemental appropriations measures, Pub. L. No. 101-45, § 404(a), 103 Stat. 97, 128-29 (1989), Congress directed the Secretary to issue waivers of certain administrative grievance procedures "as long as evictions of a household member involved in drug-related criminal activity shall not affect the right of any other household member who is

not involved in such activity to continue tenancy." Defendants contend that the "innocent" tenants would not need the protections of additional grievance procedures if the law did not already permit the termination of their tenancies. They also cite floor debate on the bill which evinces concern over drug use in public housing by people "who are not on leases." *See* 134 Cong.Rec. 33148 (daily ed. Oct. 21, 1988).

This legislative history, however, like the statute itself, is silent on the issue of the tenant's knowledge of or ability to control the wrong-doer's criminal behavior. For example, the temporary extra "protection" applied to household members who were not *personally involved* in the criminal activity, but who may have had knowledge or a reason to know of the drug-related criminal activity. The statute says nothing about tenants who did not know, and had no reason to know, of the criminal activity. In other words, if Congress had intended that a tenant's lease could not be terminated without the tenant having knowledge or the ability to control the drug-related criminal activity, the temporary protection still would have been necessary since the statute would permit terminating the leases of tenants who knew of the activity but were not personally involved. Similarly, concern about drug use by people who are not on leases does not equate with an intention to permit termination of the leases of "innocent" tenants. Such a concern may be addressed by terminating the leases tenants who knowingly permit such criminal behavior or knowingly allow guests into public housing who they have reason to know may engage in criminal behavior.

In sum, the legislative history is, at best, inconclusive. It is significant that defendants cannot identify anything in the legislative history that unambiguously indicates that Congress specifically intended that a public housing authority may terminate a tenant's lease for drug-related criminal activity of someone else even when the tenant had no knowledge, or no reason to know, of the criminal activity and no ability to control the person for whom HUD wants to hold the tenant responsible.

Since Congress has not spoken on the issue of terminating "innocent" tenants' leases, the next inquiry is whether HUD's interpretation of the statute as permitting termination under such circumstances is a permissible construction of the statute. *See Chevron U.S.A., Inc.*, 467 U.S. at 842-43. The Court's determination must be guided by the statute itself which provides that public housing authorities shall not utilize leases which contain "unreasonable terms and conditions." 42 U.S.C. § 1437d(l)(1). The only federal court which has addressed what constitutes an "unreasonable" lease term in a published opinion interpreted the clause to mean that the lease term

> must be rationally related to a legitimate housing purpose. In applying this test, the crucible of reasonableness will be defined by the particular problems and concerns confronting the local housing authority. Lease provisions which are arbitrary and capricious, or excessively overbroad or underinclusive, will be invalidated.

Richmond Tenants Organization, Inc. v. Richmond Redevelopment and Housing authority, 751 F. Supp. 120, 1205 (E.D. Va. 1990). The court concluded, after a

trial on the merits, that a lease provision which prohibited tenants from the illegal use, sale or distribution of drugs and alcoholic beverages *off* the premises was unreasonable. *See id.* at 1206.

On a motion to dismiss, the Court must accept plaintiffs' allegations as true and construe them in a light most favorable to the plaintiffs. *See School of Business v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Based on the allegations in the complaint, it does not appear as a matter of law that terminating the leases of "innocent" tenants is reasonable. The Court simply cannot conclude—without any evidence before it—that the statute is not overbroad by permitting evictions of tenants who themselves had no knowledge and no reason to know of the drug-related criminal activity of another, or of tenants who had no ability to control the alleged wrong-doer. Accordingly, plaintiffs have stated a claim under the APA.

D. *The Section 1983 Claim.*

42 U.S.C. § 1983 creates a cause of action against *persons* who act "under color of state law" to deprive citizens of their federal rights. Plaintiffs' section 1983 claims against HUD and OHA must therefore be dismissed as HUD and OHA are not "persons" within the meaning of the statute. *See Hurt v. Philadelphia Housing Authority*, 806 F. Supp. 515, 524 (E.D. Pa. 1992). Plaintiffs argue, citing *Savage v. Toan*, 636 F. Supp. 159 (S.D.N.Y. 1986), that they may state a claim against a federal official of HUD if HUD pressured a local entity (here, OHA) to violate the plaintiff's federal rights. *See Hurt*, 806 F. Supp. at 523 (to state a section 1983 claim against a federal official, the complaint must plead specific acts taken by the federal

official together with local officials toward some unlawful end). The first amended complaint does not name any federal official, let alone include the required specific allegations. As this is defendants' first motion to dismiss, the Court will grant plaintiffs leave to amend to add a federal official defendant and make the required allegations, provided they can do so consistent with Federal Rule of Civil Procedure 11.

OHA's Director Harold Green argues that the section 1983 claim against him must be dismissed because the lease provision pursuant to which OHA terminated plaintiffs' tenancies, paragraph 9(m), is mandated by federal regulations and as a result, he—a local government official—was not acting under color of state law. The federal regulations, however, merely permit termination of the lease of an "innocent" tenant, they do not mandate termination of the tenancy. Thus, Green was acting under color of state law when he, a state actor, exercised OHA's discretion to serve plaintiffs with three-day notices to quit.

E. *The ADA Claims.*

Defendants contend that neither Rucker nor Walker has stated a claim for violation of the ADA. Plaintiffs may not state a claim under the ADA against HUD as the ADA does not apply to actions taken by the federal government. *See* 42 U.S.C. § 12131(1), 12132 (omitting federal entities from definition of pertinent "public entity"; 12181-82 (prohibiting discrimination by private entities in public accommodation).

The Rehabilitation Act, on the other hand, does apply to federal entities. Since giving plaintiffs leave to amend to state a claim under the Rehabilitation Act would be futile if they cannot state such a claim, the

Court will address whether under the facts alleged in the first amended complaint plaintiffs can state such a claim.

The Rehabilitation Act prohibits excluding a person from participation in a federal program "solely by reason of his or her disability." *See* 29 U.S.C. § 794(a). To prevail on a Rehabilitation Act claim a plaintiff must show "(1) he is an 'individual with a disability'; (2) he is 'otherwise qualified' to receive the benefit; (3) he was denied the benefit of the program solely by reason of his disability; and (4) the program receives federal financial assistance." *Weinreich v. Los Angeles County Metropolitan Transp. Authority*, 114 F.3d 976, 978 (9th Cir.), *cert. denied*, 522 U.S. 971, 118 S. Ct. 423, 139 L.Ed.2d 324 (1997). Plaintiff Rucker argues that HUD's regulation excludes her from the public housing program by permitting the termination of her tenancy for her mentally disabled daughter's conduct. Walker argues that HUD's regulation excludes him from public housing on account of his disability by permitting the termination of his tenancy for the conduct of his care-giver—conduct of which he was not aware and could not control.

Plaintiff Rucker's claim must fail because she does not allege that *she* has a disability.

Plaintiff Walker's claims similarly must fail because HUD's regulation does not mandate his eviction; rather, it gives the housing authority discretion as to when to evict. The housing authority's discretion must be exercised consistent with HUD's edict that the housing authorities not discriminate against anyone on account of a disability. *See* 24 C.F.R. § 966.7(a) ("[f]or all aspects of the lease and grievance procedures, a han-

dicapped person shall be provided reasonable accommodation to the extent necessary to provide the handicapped person with an opportunity to use and occupy the dwelling unit equal to a non-handicapped person"). Accordingly, HUD's regulation does not deprive Walker of participation in a federal program on account of his disability. Plaintiffs, therefore, will not be granted leave to amend to state a Rehabilitation Act claim against HUD.

Plaintiffs Rucker and Walker also make a claim for violation of the ADA against defendants OHA and Green. The ADA provides in relevant part that

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

42 U.S.C. § 12132. To prove a public program violates the ADA a plaintiff must show that

> (1) he is a "qualified individual with a disability"; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against by a public entity, and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.

Weinreich, 114 F.3d at 978.

As plaintiff Rucker does not and cannot allege that she is a "qualified individual with a disability," she cannot state a claim under the ADA.

OHA argues that plaintiff Walker similarly cannot state a claim because paragraph 9(m) of the lease treats all tenants equally. A tenant may be evicted for the drug-related criminal activity of a household member even if the tenant did not know of or could not control the household member's conduct. Therefore, OHA argues, Walker's inability to control his caregiver due to his disability is immaterial and OHA has not as a matter of law excluded Walker from participation in public housing on account of his disability.

A tenant can ensure that she will not forfeit her tenancy pursuant to lease paragraph 9(m) for the conduct of a household member, guest or other person which the tenant controls by choosing not to have any household members or guests. Plaintiff Walker, on the other hand, does not have that choice. He alleges that he requires a caregiver in order to live. *Cf. Green v. Housing Authority of Clackmas County*, 994 F. Supp. 1253 (D. Or. 1998) (ADA required housing authority to modify "no dogs" policy to allow a hearing impaired tenant to have hearing assistance dog). Based on the allegations of the first amended complaint, OHA's eviction of Walker may thus violate the ADA since paragraph 9(m) places him at more risk for forfeiture of his tenancy than other tenants who do not require in-home care.

OHA also argues that plaintiff Walker's disability cannot be reasonably accommodated other than to grant him a blanket exemption from paragraph 9(m) which, OHA contends, is not reasonable and would permit a disabled person's apartment unit to become a drug haven. Based on the allegations of the complaint, however, the Court cannot rule as a matter of law that

no reasonable accommodation exists and that nothing short of a blanket exemption from the rule prohibiting drug-related criminal activity will accommodate Walker's interests and that of the OHA and the other public housing tenants. *See Niece v. Fitzner*, 922 F. Supp. 1208, 1218 (E.D. Mich. 1996) (concluding that "reasonable accommodation" is generally a question of fact inappropriate for resolution on a motion to dismiss).

F. *State Law Claims.*

Plaintiffs also allege that paragraph 9(m) of the lease is unenforceable under California law as a contract of adhesion containing unconscionable terms. (FAC ¶ 43.) As a preliminary matter, as HUD is not a party to the contract at issue plaintiff may not state a contract claim against it. In any event, defendants argue that the unenforceable contract claim is preempted because, among other reasons, Congress has already mandated that public housing leases not contain any unreasonable terms. If the Court ultimately concludes that paragraph 9(m) is reasonable, a conclusion that it nonetheless is unconscionable under state law would conflict with federal law. Accordingly, plaintiffs' "unconscionable" contract claim is preempted. *See Gibbons v. Ogden*, 9 Wheat. 1, 22 U.S. 1, 210, 6 L.Ed. 23 (1824); *Free v. Bland*, 369 U.S. 663, 666, 82 S. Ct. 1089, 8 L.Ed.2d 180 (1962); *Industrial Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997).

Plaintiffs also argue in their memoranda that paragraph 9(m) of the lease is ambiguous as to what it means for a tenant "to assure" that the tenant and a member of the tenant's household not engage in drug-related criminal activity. Plaintiffs have not made the

"ambiguous language" claim in their first amended complaint.

Nonetheless, defendants argue that the proposed "ambiguous language" contract claim is also preempted since HUD's regulations require public housing authorities to include the "to assure" language in their leases. As defendants must admit, however, Congress did not mandate that public housing leases include a provision requiring tenants "to assure." That language was added by HUD. To the extent that language may make the lease provision ambiguous, plaintiffs have stated a claim. *See American Apartment Management Co. v. Phillips*, 274 Ill. App.3d 556, 566, 210 Ill. Dec. 639, 653 N.E.2d 834, 840 (1995); *see also Diversified Realty Group, Inc. v. Davis*, 257 Ill. App.3d 417, 421-22, 195 Ill. Dec. 617, 628 N.E.2d 1081, 1084-85 (1993) (strict liability provision of lease, while federally mandated, must be read in connection with other terms of lease under contract law). The fact that HUD adopted the language is immaterial. The Court is not aware of any law which would allow HUD to require housing authorities to use ambiguous lease language and then deprive the affected tenants of arguing that the lease provision is ambiguous. To put it another way, a conclusion that the lease language is ambiguous will not conflict with Congress's directive that drug-related criminal activity may be cause for termination of a lease.

OHA argues even if the "ambiguous language' claim is not preempted, the claim must nonetheless fail because the court in *City of South San Francisco Housing Authority v. Guillory*, 49 Cal. Rptr.2d 367, 41 Cal. App.4th Supp. 13 (1995) concluded after a trial upon stipulated facts that the words "to assure" in the lease

at issue there were not ambiguous. The *Guillory* court, however, was interpreting a similar, but different, lease between parties not present in this lawsuit. The parties to this action and this Court are not bound by that decision. Accordingly, the Court will grant plaintiffs leave to amend to make a contract claim which alleges that paragraph 9(m) is ambiguous under state law.

G. *Claims Against Defendant Green.*

Defendant Green makes additional arguments as to why he cannot be individually liable in this action. Plaintiffs, however, are not making claims against him in his individual capacity. Rather, they have named in his official capacity only as the Director of Oakland Housing Authority. (FAC ¶ 2.) Since the complaint also names OHA, and OHA is the real party in interest, the claims against defendant Green in his official capacity will be dismissed as redundant except for the section 1983 claim. *See Walston v. City of Port Neches*, 980 F. Supp. 872, 878 (D. Tex. 1997).

II. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION.

Plaintiffs move for an order enjoining the unlawful detainer action and enjoining the enforcement of HUD's regulation and paragraph 9(m) of OHA's form lease without evidence of a tenant's personal participation in, prior knowledge of, or actual ability to prevent the drug-related criminal activity.

To be entitled to a preliminary injunction, plaintiffs must show "either (1) a combination of probable success

on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits." *Miller v. California Pacific Medical Center*, 19 F.3d 449, 456 (9th Cir. 1994).

A. *The Merits.*

The Court concludes that plaintiffs have shown, at a minimum, the existence of serious questions and a fair chance of success with respect as to whether OHA's termination of a tenant's lease for a household member's drug-related criminal activity outside of the tenant's unit is unreasonable within the meaning of 42 U.S.C. § 1437d(l)(1) when the tenant had no knowledge of, and no reason to know of, the activity. In opposition to plaintiffs' motion the defendants have not offered any evidence as to how terminating the lease of an "innocent" tenant for conduct which occurred outside of the tenants's apartment unit is rationally related to a legitimate housing goal and constitutional.

The policy on its face appears irrational because evicting the tenant will not reduce drug-related criminal activity since the tenant has not engaged in any such activity or knowingly allowed such activity to occur. To the contrary, terminating the leases of "innocent" tenants may facilitate, or least conceal, criminal drug-activity by ensuring that tenants who learn of such activity by their household members or guests will not report the activity to the public housing or other authorities. If a tenant were to report such conduct she would be advising the housing authority that she is in breach of the lease and subject to termination of her

tenancy since her guest or household member engaged in drug-related criminal activity.

The only "rational relationship" which is immediately apparent to the Court is that household members may be less likely to engage in drug-related criminal activity on or off the premises if they know their conduct could lead to the eviction of the tenant. Such a rationale, however, would appear to violate the first amendment guarantee of freedom of association. *See Tyson v. New York City Housing Authority*, 369 F. Supp. 513, 530 (S.D.N.Y. 1974) (holding that complaint that challenges eviction of tenant for conduct of adult son who did not live with tenant states a claim for violation freedom of association). For example, under that rationale, one could argue that husbands should be held responsible for the crimes of their wives because the wives will be less likely to commit crimes if they know the government will punish their husbands for their crimes. In such a situation, and the situation present here, the person penalized is not being punished for his own conduct and failure to police his own apartment or home, but rather because he lives with someone who committed a drug-related crime while outside of the apartment or home.

Defendants argue that with respect to drug-related criminal activity outside of the apartment the tenant is not being punished for her association with the household member, but rather for her failure to ensure that the household member does not ever—in or outside the apartment unit—engage in drug-related criminal activity. *See Chavez v. The Housing Authority of El Paso*, 973 F.2d 1245, 1248 (5th Cir. 1992). But the same argument could be made with respect to the husband/wife

analogy; the husband is being punished for his failure to ensure that his wife does not commit a crime even if he had no way of knowing she was likely to commit a crime. To say that a person is being held responsible for their failure to do something necessarily implies that they *could* do something. *See Tyson*, 369 F. Supp. at 520 ("[t]here must be some causal nexus between the imposition of the sanction of eviction and the plaintiff's own conduct"). If they could not do something they are in practice being punished merely for their association with the wrong-doer.

The Court is not persuaded, however, that OHA should be preliminarily enjoined from terminating the leases of tenants for drug-related criminal activity that occurs in the tenant's unit. A tenant may control what occurs in her unit by ensuring that no one is present when she is not and searching her apartment and perhaps, her guests and household members before they enter. In other words, terminating the lease of a tenant for her failure to maintain a drug-free environment in her apartment holds the tenant responsible for something over which she has some control. Eviction under such circumstances appears rationally related to a legitimate public housing goal and constitutional.

Plaintiffs argue that the presumption that a tenant has control over what occurs in her apartment should be a rebuttable presumption for there may be situations when that presumption simply does not apply. Plaintiff Walker may present such a situation. He is unique, however, because it is alleged that he could not choose not to let his caregiver into his apartment and because he requires his caregiver to live as a result of his disability. He further alleges that he would not be physical-

ly able to search his caregiver. Thus, the ADA may require that defendants modify their policy to accommodate his disability. Accordingly, the Court will enjoin the eviction of plaintiff Walker on account of the drug-related criminal activity of the caregiver. The Court will not enjoin all OHA evictions for drug-related criminal activity in the tenant's apartment even if the tenant did not know, and had no reason to know of, or ability to control, the drug-related criminal activity. The Court cautions, however, that it is not foreclosing plaintiffs' claim on this issue. The Court's ruling herein is based merely upon the showing that the parties have made thus far.

B. *The Balance of the Hardships.*

The balance of the hardships weighs strongly in favor of granting preliminary injunctive relief. If OHA's prosecution of the unlawful detainer actions against plaintiffs or its termination of the leases of other "innocent" tenants are not enjoined, the plaintiffs and other "innocent" tenants will lose their homes. OHA, on the other hand, has not offered any evidence of the hardship it and the other public housing tenants will suffer if tenants who themselves have not engaged in drug-related criminal activity are not evicted pending trial in this action. Such a hardship might be present if the Court were to enjoin OHA from terminating the leases of tenants who themselves engage in drug-related criminal activity or who knowingly permit such activity by guests or household members. The Court, however, has not done so.

C. *The Bond.*

Federal Rule of Civil Procedure 65(c) requires "the giving of security by the applicant, in such sum as the court deems proper" before a preliminary injunction may issue. Nonetheless, "[t]he court has discretion to dispense with the security requirement where giving security would effectively deny access to judicial review, . . . or where suit is brought on behalf of a class of poor persons." *Walker v. Pierce*, 665 F. Supp. 831, 843-44 (N.D. Cal. 1987). This lawsuit is brought by plaintiffs proceeding *in forma pauperis*. Moreover, defendants have not asked for a bond. The Court will therefore exercise its discretion not to require a bond since to do so may deprive plaintiffs of their right to judicial review.

CONCLUSION

For the foregoing reasons, defendants' motions to dismiss are GRANTED in part and DENIED in part as follows:

1. Defendant Green's motion to dismiss the claims against him is GRANTED as to all claims except the 42 U.S.C. § 1983 claim, without leave to amend;

2. HUD's motion to dismiss the APA claim is DENIED;

3. HUD's motion to dismiss the section 1983 claim is GRANTED with 30 days leave to amend;

4. HUD's motion to dismiss the ADA claim is GRANTED without leave to amend;

5. HUD's motion to dismiss the state contract claim is GRANTED without leave to amend;

6. OHA's motion to dismiss the section 1983 claim is GRANTED without leave to amend;

7. OHA'S motion to dismiss the ADA claim is GRANTED as to plaintiff Rucker without leave to amend and DENIED as to plaintiff Walker; and

8. OHA's motion to dismiss the state contract claim is GRANTED with 30 days leave to amend.

The Court also concludes that plaintiffs have shown, at a minimum, that there is a serious question and a fair chance of success on the merits as to the lawfulness of OHA's termination of the leases of "innocent" tenants for drug-related criminal activity that occurs outside of the tenant's unit, and that the balance of hardships weighs in favor of enjoining OHA's termination of the tenants' leases under such circumstances pending trial in this lawsuit. Plaintiff Walker has also demonstrated a serious question with respect to whether OHA's eviction of him for the drug-related criminal activity of his caregiver violates the ADA and that the balance of hardships weighs in favor of enjoining the prosecution of the unlawful detainer action against him on this ground. Accordingly,

IT IS HEREBY ORDERED that defendant Oakland Housing Authority ("OHA"), its officers, agents, servants, employees, and attorneys, are preliminarily enjoined, until further order of this Court, from terminating the leases of tenants pursuant to paragraph 9(m) of the "Tenant Lease" for drug-related criminal activity that does not occur within the tenant's apartment unit

when the tenant did not know of, and had no reason to know of, the drug-related criminal activity. OHA is not preliminarily enjoined from evicting tenants pursuant to paragraph 9(m) of the Tenant Lease for drug-related criminal activity in the tenant's apartment, regardless of whether the tenant knew, or had reason to know, of the criminal activity, except as is set forth below with respect to plaintiff Walker.

IT IS FURTHER ORDERED that defendant OHA, its officers, agents, servants, employees, and attorneys, are preliminarily enjoined, until further order of this Court, from prosecuting the Oakland-Piedmont-Emeryville Judicial District, Alameda County eviction proceedings in *Oakland Housing Authority v. Hill*, No. 013198, *Oakland Housing Authority v. Lee*, No. 013197, *Oakland Housing Authority v. Walker*, No. 011040 on the ground that the defendants in those actions violated paragraph 9(m) of the Tenant Lease.

IT IS FURTHER ORDERED that plaintiffs shall not be required to post a bond pursuant to Fed.R.Civ.P. 65(c) as to require them to do so would effectively deny them judicial review of their complaints.

IT IS SO ORDERED.

APPENDIX E

STATUTORY AND REGULATORY PROVISION INVOLVED

1. Section 1437d(*l*) of Title 42 of the United States Code (Supp. IV 1998) provides:

> **(*l*) Leases; terms and conditions; maintenance; termination**
>
> Each public housing agency shall utilize leases which—
>
> (1) have a term of 12 months and shall be automatically renewed for all purposes except for noncompliance with the requirements under section 1437j(c) of this title (relating to community service requirements); except that nothing in this subchapter shall prevent a resident from seeking timely redress in court for failure to renew based on such noncompliance;
>
> (2) do not contain unreasonable terms and conditions;
>
> (3) obligate the public housing agency to maintain the project in a decent, safe, and sanitary condition;
>
> (4) require the public housing agency to give adequate written notice of termination of the lease which shall not be less than—
>
> (A) a reasonable period of time, but not to exceed 30 days—

(i) if the health or safety of other tenants, public housing agency employees, or persons residing in the immediate vicinity of the premises is threatened; or

(ii) in the event of any drug-related or violent criminal activity or any felony conviction;

(B) 14 days in the case of nonpayment of rent; and

(C) 30 days in any other case, except that if a State or local law provides for a shorter period of time, such shorter period shall apply;

(5) require that the public housing agency may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause;

(6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy;

(7) specify that with respect to any notice of eviction or termination, notwithstanding any State law, a public housing tenant shall be informed of the opportunity, prior to any hearing or trial, to examine any relevant documents,

records, or regulations directly related to the eviction or termination;

([8]) provide that any occupancy in violation of section 13661(b) of this title (relating to ineligibility of illegal drug users and alcohol abusers) or the furnishing of any false or misleading information pursuant to section 13662 of this title (relating to termination of tenancy and assistance for illegal drug users and alcohol abusers) shall be cause for termination of tenancy;

(9) provide that it shall be cause for immediate termination of the tenancy of a public housing tenant if such tenant—

(A) is fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the individual flees, for a crime, or attempt to commit a crime, which is a felony under the laws of the place from which the individual flees, or which, in the case of the State of New Jersey, is a high misdemeanor under the laws of such State; or

([B]) is violating a condition of probation or parole imposed under Federal or State law.

For purposes of paragraph (5), the term "drug-related criminal activity" means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 802 of title 21).

2. Part 966.4(f) of Title 24 of the Code of Federal Regulations provides in pertinent part:

(f) *Tenant's obligations*. The lease shall provide that the tenant shall be obligated:

* * * * *

(12)(i) To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:

(A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or

(B) Any drug-related criminal activity on or near such premises.

Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

(ii) For purposes of subparts A and B of this part 966, the term *drug-related criminal activity* means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

3. Part 966.4(*l*) of Title 24 of the Code of Federal Regulations provides in pertinent part:

(*l*) *Termination of tenancy and eviction.*—

* * * * *

(2) *Grounds for termination of tenancy.*

(i) The PHA may terminate the tenancy only for serious or repeated violation of material terms of the lease, such as failure to make payments due under the lease or to fulfill tenant obligations, as described in paragraph (f) of this section, or for other good cause (including failure to accept the PHA's offer of a lease revision in accordance with paragraph (l)(2)(iv) of this section).

(ii) Either of the following types of criminal activity by the tenant, any member of the household, a guest, or another person under the tenant's control, shall be cause for termination of tenancy:

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the PHA's public housing premises by other residents.

(B) Any drug-related criminal activity on or near such premises.

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(5) *Eviction for criminal activity.—*

(i) *PHA discretion to consider circumstances.* In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family

members who engaged in the proscribed activity will not reside in the unit. A PHA may require a family member who has engaged in the illegal use of drugs to present evidence of successful completion of a treatment program as a condition to being allowed to reside in the unit.

(ii) *Notice to Post Office.* When a PHA evicts an individual or family from a dwelling unit for engaging in criminal activity, including drug-related criminal activity, the PHA shall notify the local post office serving that dwelling unit that such individual or family is no longer residing in the dwelling unit. (So that the post office will terminate delivery of mail for such persons at the unit, and that such persons not return to the project for pickup of the mail.)