No. 05-CV-207

DISTRICT OF COLUMBIA COURT OF APPEALS

SANTOSHA SCARBOROUGH,

Appellant,

v.

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

Appellee.

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

BRIEF AMICI CURIAE OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, BREAD FOR THE CITY, AND WASHINGTON LEGAL CLINIC FOR THE HOMELESS IN REPONSE TO THE BRIEF OF THE UNITED STATES

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

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

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

Counsel for Amici Curiae

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INTRODUCTION

The United States does not, and cannot, demonstrate any preemptive conflict between 42 U.S.C. § 1437f(d)(1)(B)(iii), which requires that leases for federally subsidized housing specify that criminal activity is a basis for eviction, and D.C. Code § 42-3505.01(b), which enables tenants to avoid eviction by curing lease violations based on criminal activity.[1] The purpose of the federal law -- to enhance the safety of federally subsidized housing -- is not incompatible with the local cure requirement. That is because the cure requirement, properly understood, permits a tenant to avoid eviction if, but only if, she takes remedial action that can reasonably be expected to eliminate the offending conduct on a permanent basis. Such action might consist, for example, of the tenant's barring the household member or guest who engaged in criminal activity from the premises. In those cases in which the tenant is capable of effecting such a cure (which will not be all cases in which criminal activity occurs), the federally assisted housing will be made no more safe by evicting the tenant than by allowing her to remain. Other important purposes of the federal housing laws would be defeated, moreover, by unnecessarily rendering an impoverished tenant and innocent family members homeless.

Because the United States misunderstands the scope of the local cure requirement, its preemption analysis is fatally flawed. Nothing in the text, history, or purpose of D.C. Code § 42-3505.01(b), or in the case law applying it, suggests that tenants may cure lease violations based on their own criminal activity simply by promising not to engage in such activity again. Such a

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[1] Because this Court directed the United States to assume that, as a matter of District of Columbia law, the cure requirement extends to criminal activity, we will not here address why that assumption is correct. We note, however, that the United States' analysis is muddied by its resistance to that assumption. See, e.g., Brief for the United States (U.S. Br.) 7-9. We likewise do not address the grounds advanced by appellant for retaining her tenancy (e.g., the adequacy of the notice to quit), whether or not federal law is generally understood to preempt local cure requirements.

purported cure would not provide the court, the landlord, or other tenants with any reasonable assurance that the criminal activity would not recur. It would thus be insufficient to enable the tenant to avoid eviction. Whether or not 42 U.S.C. § 1437f(d)(1)(B)(iii) would preempt the sort of local cure law that the United States hypothesizes, there is no reason to view D.C. Code § 42-3505.01(b) as such a law.

None of the decisions relied on by the United States involves circumstances remotely analogous to those here. Most of those cases concern the interplay of federal and state laws in an area in which the national government has traditionally been preeminent, such as international relations or interstate banking regulation. This case, in contrast, involves regulation in an area of traditional state preeminence. As we previously explained, because Congress chose to address crime in subsidized housing through a lease provision generally enforceable only in state landlord-tenant courts, there is particular reason to conclude that Congress intended the new federal law to coexist with existing state statutory protections for tenants in the eviction process. The United States offers no serious response to that proposition.

ARGUMENT

I. THE DISTRICT'S CURE OPPORTUNITY DOES NOT "FRUSTRATE THE PURPOSE" OF THE FEDERAL "ONE-STRIKE" LAW

The United States is unable to explain how Congress's purpose of promoting the safety of federally subsidized housing would be frustrated by allowing its tenants the same opportunity that is allowed all other District of Columbia tenants to avoid eviction by curing lease violations. When a lease violation involving criminal activity can be cured -- by, for example, permanently excluding the offending individual from the premises -- allowing the tenant to do so advances, rather than frustrates, Congress's safety-enhancing purpose. Moreover, the federal housing programs, of which the "one strike" provisions are but one component, were intended by

Congress to serve multiple purposes, including preventing homelessness among low-income families, who may have no alternative affordable housing available to them if they are evicted from their federally subsidized dwelling. See Br. for Amici Curiae 6-15 (filed Aug. 5, 2005) (addressing this question).

As the Supreme Court has recognized, Congress enacted "one-strike" statutes such as 42 U.S.C. § 1437f(d)(1)(B)(iii) to "provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs." Department of Housing and Urban Development v. Rucker, 535 U.S. 125, 234 (2002) (quoting 42 U.S.C. § 11901(1) (1994 ed.)). The statute does so by directing landlords to write their leases to include provisions that may be used to seek the eviction of tenants who pose a threat to the security of the housing. But the statute does not, as the United States seems to suggest (U.S. Br. 6, 7), make increased eviction an end in itself. There is no reason to attribute to Congress the purely punitive purpose of evicting tenants who, despite their unwitting violation of the lease provision, pose no continuing security threat -- in particular, tenants who did not themselves engage in any criminal activity and who are willing and able to bar from the premises any household member or guest who did engage in criminal activity. To the contrary, any such purpose is negated by the statute and implementing regulations, which do not automatically require a tenant's eviction whenever the lease provision has been violated. Rather, they "entrust[] that decision to the [landlords], who are in the best position to take account of, among other things, the degree to which the housing project suffers from 'rampant drug-related or violent crime,' 'the seriousness of the offending action,' and 'the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action.'" Rucker, 535 U.S. at 134 (quoting 42 U.S.C. § 11901(2) and 66 Fed. Reg. 28781, 28803 (2001)) (emphasis added).

The cure requirement provided by District of Columbia law is entirely consistent with the statutory purpose of promoting safety in federally subsidized housing. To constitute the sort of "cure" under local law that enables a tenant to avoid eviction, the tenant's actions must be reasonably likely to be effective at terminating the illegal activity and preventing its recurrence.[2] For that reason, the United States errs in suggesting (U.S. Br. 8) that "transferring possession briefly, periodically, or otherwise briefly halting the illegal activity or condition" would be sufficient to constitute "cure" under local landlord-tenant law. If the tenant cannot establish that she has effectively solved the problem, she cannot avoid eviction under D.C.'s cure law. If, however, the tenant is able to show that she has cured the violation on an ongoing basis, Congress's purpose of eliminating criminal activity from the premises is achieved. The local cure requirement, properly understood, poses no significant obstacle to the accomplishment of that purpose.[3]

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[2] Although this Court has not specifically defined "cure" in the landlord-tenant context, the term is commonly understood as "something that corrects or relieves a harmful or disturbing situation." See American Heritage Dictionary of the English Language (4th ed. 2000); cf. Black's Law Dictionary (5th ed. 1979) (defining "cure" as, inter alia, "[t]he act of healing, restoration to health from disease, or to soundness after injury" or as "[t]he right of a seller under U.C.C. to correct a non-conforming delivery of goods").

[3] That a cure must reasonably be expected to eliminate the offending conduct on a permanent basis is consistent with this Court's recent decision in Douglas v. Kriegsfeld Corp., No. 02-CV-711, 2005 D.C. App. LEXIS 515 (D.C. Oct. 13, 2005) (en banc). In Douglas, which involved a landlord's obligation under the federal Fair Housing Act to provide a reasonable accommodation to a tenant with a mental disability, the Court understood that, when a tenant's disability caused her persistently to violate the lease provision requiring that her apartment be kept clean, a sufficient cure would not consist of the tenant's mere promise to do better in the future.. Rather, in the circumstances of that case, the Court recognized that the cure would have to involve the intervention of third parties (specifically, the District of Columbia government) to clean the apartment and assure that it remained clean. See, e.g., id. at *58 ("There was no question in the landlord's -- or the [trial] court's -- mind that the tenant, in requesting a 'reasonable accommodation,' meant a stay of the eviction proceeding for the period reasonably required for the D.C. government to clean up the apartment and for the tenant to demonstrate, through the continuing help of the D.C. government, that she would keep it clean. Furthermore, no one

The United States' analysis is further flawed by its single-minded focus on the congressional purpose of enhancing the safety of subsidized housing. As the Supreme Court has recognized, "no legislation pursues its purposes at all costs." Rodriguez v. United States, 480 U.S. 522, 525-526 (1987) (per curiam). Because "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice," the Supreme Court has observed, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." Id. at 526. Here, Congress's choice in the "one-strike" statute to make eviction an option, not a mandate, in cases involving criminal activity reflects that Congress had other purposes as well -- including the overarching purpose of the federal housing assistance programs to reduce homelessness among families living in poverty. See, e.g., 42 U.S.C. § 12702. That important purpose is advanced by allowing tenants, in appropriate circumstances, to cure lease violations based on criminal activity by a household member or guest.[4]

II. THE CASE LAW INVOKED BY THE UNITED STATES OFFERS NO SUPPORT FOR PREEMPTING THE PROVISION OF LOCAL LANDLORD-TENANT LAW AT ISSUE HERE

As the Supreme Court very recently reiterated, "[i]n areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." Bates v. Dow Agrosciences LLC, 125 S. Ct. 1788, 1801 (2005)

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disputes that a clean apartment would erase the legal justification for the notice to cure or quit and thus would cure -- albeit belatedly -- the tenant's default.").

[4] The United States places a puzzling emphasis on the distinction between "discrete" and "continuous" instances of illegal activity. See U.S. Br. 7-9. The United States is correct that "the pre-emption determination should not hinge on whether the criminal conduct is a discrete event or a continuous violation," nor has the tenant in this case contended otherwise. Id. at 8. In any event, the distinction suggested by the United States is an artificial one, because many lease violations by tenants, including those involving criminal activity, may be characterized as either "discrete" or as "continuous."

(quoting New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995), and Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (internal quotation marks omitted); accord Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (cited in our earlier brief). The United States does not seriously dispute that settled principle of preemption analysis. Nor does the United States dispute that landlord-tenant law is an area of traditional state regulation.

A. To the extent that the United States' brief could be read to suggest that congressional intent has ceased to be the central focus of preemption analysis (see U.S. Br. 5), that suggestion is refuted by Bates and other recent decisions of the Supreme Court. See, e.g., Sprietsma v. Mercury Marine, 537 U.S. 51, 69 (2002) (considering whether, in the absence of an express preemption clause, the statutory "structure and framework . . . convey a clear and manifest intent" to occupy the field); Crosby v. National Foreign Trade Council, 530 U.S. 363, 377 (2000) (focusing on what "Congress manifestly intended" to be the extent of economic pressure on Burma). It is also inconsistent with the position of the Solicitor General of the United States in recent submissions to the Supreme Court. See, e.g., Brief for the United States in Bates, No. 03-388, at 16 (Nov. 2004) ("Congress's intent is the ultimate touchstone in every pre-emption case.") (quoting Medtronic, 518 U.S. at 485, and Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963)) (internal quotation marks omitted). To be sure, when Congress has not spoken expressly on the subject of preemption, courts must discern its intent from the statutory structure, purpose, and history. But courts are not authorized in such circumstances to implement their own policy preferences divorced from congressional intent.

The United States points to nothing in the "one-strike" statute's text, structure, purpose, or history that reflects any congressional intention to preempt cure requirements such as the one

at issue here, much less the requisite "clear and manifest" intention. The United States hypothesizes a conflict between the safety-promoting purpose of the federal statute and the operation of a very different state law from the one here -- a law that would allow tenants who themselves committed a crime to avoid eviction merely by promising not to do so again. See, e.g., U.S. Br. 7 & n.4, 8. As explained above, however, the District's cure requirement has not been applied in that manner, and there is no reason to think that the local courts would apply it in that manner in the future. This case does not, of course, even involve a tenant who committed any crime herself.[5]

B. Although the United States cites several decisions that involved questions of conflict preemption (see, e.g., U.S. Br. 4-5), none of those decisions supports, much less compels, a finding of preemption here. Several of those cases involved preemption of state laws in an area of traditional federal preeminence, such as international relations, see Crosby, supra; Hines v. Davidowitz, 312 U.S. 52 (1941); or interstate banking regulation, see Barnett Bank v. Nelson, 517 U.S. 25 (1996); Goudreau v. Standard Federal Savings & Loan Ass'n, 511 A.2d 386 (D.C. 1996). Other cases involved unambiguous expressions of Congress's or an agency's intent to supplant state law. See, e.g., City of New York v. FCC, 486 U.S. 57 (1988) (expressly preemptive regulation); Rice, 331 U.S. at 232-235 (statutory language providing that the Secretary of Agriculture's "power, jurisdiction, and authority" over persons licensed under the federal Warehouse Act was "exclusive").

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[5] That distinction appears to have eluded the United States. See, e.g., U.S. Br., Statement Of Issues Presented For Review (erroneously characterizing this eviction in this case as having been based on "the tenant's possession of an illegal firearm in her unit"); id. at 7 n.4 (suggesting that this case is "like" prior cases in the Landlord and Tenant Branch in which "tenants violated by [sic] the lease by committing a crime"); id. at 9 (suggesting that this case involves "the eviction of a tenant who engages in proscribed criminal activity").

This case stands in stark contrast to Geier v. American Honda Motor Co., 529 U.S. 861 (2000), which illustrates the rare circumstances in which conflict preemption is appropriately found in an area of traditional state regulatory authority. There, the Supreme Court found that federal motor safety standards, which required some but not all 1987 vehicles to be equipped with airbags, preempted a state common-law tort action that sought to establish negligence based on a manufacturer's failure to equip a 1987 vehicle with airbags. See id. at 874-881. The federal standards reflected the agency's judgment that a particular mix of safety devices, imposed on a particular, gradual timetable, was necessary to achieve safety goals. Because that balance could be achieved only by a comprehensive set of federal rules, the Court reasoned that state tort suits would "upset the careful regulatory scheme established by federal law" and therefore were preempted. Id. at 870. Here, by contrast, the United States has not claimed, nor could it credibly claim, that the "one-strike" statute is part of a comprehensive scheme of federal regulation that overrides state housing law. To the contrary, the statute depends entirely on the state landlord-tenant process for its implementation. Congress and HUD chose to target criminal activity in subsidized housing not through a freestanding prohibition, but through a contractual provision in the lease between the tenant and the subsidized landlord. In so doing, they incorporated, rather than displaced, existing state landlord-tenant law. See, e.g., Final Rule, Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28,776, 28,776 (May 24, 2001); HUD Handbook 4350.3 REV-1, Occupancy Requirements of Subsidized Multifamily Housing Programs, Ch. 8, at 13 ("To terminate tenancy, an owner must establish that the basis for the termination is consistent with . . . [a]pplicable state and local laws.").

The United States does not attempt to reconcile that approach with its claim that state law poses an "obstacle" to the goals of the "one-strike" statute. If Congress had chosen to enact a

freestanding ground for eviction based on criminal activity, the preemption analysis might be different. But it is hardly reasonable to conclude that Congress, having had the power to create a direct federal ground for eviction from federally subsidized housing based on criminal activity, chose instead to rely on general state landlord-tenant laws but to extinguish major components of those laws. The more straightforward conclusion is that the eviction provisions in federally subsidized housing build in the rules and protections of state law. See, e.g., Final Rule, Tenancy and Administrative Grievance Procedure for Public Housing, 53 Fed. Reg. 33,216, 33,257 (Aug. 30, 1988) ("[I]t is assumed that the procedural and substantive law affecting a tenancy in the public housing program is compounded of elements established by both Federal and State law.").

C. Finally, the United States' attempt to explain away HUD's explicit statement against preemption in this context is unpersuasive. In enacting the federal regulations to address crime in federally subsidized housing, HUD stated that those regulations do not "preempt State law within the meaning of Executive Order 13132," a general federal order incorporating basic preemption doctrine. See Brief of Amici Curiae 10-13 & n.5 (quoting 66 Fed. Reg. 28776, 28791 (May 24, 2001)). The United States attempts to dismiss HUD's statement by asserting that Executive Order 13132 "speaks to regulations with far greater impact on the federal-state balance of authority than that at issue here." U.S. Br. 10 n.6. The United States does not offer any support for that assertion or identify any regulation to which it concedes HUD's statement was directed. If, as the United States maintains throughout its brief, the "one-strike" regulation preempts a state-law protection generally available in landlord-tenant proceedings, one would have difficulty imaging a regulation with greater "impact on the federal-state balance of authority." The United States cannot have it both ways.

CONCLUSION

The judgment of the trial court should be reversed.

Respectfully submitted.

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

Counsel for Amici Curiae

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

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

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Motion of the Legal Aid Society, Bread for the City, and Washington Legal Clinic for the Homeless for Leave to File a Brief in Response to the Brief of the United States and the accompanying Brief to be delivered by first-class mail, postage prepaid, this 12th day of December, 2005, to:

Nathan Neal, Esq.
Ann Marie Hay, Esq.
D.C. Law Students in Court
806 7th Street, N.W., Suite 300
Washington, D.C. 20001

Counsel for Appellant

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

Lisa Dessel, Esq.
Musolino & Dessel
1615 L Street, N.W., Suite 4400
Washington, D.C. 20036

Margaret McFarland, Esq.
Melinda Bolling, Esq.
D.C. Housing Authority
1133 North Capitol Street, N.E.
Washington, D.C. 20002

Frederick Douglas, Esq.
1401 Eye Street, N.W.
Washington, D.C. 20005

Counsel for Appellee

Michael J. Ryan, Esq.
Alan Burch, Esq.
Office of the United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530

Counsel for the United States

_____
Barbara McDowell