Nos. 00-1770 & 00-1781

In the

Supreme Court of the United States

October Term, 2001

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Petitioner,
v.
PEARLIE RUCKER, *et al.,*
Respondents.

OAKLAND HOUSING AUTHORITY, *et al.,*
Petitioners,
v.
PEARLIE RUCKER, *et al.,*
Respondents.

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

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF NORTHERN CALIFORNIA, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Northern California is one of its regional affiliates. The issue in this case is whether public housing tenants may lawfully be evicted from their homes without even any allegation by the government that the evicted tenants have engaged in personal wrongdoing or that any illegal activity has taken place in their homes. For tenants with limited resources and thus a limited capacity to find somewhere else to live, the consequences of the government's harsh eviction policy can often be severe. More broadly, this case raises fundamental questions about the scope of the government's authority to pursue its "war on drugs" without regard to principles of individual guilt and responsibility that have always been central to our conception of justice. The proper resolution of this case is therefore a matter of significant concern to the ACLU and its members throughout the country.

STATEMENT OF THE CASE

This case involves the eviction of three tenants and their families from public housing in Oakland, California. Respondent 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. Petitioners 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.

Respondent Willie Lee is a 71 year-old man who has lived in Oakland public housing for 25 years. He currently lives with his grandson. Petitioners assert as a ground for his eviction that Mr. Lee's grandson possessed marijuana in a parking lot of the housing complex. Petitioners do not allege that Mr. Lee had any knowledge of his grandson's marijuana possession.

Respondent 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. Petitioners 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.

Petitioners contend that 42 U.S.C. §1437d(*l*)(6), part of the National Housing Act, authorizes eviction of public housing tenants and their families if any member of the household or guest engages in any drug-related criminal activity (including possession of marijuana) on or off the public housing premises, whether or not the tenant had any knowledge of, or ability to control, the illegal activity.[2] Thus, under petitioner's construction of the statute, an indigent

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] In its current version, §1437d(*l*)(6) provides:

> [A]ny 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

(continued...)

parent or grandparent who has done everything within her power to discourage drug use is nonetheless subject to eviction if a child in her care experiments with marijuana, even once and even outside the home.

The district court issued a preliminary injunction, holding that petitioners' refusal to recognize an "innocent tenant" defense was inconsistent with the statute and congressional intent. *Rucker v. Davis*, No. 98-00781, 1998 WL 345403 N.D.Ca. June 19, 1998). On appeal, the preliminary injunction was initially reversed by a divided panel of the Ninth Circuit, 203 F.3d 627 (9th Cir. 2001). However, the panel decision was subsequently vacated by the *en banc* court, which both reinstated the preliminary injunction and reaffirmed that petitioners' unyielding interpretation of the statutory language would, if adopted, raise serious constitutional issues. 237 F.3d 1113 (9th Cir. 2001).

SUMMARY OF ARGUMENT

Except in narrow circumstances not present here, the fundamental requirements of due process prohibit the government from taking adverse action against one person based on the illegal conduct of another person. Yet, that is precisely what occurred in this case. Each of the respondents faced eviction from public housing under petitioners' no-fault eviction policy, although none of the respondents was accused of using illegal drugs, or authorizing the use of illegal drugs, either on or off the premises. The fact that respondents are indigent tenants who face dire personal consequences only magnifies the fundamental unfairness of petitioners' policy. This Court has often stressed that constitutional rights are personal, and so is guilt. What the government proposes to do in this case ignores the second principal and violates the first. There were thus ample grounds for the court of appeals to invoke the doctrine of constitutional doubt in concluding that the challenged regulations are inconsistent with the underlying statute.[3]

Petitioners would like to divorce this case from its factual context and argue it in the abstract. The factual context is critical, however, both in understanding what is at stake and in determining which legal rules should apply. This Court has repeatedly stressed, in a variety of contexts, the importance of protecting the home against arbitrary government action. The Court has also consistently emphasized, especially in its recent jurisprudence, that the government must respect constitutional limits when it seeks to interfere with vested property rights. Here, both the terms of the statute and the terms of the lease give respondents a vested property right in their homes. In seeking to evict respondents from their homes without any evidence of individual wrongdoing, respondents are arbitrarily disturbing that vested property interest in a manner that inevitably produces the sort of unfair results that the facts of this case highlight.

Petitioners cite this Court's forfeiture decisions for the proposition that the Constitution does not require an "innocent tenant" defense and that the lower courts erred in therefore reading one into the statute. But that reliance is misplaced for at least two reasons. First, the forfeiture provisions enacted by Congress as part of the same chapter and subtitle as the original version of

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under the tenant's control, shall be cause for termination of the tenancy.

Among other changes, the 1996 amendments to §1437d(*l*)(6) eliminated the requirement that illegal drug activity would trigger an eviction only if it occurred on or "near" the public housing premises.

[3] *Amici* support the interpretation of the statute adopted by the lower courts in this case, largely for the reasons set forth in respondents' brief. To avoid repetition, however, this brief focuses exclusively on the merits of respondents' substantive due process claim. At the very least, the constitutional flaws inherent in petitioners' view of the statute are a relevant consideration under well-settled rules of statutory construction. *E.g.*, *National Labor Relations Board v. Catholic Bishops*, 440 U.S. 490 (1979).

the statute at issue in this case expressly stipulated that a forfeiture claim could not be based on acts "committed or omitted without the knowledge or consent of the [property] owner." 21 U.S.C. §881(a)(7). Second, *Bennis v. Michigan*, 516 U.S. 442 (1996), on which petitioners' rely, is not nearly as sweeping as petitioners contend. *Bennis* plainly does not reject an "innocent owner" defense in circumstances where the forfeited property is unconnected to any crime. That connection was indisputably present in *Bennis*; it is just as indisputably absent here.

Petitioners are equally misguided in pointing to the lease as a justification for these evictions. Given the disparity of bargaining power, the notion that public housing tenants voluntarily waive their rights by signing a standardized lease prepared by the public housing authority is fanciful, at best. To the contrary, the lease provision authorizing the eviction of innocent tenants represents a coerced and unconstitutional condition that is just as unenforceable as a provision authorizing a tenant's eviction because a family member or guest supported an unpopular political cause. It is true, of course, that the government has an interest in eliminating illegal drug activity that it does not have in eliminating political dissent. But the government cannot pursue even a legitimate goal through unconstitutional means, which is what it has done in this case by abandoning the principle of individual guilt.

Because that principle represents a fundamental aspect of substantive due process, this case involves more than a simple decision about the allocation of scarce government resources. Accordingly, petitioners' plea for deference and rational basis review should be rejected. Even under petitioners' proposed standard, however, a policy that evicts indigent tenants from their home cannot be described as a reasoned response to the problem of illegal drug activity occurring off-premises, and without the tenant's knowledge or consent, albeit by members of the tenant's household. Indeed, having eliminated the requirement that the illegal drug activity must occur "near" the public housing site, any plausible relationship between the challenged policy and the government's interest as a landlord in maintaining a drug-free environment has been strained to the breaking point.

ARGUMENT

I. PETITIONERS' NO-FAULT EVICTION POLICY VIOLATES SUBSTANTIVE DUE PROCESS BY THREATENING INNOCENT TENANTS WITH EVICTION FROM THEIR HOMES

The government in this case seeks to defend its authority to evict indigent and wholly innocent tenants from public housing -- inevitably driving many to homelessness -- because other family members or guests have engaged in illegal activity outside the tenant's home and without the tenant's knowledge or consent.

This draconian policy violates the substantive due process norm of individual guilt, which is fundamental to our concept of justice, and deeply embedded in our nation's history and traditions. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). "In our jurisprudence, guilt is personal." *Scales v. United States*, 367 U.S. 203, 224-25 (1960). This is true in the criminal context, where some element of scienter is generally required to establish individual culpability. *E.g., Morrisette v. United States*, 342 U.S. 246, 264-65 (1952). It is also true in civil cases.[4] As this Court just recently observed in a suit seeking damages against a media defendant for broadcasting a private conversation that had been illegally intercepted by someone else: "The

[4] *See Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 490-91 (1915)(invalidating civil penalty under Due Process Clause for conduct that involved "no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct").

normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." *Bartnicki v. Vopper*, 532 U.S. 514, ___, 121 S.Ct. 1753, 1764 (2001); *see also Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, __, 121 S.Ct. 2351, 2380 (2001)(Thomas, J., dissenting)(same observation).

The Court's adherence to these principles has never turned on the formality of whether the government sanction represents a penalty or punishment in the sense necessary to invoke the Eighth Amendment or Double Jeopardy Clause.[5] Rather, the Court has taken a much more practical approach. For example, the issue in *Plyler v. Doe*, 457 U.S. 202 (1982), was whether Texas could exclude undocumented immigrant children from its public schools. Although the Court relied on equal protection rather that due process, its holding was written in language that broadly embraces both concepts. Thus, the Court explained in one particularly pivotal passage, "[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against its children does not comport with *fundamental conceptions of justice*." *Id.* at 220 (emphasis added).

For similar reasons, the Court has repeatedly rejected as unconstitutional efforts to deny government benefits to children born out of wedlock. The rationale of those decisions was succinctly expressed in *Weber v. Aetna Casualty and Surety Co.,* 406 U.S. 164, 175 (1972)(emphasis added): "[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that *legal burdens should bear some relationship to individual responsibility or wrongdoing*. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual -- as well as unjust -- way of deterring the parent."

In *Plyler* and the illegitimacy cases, the Court's concern was that the government had misdirected its attention against innocent children who "can affect neither their parents' conduct nor their own status." *Trimble v. Gordon*, 430 U.S. 762, 770 (1977). Petitioners' actions in this case suffer from the same logical fallacy and the same constitutional infirmity. The indigent tenants who brought this action did not engage in any illegal drug activity and the government has not even claimed that they had any ability to control those who did engage in such activity outside the home. Yet, through no fault of their own, respondents are now faced with the loss of a significant property interest and the right to continue living in their own homes. At a minimum, those deprivations are surely comparable to the losses suffered in other cases where this Court has insisted, under both equal protection and substantive due process, that the government must present at least some evidence linking the person or property to the harm the government seeks to avoid. Here, the challenged policy does not require any such link and, so far as the record reveals, there is absolutely none.

[5] Even in those terms, there is a significant Eighth Amendment claim in this case under the Excessive Fines Clause, which respondents have briefed.

A. By Evicting Respondents From Their Homes, Petitioners' Policy Abridges Substantial Property And Liberty Interests

Although the Court has never squarely held that public housing tenants have a property interest in their leasehold, in *Greene v. Lindsey*, 456 U.S. 444 (1982), the Court struck down an Oregon forcible entry and detainer statute that failed to provide public housing tenants with notice. In finding that the Fourteenth Amendment was violated, the Court's discussion proceeds from the assumption that public housing tenants have "a significant interest in property, indeed of the right to continued residence in their homes." *Id.* at 451. *See also Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 283-84 (1969). The existence of a property interest in public housing tenancies is consistent with this Court's decisions in other contexts. *See Goldberg v. Kelly*, 397 U.S. 254 (1970)(welfare recipients have property interest); *Perry v. Sinderman,*408 U.S. 593 (1977)(college professor who had understanding that he would not be fired, arising from *de facto* tenure policy, has property interest); *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985)(government employee who could not be fired except for cause has a protected property interest). *See also Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)(property under the due process clause is an interest to which government has given someone an entitlement). These cases all recognize that the property protected by the constitutional right to due process is not limited by traditional notions of real or chattel property. The term also includes certain entitlements, benefits, and expectations that are statutorily or contractually created. *Id.* In this case the property interest in public housing derives from both sources.[6]

Specifically, the property interest at stake in this case is very plainly established by statute and by the terms of the lease itself. The federal public housing program was established in 1937 in 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, Congress put a number of protections in place that limit the ability of local public housing authorities (PHAs) to evict. In §1437(d)(*l*)(2) 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). Read together, these provisions of subsection (d) are sufficient to create a property interest for purposes of the Due Process Clause.[7]

The case for recognition of a protectable property interest for public housing tenants is even stronger than in the cases involving entitlement programs or employment. The parties have entered into a lease agreement that defines the terms and conditions of the tenancy. Public

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[6] *Amici* recognize that these cases define the procedural protections that flow from the Due Process Clause. Those protections would be rendered meaningless, however, if the property interests it protects could be terminated for arbitrary reasons unrelated to individual guilt. This Court has emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell,* 418 U.S. 539, 558 (1974), whether the fault lies in a denial of fundamental procedural fairness, *see*, *e.g., Fuentes v. Shevin,* 407 U.S. 67, 82 (1972)(the procedural due process guarantee protects against "arbitrary takings"), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, *see*, *e.g.*, *Daniels v. Williams*, 474 U.S. 327, 331 (1986)(the substantive due process guarantee protects against government power arbitrarily and oppressively exercised). *See also County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998)(making the foregoing observation about the procedural and substantive protections of the Due Process Clause).

[7] There is wide agreement on this point in the lower courts. *See Escalera v. New York City Housing Authority*, 425 F2d 853, 861 (2nd Cir. 1970); *Davis v. Mansfield Metropolitan Housing Authority*, 751 F.2d 180 (6th Cir. 1984); *Jeffries v. Georgia Residential Financial Authority,* 678 F.2d 919 (11th Cir. 1982); *see also Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1981)(tenants have property interests in subsidized housing payments if mandated by law); *Ressler v. Pierce* 692 F.2d 1212 (9th Cir. 1982)(section 8 applicants have protected property interest).

housing tenants are required to contribute up to 30 percent of their adjusted monthly income as rent. 42 U.S.C. §1437a(a)(1). Pursuant to §1437d(*l*)(5), the lease specifically provides that an eviction must be based on repeated violations of the lease terms or "good cause." These regulatory safeguards create an expectation that the law acknowledges and protects. "The expectation of uninterrupted occupation and privacy exist whether the home is held in fee or by lease. A leasehold is subject to constitutional protections against arbitrary forfeitures by government." *United States v. Leasehold Interest in 121 Nostrand Avenue*, 760 F.Supp. 1015, 1027 (E.D.N.Y. 1991), citing *Alamo Land and Cattle Co. v. Arizona*, 424 U.S. 295, 303 (1976)(leasehold interest is a form of property protected by the Fifth Amendment against uncompensated taking).[8]

This conclusion is reinforced by examination of the legislative history that led to the adoption of the statute at issue in this case. 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)(7). 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. S17360-02 (Nov. 10, 1998).

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)(7) (emphasis added).[9] Although the court below clearly understood the

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[8] In discussing due process protections of public housing tenants, it should not be forgotten that, by definition, these low income tenants will have very limited resources to contest an eviction, and no right to a government appointed lawyer. Nelson H. Mock, "Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties," 76 Tex.L.Rev. 1495, 1505-06 (1998).

[9] 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

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statutes to be "different animals," it concluded that Congress meant them to be read consistently since they govern the same subject matter and were enacted at the same time. 237 F.3d at 1121-22. More importantly, by including public housing leaseholders in its definition of property that may be subject to forfeiture, Congress clearly expressed its intention to treat those leaseholds as property interests indistinguishable from any other property interest.

Finally, the property interest at stake here is reinforced by an undeniable liberty interest because it involves respondents' homes. "[S]afeguarding of the home does not follow merely from the sanctity of property rights. The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted constitutional right." *Hodgson v. Minnesota,* 497 U.S. 417, 448 n.33 (1990). Thus, an "overriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 U.S. 573, 601 (1980). *See also United States v. James Daniel Good Real Property*, 510 U.S. 43, 53-54 (1993)("Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance").

The rationale for providing heightened protections against governmental actions against the home is especially compelling in the case of public housing tenants:

> For the poor, the shortage of livable low-priced housing is especially acute. Tenants -- and especially their minor children -- who are evicted are likely to become homeless, with whatever stability their lives afforded seriously jeopardized.

United States v. The Leasehold Interest in 121 Nostrand Avenue, 760 F.Supp. at 1018; *see also United States v. Robinson*, 721 F.Supp. 1541, 1544 (D.R.I. 1989)("an order of forfeiture here would be, in effect, a sentence of homelessness for the defendants and her three young children"); *Richmond Tenants Organization v. Kemp*, 956 F.2d 1300, 1306 (4th Cir. 1992)("the summary eviction of tenants from a public housing project is hardly comparable to the seizure of a yacht"). In addition to the possibility of being turned out into the street with nowhere to go, an eviction may result in the breakup and scattering of the family. It may also result in the loss of an individual's furniture, clothing, personal effects and important papers if they are unable to find a new home or place to store those items in the interim. Simply put, public housing is the refuge of last resort for the individual respondents in this case and many other elderly and low-income residents.

B. By Disregarding The Principle Of Individual Guilt, Petitioners' Policy Violates Core Notions Of Fundamental Fairness

Under the circumstances of this case, petitioners' contention that an otherwise unconstitutional government policy should be sustained because it is included in a lease imposed on indigent tenants seeking public housing is both self-serving and wrong. As a matter of fact, it ignores the obvious reality that public housing leases are not negotiated agreements and the parties do not possess anything remotely resembling equivalent bargaining strength. As a matter of positive law, it misrepresents the statutory scheme established by Congress, which prohibits petitioners from coercing compliance with unreasonable lease terms and conditions. 42 U.S.C. §1437d(*l*). And, as a matter of constitutional doctrine, it disregards the fundamental principle that any waiver of constitutional rights must be knowing and voluntary. *See, e.g.*, *Johnson v. Zerbst*, 304 U.S. 458 (1938).

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of the property." 18 U.S.C. §983(d)(2)(A).

Indeed, were petitioners correct, a public housing tenant could just as easily be evicted for violating a lease provision requiring a tenant to vote for designated political candidates. Even petitioners would presumably not defend the constitutionality of such a provision. Petitioners' reliance on the lease therefore begs the question. If a lease condition is constitutional, it can certainly be enforced. If it is an unconstitutional condition, then the fact that respondents signed the lease is immaterial

To the extent that they respond to the due process argument at all, petitioners point to the forfeiture cases as support for their position. Just the opposite is true. In recent years, virtually every member of this Court has expressed disapproval of forfeitures where, as here, the property itself has not been used for crime and where the individual property owner is not guilty of any wrongdoing. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974)(observing that serious constitutional questions would be raised by the forfeiture of property by an owner who "was uninvolved in and unaware of illegal activity" and who "had done all that could be reasonably expected to prevent the proscribed use of his property"); *Austin v. United States*, 509 U.S. 602 (1993)(placing limits on the government's ability to define property as an instrumentality of the crime); *id.* at 627-628 (Scalia, J., concurring in part, concurring in judgment)(same); *Bennis v. Michigan*, 516 U.S. at 466-467 (Stevens, Souter, Breyer, JJ., dissenting)(recognizing innocent owner defense); *id*. at 472-473 (Kennedy, J., dissenting) (same); *id.* at 458 (Ginsburg, J., concurring)(the government "has not embarked on an experiment to punish third parties . . . Nor do we condone any such experiment"); *id*. at 456 (Thomas, J., concurring)(limiting forfeiture to cases where property is misused).

Bennis is the Court's most recent decision on point. It involved the seizure of an automobile owned jointly by a Michigan husband and wife. Contrary to petitioners' view, however, *Bennis*, does not support their position on the constitutional issues presented by this case. If anything, it refutes it. The car in *Bennis* was forfeited under Michigan's abatement statute because it was used by the husband to solicit a prostitute. The wife, who had obviously not approved the arrangement, alleged that the statutory abatement scheme deprived her of due process in violation of the Fourteenth Amendment. In a straightforward application of its forfeiture cases dating back to the early nineteenth century, a nevertheless sharply divided Court held in a 5-4 decision that property entrusted to another is subject to forfeiture if it is used for illegal activity. 516 U.S. at 449. *See also Calero-Toledo*, 416 U.S. 663 (yacht rental); *Van Oster v. Kansas*, 272 U.S. 465 (1926)(automobile on loan); *J.W. Goldsmith, Jr.- Grant Co. v. United States*, 254 U.S. 505 (1921)(automobile sale where the dealer held title as security on note); *Dobbins v. Distillery*, 96 U.S. 395 (1877)(property used by lessee); *Harmony v. United States*, 43 U.S. (2 How.) 210 (1844)(vessel); *The Palmyra*, 25 U.S. (12 Wheat) 1 (1827)(vessel).

In these cases, forfeiture has been justified on two theories -- that the property itself is "guilty" of the offense, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property. Both theories rest, at bottom, on the notion that the owner has been negligent in allowing his property to be misused and can be properly punished for that negligence. *See Austin*, 509 U.S. at 614.[10]

Based on that understanding, this Court's cases that have rejected an "innocent owner" defense have been carefully limited to situations where the property has been misused by a third person to whom the property was entrusted. In one of its earliest decisions, involving the cargo of

[10] In *Austin v. United States,* 509 U.S. 602 (1993), the Court reviewed *Calero-Toledo* and earlier *in rem* forfeiture cases and found that they were based on "the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for his negligence," 509 U.S.at 615, and that none of these cases upheld forfeiture "when the owner had done all that reasonably could be expected to prevent the unlawful use of his property." *Id.* at 616.

a seized vessel, the Court speaking through Chief Justice Marshall recognized as "unquestionably a correct legal principle" that "a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed." *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 364-65 (1808). This Court held in *Peisch* that the owners of the vessel could not be made to suffer for actions taken by the salvors, persons over whom the owners had no control. *Id.* at 364-65. The more recent cases have expressly reserved the question whether the "guilty property" fiction could be employed to forfeit the property of a truly innocent owner. *Austin*, 509 U.S. at 614-15; *Goldsmith-Grant Co.,* 254 U.S. at 512. In *Calero-Toledo*, 416 U.S. 663, the Court explained this reservation by noting that forfeiture of a truly innocent owner's property would raise "serious constitutional questions." Drawing an analogy to the situation in *Peisch* where the owner of the vessel had no control over the actions of the salvors, Justice Brennan's opinion for the Court explained:

> [T]he same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

416 U.S. at 689-690.

The four dissenting justices in *Bennis* would have adopted Justice Brennan's formulation in *Calero-Toledo*, and recognized an "innocent owner" exception for truly blameless individuals who establish that they took all reasonable steps to prevent illegal use of the property. *Bennis,* 516 U.S. at 466-67 (Stevens, Souter, Breyer, JJ. dissenting); *id.* at 472-73 (Kennedy, J., dissenting). To be sure, the majority opinion does not endorse that view but it also does not reject it. It concludes, instead, that the "innocent owner" defense is inapplicable. Each of the three opinions by the five Justices in the majority relied heavily on the particular facts and circumstances of the case, and both singly and

cumulatively they are inconsistent with the expansive reading of the decision urged by petitioners.[11]

Chief Justice Rehnquist's opinion for the Court acknowledged that the argument that the forfeiture of the property of innocent owners is unfair "has considerable appeal." *Id*. at 453.[12] However, the "force" of this claim of unfairness was "reduced" in the *Bennis* case because of a number of factors. *Id.* First, in *Bennis* the automobile "was used in criminal activity" by its joint owner, the husband. *Id.* This placed the case within "a long and unbroken line of cases [which] hold 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. (emphasis added).[13]

Furthermore, both Justice Rehnquist and Justice Ginsburg stressed that the car could be forfeited to the state because the husband was the joint owner, and thus the innocent spouse's claim was solely for an offset interest in the proceeds. *Id*. at 453, 457 (Ginsburg, J. concurring). In fact, as Justices Rehnquist, Thomas and Ginsburg all noted, the proceeds from the sale of the car (purchased for $600) did not exceed the cost of the sale so there was "practically nothing left" for Ms. Bennis' offset. *Id*. at 445, 456, 458. The Court also stressed that the nuisance proceeding was an equitable action, and that the state courts retained remedial discretion to prevent unjust results, *id*. at 444-45, 453, or, in Justice Ginsburg's words, "to police exorbitant applications of the statute." *Id*. at 457. In exercising that discretion, the state court took special note of the fact that the Bennises had another automobile. *Id*. at 445.

The importance of these particular facts to the result reached by the Court is clear from the emphasis placed on them by all of the Justices in the majority; in fact, Justice Ginsburg made it explicit that these facts were "key to my judgment." *Id*. at 457. Based on these limiting factors, Justice Ginsburg concluded that "Michigan, in short, has not embarked on an experiment to punish innocent third parties. Nor do we condone any such experiment." *Id*. at 458 (citation omitted). However, the no-fault eviction policy adopted by petitioners in this case is exactly that -- "an experiment to punish innocent third parties."

Justice Thomas wrote a separate concurring opinion in *Bennis* explaining his own concerns with the law of forfeiture. While acknowledging that the Constitution may permit forfeiture without providing an "innocent owner" defense, he cautioned that such forfeiture must be limited to circumstances in which the property serves as an instrument of the crime.

> The limits on *what* property can be forfeited as a result of what wrongdoing -- for example, what it means to "use" property in crime for purposes of forfeiture law -- are not clear to me. See *United States v. James Daniel Good Real Property,* 510 U.S. 43, 81, 83, 114 S.Ct. 492, 515, 516, 126 L.Ed.2d 490 (1993) (THOMAS, J., concurring in part and dissenting in part). Those limits whatever they may be, become especially significant when they are the sole

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[11] The narrowness of the *Bennis* decision has been noted in both the leading treatises in the field. David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, vol. 1, §12.04, pp.12-62 (Matthew Bender 1998)("The Court's opinion, per Chief Justice Rehnquist, should be read as resting on narrow grounds peculiar to the *Bennis* case . . . . Thus, this decision is not going to be the Court's final word on the subject"); Steven L. Kessler, CIVIL AND CRIMINAL FORFEITURE, vol.1, §3.01[3][a], pp.3-180 (West Group 1999).

[12] Justice Thomas went further in his concurring opinion by characterizing such a result as "intensely undesirable." 516 U.S. at 454.

[13] In his concurrence, Justice Thomas characterized *Bennis* as a case in which "the property sought to be forfeited has been entrusted by its owner to one who uses it for crime . . . ." 516 U.S. at 456.

> restrictions on the state's ability to take property from those it merely suspects, or does not even suspect, of colluding in crime. It thus seems appropriate, where a constitutional challenge by an innocent owner is concerned, to apply those limits rather strictly, adhering to historical standards for determining whether specific property is an "instrumentality" of crime. *Cf. J.W. Goldsmith, Jr.,-Grant Co., supra*, at 512, 41 S.Ct., at 191 (describing more extreme hypothetical applications of a forfeiture law and reserving decision on the permissibility of such applications).

516 U.S. at 455 (Thomas, J., concurring).[14]

The contrast between the facts of *Bennis* and the instant case is clear. In the instant case, the property in question was not "used in criminal activity;" in fact the illegal activity took place off the premises, and the district court made it clear that its preliminary injunction did not apply if the illegal activity took place inside the apartment. Additionally, respondents have alleged, and petitioners have not contested, that they had neither knowledge of nor control over the illegal activity. The factors present in *Bennis* are thus not at work here. The respondents are blameless and the property was not an instrumentality of the crime.

Additionally, the *prosecutorial* discretion vested in PHAs to decide whether to institute an eviction proceeding is not the same as the equitable *judicial* discretion noted by the Court in *Bennis*. Finally, what is at stake in this case is not a negligible financial interest in a family's second car, but rather their entire property interest in their home. The eviction of these low-income tenants, regardless of their being innocent of any wrongdoing or negligence, is a perfect example of, in Justice Ginsburg's phrase, an "exorbitant application" of a forfeiture statue. 516 U.S. at 457.

None of the Court's decisions upholding forfeiture involve an analogous situation where there is no allegation that any unlawful activity occurred on the leasehold premises. Indeed, there is no allegation that any of the respondents did anything unlawful whatsoever. The forfeiture cases cited by petitioners do not allow the government to impute knowledge or responsibility to the respondents based on the unlawful activities of their children and grandchildren, especially when those activities did not even occur on the property at issue.

Finally, petitioners are no more free to enforce a lease condition that violates substantive due process than they would be free to violate respondents' rights directly. *Amici* recognize that most of this Court's unconstitutional condition cases have involved free speech claims. *See, e.g.*, *Speiser v. Randall*, 357 U.S. 513 (1958); *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001). But the government itself has recently acknowledged that the doctrine is not limited to

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[14] In recent years, a majority of the members of this Court has agreed that the concept of an instrumentality subject to forfeiture -- also expressed as the idea of "tainted" items -- must have an outer limit. In *Austin*, the Court rejected the argument that a mobile home and auto body shop where an illegal drug transaction occurred were forfeitable as "instruments" of the drug trade. 509 U.S. at 621. Justice Scalia agreed that a building in which an isolated drug sale happens to take place also cannot be regarded as an instrumentality of that offense. *Id.* at 627-28 (Scalia, J., concurring in part and concurring in judgment). Justice Thomas, too, has stated that it is difficult to see how real property bearing no connection to crime other than serving as the location for a drug transaction is in any way "guilty" of an offense. *See United States v. James Daniel Good Real Property*, 510 U.S. at 81-82 (Thomas, J., concurring in part and dissenting in part).

Austin was decided under the Eighth Amendments Excessive Fines Clause. Although some members of the Court have drawn a distinction between the considerations that are relevant to a claim brought under the Excessive Fines Clause and the Due Process Clause, the principles at issue are plainly related. Both constitutional clauses are designed to cabin the authority of government officials to seize private property which is not fairly characterized as an instrumentality of a crime, or where the owner is strictly blameless.

that context. *See United States v. Knights*, No. 00-1260, slip op. at 5 n.4 (Dec. 10, 2001).

More significantly, the action challenged here violates the principles involved in the unconstitutional conditions cases in a way that may be different in kind but no less damaging in impact. The imposition of a no-fault standard elevates form over substance by sidestepping the substantial protections of the Fifth and Fourteenth Amendments. In particular, the leasehold is conditional on respondents' acceptance of lease terms that erase the requirement of individual guilt, although that requirement is fundamental to the validity of government-imposed deprivations under the Due Process Clause. That result is unconstitutional whether the government accomplishes it directly, through forfeiture, or indirectly, as here, by including it as a condition of the tenancy.

II. PETITIONERS' NO-FAULT EVICTION POLICY IS NOT PROPERLY SUBJECT TO MINIMUM SCRUTINY, WHICH IT CANNOT SURVIVE IN ANY EVENT

Petitioners do not seriously contend that their challenged policy can survive any form of meaningful scrutiny under the Constitution. Instead, they argue that government decisions about the allocation of scarce benefits are entitled to deference, and that those cases applying a deferential standard of review, primarily in the welfare context, are controlling here. *See, e.g.*, *Dandridge v. Williams*, 397 U.S. 471 (1970).[15] Petitioners' contention might have more force under existing law if respondents were arguing that there is a constitutional right to public housing. *Cf. Lindsey v. Normet*, 405 U.S. 56 (1972). But that is not the argument that is being made. Respondents are not asserting a claim to scarce benefits that have in fact been allotted to somebody else. They are challenging the government's authority to evict them from their homes absent any evidence of personal wrongdoing or misuse of the property. That is not a quarrel about resources. It is a dispute over the government's obligation to act on the basis of individual guilt and accountability -- a principle that this Court has described, in other contexts, as fundamental to our conception of justice. *See* pp.6-7, *supra*. Our conception of justice also demands that intrusions on fundamental rights be subject to more than the cursory review that respondents allege is appropriate here. At this Court has noted, the substantive component of the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and interests." *Washington v. Glucksberg*, 521 U.S. at 720.

On that basis, this case is easily distinguishable from *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977), and *Lyng v. United Auto Workers*, 485 U.S. 360 (1988), two deference cases that petitioners cite. As a threshold matter, neither *Lyng* nor *Hodory* involved the termination or denial of government benefits based on the conduct of the recipient's children or grandchildren. Additionally, neither case involved the loss of the family domicile. Moreover, none of the government interests at stake in *Hodory* and *Lyng* are present in this case. For instance, *Lyng* stands for the proposition that the Federal Food Stamp program need not increase benefits to supplement the loss of income of the head of the household who decides to go on strike. Applying minimal scrutiny under the Equal Protection Clause, the Court upheld the distinction between persons who go out on strike voluntarily and those who lose their jobs involuntarily. In the Court's view, it was not unlike the decision by most state agencies to deny unemployment benefits to those who quit their jobs voluntarily or are fired for cause. In addition, there was at least an element of personal accountability in *Lyng* that is totally missing here. While the striker's family would undoubtedly suffer from his decision, the striker controls the destiny of his own family. Finally, unlike *Lyng*, the respondents in this case are not asking the government to subsidize the exercise of their constitutional rights, they are merely asking the

[15] Petitioners make this argument primarily by reference to Judge Sneed's dissent from the *en banc* decision below.

government to refrain from abridging them.

The essential facts in *Hodory* are different from *Lyng* only to the extent that the unemployment statute in *Hodory* did not draw any distinction between individuals who voluntarily went out on strike and those who were temporarily furloughed because of a plant closing. In this sense, the furloughed worker in *Hodory* was blameless. Any similarity between *Hodory* and this case ends there, however. As in *Lyng*, there was no property interest at stake. Furthermore, the steelworker plaintiff in *Hodory* was laid off as a result of a strike at one of the employer's coal mines. Under these circumstances, the Court reasoned that the denial of benefits was rationally related to the goal of maintaining governmental neutrality in labor disputes. The Court recognized that "[t]he employer's costs go up with every laid-off worker who is qualified to collect unemployment. The only way for the employer to stop these rising costs is to settle the strike so as to return the employees to work. Qualification for unemployment compensation thus acts as a lever increasing the pressures on an employer to settle a strike." *Hodory*, 431 U.S. at 492. Because the distinction in *Hodory* did not involve a suspect class, the denial of benefits was upheld. But being denied benefits under the circumstances present in *Hodory* is very different from being turned out of your home when an individual possesses a lease agreement. Respondents' complaint in this case has less to do with disparate treatment than with treatment that is fundamentally unfair. Thus, there is no occasion to apply rational basis analysis or to dispense with the due process analysis we have argued throughout.

Even if the Court's equal protection or due process decisions involving economic regulation are applicable, the interests identified by the petitioners and referenced by the dissent in the *en banc* decision below are not advanced by the no-fault eviction policy. The policy is premised on the empowerment of public housing residents to assist in the fight against crime and violence. It is the intent of housing officials that the policy will "provide a credible deterrent against criminal activity and facilitate the eviction of truly culpable tenants." *Rucker,* 237 F.3d at 1139-40. It is also hypothesized that the policy will "create incentives for all tenants to report drug related activity." *Id.* The court of appeals rejected this far reaching argument for the very basic reason that "[I]mposing 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." *Id.* at 1121. Likewise, when applied against elderly, low-income residents for the conduct of their adult children and grandchildren, there is no basis to conclude that the government's interests will be rationally advanced.[16] The individuals evicted are innocent of any wrongdoing and culpable of nothing. "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." *Id.* All the policy accomplishes is the removal of these otherwise law-abiding individuals. Under this Court's cases requiring personal guilt, the means chosen by the petitioners cannot justify the ends.

The court of appeals' analysis rejecting the interests of petitioners is unquestionably correct. Indeed, this Court's forfeiture decisions can be understood to reach the very same conclusion when applied to the facts of this case. *Austin*, 509 U.S. 602, stands for the

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[16] Admittedly, the policy might have some rational basis if it were targeted at the children and grandchildren who are allegedly engaged illegal activity, but this cannot provide the justification for evicting the parents or grandparents -- especially where as here the conduct did not occur in the leasehold premises and was beyond the power of leaseholder to prevent or control. What makes petitioners' position so untenable is that if they are aware of illegal activity by the leaseholder or of illegal activity occurring on the leaseholder's premises, they have abundant authority under the policy to evict the tenant on this basis. Similarly, if petitioners are aware that the leaseholder's children, grandchildren or other household members or guests are engaging in illegal activity on or off the premises, they can intercede or seek the assistance of local law enforcement authorities. Petitioners' enforcement of the no-fault policy would allow irrational evictions of innocent tenants.

proposition that forfeiture of property that is not an instrumentality of the crime does not rationally advance the government's interest in deterring misuse of the property. The government's rationale is even more attenuated here because there is no allegation of misuse. Moreover, if *Bennis*, 516 U.S. 442, is understood as a case involving ownership or negligent entrustment of the car, and not as a case categorically rejecting an innocent owner defense where the property owner is strictly blameless, then the government's interests in deterring or punishing drug use by the tenant or tenant's household members are not rationally advanced, just as they wouldn't be rationally advanced if the government forfeited the property of individuals who could not foresee or control the misuse of their property. Under these circumstances, it is "difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." *Calero-Toledo*, 416 U.S. at 689-90.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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