STATE OF WISCONSIN
SUPREME COURT

District 1 Appeal No. 2013AP002207
Circuit Court Case No. 2013SC020628

MILWAUKEE CITY HOUSING AUTHORITY,

Plaintiff-Respondent-Petitioner

v.

FELTON COBB,

Defendant-Appellant.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT 1
REVERSING A JUDGMENT OF THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
PEDRO A. COLON, JUDGE

BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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ISSUE PRESENTED FOR REVIEW

When a public housing authority commences an eviction action, based on a tenant's illegal activity, is Wisconsin's right-to-cure statute, Wis. Stat. § 704.17(2)(b), pre-empted because the statute conflicts with the federal "One Strike and You're Out" initiative?

Answered by circuit court: Yes.

Answered by court of appeals: No.

STATEMENT OF THE CASE

This is an eviction action brought by the Petitioner landlord, Housing Authority of the City of Milwaukee (HACM). HACM is a public body, organized and chartered pursuant to Wis. Stat. § 66.1201, for the purpose of operating a low-income housing program under the United States Housing Act of 1937, as amended, codified at 42 U.S.C. § 1437, *et seq.* It is funded by the United States Department of Housing and Urban Development (HUD) and regulated by Title 24 of the Code of Federal Regulations. Mr. Cobb leases a public housing unit at HACM's Merrill Park housing development under a one-year lease.

HACM's funding is dependant on its compliance with the federal regulations that govern public and Indian housing. *See* 24 C.F.R. Ch. IX, Parts 900-971. Pursuant to those federal regulations, HACM enters into written contracts, called Annual Contributions Contracts, under which HUD agrees to provide funding for its programs and HACM agrees to comply with HUD regulations for the programs. 24 C.F.R. § 5.403, Definitions. These funding requirements imposed on HACM by HUD significantly

affect HACM's role as a landlord in the community and, in large part, dictate its relationship to its tenants.

FACTS

On June 5, 2013, James Darrow, a HACM Public Safety Officer, with 14 years experience, was patrolling the hallways of HACM's Merrill Park public housing development building. While on the fourth floor, Officer Darrow detected the scent of smoked marijuana. Officer Darrow, after checking a number of doors on the fourth floor, determined that the marijuana odor was strongest outside the door to unit 414, leased solely by the Defendant-Appellant-Respondent, Felton Cobb (APPX-144-148)[1]. Officer Darrow pursued his investigation by knocking on the door to unit 414. The tenant, Mr. Felton Cobb ("Cobb"), opened the door approximately 12 inches. Officer Darrow observed the odor of burnt marijuana intensify when the door was opened (A-73). When questioned regarding the source of the odor, Cobb initially stated it was due to his spraying bug spray in his unit. Later, in their five to

[1] In this brief, references to specific portions of the Appendix of Plaintiff-Respondent-Petitioner will be denoted as: (APPX-____). References to the Appendix of the Defendant-Appellant-Respondent in the Court of Appeals will be denoted as: (A-____).

seven minute conversation, Cobb attributed the odor Officer Darrow had detected to his own cooking. Ultimately, Officer Darrow concluded that Cobb had been smoking marijuana in violation of his lease. (APPX-151-152).

In a communication to Cobb dated June 9, 2013, HACM notified the tenant that he had violated the terms of his lease on June 5th through his illegal drug use. On June 26, 2013, HACM provided Cobb with a 14-day Notice terminating his tenancy due to his drug-related activity on the premises. This lease termination notice served on Cobb did not offer Cobb a 5-day opportunity to remedy or cure his default as provided for in Wis. Stat. § 704.17(2)(b) (APPX-182-184).

With respect to the type of lease termination notice required to evict tenants from federally-funded housing, 24 C.F.R. § 966.4(f)(*l*)(3) provides:

> (3) *Lease termination notice.* (i) The PHA must give written notice of lease termination of:
>
> (A) 14 days in the case of failure to pay rent;
>
> (B) A reasonable period of time considering the seriousness of the situation (but not to exceed 30 days):
>
> (1) If the health or safety of other residents, PHA employees, or persons residing in the immediate vicinity of the premises is threatened; or

> (2) If any member of the household has engaged in any drug-related criminal activity or violent criminal activity;

Both Cobb and Public Safety Officer Darrow testified in the eviction action before the trial court. Although Cobb denied he had used marijuana, the circuit court concluded that Officer Darrow was the more consistent and more credible witness (APPX-165). The trial court also concluded that illegal drug-related activity was engaged in by Cobb (APPX-166). Finally, and most significantly for purposes of this appeal, the trial court found that, consistent with *Dep't. of Hous. v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002), and *Scarborough v. Winn Residential L.L.P./Atl. Terrace Apts.*, 890 A.2d 249 (D.C. 2006), where criminal activity is found by the trial court, there does not have to be a cure offered the tenant prior to eviction (APPX-172).

On appeal, the District I Court of Appeals found that HACM's failure to offer Cobb the right to cure his lease violation in the lease termination notice disposed of the controversy by depriving the circuit court of competency to adjudicate the eviction action. (Ct. App. Decision ¶¶ 1, 2, and 14; APPX-101-104 and APPX-113.)

In rejecting HACM's position that Federal pre-emption relieved it of the obligation to offer the tenant a "right to cure," the Court of Appeals analyzed the three sets of circumstances where federal law pre-empts state law. Noting that two of the three circumstances were not at issue, the Court of Appeals found no "preemption requisites" to conclude that there exists a conflict between the right-to-cure provision in Wis. Stat. § 704.17(2)(b) and the manifest objectives of Congress in enacting 42 U.S.C. § 1437d(*l*)(6), which provides:

> Each public housing agency shall utilize leases which[:]
>
> * * *
>
> (6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or <u>any drug-related criminal activity on or off such premises, engaged in by a public housing tenant</u>, any member of the tenant's household, or any guest or other person under the tenant's control, <u>shall be cause for termination of tenancy</u>.

(underscoring added).

ARGUMENT

I. Wisconsin's "Right to Cure" Statute, § 704.17(2)(b), Significantly Interferes with the Purposes and Objectives of Congress, Expressed in Federal Statutes and Regulations, in Addressing Criminal Activity in Public Housing.

A. Legal Standards of Pre-emption

The framework for federal pre-emption of state laws and regulations is well established and familiar to this Court. *Miller Brewing Co. v. Dep't of Indus., Labor and Human Rels., Equal Rights Div.,* 210 Wis. 2d 26, 34-35, 563 N.W.2d 460, 464 (1997). As the Court of Appeals stated: "Federal preemption is based on Article VI of the United States Constitution, which makes federal law 'the Supreme law of the land.'" (Ct. App. Decision at ¶ 4, p. 4; APPX-104). *Estate of Kriefall ex rel. Kriefall v. Sizzler USA Franchise, Inc.*, 265 Wis. 2d 476, 484, 665 N.W.2d 417, 421 (2003) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and U.S. CONST. Art. VI).

Federal law pre-empts state laws in any of the following situations:

> - When federal statutes or regulations expressly provide for pre-emption. ("Express pre-emption").
> - When the "scheme of federal regulation" from statutes and/or regulations is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." ("field pre-emption")
> - When the state and federal laws conflict, either because:
>   - Compliance with both at the same time would be a "physical impossibility," for example because one bans something that the other requires ("conflict pre-emption"), or
>   - *"state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"("frustration of purpose pre-emption").*

(emphasis added). *See*, *e.g. Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996); and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

In this case, the circumstances last-described above are present because there is a conflict between federal law and Wis. Stat. § 704.17(2)(b) and that conflict constitutes "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

This third form of pre-emption, known as "frustration of purpose pre-emption," has been addressed by the United States

Supreme Court on numerous occasions. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 885 (2000); *Barnett Bank*, *supra*; *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Hines v. Davidowitz*, *supra*. These cases hold that a state law is pre-empted if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal law. *See Crosby*, 530 U.S. at 373. A state law will be pre-empted even though the state law does not completely block the objectives of the federal law. If a state law significantly interferes with, limits, or constrains the exercise of the full authority granted by the federal law, courts have held that the state law is pre-empted in such circumstances. *See e.g., Barnett Bank*, 517 U.S. 31-32 (rejecting argument that state law may merely limit, without blocking, exercise of National Bank's authority granted by National Bank Act.)

B. Federal Statutes and Regulations Pre-empt a Requirement that Public Housing Authorities, per Wis. Stat. § 704.17(2)(b), Must Offer Tenants an Opportunity to Cure Drug-Related or Other Criminal Activity.

HACM submits that Wisconsin's five-day statutory cure period "stands as an obstacle to the accomplishment and execution of the full purposes and objectives," of the anticrime provision in 42 U.S.C. § 1437d(*l*)(6). Congress expressly decreed 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." 42 U.S.C. § 11901(1), as enacted by Section 581(a) of Pub. L. 100-690, 104 Stat. 4079 (1990) (underscoring added).

In *Dep't. of Hous. [HUD] v. Rucker*, *supra*, the Supreme Court interpreted the scope of the authority conferred in the anticrime provision when it rejected a challenge to the constitutionality of Oakland, California's public housing authority (PHA) evicting tenants who neither committed the crimes at issue, knew or reasonably should have known about the crimes, nor were able to physically control the conduct of the persons who committed

the crimes. *See Rucker* at 130-31. The Supreme Court focused on the statutory language providing that "any" statutorily-mentioned criminal activity by a statutorily-prescribed person was cause for lease termination, and observed that "the word 'any' has an expansive meaning." Ultimately, the Supreme Court concluded the tenants' evictions were lawful. *Id.* at 131. Thus, the purpose of the statute at issue here, 42 U.S.C. § 1437d(*l*)(6), is to prevent crime in public housing by enabling and facilitating the eviction of tenants when they, their households, guests, and persons under their control, engage in drug-related criminal activity or commit crimes that threaten the health, safety or right of peaceful enjoyment of the premises of other tenants at the building. The *Rucker* Court found the federal purpose so compelling, it ruled that "no fault" or "innocent tenant" evictions were "entirely reasonable." *Rucker* at 132.

Subsequent to the *Rucker* decision, the highest court in Massachusetts considered to what extent a state statute that afforded an "innocent tenant defense" in certain eviction actions "remains viable in the termination of tenancies in federally assisted public

housing projects." *Boston Hous. Auth. v. Garcia*, 449 Mass. 727, 729, 871 N.E.2d 1073, 1075 (2007). In that case, the Supreme Judicial Court agreed "that Federal housing law preempts Massachusetts law that would otherwise permit a public housing tenant to defeat a lease termination" in light of a pre-emption argument advanced in that case. *Garcia* at 729. More specifically, that court recognized that one of the circumstances where pre-emption exists, and where state law must yield, is where th[pe state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Garcia* at 733, quoting *Geier v. Am. Honda Motor Co.*, *supra*, 529 U.S. at 873. In doing so, the Massachusetts court noted:

> Congress (through 42 U.S.C. § 1437d(*l*)(6)), and HUD (through its implementing regulations) have required that housing authorities use clauses in their leases that permit the termination of a tenant's lease for crimes committed by household members, even where a tenant had no knowledge of and was not at fault for a household member's criminal activity. As the *Rucker* Court noted, the lodging of such discretionary authority with the housing authorities is integral to the accomplishment of the congressional objective because "[s]trict liability maximizes deterrence and eases enforcement difficulties." *Rucker*, *supra*, citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991).

Garcia at 734.

If public housing authorities, such as HACM, were prevented from promptly evicting tenants who engaged in drug-related or violent criminal activity, because of the need to comply with a "right to cure" statute such as Wis. Stat. § 704.17(2)(b), such a result, just as in Massachusetts, would run afoul of and substantially interfere with the congressional objective. Under such circumstances, the state law must yield to the provisions authorized by federal law. As the Massachusetts Court stated, under a similarly restrictive state statute:

> If it were not, a judge could permit a tenant to demonstrate that she was an "innocent tenant" and consequently determine that eviction was not appropriate. The housing authority would thus have lost the ability to terminate a tenant who violated her lease by not preventing her household member from engaging in drug related criminal activity, an ability Congress intends to preserve for housing authorities "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,' 42 U.S.C. § 11901(2) (1994 ed. and Supp. V), 'the seriousness of the offending action,' 66 Fed. Reg., at 28803 [codified at 24 C.F.R. § 966.4(1)(5)(vii)(B)], and 'the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action. [*Id.*] *Rucker*, *supra* at 134.

Garcia at 734-735.

Applying the "right to cure" clause in Wis. Stat. § 704.17(2)(b) would frustrate this Congressional purpose by severely limiting when the right of eviction for criminal and drug-related activity could be exercised. In that respect, Wis. Stat. § 704.17(2)(b) provides that, if a tenant breaches a lease, as here, based on illegal drug activity, the tenant is given notice of an opportunity to remedy that breach. The statute further provides that:

> [A] tenant is deemed to be complying with the notice if promptly upon receipt of such notice the tenant takes reasonable steps to remedy the default and proceeds with reasonable diligence . . .."

Cobb's position before the Court of Appeals was that Wis. Stat. § 704.17(2)(b) properly affords a tenant "one warning to remedy a breach within five days, . . . (t)he tenant must take reasonable steps to eliminate the problem. Reasonable steps would seemingly include ceasing the activity . . .." (Brief of Defendant-Appellant, p. 25.) Under Cobb's reasoning, absent a second offense within five days, the tenant decides whether he should stay or go. Moreover, under Cobb's rationale, a tenant who commits a sexual assault, or armed robbery of his neighbor, even a homicide, could raise the same defense.

As argued in *Scarborough* and quoted by the Court of Appeals (APPX-110), the only way to make sense of the notion of curing criminal activity is to require the tenant not to engage in such activity again.

> But[. . .] this interpretation quickly renders the eviction provision a virtual nullity, because the grounds for eviction – the criminal act – would be washed away by a simple promise not to commit another crime.

Scarborough at 257. The ease of thwarting the landlord's right to evict a tenant who committed such a crime is sufficient for the Wisconsin statute's (§ 704.17(2)(b)) "right to cure" provision to constitute an "obstacle" to the purposes of 42 U.S.C. § 1437d(*l*)(6).

What Congress intended to be a "One Strike" statute could easily be converted into a law under which a tenant would be afforded additional "strikes" annually. Again, the ease with which the tenant could thwart the landlord's right to evict sufficiently frustrates the purpose of the "One Strike" initiative to trigger pre-emption of the "right to cure" clause.

II. **"One Strike" Refers to Extensive Federal Effort to Combat Crime in Public Housing, Not Just a Pamphlet and Agency Manual.**

The record before the Court of Appeals included a document, entitled: "One Strike and You're Out," Policy in Public Housing (March 1996) (Decision at ¶10; A-93-109). The Court of Appeals calls the document a pamphlet and an agency manual (Decision at ¶11; APPX-111), but neglects to note the federal statutes and regulations that have been enacted as part of the "One Strike" initiative.

As set forth by the United States Supreme Court in *Rucker*, the implementation of the "One Strike" initiative begins with the Anti-Drug Abuse Act of 1988 (codified at 42 U.S.C. § 1437d(*l*)(6)), which obligated Public Housing Authorities (PHAs) to utilize leases that provide:

> [A]ny drug-related criminal activity on or near the public housing 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*)(6) (1994 ed. Supp. V). *Rucker* at 152. As the *Rucker* Court explains in footnote 4:

> A 1996 amendment to § 1437d(*l*)(6), enacted five years after HUD issued its interpretation of the statute, supports our holding. The 1996 amendment expanded the reach of § 1437d(*l*)(6), changing the language of the lease provision from applying to activity taking place "on or near" the public housing premises, to activity occurring "on or off" the public housing premises. See Housing Opportunity Program Extension Act of 1996, § 9(1)(2), 110 Stat. 836.

Rucker at 152 (footnote 4).

According to the Supplementary Information provided as background to the text of the Proposed Rule, at 64 Fed. Reg. 40262 (1999)[2]:

> President Clinton, in his 1996 State of the Union address, proposed the "one strike and you're out" policy. The President challenged local housing authorities and tenant associations to stop criminal gang members and drug dealers who were destroying the lives of decent tenants. In response to the President's "One Strike" mandate, HUD expeditiously issued guidelines and procedures and conducted extensive training for PHAs around the country.
>
> * * *
>
> Crime prevention will be advanced by the authority to screen out those who engage in illegal drug use or other criminal activity, and enforcement will be advanced by the authority to

[2] The title given the proposed rule in the 1999 Federal Register is: "One-Strike Screening and Eviction for Drug Abuse and Other Criminal Activity." *See* 64 Fed. Reg. 40262 (July 23, 1999) (notice of proposed rule making). This proposed rule was followed by a final rule (*see* 66 Fed. Reg. 28776) (May 24, 2001) and HUD's implementing regulations for the public housing program, which appear at 24 C.F.R. Parts 5, 960 and 966. The words "One-Strike" were omitted from the title of the Final Rule.

> evict and terminate assistance for persons who participate in criminal activity.
>
> * * *
>
> Sections 575-579 of the Quality Housing and Work Responsibility Act of 1998 (Public Law 105-276, approved Oct. 21, 1998, 112 Stat. 2634-2643) ("the Public Housing Reform Act" or "the 1998 Act") revised provisions of the 1937 Act (sections 6 and 16) and created other statutory authority to expand crime and security provisions to most federally assisted housing. Instead of issuing a final rule on the admission and eviction provisions of the Extension Act, HUD is publishing this new proposed rule on the provisions as they exist after the revision to the drug abuse and criminal activity requirements made by the Public Housing Reform Act.

So, 'One Strike' is far more than just a pamphlet or manual and has been recognized as such in a number of court decisions around the country. *See e.g. Rucker* at 130-134 (repeatedly referencing the "statute" and finding it unambiguous); *Scarborough* at 255 ("the issue is . . . whether . . . a congressional statute [and regulations] of national application prevail [ ] over a statute applying only to the District of Columbia."); *Boston Hous. Auth. v. Garcia* at 729 ("Federal housing law, 42 U.S.C. § 42 U.S.C. 1437d(*l*)(6) (2000) 'unambiguously' requires lease terms 'that vest local (PHAs) with the discretion to evict tenants for the drug-related activity of

household members and guests whether or not the tenant knew, or should have known, about the activity.'" (citing *Rucker*).

In addition to the statutory authority for PHAs to evict tenants engaged in illegal drug activity, as recognized by the courts, federal regulations also support the "One Strike" initiative. In that regard, although 24 C.F.R. § 966.4(*l*)(2) provides, in part, that PHAs may terminate a tenancy only for serious or repeated violations of the lease or for "[o]ther good cause," the regulations make clear that such "good cause" exists where there has been "drug-related criminal activity engaged in on or off the premises by any tenant." *See* 24 C.F.R. §§ 966.4(*l*)(2)(iii)(A) and 966.4(*l*)(5)(i)(B).

III. Federal Law Places the Discretion Over Whether to Evict with the Public Housing Authority, Not the Tenant.

Critical to understanding the issue in this appeal is recognition of who Congress intended should make the decision whether a tenant who has breached his or her lease remains in publicly subsidized housing. This issue arises because the effect of the Court of Appeals decision is to remove the ability of the PHA to elect to evict for first breaches of the lease for criminal activity.

In its analysis of the *Rucker* decision, the court in *Scarborough*, *supra*, made clear its view that, where the federal government is the landlord, Congress intended the PHA to have the authority to evict when criminal and drug-related breaches of the lease occur:

> The [*Rucker*] Court thus affirmed, in stark terms, the federal government's authority "as a landlord of property that it owns," *Rucker* at 135, to prevent crime in federally-assisted housing by permitting the eviction of tenants when they or persons they have allowed access to their premises commit crimes threatening the health or safety of other residents.
>
> * * *
>
> It is true, as the *Rucker* Court pointed out, that termination of a tenancy after a criminal activity is not automatic under federal law; housing providers have discretion whether to exercise the right of eviction. *See Rucker*, 535 U.S. at 133-34. But the cure opportunity provided by § 42-3505.01(b), if applicable to violations of "an obligation of tenancy" dangerously criminal in nature, would substitute for the landlord's discretion a mandatory second-strike opportunity for a tenant to stay eviction by discontinuing, or not repeating, the criminal act during the thirty days following notice. We do not believe Congress meant to permit that obligatory re-setting of the notice clock.

Scarborough at 257-258. (underscoring added)

While the *Rucker* and *Garcia* cases dealt with the innocent owner defense, *Scarborough* involved a 'right-to-cure' statutory

defense similar to the one under review here. All three courts found the federal statute prevailed over state statutory defenses whether in a Due Process clause analysis or by using principles of conflict pre-emption ("[local code provision] would stand as a pronounced obstacle to the exercise of this authority." *Scarborough* at 257.)

That HUD intended to vest discretion in PHAs is underscored by HUD's enacting regulations expressly intended to inform, guide, and reward the exercise of that discretion. 24 C.F.R. § 966.4(*l*)(5)(vii)(A) and (B) provides:

> (vii) PHA action, generally.
>
> (A) Assessment under PHAS. Under the Public Housing Assessment System (PHAS), PHAs that have adopted policies, implemented procedures and can document that they appropriately evict any public housing residents who engage in certain activity detrimental to the public housing community receive points (See 24 CFR 902.43(a)(5).) This policy takes into account the importance of eviction of such residents to public housing communities and program integrity, and the demand for assisted housing by families who will adhere to lease responsibilities.
>
> (B) *Consideration of circumstances*. In a manner consistent with such policies, procedures and practices, the PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action,

> the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.

(underscoring added).

Subsection (A) above illustrates the foundational policy considerations considered when deciding to reward PHAs for effective eviction policies and procedures. That is, the importance of PHAs having the discretion to evict tenants engaged in illegal activity in light of the federal interest in public housing communities and program integrity, as well as the high demand for public housing. Statutes such as Wisconsin's "right to cure" statute clearly obstruct the accomplishment of these federal interests.

IV. The Court of Appeals Overlooked Exception in Lease Section 9(C).

In its decision below, the Court of Appeals, at ¶ 6, highlighted that HACM's lease includes, at Section 9(C), the following provision:

> C. The [Housing Authority] may evict the resident only by bringing a court action. The [Housing Authority] *termination notice shall be given in accordance with a lease for one year*

> *per Section 704.17(2)* of the Wisconsin Statutes, except the [Housing Authority] shall give written notice of termination of the Lease as of:

(emphasis in original). Focusing on the italicized text, the Court emphasized that HACM has, thus, agreed in its lease to provide curable notices, as called for in Wis. Stat. § 704.17(2), and is so bound *(see also* ¶¶ 11 and 14). However, the Court failed to note the "except" that immediately follows the italicized text and provides:

> **[E]xcept** the HACM shall give written notice of termination of the Lease as of:
>
> 1. Fourteen (14) days in the case of failure to pay rent;
> 2. A reasonable time commensurate with the exigencies of the situation (not to exceed 30 days) in the case of criminal activity which constitutes a threat to other Residents or employees of the HACM or any drug-related criminal activity on or off the development grounds;
> 3. Thirty (30) days in all other cases;

(bold and underscoring added).

The exception to the statutory notice requirements carved out for notices of drug-related and other criminal activity reinforces HACM's position and serves to emphasize the federal authority for local PHAs to use their discretion in determining how best to terminate leases when the proscribed activities form the causes for termination.

In addition, lease section 5(C) provides:

> "Resident agrees:
>
> * * *
>
> C. To abide by . . . all rules, regulations, and ordinances promulgated by HUD . . . for the benefit and well being of the housing development . . ..

(A-78). Thus, the relevant lease language excepts circumstances like Cobb's illegal drug activity on the premises from the 'right to cure' clause in § 704.17(2)(b), Wis. Stat., and requires him to abide by HUD regulations, like those enacted as part of HUD's "Screening and Eviction for Drug Abuse and Other Criminal Activity," 66 Fed. Reg. 28776 (May 24, 2001).

V. Federal Regulations Work for the Benefit of All Subsidized Housing Tenants, Not Just Cobb.

As is evident from the divergent views of the parties with respect to the importance of § 704.17(2)(b), Wis. Stat. when viewed in the light of the 'One Strike' federal policy and regulations, there is a conflict in our respective views of the policies behind the statute and the regulations. The U.S. Supreme Court, Massachusetts Supreme Court, and District of Columbia Court of Appeals have reviewed these policies. Each placed greater importance on

effectuating the intent of Congress than on the state statutory rights afforded the individual affected tenants.

Also in accord is *Ross v. Broadway Towers, Inc.*, 228 S.W.3d 113 (Tenn. App. 2006). In that case, the Tennessee Court described the importance of the federal regulations, including those that entitle landlords to screen applicants and deny an application based on certain criminal conduct, as benefitting the larger subsidized housing community and its neighbors, not just the tenant under eviction.

> . . . the regulations involved in this case are for the benefit not only of Mr. Ross but also for all the other occupants of the subsidized housing project.
>
> * * *
>
> [If the tenant were to prevail and avoid eviction] [s]uch a holding would be contrary to the intent of the regulations to protect all the occupants of the subsidized housing project.

Ross at 121.

The *Ross* decision also states:

> . . . the Trial Court essentially determined that Broadway Towers had a "duty to enforce [the federal] regulations and enforce those lease provisions for the benefit of other tenants; and that they are not entitled to waive the right of other tenants to insist upon the enforcement of those regulations." In short, the Trial Court determined that the policies behind the federal regulations trumped the Landlord and Tenant Act in this regard. We agree.

The same reasoning applies in the case before this court. Cobb asserts that he is entitled to a state statutory privilege that protects him from the consequences of his illegal activity, and his breach of the lease, so long as he is not caught a second time in the ensuing 12 months following service of termination notice.

The Tennesse Appellate Court, in considering whether the particular Tennessee statute cited by the tenant in an effort to avoid eviction was applicable, went on to note:

> [W]e believe the federal public policy in providing subsidized housing that is safe and crime-free for all the tenants is paramount to any policy at issue in Tenn. Code Ann. § 66-28-508. In light of the facts presented in this case, we conclude that *even if the provisions of Tenn. Code Ann. § 66-28-508 were triggered*, application of that statute is preempted by the federal regulations because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Scarborough, 890 A.2d at 255 (quoting Boggs v. Boggs, 520 U.S. 833, 844, 117 S.Ct. 1754, 138 L. Ed. 2d 45 (1997)).

Ross at 124 (emphasis added).

As previously noted, the Massachusetts Supreme Judicial Court, in the *Garcia* case, also speaks to the policies at issue in this case. That court wrote:

> The stated public housing policy of the United States is to "promote the goal of providing decent and affordable housing for all citizens through the efforts and encouragement of Federal, State, and local governments, and by the independent and collective actions of private citizens, organizations, and the private sector." 42 U.S.C. § 1437(a)(4) (2000). Consistent with this policy, Congress enacted the Anti-Drug Abuse Act of 1988, with the objective of reducing drug-related crime in public housing and ensuring "public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs." *Rucker*, *supra* at 134, quoting 42 U.S.C. § 11901 (1) (1994).

Garcia at 733-734.

HACM, therefore, submits that our United States Supreme Court, the Massachusetts Supreme Judicial Court, and the District of Columbia Court of Appeals[3] have each considered the legal question before this Court. Each court decided that tenant defenses raised in eviction actions brought by PHAs due to a tenant's illegal activities must yield to the federal interests because they stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

[3] *See* also *Hous. Auth. of Norwalk v. Brown*, 129 Conn. App. 313, 19 A.3d 252 (2011) and *Horizon Homes v. Nunn*, 684 N.W. 2d 221 (Iowa, 2004).

HACM urges this Court to ratify the wisdom in those decisions and reach the same conclusion for public housing in Wisconsin.

CONCLUSION

Therefore, for the reasons set forth herein, the Petitioner, Housing Authority of the City of Milwaukee, respectfully requests that the Supreme Court vacate the Order and Decision of the Court of Appeals dated May 28, 2014, and reinstate the decision and order of the Circuit Court of Milwaukee County dated September 17, 2013.

Respectfully submitted, dated and signed at Milwaukee, Wisconsin this 20th day of October, 2014.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stat. for a brief and appendix produced with a proportional serif font. The length of this brief is 28 pages; 5,218 words.

Dated and signed at Milwaukee, Wisconsin this 20th day of October, 2014.

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ELECTRONIC FILING CERTIFICATION

I hereby certify that I have submitted an electronic copy of this Brief and Appendix which complies with the requirements of § 809.19(12), Wis. Stat.

I further certify that the electronic Brief and Appendix is identical in text, content and format to the printed forms of the Brief and Appendix filed as of this date.

Dated and signed at Milwaukee, Wisconsin this 20th day of October, 2014.

s/John J. Heinen
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CERTIFICATION OF APPENDIX

I hereby certify that filed with this Brief of Plaintiff-Respondent-Petitioner, as a separate document, is the Appendix of Plaintiff-Respondent-Petitioner's that complies with § 809.19(2)(a), Wis. Stat. and contains at a minimum: (1) a table of contents; (2) relevant trial court record entries and portions of the record essential to an understanding of the issue(s) raised, including decisions oral or written rulings or decisions showing the Circuit Court's and the Appellate Court's reasoning regarding those issue(s).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated and signed at Milwaukee, Wisconsin this 20th day of October, 2014.

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CERTIFICATE OF THIRD-PARTY COMMERCIAL DELIVERY AND CERTIFICATION OF HAND-DELIVERY

I, Linda K. Dirnbauer, herein certify that I am employed by the Housing Authority of the City of Milwaukee as a Legal Assistant, assigned to duty in the City Attorney's Office, for Assistant City Attorney, John J. Heinen, which is located at 841 North Broadway, Suite 1018, Milwaukee, Wisconsin 53202; that on the 20th day of October, 2014, I sent 22 copies of the Brief of Plaintiff-Respondent-Petitioner, and 22 copies of the Appendix of Plaintiff-Respondent-Petitioner in the above-entitled case, via third-party commercial overnight delivery, addressed to: Clerk of the Wisconsin Supreme Court, 110 East Main Street, Suite 215, Madison, Wisconsin 53703.

I further certify that three copies of the Brief of Plaintiff-Appellant-Petitioner, and three copies of the Appendix of Plaintiff-Appellant-Petitioner, in the above-entitled case, were hand-delivered to counsel for the Defendant-Appellant-Respondent, Attorney April A.G. Hartman, of Legal Action of Wisconsin, Inc., located at 230 West Wells Street, Suite 800, Milwaukee, Wisconsin 53203-1700.

s/L.K.Dirnbauer
LINDA K. DIRNBAUER

Subscribed and sworn to before me
this 20th day of October, 2014.

s/John J. Heinen
Notary Public, State of Wisconsin
My Commission is permanent.

1031-2013-1758/207844

STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2013AP002207

Milwaukee City Housing Authority,

Plaintiff-Respondent-Petitioner,

v.

Felton Cobb,

Defendant-Appellant,

REVIEW OF A DECISION BY DISTRICT I OF THE WISCONSIN COURT OF APPEALS REVERSING THE MILWAUKEE COUNTY CIRCUIT COURT, THE HON. PEDRO COLON PRESIDING, CIRCUIT COURT CASE NO.: 13SC020628

RESPONSE BRIEF OF DEFENDANT-APPELLANT-RESPONDENT FELTON COBB

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STATEMENT OF THE ISSUE

Does 42 U.S.C. § 1437d(*l*)(6) pre-empt Wisconsin's statutory tenancy termination notice requirements?

The circuit court answered yes.

The court of appeals answered no.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Felton Cobb is a sixty-two-year old disabled public housing tenant at Merrill Park, one of the Housing Authority of the City of Milwaukee's (HACM's) mid-rise complexes for the elderly and single disabled adults. **(**R. 18-9 & 10, Pet'r's App. 178.) He occupies his apartment pursuant to a lease for one year. (R. 6-8, Resp't's App. A-1.) Mr. Cobb disputed the facts and evidence at his eviction trial held in Milwaukee County's Circuit Court on August 20, 2013, the Honorable Pedro Colon presiding.

The allegations underlying this eviction stem from an incident on June 5, 2013, when Housing Authority of the City of Milwaukee (HACM) Public Safety Officer James Darrow smelled marijuana while on routine patrol at Merrill Park. (R. 6-3&4, Pet'r's App. 182-83.) Officer Darrow believed the

smell was coming from Mr. Cobb's apartment, so he knocked on Mr. Cobb's door. *Id.* Mr. Cobb opened the door slightly and answered Officer Darrow's questions. *Id.* Officer Darrow did not believe Mr. Cobb's explanations for the smell. *Id.* Mr. Cobb refused to allow Officer Darrow to search his apartment. *Id.* Officer Darrow did not observe Mr. Cobb using or possessing marijuana. (R. 17-39, L. 10-16, Pet'r's App. 153.) Thus, the entirety of the evidence against Mr. Cobb was Officer Darrow's belief that the smell of burnt marijuana intensified when Mr. Cobb opened his door.

Officer Darrow did not contact the police or engage in any further investigation. (R. 17-42, L. 20-25, Pet'r's App. 156.) Three weeks *after* the incident occurred, on June 26, 2013, HACM's attorney issued a 14-Day Notice to Tenant Terminating Tenancy which alleged that Mr. Cobb had engaged in drug related criminal activity. (R. 6-3&4, Pet'r's App. 182-83.) This eviction action followed.

At trial, HACM offered as evidence only Officer Darrow's testimony and his written report of the incident. (R. 17-29 – 17-43, Pet'r's App. 143-57.) Mr. Cobb then took the stand and testified that he had not engaged in drug related

criminal activity on the day alleged, and that his entire conversation with Officer Darrow lasted less than a minute. (R. 17-46-48, Pet'r's App. 160-62.) Judge Colon, however, determined that the evidence was sufficient to find that Mr. Cobb engaged in drug related criminal activity. (R. 17-51 -53, Pet'r's App. 165-67.)[1] Additionally, the circuit court held that because HACM alleged that Mr. Cobb engaged in criminal activity, a right-to-cure notice as provided in Wisconsin Statutes, section 704.17(2)(b) was not required because the Wisconsin statute was pre-empted by federal law. (R. 18-2-4, Pet'r's App. 171-73.) The circuit court entered a Judgment of Eviction and issued a Writ of Restitution, which it then stayed for thirty days pursuant to Wis. Stat. § 799.44(3). (R. 18-7-11, Pet'r's App. 176-80.) On October 1, 2013, Mr. Cobb timely filed the Notice of Appeal. (R. 15-1)

On May 28, 2014, the Court of Appeals of Wisconsin issued its decision, now published, reversing the circuit court and holding that HACM was required to include Wisconsin's statutory right to cure in Mr. Cobb's termination notice.

[1] Judge Colon made his findings applying the preponderance of the evidence standard. (R. 18-7, L. 13-23, Pet'r's App. 176.) After trial, Mr. Cobb argued that the appropriate evidentiary standard was clear, satisfactory and convincing evidence. (R. 9-1 – 18.) This issue was not addressed by the court of appeals and is not before this Court.

Milwaukee City Hous. Auth. v. Cobb, 2014 WI App 70, ¶ 1, 354 Wis. 2d 603, ¶ 1, 849 N.W.2d 920, ¶ 1 (Pet'r's App. 101.) The court of appeals held that Wisconsin's law did not conflict with federal law, so it was not pre-empted. *Id.* at ¶¶ 6 & 14 (Pet'r's App. 106 & 113.) Further, the court of appeals held that HACM had explicitly agreed to comply with section 704.17(2) in its lease with Mr. Cobb. *Id.* The court of appeals remanded the case to the circuit court to vacate the eviction judgment and the restitution order. *Id.* ¶ 1 (Pet'r's App. 101.)

On June 26, 2014, HACM filed a Petition for Review with the Supreme Court of Wisconsin, and on September 18, 2014, this Court granted that Petition. Mr. Cobb continues to reside at Merrill Park.

STANDARDS OF REVIEW

The pre-emptive effect of a federal law is a question of law determined de novo by this Court. *Miller Brewing Co. v. Dep't of Indus., Labor and Human Relations*, 210 Wis.2d 26, 33-34, 563 N.W.2d 460, 463 (Wis. 1997).

ARGUMENT

I. Wisconsin Statutes, section 704.17(2) is not pre-empted by federal law.

The Housing Authority of the City of Milwaukee (HACM) argues that a federal statute specifying the lease terms public housing agencies must include in their leases pre-empts Wisconsin's statutory tenancy termination notice requirements. HACM's argument is only "conflict" pre-emption. HACM claims Wisconsin's law stands as an obstacle to Congress's manifest intent to reduce crime in public housing.[2] *See* 42 U.S.C. § 1437d(*l*)(6) & Wis. Stat. § 704.17(2)(b). HACM has the burden of establishing pre-emption. *Miller Brewing Co. v. Dep't of Indus., Labor and Human Relations*, 210 Wis.2d 26, 33-34, 563 N.W.2d 460, 464 (Wis. 1997).

A. The federal policy is to defer to state tenancy termination notice procedures, including when implementing the so-called "one strike" provision required to be in public housing leases by 42 U.S.C. § 1437d(*l*).

HACM is unable to meet its burden and overcome the strong presumption against federal pre-emption of state law

[2] HACM does not argue that express pre-emption or field pre-emption applies. (Pet'r's Br. 8-9.) Accordingly, Cobb's response brief does not discuss the express pre-emption or field pre-emption cases which support the court of appeals decision on review.

for the three reasons: First, Congress and the Department of Housing and Urban Development (HUD) expressly stated their intent that federal requirements co-exist with state law procedures for terminating tenancies. This express deference to state tenancy termination methodology is unsurprising, given that state judicial proceedings and termination notice requirements have traditionally applied to evictions from housing regulated by federal law. Second, Wisconsin's statutory termination notice requirements compliment, rather than conflict with, federal law. Third, federal law requires HACM to state its tenancy termination procedures in its lease, and HACM's lease with Mr. Cobb provides that HACM will comply with Wisconsin Statutes, section 704.17(2)(b).

1. Federal regulations explicitly acknowledge the validity of parallel state and local tenancy termination and eviction procedures.

a. Wisconsin's tenancy termination scheme has different notice provisions and different cure opportunities for different grounds.

Wisconsin statutes specify the method for terminating tenancies for all tenants residential and commercial. The notice periods are different, depending on whether the tenancy is under a lease or not and depending on the alleged

breach that is grounds for termination. *See generally* Wis. Stat. §§ 704.16-704.19. The parties agree that, in this case, but for HACM's pre-emption argument, the applicable state statute is Wisconsin Statutes, section 704.17(2)(b) and that it requires a five-day-right-to-cure notice. If the claimed breach is not cured within five days, the eviction may proceed; if the alleged breach is cured, any notice of a second lease breach within a twelve month period (whether of the same clause or not) terminates the tenancy without any right to cure. Wis. Stat. § 704.17(2)(b).

In some circumstances, Wisconsin law permits termination of a tenancy without a right to cure. First, under section 704.17(2)(c), when the local police department has determined that a drug or gang nuisance exists in the unit or was caused by the tenant on the property, the tenancy may be terminated without an opportunity to cure. Wis. Stat. § 704.17(2)(c). Second, Wisconsin law also permits a five-day-no-right-to-cure notice if an offending tenant commits one or more acts that cause another tenant within the same complex to face an imminent threat of serious physical harm and the offending tenant is named in an injunction or criminal

complaint alleging domestic abuse, child abuse, stalking, or sexual assault. Wis. Stat. § 704.16(3).

This review of Wisconsin's various notice requirements for terminating tenancy in different circumstance permits a response to HACM's serious mischaracterization of Cobb's argument. (Pet'r's Br. 14.) Neither the reasoning expressed in Cobb's briefs to the court of appeals nor the court of appeals decision leads to a result that "absent a second offense within five days, the tenant decides whether he should stay or go." Nothing in Wisconsin's statutory right to cure requires a "second offense within five days." The statute clearly says that **even if** the tenant cures the alleged breach perfectly, the tenancy may be terminated upon a 14 day notice, without any right to cure, "if the tenant . . . breaches the same or any other covenant or condition of the tenant's lease." Wis. Stat. § 704.17(2)(c). More fundamentally, the tenant does not "decide whether he should stay or go." As with any dispute of alleged breach of contract, whether involving a commercial lease or a residential lease, or a contract for the sale of goods, the court system "decides whether" the evidence of any given case

establishes a breach of contract. The legislature's policy determination, however, is that even when that first breach is adjudicated to have occurred, tenants have a right to cure, and so long as there is not another breach of "the same or any other covenant or condition of the tenant's lease," the tenancy continues.

Similarly, HACM is wrong in its assertion that Cobb's (or the court of appeals') "rationale" prevents eviction by a tenant "who commits a sexual assault, or armed robbery of his neighbor, even a homicide" (Pet'r's Br. 14.) As discussed above, there are a number of circumstances in Wisconsin where tenancies may be terminated without a right to cure and with only five days' notice, including drug nuisances, gang nuisances, domestic abuse, child abuse, stalking, and sexual assault. Wis. Stat. §§ 704.17(2)(c), 704.16(3).

b. The federal policy is to defer to and to supplement state law notice procedures for terminating tenancy.

The express federal policy is that state law provisions for terminating tenancies and federal law provisions for terminating tenancies co-exist. The most explicit statement of

the deference to state notice methods is 24 C.F.R. § 966.4(*l*)(3)(iii), which provides:

> A notice to vacate which is required by State or local law may be combined with, or run concurrently with, a notice of lease termination under paragraph (l)(3)(i) of this section.

The context explains the reference in § 966.4(*l*)(3)(iii) to federal notices being combined with or running concurrently with state notices. The title of § 966.4(*l*) is "Termination of tenancy and eviction." The title of § 966.4(*l*)(1) is "Procedures." It provides that "all procedures to terminate tenancy must be stated in the lease." The title of § 966.4(*l*)(2) is "Grounds." It limits the reasons a housing authority may terminate a public housing lease to serious or repeated violations of material lease terms, being over the income limit, and other good cause. The title of § 966.4(*l*)(3) is "Lease termination Notice." HACM concedes that it must give the notice terminating tenancy required by 24 C.F.R. § 966.4(*l*)(3)(i). (Pet'r's Br. 4-5.) HACM then simply ignores whether there is any relationship between the notices terminating tenancy required by federal law in § 966.4(*l*)(3)(i) and any notices required by state law. That is, however, the entire question of pre-emption. Do the federal tenancy

termination notice provisions supplant and replace state law tenancy termination notice provisions, or do federal law notice provisions co-exist with state law notice provisions?

Sub-section 966.4(l)(3)(iii) answers the question unequivocally: the federal notice provisions are minimal national standards that exist in addition to state law tenancy termination notice provisions. Sometimes the required federal notice provides more time and more protections than a given state law might. For example, 24 C.F.R. § 966.4(*l*)(3)(i)(A) gives 14 days' notice for non-payment of rent; Wisconsin state law allows only 5 days to cure by payment. *See* Wis. Stat. § 704.17(2)(a). Sometimes the federal notice period is longer and the public housing authority must provide a pre-eviction federal grievance hearing. See 24 C.F.R. § 966.4(*l*)(3)(iv) ["the tenancy shall not terminate (even if any notice to vacate under State or local law has expired) until the time for a tenant to request a grievance hearing has expired".] Sometimes federal law collapses its notice period down to a shorter state or local time period. *See* 24 C.F.R. §966.4(l)(3)(i)(C) ("30 days in any other case, except that if a State or local law allows a shorter notice period, such shorter

period shall apply"). The provision stating that a state termination notice may either be combined with or run concurrently with a required federal notice qualifies all of the preceding notice requirements, and it provides no exception for notices regarding drug-related criminal activity. 24 C.F.R. § 966.4(*l*)(3)(iii).

This peaceful co-existence of state and federal tenancy termination methods has been recognized in Wisconsin for more than 65 years. The court of appeals decision in this case cites at length the Supreme Court of Wisconsin's 1948 decision in *Meier v. Smith*, which considered the issue of federal pre-emption of a state tenancy termination notice requirement. *Milwaukee City Hous. Auth. v. Cobb*, 2014 WI App 70, ¶ 8, 354 Wis. 2d 603, ¶ 8, 849 N.W.2d 920, ¶ 8. In *Meier*, the Court upheld a state law requiring six months' notice prior to an eviction filing, although a relevant federal law required only "at least sixty days" notice. *Meier v. Smith*, 254 Wis. 70, 75, 35 N.W.2d 452, 455 (Wis. 1948). The *Meier* court noted that it was state law alone that provided the eviction remedy the landlord sought, not the federal act. *Id.* at 74. The *Meier* court declared, "[s]ince the state must create

the remedy, the state may impose such restrictions as it deems to be in the best interests of its citizens, provided such restrictions are equivalent to or in excess of," the minimum federal requirements. *Meier*, 254 Wis. at 74-75. The state law required at least sixty days' notice, so it was not in conflict with the federal law and was not pre-empted. *Id*.

The Court's *Meier* decision applies here. HACM seeks to obtain possession through Wisconsin's summary eviction proceedings, and the federal regulations require removal by state judicial eviction proceedings unless the law of the local jurisdiction permits administrative evictions. 24 C.F.R. § 966.4(*l*)(4). Like the state notice requirement at issue in *Meier*, Wisconsin's five-day notice required by section 704.17(2)(b) fits well within the federal minimum notice requirement, which is *any* reasonable length of time, but not more than 30 days. 42 U.S.C. § 1437d(*l*)(4)(A)(ii).

2. Wisconsin's tenancy termination procedures compliment rather than conflict with federal law.

Contrary to HACM's assertions, Wisconsin law allows HACM to act aggressively against gang and drug crimes in public housing. For example, when HACM suspects tenants

are engaging in drug crimes, a proper and aggressive first step for HACM employees to take is to report their suspicions to the police. If the police department finds that a drug nuisance exists in the unit, HACM may proceed to issue a five-day notice with no right to cure, followed by an eviction. Wis. Stat. §§ 704.17(2)(c) & 823.113. If the police department does not find a drug nuisance, but HACM still believes it has sufficient evidence to prove a breach of the lease, then HACM may issue a five-day-remedy-or-vacate notice. Wis. Stat. § 704.17(2)(b). A five-day-remedy-or-vacate notice *is* an appropriate, aggressive step toward removing gang and drug crime from public housing because it requires that the behavior cease or that the tenant vacate the unit within a mere five days. It informs the tenant that the tenant's behavior was noted, and that the behavior must stop if the tenant wishes to retain his housing. If the tenant does not cease the behavior within five days, HACM may immediately proceed with an eviction action. If the tenant ceases his behavior but is found to have breached the lease again within twelve months, HACM may issue a fourteen-day notice with no right to cure, followed by an eviction filing. Wis. Stat. § 704.17(2)(b).

Thus, Wisconsin's tenancy termination scheme is extremely aggressive, allowing public housing authorities (and any other landlords) to quickly stop lease violating behaviors and evict non-compliant tenants. Wisconsin's court of appeals rightfully described the 5-day right to cure as "minimal." *Milwaukee City Hous. Auth. v. Cobb*, 2014 WI App 70, ¶ 14, 354 Wis. 2d 603, ¶ 14, 849 N.W.2d 920, ¶ 14. Although it is minimal, Wisconsin's right-to-cure provision smartly ensures that lease-breaching behavior ceases, while reducing housing instability. If anything, Wisconsin's termination notice scheme is more aggressive than any scheme envisioned by Congress or HUD; federal law explicitly permits up to thirty days' notice for termination of tenancy, even when the allegation is criminal activity. 42 U.S.C. § 1437d(*l*)(4)(A); 24 C.F.R. § 966.4(*l*)(3)(i)(B). Therefore, Wisconsin's termination notice scheme is consistent with the federal objectives of providing safe, sanitary, and crime free public housing.

Despite Wisconsin's aggressive termination scheme, HACM's behavior in this case can only be described as lackadaisical, which underscores the false sense of urgency

and frustration that HACM is now attempting to portray. On June 5, 2013, HACM Public Safety Officer Darrow suspected Mr. Cobb of smoking marijuana in his unit. (R. 6-3&4, Pet'r's App. 182-83.) Officer Darrow did not call the police to report the alleged crime, and he did not talk to any neighboring tenants to investigate further.[3] (R. 17-42, L. 20-25, Pet'r's App. 156.) Three weeks later, on June 26, 3013, HACM decided to issue a notice terminating tenancy. (R. 6-3&4, Pet'r's App. 182-83.) An eviction was not filed until July 18, 2013, more than a month after the alleged breach. (R. 2-1.)

Under Wisconsin law, however, HACM *could* have resolved the problem on or before June 11, 2013, two weeks before HACM even issued a termination notice, by following one of two paths. HACM could have:

> -immediately called the police, and if the police found a drug nuisance within the unit, issued Mr. Cobb a five-day notice without a right to cure requiring him to be out on or before June 11, 2013. *See* Wis. Stat. § 704.17(2)(c), or

[3] By statute, HACM is evaluated based on its implementation of *effective* eviction and anticrime strategies and the extent to which HACM coordinates with local government officials and residents in the implementation of such strategies. 42 U.S.C. § 1437d(j)(1)(I) (emphasis added). Any effective eviction and anticrime strategy should include reporting suspected crimes to the police.

> -immediately issued Mr. Cobb a five-day notice requiring him to cease the behavior or vacate on or before June 11, 2013 or face eviction, and if he breached a term of the lease again within 12 months, issued Mr. Cobb a fourteen-day notice to vacate or face eviction with no right to cure. *See* Wis. Stat. § 704.17(2)(b).

Either of those strategies would have been more aggressive than HACM's. And, either of those strategies would have been compliant with both state and federal law, resulting in HACM's correct and appropriate implementation of Congress's intent in enacting 42 U.S.C. § 1437d(*l*)(6). Therefore, HACM's argument that section 704.17(2)(b) is an obstacle to congressional intent is proven wrong by the ease with which HACM could have complied with federal *and* state law in this case, while still reducing drug crime in public housing.

3. The federally required lease provision in this case is not different than any other federally required lease provision and does not evince Congressional intent to pre-empt state law.

Mr. Cobb does not dispute that 42 U.S.C. § 1437d(*l*)(6) has a general purpose to reduce or eliminate gang and drug crimes from public housing. It is, however, too great a leap to infer that Congress intended a required lease clause to trample

on state legislatures' traditional control of its courts' eviction procedures. Congress's lack of pre-emptive intent is evinced by the passive, permissive statutory language it chose, a review of the HUD implementing regulations and policy statements, and the contrast between this statutory language and other, clearly pre-emptive language within the same statute.

When interpreting a statute, Wisconsin courts assume that Congress's intent is expressed in the statutory language. *State ex rel. Kalal v. Cir. Ct. of Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, ¶ 44, 681 N.W.2d 110, ¶ 44.

a. No statutory language distinguishes the required drug use lease clause from any other clause breach of which might lead to lease termination.

Despite the rhetoric surrounding the passage of the Act, the ultimate statutory language that Congress chose in passing 42 U.S.C. § 1437d(*l*) was only to require that public housing authorities' leases include a provision that any drug-related criminal activity on or off the premises, engaged in by a 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*)(6). Congress

requires a number of lease provisions in public housing, breach of which can be the basis for terminating the tenancy. Non-payment of rent, serious or repeated violations of terms or conditions of the lease, other good cause, furnishing false information, or abusing alcohol are all federal statutory grounds for terminating a public housing tenancy which must be in all public housing leases. 42 U.S.C. §§ 1437d(*l*)(5)-(7).

Although Congress requires lease terms, it does not require immediate termination and eviction for **any** of them. Rather, Congress specifies the minimum number of days' notice that must be provided for various breaches. 42 U.S.C. § 1437d(*l*)(4). As discussed above, those notice provisions co-exist with state law termination procedures. Sometimes the federal method is longer, sometimes shorter, and sometimes the federal provision collapses to a shorter state law period.

Additionally, Congress left the decision of *whether* to terminate a tenancy for drug-related criminal activity up to each individual housing authority. As the Court of Appeals noted, Congress did not mandate that every incident of alleged drug activity result in eviction. Instead, the

implementing regulations permit the housing authority to consider all mitigating circumstances relevant to a particular case when drug-related criminal activity is alleged and to use their discretion to determine whether to issue a termination notice. 24 C.F.R. § 966.4(*l*)(5)(vii)(B). Leaving the decision of whether to issue a termination notice up to each individual housing authority in each individual case hardly evinces a manifest Congressional intent to take the extreme step of impliedly pre-empting state law.

b. **HUD's *post-Rucker* guidance demonstrates that the "one-strike" metaphor does not imply a federal policy of immediate tenancy termination or pre-emption.**

Years after Congress enacted the statutory requirement, the United States Supreme Court decided *Department of Housing and Urban Development v. Rucker*. 535 U.S. 125, 122 S. Ct. 1230, 152 L.Ed. 2d 258 (2002). That decision held that the plain language of 42 U.S.C. § 1437d(*l*) permits the eviction of innocent tenants whose family members or guests committed crimes. *Id.* at 127-28. *Rucker* is not a pre-emption case. There was no question that

the state law procedures for terminating the tenancy were followed.

The federal department charged with enforcing the statute responded to the *Rucker* decision with a guidance letter interpreting the act: then HUD Secretary Mel Martinez sent a letter to housing authorities, advising, "[e]viction should be the last option explored, after all others have been exhausted." (R. 6-18.) The language in this letter starkly contrasts with HACM's claim that Wisconsin's minimal five-day right to cure is an impenetrable obstacle to Congressional intent. Even *post-Rucker*, HUD does not view a right to cure an alleged breach as an "impenetrable obstacle" to Congressional intent.

Secretary Martinez's *post-Rucker* guidance, that eviction is **not** mandatory, is in line with HUD's interpretation that state law eviction procedures are in addition to the federal minimums. While expressly interpreting 42 U.S.C. § 1437d(*l*)(6), HUD clearly stated that state law eviction procedures apply to its so-called "One-Strike" policy:

> State or local law governing eviction procedures may give tenants procedural rights **in addition** to those provided by federal law. Tenants may rely on those state or local laws so long as they have not been pre-empted by federal law.

("One Strike policy" guidance, R. 10-19, emphasis added.) It would be absurd to interpret HUD's regulations as pre-empting state law, when HUD explicitly acknowledges the existence of state termination procedures and says that they still apply.

Finally, HACM's reliance on the Supplementary Information provided in the proposed federal regulation implementing the so-called "One Strike" policy rests on a reed too thin to support its argument. (Pet'r's Br. 17-19.) HACM's brief quotes repeated "one strike" references as if they are more than a metaphor, but HACM leaves for the last sentence of a footnote, that all of the "One Strike" references were removed "from the title of the Final Rule." (Pet'r's' Br. 17, n2.)

HUD's final rule is a far more powerful rebuke of HACM's argument than just deleting the One Strike metaphor from the title. HUD demonstrates that its rule does not in any way pre-empt or modify any state law on terminating tenancy and evicting tenants from public housing.

The most explicit statement of the lack of pre-emption is at the end of the final rule publication:

> *Executive order 13132, Federalism*
>
> This final rule does not impose substantial direct compliance costs on State and local governments or pre-empt State law within the meaning of Executive Order 13132.

Screening and Eviction for Drug Abuse and Other Criminal Activity, (Final Rule), 66 Fed. Reg. 28,776, 28791 (Resp't's App. A-26.) Thus, HUD's Supplementary Information promulgating its *final* rule implementing the so-called "One Strike" policy removes any reference to the "one-strike" metaphor, does not explicitly pre-empt state law, and specifically states that the rule does not pre-empt state law.

4. In its lease with Mr. Cobb, HACM agreed to comply with Wisconsin Statutes, section 704.17(2), except as to the number of days' notice it would provide for specific breaches.

Federal law requires HACM to state in its public housing leases the procedures it will use to terminate tenancies. 24 C.F.R. § 966.4(*l*)(1). HACM's lease with Mr. Cobb specifically states that it will give termination notices:

> in accordance with a lease for one year per Section 704.17(2) of the Wisconsin Statutes, except the HACM shall give written notice of termination of the Lease as of:

1. Fourteen (14) days in the case of failure to pay rent;
2. A reasonable time commensurate with the exigencies of the situation (not to exceed 30 days) in the case of criminal activity on or off the development grounds;
3. Thirty (30) days in all other cases:
4. A notice to vacate pursuant to state law may run concurrently with a notice of lease termination.

(R. 6-14, Resp't's App. A-7, Dwelling Lease, p. 7, § 9.C.)

Thus, HACM has explicitly agreed to comply with the provisions of section 704.17(2), except as to the number of days' notice it will give depending on the breach.

In its brief, HACM underlines the exception for notices issued because of alleged criminal activity. But, there is nothing in the contractual language regarding notices for criminal activity that says that HACM will ignore the section 704.12(2) right to cure in those cases. Other than providing a different number of days, there is nothing that differentiates that provision from the provisions regarding non-payment of rent or other cases. HACM does not claim that its lease permits it to ignore the cure provision in section 704.17(2)(a) for failure to pay rent or in section 704.17(2)(b) for "all other cases." Further, HACM's lease specifically provides (as federal law requires) that state law notices to vacate will be

provided, but may run concurrently with a federally required notice of lease termination. (R. 6-14, Resp't's App. A-7, Dwelling Lease, p. 7, § 9.C.4.)

The Court of Appeals found this lease language unambiguously required HACM to comply with section 704.17(2)(b) by providing Mr. Cobb a right-to-cure notice. *Milwaukee City Hous. Auth. v. Cobb*, 2014 WI App 70, ¶ 11, 354 Wis. 2d 603, ¶ 11, 849 N.W.2d 920, ¶ 11. A lease is a contract. *Town of Menominee v. Skubitz*, 53 Wis.2d 430, 435, 192 N.W.2d 887, 889 (Wis. 1972). The lease should be equally enforceable against HACM *and* Mr. Cobb. Further, the lease is a form contract drafted by HACM, and if this Court finds ambiguity in its terms, the ambiguity should be resolved against the drafter. *Wis. Label Corp. v. Northbrook Prop. & Cas. Ins. Co.*, 2000 WI 26, ¶ 24, 233 Wis.2d 314, ¶ 24, 607 N.W.2d 276, ¶ 24. HACM should not be permitted to avoid federal law's explicit requirement that HACM state its procedures for terminating tenancy in its lease by arguing that Congress implicitly intended something else. *See* 24 C.F.R. § 966.4(*l*)(1).

B. HACM's pre-emption cases are easily distinguished from the present case.

1. HACM's United States Supreme Court pre-emption cases are inapposite because they all involve statutes in which the federal policy was uniformity.

HACM's string citation (Pet'r's Br. 9) of federal conflict pre-emption cases does not advance its argument because, unlike the federal policies in the cases that HACM cites, the federal policy with respect to state eviction procedures is explicitly to preserve them and blend the federal minimum procedures into peaceful co-existence with state law. The more analogous case law supports Mr. Cobb's position. It is worthwhile to take a closer look at the cases HACM cites.

In *Geier v. American Honda Motor Company, Inc.*, the federal policy was uniform safety standards for automobile manufacturers. 529 U.S. 861, 871, 120 S.Ct. 1913, 1920, 146 L.Ed. 2d 914 (2000). When the uniform federal standard did not require an airbag, a District of Columbia tort claim against Honda for failing to install an airbag conflicted with the federal policy of uniformity. *Id.* The federal policy was uniformity. Similarly, in *Barnett Bank of Marion County v.*

Nelson, state law forbade national banks from selling insurance in small towns while federal law permitted national banks to sell insurance in small towns. 517 U.S. 25, 31, 116 S.Ct. 1103, 1108, 134 L.Ed. 2d 237 (1996). A uniform federal authority to sell insurance was impossible without pre-emption. *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 367, 120 S.Ct. 2288, 2291, 147 L.Ed. 2d 35 (2000), involves the uniquely federal sphere of foreign relations. The Supreme Court noted Congress' intent to vest control of economic sanctions in the President, to limit the range of economic sanctions against Burma, and to authorize the President to speak for the United States in developing a strategy to improve human rights in Burma. 530 U.S. at 374, 377, 380. Similarly, in *Hines v. Davidowitz,* state legislation affected immigration and international relations, matters uniquely within federal exclusive control. 312 U.S. 52, 67-68, 61 S.Ct. 399, 404, 85 L. Ed. 581(1941). In *Rice v. Santa Fe Elevator Corporation,* the Warehouse Act's "special and peculiar history" included an amendment, changing the federal act from one that was at one time explicitly subservient to state law to an act specifying that the power,

jurisdiction, and authority of the Secretary with respect to warehouseman licensing would be exclusive. 331 U.S. 218, 232, 67 S.Ct. 1146, 1153, 91 L.Ed. 1447 (1947).

The common thread of these cases is that they involve a clearly identified Congressional expression of a national interest in uniformity, with which any state law deviation would conflict. In the present case, however, the federal policy is the federalism opposite of uniformity. Congress intended deference to and co-existence with local tenant termination notice provisions. For example, a notice to terminate for criminal activity can be for *any* reasonable length of time, but not more than 30 days. 42 U.S.C. § 1437d(*l*)(4)(A)(ii). A notice terminating tenancy for any other reason, except non-payment of rent, must be 30 days or more *unless* a State or local law provides for a shorter period of time. 42 U.S.C. § 1437d(*l*)(4)(C) (emphasis added). Congress fully anticipated and explicitly provided, not for federal uniformity, but for variability among the states regarding public housing tenancy termination notices.

The Wisconsin statutes, including section 704.17(2)(b), fit well into this policy of deference to state

law. A Wisconsin termination notice may be issued for breach of "any covenant or condition of the tenant's lease," so it does not impermissibly limit the grounds for which a notice terminating tenancy may be issued Any federally required lease covenant or condition may be the source of the alleged breach. Further, a notice pursuant to 704.17(2)(b) can terminate the tenancy in as little as five days, well within the federal 30-day limit of 42 U.S.C. § 1437d(*l*)(4)(A)(ii). The state law cure provision is entirely consistent with HUD's directive that "[e]viction should be the last option explored, after all others have been exhausted." (R. 6-18.) Thus, HACM's inability to cite any precedential pre-emption case that is analogous to this situation is unsurprising given the strong presumption against pre-emption, and the explicit statutory and regulatory language incorporating state tenancy termination and eviction procedures into federal public housing law. *See* 42 U.S.C. § 1437d(*l*)(4)(C); 24 C.F.R. § 966.4(*l*)(3)(iii).

2. The public housing cases on which HACM relies do not address tenancy termination or eviction procedures, which Congress and HUD specifically left to the states.

HACM's reliance on the United State Supreme Court decision in *Department of Housing and Urban Development v. Rucker* is misplaced because *Rucker* is not a pre-emption case at all. See, *Milwaukee City Hous. Auth. v. Cobb*, 2014 WI App 70, ¶ 12, 354 Wis. 2d 603, ¶ 12, 849 N.W.2d 920, ¶ 12. There is nothing in *Rucker* that suggests that the local housing authority failed to follow the state's tenancy termination procedures. Indeed, the tenants sued to establish that the federal statute should be interpreted to permit the eviction of the tenant who violated the lease clause, but not the innocent tenants who had not. 535 U.S. at 129-30. The United States Supreme Court was simply interpreting the plain language of 42 U.S.C. § 1437d(*l*) and found that it permitted the eviction of innocent tenants whose family members or guests committed the crime. 535 U.S. at 130-32. *Rucker* is not a pre-emption case, and HACM misstates its holding when HACM claims the United States Supreme Court placed greater importance on effectuating the intent of

Congress than on state statutory rights. (Pet'r's Br. 25). *Rucker* did not even consider whether a state's procedures for terminating a tenancy applied.

For the same reason, HACM's heavy reliance on *Boston Housing Authority v. Garcia* is misplaced. *Garcia* was the direct result of *Rucker,* but at least *Garcia* mentions pre-emption. 449 Mass. 727, 729, 871 N.E.2d 1073, 1075 (Mass. 2007). In *Garcia*, the state's statutory "innocent tenant defense" impermissibly limited the housing authority's discretion to evict an innocent tenant whose guest engaged in criminal activity. 871 N.W.2d at 1075. Given *Rucker's* interpretation of the federal statutory language, the state's "innocent tenant defense" directly conflicted with the federal law which the United States Supreme Court had just construed as forbidding the "innocent tenant" defense. The Massachusetts court held that the state's "innocent tenant defense" was pre-empted. *Id*. In *Garcia,* the court was determining permissible grounds for termination of tenancy, not the validity of the state's termination notices and eviction procedures, which the federal government left up to the states.

HACM's reliance on the *Garcia* case is similar to Smith's reliance on a New York pre-emption case in *Meier v. Smith*, 254 Wis. 70, 79, 35 N.W.2d 452, 456 (Wis. 1948). Smith tried to compare Wisconsin's six month notice requirement, significantly longer that the 60 federal notice requirement, with a New York law that prohibited eviction for purposes of withdrawing leased housing accommodations from the rental market. *Id.* In holding that Wisconsin's procedures for terminating tenancies were not pre-empted by the shorter federal notice period, the Supreme Court of Wisconsin distinguished the pre-emptive result in New York, where the federal Housing and Rent Act of 1948 specifically permitted evictions for the reason prohibited by the New York law. *Id.* Comparably, the Massachusetts law in *Garcia* prohibiting eviction of an innocent tenant directly conflicted with 42 U.S.C. § 1437d(*l*)(6), which explicitly permits the eviction of an innocent tenant. When it came to the different notice procedures for terminating tenancy, the Wisconsin Supreme Court held in Meier that Wisconsin's termination notice requirements did not conflict with the shorter federal time period and was, therefore, not pre-empted.

The Tennessee case HACM cites is somewhat of a pre-emption case, although it was not about termination notices or the right to cure. Instead, the Tennessee court determined that its statutory waiver defense was "trumped" by Congress's intent to provide housing that is "crime-free" for all tenants. *Ross v. Broadway Towers, Inc.*, 228 S.W.3d 113, 122 (2006). Tennessee's waiver defense provided that a landlord could not evict based on a default if the landlord had accepted rent for a subsequent month with full knowledge of the default. *Id.* at 121-22. Without doing any kind of specific pre-emption analysis, the Tennessee court unreasonably held that Tennessee's waiver defense was pre-empted because, otherwise, the landlord would be waiving the rights of other tenants to insist on the enforcement of the federal regulations. *Id.* at 122. Tennessee was clearly willing to overlook any and all procedural and substantive mistakes by the landlord to ensure that this particular defendant was evicted. *See Id.* at 120 (permitting eviction for a crime a live-in aid committed and was convicted of prior to moving in, instead of requiring the landlord to notice and prove a violation of the current lease), at 121 (allowing a notice terminating tenancy that did

not really include the required specificity to enable a tenant to prepare a defense), *Id.* (stretching to find that the trial court relied solely on the allegations in the notice terminating tenancy to find grounds for eviction). The court's faulty decision regarding pre-emption vests in other tenants the "right" to demand that certain tenants be evicted and finds that it would be a violation of that "right" to require the landlord to follow the law. *Id.* at 122.

Although HACM urges this Court to vest Wisconsin's public housing tenants with similar rights, the Tennessee court's reasoning is contrary to the permissive, as opposed to mandatory, statutory language chosen by Congress and HUD. *See* 42 U.S.C. § 1437d(*l*)(6), 24 C.F.R. § 966.4(*l*)(5)(vii)(B). It is also contradictory to HACM's assertion, supported by the regulations, that the *landlord* has the discretion to consider mitigating circumstances and to decide whether to issue a termination notice. (Pet'r's Br. 21-22.); 24 C.F.R. § 966.4(*l*)(5)(vii)(B). Taken to its logical conclusion, Tennessee's reasoning would eliminate any procedural or notice requirements, along with landlord discretion, if they impeded other tenants' "rights" to be in crime-free housing.

Clearly, Congress and HUD did not intend that result. *See, e.g.* HUD "One Strike" policy guidance (providing that state and local tenant protections apply) (R. 10-19.)

In a footnote, HACM also cites without explanation a case from Connecticut and a case from Iowa. In HACM's Connecticut case, the court applied and interpreted a Connecticut statute; it did not do a pre-emption analysis. *Hous. Auth. of City of Norwalk v. Brown*, 129 Conn. App. 313, 317, 19 A.3d 252, 255 (2011). The Connecticut court held that the tenant had not cured under the state's cure statute because the statute only permitted tenants to cure by repair or payment. 19 A.3d. at 256. Thus, under state law the breach could not be cured. *Id.* at 259. The Connecticut tenant did not challenge the housing authority's compliance with federal or state termination notice requirements.

The Iowa case cited by HACM also did not do an implied conflict pre-emption analysis. The tenant argued that both federal law and the lease explicitly required "good cause" before it could be terminated. *Horizon Homes of Davenport v. Nunn*, 684 N.W.2d 221, 224 (Iowa 2004). The Iowa court simply found that the plain language of the

relevant federal statutes and regulations required good cause to terminate a federally subsidized tenancy. 684 N.W.2d at 225-26. The court also noted that subsidized housing tenants have significant procedural due process rights prior to the termination of their tenancies. *Id.* at 225. Nothing in *Horizon Homes* supports HACM's position.

3. Only one state and the District of Columbia have considered whether their right-to-cure provisions were pre-empted by 42 U.S.C. § 1437d(*l*)(6).

Although HACM asserts that multiple jurisdictions have considered the legal question before this Court, (Pet'r's Br. 27), in fact, only Kentucky and the District of Columbia have considered the question of whether a state statute's right-to-cure lease termination notice provision is pre-empted by 42 U.S.C. § 1437(*l*)(6). The two courts came to different conclusions.

The Kentucky Court of Appeals decision is the better reasoned and involves a cure statute similar to Wisconsin's. In *Housing Authority of Covington v. Turner*, 295 S.W.3d 123, 127 (Ky. Ct. App. 2009), the statutory tenancy termination notice procedure includes the right to cure the

first alleged breach. Like HACM, the Covington housing authority had incorporated the right-to-cure statute into its lease. *Id.* at 124. The Kentucky state statute, Kentucky Revised Statutes, section 383.660(1) reads, in pertinent part, as follows:

> . . . if there is a material noncompliance by the tenant with the rental agreement or a material noncompliance with KRS 383.605or 383.610, the landlord may deliver a written notice to the tenant specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than fourteen (14) days after receipt of the notice. If the breach is not remedied in fifteen (15) days, the rental agreement shall terminate as provided in the notice subject to the following. If the breach is remediable by repairs or the payment of damages or otherwise and the tenant adequately remedies the breach before the date specified in the notice, the rental agreement shall not terminate. If substantially the same act or omission which constituted a prior noncompliance of which notice was given recurs within six (6) months, the landlord may terminate the rental agreement upon at least fourteen (14) days' written notice specifying the breach and the date of termination of the rental agreement.

KRS § 383.660(1). Kentucky permits 15 days to cure; Wisconsin only 5. In both states, a successful cure permits the tenancy to continue. In both states a subsequent breach can result in termination of the tenancy without a right to cure. In Kentucky, the subsequent breach must be within six months and be for the same act or omission. In Wisconsin, the alleged subsequent breach can be of any covenant or condition within

the next year. *Compare* KRS § 383.660(1) *and* Wis. Stat. § 704.17(2)(b).

The Housing Authority of Covington made exactly the same argument HACM makes here and relied on *Rucker*. 295 S.W.3d at 127. The Kentucky Court of Appeals noted that *Rucker* does not require eviction for a lease violation, even the drug use provision. *Id.* Thus, the legislature's determination that a cure should be allowed does not conflict with the Congressional purpose. *Id*. Further, the Kentucky court then adopted the Kentucky trial court's reasoning, observing that a state law cure provision may well further discouraging drug use in public housing:

> In its well-reasoned opinion, the circuit court applied judicial common sense and concluded the right to remedy may further the objective of discouraging illegal drug use on public housing premises. We quote: '[R]ather than the provision of an opportunity to remedy being an obstacle to the purposes and objectives of the Anti-Drug Activity law, a tenant who has been served with notice of the intent to evict has clear knowledge of the provision, and having been given the opportunity to remedy may be among the most likely of tenants to prevent the situation from recurring, thereby furthering the purpose of and objectives of the law.

Id. Notice of a suspected violation, with a right to cure, provides a powerful incentive to the tenant household to be vigilant, even against future allegations of breach. It removes

the incentive to litigate the first allegations and focuses on ensuring that future unacceptable conduct is prevented. The *Turner* court specifically found that the right to remedy an alleged lease violation is consistent with the Department of Housing and Development's (HUD) polices and prior holdings of the United States Supreme Court. *Id*.

By contrast, a District of Columbia court decision is an example of bad facts making bad law. The allegations against the tenant in *Scarborough v. Winn Residential L.L.P./Atl. Terrace Apartments,* 890 A. 2d 249 (D.C. 2006) were very serious. Ms. Scarborough was found responsible for the presence in her apartment of a loaded, unregistered, 12-gauge shotgun that had been used in a fatal shooting, which had happened in her apartment, the previous day. 890 A.2d 249, 251. Importantly, the D.C. Code at issue in *Scarborough* required a 30-day notice to correct an alleged breach, with no apparent limit in how often a tenant must be given the opportunity to correct any alleged future breaches before the landlord might initiate an eviction action. *Id.* at 253.

Unlike the District of Columbia, Wisconsin places a strict limit on the right to cure, providing a short, five-day cure period and allowing a tenant only one chance to cure within a year. Wis. Stat. § 704.17(2)(b). If a tenant does not cure the alleged behavior within five days, an eviction action may be filed. *Id.* If a tenant cures the behavior, but breaches the lease again within twelve months of the 5-day-right-to-cure notice, a fourteen-day notice with no right to cure will validly terminate the tenancy. *Id.* Applying Wisconsin's law, Ms. Scarborough may well have been evicted because after one potential breach (violent crime between guests) she may have committed a second breach (hiding an illegal gun). A Wisconsin court may have found that Ms. Scarborough failed to take reasonable steps to remedy a breach of the lease, or that she committed two distinct breaches within a twelve-month period. *See* Wis. Stat. § 704.17(2)(b).

Conclusion

For the reasons stated above, the court of appeals decision should be affirmed.

Dated this 11th day of November, 2014 at Milwaukee, Wisconsin

LEGAL ACTION OF WISCONSIN
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif fond. The length of this brief is 7,689 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 11th day of November at Milwaukee, Wisconsin.

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Jeffery R. Myer, SBN 1017339

CERTIFICATION OF MAILING AND SERVICE

I hereby certify that:

On this day, I caused Twenty-two (22) copies of Defendant-Appellant-Respondent's Brief and Appendix to be deposited with a third-party commercial carrier (FedEx) for delivery to the Clerk of the Supreme Court and Court of Appeals by first class mail or other class of mail that is as expeditious.

I further certify that on this day, I caused three copies of this brief and appendix to be served by third-party commercial carrier (FedEx) on Assistant City Attorney John Heinen.

I further certify the packages were correctly addressed and postage was pre-paid.

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STATE OF WISCONSIN
SUPREME COURT

District 1 Appeal No. 2013AP002207
Circuit Court Case No. 2013SC020628

MILWAUKEE CITY HOUSING AUTHORITY,

Plaintiff-Respondent-Petitioner

v.

FELTON COBB,

Defendant-Appellant.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT 1
REVERSING A JUDGMENT OF THE CIRCUIT COURT FOR
MILWAUKEE COUNTY, PEDRO A. COLON, JUDGE

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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A. Cases Cited by HACM Recognize That Congressional Objectives Prevail Over State Laws Permitting Tenant Defenses.

Cobb, in his Response Brief, goes to some lengths in an effort to distinguish *Dep't of Hous. v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002) and *Boston Hous. Auth. v. Garcia*, 449 Mass. 727, 871 N.E.2d 1073 (2007). The gist of Cobb's argument is that the tenants facing eviction in *Rucker* and *Garcia* presented "innocent tenant" defenses, as opposed to "right to cure" defenses, and so the decisions do not aid a pre-emption analysis. This argument misses HACM's purposes for citing and quoting *Rucker* and *Garcia*, which are three-fold.

First, both decisions weigh the public policies behind 42 U.S.C. § 1437d(*l*)(6) [which authorizes evictions for any drug-related criminal activity], against the "innocent tenant defense" in *Rucker*, and against the "special circumstances" defense in *Garcia*. With respect to the "innocent tenant defense," the U.S. Supreme Court, in *Rucker*, wrote there are "no 'serious constitutional doubts' about Congress' affording local public housing authorities the discretion to conduct no-fault evictions for drug related crime."

Rucker, 535 U.S. 125 at 135 (citation omitted). As to the "special circumstances defense," a variant of no-fault, the Massachusetts Supreme Judicial Court explained: "left undecided was whether Congress intended Federal law to make inoperative any State law that limits the exercise of discretion by local housing authorities in such circumstances. It is to this question we now turn." *Garcia*, 449 Mass. 727 at 733. The Court then observed that Congress and HUD intended "to reduce illegal drug activity in federally funded housing projects by eliminating the innocent tenant defense . . ." *Id.* at 735. The Massachusetts court ultimately concluded that the "special circumstances" defense "would run afoul of and substantially interfere with the congressional objective. It is therefore preempted." *Id.* at 734.

Second, both cases find that a no-fault defense to eviction, which HACM submits is a far more compelling tenant defense than Wisconsin's right-to-cure statute, cannot be sustained in the light of the Congressional objectives behind the federal 'One Strike and You're Out' policy. Both decisions recognize the principle: "strict liability maximizes deterrence and eases

enforcement difficulties." Garcia at 734 (citing *Rucker*, citing *Pacific Mut. Life Ins. Co. v. Haslip*, 449 U.S. 1, 14, 111 S. Ct. 1032, 113 L. Ed.2d 1 (1991)).

Thus, the caselaw cited by HACM demonstrates an understanding of the importance Congress and HUD placed on PHA's having discretion to evict by finding lawful a regulation, 24 C.F.R. § 966.4(f)(12)(i), that goes well beyond pre-empting a state procedural right to a second strike, at issue here, through that regulation's authorizing the eviction of even innocent tenants for the illegal activities of their guests and household members.

Third, both decisions arise from the highest level of appellate review available in their respective jurisdictions: the United States federal courts and the Massachusetts' state courts.

Against these cases, Cobb puts forth one Kentucky intermediate appellate court decision, *Housing Authority of Covington v. Turner*, 295 S.W.3d 123 (Ky. Ct. App. 2009), contending it is "better reasoned." Yet, in the only case advanced to bolster Cobb's argument, the Kentucky Court of Appeals split on whether the pre-emption doctrine should apply, with Judge Moore,

although concurring in the outcome, writing: "In my opinion there is no doubt that the federal law in this case occupies the field. Thus, it preempts any state law to the contrary." *Id.* at 128 (Moore, concur)[1]. After citing to the *Rucker* case, Judge Moore concluded: "Thus a state statute allowing a remedy is contrary to the clear language of the federal statute." *Id.* He then lists eight findings Congress made regarding elimination of drugs in public housing and adds:

> Consequently, the "one-strike" policy was implemented as a result of these findings. Accordingly, Congress sought to occupy the field in the area of drug-related crimes in public housing in an effort to eradicate it. Had Congress intended to mandate remedies to this policy, it would have so said. Thus, a state statute allowing remedies beyond any that may be granted by Congress is contrary to clear congressional language and intent. Thus, I conclude that KRS 383.660(1) is preempted by 42 U.S.C. §1437d(*l*)(6).

However, because *Turner* was also an "innocent tenant" case, Judge Moore sides with the majority to prevent Ms.

[1] It should be noting that the U.S. Supreme Court has stated with respect to the three categories in pre-emption analysis that the categorization "should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: a state law that falls within a pre-empted field conflicts with Congress' intent (either expressly or plainly implied) to exclude state regulation." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, fn. 5, 110 S. Ct. 2270, 110 L.Ed.2d 65 (1990).

Turner's eviction, concluding that the PHA failed to show it met the policy considerations behind the federal statute.

Thus, the cases cited by HACM demonstrate how courts have evaluated the Congressional policies for enacting 42 U.S.C. § 1437d(*l*)(6) and found that they trump the tenant defenses presented in those cases. Even the concurring opinion in Respondent's one case to the contrary supports HACM's "One Strike" position.

B. Contrary to the Defendant-Appellant's Contention, Wis. Stat. § 704.17(2)(b) Provides Multiple Opportunities to Cure.

Throughout his Response Brief (e.g. pages 7-9, 14), Cobb argues that even if the tenant cures an initial breach, a second breach of the tenant's lease will result in eviction *without any right to cure*, citing Wis. Stat. § 704.17(2)(b), Stat. The claim is contrary to the language of the statute.

HACM's initial brief highlighted the practical workings of the right to cure clause and its frustrating effect on a public housing landlord, like HACM, seeking to evict tenants who have engaged in criminal activity. If all that is necessary to cure

criminal lease violations is merely to "cease the activity," then clearly a first crime, standing alone, is insufficient to evict any tenant who can "remedy the default" (cure) during the statutory five-day cure period. Cobb contends that the absence of repeat criminal conduct ("ceasing the activity") amounts to "complying with the notice" and preserves the tenancy. In short, as HACM has argued, such a state of affairs amounts to the tenant deciding whether he will stay or go, rather than a public housing authority making that determination. Any such result under a state law would be contrary to Congress's purposes and objectives.

Once a tenant has breached the lease, but cured that breach, Cobb's Brief contends that the tenant may be evicted "if within one year from being served the first termination notice the tenant . . . breaches the same or any other covenant or condition of the tenant's lease." Through a paraphrasing of the statute, Cobb claims that "the tenancy may be terminated upon a 14-day notice, without any right to cure. . .. (Respondent's Brief at p. 8.)

Even if the defendant-appellant's characterization of Wis. Stat. § 704.12(2)(b) were accurate, the federal 'One Strike"

policy objectives would be frustrated if state law required two strikes before a tenant could be evicted by a public housing authority. But Cobb's citation to Wis. Stat. § 704.17(2)(b) ignores a further statutory cure option, adding further frustration to PHAs. The statute reads:

> (b) If a tenant under a lease for a term of one year or less . . . breaches any covenant or condition of the tenant's lease, other than for payment of rent, the tenant's tenancy is terminated if the landlord gives the tenant a notice requiring the tenant to remedy the default or vacate the premises on or before a date at least 5 days after the giving of the notice, and if the tenant fails to comply with such notice. A tenant is deemed to be complying with the notice if promptly upon receipt of such notice the tenant takes reasonable steps to remedy the default and proceeds with reasonable diligence . . . If within one year from the giving of any such notice, the tenant again . . . breaches the same or any other covenant or condition of the tenant's lease, other than for payment of rent, the tenant's tenancy is terminated if the landlord, **prior to the tenant's remedying the waste or breach**, gives the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

(underlining and emphasis added). Thus, the statute contains not one but at least two cure opportunities within every 12-month period. The first opportunity falls in the five-day window following service of the first termination notice. Then, contrary to Cobb's assertion that a subsequent breach can bring a 14-day notice "without any right to cure," the bold text reveals that even

enforcement of the second termination notice may be frustrated by the tenant who contends he or she has again cured, this time prior to the landlord giving the tenant notice to vacate. Moreover, the cycle repeats every 12 months.

For clarity's sake, applying the statute to a common lease violation, like harboring a pet, is instructive. Under Wis. Stat. § 704.17(2)(b), a tenant who keeps a pet in violation of the lease would cure by removing the pet after being served a first termination notice. Should the tenant, in the ensuing 12 months, again harbor a pet, a second termination notice could be served. However, pursuant to the second cure clause in the statute, it appears the tenant would have a defense to the eviction by arguing the second pet had been removed before service of the second notice. One need only substitute any of a laundry list of drug related or criminal lease violations to reveal how unworkable the statute is. Conceivably, Cobb could use the statute to play cat and mouse with HACM after a second illegal drug use, arguing that he remedied by ceasing his marijuana smoking activity before being served the non-curable second notice.

In sum, notwithstanding Cobb's protestations of how state law compliments and peacefully co-exists with federal law, Wis. Stat. § 704.17(2)(b) impermissibly obstructs the accomplishment and execution of Congressional policy applicable to public housing authorities. If the defendant-appellant's position prevails, a tenant who beats up his neighbor, robs the development office, or breaks out all the windows in the building with a bat may, upon receipt of a (termination) notice, remedy the default by "ceasing the activity" (in Cobb's words). Such practical applications of the right to cure criminal activity demonstrate how Wis. Stat. § 704.17(2)(b) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 61 Sup. Ct. 399, 85 L. Ed. 581 (1941).

As the defendant-appellant has rightly recognized, "Congress left the decision of *whether* to terminate a tenancy for drug-related criminal activity up to each individual housing authority." (Respondent's brief, p. 19) (emphasis in original). Yet the application of Wis. Stat. § 704.17(2)(b) sought by Cobb would

prevent public housing authorities from making that judgment, contrary to the intent of Congress.

C. Executive Order 13132 Comports with HACM's Position on Pre-Emption.

In his efforts to rebut the simple directive of the 'One Strike' policy, Cobb points to Executive Order 13132, entitled 'Federalism,' and cited in the Final Rule, 66 Fed. Reg. 28, 776 (May 24, 2001). It reads: "This final rule does not impose substantial direct compliance costs on State and local governments or pre-empt State law within the meaning of Executive Order 13132." (emphasis added). Cobb calls the Order: "[T]he most explicit statement of the lack of pre-emption." However, Cobb's analysis again stops short, this time of that portion of the Order that expressly allows for the conflict pre-emption HACM contends is appropriate in this case.

The fourth section of the Order provides:

> **Sec. 4**. *Special Requirements for Preemption.* Agencies, in taking action that preempts Sate law, shall act in strict accordance with governing law.
>
> (a) Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.

(emphasis added). (Respondent's Appendix A44). As is evident from its section on "Special Requirements for Preemption," Executive Order 13132 sets out parameters for pre-emption of state law consistent with principles of federalism. The language, however, expressly allows for HACM's position, that Wis. Stat. § 704.17(2)(b) **conflicts** with the **exercise** of the 'One Strike and You're Out' Federal policy, and is, therefore, pre-empted.

D. Prohibited Drug-Related and Threatening Criminal Activity Given Unique Treatment in HACM Lease Section 9.

Cobb challenges HACM's unique treatment of termination notices issued pursuant to HACM lease section 9(C)(2) for threatening or drug-related criminal activity, arguing: "Other than providing a different number of days, there is nothing that differentiates that provision from the provisions regarding non-payment of rent or other cases." The subsequent subsections, however, serve to rebut the argument.

In addition to how Lease Section 9(C)(2) vests HACM with the discretion to determine what will constitute a "reasonable time" before lease termination for each 'One Strike' lease violation,

the next subsection, 9(D)(4), provides that termination notices shall state that the Resident has a right to request a hearing in accordance with the HACM's Grievance Procedures (administrative review procedure), **except**:

> 5. That a notice given under Section 9(C)(2) shall state that the circumstances have been considered by HACM and that a Resident is not entitled to a Grievance Hearing and the HUD has determined the Sate judicial eviction procedure contains the basic elements of due process requirements and provides the opportunity for a hearing in court.

(emphasis added).

As can be seen, HACM's lease distinguishes terminations for illegal drug related and other criminal activity in several ways: a variable number of days to vacate subject to HACM's discretion (depending on "the exigencies of the situation"); no right to HACM's grievance procedure; and an affirmative acknowledgment that a state court proceeding is all the due process to which such tenants are entitled. These exceptions include HACM's determination that the same class of lease violators is not entitled to the right to cure afforded by Wis. Stat. § 704.17(2)(b).

CONCLUSION

Therefore, for all of the reasons set forth here and in its Brief of October 20, 2014, the Plaintiff-Respondent-Petitioner, Housing Authority of the City of Milwaukee, respectfully requests that the Supreme Court vacate the Order and Decision of the Court of Appeals dated May 28, 2014, and reinstate the decision and order of the Circuit Court of Milwaukee County dated September 17, 2013.

Respectfully submitted, dated, and signed at Milwaukee, Wisconsin this 25th day of November, 2014.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19 (8)(c)(2), Wis. Stat., for a brief produced with a proportional serif font. The length of this brief is 2,388 words

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I hereby certify that I have submitted an electronic copy of this Reply Brief which complies with the requirements of § 809.19(12), Wis. Stat.

I further certify that the electronic Reply Brief is identical in text, content and format to the printed form of the brief filed as of this date.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY AND CERTIFICATION OF MAILING

I, Wilhelmina Taylor, herein certify that I am employed by the Housing Authority of the City of Milwaukee as a Legal Assistant, assigned to duty in the City Attorney's Office, for Assistant City Attorney, John J. Heinen, located at 841 North Broadway, Room 1018, Milwaukee, Wisconsin 53202; that on the 25th day of November, 2014, I sent twenty-two (22) copies of the Reply Brief of Plaintiff-Respondent-Petitioner, in the above-entitled case, via third-party commercial delivery, addressed to: Clerk of the Wisconsin Supreme Court, 110 East Main Street, Suite 215, Madison, Wisconsin 53703.

I further certify that three copies of the Reply Brief of Plaintiff-Appellant-Petitioner, in the above-entitled case, were mailed on November 25, 2014 to all counsel for the Defendant-Appellant-Respondent, Attorneys Jeffrey R. Myer, April A.G. Hartman, and Christine Donahoe, of Legal Action of Wisconsin, Inc., located at 230 West Wells Street, Suite 800, Milwaukee, Wisconsin 53203-1700.

s/Wilhelmina Taylor

STATE OF WISCONSIN
SUPREME COURT

District 1 Appeal No. 2013AP002207
Circuit Court Case No. 2013SC020628

MILWAUKEE CITY HOUSING AUTHORITY,

Plaintiff-Respondent-Petitioner

v.

FELTON COBB,

Defendant-Appellant.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT 1
REVERSING A JUDGMENT OF THE CIRCUIT COURT FOR
MILWAUKEE COUNTY, PEDRO A. COLON, JUDGE

AMICUS CURIAE BRIEF AND APPENDIX OF HOUSING AND DEVELOPMENT LAW INSTITUTE IN SUPPORT OF PETITIONER

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I. INTEREST OF *AMICUS CURIAE*

The Housing and Development Law Institute (HDLI) serves as a legal resource on public and affordable housing issues nationwide. HDLI's 200+ members are composed of public housing and redevelopment agencies, legal counsel representing those agencies, and other industry stakeholders.[1] HDLI, its 22 directors, and members have considerable expertise in the public housing issues underlying this case. HDLI served as *amicus curiae* in *HUD v. Rucker*,[2] and is familiar with federal and housing agency initiatives regarding drug-related activity in public and affordable housing.

II. STATEMENT OF THE CASE

This case involves a public housing agency's (Petitioner) eviction of a public housing tenant (Respondent) based on the Respondent's alleged use and/or possession of marijuana in his unit, which was a violation of his dwelling lease. The Petitioner evicted the Respondent without providing him a statutory five day right to cure found under Wis. Stat. §704.17(2)(b), on the basis that federal law preempts state law. The circuit court below affirmed the Petitioner's position.[3] The Wisconsin Court of Appeals reversed, finding that Petitioner's failure to provide Respondent with a pretermination notice that contained notice of a right to cure his

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[1] Although counsel for the Petitioner, the Milwaukee City Attorney's Office, is an HDLI member, HDLI is participating as *amicus curiae* to represent the collective interest of all of its members on these very important issues of national significance.

[2] *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002).

[3] The decision is found in the appendix to the Petitioner's Brief @ p. 5 (APPX-172).

lease violation deprived the circuit court of competency to adjudicate the eviction action.[4]

III. ARGUMENT

A. Summary of Argument.

42 U.S.C. §1437d(l)(6), and the comprehensive federal scheme surrounding that statute, preempts Wis. Stat. §704.17(2)(b) insofar as it applies to lease violations by public housing residents that involve drug-related or other criminal activity.

This brief does not re-argue that the bases for preemption are present in this case, and hereby adopts the arguments set forth in the Petitioner's Brief in that regard.[5] Rather, it explains that a comprehensive federal scheme allows housing agencies to quickly evict tenants for drug-related criminal activity, and this scheme does not merely exist in a "pamphlet" or "agency manual," as suggested by the Court of Appeals, below.

B. The Wisconsin Right To Cure Provision Significantly Frustrates the Federal Scheme to Eliminate Drug-Related Criminal Activity on Public Housing Property.

Congress and HUD consider drug-related criminal activity in public housing to be a very serious problem. The federal scheme designed to reduce and eliminate drug-related criminal activity in public housing properties is comprehensive. It began with the Anti-Drug Abuse Act of 1988[6]. President Clinton first articulated the "One Strike" policy discussed in the parties' briefs in his 1996 *State*

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[4] Petitioner's Brief @ p. 5 (Ct. App. Decision ¶¶ 1, 2, and 14; APPX-101-104 and APPX-113.).

[5] HDLI hereby adopts and incorporates by reference pages 7-24 of the Petitioner's Brief.

[6] Anti-Drug Abuse Act of 1988, Pub.L. 100–690, 102 Stat. 4181 (1988).

of the Union Address. Federal anti-crime statutes, implementing regulations, a *mandated* form public housing dwelling lease, and a series of official HUD notices all contribute to this comprehensive regime.

In his January 23, 1996 *State of the Union Address*, President Bill Clinton laid the foundation of an omnibus "One Strike" policy, stating:

> I challenge local housing authorities and tenant associations: Criminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the rule for residents who commit crimes and peddle drugs should be one strike and you're out . . .

On March 28, 1996, President Clinton signed into law the "Housing Opportunity Program Extension Act of 1996" (Extender Act),[7] which provided additional authority to housing agencies to provide stricter screening, lease enforcement, and eviction efforts. The Extender Act gave housing agencies new authority to deny occupancy on the basis of illegal use of a controlled substance, among other powers.[8]

Thereafter, in 1998 Congress passed the Quality Housing and Work Responsibility Act of 1998 (QHWRA).[9] One of the purposes of QHWRA was to deregulate housing agencies and provide them more discretion to deal with criminal activity. Under QHWRA, a public housing lease could be terminated within a "reasonable time, not to exceed 30 days" for cases involving, *inter alia*, drug-related criminal activity. At least one judge has argued that Congress has

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[7] Housing Opportunity Program Extension Act of 1996, Pub. L. 104–120 (1996).

[8] *Id.*

[9] Quality Housing and Work Responsibility Act of 1998, Title V of HUD's FY1999 appropriations act, P.L. 105-276 (1988).

sought to occupy the field of evictions in public housing that are based upon drug-related criminal activity.[10]

Amendments to the 1937 United States Housing Act require that every public housing lease permit the agency to evict for illegal drug activity on or off public housing premises. Specifically, 42 U.S.C. §1437d(l)(6) provides that:

> Each public housing agency shall utilize leases which . . . provide that . . . any drug-related criminal activity on or off such premises, engaged in by a public housing tenant . . . shall be cause for termination of tenancy."

42 U.S.C. 1437d(l)(6) defines "drug-related criminal activity" as *"the illegal manufacture, sale, distribution, use, or possession . . . of a controlled substance (as such term is defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802.)"*

In 2001, HUD published revised regulations in the Federal Register in a Final Rule titled *Screening and Eviction for Drug Abuse and Other Criminal Activity*, 66 FR 28776 (May 24, 2001).[11] The revised regulations give housing agencies enhanced tools for adopting and implementing comprehensive screening and eviction policies for illegal drug use and other criminal activity.

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[10] *See* Judge Moore's concurrence in *Housing Authority of Covington v. Turner*, 295 S.W.3d 123 (Ky. Ct. App. 2009), wherein he wrote: "there is no doubt that the federal law in this case occupies the field." (Moore J concur. @128).

[11] Attached hereto as HDLI APPX-A

In particular, 24 C.F.R. §966.4(l)(5)(i)(B) states:

> (B) Drug crime on or off the premises. The lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the PHA to terminate tenancy. In addition, the lease must provide that a PHA may evict a family when the PHA determines that a household member is illegally using a drug or when the PHA determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

Wisconsin's right to cure statute also compromises a housing agency's rights to evict persons involved with methamphetamine production on federally assisted property,[12] fleeing felons,[13] and anyone else whose criminal activity threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or agency staff residing on the premises.[14] The right to cure renders the federal law and regulations a nullity.

Another regulation is noteworthy. 24 C.F.R. §966.4(l)(5)(vii) discusses HUD's formal assessments of public housing agencies:

> . . . PHAs that have adopted policies, implemented procedures and can document that they appropriately evict any public housing residents who engage in certain activity detrimental to the public housing community receive points . . . This policy takes into account the importance of eviction of such residents to public housing communities and program integrity, and the demand for assisted housing by families who will adhere to lease responsibilities.

Assessment scores affect an agency's status with HUD and potentially future funding.

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12 24 C.F.R. § 966.4(l)(5)(i)(A).

13 24 C.F.R. § 966.4(l)(5)(ii)(B).

14 24 C.F.R. § 966.4(l)(5)(ii)(A).

Respondent's Dwelling Lease

The HUD-mandated lease also is a part of this comprehensive scheme. In Section 5(Q) of the Respondent's Lease, titled "Resident Obligations (a provision mandated by HUD[15])," the Respondent agrees not to engage in:

> 1. Any activity that threatens the health, safely or right to peaceful enjoyment of the premises, property or neighborhood by other residents, neighbors, or employees of the HACM; or
>
> 2. Any drug-related or violent criminal activity, on or off the public housing development's property ... or
>
> 3. Any illegal use of a controlled substance, or abuse of alcohol or use or controlled substance that in any way that interferes with the health, safety or right to peaceful enjoyment of the premises, property or neighborhood by other residents, neighbors or employees of the HACM.

Respondent's Brief, App. 5.

Next, Section 9(C)(1)-(3) of the Lease titled "Termination" states:

> The HACM may evict the resident only by bringing a court action. The HACM termination notice shall be given in accordance with a lease for one year per Section 704.17(2) of the Wisconsin Statutes, except the HACM shall give written notice of termination of the Lease as of:
>
> 1. Fourteen (14) days in the case of failure to pay rent;
> 2. A reasonable time commensurate with the exigencies of the situation (not to exceed 30 days) in the case of criminal activity which constitutes a threat to other Residents or employees of the HACM or any drug related criminal activity on or off the development grounds;
> 3. Thirty (30) days in all other cases:

Respondent's Brief, App. 7. Thus, in cases involving criminal activity Congress and HUD have given housing agencies discretion to determine what constitutes a "reasonable" amount of time to

[15] 24 C.F.R. §966.4(l)(5)(i)(B).

provide notice before initiating the eviction process. Wis. Stat. §704.17(2)(b) takes away that discretion.

Extensive HUD Guidance

HUD has issued a series of official federal notices explaining the breadth and importance of the "One Strike" policy for housing agencies. Shortly after the passage of the Extender Act, on April 12, 1996, HUD issued Notice PIH 96-16 (HA), titled *"One Strike and You're Out" Screening and Eviction Policies for Public Housing Authorities (HAs)*[16]," providing guidelines to assist housing agencies in the development and enforcement of stricter screening and eviction procedures. The following month, HUD followed with Notice PIH 96-27 (HA), titled "Occupancy Provisions of the Housing Opportunity Program Extension Act of 1996"[17], describing, *inter alia*, the screening, lease, and eviction provisions that housing agencies must adopt as a result of the Extender Act.

These series of notices signify how extensive an effort the federal government has made to establish protocols to address the problem of rampant crime in public housing, including promoting the use of evictions to make public housing sites safer.

C. The Respondent's Lease Addresses the Absurdity of the Result that the Respondent Seeks. The Law Does Not Permit an Absurdity.

The "absurd result" principle authorizes a court to ignore a statute's plain words in order to avoid the outcome those words

[16] Attached hereto as HDLI APPX-B

[17] Attached hereto as HDLI APPX-C

would require in a particular situation.[18] The U.S. Supreme Court, other federal courts, and state courts refer to the absurd result principle with great frequency.[19] Indeed, the highest courts of all 50 states, including the Wisconsin Supreme Court, have endorsed this principle.[20]

To find that a right to cure is applicable to the circumstances of this case would produce an absurd result. Federal regulations prohibit housing agencies from admitting persons who previously were evicted from federally assisted housing for drug related activity, for a period of 3 years from the date of eviction.[21] A right to cure permits an illegal drug user at least one free opportunity, if not more, to use an illegal drug on public housing property in violation of federal regulations and avoid an eviction. Other criminals enjoy the same "get-out-of-jail-free-card."

Housing agencies are not allowed to admit into public housing a person whom the housing agency believes is *currently* engaged in illegal drug use.[22] It would be absurd under the law to allow an illegal drug user to "cure" and remain in federally assisted housing, upon nothing more than his simple promise not to continue to engage in illegal drug use. This contradicts HUD regulations that would not allow this person to be admitted in the first place.

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[18] Dougherty, Absurdity And The Limits Of Literalism: Defining The Absurd Result Principle In Statutory Interpretation, American Univ. Law. Rev., Vol. 44:127 (1994) at 145.

[19] *See, e.g., Rowland v. California Men's Colony*, 113 S. Ct. 716, 720, n.3 (1993).

[20] For the Supreme Court of Wisconsin, *see Reyes v. Greatway Ins. Co.*, 227 Wis. 2d 357, 376-377 (Wis. 1999) ("statutes must be interpreted in a way that avoids absurd or unreasonable results"). For a compilation of other state decisions, *see Dougherty, supra* n. 18 at 129, fn. 9.

[21] *See* 24 C.F.R. §960.204(a)(1).

[22] *See* 24 C.F.R. §960.204(a)(2).

These examples illustrate the absurdity of the application of a right to cure statute to federally assisted housing programs that, by federal statute and regulation, must deny admission, and evict, for criminal activity.

Not by accident, Respondent's Lease, which is *mandated* by federal regulations, takes care of this. Sections 9(C)(2) of the Lease provides an exception to the Wisconsin right to cure. The Lease states in pertinent part:

> The HACM may evict the resident only by bringing a court action. The HACM termination notice shall be given in accordance with a lease for one year per Section 704.17(2) of the Wisconsin Statutes, except the HACM shall give written notice of termination of the Lease as of:
>
> 1. Fourteen (14) days in the case of failure to pay rent;
> 2. A reasonable time commensurate with the exigencies of the situation (not to exceed 30 days) in the case of criminal activity which constitutes a threat to other Residents or employees of the HACM or any drug related criminal activity on or off the development grounds;
> 3. Thirty (30) days in all other cases:

Respondent's Brief, App. 7.

Section 9(C)(2) is an exception to the statutory notice requirements and carves out a shorter notice for drug-related and other criminal activity and *allows the housing agency* to decide what time is "reasonable," depending on the facts of the lease violation. This exception parallels 24 C.F.R. §966.4(l)(5)(i)(B), and is consistent with Congress' grant of power to housing agencies to use their discretion in terminating leases for criminal activity. This lease provision avoids Respondent's absurd result.

D. Unlike Private Leases, Public Housing Leases Do Not Expire. Health and Safety Dictates That Public Housing Agencies Be Able to Evict As Soon As Illegal Drug Use is Discovered.

Unlike a private lease issued by a private landlord, a public housing lease never expires. It is critical that housing agencies be able to *meaningfully* use the tool of eviction as a viable means of controlling illegal drug activity, and otherwise maintain the safety of their developments. A housing agency is in the best position to determine the measures necessary to eliminate illegal drugs from its sites, and to judge how drug activity by its tenants affects other crime rates, such as theft, prostitution, and violence.

A housing agency may find that its duty to provide safe and secure housing for all residents is compromised when illegal drug users reside in its developments, when marijuana smoke wafts throughout the public housing building, and the housing agency does not have a means to remove the offender as quickly as the federal regulations allow. Since the eviction process may take several weeks or even months to conclude, delays exacerbate the problem.

Illegal drug users can be undesirable tenants for a variety of other reasons. While perhaps not applicable to all, illegal drug users who also are addicts may obtain money illegally to support their habit; their subsidized rent may help to fund the illegal habit; they may prey on the elderly and disabled to fund their habit; they may associate with other illegal drug users; they may invite illegal drug dealers onto public housing property; and they may not care about the habitability of their living environment, as long as their illegal habit is satisfied.

Perhaps the best way to combat illegal drugs is to evict illegal drug users as soon as they are discovered. If a housing agency is compelled to offer a right to cure that can be satisfied by simply promising to refrain from illegal activity during the short five-day period set forth in the cure statute,[23] the agency's other residents, staff, and property remain exposed to the potential ills of illegal drug use for an indeterminate amount of time, until the agency is fortunate enough to "catch" the resident in a subsequent wrongdoing.

As recognized by the District of Columbia Court of Appeals in *Scarborough v. Winn Residential L.L.P.*,[24] permitting a right to cure significantly compromises the housing agency's authority to fight rampant drug problems in its developments and to fulfill its mission to provide safe and decent housing for low-income people.[25]

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[23] Brief of Appellant @ p. 25.

[24] *Scarborough v. Winn Residential L.L.P.*, 890 A.2d 249 (D.C. 2006).

[25] *Id.*@257. Respondent attempts to distinguish *Scarborough* by, *inter alia* recounting the "bad facts" relating to the criminal conduct in that case. (Respondent's Brief @39-40). To the extent that Respondent is suggesting that his own criminal activity is not "serious" enough to fit within the holding in *Scarborough*, HDLI does not deem it appropriate for HDLI, Respondent, or the courts, to dictate to a housing agency which types of criminal activity can be cured. Congress and HUD have given the housing agency the authority to decide what criminal activity in its public housing program cannot be cured.

IV. CONCLUSION

For the foregoing reasons, *Amicus Curiae* Housing and Development Law Institute respectfully requests that this Court overturn the decision of the Court of Appeals dated May 28, 2014, and reinstate the decision and order of the Circuit Court of Milwaukee County dated September 17, 2013.

Respectfully submitted,

_____

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stat. for a brief and appendix produced with a proportional serif font. The length of this brief is 12 pages; 2,944 words.

Dated and signed at Washington, DC this 24st day of November, 2014.

_____

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ELECTRONIC FILING CERTIFICATION

I hereby certify that I have submitted an electronic copy of this Brief which complies with the requirements of § 809.19(12), Wis. Stat. I further certify that the electronic Brief is identical in text, content and format to the printed forms of the Brief filed as of this date.

Dated and signed at Washington, DC this 24th day of November, 2014.

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CERTIFICATE OF THIRD-PARTY COMMERCIAL DELIVERY AND CERTIFICATION OF MAILING

I, Wilhelmina Taylor, herein certify that I am employed by the City of Milwaukee as a Legal Assistant, assigned to duty in the City Attorney's Office, located at 841 North Broadway, Room 1018, Milwaukee, Wisconsin 53202; that on November 24, 2014, I sent twenty-two (22) copies of the Brief of *Amicus Curiae* Housing and Development Law Institute in the above-entitled case, via third-party commercial delivery, addressed to: Clerk of the Wisconsin Supreme Court, 110 East Main Street, Suite 215, Madison, Wisconsin 53703.

I further certify that on November 24, 2014, three (3) copies of the Brief of *Amicus Curiae* Housing and Development Law Institute in the above-entitled case, were mailed to all counsel for the Defendant-Appellant-Respondent, Attorneys Jeffrey R. Myer, April A.G. Hartman, and Christine Donahoe, of Legal Action of Wisconsin, Inc., located at 230 West Wells Street, Suite 800, Milwaukee, Wisconsin 53203-1700.

_____

Wilhelmina Taylor

STATE OF WISCONSIN
SUPREME COURT

District 1 Appeal No. 2013AP002207
Circuit Court Case No. 2013SC020628

MILWAUKEE CITY HOUSING AUTHORITY,

Plaintiff-Respondent-Petitioner

v.

FELTON COBB,

Defendant-Appellant.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT 1
REVERSING A JUDGMENT OF THE CIRCUIT COURT FOR
MILWAUKEE COUNTY, PEDRO A. COLON, JUDGE

AMICUS CURIAE BRIEF AND APPENDIX OF APARTMENT ASSOCIATION OF SOUTHEASTERN WISCONSIN, INC. and WISCONSIN ASSOCIATION OF HOUSING AUTHORITIES

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INTEREST OF THESE *AMICI*

The Apartment Association of Southeastern Wisconsin, Inc. (AASEW) is a nonprofit trade association with headquarters in Milwaukee, Wisconsin. The AASEW represents individuals and businesses engaged in the rental housing industry. The association has approximately 600 members who are owners and operators of residential rental property and over 50 business members who service the housing industry, ranging from appliance repair to windows and door suppliers. Many members own only a duplex or a few rental units while other members own and/or manage several hundred units.

The Wisconsin Association of Housing Authorities (WAHA) is an umbrella organization for public housing authorities or community/development redevelopment authorities in the state of Wisconsin. WAHA has 125 active members consisting of such public authorities and 49 associate members who are individuals, organizations, agencies or boards whose professional interests are allied with those of the public housing authorities. WAHA defines its mission statement as *"To foster and promote low-rent public housing and other housing programs for low and moderate income families, including elderly and handicapped, which provide a physical and social environment for the benefit of both the family and the community."*

The interests of WAHA are clearly aligned with those of Plaintiff-Respondent-Petitioner Milwaukee City Housing Authority because WAHA members face the same legal issues concerning federal versus Wisconsin housing statutes and regulations as are presented by this appeal.

Those members of AASEW who participate in the federal Section 8 housing program as private landlords are also affected by this issue of whether federal statutes and regulations preempt Wisconsin landlord/tenant law.

ARGUMENT

I. The Court of Appeals Decision Mistakenly Elevates the Rights of an Individual Tenant Over Federal Statutes and Regulations Intended to Create Safe, Crime-free Subsidized Housing

A. Hard Cases Make Bad Law

We start with a disabled 62 year old public housing tenant in the City of Milwaukee. He was perhaps smoking a bit of weed in his own apartment, doing it quietly, and when the security officer knocked on his door to ask, "What's that smell?" he understandably didn't let the officer in. And for this small, albeit *criminal* transgression (we are in Wisconsin, not Colorado!) his Housing Authority landlord serves him with an eviction notice. When his case gets to the Wisconsin Court of Appeals the court reverses the eviction because the notice did not give the tenant the required 5 days per Wis. Stat. § 704.17(2)(b) to cure himself of his addiction.

So he is elderly, he is disabled, he never admitted to the act and the landlord didn't have that much solid proof of a lease violation – all sympathetic, mitigating facts – but facts which should not play a role in the appellate decision.

As said, we start with these facts but this eviction case could have started with other facts and one wonders if the rationale of the decision below would have changed. Other facts might be like those in *Scarborough v. Winn Residential L.L.P./Atl. Terrace Apts.*, 890 A.2d 249 (D.C. 2006) where the tenant was evicted for having a loaded shotgun in her apartment which had been used in a fatal shooting. Or what if Mr. Cobb had been like the tenant in *Housing Authority of Covington v. Turner*, 295 S.W. 3rd 123 (Ky, Ct. App. 2009) who allowed her nephew to store crack cocaine and drug paraphernalia in her apartment?

Or we can posit a fact situation where a tenant goes to the rental office in the lobby of his building, slugs the manager and steals rental payments from the manager's desk. That is an obvious crime but, as we will discuss later, eviction would not be automatic, the tenant would get a 5-day notice to cure and if he behaved himself he could remain a tenant from year to year because public housing leases renew automatically.

B. The Court of Appeals decision implicitly says that Wisconsin statutes give a tenant the right to cure a criminal act as long as it is a minor one.

The Court of Appeals opinion implicitly finds fault with a landlord who rigorously enforces the federal mandate that one criminal act, however minor, can be grounds for termination of a lease. This is apparent at several points in the opinion:

(1) At ¶7 where the Court cites federal housing regulations which say the housing provider "may consider all circumstances" regarding the seriousness of the tenant's breach including whether the tenant has mitigated his offending action.

(2) At ¶11 where the opinion erroneously states that the federal "One Strike and You're Out" Policy does not have the force of law or regulation and is trumped by the Wis. Stat. § 704.17(2)(b) provision because a one strike clause is not included in the lease.

(3) At ¶12 where the opinion brushes off the rationale of *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002) by saying it "is not a preemption case and is of little help here." *Rucker* has been sufficiently analyzed in the briefs of the parties. The U.S Supreme Court's holding that a totally innocent public housing tenant, who did not commit a crime and could not have prevented commission of a crime by others, was nevertheless properly evicted when a crime occurred on the

premises emphasizes the importance of the federal mandate that public housing be made as crime-free as possible.

(4) At ¶14 the Court of Appeals is flatly wrong about the workings of the "cure" statute, § 704.17(2)(b). The opinion says tenants do not get "a free pass for whatever 'criminal activity' the Housing Authority contends" they committed. But yes, there **is** a free pass for the first crime and it could be as serious as homicide or sexual assault. The only exceptions giving no right to cure are under Wis. Stat. § 704.17(2)(c) [operation of a drug or criminal gang house] or under Wis. Stat. § 704.16(3)(b) [crime must be committed against another tenant **and** an injunction or criminal complaint must have been issued]. So the hypothetical crime we posited above of a tenant beating and robbing an employee of the landlord will require the landlord to give the tenant a 5-day notice to not repeat his crime. If the tenant commits a sexual assault on a *guest* of another tenant the co-tenants in his building would be justifiably concerned about his continued presence but, again, all the landlord can do is serve a 5-day notice telling the tenant to "remedy the default" (Don't do it again!) and the tenant can stay unless there is a future breach of some kind.

II. Private Landlords Face the Threat of Municipal Nuisance Ordinances if They Can't Promptly Evict Tenants Who Commit a Crime

Several municipalities in Wisconsin have enacted so-called "chronic nuisance premises" ordinances. See Milwaukee, Wis., Code of Ordinances § 80-10 (2014) (copy provided in our appendix) and Madison, Wis. Gen. Ordinances § 25.09 *available at*

https://www.municode.com/library/wi/madison/codes/code_of_ordinances?nodeId=Chapter%2025%20-%20Offenses%20Against%20Public%20Safety.

The City of Milwaukee ordinance defines a huge range of 39 undesirable activities, including most any kind of crime, as "nuisance activity" (§ 80-10-2-c). Violations of various Wisconsin criminal code chapters such as chapter 961 (possession or delivery of controlled substances) and Wis. Stat. §§ 940.01 to 940.32 (crimes against life and bodily security) are incorporated by reference. See § 80-10-2-c-1-i and c-1-k. Scanning through the list of the types of nuisance activities quickly reveals that they are almost all activities which would be engaged in by tenants, not landlords. However, the ordinance makes the owner of the property liable for the cost of police enforcement (§ 80-10-2-c). The owner can also be fined between $1,000 and $5,000 if the owner has not persuaded the troublesome tenant to abate the nuisance activity and the property is

declared to be a "chronic nuisance" premises by the chief of police. § 80-10-6-a-3. The Madison ordinance is similar in scope.

The City of Milwaukee most recently enacted another type of nuisance ordinance (published November 21, 2014) to control after-hours types of activities where premises are used for the unlicensed sale of alcohol or likely distribution of drugs, known as "after set" activities. Milwaukee Code of Ordinances § 80-11 (copy furnished in our appendix). A property owner can be charged for police enforcement after only the *second* instance of after set activity. § 80-11-3-c. If the owner receives police notification that a tenant has operated an illegal after set, the owner could promptly give the tenant a 5-day notice to cease the activity. If the tenant then runs an after-hours party again the owner can definitely file an eviction. But the owner would still be liable for police enforcement costs of closing down the second after hours party. If the owner could rely on federal law preempting the tenant's Wisconsin's right to cure the owner could serve a 14 day notice upon occurrence of the first after set and neighborhood peace would be more quickly restored.

Such after set activity may be unlikely to occur at supervised multi-unit public housing but it is of concern to public housing authorities who operate scattered site properties and certainly to private owners who operate Section 8 subsidized housing.

III. All Subsidized Housing Tenants and their Neighbors Benefit from the Prompt Removal of Criminals in their Midst

Plaintiff-Respondent HACM makes this public policy argument at pages 24-27 of its initial brief. We *amici curiae*, as both public agency and private operators of federally subsidized housing, strongly second that argument. Unless they rent to someone living upstairs, private landlords and most employees of public housing agencies leave their "place of work" and go home at night. True, there are the night time calls from tenants or the police complaining about bad actor tenants with the resulting stress and expense to the owner of dealing with dysfunctional members of society. But crimes such as drug dealing, drug usage, violence, theft, or providing alcoholic beverages to minor guests most directly affects the fellow tenants at the premises and neighboring property owners and residents. Their welfare is an additional reason why federal preemption should be given effect.

IV. A Tenant Cannot "Cure" the Commission of a Crime

The "right to cure" provided by Wis. Stats. §704.17(2)(b) is not wiped out through federal preemption for most tenant breaches which can effectively be cured, such as loud music, harboring an illegal pet, leaving garbage in the hall or failing to properly dispose of recyclables. How does

one cure a criminal act? Especially if it is a serious crime, what societal purpose is served by giving the perpetrator only a cease and desist notice?

The Court of Appeals was too concerned with protecting Cobb's rights as a tenant when he was faced with losing his abode due to a relatively minor criminal act. That judgment call – is there enough evidence of illegal activity – rested with the landlord in the first instance. And then it rested with the trial judge who supported the landlord. And then it could have rested with the Court of Appeals reviewing the trial judge's findings on the sufficiency of the evidence except that that evidentiary issue was not decided by the Court of Appeals. Instead, the Court of Appeals has ruled that public housing **tenants will always have a right to commit a first criminal act** and cannot be evicted under a one year lease until they commit the second criminal act or some other breach.

That ruling and precedent should be reversed.

Dated this 5th day of December, 2014.

Respectfully submitted,

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19 (8)(c)(2), Wis. Stats., for a brief produced with a proportional serif font. The length of this brief is 2049 words.

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this *Amicus Curiae* brief and a separate electronic copy of the appendix bound with the brief which complies with the requirements of § 809.19(12).
I further certify that the electronic brief and appendix are identical in text, content and format to the printed form of the brief and appendix filed as of this date.

Dated at Milwaukee, Wisconsin this 5th day of December, 2014

_____
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