

No. 17-782

IN THE
Supreme Court of the United States

CHATEAU FOGHORN LP,
Petitioner,

v.

WESLEY HOSFORD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Maryland law provides that a court ruling on a landlord-tenant dispute shall grant judgment for possession of the leased premises to the landlord if “the court determines that the tenant breached the terms of the lease and that the breach was substantial and warrants an eviction.” Md. Code, Real Prop. §8-402.1(b)(1).

The question presented is whether the federal Quality Housing and Work Responsibility Act (QHWRA), which requires certain private, federally subsidized housing developments to include terms in their tenant lease agreements providing that “any drug-related criminal activity on or near such premises ... shall be cause for termination of tenancy,” 42 U.S.C. §1437f(d)(1)(B)(iii), preempts the Maryland law.

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BRIEF IN OPPOSITION

INTRODUCTION

Respondent Wesley Hosford is a paralyzed, wheelchair-bound, 65-year-old who suffers from pain and muscle spasms due to his quadriplegia. For nearly thirty years, he has lived in an apartment owned by petitioner Chateau Foghorn LP. During work to exterminate bedbugs in the apartment building, Foghorn found in Mr. Hosford's apartment a small quantity of what it believed to be marijuana, which can alleviate pain and muscle spasms like Mr. Hosford's. Foghorn reported Mr. Hosford to the police, but the prosecutor later declined to press charges. Foghorn also brought an eviction action against Mr. Hosford in state court for breaching a lease term prohibiting "drug related criminal activity."

Under Maryland law, a court must issue an order of eviction if it “determines that the tenant breached the terms of the lease and that the breach was substantial and warrants an eviction.” Md. Code, Real Prop. §8-402.1(b)(1) (RP §8-402.1). The state court here has not yet determined whether Mr. Hosford’s breach was substantial and warrants an eviction, but Foghorn seeks this Court’s review to pretermitt the state court’s determination. That Foghorn cannot do. This Court has no jurisdiction to review this case because the state-court proceedings are not final.

Even if this Court had jurisdiction, review would not be warranted. Foghorn claims that a federal statute, the Quality Housing and Work Responsibility Act (QHWRA), preempts the Maryland law and requires the state court to order an eviction even if it determines that a breach was not substantial or eviction is otherwise unwarranted. The Maryland Court of Appeals correctly rejected that claim. Foghorn argues that the decision below is inconsistent with this Court’s decision in *HUD v. Rucker*, 535 U.S. 125 (2002), but *Rucker* was not a preemption case, did not involve any state law like the Maryland law, and was not about the QHWRA. Foghorn also argues that the decision below is inconsistent with other state courts’ decisions, but those decisions are about state laws different from the Maryland law and do not involve a private landlord’s authority to evict a tenant for a drug-related breach. Finally, Foghorn makes a number of case-specific objections to the decision, none of which warrants review. Federal law does not preempt the Maryland law. *See, e.g.*, 24 C.F.R. §880.607(b)(iv) (“All terminations must ... be in accordance with the provisions of any State and local landlord tenant law.”). Certiorari should be denied.

JURISDICTION

This Court has no jurisdiction over this case. The Maryland Court of Appeals held that Foghorn’s motion for summary judgment should not have been granted and remanded the case for further proceedings in state court. Pet. App. 78a. Therefore, the decision below is not a “[f]inal judgment[] or decree[]” under 28 U.S.C. §1257(a). *See infra*, Part I.

STATEMENT

A. Factual Background

Mr. Hosford is a paralyzed, wheelchair-bound, 65-year-old Baltimore City resident who suffers from pain and muscle spasms because of his quadriplegia. Pet. App. 5a, 11a-12a. Since 1989, he has lived at Ruscombe Gardens Apartments, which Foghorn owns. *Id.* He is a low-income tenant who receives housing assistance through the Section 8 project-based rental subsidy program that pays Ruscombe Gardens directly. *Id.*

In June 2014, exterminators entered Mr. Hosford’s apartment to address a bed bug infestation. Pet. App. 7a. The exterminators found what they believed to be marijuana, which they reported to Foghorn. *Id.* Foghorn reported Mr. Hosford to the police, who cited Mr. Hosford for possession of less than ten grams of marijuana. *Id.* 7a-8a. Prosecutors later declined to press charges. *Id.* 8a.¹

¹ The police and court records have since been expunged. Pet. App. 120a n.19. Mr. Hosford argued below that the expungement renders the records inadmissible as evidence in the eviction case and that Foghorn therefore cannot establish the presence of marijuana in Mr. Hosford’s apartment. *Id.* That argument remains open to Mr. Hosford on remand. *Id.* 121a n.19.

Mr. Hosford’s lease contains a term providing that Foghorn may terminate the lease for “drug related criminal activity engaged in ... or near the premises by any tenant.” Pet. App. 82a. Foghorn asserted that Mr. Hosford had breached that term and filed an eviction action in state court. *Id.* 8a-9a. Under Maryland law, the state court must grant a judgment of eviction if “the court determines that the tenant breached the terms of the lease *and that the breach was substantial and warrants an eviction.*” RP §8-402.1 (emphasis added). Foghorn moved for summary judgment, contending that there was no dispute that Mr. Hosford breached his lease term. Pet. App. 10a. Mr. Hosford responded that even if he had breached the term, the Maryland law required a finding that that the breach “was ‘substantial and warrants an eviction.’” *Id.* 12a. Foghorn countered that the Maryland law was preempted by federal law governing the Section 8 program. *Id.* 11a.

B. Federal Statutory Background

Section 8 of the Housing Act of 1937 authorizes the federal government to assist low-income families that live in privately operated rental housing. *See* 42 U.S.C. §1437f. It authorizes both “tenant-based” rental assistance, which low-income families can use to subsidize rent for any private apartment that meets federal guidelines, and “project-based” rental assistance, which private landlords can use to subsidize rent for some or all of the units in a housing development leased by low-income families. The Housing Act separately provides for public, subsidized apartment projects, which are operated by local public housing authorities. *See* 42 U.S.C. §1437d. Those housing authorities receive fund-

ing from and are closely regulated by the Department of Housing and Urban Development (HUD).

Congress amended the provisions pertaining to public housing projects as part of the Anti-Drug Abuse Act of 1988 (ADAA). Congress found that the government has “a duty to provide public housing that is decent, safe, and free from illegal drugs”; that “public housing projects in many areas suffer from rampant drug-related crime”; that drug dealers in public housing “increasingly impose[] a reign of terror on ... tenants”; that “the increase in drug-related crime” leads both “to murders, muggings, and other forms of violence against tenants” and to physical deterioration of public housing projects “that requires substantial government expenditures”; and that local law enforcement “often lack the resources to deal with the drug problem in public housing.” Pub. L. No. 100-690, §5121, 102 Stat. 4181, 4301 (1988), *codified as amended*, 42 U.S.C. §11901. Accordingly, Congress revised Section 1437d to require public housing agencies to use leases that provide that “any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.” 42 U.S.C. §1437d(l)(6). The ADAA did not address Section 8 housing or require any particular lease terms for private, federally assisted rental housing.

Ten years later, Congress enacted the QHWRA, which addressed Section 8 housing. The QHWRA revised Section 1437f to require that Section 8 leases include a term that provides:

[A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of

the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, 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. §1437f(d)(1)(B)(iii).

C. Decisions Below

The Baltimore City Circuit Court agreed with Foghorn that Section 1437f preempts the Maryland law requirement that a breach of a lease term prohibiting drug-related criminal activity must be “substantial and warrant[] an eviction,” RP §8-402.1. Pet. App. 136a-137a. It therefore granted Foghorn's motion for summary judgment. *Id.* 138a-139a.

Mr. Hosford appealed to the Maryland Court of Special Appeals. The Court of Special Appeals reversed the Circuit Court's judgment, holding that the Maryland law is not preempted, and remanded the case for further proceedings to determine whether Mr. Hosford's breach was substantial and warrants eviction under state law. Pet. App. 121a.

Foghorn appealed to the Maryland Court of Appeals. The Court of Appeals granted certiorari and affirmed the Court of Special Appeals, holding that the Maryland law is not preempted. Pet. App. 78a. It explained that Congress's intent in requiring Section 8 landlords to include the “drug-related criminal activity” provision was two-fold. First, Congress's “broad intent

was to reduce drug-related crime in federal-subsidized housing that threatens resident safety and causes deterioration of the condition of housing.” *Id.* 51a. Second, Congress “more specific[ally]” wanted to “vest landlords with significant discretion to bring an eviction action against tenants” for drug-related criminal conduct “in order to effectuate its broader aim.” *Id.* 53a. The Court of Appeals concluded that the Maryland law does not conflict with either of those objectives. Congress intended landlords to evict tenants by bringing eviction actions in state or local court, and both Congress and HUD understood that state law would govern those eviction proceedings. Any tension between the Maryland law and federal objectives, the Court of Appeals found, is therefore minimal and inadequate to overcome the presumption against preemption. *Id.* 76a-78a. The Court of Appeals “remand[ed] the case to the circuit court for further proceedings,” *id.* 78a, to determine whether Mr. Hosford’s “breach of lease was ‘substantial’ and ‘warrants an eviction’” under Maryland law, *id.* 22a; *see also id.* 21a n.13.

REASONS FOR DENYING THE PETITION

This Court should deny the petition because it has no jurisdiction. Foghorn seeks review of a state-court decision that is not “[f]inal” under 28 U.S.C. §1257(a). The Maryland Court of Appeals held only that Foghorn should not have been granted summary judgment and remanded the case for further proceedings; the decision below does not determine the outcome of this case. Moreover, even if this Court had jurisdiction, it should deny the petition because the decision below does not conflict with a decision of this Court or any other court. No court has held that federal law preempts a state landlord-tenant law like the Maryland law, requiring only that before ordering eviction, a court must deter-

mine whether the breach of a lease term was substantial and warrants eviction. The decision below is correct and does not merit review.

I. THIS COURT LACKS JURISDICTION

This Court’s jurisdiction to review state-court decisions is limited under 28 U.S.C. §1257 to decisions that are “final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.” *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997); *see* 28 U.S.C. §1257(a) (extending jurisdiction only to “[f]inal judgments or decrees”). The finality rule serves “[to] limit[] review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.” *North Dakota State Bd. of Pharmacy v. Snyder’s Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). The Court has repeatedly emphasized that “the finality rule ‘is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.’” *Jefferson*, 522 U.S. at 81.

The decision below does not satisfy the finality rule’s jurisdictional requirement. Because the Maryland Court of Appeals “remand[ed] the case to the circuit court for further proceedings,” Pet. App. 78a, “its decision is not final ‘as an effective determination of the litigation.’” *O’Dell v. Espinoza*, 456 U.S. 430 (1982) (per curiam) (dismissing writ of certiorari for want of jurisdiction because state-court decision had remanded case for further state-court proceedings); *see also, e.g., Johnson v. California*, 541 U.S. 428, 432 (2004) (per curiam) (same); *Florida v. Thomas*, 532 U.S. 774, 781 (2001) (same); *Jefferson*, 522 U.S. at 84 (same). The Court of Appeals determined that the circuit court should not have granted Foghorn’s motion for summary

judgment; it did not award Mr. Hosford a final judgment. There will now be further proceedings in the circuit court to determine whether Foghorn can establish the presence of marijuana in Mr. Hosford's apartment, *see supra*, p.3 n.1; Pet. App. 121a n.19, and, if so, whether Mr. Hosford's "breach of lease was 'substantial' and 'warrants an eviction'" under Maryland law, Pet. App. 22a; *see id.* 21a n.13.

Nor does this case qualify for any of the "four exceptional categories of cases to be regarded as 'final' on the federal issue despite the ordering of further proceedings in the lower state courts," *Johnson*, 541 U.S. at 429-430, known as "the four *Cox* exceptions," *Nike, Inc. v. Kasky*, 539 U.S. 654, 660 (2003) (Stevens, J., concurring in dismissal of writ of certiorari). *See Cox Broadcast Corp. v. Cohn*, 420 U.S. 469 (1975). As a threshold matter, Foghorn has forfeited any argument that a *Cox* exception applies. "A petition for certiorari must demonstrate to this Court that it has jurisdiction to review the judgment." *Johnson*, 541 U.S. at 431 (citing Rule 14.1(g)). In particular, "since the finality of a state court judgment is of jurisdictional dimensions, both the petitioner and the respondent are obliged by the Supreme Court Rules to discuss such a finality problem in the certiorari petition and in the brief in opposition." Shapiro et al., *Supreme Court Practice* 156 & n.30 (10th ed. 2013) (summarizing Rules 14.1(g)(i) and 15.2); *see Adams v. Robertson*, 520 U.S. 83, 91-92 n.5 (1997) (per curiam) (petitioner's obligation to demonstrate jurisdiction in petition is "independent" of respondent's obligation to raise any objection to jurisdiction). Because Foghorn's petition simply asserts that this Court has jurisdiction under 28 U.S.C. §1257, without asserting that any *Cox* exception applies, *see* Pet. 2, Foghorn has forfeited any such argument.

Even if Foghorn could address that issue for the first time in its reply brief, no *Cox* exception would apply. The first exception—cases in which “the federal issue is conclusive or the outcome of the further proceedings preordained,” *Thomas*, 532 U.S. at 777—does not apply because the state court’s decision on the federal preemption issue does not preordain its determination whether Mr. Hosford’s “breach of lease was ‘substantial’ and ‘warrants an eviction’” under state law. Pet. App. 22a. The second exception—“cases in which ‘the federal issue ... will survive and require decision regardless of the outcome of future state-court proceedings,’” *Thomas*, 532 U.S. at 778—does not apply because if Foghorn prevails on the state-law question on remand, the federal issue will be moot. See *Jefferson*, 522 U.S. at 82. The third exception—cases in which “‘later review of the federal issue cannot be had, whatever the ultimate outcome of the case,’” *Thomas*, 532 U.S. at 779—does not apply because Foghorn can seek certiorari on the federal issue later if Mr. Hosford prevails on remand. See *Johnson*, 541 U.S. at 430-431; *Jefferson*, 522 U.S. at 82-83.

Finally, the fourth exception does not apply because this is not a case in which “a refusal immediately to review the state-court decision might seriously erode federal policy.” *Thomas*, 532 U.S. at 780. Cases may fall within that exception when a federal policy is so important—for instance, the right to a free press—that it would be “intolerable to leave [the federal question] unanswered” until further proceedings are completed, *Cox*, 420 U.S. at 485-486, or when delaying review would wholly defeat a federal policy that denies the state court jurisdiction to hear the case in the first place, *id.* at 483-484. The petitioner must also make a “convincing claim of erosion of federal policy that is not

common to all decisions” presenting the same issue to ensure that “the fourth exception” does not “swallow the rule.” *Johnson*, 541 U.S. at 430.

This case does not satisfy any of the fourth exception’s requirements. There is no established federal policy—let alone one akin to the constitutional right to a free press—preventing state courts from determining whether a tenant’s breach of lease was substantial and warrants an eviction under state law. But even if there were such a policy, it could be vindicated after the state court reaches a final judgment. *See Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (per curiam) (fourth exception does not apply when resolution of federal issue “can await final judgment without any adverse effect upon important federal interests”). Foghorn’s petition is based on its commonplace claim that a state “court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction.” *Local No. 438 Constr. & Gen. Laborers’ Union v. Curry & Co.*, 371 U.S. 542, 548 (1963). As Foghorn recognizes, *see* Pet. 39-40, federal law requires landlords to pursue an eviction action in state court and to obtain a final judgment from the state court. *See* 24 C.F.R. §247.6(a) (“The landlord shall not evict any tenant except by judicial action pursuant to State or local law ...”). Allowing the state court to reach a final judgment on this matter undeniably within its jurisdiction thus would not defeat any federal policy. Nor can Foghorn convincingly claim a “serious erosion of federal policy that is not common to all run-of-the-mine decisions” involving the same issue. *Thomas*, 532 U.S. at 780. The fourth *Cox* exception thus does not permit this Court to pretermitt the state court’s determination of whether Mr. Hosford should be evicted from the apartment he has lived in for almost 30 years.

II. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S DECISION IN *RUCKER*

Even if this Court had jurisdiction, review would not be warranted. Contrary to Foghorn's contentions, *see* Pet. 20-22, the decision below is consistent with this Court's decision in *Rucker*. *Rucker* was about a different federal issue—it was not even a preemption case—and did not involve any state law, let alone one like the Maryland law. The Court of Appeals considered *Rucker*, Pet. App. 43a-44a, 46a, 51a, 54a, 56a, and correctly rejected Foghorn's argument that it required a finding of preemption, *id.* 59a-60a.

Rucker was an Administrative Procedure Act (APA) action challenging a HUD interpretation of the ADAA, 42 U.S.C. §1437d(l)(6). The issue was whether Section 1437d(l)(6) requires leases between public housing authorities and tenants to include certain terms enabling housing authorities to evict “innocent” tenants unaware of drug activity in their households. *HUD v. Rucker*, 535 U.S. 125, 127-128 (2002). This Court held that Section 1437d(l)(6) “requires lease terms that vest local public housing authorities 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.” *Id.* at 130.

This case, in contrast, is not about a federal requirement that a lease include particular terms, or about a landlord's right to require particular terms in a lease. It is undisputed that the lease between Foghorn and Mr. Hosford could and did include terms prohibiting drug-related activity by Mr. Hosford and his guests. Pet. App. 6a-7a. It is also undisputed that Foghorn could bring an eviction action for the breach of

that lease term, as it has done. *Id.* 55a, 57a-60a. Thus, Foghorn is wrong that the decision below “is in direct conflict with *Rucker*” and “would preclude the application of *Rucker*.” Pet. 22; see Pet. App. 59a-60a (distinguishing *Rucker*).

The issue here is what a state court must find for Foghorn to prevail in its eviction action—an issue *Rucker* did not address. *Rucker* did not bar state courts from requiring, before evicting a tenant, that a breach of a lease term regarding drug activity—like a breach of any other lease term—must be substantial and warrant eviction.

Nor does it follow from *Rucker* that federal law preempts such a generally applicable state law. Since *Rucker*, federal courts have repeatedly rejected arguments that federal housing laws preempt generally applicable state law when preemption would result in Section 8 tenants being treated worse than other tenants, *e.g.*, *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1210 (9th Cir. 2009) (“preemption of local eviction controls ... would lead to absurd results in a vacancy decontrol jurisdiction like California, because it would make assisted [*i.e.*, Section 8] tenants special victims of eviction by landlords”), or when generally applicable state law would not disadvantage Section 8 landlords relative to other landlords, *e.g.*, *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065, 1073 (9th Cir. 2003) (no preemption where local law “treats properties exiting federal housing programs neither better nor worse than properties that were never part of such programs”); accord *Independent Park Apartments v. United States*, 449 F.3d 1235, 1244 (Fed. Cir.

2006).² Preemption of the Maryland law, however, would cause Section 8 tenants in Maryland to have fewer protections than other Maryland tenants have under state law and would give Section 8 landlords in Maryland more power to evict than other Maryland landlords have. *Rucker* simply did not decide any such preemption question. Nor did it suggest that applying generally applicable state-law protections to Section 8 tenants might conflict with federal law.

This case is about that issue: Whether Maryland may adjudicate an eviction action for the breach of federally required terms in a Section 8 lease under the same rules that apply in eviction actions for any other breach of lease, including for the breach of identically worded terms in a non-Section 8 lease. *Rucker* does not require Maryland to exempt Section 8 leases from its generally applicable rules governing evictions.

Finally, even if *Rucker* did involve preemption, it still would not conflict with the decision below because, as the Court of Appeals noted, *Rucker* “involved an interpretation of 42 U.S.C. §1437d governing public housing projects, and not §1437f governing the type of Section 8 project-based housing that is at issue” here. Pet. App. 60a. The ADAA provision in *Rucker*, 42 U.S.C. §1437d(l)(6), applies to public housing projects operated by public housing authorities, *see Rucker*, 535 U.S. at 136, and *Rucker* did not construe the QHWRA provision at issue here, 42 U.S.C §1437f(d)(1)(B)(iii).

² Although some of the landlords’ briefs in those cases cited *Rucker*, none of the federal courts of appeals found *Rucker* sufficiently relevant to cite it in their preemption analysis.

III. THE DECISION BELOW DOES NOT CONFLICT WITH OTHER STATE-COURT DECISIONS

Foghorn also contends that the decision below is inconsistent with other state courts' decisions. Pet. 22-36. Like *Rucker*, however, those decisions did not involve state laws that are like the Maryland law or Section 1437f's requirement that Section 8 leases include particular terms regarding drug-related criminal activity. The Court of Appeals addressed the decisions that Foghorn invokes here, Pet. App. 70a-74a, and explained why its "holding ... is consistent with the holdings of those out-of-state cases," *id.* 70a. Foghorn's purported conflict does not exist.

A. The Other State-Court Decisions Involved Laws That Are Not Like The Maryland Law

1. The D.C. And Wisconsin Decisions On Right-To-Cure Provisions Do Not Conflict With The Decision Below

Foghorn relies on two decisions holding that federal law preempted state right-to-cure laws. *See* Pet. 25-27, 32-35. Right-to-cure laws, however, are not like the Maryland law. *See* Pet. App. 70a-71a.

First, in *Scarborough v. Winn Residential LLP/Atlantic Terrace Apartments*, 890 A.2d 249 (D.C. 2006), the D.C. Court of Appeals held that Section 1437f preempted a D.C. law that required landlords to give tenants thirty days to cure any breach, no matter how substantial, before bringing an eviction action. *Id.* at 251. The court explained that the right-to-cure law conflicted with federal policy allowing landlords to bring eviction actions because it would have "substitute[d] 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.” *Id.* at 257.

Second, in *Milwaukee City Housing Authority v. Cobb*, 860 N.W.2d 267 (Wis. 2015), the Wisconsin Supreme Court held that Section 1437d preempted a similar Wisconsin law that required landlords to give tenants five days to cure any breach before seeking eviction. *Id.* at 269 & n.3. The court explained that the right to cure conflicted with the federal policy to “allow[] eviction of tenants who engage in drug-related criminal activity” and not to require “a landlord ... to give a ‘free pass’ on a tenant’s first drug offense,” *id.* at 276-277, “regardless of how heinous the offense was,” *id.* at 279.

The Maryland law is wholly unlike these “right to cure” laws. It does not give tenants any right to defeat an eviction proceeding by “curing” a breach, nor does it limit a landlord’s discretion to bring an eviction proceeding for a breach of lease terms. A landlord may bring such an action even if the tenant had no opportunity to cure and even if it is the tenant’s first offense. *See* Pet. App. 61a. If the landlord shows that the drug-related breach was substantial and warrants eviction, Maryland law requires the court to grant a judgment for eviction. RP §8-402.1. Tenants are not entitled to “wash[] away” any drug-related criminal activity through a “promise not to commit another crime,” *Scarborough*, 890 A.2d at 257, or to demand a “‘free pass’ on a ... first drug offense,” *Milwaukee City Housing Auth.*, 860 N.W.2d at 277. The Maryland law thus avoids the conflict between federal policy and right-to-cure laws that would prevent a landlord from seeking to evict a tenant for a first offense that was “dangerously criminal in nature,” *Scarborough*, 890 A.2d at 257, or otherwise “heinous,” *Milwaukee City Housing*

Auth., 860 N.W.2d at 279. Foghorn has not shown that this case would have been decided differently in the District of Columbia or Wisconsin.

2. The Massachusetts Decision On The “Innocent” Tenant Defense Does Not Conflict With The Decision Below

Foghorn also relies on a Massachusetts decision holding that federal law preempted a state “innocent” tenant defense like the federal “innocent” tenant defense in *Rucker*. Pet. 25-32. An “innocent” tenant defense is not like the Maryland law. *See* Pet. App. 71a-74a.

In *Boston Housing Authority v. Garcia*, 871 N.E.2d 1073 (Mass. 2007), the Massachusetts Supreme Judicial Court explained that Massachusetts law bars a housing authority from evicting a tenant without “cause,” Mass. Gen. L. ch. 121B, §32, and that Massachusetts precedent pre-dating *Rucker* had held that a housing authority could never demonstrate “cause” if the tenant was unaware of drug-related activity. The court held that, in light of *Rucker*, Section 1437d preempted such an “innocent” tenant defense because otherwise a housing authority would “have lost the ability to terminate a tenant who violated [a] lease by not preventing her household member from engaging in drug related criminal activity.” *Boston Housing Auth.*, 871 N.E.2d at 1078.

The Maryland law is not like an “innocent” tenant defense. It does not prevent a landlord from seeking an eviction if the tenant was unaware of drug-related criminal activity. Rather, it requires the court to grant a judgment of eviction for any substantial breach that warrants eviction, including “where a tenant contends

that he was not aware of drug-related misconduct by a household member or guest, but the serious or violent nature of the illegal activity posed a safety risk to others in the housing complex, or caused substantial expenses for the landlord.” Pet. App. 73a.³

Moreover, the Massachusetts court noted that Section 1437d did *not* preempt the general requirement of “‘cause’ before a public housing tenancy may be terminated.” *Boston Housing Auth.*, 871 N.E.2d at 1080. The decision below is consistent with that holding. *See* Pet. App. 74a-75a. Just as the Massachusetts statute requires a court to make a finding of “cause” before granting a judgment of eviction, the Maryland law requires the state court to make a particular finding—a substantial breach that warrants eviction—before granting a judgment of eviction. RP §8-402.1. Foghorn cannot show that the Massachusetts court would have decided the case below differently.

3. The North Carolina Decision On The Unconscionability Defense Does Not Conflict With The Decision Below

Foghorn also alleges a conflict with a North Carolina landlord-tenant case. Pet. 35-36. But that case is not even about preemption. In *Eastern Carolina Regional Housing Authority v. Lofton*, 789 S.E.2d 449 (N.C. 2016), the North Carolina Supreme Court held that “the equitable defense of unconscionability is not a consideration in summary ejectment proceedings” un-

³ Foghorn also cites intermediate state-court decisions involving “innocent” tenant defenses, Pet. 24, but the decision below does not conflict with them for the same reason, *see* Pet. App. 72a. In any event, an alleged conflict with intermediate state court decisions is not grounds for this Court’s review. *See* R. 10(b).

der North Carolina state law. *Id.* at 452. Because the defense was not available in North Carolina, the court was not required to decide whether federal law would preempt such a defense in public housing cases. Separately, the court held that federal law requires a public housing authority to exercise discretion before pursuing a tenant’s eviction and therefore remanded the case so that the public housing authority could properly exercise its discretion, *id.* at 454—also not a holding that conflicts with the decision below. Foghorn therefore cannot show that this case would have been decided differently in North Carolina.⁴

B. The Other State-Court Decisions Do Not Involve The QHWRA’s Drug-Related Criminal Activity Requirement

The state-court decisions on which Foghorn relies, Pet. 22-36, also do not conflict with the decision below because they were not about Section 1437f’s requirement that Section 8 leases include particular terms regarding drug-related criminal activity. As a threshold matter, the North Carolina, Wisconsin, and Massachusetts decisions concerned public housing authorities subject to the ADAA, 42 U.S.C. §1437d(l)(6), not private landlords like Foghorn governed by the QHWRA, *id.* §1437f(d)(1)(B)(iii). See *Eastern Carolina Reg’l Housing Auth.*, 789 S.E.2d at 452 (discussing court’s “role as the final forum for review of government housing decisions”); *Milwaukee City Housing Auth.*, 860

⁴ The intermediate state-court decision cited by amicus National Apartments Association (NAA), NAA Br. 6, is doubly inapposite. Not only did it involve a right-to-cure defense not at issue here, but it too was not a preemption case and was decided on state-law grounds. See *Housing Auth. City of Norwalk v. Brown*, 19 A.3d 252, 257 (Conn. App. Ct. 2011).

N.W.2d at 278; *Boston Housing Auth.*, 871 N.E.2d at 1079.

Only the D.C. decision was about private Section 8 housing, but that case also does not conflict with the decision below because it involved a separate requirement in Section 1437f requiring lease terms regarding dangerous activity. *See Scarborough*, 890 A.2d at 255-256. The court held that the tenant's right to cure "as applied to criminal activity—such as possession of the loaded shotgun in this case—that endangers the safety or right to peaceful enjoyment of other tenants may not be imposed consistently with the federal statute and regulations governing appellant's tenancy." *Id.* at 251; *see also id.* at 257 ("the cure opportunity ... if applicable to violations of 'an obligation of tenancy' dangerously criminal in nature," was preempted).

Nothing in the decision below casts doubt upon a private landlord's authority to evict for a breach that implicates safety concerns. To the contrary, the Court of Appeals explained that where "the serious or violent nature of the illegal activity posed a safety risk to others in the housing complex, ... a court should find that the activity was a 'substantial' breach of lease that 'warrants eviction.'" Pet. App. 73a-74a; *see also* Pet. App. 56a-57a ("If the illegal conduct of a tenant, household member, or guest in federally-subsidized housing involves a violent drug-related crime, or the distribution of drugs from a rental unit, or significant property damage caused by drug-related activity, such conduct would surely be both 'substantial' and 'warrant eviction.'"). Foghorn has not shown that a private landlord who could obtain an eviction in the District of Columbia for dangerous activity in breach of a Section 8 lease could not obtain a similar eviction in Maryland.

IV. THE DECISION BELOW IS CORRECT

Foghorn also argues that the decision below is wrong. It does not, however, dispute that the Court of Appeals followed the standards for determining preemption established by this Court's precedents. *See* Pet. App. 25a-30a. Instead, Foghorn challenges only the application of those standards to Maryland's particular landlord-tenant requirement. That narrow question does not warrant this Court's review. In any event, the decision below correctly held that Maryland's law is not preempted. Foghorn's objections to the court's decision are meritless.

A. The Maryland Law Does Not Impair Congress's Objectives

Foghorn contends that the Maryland law is preempted because it obstructs Section 1437f's goal of achieving safe low-income housing. Pet. 37-39. The Maryland law does not pose any obstacle to that goal, let alone the sort of serious impediment necessary to overcome the strong presumption against preemption that applies when Congress legislates in areas, like landlord-tenant law, "traditionally the domain of state law," *Hillman v. Maretta*, 569 U.S. 483, 490 (2013).

The Maryland law allows landlords to include in their leases the federally mandated terms prohibiting drug-related criminal activity and to bring an eviction action for a breach of those terms. The law simply treats a breach of those lease terms like any other breach, requiring a court to determine whether the breach "was substantial and warrants an eviction" before granting the landlord a judgment for eviction. *See* RP §8-402.1. That layer of judicial review does not impair Congress's objective of ensuring safe low-income

housing. As the Court of Appeals explained, drug-related criminal activity that threatens resident safety or otherwise causes housing conditions to deteriorate would be substantial and warrant eviction under the Maryland law. *See* Pet. App. 56a-57a, 73a-74a.

As the Court of Appeals also noted, Congress chose not to impose a zero-tolerance policy that would require automatic eviction for any drug-related criminal activity in Section 8 housing, no matter how insubstantial, nor did it specify what standards state courts must apply in determining whether eviction is warranted. *See* Pet. App. 52a; *compare* 42 U.S.C. §1437f(d)(1)(B)(iii), *with id.* §1437n(f)(2) (requiring public housing agency to establish “standards” that “immediately and permanently terminate the tenancy” of public housing tenant who is “convicted of manufacturing ... methamphetamines on the premises”). Instead, Congress provided that landlords could bring eviction actions for drug-related criminal activity in state courts, subject to state landlord-tenant law.⁵ The Court of Appeals correctly concluded that the Maryland law poses no obstacle to that scheme.

B. The Maryland Law Is Consistent With HUD’s View

Foghorn also argues that the Maryland law conflicts with HUD’s interpretation of Section 1437f. Pet.

⁵ Thus, contrary to amicus NAA’s assertion, *see* NAA Br. 3-4, this case is not like ones in which state law interferes with federal rights guaranteed to landlords. Nor does Maryland law interfere with any legitimate expectation of landlords participating in a Section 8 program. *See id.* 5-7. Federal law requires landlords to include certain terms in Section 8 leases but does not give landlords any entitlement to the outcome of an eviction proceeding.

38-40. The Court of Appeals considered HUD regulations and guidance, *see* Pet. App. 46a-49a, 61a-68a, and correctly concluded that the Maryland law is consistent with HUD’s interpretation.

HUD regulations permit landlords to evict tenants only in accordance with state landlord-tenant law. The regulation that addresses termination of tenancy for Section 8 housing provides that “[a]ll terminations must also be in accordance with the provisions of any State and local landlord tenant law.” 24 C.F.R. §880.607(b)(iv). And the regulation addressing eviction specifically for drug-related criminal activity in Section 8 housing provides that landlords may terminate tenancy “in accordance with [their] leases *and landlord-tenant law*.” *Id.* §5.851(b) (emphasis added).

To the extent HUD’s regulations could somehow be ambiguous, HUD’s current guidance clearly recognizes that evictions must comply with state law. HUD’s Handbook explains that HUD requirements for terminating tenancy are only “the minimum standards” and that “[m]ost state and/or local laws are more restrictive than HUD’s minimum requirements; therefore, an owner should be aware of state and local laws governing terminations.” *HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Program*, ch. 8 ¶8.13B (Nov. 27, 2013), <https://www.hud.gov/sites/documents/43503HSGH.PDF>. Thus, “owners must be in compliance with applicable federal, state, and local requirements when pursuing termination of tenancy.” *Id.* ¶8.12B; *see also id.* ch. 1 ¶1.5A (“[I]n addition to complying with this handbook, owners must comply with other federal, state, and local laws applicable to the occupancy of multifamily housing properties.”). The decision below is consistent with that guidance.

Foghorn does not rely on any HUD regulations or even contemporary guidance to support its argument, but relies instead on HUD commentary about a regulation issued for a different HUD program in 1983—fifteen years before Congress enacted the QHWRA (and five years before even the ADAA). *See* Pet. 39-40. That commentary explained that the regulation requires landlords to pursue evictions in state courts, rather than resorting to self-help remedies, and to provide notice that a tenant is entitled to such a judicial proceeding. 48 Fed. Reg. 22,913 (May 23, 1983). HUD’s statement that the regulation is only “procedural,” Pet. 40, does not suggest that landlords could evict tenants without complying with state law. Nor does it address HUD’s regulations for the Section 8 program at issue here, which require evictions to comply with state law. *See supra*, p.23.

Foghorn also relies on a federal amicus brief filed more than ten years ago in the D.C. Court of Appeals. Pet. 38. That reliance is triply misplaced. First, Foghorn never referenced that brief in its own briefing to the Court of Appeals, so the decision below never considered it. *Cf. CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1653 (2016) (this Court does not adjudicate new arguments not properly raised below). Second, the brief is not relevant because it addressed a different issue about a different state law—the District of Columbia’s right-to-cure law in *Scarborough*, which is not like the Maryland law here. *See supra*, pp.15-17, 20. Third, even if the brief were relevant to this case, it could be entitled, “at most,” only to *Skidmore* deference. *Riegal v. Medtronic, Inc.*, 552 U.S. 312, 338 n.8 (2008) (Ginsburg, J., dissenting opinion). The Court of Appeals already considered the relevant federal “agency’s explanation of how state law affects the regulatory

scheme,” *Wyeth v. Levine*, 555 U.S. 555, 576 (2009), afforded that explanation the proper level of deference, Pet. App. 61a, and correctly concluded that the Maryland law is not preempted.

V. FOGHORN MISCHARACTERIZES THE DECISION BELOW

Finally, Foghorn’s argument that the decision below will have far-reaching implications, *see* Pet. 41-43, does not warrant review. Foghorn suggests that the decision will allow tenants to engage in any drug-related criminal activity, prevent landlords from protecting other tenants from that activity, and eliminate eviction as “an effective tool for combatting drug-related crime in HUD-assisted housing.” Pet. 42. The decision does no such thing. The Maryland law allows landlords to bring an eviction action for any drug-related criminal activity, and it requires the state court to grant judgment for eviction if that activity was a substantial breach of the lease and warrants eviction. RP §8-402.1. The Court of Appeals made clear that drug-related activity posing a safety risk to others will meet that standard. Pet. App. 56a-57a, 73a-74a. The decision below simply assures that low-income Maryland tenants subject to a state-court eviction proceeding will be treated like all other Maryland tenants.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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