ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-5915

TITLE BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN AND SULVAI P. CARTER, Petitioners V. CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHOR

PLACE Washington, D. C.

DATE October 6, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN, AND SULVAI P. CARTER, Petitioners : v. : No. 85-5915

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY :

- -x

Washington, D.C.

Monday, October 6, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock p.m.

APPEARANCES:

HENRY L. WOODWARD, ESQ.
of Roanoke, Va., on behalf of Petitioners.

BAYARD E. HARRIS, ESQ.
of Roanoke, Va., on behalf of Respondent.

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C O N T E N T S

P R C C E E D I N G S

CHIEF JUSTICE REHNQUIST: We'll hear arguments first this afternoon in No. 85-5915, Brenda E. Wright et al. versus the City of Roanoke Redevelopment and Housing Authority. You may proceed, Mr. Woodward.

ORAL ARGUMENT OF HENRY L. WOODWARD, ESQ.

ON BEHALF OF PETITIONERS

MR. WOODWARD: Mr. Chief Justice and may it please the Court:

The petitioning public housing tenants in this case and the Roanoke Housing Authority agree on one critical point of the case: Where a Section 1983 plaintiff has a substantive right under federal law, we are in agreement that there arises a presumption that Congress intended for a private enforcement action to be possible rather than precluded.

The major issue before the Court is how that presumption operates.

QUESTION: Mr. Woodward, from what you say I gather that's a somewhat different test than the test for an implied cause of action under a federal statute?

MR. WOODWARD: We believe that it is, Your Honor. It has some elements in common, but I believe that the experience of the Fourth Circuit in trying to address the preclusion inquiry here shows that the

traditional Cort versus Ash four-step approach is not really going tc serve the express Congressicnal purpcses of 1983 adequately.

QUESTION: And why do ycu say that?

MR. WOODWARD: Well, looking specifically at the pieces of the Cort versus Ash test, scme of them just don't seem to fit very well. The first, which has to do with identifying a substantive right really, is in the 1983 context presumed, if we've gotten that far, by the Pennhurst sort of analysis. If there is nc substantive right, then we dcn't get to the preclusion question. So that part of the traditional fcur-part test fcr the implied right is not directly a part of the preclusion inquiry for 1983.

The other piece that just doesn't fit very well with the nature and purpose of 1983 is perhaps the fourth step of the Cort versus Ash test, that which would have us look to whether the matter is cne in which state law has something to say.

And that doesn't fit very well because of the traditional federalism concerns of Section 1983. It has traditionally been viewed by this Court as a supplemental remedy to whatever the state may provide.

QUESTION: Certainly it is as a practical matter kind of awkward to have two different tests for

such closely related things, isn't it?

MR. WOODWARD: Well, there is some awkwardness. On the other hand, unless some specific method is found of addressing the particular nature of Section 1983, then the demands of that statute and the intent of Congress expressed in that statute are just not likely to be recognized.

Now, we concede that there is some similarity in sort of the middle and the core tests of the implied rights inquiry, that is the inquiry into Congressional intent, and the Section 1983 inquiry about preclusion. But there is a difference of where they're coming from as well.

The implied rights inquiry is really traditionally applied in the context of a plaintiff trying to meet a burden of establishing Congressional intent, from whatever evidence is available. In the 1983 context, the Congressional intent that you start with is the expressed intent, express intent in 1983 itself.

QUESTION: Where there is a state involved.

MR. WOODWARD: Where a state or a state actor is involved, yes.

QUESTION: This is the class of cases that 1983 applies to?

MR. WOODWARD: That is correct. It is defendant-specific, in that sense, and it is only in that context that this area of examination of Congressional intent would be different from the implied rights inquiry.

The nature of Section 1983 is such that the sort of evidence that will suffice to justify preclusion has to be substantially greater than that which would defeat a plaintiff attempting to establish an implied right of action. And the reason for that is that there is, after all, in 1983 that express intent that private parties have that remedy against that certain class of defendants.

And so it should not be, that express grant of authority to proceed, should not be really impeachable, except by equally strong evidence.

QUESTION: It's only if there is some identifiable federal legal right involved?

MR. WOODWARD: That is correct, Your Honor. We would concede that you have to identify a right secured by the Constitution and laws, as Section 1983 requires.

But I think that the chief problem in this case was not the identification of a right. The Fourth Circuit may have been a little reluctant about it and

they never really examined the Brcoke amendment, but they seem to concede that there was a right involved there and to focus instead on the enforceability.

QUESTION: Well, your opponent certainly challenges that.

MR. WOODWARD: Well, I think in some respects he does. He challenges only whether the right extends to the reasonable allowance of utilities, as we say that it does. He doesn't appear to challenge that the Brcoke amendment itself establishes some rights in tenants.

QUESTION: Well, your opponent thinks that the right ought to appear in the statute.

MR. WOODWARD: Well, I think it does, Your Honor. It doesn't appear expressly in the Brooke amendment, but the Brooke amendment does limit the portion of tenant income that can be applied to rent. What you have to do, since that doesn't say what you get for your rent, it only says how much rent you pay, you have to look elsewhere in the statute to see what you get for the rent.

And the elsewhere that we would recommend is the definitional part of what was originally 1437(a), that says --

QUESTION: You don't think you have to rely on the regulations?

MR. WOODWARD: Pardon?

QUESTION: You don't think you have to rely on the regulations?

MR. WOODWARD: We don't have any reservations about reading that together with the statute, but we think that there is adequate strength in the statute itself if we had to do that. This is not a case where we have to separate the regulation and the statute, because they are closely tied.

But I'm trying to point out that there is in 1437(a) a definition of low income housing that includes not only the dwelling, but also embracing the necessary appurtenances thereto. Now, both before and after Congress passed the Brooke amendment HUD's regulations interpreted specifically or prescribed specifically what tenants were supposed to get for their rent.

And in those regulations, HUD said not only the dwelling, but also the equipment that's included in the dwelling, necessary services, and reasonable amounts of utilities. That was the standard before and after the Brooke amendment was adopted, and that was the standard that the Housing Authority and the tenants and HUD and everybody agreed on.

So that when the Brooke amendment was adopted, that limitation of 25 percent, now up to 30 percent, of

family income that could be charged was to include those things which the Housing Act had previously and was in the future to contemplate being provided in exchange for rent.

It should be no mystery that the Brooke amendment itself doesn't say utilities. The Brooke amendment doesn't attempt to say what's covered. It only says what the tenant pays, and what he gets is clear from the other part of the statute and from the regulations.

Now, it was only in 1980 that HUD went beyond its previous approach of non-mandatory guidelines to establish a firm and binding and mandatory regulation that explained how utilities allowances were to be calculated. And it did so in no uncertain terms, and it made a -- it mandated that the housing authorities receiving public housing subsidies begin to implement that regulation immediately, and set an outside deadline of 120 days for doing so.

The regulation provided both procedural steps to be followed in calculating the allowances and it set a substantive standard, the intent being that not more than ten percent of the tenants in a given size of housing unit should have to pay anything more than their 25 percent maximum of income rent in order to enjoy the

utilities allcwance established.

When that happened, the Housing Authority was duly notified by HUD, as the record shows, and told to implement it not later than 120 days from the date cf promulgation, and the Housing Authority simply refused tc do it.

The Housing Authority continued to use an allowance of utilities which was so low that they cculd no longer explain how it was calculated. And instead cf it providing adequately for 90 percent of the tenants, it seems to have resulted in the charging of additicnal surcharges to 90 to 100 percent of the tenants in most of the sizes cf apartments, for most of the quarters.

This state of affairs continued even after the 120 day deadline had passed, even after tenant demands had been made for recalculation, even after the filing of this suit. So there is simply no question that the Housing Authority in this case simply refused to fcllow the mandate of HUD.

Now, the tenants complained in the district court that this was illegal and they sued tc get their money back that had been collected in excess of their maximum Brooke rent during the period in which these surcharges were in effect. They sued under both 1983 and under their leases with the Authority.

The Fourth Circuit, focusing chiefly on the 1983 question, found that Congress had intended to preclude such private actions for enforcement, notwithstanding the specificity with which the Brooke amendment identifies the tenants as the beneficiaries, in fact the sole beneficiaries, of the rent limit in that statute.

And the way in which the question was approached I think suggests the weakness of trying to apply uniformly a Cort versus Ash sort of inquiry, because it led to what is definitely a wrong conclusion.

Despite the fact that in this context there is no Congressional express preclusion of private suits -- there is nothing in the statute, there is nothing in the legislative history that says private parties may not sue -- and despite the absence of any express private remedy effective in these circumstances, such as was present in the Middlesex County Sewerage Authority versus National Sea Clammers case, the Fourth Circuit reached out to find from the very, very modest evidence of the granting of administrative authority to HUD over this program that that represented Congressional intent to preclude a Section 1983 remedy.

Now, when you examine that evidence you have

to conclude that this is fairly modest administrative authority even relative to other federal grant programs, such as the AFDC program for instance. It does not extend, according to HUD itself and to the wording of the statute, to withdrawal of operating subsidies from a noncomplying housing authority, except in very narrow circumstances.

The administrative authority of HUD operates only through the annual contributions contract, and that section of the United States Housing Act which specifies what is to be enforced through the annual contributions contract does not even specify the Brooke amendment. The Brooke amendment occurs in a different portion of the Act, suggesting that that's not one of the explicit things to which the contributions contract must be addressed.

It is also the case that HUD itself apparently does not believe it has the enforcement authority that the Fourth Circuit ascribes to it here. While we believe that HUD may be overreading the extent of its lack of power here, HUD has taken the position in several cases which are cited in our brief that it itself has no authority to enforce the Brooke amendment.

That may be extreme, but it certainly appears

to be the case that it was not given anywhere in the Act or in its administrative authority over housing authorities an exclusive sort of right to enforce the Act.

The degree to which the Fourth Circuit went astray here suggests to us the importance of returning to a more demanding standard for when a Section 1983 remedy may be precluded. It is simply too great a derogation of Section 1983 to accept evidence so far afield as that in this case of HUD's authority as evidence of intent to preclude.

Where Congress has expressly established in 1983 a right for individuals to vindicate their federal rights, then we think it should take at least an equally clear expression in the program statute that invests the substantive right to bar the beneficiaries of that substantive program right from exercising the 1983 remedy.

QUESTION: Well, Mr. Woodward, that's assuming that there is a substantive right enforceable by these plaintiffs at all, isn't it?

MR. WOODWARD: That is quite correct, Justice O'Connor.

QUESTION: And are we really looking here only at an alleged right that HUD itself created with

regulations in 1980 and then withdrew in 1984?

MR. WOODWARD: I think not, Your Honor. I think that the Brooke amendment itself, the statutory enactment of 1969, ties in the right that we're talking about here.

QUESTION: You don't rely, then, on the HUD regulations for the creation of this so-called right?

MR. WOODWARD: We don't rely solely upon them. What we think is happening here is the statutory creation of a right, which is refined, as it necessarily must be in the fine detail, by the regulations.

QUESTION: Well, there certainly isn't anything in the Brooke amendment very specifically about these utility costs, is there?

MR. WOODWARD: That's correct. Well, what we are --

QUESTION: So we really have to focus on the regulations, and that was for a very short span of time, wasn't it?

MR. WOODWARD: Well, it was for a four-year period, Your Honor, during which there was discussion about whether to change them, during which at any time HUD had the authority to waive these regulations as applied to this particular housing authority or as to housing authority generally -- housing authorities

generally -- and did not do so.

So it is for a rather extended period of time, actually.

QUESTION: If the regulation was consistent with the statute, it had the force of law, didn't it?

MR. WOODWARD: That is our position, Your Honor. It had the force of law because it was entirely consistent with the statute.

QUESTION: Has there been any claim that the regulation is invalid?

MR. WOODWARD: There has been no claim whatsoever of that, Your Honor. The Housing Authority has suggested in various ways that the regulation was not a great idea, but it has at no time challenged its validity.

It has simply said that it could have thought of a better regulation, and it also contends that HUD eventually did. And we don't challenge the decision of 19 --

QUESTION: So I suppose you would, or do you -- if you say that the statute itself requires the inclusion of utilities, HUD would not be free to say that it doesn't?

MR. WOODWARD: I believe that's correct, Your Honor.

QUESTION: But you don't think, you don't think HUD would have the authority to take a contrary position under the statute?

MR. WOODWARD: I think that is so, Your Honor, because of the nature and purpose of the Brooke amendment.

QUESTION: Of course, it isn't fatal to your case, I don't suppose, for you to answer the way, if you answered the other way and said that HUD could interpret the statute either way.

MR. WOODWARD: Well, it may not be fatal to our case because they have not done so, of course. But I think that the purpose of the Brooke amendment may create some problems for HUD if it sought to do so.

QUESTION: I see.

MR. WOODWARD: And the reason is that the legislative history contemporaneous --

QUESTION: So you think a contrary regulation would very well be invalid?

MR. WOODWARD: I believe that's correct, Your Honor. In the absence of any regulation, there is the legislative purpose, really, of assuring that only 25 percent of a low income family's meager income is allocated for the purpose of shelter. That's repeatedly in the legislative history, and that purpose of shelter

includes obviously more than just a roof over your head. It includes all those things which housing authorities traditionally had provided.

That I think is what we are trying to show at page 24 of our brief, where we relate the Brooke amendment itself, Justice O'Connor, to the traditional HUD interpretation of what a tenant was to get for rent. It is that combination of the amendment with the regulations of HUD explaining what you get for your rent that we think imports the utilities allowance to the Brooke amendment.

QUESTION: Mr. Woodward, if you -- you're suing for money as I understand it in this case?

MR. WOODWARD: That is correct, Your Honor.

QUESTION: And if you prevail in this case, would your opponent have a claim over against HUD?

MR. WOODWARD: I'm not sure of that, Your Honor. There is a recognized mechanism in HUD regulations for an adjustment to be sought or for special funding to be sought from HUD. It is not entirely clear to us at this point that we or the Housing Authority would have the --

QUESTION: I'm not suggesting you would. But it seemed to me, as I understood the picture, what your clients don't pay HUD has to pay the difference.

MR. WOODWARD: That's correct.

QUESTION: So that if you get a little more money out of your opponents, it seems to me they have to get that money from HUD.

MR. WOODWARD: That is probably the case, Your Honor. It is not entirely clear whether we get it, but that's the likely source.

QUESTION: So they're not the typical trustee in this situation then, are they?

MR. WOODWARD: Pardon?

QUESTION: They're not a typical disinterested trustee insofar as they might have views on what should be done?

MR. WOODWARD: Certainly not, and they're hardly a trustee as to the tenants' own money, which is really what's at issue here. We're not talking about some tax, state tax base money. We're not talking about something the Federal Government paid or didn't pay.

What we're talking about is tenant money in excess of what the Brocke amendment permits being returned to the tenants.

QUESTION: And HUD has never actually tried to take a formal position in this litigation, have they?

MR. WOODWARD: That's correct, Your Honor. We believe that wasn't necessary as far as getting an

understanding of what the regulations mean, because the regulations really quite clearly say what they mean. It might be a more difficult case if the Housing Authority had attempted compliance with the regulations and could show, other than by some ingenious speculation on the part of their counsel, what the difficulties might be in implementing the regulations.

But that is not the case here. We don't have --

QUESTION: Has HUD taken a position whether or not 1983 is available to your client?

MR. WOODWARD: I don't know that they have taken a position specifically with regard to this issue, Your Honor. What they have done that's very important is --

QUESTION: To say that they don't have much authority themselves at all.

MR. WOODWARD: That's it. And they also said in comments upon the 1984 promulgation --

QUESTION: And hence, the Congress could never have intended their regime to displace 1983?

MR. WOODWARD: Well, we would prefer not to be held accountable for the extent of their authority, but only for the extent of our clients' --

QUESTION: Well, I know. But if HUD has that

limited an authority, you would say therefore Congress couldn't have intended to preempt 1983?

MR. WOODWARD: That certainly points in that direction, Your Honor. It would require more than the very limited authority shown here, certainly.

The implications of the way the Fourth Circuit has treated this, of course, are substantial. If with this very modest grant of administrative authority, whether you read it as the statute says or the way HUD reads it -- either way, it's a fairly modest grant of administrative authority and what we believe is a very clearly vested sort of right in the individual.

If that combination in this case presents preclusion problems, then there will be preclusion problems or perhaps an insurmountable preclusion barrier in virtually any case in which an individual tries to vindicate their individual rights in a grant program, without regard to how specifically, how concretely, or how strongly Congress in the program statute vested the individual rights.

QUESTION: Of course, one of the questions here is whether there is a vested individual right, isn't it?

MR. WOODWARD: That is a legitimate question, Your Honor. We think it is not hard to find the

individual right that the Pennhurst inquiry calls for here, because of the specificity of the Brooke amendment itself, which both in its legislative history and in its original wording talks about the family's income, the fact that nobody else benefits from that limit -- while it may operate as a standard for what HUD pays, it's only the tenants that benefit from that limit -- and from the fact that the regulations that tie into the statute are themselves phrased in terms of the shalls and the mandatory elements of a right and focus very specifically, again, on what the tenant is to get for his rent.

QUESTION: It's phrased in terms of what HUD will contribute to the local housing authority, not in terms of just an across the regulation, across the board regulation, isn't it?

MR. WOODWARD: Now, I believe that ultimately it is tied into that, but my recollection of the regulation is that it does give absolute sort of legislative commands to the Housing Authority about how it must perform its duties.

And again, we're not talking here about an ambiguous performance of a duty or a discretionary performance. We're talking about no performance at all. This in that sense is the classic core application

of 1983, where federal statutory provisions for the benefit of an individual have been absolutely defied.

QUESTION: Mr. Woodward, excuse me for interrupting you, but I'd like to ask whether, is your position that any individual tenant could bring a Section 1983 action about any complaint he had? Let's say the tenant felt the heat was inadequate or the maintenance was inadequate or the air conditioning wasn't working. Could the individual go to federal court and bring a suit in 1983?

MR. WOODWARD: That would be a very broad assumption, Justice Powell.

QUESTION: Yes, but I want to know where the limits of your argument lead us.

MR. WOODWARD: I don't think we need to go that far.

QUESTION: I understand that.

MR. WOODWARD: And the reason is this. I think we're tied in this case to the very specific grant of substantive right which the Brooke amendment represents. Now, the Fourth Circuit at least has held that other provisions of the Housing Authority -- I mean, I'm sorry, of the Housing Act -- don't go so far and don't grant a substantive right.

Without conceding that those decisions are

correct, we recognize that the case -- the issue must be addressed in each case. It will not follow from a holding that the tenants may vindicate their Brooke amendment rights that any tenant may vindicate any right that he asserts against a housing authority.

It still must be specifically tied into some provision of the Housing Act which grants a substantive right.

Another important point about that --

QUESTION: You mean these tenants have a right to get the utilities paid for, but they don't necessarily have a right to have the utilities working?

MR. WOODWARD: Well, I'm not going to assume that they might not, Your Honor. I think that what I'm saying is only that, as far as the regulation goes, it doesn't -- that we're relying upon, it doesn't address that.

QUESTION: That's not a very appealing argument in the next case. I mean, if we find a right here, won't you be arguing in the next case that, you know, what's the use of having utilities paid for --

MR. WOODWARD: If they don't work.

QUESTION: -- if they don't work?

MR. WOODWARD: If in that case it can equally be shown that that's tied -- and I think it probably

can, to follow the implication of your question -- that it is tied to a right, then in fact we may have an enforcement problem.

But I think it's important to note that we have had that perhaps all along. Since the Brooke amendment was passed in 1969, it has widely been assumed that tenants may sue under the Brooke amendment to enforce the rental limitation in that amendment. The Fourth Circuit's decision precluding any suit under the United States Housing Act is really an aberration in terms of what has happened in the last 15 years. It has been assumed that tenants could sue.

In fact, as the cases cited in our brief show, they have sued. They have not sued in such overwhelming numbers as to flood the courts, but the assumption that they had suit available has been operative, and they have used those suits.

QUESTION: You say "sue." Now, of course your claim could be asserted in state court, if I understand you, could it not?

MR. WOODWARD: Well, it is my understanding state courts have an obligation to entertain any federal claim. The real question here is whether the federal courts also must entertain the claim.

QUESTION: And as I understood the Fourth

Circuit, it assumed that, A, there was a substantive right and, B, it was enforceable in state court.

MR. WOODWARD: That's correct, Your Honor.

We don't think that that addresses the question, though, of the problem that 1983 poses here, of course. If there is a right to bring a 1983 claim, then it is also true that it can be brought in federal court.

QUESTION: Well, why the preference for federal court over state court here? Why not bring an ordinary landlord-tenant action in state court?

MR. WOODWARD: It just wouldn't work in this particular context, Your Honor. Perhaps in some it might, but in the courts of Virginia the court that would have jurisdiction over amounts of $200 and $300, such as is the case here, is the very lowest level of the courts and not of record.

And since there is no class action provision in Virginia, we'd be talking about 1100 individual tenant suits in that court to try to vindicate this right and get these damages back. Totally impractical.

In other circumstances, in other courts, it might be possible. But where Section 1983 permits this sort of suit in federal court and where the remedies are appropriate, we believe the Fourth Circuit should have

addressed that.

I'll reserve the rest of my time, if there are no other questions, for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Woodward.

We will hear from you now, Mr. Harris.

ORAL ARGUMENT OF

BAYARD E. HARRIS, ESQ.,

ON BEHALF OF RESPONDENT

MR. HARRIS: Mr. Chief Justice and may it please the Court:

Perhaps if I might begin at a place that is an uncommon beginning, at the end. The end of the case as presented to this Court is an end that we do not believe was anticipated by Congress in 1937, nor was it anticipated through the course of the legislative history of this statute.

Mr. Justice Powell has noted the question of whether or not an individual tenant can bring a complaint over other things. Justice Scalia has rightly questioned whether the utilities might not be working and you might have a right to the money but not the utility to work.

We would submit to you that the regulations of HUD in this instance are identical to the Brooke

amendment utility regulations, whether you view them from the question of maintenance and repair of the facilities, the ventilation, the plumbing, the heating, the electrical, or whether you view them merely from the narrow attempt of Petitioners to achieve utilities in the form of electricity.

Please allow me to be more specific. 24 CFR 966 had a precursor at 24 CFR 866 and had a precursor at the HUD handbook. In each and every one of those instances, HUD has uniformly held that housing authorities, in order to be able to operate under the scheme envisioned by Congress in 1937, a scheme envisioning a lease and a relationship of landlord-tenant sorts of things, that under those provisions the PHA could charge maintenance for everything over ordinary wear and tear.

That is by regulation. Moreover, they may charge late charges, they may charge for security deposits, they may also, incidentally -- and this is true prior to the Brooke amendment -- charge for excess utilities, particularly where those utilities are incurred through the use of major tenant-supplied appliances.

Congress has embodied those regulations in the very same statute upon which Petitioners rely in this

instance. Petitioners rely under what is commonly known now as the Brooke amendment, found at Section 1437a(a) of the Act, previously found at Section 1402, and embodied in the Housing Act in one form or another as a definition of low rent housing, which I might transfer into a definition of what you get for your dollar, ever since 1937.

In 1983 the Congress, realizing that HUD was about to repeal its regulations pertaining to the maintenance of the lease action, amended the Act at 14371. And interestingly and curiously enough, "1" happens to coincide with "lease."

14371 of the Act says that every PHA lease shall have a reasonable term, shall provide for decent, safe, and sanitary housing, shall provide for a time for eviction and notice of cause for eviction, things which HUD had before regulated.

Now Congress, recognizing that they were an essential part of that program enacted in 1937 and amended in 1947, '49, '59, '69, '74, and through the course then of the eighties in '81 and '83, Congress had linched its entire scheme of landlord-tenant proceedings on a lease, a lease which they had now, realizing that HUD might back away from the regulations, Congress enacted an amendment which said, no, you may not do it.

And so if it can be said that the Brooke amendment limit to rent under 1437a(a) and the regulations under 24 CFR 865, now 965, if these give rise to a right or to a remedy, then so does every term of every lease in every PHA, for every one of millions of families in this country.

QUESTION: Mr. Harris, let me just interrupt you with a question. Do you agree that these people have a remedy in the state courts for the very thing they're claiming here?

MR. HARRIS: Yes, sir.

QUESTION: So there is a substantive right involed, then?

MR. HARRIS: Yes, sir.

QUESTION: I see.

MR. HARRIS: There is a substantive right under the lease, if it please, Justice Stevens, to the extent that that relationship, landlord-tenant, gives rise to a lease right. The lease in this case, for an example, gives rise to a utility right. The HUD regulations give rise to the same regulated utilities.

But that action under the Congressional scheme was a lease, a lease between the landlord and tenant, that ensured that the tenant would have no lesser rights in public housing in this country than would tenants in

any housing in this country, nor, concomitantly, would they have greater rights.

And depending upon how we might view the federal judiciary, the remedy of the federal forum differs only. But if you look at Congress' intent in 1937, it was a lease arrangement.

QUESTION: Let me put a little different question. Do the regulations regulate the amount of the rent? Get away from all these fringe things like the utilities and the heat and so forth. But they do impose a limit on the amount of rent that can be charged based on the person's income, is that right?

MR. HARRIS: The statute does that --

QUESTION: The statute does that.

MR. HARRIS: -- Your Honor.

QUESTION: And if the Housing Authority should charge more than the permitted statutory rent, would there be a remedy in federal court for that kind of thing?

MR. HARRIS: No, sir.

QUESTION: There would not, even if it's a very simple, flagrant case? You'd have to go to state court, would be your view?

MR. HARRIS: Yes, sir. The lease provides the amount of rent, and that section 5, I believe, of the

lease, which is found in the record, it also provides for redeterminations of that.

And there has been perhaps confusion in the courts over that very issue, and hence the many cases cited, never to reach this Court as yet, over that very issue.

QUESTION: (Inaudible.)

MR. HARRIS: Yes, sir.

QUESTION: (Inaudible) state court if you simply did not execute a proper lease. If the amount specified in the lease is below the amount -- is above the amount that the federal law allows, you would have neither a right in the state court nor a right in the federal court.

MR. HARRIS: The lease, Your Honor, would I believe provide for a fixed amount of rent, which by statute can be no more nor no less than 30 percent of income.

QUESTION: I know, that's the way it's supposed to me.

MR. HARRIS: Yes.

QUESTION: But if you have a housing authority that executes different leases, there would be no remedy for that difference.

MR. HARRIS: The remedy in that instance would be the remedy of HUD's enforcement of the annual

contribution contract, through which the other side of this tripartite arrangement between the tenant and the PHA and HUD are regulated.

And indeed, when the Brooke amendment was passed --

QUESTION: But the individual lessee would have no remedy, either in state court nor in federal court, so long as the defect is that the form of lease that the authority uses does not comply with what federal law requires, right?

MR. HARRIS: Yes.

QUESTION: And if HUD were to sue, it would have to pay for whatever it recovered on behalf?

MR. HARRIS: I haven't figured out the answer to that one, Justice Stevens, and would that I could, because I at one time had decided, as I had argued and moved in this case originally, that it ought be dismissed since HUD was an indispensable party and had not been joined.

And subsequent to my having the bonus of making that motion, the decision of this Court in Heckler was rendered and there became some serious question as to the wisdom of my motion at that moment. The district court having taken it under advisement, I was never forced to belabor it greater, although I had

some concern because as a practical matter under the annual contribution contract it's what I would describe to this Court as my mother ship.

If you can see the mother ship and its auditors and its control and the fact that the PHA indeed exists by reason of its relationships on a daily basis with HUD, and so it would be tough. Next year I'd have to go to the subsidy meetings and say: Gosh, I've lost all this money and I've got to pay all these folks, and what are we going to do about it, HUD?

And I don't know the answer to that, except to pose it back.

QUESTION: Let me ask one other question, following up on Justice Scalia's. Supposing you had a form lease that you used that did contravene the statute, so that we have an argument then about whether the tenant could sue for the excess rent. Would he have a forum in which he could get equitable relief to have a different lease executed to conform to the statute, and if so could he do that in federal court, as he did I guess here?

MR. HARRIS: I don't know, Your Honor, that he would have a right even in federal court --

QUESTION: For equitable relief.

MR. HARRIS: -- to revise a lease. I believe

that --

QUESTION: Well, to compel the Authority to comply with the federal regulations, would be the way to phrase it.

MR. HARRIS: No, sir, I believe that transcends the intent of Congress in that instance, and I would think that that would be up to HUD, realizing that they had a derelict PHA on their hands, to exercise Section 1404 of the Act, which explicitly gives HUD the right to sue and, interestingly enough, also gives the right to sue HUD.

And whether or not that would get me out of the Heckler dilemma or not, I would not want to land flat-footed on that in this Court. I think I might wind up back on my heels a bit.

But I do wonder whether 1404a would give me a right to sue HUD. It certainly gives HUD the right to sue me, and I have very little doubt that they would come round to me and say -- if they allocated the conflicting interests in that manner, then I believe they would come round to me and say: You know, get in line, PHA; get in line now; and if you don't want to get in line, we want to meet with your board of commissioners, because they'll get you in line, Mr. Executive Director or Mr. Staff Member.

The practical reality of the relationship is very tight, Your Honor.

QUESTION: Do you think the state was obligated to follow the regulation?

MR. HARRIS: That the Housing Authority was obligated to follow the regulation? I think the Housing Authority followed the regulation, Your Honor. And I believe that they had an obligation under the VCC --

QUESTION: So your answer is yes, you were obligated to follow the regulation and you did?

MR. HARRIS: Yes, sir. But our obligation is under the annual contribution contract.

QUESTION: Yes. But you're following the regulation? You are bound to follow the regulation?

MR. HARRIS: Yes, sir.

QUESTION: And the regulation is consistent with the statute?

MR. HARRIS: Yes, sir.

QUESTION: And has the force of law?

MR. HARRIS: Yes, sir.

QUESTION: Thank you.

MR. HARRIS: The interesting analysis of the conflicting interests which was suggested by my answer to Justice Stevens' question brings to mind a point that I think is particularly interesting and is not treated

in the briefs. If I might share it briefly with this Court.

The HUD regulations at 24 CFR 865 et seq., and at 965 in their current form are a little different. But the ones at issue in this instance are a consumption set of regs. They are based on, the more you use the more you get, if you adopt the Petitioners' view.

And in response to my question to you, Justice White, I'm not sure that I agree with Petitioners' view of what these regs may mean in terms of whether or not all of these very nice steps on the -- in fact, the interrogatory answers say, as I'm sure the Court is aware, that we deemed our compliance in compliance with the regs.

But nevertheless --

QUESTION: Part of your argument, as I understand your brief, is that the state has never understood its obligation under the contract or under the law or under the regulations to make it liable to cover utilities.

MR. HARRIS: We provide utilities, free utilities in a reasonable amount, to the tenants of the PHA in this instance.

QUESTION: But you've never understood your obligation to be any more than what you say it is?

MR. HARRIS: No, sir.

QUESTION: And so you in effect say there really isn't any clearly enough expressed right under the statute or regulations to found a 1983 suit?

MR. HARRIS: That is correct, sir, although I am troubled somewhat by going back, as Mr. Woodward has pointed out, that I somehow have said that there might be some sort of right.

The question in this instance is how much utilities, and when you get into the regs and you start finding things like wasteful, individual circumstance, higher use by reason of tenant-supplied appliances, when you get into the new regs which speak of luxuries versus necessities, when indeed as you get to the conflicting allocation, which I was about to mention.

The regs also provide that in fiscal year 1981 and 1982, if the PHA does not effectuate a five percent -- a reduction, excuse me -- a reduction in energy use, then it will be penalized five percent of its operating subsidy in the subsequent year. This is at Section 990 of the regs as subsection 116.

The contradictory reality is that at the same times those regs were in force the other regs were saying the more the tenant -- if you believe Petitioners' argument, and I do not subscribe to that,

Your Honor. But if you adopt it, the more you use the more you get, but if you give away more we're going to take five percent of your money.

Now, this was HUD speaking out of all of its regulations simultaneously. And it illustrated to me that HUD has got responsibility under this scheme to render its discretionary judgment over the conflicting interests that have got to be reconciled in order to deal with how do you allocate the moneys available and how do you provide for tenant housing.

QUESTION: Well, do you draw the line essentially, Mr. Harris, as to what the tenants can sue for and what is left to these considerations you're just mentioning, what's in the lease the tenants can sue the PHA for if it's not furnished, but the section you just mentioned is left to some sort of other kind of adjustment between the PHA and HUD?

MR. HARRIS: Yes, sir. It is -- the regulatory -- the part of the regulations that a tenant may sue for is that part which is embodied in the lease, which ironically is regulated in itself in all of its detail.

And yet, there are myriad other regulations pertaining to housing that do not have any relationship perforce with the tenant, but have an indirect impact in

that the PHA and HUD also have an annual contribution contract which says in small part in Section 5 that the PHA will abide by the law. And that gives yet another part of this tripartite relationship of HUD, PHA, and tenant.

QUESTION: Suppose there was either a provision of the statute or the regulation that was perfectly clear and the Housing Authority had just been ignoring it. Just suppose that. I know you have an argument that there are utilities and then there are utilities. But let's just suppose that it was perfectly clear.

Do you suppose a 1983 action would be available then?

MR. HARRIS: No, sir.

QUESTION: Why not?

MR. HARRIS: Because I believe that the remedy at that point, given the tripartite scheme, would be for HUD to come in and say either, as a practical matter let's get together because next year we've got to renew your subsidy and we may not, or to --

QUESTION: Well, what about Maine against Thiboutot? Wasn't there a holding that 1983 is available to enforce statutory rights?

MR. HARRIS: Yes, sir. And I can't read Maine

without also reading the decisions of the Court subsequent, particularly the Sea Clammers case, in which if it has found that by the Congressional scheme there was evidence of a Congressional intent to foreclose -- and Congress when it set up the lease arrangement in 1937 certainly did not envision a federal remedy, as one certainly did not exist in 1937.

When the Brooke amendment was passed in 1969, Congress certainly, I would submit, did not envision a federal remedy at that juncture.

QUESTION: Well, I would suppose you'd make the same argument in any of these spending power grant programs.

MR. HARRIS: I have difficulty with that for one reason, Your Honor, and that is simply because some of the language in some of the opinions which has reference to the fact that if you can't forfeit the money there isn't a right. And quite frankly, I think it is not a pragmatic response for any PHA to come into this Court and say that, as a practical matter we built these projects 30 years ago and now we're going to forfeit that money and leave the state with 1100 low income tenants sitting in these 30 year old buildings that are going to fall down if there isn't money to take care of them.

And I'm very reluctant to try to come in here with that kind of argument. I think it is much more the pragmatic response to say that there's not going to be anything of that sort to happen. Quite the contrary, HUD's going to come down and it's going to say: Lock guys, we've got --

QUESTION: Straighten up.

MR. HARRIS: Yes, or I can freeze your money, I can sue you. But more importantly, I own you. I've owned you ever since your inception. And the fact of the matter is that an active, aggressive HUD can solve that problem, has full legal remedy to do so, and I believe would do so.

But to get into -- one of the things that's bothered me, I think, most of all about this case, is I've wondered a little bit why I'm here. The real complaint these Petitioners have is not with the PHA. The real complaint they have is with HUD, HUD that they contend did not enforce the regulation.

Moreover, they admit, as I believe was pointed out earlier by question, that if I lose HUD is going to pay the bill. I don't know that's true. Would that I knew it was true. I'm sure that I could reassure my client, who is a little bit more local and a little bit more removed.

But nevertheless, that's the Petitioners' point, that they'll get the money from HUD; that if I win I'll just get less subsidy or less money from the tenant -- or more money from the tenant and less subsidy.

I have no interest therefore in winning. I would be just as well off to lose. And I think the truth of the matter is that the Petitioners have revealed their hand by suggesting to this Court that, while they cannot under Heckler perhaps sue HUD, notwithstanding my attempt to stand in quicksand of 1404a and maybe get around Heckler -- and I reserve that for another day on the ill-begotten chance that you may remand me and I have to try, and I don't really want to come back, as much as I've enjoyed it --

(Laughter.)

QUESTION: Mr. Harris, if you're correct in saying that the tenants' real complaint is with HUD, I suppose they might have some sort of an action similar to that which we recognized last term in Brock versus United Auto Workers, to sue HUD over some interpretation of the regulation they claim was wrong but HUD was adhering to.

MR. HARRIS: Yes, sir. As a matter of interpreting a regulation, I believe they would. I'm

afraid that they would style it or that HUD would try to restyle it as a failure to enforce the regulation pertaining to utilities. If they did that and they walked full into the teeth of Heckler, I can only imagine that I have had difficulty distinguishing the two cases, although, as I've indicated, I've left myself, on the chance that this is transcribed and I'm back in the district court, room to run, because I certainly want to talk to HUD about it in that event.

My concern is that if my hypothesis is correct and if indeed the complaint is directed toward HUD, then Petitioners do the Heckler case an injustice by suing me and attempting to get money from HUD. And that bothers me a little bit about this case on just a very basic level.

I think that, most importantly, one of the things that we have said throughout is that the idea of jurisdictional kinds of claims of this sort or remedies of this sort is something that I have referred to before and would leave with this Court for its consideration as what I call screen door jurisdiction.

Screen door jurisdiction is not the flood and the torrent, the flood gate of 1983 cases, and that's where the idea came to mind. I'm not sure that even Petitioners would bring us a floodgate of major

litigation.

But they would certainly bring us litigation on every screen door kicked in in every housing authority across this country, because the right to collect for that maintenance over ordinary wear and tear is the very self-same right that they urge to you as supports the claim for free electricity in a specific amount.

Screen door jurisdiction might be lightbulbs in hallways, it might be failure to cut lawns.

QUESTION: Mr. Harris, do you have a lot of screen door litigation in state courts in these projects?

MR. HARRIS: Yes, sir. As a matter of fact, that's the prototypical place that they ought to go and do on numerous occasions. I'm uncertain of my breadth of knowledge, but I feel comfortable to say that most, if not all, of the 50 states have passed extensive landlord-tenant statutes.

QUESTION: No, I'm not talking about just general landlord-tenant litigation. Of course there's a lot of that. But in these housing projects, is there a great deal of litigation brought by tenants against your client in state court?

MR. HARRIS: Most of it -- to answer your

question, it is no more than ordinary litigation in any landlord-tenant, Your Honor, and not that many cases. Most of them --

QUESTION: How much of a burden is it? I mean, is there hundreds of these cases every year?

MR. HARRIS: I don't know how many. I do know that most of these cases are handled under the tenant grievance mechanism, which is also mandated by HUD and is provided for as a part of the lease, under section 13 of the lease in this particular instance and as a part of the prototype lease required by 1437k of the Act.

QUESTION: Are you suggesting that if a federal remedy were available, the tenants would no longer use this grievance procedure that the regulations provide for?

MR. HARRIS: No, sir. I do not believe a federal remedy is available, but I do believe they would use the grievance mechanism. I believe that if a federal remedy were available, that that's where they would go, because it does have class action impact and because every screen door and every broken light bulb is a part of what someone has once referred to me as the typical seething undercurrent of discontent that you might find among tenants generally.

And I do not mean to characterize any

particular sort of tenancy, but I am comfortable to believe that people who don't own their own property sometimes get unhappy with the people who do. And they'll take the best and shortest route to take on that landlord they can.

Unfortunately, if that landlord right is not in the forum where it really belongs, where it can be processed expeditiously and by people with that kind of expertise, if -- they will, in the words of some friend of mine, who said don't make a federal case out of it, they will, given that right or given that remedy.

And I think that that's outside of the ambit of what the Congress intended when it set up a virtually unique situation 50 years ago with a lease arrangement with a landlord-tenant relationship, recognizing that they were dealing in leaseholds.

The principle that we suggest with regard to the cases is really quite simple. There's no need to make a federal case of this. There is a grievance mechanism, there is a leasehold remedy in state court, and most importantly, taken as a whole under the Sea Clammers test, that that is the remedy anticipated.

QUESTION: Would you summarize the grievance procedure?

MR. HARRIS: Yes, sir.

QUESTION: Let's take an individual tenant and he or she has this complaint.

MR. HARRIS: It is processed through ultimately to a panel, which is --

QUESTION: What's the first step?

MR. HARRIS: The first step is to lodge a complaint with the Housing Authority.

QUESTION: That's in Roanoke?

MR. HARRIS: Yes, sir.

QUESTION: Right. Carry on from there.

MR. HARRIS: That ultimately goes through two levels, I believe, and perhaps three, of management within the staff of the Housing Authority. At that point a panel is appointed, and I frankly can't recall right now how it is constituted.

But it encompasses not only management representatives, but tenant representatives. There are due process rights attached to that. There is opportunity to be heard, to be represented by counsel. Indeed, that has happened as recently as a few weeks ago over a twelve dollar claim with which I am familiar.

And those panel members sit and hear a full-fledged discussion of whether or not something has happened according to the way it ought, according to the lease, according to the other regulations of the Housing

Authority.

It terminates at that point, although it is enforceable in my view in state court because the grievance procedure itself is a part of that same lease at section 13. So I believe they have a lease entitlement to the grievance remedy, as well as to the HUD regulatory remedy.

And consequently, while none that I know of have gone to state court, I believe were you to say you had been denied the grievance mechanism you could seek declaratory relief in the state forum.

QUESTION: Does a tenant ever get to HUD in Washington?

MR. HARRIS: Not to my knowledge. I don't know that he sought that.

The lease demonstrating this adequate remedy I think brings you squarely to the simple question of, why make a federal case of this if you have the potential of what I have referred to as screen door jurisdiction and where you have an adequate remedy at state law. The lease demonstrates this Congressional intent, coupled with the administrative regulation.

If there are no other questions from the Court, I would ask you to affirm.

CHIEF JUSTICE REHNQUIST: Thank you, Mr.

Harris.

Mr. Woodward, do you have anything more to say?

MR. WOODWARD: I do, Your Honor.

CHIEF JUSTICE REHNQUIST: You have about four minutes.

REBUTAL ARGUMENT OF

HENRY L. WOODWARD, ESQ.

ON BEHALF OF PETITIONERS

MR. WOODWARD: If I may accept the invitation of Justice Stevens to expand a little bit beyond the record with regard to the screen door cases, I would like to say that if those cases are brought with regard to the Housing Authority in Roanoke we would probably be bringing them, and in fact there are very few.

What happens in fact is that the grievance mechanism does work in individual cases to some extent. It's not a marvelous thing, but if the problem of the tenant is with the question of who kicked in the screen door and who should pay for it, the grievance mechanism is a way to address that.

What the grievance mechanism is specifically not available for, according to HUD and in the regulations it promulgated to implement it, is for challenges to the policy of the Housing Authority. And

that makes some sense. If the problem is a project-wide or authority-wide policy problem with the Housing Authority, then taking it to a panel is not only impractical but it's specifically contrary to the regulations. And it certainly never gets beyond the panel in that mechanism to HUD itself.

So in fact, some matters are specifically appropriate for grievance mechanisms and some aren't. What makes this case particularly a federal case is that the Brooke amendment, as the Sixth Circuit has recognized, is the backbone of the public housing program.

It just isn't right for a state court to be making critical determinations of what the Brooke amendment means and how it affects 1100 families in public housing in Roanoke as a matter of policy. And that is I think the ultimate reason this is a federal case.

QUESTION: Do you have any doubt that a suit against the federal agency would lie?

MR. WOODWARD: For non-enforcement or for --

QUESTION: For non-enforcement.

MR. WOODWARD: -- damages?

I think it probably would. I think in trying to decide where to sue, though, you try to identify

where the breach is clearest. And I think in this case we need not get beyond the non-compliance with the regulations to find out where the real, the ultimate fault lies.

QUESTION: Is the complaint the non-compliance by the PHA or the non-compliance by HUD?

MR. WOODWARD: In our case, our complaint is clearly non-compliance by the PHA. HUD has done what it could to say what the Housing Authority should do. That it didn't do it, there may be some remedy that somebody can come up with from HUD, but we have no way to invoke it. There is no mechanism for us to invoke that remedy.

What we can do is we can exercise --

QUESTION: No way to invoke what?

MR. WOODWARD: To invoke a remedy from HUD. I mean, perhaps we can sue HUD.

QUESTION: I thought you said you could sue them.

MR. WOODWARD: Well, it's always possible to sue, but winning is another question.

QUESTION: Well, I know. But didn't Justice Scalia ask you --

QUESTION: I meant sue and win. I know you could sue them.

(Laughter.)

QUESTION: I'll have to be more careful. I meant sue and win.

MR. WOODWARD: Well, I think the enforcement question does leave an avenue open. We're not there yet. But I think that under --

QUESTION: Well, now you've answered the question three ways.

MR. WOODWARD: Underlying the question, though, is the -- I mean, underlying the pursuit is the question of whether these folks have done something wrong in the first place. And I think it's putting first things first to establish that.

QUESTION: Well, don't they have your money, too?

MR. WOODWARD: Pardon?

QUESTION: Don't they have your money, too?

MR. WOODWARD: They have received the benefit of our money as well.

QUESTION: I mean, they actually have the money, don't they?

MR. WOODWARD: Well, it's not clear, frankly, at this point whether they still have it or not, Your Honor.

QUESTION: I see. But you paid it.

MR. WOODWARD: We paid it, we know that. We know that. And over a period of --

QUESTION: And they haven't given it back.

MR. WOODWARD: They certainly haven't given it back.

A question was asked earlier, what HUD's position is with regard to the private remedy of 1983 in these situations. I failed to recollect that in a couple of cases, the Stone case in the District of Columbia Circuit and the Brown case in the Eleventh Circuit, HUD has taken the position in briefing that the individual tenants may assert the 1983 remedy to redress utilities problems.

QUESTION: Your time has expired, Mr. Woodward. Thank you.

The case is submitted.

(Whereupon, at 1:58 p.m., oral argument in the above-entitled case was submitted.)

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tioners V. CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY

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BY Paul A. Richardson

(REPORTER)