No. 22-2828

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DEBORAH BRUMIT AND ANDREW SIMPSON,

Plaintiffs-Appellants,

v.

THE CITY OF GRANITE CITY, ILLINOIS,

Defendant-Appellee.

Appeal from United States District Court for the Southern District of Illinois, No. 3:19-cv-01090-SMY (Hon. Stacy M. Yandle)

BRIEF FOR PROFESSOR KATHRYN RAMSEY MASON AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

DANIEL P. MUINO
MORRISON & FOERSTER LLP
2100 L Street, NW, Suite 900
Washington, DC 20037
Telephone: (202) 887-1501
DMuino@mofo.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

Professor Kathryn Ramsey Mason respectfully submits this brief in support of the appeal filed by Deborah Brumit and Andrew Simpson. Professor Ramsey Mason is an Assistant Professor of Law and Director of the Medical-Legal Partnership Clinic at the University of Memphis Cecil C. Humphreys School of Law. She has an interest in this appeal because she researches and writes in the area of landlord-tenant and eviction law and has a particular interest in municipal crime-free ordinances like the one at issue in Granite City. In 2018, she published a paper in the UCLA Law Review titled *One-Strike 2.0: How Local Governments Are Distorting a Flawed Federal Eviction Law*, which discusses these ordinances and the problematic legal issues surrounding them. 65 UCLA L. REV. 1146 (2018). Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Professor Ramsey Mason represents that (A) no party or any party's counsel authored this brief in whole or in part; (B) no party or any party's counsel contributed money that was intended to fund preparing or submitting this brief; and (C) no person contributed money that was intended to fund preparing or submitting this brief.

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[1] All parties have consented to the filing of this brief.

INTRODUCTION

The District Court's orders granting Granite City's motion to dismiss and motion for summary judgment should be overturned. Defendant Granite City and the District Court erroneously relied on *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002), to justify the constitutionality of Granite City's crime-free housing ordinance. This is a misinterpretation of the *Rucker* holding and this Court should not repeat the Defendant's and District Court's error.

The *Rucker* precedent is simply not applicable in the case that is before this Court. The federal law – known as the "one-strike policy" – that was at issue in *Rucker* is a completely different law than Granite City's crime-free rental housing ordinance that is the subject of this appeal. *See* 42 U.S.C. § 1437d*(l)(*6); Granite City Mun. Code § 5.142.010 (2019). First, the interests and positions of the parties in each case are so different as to render a comparison useless. *Rucker* involved a law passed by the federal government that pertained to tenants in public housing that was owned and managed by the government as the landlord. 535 U.S. at 132. The appeal before this Court concerns a municipal government overstepping its authority in an attempt to improperly regulate the contractual relationship between a private-market landlord and his tenants, none of whom receive a direct subsidy or benefit from the government.

Second, *Rucker* was a case about statutory interpretation and the deference that courts have traditionally afforded to legislatures and agencies fulfilling their mandates, and not the constitutionality of the substance of the one-strike policy. In *Rucker*, the Supreme Court determined that constitutional objections were not relevant to the case because neither the federal government nor the housing authority that was implementing the program were acting in a sovereign capacity to regulate the general populace, but rather as landlord of property that the government owned. 535 U.S. at 135. Another distinction between the facts of *Rucker* and the facts of this appeal is that in *Rucker*, the federal government, as landlord, had the discretion to evict tenants under the one-strike policy but was not mandated to do so. 535 U.S. at 131. In this case, Granite City mandated eviction for violation of its ordinance; the landlord of the property had no choice but to obey, even if they disagreed. Op. Br. 6-7. Additionally, *Rucker* was factually limited to public housing, which is a small subset of the residential rental market. Granite City's ordinance applied to all rental housing in Granite City, even though the government had no direct relationship with either landlord or tenant. Op. Br. 8. Finally, there are due process concerns under Granite City's crime-free housing ordinance that were not presented in *Rucker*. The *Rucker* Court stated that any due process concerns about the housing authority's application of the one-strike policy would be resolved during the eviction proceedings. 535 U.S. at 135-36. While landlords subject to Granite City's law

would also have to go through the state court eviction process in order to legally evict tenants, there is no recourse available for a landlord who disagrees with the mandate to evict. Op. Br. 8. As a result, Granite City's reliance on *Rucker* to justify the constitutionality of its crime-free housing ordinance is erroneous and should be disregarded.

ARGUMENT

Granite City relied heavily on the *Rucker* decision in its briefings to the District Court to argue that its crime-free rental housing ordinance is constitutional. However, this is a misinterpretation and misapplication of the *Rucker* ruling, and this appeals court should not perpetuate such a mistake. Granite City's crime-free ordinance is in an entirely different legal category, with different rights at stake, than the federal one-strike policy and should be treated as such.

I. GRANITE CITY'S CRIME-FREE ORDINANCE IS LEGALLY DISTINCT FROM THE FEDERAL ONE-STRIKE POLICY.

To understand why the *Rucker* precedent does not apply to local crime-free ordinances like Granite City's, it is essential to appreciate the history of the one-strike policy and why municipalities have made distorted attempts to imitate it. In *Rucker*, the Supreme Court considered a challenge to the federal one-strike policy, which since 1988 has allowed public housing authorities to evict tenants from government-subsidized public housing for a single incident of criminal activity by the tenant, a household member, or guest, on or off the premises. 535 U.S. at 127;

42 U.S.C. § 1437d(*l*)(6). The one-strike policy was enacted in order to address the government's concern, as a landlord, about drugs and crime in public housing. *Rucker,* 535 U.S. at 127; Lisa Weil, Note, *Drug-Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 YALE L. & POL'Y REV. 161, 161 (1991). The Court ruled that the plain language of the statute unambiguously required that public housing leases include such eviction provisions, and that public housing authorities therefore had the ability to evict tenants under the lease terms, even if the tenant did not know about the alleged criminal activity. *Rucker*, 535 U.S. at 127-28. What the Court did not do is what Granite City would like this court to believe – issue a blanket endorsement of the one-strike policy on terms so broad as to fit an unwarranted extension to crime-free municipal ordinances that are intended to be applied on terms completely different from those involved in *Rucker*.

The *Rucker* plaintiffs were particularly concerned about the one-strike policy's permission for the eviction of so-called innocent tenants – that is, tenants who had no knowledge of or control over the criminal activity that was the basis for their eviction. 535 U.S. at 133-34. The Supreme Court, however, held that it was clear that Congress allowed for this possible outcome. *Id*. The Court discussed one of the most important features of the one-strike policy: that while it allows eviction as a first resort measure to address the government/landlord's concerns about crime, it does not require it. *Id*.; Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809,

850-52 (2015). Furthermore, if a housing authority proposes to terminate a tenancy because of criminal activity, the tenant has the right to participate in an administrative hearing process that can result in the continuation of the tenancy. 24 C.F.R. § 966.1 *et seq.*; *see also* Megan Stuart, *Housing Is Harm Reduction: The Case for the Creation of Harm Reduction Based Termination of Tenancy Procedures for the New York City Housing Authority*, 13 N.Y.C. L. REV. 73, 95 n.140 (2009). The discretion given to the housing authority under the one-strike policy was a reason the *Rucker* Court disagreed with the Ninth Circuit's characterization of the innocent-tenant evictions as "absurd." 535 U.S. at 133. The Court also discussed how the landlord, which in *Rucker* was the government, is best situated to determine if eviction is actually the solution to the problems the property faces. *Id.* at 133-34. Crime-free ordinances like Granite City's do not allow the landlord to make that determination, instead placing that decision in the hands of the local police department. *See* Ramsey, 65 UCLA L. Rev. at 1179-84.

Beginning in the 1990s, local governments around the country, including Granite City in 2006, began to enact laws that were attempted extensions of the federal one-strike policy but which are actually distortions of the federal one-strike policy. *See generally* Ramsey, 65 UCLA L. REV. 1146; Op. Br. 2, 5. Granite City's law applied to all rental housing in Granite City. Granite City Mun. Code § 5.142.010 (2019); Op. Br. 7. The ordinance required a landlord to evict a tenant

when anyone associated with the tenant – the tenant herself, a household member, or a guest – committed a felony on or off the premises, regardless of whether the tenant was aware of the alleged criminal activity. Granite City Mun. Code § 5.142.050(A)(3)(c) (2019); Op. Br. 8. Unlike the housing authority in *Rucker*, Granite City, acting as sovereign, had no direct contractual relationship with the tenants or landlords subject to its ordinance. Furthermore, unlike the federal one-strike policy involved in *Rucker*, the city left no option for the landlord herself to exercise discretion about whether to evict under the crime-free housing ordinance; if the landlord refused to do so, she would be subject to monetary fines and possible loss of her business license. Granite City Mun. Code § 5.142.050(A), (B) (2019); Op. Br. 7.

II. GRANITE CITY IS ACTING AS SOVEREIGN IN ENACTING AND ENFORCING ITS CRIME-FREE HOUSING ORDINANCE AND IS SUBJECT TO INCREASED CONSTITUTIONAL SCRUTINY.

Public housing tenants and private-market renters are situated differently in the eyes of the law and with regard to the considerations that the Supreme Court undertook in *Rucker*. The landlord-tenant relationship has always been fraught, whether the landlord is the government or a private property owner. *See* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 306-14 (2016). The Supreme Court's decision in *Rucker* exacerbated this tension for public housing tenants. *See* Ramsey, 65 UCLA L. REV. at 1174-75. But public housing tenants, by

virtue of their acceptance of federal housing subsidies, are subject to more governmental restrictions than the average private-market renter. *See* Ramsey, 65 UCLA L. REV. at 1180-82. Public housing tenants agree and expect to be subject to increased government oversight of their tenancies because they have a direct contractual relationship with the federal government as landlord. Private market renters have no such agreement or expectation. In fact, they have an increased expectation of privacy as compared to public housing tenants, and they also expect to be able to negotiate the terms of their tenancies directly with the property owner, with minimal governmental interference. Ramsey, 65 UCLA L. REV. at 1194-95.

One of the major differences between the federal one-strike policy and Granite City's crime-free housing ordinance is that Granite City has enacted its law in the exercise of its sovereign powers, whereas the federal government, in enacting the one-strike policy, is acting as landlord of property that it owns. This is an essential distinction for the purposes of the legal analysis this Court is undertaking. It is well settled that local governments have the ability to exercise their police power to protect the health and safety of their citizens. *See Berman v. Parker*, 348 U.S. 26, 33 (1954). While this police power is broad, it is not unlimited, and courts have reined in municipalities that have overreached in their attempts to reduce crime. *See City of Chicago v. Morales*, 527 U.S. 41 (1999); *Floyd v. City of New York*, 959 F.Supp.2d 540 (2013). Crime-free housing ordinances also impermissibly expand the

municipal police power by inserting the local government into the private-market landlord-tenant relationship and removing the decision about whether and when to evict a tenant from the property owner and placing it with the local police department, as Granite City has attempted to do. *See* Ramsey, 65 UCLA L. REV. at 1179-84. By enacting and enforcing its crime-free housing ordinance against Appellants Deborah Brumit and Andrew Simpson, Granite City has attempted to arrogate to itself the right to require private-market landlords to terminate leases against their will. In *Rucker*, HUD was not enforcing the one-strike policy as an exercise of sovereign power and was therefore not subject to full constitutional scrutiny. 535 U.S. at 135. In this case, Granite City is exercising its sovereign power through its crime-free housing ordinance and therefore all constitutional considerations are fully applicable, including procedural and substantive due process and equal protection. At a minimum, Granite City's mandatory termination of Appellants' lease has deprived both the landlord and the Appellants (as tenants) of a valuable property right. *See Rucker*, 535 U.S. at 135-36 (stating "respondents have a property interest in their leasehold interest []. This is undoubtedly true, and [the Supreme Court] held that an effort to deprive a tenant of such a right without proper notice violated the Due Process Clause of the Fourteenth Amendment" (citing *Greene v. Lindsey*, 456 U.S. 444 (1982))).

An additional consideration for this Court is that crime-free housing ordinances like Granite City's apply to almost all tenants in the towns where they exist, which is potentially tens of millions of people across the United States, while the federal one-strike policy only applies to the two million public housing tenants in the entire country. Ramsey, 65 UCLA L. REV. at 1176-77. While the federal government has enacted laws and regulations applicable to the public housing program that are expressly designed to promote fair housing and protect tenant's constitutional rights, Granite City's crime-free housing ordinance contains no such provisions, thereby opening the door to implementation of the crime-free housing ordinance in derogation of vested constitutional rights. This brings up concerns about racial justice and other civil rights considerations since many residential renters are members of protected classes. *See Jones v. Faribault*, Summary Judgment Order, ECF 253, No. 0:18-CV-1643 (D. Minn. Feb. 18, 2021); *see also generally* Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173 (2019).

Crime-free housing ordinances like Granite City's implicate an entirely different set of rights for tenants than the federal one-strike policy does, and the *Rucker* decision does not contemplate or discuss those important issues.

III. GRANITE CITY'S ORDINANCE REMOVES THE DISCRETION ABOUT WHETHER AND WHEN TO EVICT FROM THE LANDLORD AND IMPROPERLY PLACES IT WITH THE LOCAL GOVERNMENT.

Granite City tries to argue that because the Supreme Court stated that "there are . . . no 'serious constitutional doubts' about Congress' affording local public housing authorities the discretion to conduct no-fault evictions for drug-related crime," 535 U.S. at 135 (quoting *Reno v. Flores*, 507 U.S. 292, 314 (1993)), then its own crime-free ordinance is constitutional. But the key word in the Supreme Court's opinion is "discretion" (535 U.S. at 129) – the one-strike policy allows for public housing authorities to decide whether or not they will evict a tenant under the policy, whereas Granite City's ordinance did not allow for that choice by the landlord. Instead, Granite City's law allowed for its own police department to determine whether a tenant should be evicted.

The *Rucker* Court was quite critical of the Ninth Circuit's ruling that included a constitutional analysis. *See* 535 U.S. at 134-36. Notably, it criticized the appeals court's reliance on two cases, *Scales v. United States*, 367 U.S. 203 (1961), and *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915), stating, "But both of these cases deal with the acts of government as sovereign . . . [In this case the] government is not attempting to criminally punish or civilly regulate

respondents as members of the general populace. It is instead acting as a landlord of property that it owns." *Rucker*, 535 U.S. at 135.

This is a pivotal distinction for the case at issue. In this case, Granite City attempted to do exactly what the Supreme Court said in *Rucker* that the government was not doing – civilly regulate members of the general populace in the exercise of its sovereign powers. 535 U.S. at 135. The Supreme Court's reasoning in *Rucker* indicates that it would treat a municipal crime-free ordinance like Granite City's substantially differently than it treated the federal law, which is applicable only to tenants in a direct contractual relationship with the federal government. In fact, private-market landlords in Granite City did not even have the opportunity to conform with the Supreme Court's contemplation of how the one-strike policy should be applied: that is, an assessment of how rampant crime is at the property, how serious the alleged criminal behavior is, whether the tenant has taken any preventative or mitigating steps, and whether the totality of the circumstances justifies eviction. *See Rucker*, 535 U.S. at 133-34. As a result, Granite City's reliance on *Rucker* to justify the constitutionality of its ordinance is erroneous and misleading.

IV. THE *RUCKER* DECISION WAS ABOUT STATUTORY INTERPRETATION, NOT THE CONSTITUTIONALITY OF THE ONE-STRIKE POLICY.

Granite City relies on *Rucker* to argue that the Supreme Court has ratified the constitutionality of a government forcing a tenant's eviction for criminal activity, even when, as is the case here, it is undisputed that the tenant was unaware of the criminal activity. Op. Br. 36-37. But *Rucker* was not an opinion about the constitutional issues at stake with the one-strike policy. Rather, it was about statutory interpretation, which the Court emphasized. *Rucker*, 535 U.S. at 130-32.

The procedural history of *Rucker* bears this out. The initial complaint contained claims of violations of due process, freedom of association, and the Americans with Disabilities Act, *Rucker v. Davis*, 1998 WL 345403 (N.D. Cal. June 19, 1998), but the only issue that the Supreme Court ruled on was the claim that HUD had violated the Administrative Procedures Act by including the one-strike policy in the tenants' leases. *Rucker*, 535 U.S. at 129.

Subsequent courts have recognized that the true precedent of *Rucker* is its holding that unambiguous statutory language should be left untouched by the courts, and the case is frequently cited for that proposition. *See United States v. Genendo Pharm., N.V.*, 485 F.3d 958, 963 n.3 (7th Cir. 2007). The Supreme Court has also cited *Rucker* to support the proposition that "the need to resolve such constitutional issues ought to be avoided where possible." *Christopher v. Harbury*, 536 U.S. 403,

417 (2002). This is exactly what the *Rucker* Court did – avoided deciding constitutional issues that were not actually part of the case. This Court should not treat *Rucker* as precedential in this case.

CONCLUSION

The federal one-strike policy and Granite City's crime-free housing ordinance are completely different laws that require separate legal analysis and consideration. This court should not rely on the Supreme Court's 2002 decision in *HUD v. Rucker* to decide that Granite City's crime-free ordinance did not violate the constitutional rights of the Appellants. Municipal crime-free housing ordinances like Granite City's fall into a different legal category than the one-strike policy and should be treated as such. The one-strike policy was developed to try to address significant concerns about drugs and crime in federal public housing. It does not require the federal government to evict tenants for these reasons, instead allowing for a discretionary determination of the best way to proceed. Granite City's law, though, involves a local government improperly regulating the private-market landlord-tenant relationship and requiring landlords to evict tenants when there is an allegation of criminal activity, even if the landlord would choose a different course of action. This is an illegal exercise of Granite City's sovereign power, and certainly not something that the Supreme Court endorsed in *Rucker*. Moreover, *Rucker* was a case about statutory interpretation, and the Court intentionally declined to rule on

the constitutionality of the one-strike policy itself. Granite City's attempt to persuade this Court that *Rucker* is precedential is erroneous and misleading. For these reasons, this Court should not rely on the Supreme Court's 2002 decision in *Rucker* to determine the constitutionality of Granite City's ordinance.

Dated: January 24, 2023

Respectfully submitted,

/s/ *Daniel P. Muino*
DANIEL P. MUINO
MORRISON & FOERSTER LLP
2100 L St., NW, Suite 900
Washington, DC 20037
Telephone: (202) 887-1501
DMuino@mofo.com

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Seventh Circuit Rule 29 because it contains 3,336 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word-counting feature of Microsoft Word 2022.

This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and Seventh Cir. R. 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2022 in Times New Roman 14-point font.

Dated: January 24, 2023

/s/ *Daniel P. Muino*
Daniel P. Muino

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system on January 24, 2023.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 24, 2023

/s/ *Daniel P. Muino*
Daniel P. Muino