

Case No. 04-31201

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**CATRICE JOHNSON; FELICIA BADON; MONA BLUNTE;
TIFFANI BRUMFIELD; BERTHA WILLIAMS; ET AL**

Plaintiffs-Appellants

v.

**HOUSING AUTHORITY OF JEFFERSON PARRISH; LOUISIANA
HOUSING DEVELOPMENT CORPORATION; JEFFREY TRAHAN,
EXECUTIVE DIRECTOR, JEFFERSON PARRISH HOUSING
AUTHORITY**

Defendants – Appellees

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

**Brief for Amicus Curiae
Housing and Development Law Institute**

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CERTIFICATE OF INTERESTED PERSONS

(1) Case No. 04-31201, United States Court of Appeals for the Fifth Circuit.

(2) The undersigned counsel of record certifies that *amicus curiae* Housing and Development Law Institute does not have an interest in the outcome of this case as described in the fourth sentence of Fifth Circuit Rule 28.2.1. The undersigned counsel of record for *amicus curiae* is not aware of any additional persons with an interest in the outcome of this case as described in the fourth sentence of Fifth Circuit Rule 28.2.1, beyond those already identified in the Certificate of Interested Persons filed by the Appellants and Appellees in this case.

This information is true and correct to the best of my knowledge.



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Dated: May 5, 2005

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INTEREST OF THE AMICUS CURAE

Housing and Development Law Institute (HDLI) is a twenty-one year-old non-profit member organization that serves as a legal resource on public and affordable housing issues nationwide. HDLI's more than 300 members are composed of public housing and redevelopment agencies, legal counsel representing those agencies, and other stakeholders in the public housing industry. HDLI has members within the State of Louisiana and other states within the Fifth Circuit, although neither the Housing Authority of Jefferson Parish (HAJP) nor the Louisiana Housing Development Corporation ("LHDC") are HDLI members.

HDLI is a national leader in the public housing industry and takes a strong interest in legal issues having significance for HDLI's broad national member base. In especially important litigation, HDLI sometimes serves as amicus curiae. The issues in this important litigation involving whether participants in the federal Section 8 Housing Choice Voucher (HCV) Program have a federal right to bring suit under 42 U.S.C. § 1983 (Section 1983) to compel a housing authority to increase voucher utility allowances affect, and have national significance for, HDLI's national member base.

HDLI and its members have considerable expertise with the relatively complex HCV Program. HDLI's eighteen-member governing board of

directors is made up of seasoned attorneys with expertise in public and affordable housing law, as well as experienced executive directors currently managing Section 8 and/or public housing programs for small, medium, and large public housing and redevelopment agencies across the nation. HDLI's Executive Director manages HDLI's daily business affairs, and also serves as HDLI's General Counsel. She has more than ten years of industry experience, handles legal issues affecting the public housing industry on a daily basis, and regularly writes and publishes a number of legal periodicals addressing the HCV program and other low income housing issues.

HDLI supports the legal positions of the Appellees in this case, and submits this brief to assist the Court in understanding the operational, programmatic, and policy aspects of the HCV Program as they relate to this case. HDLI offers a point of view that represents the broad interests of public housing agencies nationwide, particularly housing agencies similarly situated to Appellees, and can assist the Court in appreciating the practical impact of its decision in this case on the larger public housing community.

SUMMARY OF ARGUMENT

HDLI has reviewed the briefs submitted by the Appellants, Appellees, and *Amici Curiae AARP et al.* in this appeal. The legal positions set forth in Appellees' brief are correct, well articulated and fully briefed; accordingly, HDLI supports those legal positions and will not repeat them here. Specifically, HDLI adopts by reference the Appellees legal arguments: 1) relating to the operation of the HCV Program; 2) that 42 U.S.C. § 1437f (o)(2) confers no federal right enforceable under 42 U.S.C. § 1983; and 3) that voucher holders do not have third party beneficiary rights in either the annual contributions contract between the administering agency and HUD or the housing assistance payment contract between the landlord and the administering agency (which issue appears to have been abandoned by Appellants).

In addition to supporting Appellees' legal positions hereinabove adopted by reference, HDLI submits the following three additional points: 1) unlike the public housing program where the percentage of income that a tenant may contribute toward rent is capped at 30%, the HCV Program is designed to allow tenants to contribute more than 30% of their monthly income toward rent so that they may qualify for higher cost units; 2) this design is actually achieved - according to recent statistics maintained by the

U.S. Department of Housing and Urban Development (HUD) - - HCV participants across the nation customarily pay more than 30% of their monthly income toward rent, and 3) pursuant to 24 CFR § 913.102, amounts that HCV voucher holders pay for retail utilities service should not to be included in the definition of “rent” for purposes of calculating the subsidy.

ARGUMENT

I. UNLIKE OTHER LOW INCOME HOUSING PROGRAMS, THE HOUSING CHOICE VOUCHER PROGRAM DOES NOT PLACE LIMITATIONS, OR CAPS, ON THE TENANT’S CONTRIBUTIONS TOWARD RENT.

A. Rental Subsidy Programs: Past and Present

Section 8 of the Housing Act of 1937, 42 U.S.C. § 1437f, created a tenant-based rental assistance program that has evolved through subsequent legislation into the current Housing Choice Voucher Program (HCV Program). Like its predecessor rental assistance programs, the HCV Program provides rental subsidies so that privately-owned housing can be within the financial reach of low income families. Under the HCV Program, the federal government, through the U.S. Department of Housing and Urban Development (HUD), provides rental subsidies on behalf of individual families to participating landlords, either directly, or commonly through a contract between the landlord and a local agency administering the subsidy.

42 U.S.C. § 1437f(b)(2). In Jefferson Parish, Louisiana, LHDC administers the HCV program.

From a policy point of view, in recent years Congress and HUD have deliberately moved away from project-based housing programs in favor of tenant-based subsidy programs - principally the HCV Program. HCV was adopted as the primary tenant-based assistance program in 1998 as part of the Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, Title V, 112 Stat. 2461 (1998) (QHWRA). Among other things, QHWRA reduced HUD's direct oversight and regulation of the public housing industry and provided more discretion for housing agencies to determine how best to use scarce public housing resources and manage their programs. Among other enhanced powers, it gave housing agencies wide discretion to develop utility allowances appropriate for local circumstances. It also created enhanced responsibilities and self-sufficiency requirements for participating tenants, adding more incentive for tenants to move up and out of federal housing assistance programs.

Further, HCV replaced a prior tenant-based rental subsidy program that capped a participant's contributions toward rent to 30% of their adjusted monthly income (the Certificate Program). Congress entirely eliminated the Certificate Program, in favor of HCV which has no such cap. Thus, HCV

demonstrates Congress' past and current intention that rent subsidy programs are not strict entitlements where everyone who qualifies for the program receives a given benefit. Today, participating tenants are not assured of, nor limited by, a 30% cap, and Congress has conferred even greater discretion upon housing agencies as they consider the totality of their local circumstances and make the hard choices of deciding how best to allocate their resources and subsidies.

The housing assistance payment (HAP) contract between the owner and HUD sets forth the maximum subsidy that the owner may receive for his/her housing unit. Likewise, the annual contribution contract (ACC) between HUD and the agency fixes the maximum rent (including utilities and other charges) which the owner is entitled to receive. Its primary focus is the calculation of the amount of the housing assistance payment that is made to the landlord; it does not cap the maximum amount that the tenant can pay towards rent. 42 U.S.C. § 1437f(c)(1) states: "an assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made."

B. All Housing Programs Are Not Created Equal.

An important fundamental precept of which this Court should be aware as it considers the underlying issues is that all low-income housing programs are not equal in either their purpose, or in their operation. From its inception, the HCV Program was designed to be fundamentally different from other low income housing programs, such as project-based Section 8 programs and public housing programs. Some may consider the HCV Program among the more “elite” of low income housing programs because it was designed and operates to support low income persons who can afford to pay a higher rent than others, who can individually manage and pay for their utility consumption where others may not, and who may be interested in housing units that have more amenities or otherwise have higher rents.

This purpose of the HCV program is directly in contrast with that of other low-income housing programs. The public housing program, for instance, was designed and is intended to serve the poorest of low-income persons, and accordingly has additional safeguards built into the program. As discussed below, one important safeguard of the public housing program not present in the HCV program is that participants in the public housing program, again the poorest of low-income persons, are limited to housing choices that allow them to pay no more than 30% of their income toward

rent. This reflects Congress' broader policy objective of providing a program that can serve persons at the very lowest income levels.

Contrast the HCV program, which was not designed, nor necessarily operates to serve the very lowest income levels. The HCV program reaches persons who will likely be in a better financial position than those participating in the public housing and other similar housing programs, or who in many cases can at least afford to pay for higher rents and other amenities.

In contrast to the 30% income cap mandated by the public housing program, in calculating the subsidy that PHAs provide landlords under the HCV Program, HUD regulations set a minimum, rather than a maximum, amount that tenants must contribute toward their monthly fair market rent payment. 42 U.S.C. § 1437f (o)(2)(B). This is distinguishable from other HUD housing programs, like the public housing program, which were designed to support the poorest of low-income residents, and thus take a more conservative approach.

C. Banks, And Not Wright, Applies to This Case Involving the HCV Program.

Appellants and Amici AARP et al. cite the United States Supreme Court's 1987 decision in *Wright v. City of Roanoke Redevelopment &*

Housing Authority, 479 U.S. 418 (1987), in support of their position that 42 U.S.C. § 1437f(o)(2), in conjunction with the regulation that sets forth the formula for calculating the amount of the payment to be made to the participant's landlord, create a federal right enforceable through 42 U.S.C. § 1983. However, as fully addressed in Appellees' brief, the principles set forth in *Wright* were discussed specifically in view of the purpose and operation of the public housing program. Because of the fundamental differences between the purposes and operations of the respective programs noted above, public housing principles do not apply to the HCV Program.

On the other hand, this very Court has considered whether a HCV program provision created a federal right enforceable under § 1983 and held in the negative. *Banks v. Dallas Housing Authority*, 271 F.3d 605, 610 (5th Cir. 2001)(construing 42 U.S.C. § 1437e and finding no rights-creating language to justify § 1983 claim). Similarly, this Court's analysis in *Banks* applies to this case.

D. The Section 8 Program Provides No Guarantee That Utilities Consumption, No Matter How Large, Will Be Covered By Governmental Subsidy.

The Ninth Circuit case of *Clary v. HUD, et al.*, 709 F.2d 1307 (9th Cir. 1983), also is helpful to the analysis, albeit decided before QHWRA and during a period where a 25% income cap applied to the Section 8 Certificate

Program. In *Clary*, a Section 8 certificate holder argued that 42 U.S.C. § 1437a(1) constituted a guarantee that his utilities consumption, no matter how large, must always be covered by governmental subsidy. This is nearly the same argument that Appellants make in this case - that housing agencies should provide high enough utility allowances such that tenants should not have to contribute more than 30% of their income toward rent.

The Ninth Circuit expressly rejected this argument, holding that to accept this view ignores the express limitation on the amount of rental assistance HUD should pay. Notably, the court held that “Section 1437a(1) does not go that far; it does not provide that an individual’s actual payments, including rent and utilities, can never exceed 25% (currently 30%) of his income. This decision was rendered before the 30% cap was terminated by QHWRA. The Ninth Circuit went on to hold that the program merely sets standards for determining the tenant “rental” per “dwelling unit.” The concurrence in *Clary* also supports the Appellees’ position in this case. The concurring judge believed that the issue of the amount that an agency provided as a utility allowance was beyond judicial review, stating that Congress intended the ultimate decision-making authority in this area to rest with the agency, not with the courts. *Id.* at 1310 (citation omitted).

II. STATISTICS MAINTAINED BY THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT REVEAL THAT HCV PARTICIPANTS ACROSS THE NATION CUSTOMARILY PAY MORE THAN 30% OF THEIR INCOME TOWARD RENT

According to current HUD statistics, 890,387 households participating in the HCV program, or 49% of all HCV program participants, contribute more than 30% of their adjusted monthly income toward rent.¹ The numbers are slightly higher for households living within the Fifth Circuit – Louisiana, Mississippi, and Texas where 88,099 households, or 51%, contribute more than 30% of their adjusted monthly income toward rent.² These statistics demonstrate that tenants participating in the HCV Program are capitalizing on their ability to live in higher cost areas, and that paying in excess of 30% of income to achieve that goal is an acceptable, or at least commonly occurring, part of the program.

¹ As of April 22, 2005, statistics maintained by HUD’s PIH Information Center system (commonly referred to as “PIC”) demonstrate that there are 1,803,178 HCV households within the United States, of which 890,387 contribute more than 30% of their adjusted monthly income towards rent. This constitutes 49% of all HCV households. See attached letter dated April 28, 2005 and HUD spreadsheet from Ted Taylor, Director of HUD’s Program Support Division, Housing Voucher Program to counsel for HDLI, a copy of which is contained in the Appendix.

² PIC system data demonstrates that there are 171,750 HCV households living within the states of Louisiana, Mississippi, and Texas, of which 88,099 contribute more than 30% of their adjusted monthly income towards rent. This constitutes 51% of all HCV households in these states. See Appendix.

III. PAYMENTS MADE TO RETAIL UTILITY SERVICE PROVIDERS SHOULD NOT BE CONSIDERED PART OF THE DEFINITION OF “RENT” FOR PURPOSES OF DETERMINING SUBSIDY.

In *Crochet v. Tampa Hous. Auth.*, 37 F.3d 607 (11th Cir. 1994), a housing agency utilized a checkmeter utilities system for some years, whereby utilities were supplied to all residents of a particular development through a central meter, and then usage costs were passed through to tenants based upon their utility allowance. Following HUD’s passage of new utilities regulations, the agency announced that it was converting from the checkmeter system to a HUD-supported “retail” system. Under the retail system, the tenants, like most private- market renters, would be required to purchase their electrical power directly from the utility service provider and maintain their own individual accounts. The agency asserted that the conversion was warranted to promote cost-effectiveness and uniformity.

Tenants who would be impacted by the proposed conversion challenged the new policy. They argued that by converting from checkmetering to retail service, and imposing a resultant obligation to pay security deposits and possibly arrearages, the housing agency was affecting an increase in their rent in violation of the Housing Act and of the Brooke Amendment, which is the commonly recognized name for the legislation mandating the 30% cap.

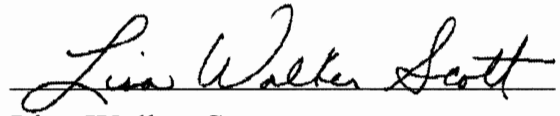
In considering the allegations, the Eleventh Circuit reiterated that PHAs are vested under the Housing Act with “the maximum amount of responsibility in the administration of their housing programs.” *Id.* at 611-12. It went on to note that amounts paid under retail service are not paid to the PHA, but directly to the utility provider. The court then determined that retail service payments should not be included within the HUD definition of “rent.” The court pointed to 24 C.F.R. 913.102 that provides that the cost of utilities “not supplied by the PHA” shall not be considered “rent.” *Id.* at 612. Accordingly, the court found that any additional costs associated with the conversion, i.e., security deposits and arrearages, did not violate either the Housing Act or the Brooke Amendment. *Id.* at 613. The court also rejected various due process challenges.

Although the *Crochet* case involves the public housing program rather than the HCV program, it is nonetheless instructive because the Ninth Circuit considered a utilities payment scheme identical to the way in which HCV participants pay for their utilities, *i.e.*, the retail system. The same principles should apply to the HCV program.

CONCLUSION

For all of the foregoing reasons, HDLI respectfully submits that the decision of the district court should be affirmed.


Respectfully submitted,

A handwritten signature in cursive script that reads "Lisa Walker Scott". The signature is written in black ink and is positioned above a horizontal line.

Lisa Walker Scott
Attorney for Amicus Curiae
Housing and Development Law
Institute

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) because this brief contains 2632 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2000 in Times New Roman 14 point font. The footnotes were prepared in a proportionally spaced typeface using Microsoft Word version 2000 in Times New Roman 12 point font, pursuant to Fifth Circuit Rule 32.1.



Lisa Walker Scott
Attorney for Amicus Curiae
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Dated: May 5,2005

CERTIFICATE OF SERVICE

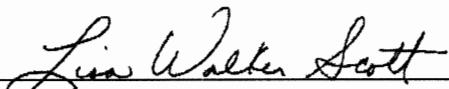
I certify that on May 5, 2005, I served a copy of the foregoing Brief for Amicus Curaie Housing Development Law Institute on all counsel of record via certified U. S. mail, return receipt requested as follows:

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Lisa Walker Scott

APPENDIX

----- Original Message -----

From: ted_taylor@hud.gov

To: [lwalker](#)

Sent: Friday, April 29, 2005 3:27 PM

Subject: Re: Housing Choice Voucher Program Data

April 28, 2005

Lisa Walker Scott
Executive Director & General Counsel
Housing and Development Law Institute
630 Eye St., N.W.
Washington, DC 20001-3736

Dear Mrs. Scott:

Enclosed please find a spreadsheet with the data you requested on households participating in the Section 8 Housing Choice Voucher program who currently pay more than 30% of their adjusted monthly income towards their rent. This information is current through April 22, 2005 and was compiled from HUD's PIH Information Center (commonly referred to as "PIC") computerized data system.

Very truly yours,

A handwritten signature in black ink, appearing to read "Ted Taylor", is written over a horizontal line. The signature is stylized and somewhat cursive.

Ted Taylor
Division Director
Program Support Division
Housing Voucher Program

Enclosure

Section 8 Voucher Households Where 30% of AMI < Rent

State	State Name	Number of Section 8 Voucher Households	Number of Section 8 Voucher Households Contributing More than 30% of Adjusted Monthly Income towards rent	% of Section 8 Voucher Households Contributing More than 30% of Adjusted Monthly Income towards rent
AK	Alaska	3,354	1,887	56%
AL	Alabama	24,427	12,745	52%
AR	Arkansas	20,030	10,130	51%
AZ	Arizona	18,649	9,086	49%
CA	California	269,941	115,921	43%
CO	Colorado	26,511	13,878	52%
CT	Connecticut	29,590	14,631	49%
DC	District of Columbia	8,181	3,659	45%
DE	Delaware	3,098	1,435	46%
FL	Florida	76,659	36,918	48%
GA	Georgia	41,064	19,961	49%
GU	Guam, Pacific Islands	2,405	1,455	60%
HI	Hawaii	10,365	5,264	51%
IA	Iowa	20,238	9,531	47%
ID	Idaho	6,400	3,665	57%
IL	Illinois	70,424	37,816	54%
IN	Indiana	28,157	15,194	54%
KS	Kansas	9,969	5,032	50%
KY	Kentucky	27,046	13,118	49%
LA	Louisiana	32,665	16,300	50%
MA	Massachusetts	62,551	32,031	51%
MD	Maryland	35,601	16,197	45%
ME	Maine	11,632	5,477	47%
MI	Michigan	40,197	21,700	54%
MN	Minnesota	27,491	14,407	52%
MO	Missouri	37,565	19,412	52%
MP	Northern Mariana Islands	242	145	60%
MS	Mississippi	16,460	8,239	50%
MT	Montana	5,515	2,840	51%
NC	North Carolina	49,790	25,568	51%
ND	North Dakota	6,896	3,381	49%
NE	Nebraska	7,838	4,165	53%
NH	New Hampshire	8,100	4,311	53%
NJ	New Jersey	51,138	26,554	52%
NM	New Mexico	12,099	5,517	46%
NV	Nevada	11,041	5,267	48%
NY	New York	177,432	89,143	50%
OH	Ohio	80,692	40,930	51%
OK	Oklahoma	20,385	9,163	45%
OR	Oregon	22,794	10,952	48%
PA	Pennsylvania	56,002	27,709	49%
PR	Puerto Rico	25,645	16,241	63%
RI	Rhode Island	7,713	3,547	46%
SC	South Carolina	21,205	10,574	50%

Section 8 Voucher Households Where 30% of AMI < Rent

State	State Name	Number of Section 8 Voucher Households	Number of Section 8 Voucher Households Contributing More than 30% of Adjusted Monthly Income towards rent	% of Section 8 Voucher Households Contributing More than 30% of Adjusted Monthly Income towards rent
SD	South Dakota	5,177	2,431	47%
TN	Tennessee	28,710	15,274	53%
TX	Texas	122,625	63,560	52%
UT	Utah	9,656	4,673	48%
VA	Virginia	37,206	18,207	49%
VI	Virgin Island	862	464	54%
VT	Vermont	5,924	3,483	59%
WA	Washington	27,703	12,339	45%
WI	Wisconsin	24,791	12,237	49%
WV	West Virginia	13,491	5,676	42%
WY	Wyoming	1,836	947	52%
	totals	1,803,178	890,387	49%