Case Nos. 14-3369 & 14-3371 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOSEPH PEERY, on behalf of himself and all persons similarly situated, Plaintiff-Appellants,

v.

CHICAGO HOUSING AUTHORITY and HOLSTEN MANAGEMENT CORPORATION, Defendant-Appellees.

DEANN STUBENFIELD, JESSICA STUBENFIELD, DEBORAH THIGPEN, and SHARON THOMPSON, Plaintiff-Appellants,

v.

CHICAGO HOUSING AUTHORITY and THE COMMUNITY BUILDERS, INC., Defendant-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois
Nos. 1:13-cv-05819, 1:13-cv-06541
The Honorable Sharon Johnson Coleman, United States District Judge

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BRIEF BY *AMICI CURIAE* THE CENTRAL ADVISORY COUNCIL, THE LATHROP HOMES LOCAL ADVISORY COUNCIL, THE CABRINI-GREEN LOCAL ADVISORY COUNCIL, THE HENRY HORNER LOCAL ADVISORY COUNCIL, THE HENRY HORNER RESIDENTS COMMITTEE, THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC., THE LAWYERS' COMMITTEE FOR BETTER HOUSING, THE HOUSING INITIATIVES CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL, JAMIE KALVEN OF THE INVISIBLE INSTITUTE, THE LOGAN SQUARE NEIGHBORHOOD ASSOCIATION, THE CHICAGO HOUSING INITIATIVE, THE CHICAGO COALITION FOR THE HOMELESS, THE UPTOWN PEOPLE'S LAW CENTER, ROBERT WHITFIELD, DAVID RODRIGUEZ OF THE DEPAUL UNIVERSITY POVERTY LAW CLINIC, AND THE SARGENT SHRIVER

NATIONAL CENTER ON POVERTY LAW, INC. IN SUPPORT OF THE PLAINTIFF-APPELLANTS

Piotr E. Korzynski
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
155 N. Wacker Drive, Suite 2700
Chicago, Illinois 60606
T: (312) 407-0700
F: (312) 407-0411
E: piotr.korzynski@skadden.com

Katherine E. Walz
SARGENT SHRIVER NATIONAL
CENTER ON POVERTY LAW, INC.
50 E. Washington Street, Suite 500
Chicago, Illinois 60602
T: (312) 368-2679
F: (312) 263-3846
E: katewalz@povertylaw.org

Counsel for Amici Curiae

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IDENTITY AND INTERESTS OF AMICI CURIAE

The Central Advisory Council ("CAC") is a public housing, jurisdiction-wide resident council organization representing Chicago Housing Authority residents. The CAC was formed, and is organized under federal regulations promulgated by the United States Department of Housing and Urban Development ("HUD"), at 24 C.F.R. Part 964. The CAC Board of Directors consists of public housing residents who have been elected by CHA residents to serve as presidents of resident councils of CHA developments where they currently or formerly resided. Appellee CHA and HUD have recognized the CAC as the duly elected jurisdiction-wide resident council representing CHA public housing residents. The presidents and other elected officers of the resident councils of CHA developments serve on the working groups in existence at most of the developments. These resident council representatives on the working groups have directly witnessed the flimsy democracy in place within the working group structure. The decision in this case about CHA's role in drug testing certain applicants and residents of public housing has a significant, direct effect on the CAC and the public housing residents it represents. The CAC believes that if the district court decision is allowed to stand, which the CAC submits is based upon a misunderstanding of the role and decision-making authority of the working groups, it will adversely affect the thousands of residents it represents. The CAC has long opposed the drug testing of public housing residents and will continue to do so.

The Lathrop Homes Local Advisory Council ("LAC") is the elected residents' council at the Julia C. Lathrop Homes, a public housing development on Chicago's North Side. The experience of the Lathrop Homes LAC with the Lathrop Working Group was that CHA often took action on major issues without consulting or informing the Lathrop Working Group – including on issues that had been discussed previously. The Lathrop Homes LAC has observed that CHA staff control the agenda and scheduling of working group meetings. On several occasions, CHA took action on major development issues over the vocal objections of Lathrop Working Group members. CHA also attributes to the working group decisions that CHA decided without consulting the working group. The Lathrop Homes LAC opposes the drug testing of public housing residents and was a part of the 2011 campaign opposing it when CHA proposed to drug test all public housing residents.

The Cabrini-Green LAC is the elected governing body that advocates for the current residents of Frances Cabrini Homes (Cabrini Rowhouses). The Cabrini Green LAC also represents those residents that have the right to return to Cabrini as former residents of the community. The Cabrini-Green LAC participates in the Cabrini-Green Near North Working Group and has personally witnessed CHA's control over the working group and unilateral determination as to what issues will go before the working group. It has been the experience of the Cabrini-Green LAC, even as a 40% owner of Parkside, that on matters where CHA's position is in conflict with working group members, CHA will simply not bring it before the working group or ignore the position of members of the working group and make its

own decision. The Cabrini-Green LAC has been a long time opponent of drug testing of public housing residents, both at Cabrini and during CHA's 2011 attempt to expand drug testing to all public housing residents.

The Henry Horner LAC is the elected governing body that advocates for the residents of the Henry Horner Homes. The Henry Horner LAC participates in the Horner Working Group and has personally witnessed CHA's control over the working group and unilateral determination as to what issues will go before the working group. The Henry Horner LAC opposes drug testing of public housing residents, both at Horner and for all public housing residents.

The Horner Residents Committee is a group of elected building, block, or area presidents at the Henry Horner Homes, who by virtue of a consent decree, *see e.g., Henry Horner Mothers Guild v. Chicago Housing Authority*, 780 F. Supp. 511 (N.D. Ill. 1991)(denying the defendants' motion to dismiss), consult and attempt to reach agreement with CHA and Horner developer on all matters related to the redevelopment of the Henry Horner Homes. Members of the Horner Residents Committee also serve on the Henry Horner LAC and have witnessed CHA's control over the working group and unilateral determination as to what issues will go before the working group. The Horner Residents Committee opposes drug testing of public housing residents, both at Horner and at other public housing developments.

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. ("CLC") is the public interest law consortium of Chicago's leading law firms. CLC provides free legal services to people with civil rights problems and nonprofit organizations that

need help with transactional issues. Its mission is to protect and promote civil rights by bringing the strength and prestige of the private bar to bear on the problems of poverty and discrimination. The goal of CLC's Fair Housing Project is to eliminate all forms of housing discrimination, and to affirmatively further fair housing in the Chicago metropolitan area. The Project carries out this mission through education, policy advocacy, investigations, and enforcement of fair housing laws. Throughout its history, CLC has advocated that people of color and people with low incomes have full and equal access to housing in Chicago and has represented residents of CHA's public housing. CLC therefore supports the elimination of unnecessary policies and practices, such as drug testing, which restricts the availability of affordable housing to them.

The Lawyers' Committee for Better Housing ("LCBH") is a non-profit law firm providing free-legal representation to low-income renters in Chicago's eviction court. LCBH has authored several publications on Chicago's high volume eviction courts, where pro se, low-income renters, including public housing residents, are often evicted from their homes without a meaningful hearing or opportunity to present defenses. Many of LCBH's clients are also currently on the waitlist for public housing. LCBH has observed how the lack of affordable housing impacts LCBH's ability to resolve client cases or ensure that clients will not be rendered homeless as a result of an eviction. LCBH opposes unnecessary policies, such as drug testing, that create additional barriers to affordable housing, especially those policies that harm low-income renters and leave them with fewer housing options.

The Housing Initiative Clinic is a transactional clinic at the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic. The Housing Initiative Clinic provides legal representation to community-based housing developers, tenant groups, and other parties involved in affordable housing development, real estate transaction, and affordable housing finance; and engages in community organizing and policy advocacy around affordable housing and public housing issues. The clinic has been a part of the Working Group at the Cabrini Green and Henry Horner public housing developments in Chicago and has observed CHA making decisions on major issues when there was no consensus in support of those actions from the working groups.

Jamie Kalven is a journalist and consultant. From 1998 to 2006, he served as technical advisor to the Stateway Gardens LAC. Since 2005, he has served, under the consent decree in *Henry Horner Mothers Guild v. Chicago Housing Authority*, as consultant to the Horner Residents Committee. In both roles, he has sat on CHA working groups and has witnessed how deficient those entities are in terms of meaningful participation of public housing residents in decisions bearing on the communities where they live. As a journalist, Kalven has written extensively about the human costs of drug enforcement in public housing. On the basis of his professional experience as a journalist and consultant, Kalven opposes the drug testing of public housing residents.

The Logan Square Neighborhood Association ("LSNA"), founded in 1962, is a non-profit, multi-issue community organization serving Chicago's Logan Square,

Avondale, Hermosa and Lathrop Homes communities. LSNA has worked closely with residents of the Lathrop Homes, a Chicago Housing Authority (CHA) development, for more than 25 years. LSNA has participated in CHA's Lathrop Homes Working Group since 2009. LSNA has observed CHA making decisions on major issues when there was clearly no consensus in support of those actions on the Lathrop Homes Working Group. CHA on several occasions has also taken actions on major issues without informing the Working Group. LSNA opposed the proposed expansion of drug testing to all public housing residents in 2011 and is opposed to the drug testing of public housing residents at any developments.

The Chicago Housing Initiative ("CHI") is a coalition of 8 community-based organizations whose mission is to amplify the voice of low-income families in their efforts to improve, preserve, and expand affordable housing.. Since 2007, CHI and its member organizations have supported the organizing efforts of the LACs and public housing residents to preserve at-risk CHA developments and advocate for CHA's full use of available public housing units and Housing Choice Vouchers. CHI's Governance Board is composed of 50% (8) federally subsidized renters living in public and project-based section 8 housing and formerly homeless individuals.

CHI's experience has been that CHA defines redevelopment plans and management policies without meaningful consultation of residents or waitlisted households. CHI has documented that families on CHA's waiting lists have so few options to access affordable housing that they are effectively forced to agree to any

terms and conditions CHA places on their access to housing. In 2011, CHI opposed the proposed drug testing of all public housing residents in residents and opposes the drug testing of residents in the mixed-income developments.

The Chicago Coalition for the Homeless ("CCH") is a non-profit organization that has a clear mission: to organize and advocate to prevent homelessness based on its belief that housing is a human right in a just society. CCH is the only non-profit in Illinois focused an advocating on behalf of individuals and families who are homeless or at risk of homelessness. A foremost concern of CCH is to ensure that all persons experiencing especially extreme poverty have full and fair access to safe, decent and affordable housing. CCH recognizes the serious dangers and indignities suffered by persons who lack affordable housing, including the loss of civil rights and the impact of discrimination barring access to housing. Accordingly, eliminating any policy or practice that operates to eliminate housing opportunities for individuals who are homeless or at risk of homelessness, such as drug testing, is critical to CCH's mission.

The Uptown People's Law Center is a not-for-profit legal clinic, serving poor and working people in Uptown and other communities on Chicago's northside. Among its other areas of work, the Law Center annually represents scores of people who reside in, or are attempting to gain entry to, CHA's scattered site housing, including individuals threatened with eviction by CHA due to alleged drug-related criminal activity. The vast majority of the problems which the Center's clients have involve drugs: old arrests for drugs, false accusations by the police that a child

possessed drugs, etc. The Law Center also represents hundreds of people locked in Illinois' prisons in class action cases regarding mental health care, medical care, and several others. As a result of this work the Law Center is aware of the disparate racial impact the drug laws have on poor people generally, and on minorities in particular. The Law Center opposes the drug testing of public housing residents.

Robert Whitfield is a private attorney, longtime low-income housing advocate, and expert on public housing and civil rights. From 1999 to 2014, Mr. Whitfield served as well as the legal counsel for the Central Advisory Council (CAC), the jurisdiction wide public housing organization representing CHA public housing residents. During that same time, Mr. Whitfield served as the legal counsel for the majority of the LACs and represented their interest on CHA working groups. Prior to that time, from 1988 to 1994, Mr. Whitfield served as the Chicago Housing Authority's General Counsel and Chief Operating Officer. Mr. Whitfield has a strong interest in the possible negative impact (and legality) of CHA drug testing policies in CHA mixed finance. Mr. Whitfield believes that the drug testing policy violates the Constitutional rights of CHA applicants and current public housing residents. Mr. Whitfield personally witnessed the lack of a decision making role by the working groups.

David Rodriguez is a visiting assistant professor at DePaul University College of Law where he has taught the Poverty Law Clinic since 2011. The Poverty Law Clinic primarily represents indigent families in eviction lawsuits filed

by the Chicago Housing Authority, especially eviction lawsuits predicated on allegations of misdemeanor criminal activity. Virtually all of the eviction cases involve allegations based upon the mere arrest of the individual who lives in subsidized housing. Prior to joining DePaul University College of Law, Mr. Rodriguez practiced at the Legal Assistance Foundation of Chicago from 2006 through 2011, focusing on public housing eviction actions and Section 8 voucher termination proceedings. In both positions, Mr. Rodriguez has advised and represented persons in traditional public housing and mixed-income housing. Through his experience, Mr. Rodriguez is also uniquely situated to address the methods of lease enforcement regularly employed by the Chicago Housing Authority, including "one-strike" eviction actions.

The Sargent Shriver National Center on Poverty Law, Inc. ("Shriver Center") is a national non-profit legal and policy advocacy organization based in Chicago. The Shriver Center's housing unit primarily focuses its work on public and subsidized housing, fair housing, and the housing rights of survivors of violence. As counsel to the Henry Horner Residents Council and counsel to other public housing residents in Chicago, the Shriver Center has observed how CHA controls the working group process and deprives the participating residents of the opportunity to decide matters with respect to their community. The Shriver Center has also advocated for less aggressive enforcement of "one-strike" eviction policies, including its use against minors and persons who have only been arrested or accused of a crime. In 2011, the Shriver Center opposed the proposed drug testing of residents

in the traditional public housing and opposes drug testing in the mixed-income developments.

SUMMARY OF THE ARGUMENT

Amici oppose the drug testing of public housing residents, as it stigmatizes and stereotypes low-income households and deprives them of their Constitutional rights. In erroneously deciding there was no state action involved in the drug testing of renters who live in CHA mixed-income public housing developments, the district court misunderstood the inherent nature of CHA's working groups, of which many *amici* are a part of, which lack real decision making authority over redevelopment matters, including tenant selection criteria. Ultimately, all decision making authority over redevelopment matters, including tenant selection criteria, is solely with CHA. Contrary to the district court's opinion, public housing residents who oppose drug testing have unequal and much more limited housing choices than that of market rate renters who oppose drug testing. They cannot simply quickly move to other housing to avoid the Constitutional injury. For most public housing residents like the Appellants, they may languish on a waitlist for another public housing unit or different housing subsidy. Even worse, residents evicted from a public housing unit for challenging CHA's drug testing policy will find it next to impossible to ever return to public housing again. Finally, although CHA waived its argument that there were "special needs" excusing the ordinarily applicable Fourth Amendment warrant and probable-cause pre-requisites to a government search, CHA's sweeping and harmful use of "one-strike" eviction policies to evict

households for allegations of drug-related criminal activity more than satisfy any special needs. The Court should reverse the decision of the district court denying Appellants' motions for preliminary injunction, and remand with instructions to enter preliminary injunctions.

ARGUMENT

I. *Amici* Oppose Drug Testing and Its Stigmatization of Public Housing Residents.

Amici CAC is a public housing, jurisdiction-wide democratically elected resident council organization representing CHA residents. The public housing residents of each public housing development are also represented by resident-led and democratically elected LACs. Elected presidents of the LACs are members of the CAC. CHA recognizes the CAC and the LACs as the sole representatives of CHA public housing residents, as required by federal regulation. 24 C.F.R. § 964.18(a)(1).

The CAC, LACs, and many *Amici* have long voiced their opposition to drug testing of public housing residents. *Central Advisory Council (CAC) 2012 Strategies and Recommendations Report*, App. D at 4 (Aug. 21, 2012), *available at* http://www.uic.edu/cuppa/voorheesctr/Publications/CAC_FINAL_REPORT_8_20_2012.pdf. The CAC and LACs, in addition to the other *Amici,* also strongly objected to CHA's 2011 proposal to amend its Admissions and Continued Occupancy Policy and lease drug test residents in the remaining public housing developments. *See, e.g.*, *id.* at 3-4; Mary C. Piemonte, *Tenants Protest CHA Drug Testing Plan,* We The People Media Residents' Journal (June 9, 2011),

http://wethepeoplemedia.org/homepage/public-hearing-on-cha-drug-test-proposal/. This opposition ultimately led to CHA's decision not to move forward with expanding its drug testing policy to the remaining public housing developments. Mary C. Piemonte, *Board Squashes CHA Drug Testing Plan*, We The People Media Residents' Journal (June 21, 2011), http://wethepeoplemedia.org/homepage/board-squashes-cha-drug-testing-plan/#more-3065; Plaintiffs' Joint Hearing Exh. 1 (Chicago Sun-Times article).

Moreover, as a part of the CAC's 2012 Strategies and Recommendations Report, the CAC commissioned a survey of current and former public housing residents on a range of matters concerning CHA policies and procedures, including CHA's drug testing of residents. *See Central Advisory Council (CAC) 2012 Strategies and Recommendations Report*, App. D. Of the 542 survey respondents, the CAC found that "a strong majority of respondents, 58.2%, do not support drug testing for any resident population." *Id.* at 4. These findings and the position of *Amici* with respect to drug testing directly contradict representations made by CHA's counsel in the district court that only a "vocal minority, 5 out of 10,000" of residents oppos[e] drug testing. *Peery* Dkt. 80, Motion to Dismiss Tr. 12:17-20 (quote from defendant's counsel). *Amici* consider the drug testing of public housing residents to be a dehumanizing and degrading requirement that stereotypes public

housing residents[1] and forces them to choose between living in affordable housing in a community of their choice or preserving their Constitutional rights.

Those feelings of stigma and humiliation by residents of mixed-income developments that drug test are well documented. In a study of three mixed-income CHA developments, including the Oakwood Shores development where one of the Appellants resides, a majority of public housing residents interviewed reported new forms of stigmatization resulting from the stringent screening and rule enforcement at these developments, including drug testing. Robert Chaskin & Mark Joseph, *The New Public Housing Stigma in Mixed-Income Developments*, at 9 (Mar. 2013), *available at* http://ssascholars.uchicago.edu/mixed-income-development-study/files/chaskin_study_8_web.pdf. These residents reported "feeling singled-out and differently treated by the administrative procedures of the …(CHA) and development staff" by such screening. *Id.* at 2. To overcome this increased stigmatization, the study's researchers recommended that CHA "distinguish between general stereotypes and perceptions from the actual conduct of specific residents in the developments" by focusing more carefully on those who are not following the rules. *Id.* at 9. CHA aggressively, but not necessarily carefully,

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[1] *Amici* understand that CHA drug testing policy is applied to all renters, not just public housing residents. They submit the stigma is particularly born by public housing households, who already face other forms of stigma as residents of public housing. *See* Robert Chaskin & Mark Joseph, The New Public Housing Stigma in Mixed-Income Developments, at 2 (Mar. 2013), available at http://ssascholars.uchicago.edu/mixed-income-development-study/files/chaskin_study_8_web.pdf.at 2. Public housing residents, due to their need for affordable housing, also lack the same or equal housing choices as higher income private market renters. *See, e.g.,* Section III.

pursues those allegedly in violation of public housing regulations without minding such distinctions. Section IV, *infra*.

Indeed, HUD's policies governing public housing authority ("PHA") admission are consistent with study's recommendation that focus should be on the actual conduct of specific individuals. HUD regulations require that all PHA admission policies be based on individual attributes and/or the individual behavior of the PHA applicant. See 24 C.F.R. § 960.203(a). Accordingly, these drug testing policies are opposed by *Amici,* as they violate federal law and regulations and stigmatize the residents subjected to them.

II. The District Court Misunderstood The Inherent Nature and Working of CHA's Working Groups As Consultative and Not Decision Making Bodies.

The district court decided that there was no state action involved in the drug testing of renters who live in CHA mixed-income public housing developments. Appellants' Appendix ("App.") 7 -10. In making that decision, the district court surmised that "[t]he working groups had the authority to accept, reject, or make suggestions and revisions to the tenant selection plans and leases before putting them up for comment" with those working groups including the developers, the elected resident representatives, and CHA. App. 10. The district court also decided that "[t]he evidence in the record demonstrates that CHA acquiesced in the inclusion of the drug testing policy, but that it otherwise took no affirmative position." App. 11. To the extent the district court's decision was based upon the working group's role in approving drug testing, this was inaccurate. The working

groups, of which many *Amici* are a part of, *see* Identity and Interests of Amici Curiae, are not decision making bodies and are, in any event, ultimately controlled by CHA. Robert Chaskin, Amy Khare & Mark Joseph, *Participation, Deliberation, and Decision Making: The Dynamics of Inclusion and Exclusion in Mixed-Income Developments,* 48 Urban Affairs Rev. 863, 875 (2012), *available at* http://gallery.mailchimp.com/90054719b11d39adfa348e50f/files/Chaskin_Khare_Joseph.2012.Participation_Deliberation_Decision_Making_in_MI_Developments.UAR.pdf. First, membership within the working groups is tightly controlled by CHA. *Id.* Second, working group meetings are facilitated by CHA. *Id.* at 877. Third, the working groups consider matters brought to their attention on a consensus basis. *Id.* at 875. Where consensus cannot be reached, meaning that not all parties to the working group, including CHA, uniformly agree on a position, CHA then has the final say. *Id.* CHA has been routinely accused of bypassing the working group process. In 2014, working group members, including Lathrop Homes LAC representatives, the local City Council aldermen, and community members, accused CHA of seeking public financing on a redevelopment plan for the Lathrop Homes site that had not been approved or vetted by the working group. *See e.g.,* Mark Brown, *CHA Maneuvering On Lathrop Homes An Unfortunate Development*, Chicago Sun Times (June 23, 2014), *available at* http://chicago.suntimes.com/uncategorized/7/71/218955/cha-maneuvering-on-lathrop-homes-an-unfortunate-development. CHA's responses to criticism that it made decisions outside of the working group further illustrate this point. As part of

the public comment period to CHA's proposed FY 2012 Moving To Work Annual Plan – Plan For Transformation Year 13, then CAC counsel noted that "[t]he CHA Board of Commissioners stressed the importance of CHA residents participating in CHA Working Groups. Participation in CHA Working Group Meetings is . . . meaningless if critical decisions continue to be made without involvement of all members of CHA Working group, including CHA resident members of the Working Group." Public Comments*, Amended FY 2012 Moving to Work Annual Plan – Plan For Transformation Year 13*, CHA, at 89 (Mar. 27, 2012), *available at* www.thecha.org/file.aspx?DocumentId=1222. In response to CAC Counsel's comment, CHA responded in part by stating that: "[d]eveloping a consensus among a diversity of opinions is a time intensive process that CHA takes seriously. CHA will continue to seek input from all members of the working groups for consideration prior to rendering its decisions." *Id.* In those same responses to public comments to the FY 2012 Moving To Work Annual Plan, CHA further clarified the working group's lack of a decision making role: "The purview of working groups is to provide CHA input on the redevelopment of a site into a mixed-income community." *Id.* CHA's control over decisions has also been the source of litigation, where CHA was accused of bypassing the working group process to issue its own decision on redevelopment matters. *See Cabrini Green Local Advisory Council v. CHA,* No. 1:13-cv-03642, Compl. ¶ 60 (N.D. Ill. filed May 16, 2013) ("[CHA Interim CEO Carlos Ponce] advised the [Cabrini Green] working group that 'CHA has determined that it will not support the row house property remaining as

100 percent public housing. Rather, CHA will actively support the creation of a mixed-income community at the property."); *see also Public Comments to the Proposed FY 2012 Moving to Work Annual Plan – Plan For Transformation Year 13, supra,* at 89. Thus, the ultimate decision making authority on development matters, including tenant selection criteria, rests firmly with CHA.

III. Public Housing Residents Should Have Not To Choose Between Housing Of Their Choice And Their Constitutional Rights.

The district court found that "plaintiffs' choice to remain at Parkside and Oakwood Shores despite the drug testing policies at each when they had options for units in nearby developments without the drug screening was not coerced or the product of duress." App. 13. The district court also found that there was "no constitutional right to public housing at any particular location." *Id.* at 12-13. These findings ignore the fact public housing residents like the Appellants have unequal and much more limited housing choices than that of market rate renters. First, many public housing residents, like the Appellants, have rights guaranteed under the Relocation Rights Contract. Exh. 6 (CHA's RRC) 6. The Relocation Rights Contract is an agreement negotiated between the Central Advisory Council and CHA in 2000, which provides certain rights and protections to CHA residents who were living in public housing on October 1, 1999 and were affected by CHA's multi-year transformation of public housing. CHA is one of several PHAs approved to participate in the HUD Moving To Work Demonstration ("MTW") program. As a condition of its entry into the MTW Program, HUD required CHA to negotiate an agreement with the resident in order to ensure that their housing rights and choices

were protected. Memorandum of Approval Resident Protection Agreement Moving to Work Agreement (Feb. 6, 2000), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_10292.pdf. Households protected by the Relocation Rights Contract are provided with a "right to return to a newly constructed or rehabilitated public housing unit." Exh. 6 (CHA's RRC) 6. The contract sets forth a process that, "to the maximum extent possible" CHA will house Relocation Rights Contract covered households in their preferred housing choice. *Id.*. This "preferred housing choice" is constrained in two ways: (1) CHA will make two offers of housing units and the failure to accept the second offer "will result in the loss of right of return under this contract"; and (2) the residents' selection of their permanent housing choice will limit their ability to move again. *Id.*; Exh. 34 (ACOP) 31–34.

For example, once the resident has been given their permanent housing choice and initially met the site-specific requirements such as regular drug testing, just as the Appellants did, they are only able to seek to move again under a resident-initiated transfer. *Id.* at 33. Resident-initiated transfers are the lowest priority transfer category for CHA, and based upon available units of the correct size for the subject household. *Id.* at 31 -34. The Relocation Rights Contract also prioritizes the move of fourteen other types of relocatees *before* a resident who has been "permanently housed" and who initially met the site-specific requirements can make a subsequent move to another public housing unit. Exh. 6 (CHA's RRC) 12. Transfers to other public housing are further hampered by a well-documented lack

of available units of public housing in Chicago due to CHA's failure to lease and maintain thousands of vacant "offline" public housing units despite having millions in unspent funds. *See,, e.g.*, Chicago Housing Initiative, *CHA Accountability: Offline Unit Summary* (Apr. 29, 2014), *available at* http://www.chicagohousinginitiative.org/blog/cha-accountability-offline-unit-summary; CHA, *Offline Unit Summary*, *available at* http://www.thecha.org/about/plans-reports/offline-unit-summary/; Center for Tax and Budget Accountability, *A Fiscal Review of the Chicago Housing Authority* (July 30, 2014), *available at* http://www.ctbaonline.org/sites/default/files/reports/ctbaonline.org/file/ajax/field_report_file/und/form-S0zfZHckLwj0_BzMRBmZQspEY6FGXyzK1QNyQoY8jSk/1407874531/R_2014.07.30_A%20Fiscal%20Review%20of%20the%20Chicago%20Housing%20Authority.pdf. At the Cabrini Rowhouses, for example, where Appellant Peery initially sought to move to but was denied, out of 584 public housing units there, an estimated 438 units are vacant and "offline" meaning that they are unavailable for leasing. *See Offline Unit Summary*.

The Housing Choice Voucher program is also not a reliable replacement housing option for public housing residents who refuse to be drug tested. First, public housing residents are not universally eligible to simply switch from public housing to the Housing Choice Voucher program. Residents who live in public housing are only eligible if they are covered by the Relocation Rights Contract and

have not yet accepted their permanent housing choice. Exh. 6 (CHA's RRC) 24. Once the public housing resident has accepted their permanent housing choice, a Housing Choice Voucher is only available to that resident by applying to the Housing Choice Voucher waitlist. *Id.* The Housing Choice Voucher waitlist is closed as of the filing of this brief. In 2014, more than 282,000 households applied to CHA's lists for public housing, property rental assistance, and the voucher program. *See, e.g.*, Press Release, *CHA Waitlist Lottery Officially Closes as More Than 282,000 Households Register for Affordable Housing,* CHA (Nov. 25, 2014), *available at* http://www.thecha.org/cha-waitlist-lottery-officially-closes-as-more-than-282000-households-register-for-affordable-housing/; Jonah Newman, *CHA Wait List Exposes Chicago's Affordable Housing Crisis,* Chicago Reporter (Nov. 26, 2014), http://chicagoreporter.com/cha-wait-list-exposes-chicagos-affordable-housing-crisis/. Prior to 2014, the Housing Choice Voucher list had not been opened since 2008. Newman, *supra.* Even for those residents who can secure vouchers, the vast majority of households with Housing Choice Vouchers live in high-poverty, racially segregated parts of the City of Chicago. *See Are We Home Yet? Creating Real Choice for Housing Choice Voucher Families in Chicago,* Illinois Assisted Housing Action Research Project, at 6 (2010) (finding that most voucher holders live in areas that are more than 60% African American and above the City poverty level).[2] CHA

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[2] In the interest of full disclosure, Katherine E. Walz, co-counsel for *Amici*, co-authored the *Are We Home Yet?* report.

acknowledged that, as of 2011, 65 percent of all relocated public housing families using vouchers had moved to areas where the poverty rate was above 23 percent. *See* CHA, *The Plan for Transformation: An Update on Relocation* 16, 26 (2011) ("CHA Relocation Update"). This segregation and lack of choice among voucher households are due in part to documented discrimination against CHA tenants with vouchers in Chicago, which makes attractive neighborhoods difficult to secure. Chicago Lawyers' Committee for Civil Rights under Law, *Final Report, Fair Housing Testing and Survey Project for the Chicago Housing Auth. Contract no. 1048,* at 3, http://cafha.net/wp-content/uploads/2014/02/CLCCRUL-CHA-testing-report.pdf (finding there was "widespread refusal to rent to Housing Choice Voucher holders, particularly African-American voucher holders, and steering them away from opportunity areas, [which] are serious obstacles to fair housing and integration").

Thus, public housing residents would have to pay a heavy price for protecting their Constitutional rights and refusing to be drug tested. Indeed, such residents face a housing Hobson's choice: either submit to a drug test and receive desired housing or be forced to move from their preferred housing choice to languish potentially for years on a transfer list with limited public housing replacement options or to wait years more for a voucher that will likely result in them living in high-poverty, racially segregated neighborhoods.

A. Public Housing Residents Who Refuse To Be Drug Tested Will Be Evicted From Public Housing And Will Be Unable to Return to Other Public Housing.

Finally, the district court presumed there would be little consequence if a public housing resident was evicted for refusing to be drug tested, noting that it would only be an "[e]viction from that particular unit." App. 12. But residents evicted from public housing for refusing to be drug tested would have to place themselves on CHA's closed public housing waitlist. *See, e.g.*, Press Release, *CHA Waitlist Lottery Officially Closes as more than 282,000 Households Register for Affordable Housing*; Newman. The average wait time for applicants who are on CHA's traditional family public housing waitlist is 3.5 years. *See* Newman.

What is more, pursuant to the Admissions Screening Criteria in CHA's Admissions and Continued Occupancy Policy, public housing applicants "with negative findings from this housing authority…will be reviewed. This burden shall be on the applicant to provide evidence to show the negative finding(s) was not the fault of the applicant." Thus, CHA would be free to review and reject an applicant who likely waited years to arrive at the application stage who was previously evicted from public housing for refusing to be drug tested. Contrary to the district court's view, Appellants and other public housing residents who have refused or want to refuse to be drug tested do so at great risk to their chance of ever securing public housing again. Indeed, public housing residents bear a far greater risk—loss of their public housing and likely homelessness—than that of market rate renters who have the means to more easily secure another market rate unit that does not drug test. *See, e.g.*, *Out of Reach 2014*, National Low-Income Housing Coalition,

available at http://nlihc.org/sites/default/files/oor/OOR2014_Introduction.pdf (finding that for every 100 extremely low income households nationally, there are just 31 affordable and available units and that most newly constructed rental units nationally are for high income households.)

IV. CHA's Drug Testing Policy Already Has, and Exercises, Ample Eviction Powers to Prevent Drug Abuse and Reduce the Potential for Drug-Related Crimes at Public Housing Sites.

Because CHA waived its argument that there were "special needs" excusing the ordinarily applicable Fourth Amendment warrant and probable-cause pre-requisites to a government search, the district court never heard testimony regarding CHA's purported special needs and any means by which they are already addressed. *See Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)). Such testimony would have revealed that CHA has no compelling government interest justifying the grave privacy intrusion caused by drug testing given its existing eviction powers to achieve the same ends motivating the policy. CHA's initially proffered special needs of preventing drug abuse and reducing the potential of attracting drug-related crimes to public housing are already met by CHA's oft-exercised and substantial eviction powers, based on publicly available data and many of *Amici*'s own experiences. *See e.g.,* Identity and Interests of Amici Curiae. Consequently, CHA could not show any special need for the policy to balance against the grave privacy intrusion it inflicts on the subject public housing residents in violation of their Fourth Amendment rights.

A. Through A Strict "One-Strike" Eviction Policy For Criminal and Drug-Related Activity, CHA Has, And Exercises, Federally Granted Authority To Evict Tenants To Deter Drug Abuse And Reduce The Potential of Attracting Drug-Related Crimes To Public Housing Sites.

Currently, CHA carries out sweeping tenant evictions through a "one-strike" policy under the Anti-Drug Abuse Act of 1988 (the "Act") that specifically targets prevention of drug abuse and deterrence of drug-related crimes at public housing sites. As amended, the Act provides that each "public housing agency shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." 42 U.S.C. § 1437d(*l*)(6); CHA FY 2011 Residential Lease Agreement, Pt. 1, Sections 8(n)(2)-(3), 16(b)(5), *available at* http://www.thecha.org/file.aspx?DocumentId=1002 ("CHA Residential Lease") (utilizing such a provision); Parkside of Old Town Lease for Joseph Peery, Peery Dkt. 35-1, at 7 (same); Oakwood Shores Leases, Stubenfield Dkt. 31-1 to 31-3, 31-5, Sections 12(xxi)-(xxv), (xxvii) (same).[3] Any tenant evicted under such a provision is barred from public housing for 3 years, unless that tenant completes a drug rehabilitation program approved by a PHA. 42 U.S.C. § 13661(a).

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[3] Criminal and drug-related criminal activity get similar treatment in tenant leases and eligibility across federal housing programs. *See generally* Lawrence R. McDonough & Mac McCreight, *Wait A Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth*, 41 Clearinghouse Rev. 55, 62-67 (2007) (discussing application to programs like Section 8 Vouchers and Moderate Rehabilitation Program).

Congress imposed the eviction provision requirement to target "rampant drug-related or violent crime" within public and other federally assisted low-income housing. 42 U.S.C. § 11901(2). Following subsequent HUD regulations, HUD interpretations and judicial interpretations, PHAs such as CHA have developed and enforced strict and sweeping "one-strike" eviction policies under which public housing tenants and their families are evicted and barred from public housing for three years notwithstanding tenuous connections to drug-related activity or even affirmative acts to prevent such activity. *See, e.g.*, Angela Caputo, *One and Done*, The Chicago Reporter, Sept./Oct. 2011, *available at* http://chicagoreporter.wpengine.netdna-cdn.com/wp-content/blogs.dir/44/files/archive/05%20TCR_SeptOct11.pdf (reporting on CHA's use of such a policy and statistics on its use between 2005 and 2010); Jamie Kalven, *One Strike Discussion on WBEZ*, The View from the Ground (June 7, 2002), http://www.viewfromtheground.com/archive/2002/06/one-strike-discussion-on-wbez.html (recounting a CHA tenant's eviction under the policy for her son's drug-related criminal activity despite her near-heroic efforts to stop him).

Ostensibly, PHAs have wide discretion in enforcing the mandated lease provision. The provision text does not require eviction; instead, a housing authority has discretion to do so. *HUD v. Rucker*, 535 U.S. 125, 133-34 (2002) (observing this and noting § 1437d(*l*)(6) "entrusts that decision [on eviction] to the local public housing authorities . . ."). HUD regulations, which largely reinforce and track the language of § 1437d(*l*)(6), *see* 24 C.F.R. § 966.4(l)(5)(i)-(vii), explicitly permit the

PHA to "consider all circumstances relevant to a particular [eviction] case," including the seriousness of the offending action, the extent of the leaseholder's participation in it, the effects of eviction on the leaseholder's family and the leaseholder's demonstration of personal responsibility. 24 C.F.R. § 966.4(l)(5)(vii)(B).

Within this legal framework, CHA exercises such sweeping eviction powers through its own § 1437d(*l*)(6) one-strike policy to target drug activity. That policy provides that CHA may initiate eviction proceedings if it becomes aware of a "covered person"—i.e., leaseholder, household member, guest, or other person under tenant's control—engaging in criminal or drug-related criminal activity, no matter how minor and without regard for whether such covered person has been arrested for that activity, or if arrested, whether he or she is ultimately convicted. Caputo, *One and Done*, *at 12* (quoting CHA lawyer as observing that "[i]f we [, i.e. CHA,] get an arrest report and the charge . . . is an offense that will end somebody's eligibility . . . , we pursue it"); Jamie Kalven, *One Strike: Introduction*, The View from the Gound, (June 17, 2002), http://www.viewfromtheground.com/archive/2002/06/one-strike-introduction.html (discussing CHA's policy on the heels of the Supreme Court's *Rucker* decision). For swifter, more efficient enforcement, CHA has a long-standing agreement with the Chicago Police Department under which arrests of people with public housing addresses and arrests on public housing property are automatically reported to the agency. *See* Caputo, *at 12.*

Between 2005 and 2010, CHA opened 1,390 one-strike eviction cases. *Id.* In 84% of those cases, the primary leaseholder was not responsible for the triggering arrest. *Id.* At 16. That is, in a vast majority of cases, the tenants subject to eviction resembled the *Rucker* plaintiffs: some member of the leaseholder's household, a guest or a person under the leaseholder's control was caught engaging in criminal or drug-related activity, triggering the tenant's eviction. Of the 1,390 cases, well over 70% involved misdemeanor drug possession or drug dealing, indicating the policy has been used to target drug activity in particular. *Id.* at 14. In a later review of 1,420 CHA one-strike eviction cases filed between January 1, 2005 through January 31, 2011, nearly half resulted in a not guilty finding at trial, a dismissal of the criminal case or no criminal case was ever even filed. *Id.* at 15; *see also Central Advisory Council (CAC) 2012 Strategies and Recommendations Report*, *supra*, at 14.

As CHA has moved forward with its Plan for Transformation, creating mixed-income public housing developments such as Parkside and Oakwood Shores, the policy has grown harsher. Between 2005 and 2010, as the Plan for Transformation ramped up, the percentage of triggering arrests that were misdemeanors rose from 40% in 2005 to 76% in 2010. The lease terms grew stricter. For traditional public housing residents, CHA's residential lease provides an "innocent tenant" defense through which a resident may argue that he or she did not know of, nor should have known of, the triggering criminal activity, an exercise of discretion under HUD's eviction regulations. CHA Residential Lease, Pt. 1, Section 16(f). Yet for mixed-

income housing residents, no such defense has been afforded, even though residency is contingent on with mandatory drug testing. Caputo, *One and Done,* at 12 (noting that one-strike evictions are growing more prevalent within the mixed-income developments).

Plainly, CHA has no special need for imposing mandatory and suspicionless annual urinalysis. The agency already has and exercises sweeping eviction powers to deter drug abuse and drug crimes. As a result, the mandatory drug testing policy violates Appellants' Fourth Amendment rights.

V. CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court reverse the district court's denial of the Appellants' motions for preliminary injunction, and remand with instructions to enter preliminary injunctions.

DATED: January 29, 2015

Respectfully submitted,

By: /s/Piotr E. Korzynski

Piotr E. Korzynski
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
155 N. Wacker Drive, Suite 2700
Chicago, Illinois 60606
T: (312) 407-0700
F: (312) 407-0411
E: piotr.korzynski@skadden.com

Katherine E. Walz
SARGENT SHRIVER NATIONAL
CENTER ON POVERTY LAW, INC.
50 E. Washington Street, Suite 500
Chicago, Illinois 60602
T: (312) 368-2679
F: (312) 263-3846
E: katewalz@povertylaw.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

As required by Rule 32 (a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that this Brief by *Amici Curiae* complies with the type –volume limitation for proportionally spaced briefs. It contains 6,828 words, excluding parts of the brief exempted by Rule 32(a)(7)(B)(iii).

DATED: January 29, 2015

/s/ Piotr Korzynski
Piotr Korzynski
Counsel for *Amici Curiae*

CERTIFICATE OF COUNSEL

As required by Rule 29(c)(5) of the Federal Rules of Appellate Procedure, I certify that (A) no party's counsel authored this Brief by *Amici Curiae* in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting this Brief by *Amici Curiae*; and (C) no person other than the *Amici Curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this Brief by *Amici Curiae*.

DATED: January 29, 2015

/s/ Piotr Korzynski
Piotr Korzynski
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I certify that on January 29, 2015, I electronically filed this Brief by *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. 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 29, 2015

/s/ Piotr Korzynski
Piotr Korzynski
Counsel for *Amici Curiae*