Nos. 14-3369 & 14-3371 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOSEPH PEERY, Plaintiff-Appellant, v. CHICAGO HOUSING AUTHORITY and HOLSTEN MANAGEMENT CORP., Defendants-Appellees.	Appeal from the United States District Court, Northern District of Illinois, Eastern Division Nos. 13 CV 5819 and 13 CV 6541
DEANN STUBENFIELD *et al.*, Plaintiffs-Appellants, v. CHICAGO HOUSING AUTHORITY and THE COMMUNITY BUILDERS, INC., Defendants-Appellees.	The Honorable Sharon Johnson Coleman, Judge Presiding

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JURISDICTIONAL STATEMENT

The district court has jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) & (4), and 1367(a). Federal question jurisdiction supports claims under the Fourth Amendment, 42 U.S.C. § 1983, and 28 U.S.C. § 2201, and for the *Stubenfield* case, claims under 42 U.S.C. § 1437d(l)(2). Supplemental jurisdiction supports claims under Article I, Section 6, of the Illinois Constitution.

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). On September 30, 2014, the district court denied plaintiffs' motions for preliminary injunction. P.Dkt. 189-90; S.Dkt. 124-25. On October 27, plaintiffs appealed. P.Dkt. 193; S.Dkt. 128.[1]

ISSUES PRESENTED

Whether the district erred by denying plaintiffs' respective motions to preliminarily enjoin drug testing of Chicago Housing Authority ("CHA") residents at CHA mixed-income developments. This turns on two legal issues:

1. Whether subjecting plaintiffs to the testing is state action.
2. Whether CHA residents voluntarily consent to the testing.

STATEMENT OF THE CASE

I. CHA's Plan for Transformation.

Under CHA's Plan for Transformation ("Plan"), CHA closed many of its traditional public housing developments and replaced them with new mixed-income developments. Tr. 15:12-21 (Boy). The new developments include CHA units,

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[1] In this brief: "P.Dkt." and "S.Dkt." are the district court dockets in *Peery* and *Stubenfield*. "Tr." is the preliminary injunction hearing transcript. P.Dkt. 181-83. "App." is this brief's appendix, the district court opinion at issue. "Exh." is plaintiffs' joint hearing exhibits. P.Dkt. 208, 211, 212. "Dep." is the deposition transcripts in the parties' joint binder. P.Dkt. 209-10.

market rate units, and affordable rate units. *Id.* 15:21-24, 78:20-79:5. Under federal regulations, the CHA units in these new developments are "public housing," and CHA must ensure they are operated in compliance with federal law. 24 C.F.R. § 5.100 (defining "public housing" to include "dwelling units in a mixed finance project"); 24 C.F.R. § 905.604(c)(1) ("Each mixed-finance project must be structured to … ensure the continued operation of the public housing units in accordance with all Public Housing Requirements.").

CHA now has 32 of these developments. *Id.* 80:1-3. They include Parkside, home to plaintiff Peery and managed by defendant Holsten Management Corporation ("HMC"), and Oakwood Shores, home to the Stubenfield plaintiffs and managed by defendant The Community Builders, Inc. ("TCB").

Under CHA's Relocation Rights Contract ("RRC"), CHA residents displaced by CHA's Plan have an enforceable "right of return" to a mixed-income development, a traditional development, or private housing with a voucher. Exh. 4 (CHA answer) #12; Exh. 5 (FY08 CHA report) 263; Exh. 6 (RRC) 143-44. But they must meet the tenant selection criteria at the new developments.

CHA controls these criteria. *Infra* Part II. CHA uses this control to impose drug testing. *Infra* Part III. CHA also controls the most important aspects of drug test implementation: whether CHA residents should be evicted for refusing or failing the test; whether they must enter the standard CHA lease, which further empowers CHA to evict residents who fail the test; and whether CHA residents can transfer to avoid testing. *Infra* Part IV. Further, CHA controls all aspects of CHA

units in these developments, including their construction, land, management, and finance. CHA uses this control to ensure testing. *Infra* Part V.

II. CHA controls the creation of all tenant selection criteria.

Selection criteria for rental units in CHA mixed-income developments are stated in tenant selection plans, lease riders, and addenda (collectively "TSPs"). Tr. 16:6-16 (Boy). CHA controls TSPs with (a) its Minimum TSP ("MTSP"), (b) its bilateral talks with developers, (c) its "working group" process, (d) its administration of public notice, and (e) its Board's ultimate power to reject proposed TSPs. CHA thereby obtains dozens of TSP changes. Exh. 7 (listing changes); Exh. 8 (listing communications about changes).

A. CHA's Minimum TSP.

CHA created an MTSP mandating screening rules for CHA residents in all CHA mixed-income developments. Tr. 16:22-17:2 (Boy); Exh. 11 (MTSP). For example, it sets minimum rent, which CHA recently raised from $25 to $75. *Id.* 17:3-9. CHA can change other parts of its MTSP. *Id.* 17:10-12.

B. CHA's initial revisions to draft TSPs.

Developers create "draft" TSP "proposals" for CHA review. Tr. 93:12-14, 113:8-10 (Boy); Tr. 186:2-5 (Holsten). Three CHA departments, including legal, thoroughly review them. Tr. 17:13-22 (Boy). CHA obtains many TSP changes. *Id.* 17:23-18:14. Examples include the removal of volunteerism from the work requirement, conforming to the Americans with Disabilities Act, and changing notice periods. *Id.* 18:20-25; Boy dep. #1 149:7-150:6, 151:8-152:10.

CHA reviews TSPs "with the Constitution in mind." Tr. 19:2-5 (Boy). For example, CHA received a First Amendment objection to a TSP's window sign ban from the Legal Assistance Foundation ("LAF"), which represents Local Advisory Councils ("LACs") elected by CHA tenants. Exh. 16 (2/24/03 LAF letter) 4282. The final TSP exempted "constitutionally protected speech" from the ban. Exh. 17, 3112 #7.[2] CHA also reviews and revises TSPs to ensure compliance with "federal and local laws." Tr. 19:2-5 (Boy). *Accord* Tr. 245:25-246:15 (Pratter).

C. CHA's working groups.

After initial CHA revisions to TSPs, working groups review the TSPs. Tr. 113:11-12 (Boy); Tr. 245:17-246:15 (Pratter). Working groups include CHA, the tenant LAC, and other stakeholders. Tr. 175:24-176:4 (Holsten); Exh. 20 (3/28/14 CHA answers) #2(b). CHA created the Near North working group by entering the *Cabrini-Green LAC v. CHA* consent decree. Tr. 113:22-114:14 (Boy). CHA "brought together" the other working groups. Boy dep. #1 236:1-9.

Working groups have never acted over CHA opposition. Exh. 20 (3/28/14 CHA answers) #2(c) on pp. 2, 4. CHA sets the agendas, facilitates the meetings, and prepares the minutes. Pratter dep. 184:2-185:4; Boy dep. #2 16:10-16. Developers need CHA permission to share draft TSPs, Tr. 245:25-246:6 (Pratter), and other information. Exh. 23 (7/23/07 TCB email) 47804; Exh. 24 (5/28/12 TCB email)

[2] The district court overruled defendants' relevance objections to questions about this LAF letter. Tr. 31:1-3. *See generally id.* 19:6-30:25 (discussing the relevance of developments other than Parkside and Oakwood Shores, and TSP rules other than drug testing).

54245. As CHA directed TCB: "You cannot discuss the ideas … without first vetting the issue thru within CHA." Exh. 25 (5/29/12 CHA email) 50104.

CHA further develops TSPs through this CHA-controlled working group process. Exh. 11 (CHA's MTSP) 150 (TSPs are "developed via the working group process"); Exh. 6 (CHA's RRC) 123 ("property specific requirements … are to be developed by the working group"); Exh. 27 (CHA public notices for Parkside, Oakwood Shores, and other developments: "CHA is working with the working group to develop a draft TSP"). For example, working groups, including CHA, discuss drug testing. Boy dep. #1 141:21-142:4, 143:6-11; McCann dep. 24:8-11.

D. CHA's public comment process.

CHA administers TSP public notice and comment. Boy dep. #1 154:5-157:1, 158:8-20, 190:20-191:7. CHA creates a comment-and-response "grid" and gives it to the developers and working groups. *Id.* 100:23-101:15, 156:5-14, 158:17-159:12. CHA considers these comments. Exh. 31 (CHA Board authorizations); 24 C.F.R. § 966.3. This process yields further CHA revisions to TSPs. Boy dep. #1 20:21-21:11, 159:13-24.

E. CHA Board review and authorization.

CHA's Board reviews draft TSPs before they become final. Tr. 32:5-10 (Boy); Exh. 32 (Parkside regulatory agreement) #3(i) on 817 (developers "propose" leases and CHA "approves" them). This is because TSPs amend CHA's Admission and Continued Occupancy Policy ("ACOP") for CHA residents. Tr. 56:17-20 (Boy); Exh. 34 (ACOP). CHA's Board "can choose not to approve" TSPs. Tr. 32:14-17 (Boy). *See also id.* 113:14-15 ("CHA decides whether to approve or disapprove" TSPs); Pratter

dep. 174:10-22 (CHA "can withhold approvals" on TSPs and other closing documents); Tr. 353:22-354:17 (HMC's closing) (when asked what would have happened if CHA had rejected drug testing, answering only that HMC "would have had to reconsider [its] participation"). *Accord* App. 10 (TSPs are "approved or rejected by the CHA board").

III. CHA controls the creation of drug testing.

Most CHA public housing units in mixed-income developments require drug testing. Exh. 20 (3/28/14 CHA answers) chart; Exhs. 88 & 89 (calculations). This is the inevitable result of 15 years of CHA efforts to impose testing on these units.

A. North Town Village in 1999.

In 1999, CHA chose HMC to build North Town Village ("NTV") to replace part of Cabrini-Green. Tr. 172:2-13, 173:25-174:3 (Holsten). This was CHA's third mixed-income development, and its first large one. Exh. 20 (3/28/14 CHA answers) chart (313 units at NTV, compared to 92 and 116 at earlier developments). It was also the first one with drug testing, *id.*, and with HMC. Tr. 172:2-5 (Holsten). HMC policy, then and now, is annual drug testing of all adult renters. *Id.* 172:14-23.

CHA could have chosen a developer that did not test. Exh. 20 (3/28/14 CHA answers) chart (listing such developers participating in CHA's Plan); Exh. 76 (1/24/14 CHA answers) #13 (unable to identify private developers that test, except those in CHA's Plan); Exh. 90 (1/24/14 HMC answers) #11 (same). Alternatively, CHA could have conditioned HMC's involvement on no testing. *Supra* Part II(E). Instead, CHA chose HMC, and adopted its testing for CHA residents. Because selection criteria must apply to all renters, Exh. 6 (RRC) 124, testing was imposed

on 79 CHA units and 78 non-CHA rental units, Exh. 20's chart. But testing was not imposed on 157 condo units. *Infra* Part III(D).

B. Hilliard in 2002.

In 2002, CHA again chose HMC and adopted its testing, for an even larger project: rehabbing CHA's Hilliard development, with 305 CHA units and 349 other units. Exh. 20 (CHA 3/28/14 answers) chart; Exh. 31 (CHA approval) 3841-42. CHA objected that the word "tenant" in the draft TSP's drug testing rider "would apply only to the Leaseholder/Tenant and not other occupants." Exh. 44 (9/9/02 CHA letter) 1598; Exh. 43 (HMC stips.) #37. To avoid the under-inclusion feared by CHA, testing was imposed on "all authorized occupants age 18 or older." Exh. 45 (10/31/02 TSP) 1257; HMC stips. #38.

C. Oakwood Shores Phase 1A in 2003.

Oakwood Shores replaced part of Madden/Wells. Tr. 49:19-21 (Boy). With 659 units, it is CHA's largest mixed-income development. Exh. 30 (3/28/14 CHA answers) chart. When TCB first met CHA and the working group, when it was applying to be the developer, TCB was asked for its position on drug testing. McCann dep. 117:20-118:21. TCB had never previously tested, *id.*, and today does not at its six mixed-income developments outside Chicago. *Id.* 52:6-53:8, 59:16-61:20. TCB's initial TSP draft had no testing. Tr. 50:3-13 (Boy); Tr. 232:4-9 (Pratter). Some working group members wanted testing. McCann dep. 43:17-44:1. LAF raised "concerns" about testing. *Id.* 28:11-29:9. The working group discussed who and when to test. *Id.* 24:8-25:18. TCB added testing to the TSP after this

discussion, Tr. 50:14-25 (Boy), and CHA's Board approved it, Exh. 31 (CHA approval) 3450-51.

D. Parkside in 2006.

In 2006, CHA again chose HMC and adopted its testing, this time for Parkside, with 503 units in the Cabrini area. Exh. 20 (3/28/14 CHA answers) chart; Exh. 31 (CHA approval) 1733-34. While all renters must test, condo owners need not. Tr. 183:18-184:13 (Holsten). So in Parkside Phase I, where Peery lives, three-quarters of the units are condos without testing, and one-quarter are CHA units with testing. *Id.* The attorney hired by HMC to write the condo bylaws did not include testing because it "might affect sales adversely." *Id.* 184:14-185:21.

CHA made three rounds of changes to the Parkside TSP. Some preceded public comment. Tr. 32:18-33:2 (Boy); Exh. 37 (CHA 5/9/06 email). Others followed instructions to CHA from the judge overseeing the *Cabrini-Green LAC v. CHA* decree, to work out LAC objections. Tr. 33:3-34:8 (Boy); Exh. 38 (6/14/06 LAF letter).[3] CHA thus allowed increased residency by: growing families; persons on electronic home monitoring; and residual family members after heads-of-household depart. Boy dep. #1 37:15-59:19. Finally, when the LAC moved to enforce the decree against a TSP rule allowing eviction for any felony, Exh. 41 (10/11/06 rider) #13(c)(9) on 16, CHA defended it without HMC's help, Exh. 42 (11/16/06 CHA brief). The district court opined that the "only question is whether CHA may choose to give Lakeside [sic] managers the discretion to evict for any felony," and held CHA's

[3] The district court overruled CHA's relevance objections to questions about these LAF objections. Tr. 33:13-23. *See generally id.* 19:6-31:3 (discussing same issue).

action not "reasonable" and "unenforceable." *Cabrini-Green LAC v. CHA*, 2007 WL 294253, *2, *5 (N.D. Ill. 2007). Within months, a new TSP limited felony eviction. Exh. 40 (6/13/07 rider) #13(c)(6)-(8) on 702.[4]

E. Oakwood Shores Phase 2A in 2007.

The LAC objected to a proposed TSP rule providing that CHA applicants who failed the drug test could not re-apply absent "verification" from a treatment counselor of no "reasonable probability" of relapse. Exh. 50 (LAF 8/8/07 letter) 4408. CHA and TCB jointly prepared, and provided to the working group, a "combined" response. Exh. 51 (TCB 8/15/07 email) 48803; Exh. 52 (CHA 8/22/07 email). The revised TSP only required treatment and follow-up. Exh. 53 (TSP) 3539. CHA's Board approved the TSP with testing. Exh. 31 (approval) 3465-66.

F. Oakwood Shores Senior Apartments in 2010.

TCB prepared a draft TSP with no drug testing. Tr. 234:10-18 (Pratter). At a meeting chaired by CHA, some working group members objected. *Id.* 237:4-12, 242:7-21, 243:5-24. TCB then sent CHA a revised draft TSP with only a testing "option." *Id.* 234:19-22; Exh. 54 (7/28/10 TCB email) 49304. CHA responded:

> [E]veryone in the working group preferred to have [the] drug testing requirement like the rest of the site. And yes seniors do use drugs. So we CHA do have an issue with you suggesting that you might drug test versus "will" drug test. … I know it is not our building but it is sitting on our site.

Id. (7/30/10 CHA email). TCB complied with CHA's direction. *Id.* (TCB 8/3/10 email) 49303.[5]

[4] The Cabrini-Green LAC owns 40% of Parkside. Tr. 177:22-178:7 (Holsten). The above episode shows the LAC cannot use its minority stake to block TSP rules.

G. CHA's proposed drug testing in 2011.

CHA proposed a new ACOP with mandatory drug testing.[6] Tr. 48:8-15 (Boy); Exh. 2 (proposed ACOP) 53. CHA withdrew the proposal, Tr. 154:19-24 (Boy), in response to public opposition. *See, e.g.,* Maudlyne Ihejirika, *CHA kills controversial plan to drug test residents*, Chi. Sun-Times (6/22/11) (quoting CHA: "The CHA received a tremendous amount of feedback during the public comment period, and simply, the result of that is that CHA will not move forward.").[7]

H. Sullivan Station in 2011.

CHA closed its Lakefront Properties and hired two developers to rebuild: Draper & Kramer ("D&K") built Lake Park Crescent, and Davis Lakefront LLC built Sullivan Station. Boy dep. #1 61:14-23, 64:14-65:9. The developers disagreed about whether to drug test at Sullivan Station: D&K was already testing and

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[5] Defendants objected that the senior apartments are irrelevant because no CHA residents live there. Tr. 144:18-145:19, 234:10-235:5, 238:3-241:10, 244:17-245:4. Plaintiffs responded: "the fact that there's no CHA residents in this building actually makes it more relevant, because it shows that CHA has an unlimited interest in the drug testing requirement." Tr. 241:1-5. The district court overruled this objection, Tr. 145:10-19, then sustained it, Tr. 235:4-5, 240:9-10, 244:23-245:4. Later, the court overruled all relevance objections to all of plaintiffs' exhibits. Tr. 293:19-294:2. Defendants only objected to this email thread about the senior units (Exh. 54) under FREs 401, 402, and 403. P.Dkt. 178. Thus, the district court admitted it. A contrary ruling would be an abuse of discretion: these units are part of Oakwood Shores, and CHA's working group process, Tr. 235:13-18, 237:6-12 (Pratter); and this episode shows CHA's pattern of imposing testing.

[6] The district court overruled defendants' relevance objection to questions about this draft ACOP. Tr. 43:2-44:8, 45:21-46:11. While CHA asserts this ACOP rule would not have applied to mixed-income developments, *id.* 78:13-19 (Boy), CHA asserts the ACOP's transfer rules do apply to mixed-income developments, *id.* 71:6-10.

[7] Available at: http://web.archive.org/web/20130319151905/http:/www.suntimes.com/news/metro/6090804-418/cha-kills-controversial-plan-to-drug-test-residents.html.

wanted consistency, but the Davis group objected it was not testing elsewhere. Boy dep. #1 65:12-66:7, 67:21-68:4, 69:11-14, 81:21-82:4; Koerner dep. 67:3-16, 68:14-24, 96:20-24. D&K feared renters would prefer the development without testing. Boy dep. #1 65:12-66:7, 77:25-78:24. The working group, including CHA, discussed this issue. *Id.* 68:10-23; Koerner dep. 68:7-19. A public housing resident had "concerns," and "hope[d]" testing would be "reversed" CHA-wide. Koerner dep. 100:16-101:5. *See also* Exh. 47 (comment grid, with objections from the CHA-wide tenants' Central Advisory Council ("CAC")). The matter was stalemated. Tr. 135:19-22 (Boy).

Then, at a one-on-one meeting at CHA's offices, CHA instructed the Davis group to "get the documents in." Gerut dep. 21:9-23:11. Shortly thereafter, Robert Koerner of the Davis group sent CHA a letter stating: "At your direction, we have included a 'drug testing' provision in the Tenant Selection Plan." Exh. 46 (10/20/11 letter). CHA's Board approved the TSP with testing. Exh. 31 (approval) 3041-42.

Koerner later testified that, contrary to his letter, CHA did not direct the Davis group to include testing in the TSP. Koerner dep. 97:17-23. But his post-litigation disavowal is not credible. He spent years working for and then partnering with CHA. *Id.* 13:7-13, 39:8-10. When Peery's counsel sought to arrange his deposition, Koerner instead called CHA's counsel, who advised him of CHA's position that it did not direct testing. *Id.* 9:14-12:4. Incredibly, Koerner claimed he could not define the word "direction," *id.* 83:22-85:12, though he has a Harvard master's degree, and daily and comfortably communicates in writing, *id.* 36:10-14, 82:9-24. He admits that he reviewed, signed, and sent the letter; that he intended it

to communicate his position on testing; that it is important to be accurate in written business communications with government; and that he would have corrected any known mistakes. *Id.* 83:1-21, 90:14-91:19.

Even under CHA's preferred facts, CHA caused the drug testing. "The CHA expressed concern about consistency, about two halves of one whole development having different policies on that matter." Tr. 130:6-11 (Boy). *Accord* Koerner dep. 67:17-68:61, 77:3-12. But for this demand for consistency, Sullivan Station would not have testing. Koerner dep. 89:2-24, 98:1-9.[8]

I. CHA's opposition to modifying the drug tests in 2012.

Prompted by Chicago's "recent decriminalization of marijuana," TCB asked CHA whether it had "a position on modifying the drug testing within the confines of the mixed income?" Exh. 55 (8/24/12 TCB email) 51567. CHA quickly responded:

> Marijuana possession/consumption is still illegal and against the rules of public housing across the country as well as Chicago. The change from arresting users/possessors of Marijuana to ticketing them does not change the illegality of the act or the prohibitions in public housing from use of illegal drugs.

Id. (8/24/12 CHA email).[9]

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[8] The district court sustained and then overruled CHA's relevance objections to questions about Sullivan Station. Tr. 36:23-26, 128:25-129:24. *See also* Tr. 34:9-36:25, 116:21-129:24 (discussion of same). Peery argued they show CHA's power and motive to impose testing. Tr. 36:14-22, 117:20-118:13. Peery also argued CHA opened the door by eliciting testimony that in general, at developments with drug testing, the developers decided to test. Tr. 116:21-117:21, 126:10-19. *See also* Tr. 79:25-80:14, 93:8-94:1 (the door-opening exchanges). Later, defendants waived their hearsay and foundation objections to Koerner's letter, in exchange for plaintiffs not calling him at the hearing. Tr. 195:6-196:25.

[9] The district court overruled defendants' relevance objections to questions about this email. Tr. 247:23-251:25.

IV. CHA controls drug test implementation.

CHA directs evictions of CHA residents, including for drug test refusal or failure. *Infra* Part IV(A). It decides whether CHA residents must sign CHA's own lease, which further empowers CHA to evict for test failure. *Infra* Part IV(B). And it decides whether CHA residents may transfer to avoid testing. *Infra* Part IV(C).

A. CHA controls eviction proceedings, including about drugs.

CHA mandates monthly "evictions reports" about CHA residents at mixed-income developments. Exh. 73 (8/31/09 email) 42982-85. *See also* Exh. 74 (7/31/09 email) 44363 (seeking further details). CHA also receives monthly reports on non-compliant CHA residents. Exh. 75 (9/7/10 email) 43276. *See also* Exh. 66 (10/5/10 CHA email) 43291 (seeking "an update on all PH [public housing] court cases"); Boy dep #2 43:3-18 (acknowledging CHA maintains such information).

Further, CHA controls eviction proceedings against CHA residents at mixed-income developments, including those who refuse or fail drug tests. For example, CHA instructed TCB that if the Stubenfields' mother failed to take steps needed to renew her lease: "please go ahead and issue a 30 day [eviction] notice." Exh. 63 (9/21/12 email) 46266. When she refused to take a drug test, CHA wrote: "She should not … receive a new lease to sign and you should proceed with your 30 day notice." Exh. 62 (10/1/12 email) 46282. When CHA learned that TCB recertified her, CHA inquired: "Are you aware that Ms. Stubenfield has done this before[?] … Why are you in this situation again?" Exh. 106 (5/28/13 email) 44479. Days later, when TCB advised she still had not been tested, CHA pointedly asked: "Is TCB pursuing legal remedies with this resident?" Exh. 72 (5/31/13 email) 44509. *See also* Exh. 59

(2/23/09 email from CHA to HUD about Ms. Stubenfield) 44327 ("refusing to take a drug test" is "a lease violation and the lease should be terminated"); A. Stubenfield dep. 330:8-21 (CHA told Ms. Stubenfield that refusal to test would cause eviction).

When a different CHA resident failed their drug test, CHA instructed TCB: "You should move forward with your eviction process." Exh. 61 (11/7/08 email) 47340. Later, TCB advised CHA that TCB had "messed up" that eviction effort, but "will order another drug test." Exh. 71 (2/1/10 TCB email). *See also* Exh. 67 (4/1/11 & 4/4/11 emails) (CHA twice directing TCB to drug test a third CHA resident).

CHA also directs the mixed-income evictions on other grounds, for example, against plaintiff Thigpen following the arrest of her husband. Exh. 64 (8/10/09 CHA email) 42958 (sending a "notice of arrest" to "initiate the eviction proceedings"); Exh. 69 (10/21/09 emails) 43019 (TCB seeking and receiving CHA agreement to evict); Exh. 70 (12/08/09 emails) 43051 (CHA sought "an update," TCB advised no proceedings were scheduled, and CHA sharply asked, "Why not, she has been in legal for over 3 months?").[10] *See also* Exh. 66 (10/5/10 email) 43291 (CHA asking TCB whether it had begun eviction proceedings against a fifth CHA resident); Exh. 65 (4/6/09 email) 44362 (TCB asking CHA for "direction/confirmation" about "the eviction schedule" against a sixth CHA resident).

[10] The district court sustained CHA's relevance objection to questions about this email. Tr. 137:18-140:4. This was an abuse of discretion: CHA directing TCB to evict Thigpen shows CHA's management of evictions. While Thigpen's ex-husband was arrested for drug possession, he was not charged. Thigpen dep. 155:20-156:17.

B. Further CHA eviction power in its standard lease.

From 2002 through early 2014, CHA required CHA residents at mixed-income developments to sign CHA's standard public housing lease, in addition to the site-specific lease. Exh. 43 (HMC stips.) #9-10, 33; Exh. 44 (9/9/02 CHA letter) 1595 #1; Exh. 45 (10/31/02 Hilliard TSP) 1258 #I; Exh. 56 (four leases with Peery); Exh. 98 (eight leases with Stubenfield plaintiffs). CHA told a working group: "failure of a drug test is a violation of the CHA lease." Exh. 58 (7/10/08 minutes) 56874. CHA's lease expressly empowers CHA to evict for drug test failure. Exh. 57 (CHA lease) § 16(b)(34) on 730 (eviction for drug use). But soon after Peery cited this as proof of state action, P.Dkt. 67 at 4, HMC reports CHA stopped requiring CHA residents to sign CHA's lease. Exh. 43 (HMC stips.) #9-12, 33. Far from diminishing state action, this shows CHA's control of CHA tenancy. Also, nothing precludes CHA from again requiring these residents to sign CHA's lease.

C. CHA controls transfer to avoid drug testing.

CHA's ACOP empowers CHA to decide whether its residents, including those in mixed-income developments, may transfer for "good cause." Tr. 58:24-59:1, 60:24-61:1, 71:6-10 (Boy). CHA decides on a "case by case basis" whether applicants have "demonstrate[d]" good cause. Exh. 34 (ACOP) #V(B)(6), V(C)(2), XIV(49) on 37, 82.

Before this litigation, CHA forbade "good cause" transfer to avoid drug testing. Exh. 59 (2/23/09 email from CHA to HUD) 44327 ("refusing to take a drug test" is "a lease violation and the lease should be terminated," as opposed to

"mov[ing] them back to public housing").[11] *See also* Exh. 60 (2/13/09 email from CHA's Ombudsman) 44501 ("She refuses to take the annual drug test … I do not know why we would be obligated to accept" a request for "transfer to traditional public housing"). Indeed, transfer to avoid drug testing is unlike the ACOP's four "examples" of good cause transfer: "undue hardship"; distance from work and the like; "jeopardy" to health; and disability access. Exh. 34 (ACOP) #XIV(49) on 82. During litigation, CHA switched course and stated good cause "can" include "opposition to drug testing," depending upon the "particular details." Boy dep. #1 230:9-18, 270:21-23.[12]

V. CHA controls its units in the mixed-income developments.

CHA controls the public housing units in the mixed-income developments, including construction, land, management, and finance. CHA uses this control to advance drug testing. Exh. 54 (7/30/10 CHA email to TCB) 49304 ("we CHA do have an issue with you suggesting that you might drug test versus 'will' drug test. … I know it is not our building but it is sitting on our site.").

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[11] The district court sustained defendants' relevance objections to using this document to question CHA's witness, without ruling on whether the court would later examine it. Tr. 147:13-153:23. The court later overruled all relevance objections to documents. Tr. 293:19-294:9.

[12] CHA objected that transfer to avoid testing is irrelevant because no plaintiff sought it. Tr. 63:8-12. The district court overruled this objection, based on the Stubenfields' representation that their mother sought transfer. Tr. 63:13-64:5. This happened. Tr. 146:8-147:3 (Boy); Exh. 110 (3/31/09 email) 44360; Exh. 99 (A. Stubenfield dep.) 203:2-16, 231:8-232:16. In any event, CHA's changing policy shows its control of transfer, and its continuing entanglement in testing.

A. CHA controls construction.

With working group input, CHA chooses developers and revises their plans. Boy dep. #1 238:16-242:14, 246:12-249:5, 266:18-267:11; Exh. 5 (FY08 CHA report) 206. CHA closes its buildings, relocates its residents, and pays for demolition. Tr. 37:20-38:5 (Boy). CHA works with other agencies to improve infrastructure. Tr. 38:6-11 (Boy). CHA monitors construction. Boy dep. #1 265:11-13. CHA fires tardy developers. Boy dep. #1 64:14-65:5. CHA inspects completed CHA units. *Id.* 265:14-266:17; Exh. 43 (Holsten stips.) #24; Pratter dep. 122:3-5.

B. CHA controls the land.

CHA owns the land under Parkside and Oakwood Shores. Tr. 38:12-15 (Boy); Tr. 186:14-18 (Holsten); Tr. 259:24-260:6 (Pratter). At Parkside, after 99 years, CHA will own the rental buildings and may option the condo buildings. Exh. 78 (Parkside 2A lease) #14.01 at 1344-45; Exh. 79 (Parkside 1A lease) #1.2 at 981-82. CHA also may option Oakwood Shores. Pratter dep. 57:17-58:3.

C. CHA controls management.

CHA must approve the management plans and managers. Holsten dep. 60:6-61:15; Pratter dep. 62:14-17; Exh. 32 (Parkside regulatory agreement) 812-13. CHA administers the waiting lists of eligible CHA residents. Tr. 38:22-25 (Boy); Holsten dep. 62:7-16. CHA requires annual inspections of CHA units. Holsten dep. 80:17-81:9; Pratter dep. 96:13-16. CHA allows its residents to file CHA grievances. Exh. 43 (HMC stips.) #5-8, 32; Pratter dep. 79:13-16; Exh. 81 (Peery's grievance).

D. CHA controls finance.

Public funds paid about half the construction costs at Parkside and 40% at Oakwood Shores. Tr. 181:22-182:12, 186:19-24 (Holsten); Tr. 254:19-23, 259:24-260:4 (Pratter). Other developments also receive substantial public funds. Boy dep. #1 254:3-5; Exh. 43 (HMC stips.) #23. During the recent housing slump, Parkside received two government bailouts: CHA reduced HMC's debt by $12 million; and the City of Chicago provided HMC early access to $3 million. Tr. 186:25-188:12 (Holsten).[13]

CHA pays a monthly operating subsidy of about $400 per CHA unit. Tr. 188:24-189:4 (Holsten). *See also* Tr. 259:24-260:4 (Pratter). For Parkside's 146 CHA units and Oakwood Shores' 277 CHA units (Exh. 20), this is more than $1.5 million annually. If costs exceed this subsidy plus tenant rent, CHA pays the difference. Tr. 189:5-8 (Holsten). *See also* Exh. 43 (HMC stips.) #4 (nearly $1 million in such reconciliation payments at Parkside over three years).

Finally, CHA must approve the annual operating budgets for CHA units. Tr. 38:16-20 (Boy); Tr. 189:9-13 (Holsten); Pratter dep. 87:8-89:18. When CHA told HMC to "improve the bottom line" at Parkside, HMC responded by reducing expenses and increasing market-unit rents. Holsten dep. 68:1-70:15.[14]

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[13] The district court overruled CHA's relevance objection to questions about these bailouts. Tr. 188:13-22.

[14] The district court sustained CHA's relevance objection to questions about CHA's changes to Parkside's budget. Tr. 189:23-190:4. This was an abuse of discretion: CHA's ongoing financial control is part of the overall fabric of state action.

VI. Plaintiffs do not consent to testing.

Each plaintiff submitted to testing but did not consent. *Infra* Parts VI(A)-(B). The deeply flawed alternatives do not show consent: the wait for a CHA unit without testing can take years; and transfer to avoid testing, a CHA policy adopted after this suit, is riddled with unknowns, limits, and barriers. *Infra* Part VI(C).

A. Plaintiff Peery.

In 1991, Peery moved into Cabrini-Green. Peery dep. 32:13-21. A few years earlier, he had been homeless. *Id.* 42:10-43:6. He has long-standing ties to the Cabrini area, including work at D'Amico Youth Services, where he counseled families about substance abuse. *Id.* 20:4-19. In 2005, CHA closed his building. Exh. 82 (1/24/14 CHA admissions) #28. Peery advised CHA that he wanted to return to a rehabbed traditional Cabrini unit. Exh. 84 (2/24/09 CHA letter) 97; Peery dep. 72:5-73:19, 77:9-79:3. But when Peery called the numbers on a form that CHA sent him in 2009, he learned Cabrini was not available. *Id.* He also learned Parkside and two other mixed-income developments in the Cabrini area were available, so he requested them. *Id.* 79:9-81:8; Exh. 84 at 100. *See also* Tr. 42:10-14 (Boy) (CHA provides information about developments seeking applicants).

Peery visited Parkside but was not told about drug testing. Peery dep. 87:6-88:7. For about a year, his housing was unstable: he sometimes had to impose on friends and family, or sleep in his car. *Id.* 190:20-192:2. In June 2010, he was advised that a Parkside apartment was immediately available. *Id.* 94:19-95:9. After completing the final Parkside forms before moving in, Peery learned for the first time about testing. *Id.* 97:14-99:13. Peery objected, asking whether it was

necessary, and was told he could not move in without it. *Id.* He also objected at a CHA-sponsored forum. *Id.* 147:22-149:11. Peery has repeatedly passed this drug test. Exh. 4 (12/20/13 CHA answer) #18.

B. The Stubenfield plaintiffs.

Jessica and DeAnn Stubenfield have lived with their mother, Annie, in Oakwood Shores since 2005. D. Stubenfield dep. 10:17-21. Annie signed the lease, and Jessica and DeAnn signed the lease addenda/renewals when they turned 18. *Id.* 10:22-12:17; J. Stubenfield dep. 9:6-10:11, 12:2-15:20. Before living at Oakwood Shores, they lived at Ida B. Wells. D. Stubenfield dep. 92:15-24; A. Stubenfield dep. 12:1-8.

Annie was told in 2002 that there were no more Section 8 vouchers or scattered sites to which she could apply. She had to wait for relocation or move out. Because she was low-income, she could not afford to move out, so she waited. A. Stubenfield dep. 17:22-18:9, 115:4-13, 345:2-18. The last she heard about the wait list for Section 8 vouchers, it was closed, and CHA was not accepting any applicants. *Id.* 119:11-120:2.

In 2005, Annie received a letter from CHA saying an apartment at Oakwood Shores was available and that it would be her permanent apartment. *Id.* 120:10-122:8, 127:10-131:22. Annie went to Oakwood Shores to meet the property manager and was shown a lease. *Id.* 132:1-133:20. When she was later told about the drug tests, Annie objected and said that she would take it upon admission but neither she nor her children would take it thereafter. *Id.* 134:3-137:22, 138:5-15, 169:5-12.

Annie was recertified for her lease from 2006-2007 without taking a drug test. *Id.* 169:19-173:1, 199:6-200:2, 317:1-3. In 2008, Annie was asked to take a drug test and refused. *Id.* 199:6-200:2. Annie was told that refusal would result in non-renewal of the lease, and she and her daughters would be evicted. *Id.* 203:2-10. CHA tried to evict them in 2009, 2012, and 2013 based on refusal to take the drug test. *Id.* 215:10-216:20, 228:4-6; J. Stubenfield dep. 17:10-18:21, 50:8-51:4, 56:4-57:2, 59:1-7.

Jessica turned 18 in September 2008. J. Stubenfield dep. 5:10-15. Jessica had no involvement in her mother's decision to accept a unit at Oakwood Shores. *Id.* 22:3-8. She did not know whether she could get a transfer. *Id.* 41:2-4. Jessica eventually decided to take the drug test in 2009 because she did not want to get evicted. *Id.* 50:8-20, 66:14-67:4; A. Stubenfield dep. 215:10-216:20. Under these circumstances, Jessica did not consent to the test. J. Stubenfield dep. 93:19-94:7.

The Stubenfields object to the drug tests, and given the prior eviction proceedings against them, which could be reopened at any time, they are in constant fear of being evicted due to refusal to take the drug test. D. Stubenfield dep. 61:2-8, 71:9-21.

While the 2009 eviction case was pending, Annie's attorney wrote to TCB's attorney, "Ms. Stubenfield is willing to be transferred." Exh. 110, 44360. Instead of transferring the Stubenfields due to their opposition to drug testing, CHA proceeded with the eviction against them. *Id.* 110, 44363. This was consistent with the CHA's

emphatic position that a CHA resident who did not comply with a drug testing policy must be evicted rather than transferred. Exh. 60, 44501-02.

Deborah Thigpen has lived in Oakwood Shores since 2005. Thigpen dep. 6:17-7:1. Prior to that, she lived in Ida B. Wells, Ida B. Wells Extensions, and Section 8 housing. *Id.* 10:9-13:24. She received a call in July 2004 from CHA about a new place that was available for her. *Id.* 27:24-28:18. Thigpen was told that she had to do drug testing. *Id.* 31:2-11. Thigpen did not know that it was an option to seek another unit that did not have drug testing. *Id.* 38:19-23. She was never told that she could reject the unit that was offered to her. *Id.* 39:11-40:10. She was told that she could not be transferred unless it was an "emergency situation," she did not have a right to seek any other unit, and she could not keep her Section 8 voucher. *Id.* 76:16-79:21.

Thigpen is opposed to the drug testing, but she feels that she has no other choice but to take the test. *Id.* 76:9-15, 80:23-81:3, 113:2-5. In 2013, Thigpen spoke with CHA about trying to get her Section 8 voucher back, and CHA said no. *Id.* 120:1-121:8.

Sharon Thompson has lived with her adult disabled son, Roy Thompson, Jr., in Oakwood Shores since 2006. Thompson dep. 6:20-7:1, 15:4-11. Before moving to Oakwood Shores, Thompson lived in Ida B. Wells for 33 years. *Id.* 15:15-16:3, 24:19-25:1. No one told her that she had an option to get a Section 8 voucher. *Id.* 49:2-24, 64:2-5.

Prior to moving into Oakwood Shores, Thompson thought she would be drug tested only at admission, not annually. *Id.* 64:20-65:8, 67:18-68:9. Thompson took the drug test for admission in 2006. *Id.* 82:15-16. She has taken the drug test every year, because she had no choice and would be evicted otherwise. *Id.* 123:15-125:6, 133:23-135:11. When CHA transferred Thompson to her current accessible unit, they told her that was her permanent housing, so she could not transfer anywhere else. *Id.* 144:7-22. Thompson was not aware of any policy under which she could apply to transfer. *Id.* 145:8-12.

C. Plaintiffs were not provided adequate alternatives to testing.

CHA administers two waiting lists of displaced CHA residents. Tr. 38:22-25 (Boy). Former Cabrini residents are on the Cabrini lottery list, which is part of the *Cabrini Green LAC* consent decree, and former residents of other developments are on the housing offer process ("HOP") list, which is part of CHA's Relocation Rights Contract. *Id.* 39:4-16. If a person on either list declines an offer, they might have to wait years for the next offer. *Id.* 41:5-16. Most CHA units in mixed-income developments have drug testing, Exhs. 20, 88-89, so waiting for a unit without testing would take longer. A person on the HOP list only gets two offers before they lose their right of return. Tr. 41:24-42:1, 102:18-22 (Boy).[15]

Before this suit, CHA did not allow transfer to avoid drug testing. *Supra* Part IV(C). While CHA now claims to interpret its ACOP to allow it, *id.*, many barriers

[15] Defendants posed relevance objections to Peery's questions about the HOP list, asserting Peery is not on that list. Tr. 39:22-40:19. The Court overruled these objections, based on Peery's representation that he is on both lists. Tr. 40:21-41:3. Peery is in fact on both. Tr. 115:8-14 (Boy); Exh. 76 (1/24/14 CHA answers) #6(a). In any event, the Stubenfield plaintiffs are on the HOP list.

remain. First, only lease-compliant residents may transfer, Tr. 61:25:62:2, 66:1-5 (Boy), and test refusal is non-compliance. *Id.* 97:5-16. Second, transfer requires residency for "at least one year," Exh. 34 (ACOP) #V(B)(6) on 37, but tenants are re-tested each year at lease renewal. Third, transfer is contingent on another available unit, Tr. 62:6-8 (Boy), and applicants must test while waiting. Fourth, if an applicant declines an offer, they must wait a year to reapply. *Id.* 65:2-19. Fifth, only household heads can apply, *id.* 60:4-20, but all adult household members can be evicted for test refusal, *id.* 60:21-23. Sixth, a transferee bears "all costs" of transfer. ACOP #V(E)(2) on 39.

VII. Procedural posture.

Peery sued CHA in August 2013, seeking class-wide injunctive and declaratory relief. P.Dkt. 1, 7-8. The Stubenfields sued CHA and TCB in September 2013, seeking class-wide injunctive, declaratory, and damages relief. S.Dkt. 1, 9, 14. The latter case was reassigned as related. P.Dkt. 36-37. Plaintiffs moved for class certification, P.Dkt. 7-8; S.Dkt. 9, and class-wide preliminary injunctions. P.Dkt. 10-11; S.Dkt. 3. Plaintiffs repeatedly renewed their motions for class certification, P.Dkt. 81 at 11, P. Dkt. 155 at 30, but the district court continued them, P.Dkt. 74, and ultimately limited its ruling on the preliminary injunction motions to the named plaintiffs, *see* App.

In fall 2013, the parties briefed and argued defendants' motions to dismiss. P.Dkt. 34-35, 44, 52, 54, 80; S.Dkt. 30-33, 37-39, 43-44, 46-48, 61. The district court denied the CAC's motion to file an *amicus* brief against testing. P.Dkt. 55-57, 59, 62. The district court denied dismissal, holding plaintiffs adequately alleged state

action and unreasonable searches. P.Dkt. 63; S.Dkt. 51. Over Peery's objections, the district court ordered Peery to join HMC, based on CHA's argument that HMC was a necessary party. *Id.*; P.Dkt. 63. Peery had argued joinder was unnecessary because he was seeking injunctive relief solely against CHA. P.Dkt. 44 at 7.

The parties took discovery from December 2013 through April 2014. P.Dkt. 74, 97. Over CHA's objections, the district court twice allowed discovery about CHA activity at mixed-income developments where plaintiffs do not reside. P.Dkt. 122-23, 136. Over plaintiffs' objections, the district court granted bifurcation, which barred discovery, prior to the preliminary injunction hearing, on "special needs" for drug testing, based on each defendants' waiver of that defense at least for that hearing. P.Dkt. 121.[16]

In May 2014, the parties completed preliminary injunction briefing. P.Dkt. 144, 146, 155-56; S.Dkt. 88-89, 97-99. Before the hearing, the district court held the parties could submit evidence by deposition and declaration, P.Dkt. 148, and HMC could not submit evidence of drug testing justifications, given its special needs waiver, P.Dkt. 165.

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[16] CHA initially asserted special needs. P.Dkt. 35 at 14; P.Dkt. 79 at 6-7; Pl. Exh. 93 at 3. Then "CHA waived special needs for the entire case, not just for preliminary injunction hearing …" P.Dkt. 118 (3/6/14 tr.) at 27:1-3. In between: The district court held that CHA "has the burden of establishing" special needs. P.Dkt. 63 at 7. CHA conceded it had no documents about reasons for drug testing. P.Dkt. 100-2 at 69 (2/11/14 letter). CHA's Rule 30(b)(6) witness testified CHA has no opinion on whether testing promotes safety, prompting CHA counsel to instruct her to stop answering special needs questions, and to advise that CHA would provide a new special needs witness. P.Dkt. 100-2 at 142 (2/14/14 dep. at 232:6-235:15). Peery disclosed his special needs experts. P.Dkt. 100-2 at 151 (2/17/14 email). Finally, Peery moved to compel CHA to provide its new special needs witness. P.Dkt. 100 (2/18/14 motion) at 9.

At the evidentiary hearing in June 2014, the parties proffered live testimony from CHA's Boy, HMC's Holsten, and TCB's Pratter. The parties also submitted exhibits. P.Dkt. 206-08, 211-13; Tr. 7:2-4, 86:10-13, 120:13-14, 215:18-21, 297:7-11, 297:20-24, 298:7-8. The district court overruled all relevancy objections to all exhibits. Tr. 293:19-294:2, 297:12-17, 298:3-16. It also admitted all deposition excerpts, Tr. 215:22-25, including of witnesses called at the hearing, Tr. 82:22-83:3. The parties then filed objections to each other's exhibits, P.Dkt. 171, 173-79, and jointly submitted two binders of deposition designations. P.Dkt. 180, 209-10; S.Dkt. 118, 139-40.

VIII. The district court's ruling.

In September 2014, the district court denied plaintiffs' respective motions for preliminary injunction. *See* App. 13. On state action, it held: "The 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. On consent, it held: "The record here indicates 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 stated facts it described as "not in dispute." App. 2. But it is disputed whether CHA or TCB "decided whether to accept or reject suggested changes" to TSPs. *Compare* App. 5; *with supra* 3-6. It is unknown how the district court would have resolved this fact dispute had the court determined it was disputed. Four more of these undisputed facts are incomplete. First, Peery wanted

to return to the Cabrini area, App. 2, and in particular to Cabrini. *Supra* 19. Second, CHA reviews draft TSPs for compliance with "HUD regulations and City of Chicago ordinances," App. 3, and also the U.S. Constitution. *Supra* 4. Third, while the district court observed that "TCB contends that the private owners are financially responsible," App. 5, the district court did not resolve the accuracy of this contention, and HMC notably received two large government bailouts. *Supra* 18. Fourth, while HMC and TCB "administered the actual drug testing," App. 6, CHA controls eviction for test refusal or failure and transfer to avoid testing. *Supra* 13-16. Also, while the district court found CHA has no "greater voting power" than other working group members, App. 10, the point is that it controls the groups by other means. *Supra* 4-5. Finally, the court did not address a host of facts proffered by plaintiffs, including CHA's many acts requiring testing, and its control of the TSP process. *Supra* 3-12.

SUMMARY OF ARGUMENT

CHA chose to transform public housing in Chicago. It closed many of its traditional developments and replaced them with public housing units in new mixed-income developments. It uprooted tens of thousands of its residents, and relocated thousands of them to CHA's new mixed-income developments. It maintained control over all aspects of the CHA units in these new developments, including admission rules. It used this control to require drug testing in most of these CHA units. Given its control over these units and its residents' lives, CHA cannot now evade its constitutional obligations.

CHA's drug testing violates the privacy guarantees of the U.S. and Illinois Constitutions. Plaintiffs seek preliminary injunctive relief. CHA does not respond on the merits – indeed, CHA waived a "special needs" defense for the entire case. P.Dkt. 118 at 27:1-3. Instead, CHA asserts there is no state action. In fact, state action rests on four nested factual foundations.

First, CHA repeatedly and directly has acted to create, expand, and continue drug testing at the new developments. At Parkside and two other large developments, CHA chose HMC, a developer known to require testing. At one of these developments, CHA objected that HMC's draft TSP would not test enough residents, and the TSP was broadened accordingly. The developer at Oakwood Shores, TCB, had never tested before joining CHA's Plan, and today does not do so at its mixed-income developments outside Chicago. Drug testing was not in the initial TSP prepared by TCB; it was added only at the request of the CHA-controlled working group. In a subsequent phase, CHA and TCB jointly responded to tenant objections about drug testing. In the senior phase, when TCB prepared a draft with optional testing, CHA directed it to adopt mandatory testing, and TCB complied. When TCB asked whether testing might be modified in light of Chicago's marijuana decriminalization, CHA said no. CHA also directed another developer (the Davis Group) to drug test at another development (Sullivan Station). Finally, CHA attempted to impose testing at its traditional developments, and backed down only in response to public outcry. *Infra* Part I(A).

Second, CHA controls critical aspects of drug test implementation: sanctions and consequences. Specifically, CHA controls: whether to evict CHA residents who fail or refuse the test; whether CHA residents must sign CHA's own lease, which empowers CHA acting alone to evict residents who fail the test; and whether CHA residents may transfer to avoid testing. *Infra* Part I(B).

Third, given CHA's extensive control over all tenant selection criteria – including its Board's duty to review all TSPs and its power to reject them – the testing could not exist but for CHA's own direct acts. *Infra* Part I(C).

Fourth, CHA controls all aspects of CHA units at mixed-income developments, including their construction, land, management, and finance. CHA uses this control to impose drug testing. *Infra* Part I(D).

CHA also argues that plaintiffs consented to drug testing. Not so. Plaintiffs seek to avoid future testing through prospective injunctive relief. Plaintiffs' prior submission to testing was coerced. And the testing requirement is an unconstitutional condition. *Infra* Part II.

Plaintiffs satisfy the other preliminary injunction requirements. The drug testing invades privacy and bodily integrity, and is stigmatizing. Thus, it imposes irreparable harm that cannot be remedied by damages. Drug testing as a housing condition is exceedingly rare. Thus, an injunction would not harm CHA or its residents and developers. *Infra* Part III.

STANDARD OF REVIEW

Constitutional questions are reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995); *Anderson v.*

Milwaukee, 433 F.3d 975, 978 (7th Cir. 2006); *Weinberg v. Chicago*, 310 F.3d 1029, 1035 (7th Cir. 2002). This includes constitutional questions presented on preliminary injunction appeal. *Bays v. Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012); *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009). *See also CLS v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("the reviewing court must decide independently whether a given course of conduct falls on the near or far side of the line of constitutional protection"); *Korte v. Sebelius*, 735 F.3d 654, 665 (7th Cir. 2013) (holding legal issues in preliminary injunction motions are reviewed *de novo*).

Thus, whether there is state action is a constitutional question reviewed *de novo*. *Rundus v. Dallas*, 634 F.3d 309, 312 (5th Cir. 2011); *Caviness v. Horizon Ctr.*, 590 F.3d 806, 811 (9th Cir. 2010); *Nieto v. Kapoor*, 268 F.3d 1208, 1215 (10th Cir. 2001). Likewise consent. *United States v. Wade*, 400 F.3d 1019, 1021 (7th Cir. 2005).

Fact findings are reviewed for clear error. *Korte*, 735 F.3d at 665. Evidentiary rulings are reviewed for an abuse of discretion. *Holder v. IDOC*, 751 F.3d 486, 493 (7th Cir. 2014).

ARGUMENT

Plaintiffs satisfy all preliminary injunction requirements. They have "(1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits." *ACLU v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012). "If the moving party makes this threshold showing, the court 'weighs the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied.'" *Id.*

Plaintiffs are likely to succeed on the merits of the two questions on appeal: state action, *infra* Part I, and consent, *infra* Part II. Plaintiffs need not address "special needs," given the bifurcation. P.Dkt. 121. Plaintiffs satisfy the remaining preliminary injunction factors. *Infra* Part III.

I. Drug testing at CHA mixed-income developments is state action.

"At its most basic level, the state action doctrine requires that a court find such a 'close nexus between the State and the challenged action' that the challenged action 'may be fairly treated as that of the State itself.'" *Rodriguez v. Plymouth Ambulatory Servs.*, 577 F.3d 816, 823 (7th Cir. 2009), quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

"This is a largely fact-specific inquiry that examines the particulars of any relationship …" *Air Line Pilots Ass'n. v. Dep't of Aviation ("ALPA")*, 45 F.3d 1144, 1149 (7th Cir. 1995). "What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity … [N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient …" *Brentwood Acad. v. Athletic Ass'n*, 531 U.S. 288, 295 (2001). *See also Lugar v. Edmondson Inc.*, 457 U.S. 922, 939 (1982) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.").

Whether a particular set of facts establishes state action is a legal holding on a constitutional question subject to *de novo* review. *Rundus*, 634 F.3d at 312; *Caviness*, 590 F.3d at 811; *Nieto*, 268 F.3d at 1215.

Here, state action rests on four intertwined sets of facts. First, CHA repeatedly required drug testing. Second, CHA controls critical aspects of implementation. Third, CHA controls the tenant selection criteria, so there can be no testing without CHA action. Fourth, CHA controls all aspects of the new public housing units, and uses this control to require testing.

A. CHA directly controls the creation of the drug test policies.

As a direct result of a 15-year history of CHA "coercive power" and "encouragement," *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), today most CHA units at mixed-income developments are subject to drug testing, *supra* 6.

1999. North Town Village was CHA's first large mixed-income development. CHA could have picked a developer that did not drug test its renters, but instead it chose HMC and adopted and implemented its testing policy. *Supra* 6-7.

2002. CHA chose HMC and adopted its drug testing for an even larger project: rehabbing Hilliard. HMC's draft TSP required only "tenants" to test. CHA objected that this would impose drug testing only on the "leaseholder" and not also on "other occupants." To achieve CHA's goal of maximum testing, the TSP was amended to impose testing on "all authorized occupants age 18 or older." *Supra* 7.

2003. CHA chose TCB to build Oakwood Shores, CHA's largest ever mixed-income development. When TCB applied and first met CHA and its working group, TCB was asked for its position on testing. TCB had never previously tested, and does not do so today at its six sites outside Chicago. When TCB prepared a draft TSP without testing, working group members objected. TCB thus added testing, and CHA approved it. *Supra* 7-8.

2006. CHA again chose HMC and adopted its drug testing policy for a large development, Parkside. *Supra* 8-9.

2007. The LAC objected to the draft TSP for Phase 2A of Oakwood Shores, because it barred re-application by CHA residents who failed a drug test, unless a treatment counselor verified a reasonable probability of no relapse. CHA and TCB collaborated on a joint response to this LAC objection, and the TSP was then amended to allow re-application based on treatment and follow-up. *Supra* 9.

2010. When TCB drafted a TSP for the senior apartments at Oakwood Shores, working group members objected to the absence of drug testing. When TCB prepared a new draft with optional testing, CHA directed mandatory testing:

> [E]veryone in the working group preferred to have [the] drug testing requirement like the rest of the site. And yes seniors do use drugs. So we CHA do have an issue with you suggesting that you might drug test versus "will" drug test. … I know it is not our building but it is sitting on our site.

Exh. 54. Several aspects of this CHA email deserve emphasis. First, CHA is part of the working groups, *e.g.,* Tr. 113:23-114:5, 153:12-15 (Boy), so it plainly falls within "everyone in the working group." Second, CHA offered its own reason to test: "seniors do use drugs." Third, CHA squarely stated that "we CHA do have an issue" with mere optional testing. Fourth, CHA wielded its land ownership – "it is sitting on our site." Thus, CHA was clearly stating its own position, and not passing along the position of others. Within days of CHA's directive, TCB acquiesced. *Supra* 9.

2011. CHA sought to drug test all adults in CHA traditional housing by amending its ACOP. CHA withdrew this proposal in response to substantial public opposition. *Supra* 10.

Later in 2011. CHA "direct[ed]" the Davis group to include drug testing in the TSP for Sullivan Station, according to the contemporaneous letter from the Davis group to CHA. Exh. 46. The letter signer's post-litigation disavowal is not credible. He did not testify in court so his credibility was not assessed by the district court. Even if this matter were in doubt, CHA still clearly caused the testing: D&K was already testing at Lake Park Crescent; the Davis group had no final policy yet for Sullivan Station; CHA instructed the two developers to be consistent; and predictably, the drug testing policy won. *Supra* 10-12.

2012. TCB asked CHA whether, in light of the Chicago City Council's recent "decriminalization of marijuana," CHA had "a position on modifying the drug testing within the confines of the mixed income." CHA quickly and forcefully rejected TCB's suggestion:

> Marijuana possession/consumption is still illegal and against the rules of public housing across the country as well as Chicago. The change from arresting users/possessors of Marijuana to ticketing them does not change the illegality of the act or the prohibitions in public housing from use of illegal drugs.

Exh. 55.

In sum, over 15 years, CHA's incremental strategy worked: today, most CHA units in mixed-income developments require drug testing. Exhs 20, 88-89. It is of no moment that most CHA mixed-income developments (22 of 32) do not have testing,

because most large developments test, and so most individual CHA *units* are tested.[17] *Cf.* App. 11. CHA today with the stroke of a pen could abolish drug testing at all mixed-income developments: it could amend its MTSP; or it could command revisions to the ten TSPs with testing. Indeed, CHA in 2007 quickly changed the Parkside TSP to remove the felony eviction rule, after the district court in the *Cabrini-Green LAC* suit held it unenforceable. *Supra* 8-9. CHA does not end the testing because, after 15 years of expanding it, CHA now wants to preserve it.

The district court held that "CHA acquiesced in the inclusion of the drug testing policy," and that it "otherwise took no affirmative position." App. 11. This is a legal holding subject to *de novo* review. If it were a factual finding, it is clearly erroneous. Either way, in light of the foregoing evidence, the ruling cannot stand.

CHA below urged the district court to avert its gaze from every CHA mixed-income development other than the two where plaintiffs live; from every CHA action at Oakwood Shores and Parkside after the initial TSPs; and from the senior apartments, the ACOP, and the marijuana decriminalization correspondence. *Supra* notes 2-15. CHA did so to advance its hollow assertion that it was a passive, powerless bystander as developers unilaterally imposed testing. However, weighing the full scope of CHA's many individual actions in support of drug testing reveals them for what they are: parts of a united pattern. This Court should reject the

[17] While CHA initially asserted special needs for testing, Exh. 93 (10/25/13 CHA answers) #1, plaintiffs were not allowed to complete special needs discovery. P.Dkt. 121. Such discovery might have identified whether CHA perceived different degrees and types of special needs at different developments, which might have explained why testing is required at most but not all CHA units in these developments.

CHA's overly narrow approach, particularly because plaintiffs seek class-wide injunctive relief on behalf of all CHA residents tested in all mixed-income developments.

Finally, it is not relevant that HMC adopted drug testing before working with CHA. App. 10. CHA repeatedly chose HMC with knowledge of its testing policy, rather than choosing one of the many developers who do not test. Moreover, many ideas and practices that start in the private sector become state action when government adopts and implements them. For example, drug testing government employees is clearly state action, even if such testing was innovated in private workplaces. Also, TCB did not test before working with CHA, and today does not test at any of its non-CHA mixed-income developments. *Supra* 7. Discovery regarding other developers is not complete.

B. CHA directly controls drug test implementation.

While CHA delegates to its property managers certain day-to-day operational decisions about drug testing, CHA controls the most important aspects of testing administration and enforcement. *Cf.* App. 11 (erroneously stating that CHA did not "administer or enforce the [drug testing] policies").

First, CHA controls whether to evict CHA residents in mixed-income developments who refuse or fail the drug test. When the Stubenfields' mother refused to test, CHA's many directives to TCB included: "please go ahead and issue a 30 day notice"; "she should not … receive a new lease to sign and you should proceed with your 30 day notice"; "Why are you in this situation again?"; and pointedly, "Is TCB pursing legal remedies with this resident?" When a different

CHA resident failed their drug test, CHA directed TCB to "move forward with your eviction process," and when that didn't work, TCB apologized to CHA that it "messed up" and promised to "order another drug test." Likewise, CHA twice commanded the testing of a fourth CHA resident, and directed the eviction of three more CHA residents for other reasons. To ensure its ongoing control, CHA requires its developers to provide CHA with monthly reports regarding CHA residents who are non-compliant with their lease, or subject to eviction proceedings. *Supra* 13-14.

When government housing agencies direct or assist with eviction proceedings by private landlords against tenants paying rent with Section 8 vouchers, those eviction proceedings are held to be state action. *See, e.g., Anast v. Commonwealth Apartments*, 956 F. Supp. 792, 798-99 (N.D. Ill. 1997) (Williams, J.) (landlord sought "advice" from HUD about "what to do with" tenant); *Swann v. Gastonia Hous. Auth.*, 675 F.2d 1342, 1346 (4th Cir. 1982) (housing authority made eviction decisions); *Jeffries v. Georgia Residential Auth.*, 678 F.2d 919, 923-24 (11th Cir. 1982) (same).[18] Here, all plaintiffs are subject to CHA-directed eviction proceedings if they violate the drug testing policy, and some plaintiffs have already been subjected to such proceedings.

Second, CHA controls whether CHA residents at mixed-income developments must sign the standard CHA lease, and thereby expressly empower CHA to directly evict them for drug use, and thus for test failure. Before litigation, CHA required

[18] Not to the contrary are cases holding that Section 8 funding and regulation alone do not turn private landlords into state actors. *Shell v. Foulkes*, 362 F. App'x. 23, 27 (11th Cir. 2010) (unpublished); *Reyes-Garay v. Integrand Co.*, 818 F. Supp. 2d 414, 434 (D.P.R. 2011); *Young v. Halle*, 152 F. Supp. 2d 355, 364 (S.D.N.Y. 2001).

CHA residents to sign these leases. After plaintiffs cited this as evidence of state action, CHA reversed course. This illustrates CHA's control over the application of drug testing to CHA residents. *Supra* 15.

Third, CHA controls whether its residents may transfer to avoid drug testing. CHA's ACOP on its face empowers CHA to make transfer decisions on a "case by case" basis, after the resident "demonstrate[s]" good cause. For years, CHA barred such transfer. After litigation, CHA changed course: "CHA asserts that plaintiffs could (and still can) apply for transfer to units in other developments." App. 12. CHA reserves great discretion: its designated witness testified that good cause to transfer "can" include opposition to drug testing, depending upon each application's "details." *Supra* 15-16.

C. CHA directly controls creation of all tenant selection criteria.

CHA deliberately decided, after a painstaking and standardized process involving its top staff, to create many TSPs that contain drug testing. This is "such a close nexus" between CHA and testing that it "may be fairly treated as that of the State itself." *Brentwood*, 531 U.S. at 295. Cf. App. 11-12 (erroneously stating that CHA merely "fail[ed] to prohibit" testing).

CHA has ultimate control over all tenant selection criteria in TSPs. CHA has unilateral power to change its MTSP. *Supra* 3. CHA staff demand and receive many changes to draft TSPs in one-on-one discussions with developers. *Supra* 3-4. CHA lawyers review "with the Constitution in mind," and change TSPs to comply with the Constitution, as when they obtained a First Amendment exception to a TSP's limit on window signs. *Supra* 4. This demonstrates CHA's recognition, outside this

litigation, that its formation of TSPs is state action subject to constitutional review. Likewise, CHA could not allow a developer to condition residency on participation in religious activity, or abstention from public criticism of the developer. CHA further revises TSPs through the CHA-controlled working group process. *Supra* 4-5. CHA creates the working groups, controls what the developers tell them, sets the agendas, facilitates the meetings, and prepares the minutes. *Id*. Working groups do not act over CHA opposition. *Id.* During the public notice period, which CHA administers, CHA staff again change TSPs. *Supra* 5.

Perhaps most importantly, CHA's Board has the power to withhold its approval from TSPs. *Supra* 5-6. *See, e.g.,* Tr. 32:14-17 (Boy) (CHA's Board "can choose not to approve" TSPs). *Accord* App. 10 (TSPs are "approved or rejected by the CHA board"). Thus, CHA has obtained dozens of TSP changes. Exhs. 7-8.

Not to the contrary are cases finding no state action when government regulators acquiesce in private action. In *Jackson*, 419 U.S. at 354-55, a challenge to a private utility company policy, that policy had "never been the subject of a hearing or other scrutiny by the [state] Commission," and in fact "became effective 60 days after filing when not disapproved by the Commission." In *Blum*, 457 U.S. at 1010, a challenge to a private nursing home's patient discharges, "nothing in the regulations authorize[d] the [government] officials to approve or disapprove" the discharges. And in *Am. Ins. Co. v. Sullivan*, 526 U.S. 40, 55 (1999), a challenge to a private company's suspension of worker's compensation benefits under a statutory scheme, state action was limited to "paper shuffling" of a company's forms. The

passivity of state regulators in these three cases is unlike the active role of CHA in controlling TSPs. *See Wilcher v. Akron*, 498 F.3d 516, 521-22 (6th Cir. 2007) (distinguishing *Blum* and finding state action where a city approved a private cable operator's proposed rule, under a contract where the city "specifically reserved the power to approve any changes" to such rules).

D. CHA controls all aspects of CHA units.

CHA controls all aspects of CHA units in mixed-income developments, including their construction, land, management, and finance. CHA uses this control to require drug testing. Exh. 54 ("it is sitting on our site"). This "symbiotic relationship" between CHA and its public housing units in the new developments further demonstrates state action.

1. The law of symbiosis.

In *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721-25 (1961), the Court held a government parking authority accountable for the discrimination of its private tenant, because of the agency's ownership of the land and building, its expenditures to build and maintain them, and the "financially integral" role of the tenant. In 2001, the Court in *Brentwood Academy* reaffirmed this test, explaining: "a criterion of state action like symbiosis … looks not to form but to an underlying reality." 531 U.S. at 301 n.4. In 2009, this Court in *Rodriguez* identified *Burton*'s "symbiotic relationship test" as one of the Supreme Court's state action tests. 577 F.3d at 823 & n.8. *See also id.* at 824 n.10, *quoting Adickes v. Kress*, 398 U.S. 144,

152 (1970) ("joint participation" of state and private parties also can be state action).[19]

In *ALPA*, this Court held that state action rested (as here) on both direct government action and a symbiotic relationship. A union sued the government and its advertising contractor, alleging exclusion of the union's message from government advertising spaces. 45 F.3d at 1144. Because it was "impossible to sort out who *really*" excluded the message, *id.* at 1150 (emphasis in original), this Court applied two tests. If the government directly advanced the exclusion, there was state action. *Id.* Alternatively, the "symbiotic relationship" comprised state action, given the government's reservation of power to exclude advertisements, its payment of contractor expenses, and its sharing of revenue. *Id.* at 1149-50. *Focus on the Family v. Pinellas Transit Auth. ("FOTF")*, 344 F.3d 1263, 1278-79 (11th Cir. 2003) (holding a transit authority had a symbiotic relationship with its private advertising manager because of its control over policy).

A symbiotic relationship frequently exists where (as here) government and a private developer enter into a tight-knit economic partnership to build low-income housing. *See, e.g., McQueen v. Druker*, 438 F.2d 781, 783-84 (1st Cir. 1971); *Male v. Crossroads Assocs.*, 469 F.2d 616, 617-22 (2d Cir. 1972); *Halet v. Wend Co.*, 672 F.2d 1305 (9th Cir. 1982); *Mendoza v. Frenchman Apartments*, 2005 WL 6581642, *8 (E.D. Wash. 2005); *Anchor Mgmt. Co. v. Green*, 205 Cal. App. 4th 232, 243-44

[19] The Court in *Sullivan* narrowed but did not overrule *Burton*, holding that *Blum* and *Jackson* "refined" *Burton*'s "vague 'joint participation' test," and established that "extensively regulated" industries "do not fall within the ambit of *Burton*." 526 U.S. at 57. Here, symbiosis goes far beyond extensive regulation. *Supra* 16-18.

(2012). *See also Jatoi v. Hurst Hosp. Auth.*, 807 F.2d 1214, 1221-22 (5th Cir. 1987) (holding government and a private hospital had a symbiotic relationship); *Elliot v. CHA*, 1999 WL 519200 (N.D. Ill. 1999) (holding state action rested on "CHA's control" of its lead abatement contractor for Section 8 housing); *Washington v. Kass Mgmt.*, 2011 WL 1465581, *3 (N.D. Ill. 2011) (finding a principal-agent relationship between CHA and one of its mixed-income developers, based on CHA's "substantial control").

These cases rely on factors present here, such as: government's reservation of power over the disputed policy, *ALPA*, 45 F.3d at 1149-50; *FOTF*, 344 F.3d at 1278-79; government ownership of the land, *Halet*, 672 F.2d at 1310; a legal requirement to use the land for low-income housing, *McQueen*, 438 F.2d at 783-84; government control of tenant admissions, *Male*, 469 F.2d at 617-22; and government's prior management and current monitoring of the property, *Jatoi*, 807 F.3d at 1221-22.

2. Facts demonstrating symbiosis here.

CHA has ultimate control over all aspects of CHA units in mixed-income developments. These are public housing units, 24 C.F.R. § 5.100, and CHA must ensure their operation conforms to federal law, *id.* § 905.604(c)(1). Specifically:

Construction. CHA hires and fires the developers and revises their plans. CHA closes its buildings, relocates its residents, arranges demolition, and works with other agencies to improve infrastructure. CHA monitors construction and inspects completed units. *Supra* 17.

Land. CHA owns the land under the developments. After 99 years, CHA will own some of the buildings and has options to purchase others. *Supra* 17.

Management. CHA must approve the management plans, and the hiring and firing of managers. CHA manages the waiting lists for returning CHA residents. CHA requires annual inspections of CHA units. CHA provides its residents, but not other residents, with a grievance process. *Supra* 17.

Finance. Public funds paid about half of the cost to build the developments. During the recent housing slump, HMC received two government bailouts: $12 million from CHA, and $3 million from Chicago. CHA annually pays millions of dollars of operating subsidies. CHA must approve the annual operating budgets, and obtains changes to those budgets. *Supra* 18.

CHA's control of CHA units is not diminished by any CHA-developer disclaimers of an agency relationship. *Cf.* App. 4-5. The symbiotic relationship test "looks not to form but to an underlying reality." *Brentwood*, 531 U.S. at 301 n.4. *See also Washington*, 2011 WL 1465581, *3 (finding a principal-agent relationship between CHA and one of its mixed-income developers, notwithstanding a disclaimer against such a relationship).

No doubt, mere government funding and regulation of a private entity do not alone establish state action. *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-42 (1982); *Blum*, 457 U.S. at 1010-11; *Jackson*, 419 U.S. at 358; App. 8-9. Nor does a "mutually beneficial contract" between government and a private party. App. 11. But here, CHA's symbiotic relationship runs far deeper and contains the same state action factors, and more, as in the cases above that found symbiosis. This symbiotic relationship is particularly probative of state action when combined with CHA's

direct control of the creation and implementation of drug testing, as discussed above. *See ALPA*, 45 F.3d at 1149-50 (state action rested on both direct acts and symbiosis); *FOTF*, 344 F.3d at 1278-79 (same).

In sum, CHA's direct actions to require drug testing, and its symbiotic relationship with its units at the mixed-income developments, combine to show "such a close nexus" between CHA and the testing that it "may be fairly treated as that of the State itself." *Brentwood*, 531 U.S. at 295.

II. The challenged drug testing is not consensual.

CHA's drug testing policy at mixed-income developments is not consensual: (a) plaintiffs seek to avoid future drug testing through prospective injunctive relief; (b) plaintiffs' prior submission to drug testing was coerced; and (c) the drug testing requirement is an unconstitutional condition.

A. Plaintiffs do not consent to future drug testing.

Even if plaintiffs consented to drug testing in the past, they do not consent to it in the future. Indeed, they sued to stop it. *See Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1284 (M.D. Fla. 2011) (although plaintiff signed a drug testing consent form, by "refusing to take the drug test and by filing this action" plaintiff "unequivocally revoked" his "initial consent"), *aff'd*, 710 F.3d 1202 (11th Cir. 2013). Prior consent "does not bar the invocation of [one's] rights under the Fourth Amendment to be free from suspicionless drug testing." *Id*. *See also United States v. Currency*, 732 F.3d 812, 819 (7th Cir. 2013) ("[N]o consent is irrevocable."); *United States v. Jachimko*, 19 F.3d 296, 299 (7th Cir. 1994) ("consent may be withdrawn"); *United*

States v. Dyer, 784 F.2d 812, 816 (7th Cir.1986) ("Clearly a person may limit or withdraw his consent to a search, and the police must honor such limitations.").

B. Plaintiffs have not consented to past drug testing.

While four of the five plaintiffs submitted to drug testing at some point,[20] they did not consent. "Submission to authority" does not amount to "an understanding and intentional waiver of a constitutional right." *Lebron*, 710 F.3d at 1214. *See also Schneckloth v. Bustamonte*, 412 U.S. 218, 233 (1973) (consent "granted only in submission to a claim of lawful authority" is "invalid").

1. Plaintiff Peery.

Peery was displaced by CHA from his traditional public housing at Cabrini, resulting in years of housing instability, including sometimes imposing on friends and family and occasionally sleeping in his car. He wanted to return to Cabrini, but when he called the number on a CHA form in early 2009, he was told he could not. He was also told he could apply for a public housing unit at Parkside or two other Cabrini-area mixed-income developments, but he was not told about drug testing. In June 2010, Peery was told a Parkside apartment was immediately available. Only after he completed the final leasing paperwork was Peery told about the drug test. Peery objected, asking if he had a choice, and was told to take the test or lose the apartment. *Supra* 19-20.

2. The Stubenfield plaintiffs.

Likewise, the Stubenfield plaintiffs did not consent to testing. Jessica Stubenfield has refused to take the drug test during most years she has lived at

[20] DeAnn Stubenfield has not taken any drug tests. D. Stubenfield dep. 10:13-16.

Oakwood Shores, and only agreed to be tested in 2009 after eviction proceedings had been filed. Because Jessica and DeAnn live with their mother, they are not heads of household, and they cannot apply for a transfer under the ACOP. Exh. 34 (ACOP) 37; Tr. 60:4-23 (Boy). Therefore, their only choice is to be tested or face the consequence of being kicked off the lease, or possibly cause their whole family to be evicted if they refuse testing. *Supra* 20-22.

Deborah Thigpen has taken the tests because she felt she had no choice. She was never told that she could reject the unit offered to her or ask for another unit. She tried to get a Section 8 voucher in 2013 but was told she could not. *Supra* 22.

Sharon Thompson was not told that there would be annual drug testing. After she was moved into her current accessible unit, she was told it was permanent and she could not move anywhere else. *Supra* 22-23.

3. Plaintiffs were not provided with adequate alternatives.

For all plaintiffs, rejecting the offered unit was not an adequate option. If a resident with the right of return rejects their first housing offer, they return to a CHA waiting list. Residents on the HOP list only receive two housing offers before losing their right to return. Residents on both lists who decline one offer could wait years for the next offer. Furthermore, the existence of housing options without drug testing does not mean they are available at any time. Tr. 341:10-20 (CHA's closing). In fact, most CHA units in mixed-income developments have drug testing. Therefore, residents on the HOP list might receive two offers with drug testing, refusal of which would extinguish their right to return. *Supra* 23.

Forced to decide between drug testing and losing known available housing, in the face of housing instability created by CHA's Plan, plaintiffs submitted to testing. The court in *Lebron* held that similar pressure on low-income people to take a drug test or lose a critical benefit "convey[ed] a message that [the defendant] has the unfettered lawful authority to require such drug testing." 710 F.3d at 1215. Such "mandatory 'consent'" has no "constitutional significance." *Id.* at 1214.

Likewise, seeking transfer to a new unit without drug testing has never been a viable option. *Cf.* App. 13. CHA only adopted its policy of allowing "good cause" transfer to avoid drug testing *after* initiation of this lawsuit.[21] In fact, when the Stubenfields' mother expressed interest in such a transfer, CHA told HUD it was not allowed. Exh. 59, 44327-28. Furthermore, given CHA's narrow examples of "good cause" in the ACOP, a reasonable resident wanting to avoid testing would have assumed a transfer application was futile. *Supra* 23-24.

Even if CHA now allows "good cause" transfers to avoid testing, many barriers remain. Not only must transferees bear "all costs," but transfers are assessed on a "case by case" basis, contingent upon another unit being available, and subject to CHA's final approval. Transfers further require residency for "at least one year," and applicants who decline an offer must wait a full year to reapply. Additionally, if plaintiffs refuse to take drug tests now or in the future, they are not

[21] Indeed, when plaintiffs asked CHA's designated deposition witness whether CHA would allow such transfer, she testified that she could not "speculate" and "would need the transfer request in front of me." Boy dep. #1 230:2-231:22. Only after a break, *id.* 233:11-18, and when questioned by defendant HMC's counsel, did the CHA's witness state good cause "can" include testing opposition. *Id.* 270:12-272:12.

lease-compliant, and residents who are not lease-compliant cannot request a transfer.[22] At best, plaintiffs may now request transfer while continuing to submit to annual drug testing for as long as the transfer process takes. Executing a transfer request could take years, and the medical needs of some plaintiffs could extend this time. Thigpen dep. 124:12-125:8 (she requires a first floor apartment); Thompson dep. 10:8-15 (she requires a disability accessible apartment). Nor would a resident-initiated transfer provide relief to residents like the Stubenfields, who are not heads of household. *Supra* 24.

C. CHA's drug testing is an unconstitutional condition.

The unconstitutional conditions doctrine "prevents the government from awarding or withholding a public benefit for the purpose of coercing the beneficiary to give up a constitutional right or to penalize his exercise of a constitutional right." *Planned Parenthood v. Health Dept.*, 699 F.3d 962, 986 (7th Cir. 2012). CHA, therefore, cannot "achiev[e] indirectly what the Constitution prevents it from achieving directly." *Id.* In *Lebron*, the court held that conditioning the receipt of TANF benefits on a drug test was an unconstitutional condition. 710 F.3d at 1217.[23]

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[22] The District Court incorrectly states that refusal to submit to testing results in "only eviction from that particular unit." App. 12. Acceptance of a CHA unit in a mixed-income development extinguishes the right of return. Exh. 6 (RRC) 143; Boy dep. #2, 45:13-22. Residents evicted from such units may only return to public housing through the main CHA waiting list for the general public, which today is closed and might not reopen for years. *Id.* 46:16:47:14, 48:7-49:11.

[23] Not to the contrary is *Wyman v. James*, 400 U.S. 309, 317-18 (1971), which upheld home visits by social workers as a condition of receiving AFDC benefits, because such visits are not searches. While the Court then hypothetically concluded that the visits would be reasonable *if* they were a search, the Court "never reached the question of whether, and under what conditions, a mandatory 'consent' could

Plaintiffs' so-called "choice" here also is an unconstitutional condition: either submit to a drug test, or forego known available housing and go back on the waiting list, possibly for years.

Such conditions are especially inappropriate where, as here, the state has not proven they are reasonable. *Burgess v. Lowery*, 201 F.3d 942, 947 (7th Cir. 2000) (rejecting the state's argument that "consent" justified the "very painful choice" between foregoing a visit to a prisoner or submitting to a strip search, especially given the state's "fatal" decision to "defend their practice without regard to the inmate's crime or punishment"); *Zboralski v. Monahan*, 616 F. Supp. 2d 792, 803 (N.D. Ill. 2008) ("In order for consent to be a defense, the search must be reasonable, a question which at this juncture we cannot answer"). The government may only condition a benefit on suspicionless drug testing upon a showing of reasonableness, and "the Supreme Court has never held that such drug testing regimes were constitutionally reasonable because of consent." *Lebron*, 710 F.3d at 1215. Instead, consent is a "component of the broader special-needs balancing test" rather than a "separate and dispositive inquiry," *Lebron v. Florida*, 772 F.3d 1352, 1374 (11th Cir. 2014), and all defendants waived a special needs defense pending resolution of plaintiffs' preliminary injunction motions. P.Dkt. 118.

The fact that plaintiffs might now be able to request a transfer to a unit without drug testing is immaterial: the availability of an alternate benefit does not

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render an *actual* Fourth Amendment search reasonable." *Lebron*, 710 F.3d at 1216 (emphasis added). Moreover, *Wyman* precedes well-established Supreme Court precedent holding that government-imposed drug testing is a Fourth Amendment search. *See, e.g.*, *Skinner v. Ry. Ass'n*, 489 U.S. 602, 617 (1989).

alleviate an unconstitutional condition. *See, e.g.*, *Bourgeois v. Peters*, 387 F.3d 1303, 1324-25 (11th Cir. 2004) ("the existence of other vehicles through which protesters could voice their disagreement . . . (e.g., letters to Congress) does not in any way alleviate the unconstitutional conditions problem"); *Herrera v. Santa Fe Sch.*, 792 F. Supp. 2d 1174, 1183 (D.N.M. 2011) (a school could not require a student to "avoid a violation of her constitutional rights by not attending her graduation," as "[g]overnment may not condition the receipt of a benefit or privilege on the relinquishment of a constitutional right"). Plaintiffs seek to remain in their current homes, and should not be forced to move to avoid an unconstitutional drug test.

III. Plaintiffs satisfy the other preliminary injunction requirements.

Plaintiffs satisfy the remaining preliminary injunction factors: irreparable harm, the absence of an adequate damages remedy, the balance of harms, and the public interest. *Alvarez*, 679 F.3d at 589.

Courts routinely grant preliminary injunctions against drug testing in Fourth Amendment litigation because of the irreparable harm and inadequacy of damages. *Fed. Emps. v. Vilsack*, 681 F.3d 483, 499 (D.C. Cir. 2012); *AFT v. Kanawha Bd.*, 592 F. Supp. 2d 883, 905 (S.D. W. Va. 2009); *Bannister v. Leavenworth Cnty.*, 829 F. Supp. 1249, 1252 (D. Kan. 1993); *Gov't Emps. v. Wilson*, 1990 WL 208749, *14 (E.D. Cal. 1990). *See also Lebron*, 710 F.2d 1202. Courts preliminarily enjoin other Fourth Amendment violations. *Mills v. D.C.*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (police checkpoints); *Buquer v. Indianapolis*, 797 F. Supp. 2d 905, 924 (S.D. Ind. 2011) (statute authorizing arrest for use of consular identification); *Pratt v. CHA*, 848 F. Supp. 792, 796 (N.D. Ill. 1994) (program of warrantless home searches). Courts

preliminarily enjoin invasions of many other constitutional rights. *Alvarez*, 679 F.3d at 589 (First Amendment); *Ezell v. Chicago*, 651 F.3d 684, 697-700 (7th Cir. 2011) (Second Amendment); *Planned Parenthood v. Doyle*, 162 F.3d 463 (7th Cir. 1998) (reproductive freedom); *NAACP v. Husted*, 768 F.3d 524, 560 (6th Cir. 2014) (voting rights); *Farnam v. Walker*, 593 F. Supp. 1000 (C.D. Ill. 2009) (Eighth Amendment).

Not to the contrary is *Campbell v. Miller*, 373 F.3d 834, 835 (7th Cir. 2004), which rejected the argument that "money never is an adequate remedy for a constitutional wrong." It does not follow, of course, that money is always an adequate remedy. Not present here are the distinctive factors in *Campbell* that weighed against a preliminary injunction: the potential for "havoc" when courts enjoin "enforcement of the criminal law"; and uncertainty whether that plaintiff was "apt to be arrested and searched again." 373 F.3d at 835-36.

Here, the challenged drug testing causes irreparable injury that cannot be remedied by damages. First, all drug testing invades privacy and bodily autonomy.

Second, the testing here stigmatizes CHA residents as presumptive drug users and abusers. Condo owners are exempt. *Supra* 8. Other than the landlords participating in CHA's Plan, defendants can identify no public or private landlords who drug test their residents. Exh. 76 (1/24/14 CHA answers) #12-13; Exh. 90 (1/24/14 HMC answers) #10-11. While non-CHA renters are subject to testing, App. 12, CHA's justification for testing is "the history" of "safety problems" and "drug problems" in "the surrounding community" (Exh. 93, CHA 10/25/13 answers at p. 3) – meaning CHA's traditional developments.

Third, the drug testing methods here (urine and saliva sampling) are embarrassing and unpleasant.

Fourth, Peery only seeks declaratory and injunctive relief, and does not seek damages. P.Dkt. 65.

On the other side of the scale, a preliminary injunction would not harm CHA, any developers, or any residents. No party has identified any public housing authority or private landlord – other than those involved in CHA's Plan – that require drug testing. Drug testing also is not used in traditional CHA developments, any condo units in CHA mixed-income developments, and some rental units in these new developments. Housing clearly can be managed safely without the extraordinary blunderbuss of drug testing. Finally, any CHA residents who support testing cannot waive the rights of residents who object. *Pratt*, 848 F. Supp. at 796.

CONCLUSION

Plaintiffs respectfully request that this Court reverse the district court's denial of plaintiffs' motions for preliminary injunction, and remand with instructions to enter preliminary injunctions.

DATED: January 22, 2015

Respectfully submitted:

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CERTIFICATE OF WORD COUNT

As required by Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that this Joint Brief of Plaintiffs-Appellants complies with the type-volume limitation for proportionally spaced briefs. It contains 13,998 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

DATED: January 22, 2015

/s/ Adam Schwartz
Adam Schwartz
Counsel for Joseph Peery

STATEMENT REGARDING APPENDIX

As required by Circuit Rule 30(d), I state that the appendix bound with this Joint Brief of Plaintiffs-Appellants includes all materials required by Circuit Rule 30(a). Specifically, it contains the appealed-from district court Memorandum Opinion and Order of September 30, 2014, denying plaintiffs' motions for preliminary injunction.

DATED: January 22, 2015

/s/ Adam Schwartz
Adam Schwartz
Counsel for Joseph Peery

CERTIFICATE OF SERVICE

I certify that on January 22, 2015, I electronically filed this Joint Brief of Plaintiffs-Appellants 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 22, 2015

/s/ Adam Schwartz
Adam Schwartz
Counsel for Joseph Peery

APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSEPH PEERY, on behalf of himself and all persons similarly situated, Plaintiffs, v. CHICAGO HOUSING AUTHORITY and HOLSTEN MANAGEMENT CORPORATION, Defendants.	Case No. 13-cv-5819 related to Case No. 13-cv-6541
DEANN STUBENFIELD, JESSICA STUBENFIELD, DEBORAH THIGPEN, and SHARON THOMPSON, Plaintiffs, v. CHICAGO HOUSING AUTHORITY and THE COMMUNITY BUILDERS, INC., Defendants.	Judge Sharon Johnson Coleman

MEMORANDUM OPINION AND ORDER

On June 16 and 17, 2014, this Court heard evidence and arguments on plaintiffs' Amended Motions for Preliminary Injunction [Dkt. 66. case no. 13 cv 5819; Dkt. 55. case no. 13 cv 6541].[1] Plaintiffs seek entry of a preliminary injunction enjoining the defendants from drug screening as a condition of residency in Chicago Housing Authority ("CHA") subsidized units in mixed-income developments. The defendants argue that the drug testing policy is solely the work of the private developers (The Company of Builders "TCB" and Holsten Management Company "HMC"), who are not state actors for purposes of the Fourth Amendment prohibition of suspicionless drug

[1] Plaintiffs are Joseph Peery, Deann Stubenfield, Jessica Stubenfield, Deborah Thigpen, and Sharon Thompson. Roy Thompson was previously dismissed.

searches, and even if they were, plaintiffs have consented to the searches. For the reasons set forth herein, the Court denies the motions.

I. Background

The Court heard live testimony from Joanne Pastores Boy, the CHA's Rule 30(b)(6) witness, Peter Holsten, and Lee Pratter of TCB. Voluminous documentary and deposition evidence was provided to the Court, including the depositions of all named plaintiffs as well as Annie Stubenfield, Robert Koener, Jackie Holsten, Susan McCann of TCB, and others. The following facts are not in dispute for purposes of ruling on this motion.

Plaintiff Joseph Peery:

Peery lived at the CHA's Cabrini-Green housing complex from 1991 to 2005. The CHA razed the Cabrini-Green complex as part of the "Plan for Transformation." Residents obtained Section 8 housing vouchers to relocate to private housing. During this time, Peery moved to California. He returned to Chicago in 2009, wanting to live in the Cabrini-Green Area. He selected three housing location preferences: Parkside Phase 1B Rental, Old Town Village East II, and Old Town Village West. In June 2010, HMC personnel from Parkside contacted Peery to apply for a one-bedroom unit in Parkside Phase 1A (a condo building in which scattered units are rented to CHA tenants). Peery successfully completed the application process, including drug testing, and signed his lease on July 23, 2010. Peery has complied with the drug testing policy each year for renewal of his lease.

HMC is a private real estate developer that owns/manages Parkside among other buildings. HMC began using drug screening in the mid-1990s at several of its properties. HMC asserts that the drug screening policy at issue here is identical to the one it employs for all its buildings whether housing CHA tenants or not. According to HMC, it administers all aspects of the drug screening at Parkside, including paying all costs. HMC also attests that results of the tests are not reported to

CHA and there is no policy to advise CHA of any objections to the drug testing.

The Parkside development began in 2006 as part of CHA's "Plan for Transformation" for public housing in Chicago. The Cabrini Consent Decree created a Near North Working Group to select developers, provide overall direction, and monitor redevelopment of the former site of Cabrini Green. The Near North Working Group consisted of the Cabrini-Green Local Advisory Council ("LAC"), the CHA, the City of Chicago, counsel for the *Gautreaux* plaintiffs, and the Habitat Company, CHA's court appointed receiver. The Working Group sought proposals from private developers to redevelop part of the Cabrini site into mixed-income housing. The Working Group selected Parkside Associates, a partnership between Holsten Real Estate Development Corporation[2], Kimball Hill Homes, and the Cabrini-Green Local Advisory Council Community Development Corporation.[3] After going bankrupt, Kimball Hill Homes' share was divided between Holsten and the Cabrini-Green Local Advisory Council Community Development Corporation. The LAC Community Development Corporation is a 40% partner in Parkside. The same Working Group is responsible for the entire Cabrini-Green Area redevelopment and approved tenant selection plans and leases for eleven mixed-income developments. Of the eleven mixed-income developments, nine did not include drug screening as conditions of occupancy. The only two developments to include the drug testing provision are HMC managed.

Joanne Boy of the CHA testified that each site's private developer is responsible for drafting proposed lease agreements and a tenant selection plan. The CHA has minimum requirements for the tenant selection plans. The CHA's minimum tenant selection plan does not contain a drug screening policy. The developer presents the proposed lease and tenant selection plan to the Working Group for review and compliance with HUD regulations and City of Chicago ordinances. Once the Working Group approves a proposed lease and tenant selection plan, it publishes the lease and

[2] Holsten Real Estate Development Corporation is an affiliate of defendant HMC.
[3] LAC Community Development Corporation is the corporate entity of the Cabrini-Green Local Advisory Council.

tenant selection plan for public comment. The Working Group then recommends the lease and tenant selection plan to the CHA Board for approval. On June 20, 2006, the CHA Board approved the lease package and tenant selection plan for Parkside.

Plaintiffs Deann Stubenfield, Jessica Stubenfield, Deborah Thigpen, and *Sharon Thompson*

Plaintiff Deborah Thigpen lived in the Ida B. Wells and the Wells Extension during the 1990s until 2003. Between 2003 and 2005, Thigpen rented an apartment from a private landlord with a Section 8 voucher that she obtained in connection with her Relocation Rights contract with the CHA. Thigpen listed Ida B. Wells and the Robert Taylor Homes as her first and second choices for locations. Thigpen was offered an apartment in Oakwood Shores Phase 1A in 2005 when it was completed and signed a lease with TCB as lessor. The lease carries an addendum that requires drug testing. Thigpen has taken the drug test every year that she has lived at Oakwood Shores.

Plaintiff Sharon Thompson lived at the Ida B. Wells homes from 1977 through 2006, when she was offered and accepted a unit at Oakwood Shores Phase 2B. Thompson identified Lakefront as her preferred location for relocation. Thompson testified that she did not have an issue with taking a drug test when she initially entered the lease, but objects to having annual tests after living there for 7 years.

Plaintiffs DeAnn and Jessica Stubenfield are not parties to a lease, but live with their mother Annie Stubenfield, a lessee at Oakwood Shores Phase 1A. Annie Stubenfield is not a plaintiff in this case, despite claiming to object to annual drug testing despite submitting to the test for her initial lease. Once her daughters turned 18 and were also required to be screened annually, they objected as well.

Defendant The Community Builders ("TCB") is the management agent for the private owners of the Oakwood Shores property, pursuant to written agreement. It is also the partial owner of the developer for the rental portion of each Oakwood Shores phase. TCB represents that none of

the documents for the development and management of Oakwood Shores define TCB or any other owner entity as an agent of CHA. Oakwood Shores leases the land from the CHA that was formerly the site of four public housing projects known as Ida B. Wells, the Wells Extension, Madden Park, and Darrow Homes. TCB contends that the private owners are financially responsible for the success of the development and responsible to the private investors/lenders. TCB drafted the leas and tenant selection plan proposed to the Madden/Wells Area Working Group, and TCB staff decided whether to accept or reject suggested changes to the documents. TCB asserts that all Oakwood Shores tenants sign an identical lease that includes the drug testing policy regardless of whether they are CHA residents or market rate tenants.

Oakwood Shores is one of the mixed-income, mixed-finance developments that were built as part of the Plan for Transformation. Oakwood Shores consists of multiple phases, each owned by a private limited partnership. The Madden/Wells Area Working Group was responsible for overseeing the redevelopment of the Madden/Wells Area, including Oakwood Shores. The Working Group consisted of the Madden/Wells Local Advisory Council, CHA, City of Chicago, counsel for the *Gautreaux* plaintiffs, the Habitat Company (CHA's court appointed receiver), and representative from the 4th Ward Alderman's office (non-voting member). TCB decided to include the drug screening policy in its lease and tenant selection plan for Oakwood Shores at the behest of the Working Group. The only member of the Working Group to oppose the policy was Richard Wheelock, attorney for the LAC. The CHA did not take a position, except requiring all the sites and units have the same requirements. In an email to Lee Pratter, TCB project manager for Oakwood Shores from Jessica Caffrey at CHA, stating that "everyone in the working group preferred to have the drug testing like the rest of the site." (Plaintiff's Ex. 54).

II. Legal Standard

In order to obtain a preliminary injunction, the plaintiff must show that (1) he has no

adequate remedy at law, (2) will suffer irreparable harm if a preliminary injunction is denied, (3) some likelihood of success on the merits, and (4) the balance of harms favors the moving party or whether the harm to the non-moving party or the public is sufficiently weighty that the injunction should be denied. *ACLU v. Alvarez,* 679 F.3d 583, 589 (7th Cir. 2012). Among these elements, the issues before the Court affect plaintiffs' likelihood of success on the merits more than any other element. On a plaintiff's motion for preliminary injunction the requirement for substantial proof is much higher than what is required on summary judgment. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). "It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Id.*

III. Discussion

A. Likelihood of Success on the Merits

Plaintiffs assert that the Chicago Housing Authority imposed, either directly or indirectly, the drug testing requirement, resulting in suspicionless searches in violation of the plaintiffs' Fourth Amendment rights. In order to succeed on the merits of their Section 1983 claims, plaintiffs must prove (1) action under color of law; (2) a search or seizure under the Fourth Amendment; and (3) that the search or seizure was unreasonable in the face of the government interests at stake and the circumstances of the search." *See, e.g., Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002). Only the first two elements are at issue here: the existence of state action and consent to the search (taking the suspicionless drug testing outside the reach of the Fourth Amendment).

The facts demonstrate that it is the private developers (HMC and TCB) that administered the actual drug testing.[4] Generally, the conduct of private parties lies beyond the scope of the Constitution. *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 114 (1973).

[4] While plaintiffs dispute responsibility for the drug testing, the record is clear that only the private developers conduct the actual testing and obtain the results not the CHA.

Therefore, plaintiffs must demonstrate with clear evidence that the drug testing conducted by the private developers as part of the lease execution and renewal process constitutes state action. Even if plaintiffs demonstrate that the private developer's actions should be treated as state action, if any of the plaintiffs consented to the drug testing then there can be no constitutional violation.

1. State Action

The determination of whether a private entity is a state actor is "necessarily a fact-bound inquiry." *Brentwood Academy v. Tennessee Secondary School Athletic Association, et al.,* 531 U.S. 288, 298 (2001). "[S]tate action may be found if, though only if, there is such a 'close nexus between the state and the challenged action' that seemingly private behavior 'may be fairly treated as that of the state itself." *Id.* at 295 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). "[T]he purpose of the requirement is to assure that constitutional standards are invoked only when it can be said that the state is responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky et al.,* 457 U.S. 991, 1004 (1982) (emphasis added).

The Seventh Circuit has characterized the determination of whether private behavior is state action as articulated in Supreme Court precedent not as a test so much as a series of examples in a fact-based inquiry. *Hallinan v. Fraternal Order of Police of Chicago,* 570 F.3d 811, 815 (7th Cir. 2009). The court in *Hallinan* lists the following examples: when private actors conspire or are jointly engaged (*Dennis v. Sparks*, 449 U.S. 24, 27-8 (1980)); where a state compels discriminatory action; when the state controls a nominally private entity; when it is entwined with its management and control (*Evans v. Newton*, 382 U.S. 296, 299 (1966); when the state delegates a public function to a private entity; when there is such a close nexus between the state and the challenged action that seemingly private behavior reasonably may be treated as that of the state itself. *Id.* It appears from the cases that this fact-based inquiry comes down to a matter of degree of involvement. Furthermore, the relationship/nexus/entanglement/entwinement between the state and the private entity must be on

the precise issue of which the plaintiffs complain, i.e. the drug testing policy.

Plaintiffs make two main arguments for why this Court should treat the drug testing policy as State action.[5] First, they argue that CHA has direct involvement in the challenged conduct because CHA has "absolute and ultimate control over tenant selection criteria" and has used this control to impose drug testing at Parkside and other developments. Second, plaintiffs argue that CHA and the private developers have a "symbiotic relationship" such that the action of the private developers may be said to be that of the CHA. Plaintiffs rely on the following to support their argument: the CHA's membership in the Working Groups; CHA's Board approval of the tenant selection plans and leases; the three-party leases between CHA tenants, the private developers and the CHA; the CHA's ownership of the land; the enforceability of CHA tenant relocation rights; and the CHA's duty to ensure the developments comply with federal law (HUD regulations).

Peery relies on several cases, including *McQueen v. Druker*, 438 F.2d 781 (1st Cir. 1971); *Male v. Crossroads Assocs.*, 469 F.2d 616 (2d Cir. 1972); *Halet v. Wend Co.,* 672 F.2d 1305 (9th Cir. 1982). The continued value of *McQueen*, however, was questioned in *Edwards v. Lutheran Senior Services, Inc.* because the court noted that *McQueen* was decided before the Supreme Court's decision in *Blum* made clear that extensive state financial support and funding, without more, do not establish a symbiotic relationship between a private entity and the state. 603 F. Supp. 315, 323 (D. Del. 1985).

In *Male*, welfare recipients residing in Peekskill, N.Y., alleged that rental agents at the Crossroads Apartments, a privately owned complex built as part of the Peekskill Urban Renewal Project, refused to consider them as applicants for housing solely because of their welfare status. *Male*, 469 F.2d at 617. The Second Circuit Court of Appeals found state action based primarily on the pervasive regulatory scheme under with the project proceeded. The court found

[5] This Court treats plaintiffs' arguments collectively since their position is nearly identical. However, in the Stubenfield plaintiffs' opening brief they addressed primarily whether CHA could claim a "special need" for the drug testing and only mentioned in passing that there is state action. *See Case No. 13 cv 6541, Dkt. 55.*

that the state's initial and continuing involvement in the construction and operation of the project was governed by a state or federal statute or rule. However, the mere existence of a regulatory scheme is insufficient evidence to establish State action. *See, e.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972) (holding that the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter "state action" within the ambit of the Equal Protection Clause of the Fourteenth Amendment.).

In *Halet*, the plaintiff claimed racial discrimination based on the private owner of an apartment complex having an adults-only policy. The court found that Halet had sufficiently alleged State action to proceed with his claim because, if proved, these allegations would place the County in a position of interedependence such that is a joint participant with defendant Wend. *Halet*, 672 F.2d at 1310. The court based its decision on the following allegations: (1) the County owns the land leased to Wend for the apartment complex; (2) the County acquired and prepared the land using federal and state funds and used federal services in dredging the harbor in the redevelopment area; (3) the purchase of land was part of a large redevelopment program; (4) the County leased the land to Wend for the benefit of the public in providing housing; (5) the lease prohibits race or religious discrimination; (6) the County oversees the development of the area and the design of the buildings and had final approval of all plans; (7) the County controls the use and purpose of the apartment and the rent charged; (8) Wend pays a percentage of the rentals to the County; and (9) Wend must abide by all the conditions of the lease. *Id.*

Plaintiffs also rely on *Airline Pilots Assoc'n v. Dep't of Aviation,* 45 F.3d 1144 (7th Cir. 1995), in which ALPA, the collective bargaining representative, sought to place an advertisement honoring the Air Wisconsin pilots in one of the display cases at O'Hare Airport. The district court dismissed for failure to state a claim and the Seventh Circuit reversed and remanded. The Seventh Circuit

found that the advertising agency's refusal to install the advertisement was a product of state action. In so finding, the Seventh Circuit pointed to four "tests" or "discernible situations" where the court will find state action despite the presence of a private party: (1) "symbiotic relationship" between the private actor and the State (*Burton,* 365 U.S. 715, 721 (1961)); (2) the "nexus test" where the State commands or encourages the private discriminatory action (*Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982)); (3) when a private party carries on a traditional public function; and (4) when the involvement of governmental authority aggravates or contributes to the unlawful conduct. *Airline Pilots Assoc'n (ALPA),* 45 F.3d at 1149.

Here, plaintiffs cannot show a sufficiently close nexus between the CHA and the private developers to establish state action. While the CHA is a voting member of both the Near North Working Group (Parkside) and the Madden/Wells Area Working Group (Oakwood Shores), the CHA is not the only member and there is nothing in the record to show that the CHA had greater voting power than any other voting member. In the case of the Near North Working Group, the same working group approved tenant selection plans and leases that did not include drug screening at nine out of eleven mixed-income developments. The only two to include testing are managed by HMC. Further, the record shows that HMC has used drug testing in its developments since the mid-1990s; long before HMC developed mixed-income housing that included CHA subsidized units.

Additionally, the record demonstrates that CHA had minimum tenant selection requirements, but that the private developers were tasked with establishing their own tenant selection plans and lease packages. The 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. Once approved in the working group, the tenant selection plans and leases were approved or rejected by the CHA board to allow the redevelopment plan to proceed to closing. Plaintiffs assert that CHA requires plaintiffs to enter three-party leases with the CHA and the private

management companies under which they can be evicted for drug-use. Yet, this provision, which is required under federal law, simply allows a landlord to terminate a public housing tenant's lease because of illegal drug-use. The provision is not a part of the drug screening policies imposed by HMC and TCB.

Plaintiffs' alternative argument that CHA is indirectly responsible for the drug testing policies, based on a "symbiotic relationship" argument also fails to show sufficient evidence that CHA is behind the testing.[6] The evidence in the record demonstrates that CHA acquiesced in the inclusion of the drug testing policy, but that it otherwise took no affirmative position. Yet, the mere fact of a mutually beneficial contract with the government entity does not render the private actor a state actor for all purposes. *ALPA*, 45 F.3d at 1150. Undoubtedly, CHA assisted in the planning and financing of the mixed-income developments. The purpose of the redevelopment plan was, after all, to provide housing to CHA residents. Similarly, the CHA necessarily exerts control over the minimum tenant selection criteria since the units at issue are to be occupied by public housing residents. Rather than mandating the drug testing as argued by plaintiffs, the CHA took the position that if a private developer wanted to require any additional requirements beyond the minimum TSP, such as drug testing as a condition of occupancy, then CHA required only that the additional conditions apply to all tenants regardless of whether they were CHA residents, affordable rate, or market rate tenants. The record demonstrates that CHA was not driving the drug testing policies of the mixed-income developments nor did it administer or enforce the policies. Indeed, if CHA were pushing the drug testing, it was not doing a very good job, particularly if it had the control over the process that plaintiffs claim since only 10 of the 32 mixed-income developments had drug screening. Essentially, plaintiffs are asking this Court to find state action based on CHA's failure to prohibit the

[6] Whether the Court uses the term "symbiotic relationship" or close nexus, the analysis is substantially the same. Under the facts in the record, is the CHA's relationship to the private developers' drug testing policy sufficiently close to be considered state action.

private developers from imposing the policy by not rejecting their proposed TSPs.

2. Consent

Even if the Court were to find state action, if plaintiffs consented to the drug testing then no constitutional violation occurred. "[A] search conducted pursuant to valid consent is constitutionally permissible." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). Plaintiffs contend that any consent was not voluntary, but was necessarily coerced because their submission to the testing meant they could stay in their current home. Defendants focus on the fact that plaintiffs agreed to the testing, repeatedly, and in the case of Peery signed a waiver. Defendants also argue that each plaintiff acknowledged that they had options of where to live within CHA's relocation program, including units within their target locations that did not mandate drug testing as a condition of lease. CHA asserts that plaintiffs could (and still can) apply for transfer to units in other developments. CHA personnel testified that they would have approved Peery's request for a transfer had he made one.

CHA distinguishes the case *Lebron v. Sec'y, Fla. Dep't of Children & Families*, 710 F.3d 1202, 1217 (11th Cir. 2013), on which plaintiffs heavily rely. In *Lebron*, the court affirmed the district court's order enjoining the State of Florida from requiring the plaintiff to submit to a suspicionless drug test as a condition of the receipt of government-provided monetary assistance for which he was otherwise qualified. *Id.* at 1205. There, Florida enacted a statute that mandated drug testing for participation in the State's Temporary Assistance for Needy Families program. In *Lebron*, unlike here, not only was there no question of state action (it was a Florida statute), but the requirement was only imposed on low-income individuals and the result of refusal was denial of benefits.

Here, the private developers' drug testing policies are applied to all tenants, not just CHA tenants, and the consequence of refusing to submit to the test is not the loss of CHA housing subsidies but only eviction from that particular unit. There is no constitutional right to public housing at any particular location. *Fincher v. South Bend Heritage Foundation*, 606 F. 3d 331, 334 (7th

Cir. 2010). The record here indicates 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. *See Schneckloth,* 412 U.S. at 227. Further, no one has ever been evicted from any of Parkside's 503 units for a failed drug test. None of the plaintiffs sought a transfer or formally complained of the drug screening. Instead, they consented to the annual testing.

B. The Remaining Elements of a Preliminary Injunction

The remaining elements of a preliminary injunction are: no adequate remedy at law; irreparable harm if no injunction imposed; and balance of harms. Here, the Court finds that plaintiffs fail to meet their burden to show a likelihood of success on the merits. Therefore, the Court need not address the remaining factors. *See Kiel v. City of Kenosha*, 236 F.3d 814, 817 (7th Cir. 2000).

IV. Conclusion

Based on the foregoing, this Court finds that plaintiffs failed to meet their burden to persuade this to impose a preliminary injunction. This Court therefore denies plaintiffs' motions for preliminary injunction.

IT IS SO ORDERED.

Date: September 30, 2014

Entered 

United States District Judge