IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT — FIRST DISTRICT

OAKWOOD SHORES LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2011 M1 721540
	)	
MORTISHA BLOODSAW,	)	
	)	
Defendant.	)	

NOTICE OF MOTION

TO: Marvin L. Husby III
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YOU ARE HEREBY NOTIFIED that on 2/8, 2013 at 2:00 AM/PM, or as soon thereafter as counsel may be heard, I shall appear before the Honorable Judge Orville E. Hambright, Jr., or any judge sitting in his stead, in the courtroom usually occupied by him in Room 1408, Richard J. Daley Center, Chicago, Illinois, and then and there move this Court pursuant to the attached **Motion of the American Civil Liberties Union of Illinois for Leave to File an Amicus Brief in Support of Defendant Mortisha Bloodsaw**. A true and correct copy of the same is attached hereto and served upon you.

January 18, 2013

Respectfully submitted,

Counsel for Amicus

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Harvey Grossman (attorney #48844)
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Plaintiff,	)	Case No. 2011 M1 721540
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v.	)	Judge Orville E. Hambright, Jr.
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MORTISHA BLOODSAW,	)	
	)	
Defendant.	)	
	)	

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS FOR LEAVE TO FILE AN AMICUS BRIEF IN SUPPORT OF DEFENDANT MORTISHA BLOODSAW

The American Civil Liberties Union of Illinois ("ACLU"), pursuant to Rule 345 of the Illinois Supreme Court, respectfully moves this Court for leave to file the attached amicus brief in support of defendant Mortisha Bloodsaw. In support of this motion, the ACLU submits the attached amicus brief, and states the following:

1. The ACLU of Illinois is a non-profit, non-partisan, statewide organization with more than 20,000 members and supporters in Illinois – and more than 10,000 in Chicago – dedicated to protecting and expanding the civil rights and civil liberties guaranteed by the U.S. and Illinois Constitutions and civil rights laws.

2. The ACLU of Illinois has long supported personal privacy and bodily autonomy, including freedom from mandatory suspicionless drug testing. For example, the ACLU has filed numerous lawsuits against such drug testing. *See, e.g., Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991); *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989). Further, the ACLU on many occasions has advocated against drug testing proposals before the Illinois General Assembly and the Chicago City Council.

3. The ACLU of Illinois for many years has investigated and advocated against mandatory suspicionless drug testing of residents of the Chicago Housing Authority ("CHA"). For example:

(a) On February 26, 2003, the ACLU testified at a meeting of the CHA Board of Commissioners against the approval of a policy of mandatory suspicionless drug testing at the Lake Park Crescent mixed-income development.

(b) On June 3, 2011, the ACLU testified at a CHA meeting against a proposed policy of mandatory suspicionless drug testing of all CHA residents.

(c) On June 1, 2011, the ACLU sent the CHA a request pursuant to the Illinois Freedom of Information Act ("FOIA") for records regarding CHA-approved policies of mandatory suspicionless drug testing. This FOIA request yielded pertinent CHA documents that are an exhibit to the proposed ACLU amicus brief.

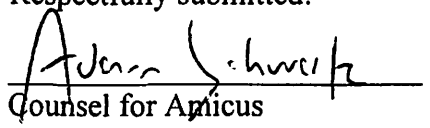
(d) On November 15, 2011, the ACLU sent the CHA a letter asking it to end its approval of policies of mandatory suspicionless drug testing at mixed-income developments.

4. The eviction suit here involves the enforcement at the Oakwood Shores mixed-income development of a CHA-approved policy of mandatory suspicionless drug testing. The proposed amicus brief argues that this CHA-approved policy violates the U.S. and Illinois Constitutions, and thus that the eviction suit should be dismissed with prejudice. The ACLU believes that its amicus brief will assist this Court in deciding this case.

WHEREFORE, the ACLU of Illinois respectfully moves this Court for leave to file the attached amicus brief in support of Ms. Bloodsaw.

DATED: January 18, 2013

Respectfully submitted:



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	)	
MORTISHA BLOODSAW,	)	
	)	
Defendant.	)	
	)	

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS IN SUPPORT OF DEFENDANT MORTISHA BLOODSAW

Due to a mandatory suspicionless drug testing policy approved by the Chicago Housing Authority ("CHA"), Mortisha Bloodsaw faces eviction from her home in a CHA public housing unit at the Oakwood Shores mixed-income housing development. Under this CHA-approved policy, in the absence of any individualized suspicion of illegal drug use or other unlawful activity, CHA residents must take and pass an annual drug test. This invasive, stigmatizing, and irrational drug testing policy violates the privacy guarantees of the United States and Illinois Constitutions. *See* U.S. Const., Amend. IV; Ill. Const, Art. I, § 6. Thus, the pending motion for reinstatement and possession should be dismissed with prejudice.

BACKGROUND

I. The Oakwood Shores housing development

Oakwood Shores is a 94-acre mixed-income housing development located in Chicago's mid-South Side, roughly bounded by 35th Street to the north, Lake Park Avenue to the east, Pershing Road to the south, and Martin Luther King Drive to the west. The site previously was occupied by three CHA public housing developments – Clarence Darrow, Ida B. Wells, and

Madden Park – which contained more than 3,500 public housing units. Under the CHA's Plan For Transformation, the site was redeveloped as a mixed-income housing development.

Today, Oakwood Shores includes CHA public housing units. It also includes units sold at market price, units rented at market price, and non-CHA units rented below market price. The CHA plays a principal role in the public housing units at Oakwood Shores: it closely regulates all aspects of those units; it spent tens of millions of public dollars to build those units; it continues to own the land under those units; and it pays much of the monthly rent for those units. The CHA has delegated day-to-day management of these public housing units to The Community Builders, Inc. ("TCBI"). These public housing units are subject to controlling federal regulations issued by the U.S. Department of Housing and Urban Development ("HUD"). *See generally* http://www.thecha.org/pages/oakwood_shores/50.php?devID=191 (the CHA's brief description of Oakwood Shores).

II. The CHA-approved drug testing policy

The TCBI has imposed a mandatory suspicionless drug testing policy on all residential renters at Oakwood Shores, including CHA residents. This policy does not extend to residential owners at Oakwood Shores. The TCBI could not apply this policy to CHA public housing units without the CHA's approval. The CHA granted such approval. Under this CHA-approved policy, applicants to CHA public housing units must take and pass a drug test as a condition of entry, and residents must take and pass an annual drug test as a condition of staying. This drug testing policy is stated in the TCBI's Tenant Selection Plan and in its Lease Agreement. *See* TCBI, Tenant Selection Plan for Oakwood Shores Phase 2A at ¶ IV(D)(2); TCBI, Residential Lease Agreement for Oakwood Shores at ¶ 12(xxvi). Both documents were reviewed and approved by the CHA. Urinalysis is the standard method of drug testing under this policy.

Pursuant to the Illinois Freedom of Information Act, the ACLU of Illinois obtained CHA records regarding the CHA-approved mandatory suspicionless drug testing policies at mixed-income developments. *See* Exh. 1, attached hereto. These records state the following:

- In September 2011, six mixed-income housing developments had CHA-approved mandatory suspicionless drug testing policies: Oakwood Shores, and also Hillard Homes, Lake Park Crescent, Legends South, North Town Village, and Parkside.
- In September 2011, these six mixed-income developments housed 1,589 CHA residents who were age 18 or older. All of them are subject to annual mandatory suspicionless drug testing under the CHA-approved policies.
- As of September 2011, and inclusive of all years of CHA-approved drug testing, only 51 CHA residents at mixed-income housing developments had tested positive for drugs.
- As of September 2011, no CHA household had been evicted due to CHA-approved drug testing at mixed-income developments.

These CHA records support three important conclusions. First, very few adult CHA residents in Chicago's six mixed-income developments use or abuse drugs. More than 1,500 are tested every year, but in all years only 51 tested positive. If all 51 of those positive tests had occurred in one year, that would yield a positive test rate of less than 4%. The actual annual rate is much lower, because these 51 positive tests occurred over multiple years.

This finding is consistent with independent social science research showing that low income persons do not use or abuse illegal drugs at rates significantly higher than persons in other income groups. *See, e.g.,* U.S. National Institutes of Health, *NIAAA Researchers estimate alcohol and drug use, abuse, and dependence among welfare recipients* (Oct. 23, 1996) ("Proportions of welfare recipients using, abusing, or dependent on alcohol or illicit drugs are consistent with proportions of both the adult U.S. population and adults who do not receive welfare . . . ."), *at* http://www.niaaa.nih.gov/NewsEvents/NewsReleases/Pages/welfare.aspx.

Second, the disputed CHA policy is expensive. Urinalysis often costs some $50 per test. With a tested population of some 1,500 persons, the total annual cost is some $75,000.

Third, the CHA resident now before this Court might be the first person ever evicted from her home due to a CHA-approved mandatory suspicionless drug testing policy.

In November 2011, the ACLU of Illinois sent the CHA a letter urging it to end its approval of mandatory suspicionless drug testing of CHA residents at mixed-income developments. *See* Exh. 2, attached hereto. Unfortunately, the CHA declined to do so.

III. The pending eviction proceedings against Mortisha Bloodsaw

Mortisha Bloodsaw is a CHA resident in a public housing unit at Oakwood Shores. In December 2011 and September 2012, Ms. Bloodsaw took and passed the CHA-approved drug test. Nonetheless, Ms. Bloodsaw now faces the pending eviction motion, because her adult daughter supposedly refused to take a drug test.

Ms. Bloodsaw contests the eviction motion on the following four asserted grounds. First, Ms. Bloodsaw tried to remove her daughter from the lease. Second, her daughter did not refuse to take a drug test. Third, the CHA-approved mandatory suspicionless drug testing policy violates HUD regulations regarding tenant selection. Fourth, the policy also violates the U.S. and Illinois Constitutions.

DISCUSSION

The challenged CHA-approved policy imposes mandatory suspicionless drug testing on all applicants to and residents of CHA public housing units at Oakwood Shores, a mixed-income housing development. This invasive, stigmatizing, and irrational policy violates the Fourth Amendment to the U.S. Constitution (*see infra* Part I), and also the Privacy Clause of the Illinois Constitution, which is even more protective of personal privacy (*see infra* Part II).

I. The CHA-approved drug testing policy violates the U.S. Constitution.

Mandatory drug tests are searches under the Fourth Amendment to the U.S. Constitution. *See, e.g., Chandler v. Miller*, 520 U.S. 305, 313 (1997). The Fourth Amendment protects public housing residents from suspicionless searches. *See, e.g., Pratt v. CHA*, 848 F. Supp. 792 (N.D. Ill. 1994) (striking down suspicionless searches for weapons in the homes of CHA residents).

The drug testing policy at issue here, as applied to CHA public housing units, plainly comprises state action subject to Fourth Amendment scrutiny. Most importantly, the disputed policy could not be applied to CHA units without the CHA's approval, and the CHA gave that approval. Moreover, the CHA closely regulates all aspects of the public housing units at Oakwood Shores; the CHA spent tens of millions of public dollars to build them; the CHA owns the land under them; and the CHA pays much of the monthly rent for them.

"To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. . . . But particularized exceptions to the main rule are sometimes warranted based on special needs, beyond the normal need for law enforcement. . . . When such special needs . . . are alleged . . . , courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 U.S. at 313. *See also, e.g., Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654, 658, 660 (1995) (identifying four discrete factors in the "special needs" balance, to wit, (1) "the nature of the privacy interest," (2) "the character of the intrusion," (3) "the nature and immediacy of the governmental concern," and (4) "the efficacy" of drug testing to advance the government interest). Government bears the burden of proof. *Chandler*, 520 U.S. at 318-19 (striking down testing absent record evidence that "the hazards . . . are real and not simply hypothetical"); *AFT v. Kanawha Bd. of Educ.*, 592 F. Supp. 2d 883, 899 (S.D.W.V. 2009).

Here, the CHA-approved mandatory suspicionless drug testing policy lacks any requirement of individualized suspicion of drug use or other wrongdoing. Thus, the controlling Fourth Amendment question is whether the disputed policy falls within the "special needs" doctrine. It does not. As explained below, the "special needs" factors balance heavily against mandatory suspicionless drug testing as a condition of CHA residency at mixed-income developments like Oakwood Shores. *See infra* Part I(A) (addressing the strong privacy interest), and Part I(B) (addressing the weak government interest).

But before scrutinizing these factors in the particular context here, it bears emphasis that two courts have struck down mandatory suspicionless drug testing of poor persons seeking cash public aid. *Lebron v. Wilkins*, 820 F. Supp. 2d 1273 (M.D. Fla. 2011); *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), *aff'd*, 60 Fed. Appx. 601 (6th Cir. 2003) (en banc). Other courts have struck down drug testing in myriad other contexts. *See, e.g., Chandler*, 520 U.S. 305 (candidates for elected office); *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (jail employees without access to inmates or firearms); *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008) (library clerks); *Kanawha Bd. of Educ.*, 592 F. Supp. 2d 883 (teachers).

A. The CHA-approved drug testing policy greatly invades privacy.

Compelled urinalysis, as here, is always a substantial invasion of personal privacy and bodily autonomy. For many people, it also is humiliating and unpleasant. *See, e.g., Pottawatomie Sch. Dist. v. Earls*, 536 U.S. 822, 841 (2002) (Breyer, J., concurring) (for some people monitored urination is "seriously embarrass[ing]" and not a "negligible" privacy invasion); *Taylor*, 888 F.2d at 1197-98 ("[a]ll urinalysis programs implicate serious privacy concerns," because monitored urination "is intrusive and often embarrassing and uncomfortable").

CHA residents do not have a diminished expectation of privacy, compared to the general population. They are just like the tens of millions of other people who live in rental property in exchange for paying rent and behaving lawfully. They are adults, they have broken no laws, and they are not engaged in dangerous activities that can directly harm other people. In this regard, CHA residents in mixed-income developments are fundamentally unlike the narrow classes of people that have been found by courts to have a diminished expectation of privacy that justifies suspicionless drug testing. *Skinner v. RLEA*, 489 U.S. 602 (1989) (train operators); *NTEU v. Von Raab*, 489 U.S. 656 (1989) (armed drug interdiction personnel); *Earls*, 536 U.S. 822 (children in public school custody); *Bates v. Davis*, 116 Fed. Appx. 756 (7th Cir. 2004) (inmates in prison custody). People with diminished expectations of privacy, who may be subjected to mandatory suspicionless drug testing, are the exception and not the rule. *See, e.g., Chandler*, 520 U.S. at 308 (such categories are "closely guarded"); *Acton*, 515 U.S. at 665 ("We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts"); *Von Raab*, 489 U.S. at 672 ("most private citizens or government employees in general" have no diminished expectation of privacy justifying drug testing).

Moreover, the drug testing policy here is highly and inaccurately stigmatizing. It comprises a public declaration by municipal government that CHA residents (and other renters) at mixed-income developments are substantially more likely to use and abuse illegal drugs, compared both to the general public, and to the residential owners at these same mixed-income developments who are not subject to the disputed policy. These CHA residents are presumed guilty of illegal drug use and abuse, until proven innocent by means of an annual mandatory suspicionless drug test. But this presumption is wholly irrational: the CHA's own data, and independent social science research, establish that CHA residents and poor people do not use or

abuse illegal drugs more than other people. *See supra* at p. 3. *See also Lebron*, 820 F. Supp. 2d at 1277-78 (analyzing a Florida study showing that only 5% of public aid applicants tested positive for drugs, compared to another study estimating that 8% of the general public used drugs). Tens of millions of middle class home owners enjoy many expensive government subsidies of their homes, such as tax deductions for home mortgage interest. They are not required to submit to suspicionless drug testing as a condition of receiving these valuable government housing benefits. Nor should poor people who live in public housing.

B. The CHA-approved drug testing policy does not advance any state interest.

To the best of the ACLU's knowledge, the CHA has never publicly explained what legitimate government interests (if any) are supposedly advanced by mandatory suspicionless drug testing of CHA residents at mixed-income developments. Three interests that the CHA might assert – public safety, reassuring middle class neighbors, and addiction treatment – cannot possibly justify the disputed policy's profound invasion of personal privacy.

1. Public safety.

Perhaps the CHA believes that the disputed policy will advance public safety. In 2011, in support of its proposal (later withdrawn) to extend mandatory suspicionless drug testing to all CHA residents (not just those at mixed-income developments), the CHA asserted that such drug testing would reduce illegal drug dealing on and about CHA property. *See* Maudlyne Ihejirika, *CHA plan for required drug testing of residents called 'a slap in the face,'* Chi. Sun-Times (May 27, 2011) (a CHA spokesperson stated: "Drug dealers won't come where there are no buyers. If you remove the folks who are interested in drugs, hopefully it will remove some of the problems.").

However, government bears the burden of proving that suspicionless drug testing will actually advance public safety. *See Chandler*, 520 U.S. at 323 ("Where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."). *See, e.g., Taylor*, 888 F.2d at 1197 (because jail safety was "not furthered by" suspicionless drug testing of jail employees who lacked access to inmates or firearms, such testing was unlawful). Here, the CHA has never cited any evidence suggesting that the disputed policy will reduce drug dealing or otherwise advance public safety.

Moreover, other methods can much more directly and effectively advance public safety. Drug dealers can be removed from mixed-income developments pursuant to trespass rules. They can be arrested and prosecuted by means of traditional police techniques such as controlled purchase stings. The estimated $75,000 expense of drug testing all adult CHA residents in mixed-income developments, *see supra at* pp. 3-4, could pay for increased security services. Destructive or disruptive residents can be evicted for cause. Drug testing of residents might be required where there is individualized suspicion of illegal drug use. The availability of such workable alternatives weighs heavily against suspicionless drug testing. *See, e.g., Willis v. Anderson Sch. Corp.*, 158 F.3d 415, 420-21, 423-24 (7th Cir. 1998) (striking down suspicionless drug testing of public school students based on a suspension for fighting, in part because of the workability of suspicion-based testing in this context).

2. Reassuring middle class neighbors.

Perhaps the CHA believes that mandatory suspicionless drug testing of CHA residents and other renters will advance the CHA's interest in building mixed-income communities, on the theory that some middle class families may decline to live next door to poor families absent mandatory suspicionless drug testing once per year. Again, the available data shows that CHA

residents, and poor people in general, do not use or abuse illegal drugs more than anyone else. It is irrational and thus unlawful for government to burden one group based on the unfounded biases of another group. *Cf. City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985) (holding that restrictive government zoning of group homes for persons with developmental disabilities, enacted in response to the "irrational prejudice" of neighbors, failed low-level rationality review under the Equal Protection Clause).

3. Addiction treatment

Perhaps the CHA believes that mandatory suspicionless drug testing of CHA residents will advance the CHA's interest in the identification and treatment of people who suffer from drug abuse and addiction. Once again, the available data refute the theory that CHA residents are unusually likely to use or abuse drugs. Moreover, there are far better ways for government to identify and treat addiction, including voluntary questionnaires, and improved access to immediate and free addiction treatment. Further, eviction of CHA families that include an addicted adult will only make matters worse.

In the two cases challenging mandatory suspicionless drug testing of public aid applicants, *Marchwinski* and *Lebron*, many leading drug abuse and addiction treatment and research organizations filed amici briefs against such policies. They argued that these policies do not advance treatment because: they fail to distinguish drug use from drug abuse and addiction; they deter needy people from seeking government aid; poor people seeking government aid are not more likely to use or abuse drugs; and alternative, less-invasive methods are more effective.[1]

[1] The *Marchwinski* amici include the American Public Health Association, the National Association of Social Workers, the National Association of Alcoholism and Drug Abuse Counselors, the American College of Obstetricians and Gynecologists, the National Council on

II. The CHA-approved drug testing policy violates the Illinois Constitution.

The Privacy Clause of the Illinois Constitution is even more protective of personal privacy than the Fourth Amendment to the U.S. Constitution, and it squarely protects people from (among other things) invasions of their bodily autonomy for purposes of gathering derogatory information about them. This is shown by the text, history, and judicial interpretation of the Illinois Privacy Clause. *See infra* Parts II(A), II(B), and II(C). The CHA-approved policy of mandatory suspicionless drug testing of CHA residents at mixed-income developments clearly violates the Illinois Privacy Clause. *See infra* Part II(D).

A. The text of the Illinois Privacy Clause.

The Privacy Clause of the Illinois Constitution ensures freedom from "unreasonable . . . invasions of privacy." *See* Ill. Const., Art. I, § 6. *See also id.* at Art. I, § 12 (the Remedies Clause, which guarantees a "certain remedy" for "all injuries" to "privacy").

B. The history of the Illinois Privacy Clause.

The record of the 1970 Illinois Constitutional Convention clearly demonstrates the delegates' intent that the new Privacy Clause would create new protections for privacy. The previous Illinois Constitution had no Privacy Clause. Delegate Dvorak explained that the new Privacy Clause would be "very progressive and very thorough and very proper." *See* Sixth Illinois Constitution Convention, Record of Proceedings, Vol. III, p. 1525. The official Constitutional Commentary explains that the new Privacy Clause "expanded upon" the rights

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Alcoholism and Drug Dependence, the Association of Maternal and Child Health Programs, the National Association on Alcohol, Drugs and Disability, and the National Black Women's Health Project. *See* http://www.aclu.org/files/FilesPDFs/marchwinskiamicusbrief1_22_01.pdf. The *Lebron* amici include the American Academy of Addiction Psychiatry, and National Advocates for Pregnant Women. *See* http://www.aclufl.org/Lebron/ACLU-LebronAmici-AAAPetal.pdf.

guaranteed by the previous Illinois Constitution and the U.S. Constitution, and that the Privacy Clause is "stated broadly." *See* Constitutional Commentary, at p. 522.

Moreover, the Report of the Convention's Bill of Rights Committee shows that the delegates intended the Privacy Clause to evolve and grow, so it could continue to vindicate privacy rights in light of new technological and social changes. Specifically, the Report states that it is "inevitable that infringements on individual privacy will increase as our society becomes more complex, as government institutions are expected to assume larger responsibilities, and as technological developments offer additional or more effective means by which privacy can be invaded." *See* Sixth Illinois Constitution Convention, Record of Proceedings, Vol. VI, pp. 31-32. The Report concluded that to meet these expanding challenges, "it was essential to the dignity and well being of the individual that every person be guaranteed a zone of privacy in which his thoughts and highly personal behavior were not subject to disclosure or review." *Id.* at p. 32.

During floor debates, delegates reaffirmed that that the Privacy Clause would protect people from privacy-invading technologies that did not then exist but might later be invented. *Id.* at Vol. III, pp. 1525, 1530 (Delegate Dvorak, hypothesizing "a general information bank" comprised of "all pertinent information about every citizen"); *id.* at p. 1535 (Delegate Gertz, Chairman of the Bill of Rights Committee, hypothesizing "devices which penetrate walls" to view "bedtime intimacies and private conversations"). Critically, when asked whether the Privacy Clause would "go beyond the area of an electronic device," Delegate Gertz answered in the affirmative: "All kinds of things might invade our dignity as human beings. . . . I want to stem that tide." *Id.* at Vol. III, p. 1535.

C. Judicial interpretation of the Illinois Privacy Clause.

In light of the foregoing text and history, the Illinois Supreme Court repeatedly has held that the Illinois Privacy Clause "goes beyond" the protections of the U.S. Constitution. *See, e.g., In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381, 391 (1992); *King v. Ryan*, 153 Ill. 2d 449, 464 (1992); *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 451 (1997); *Kunkel v. Walton*, 179 Ill. 2d 519, 537 (1998).

The Illinois Privacy Clause protects people from (among other things) invasions of their bodily autonomy for purposes of gathering derogatory information about them. *See, e.g., People v. Caballes*, 221 Ill. 2d 282, 322, 327 (2006) (holding that the Privacy Clause provides protection from "close scrutiny of the personal characteristics of an individual," and "an invasion of the actual physical body of the person"); *Will County Grand Jury*, 152 Ill. 2d at 400 (holding that the Privacy Clause requires a grand jury to have probable cause to subpoena a person's pubic hair or head hair, and individualized suspicion to subpoena a person's fingerprints or palm prints); *King*, 153 Ill. 2d at 464 (holding that the Privacy Clause was violated by a statute mandating breathalyzer testing absent adequate individualized suspicion).[2]

D. Application of the Privacy Clause to the CHA-approved drug testing policy.

Scrutiny under the Illinois Privacy Clause plainly is triggered when, as here, a person is forced to surrender a sample of their urine, and that sample is subjected to urinalysis to gather derogatory information about them. *See King*, 153 Ill. 2d at 464 ("requiring a urine sample is more intrusive than cutting a person's hair"). *Cf. Will County Grand Jury*, 152 Ill. 2d at 400

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[2] *Cf. Fink v. Ryan*, 174 Ill. 2d 302 (1996) (upholding the post-*King* breathalyzer statute, which unlike the pre-*King* version only applies to a motorist who is issued a moving citation for a crash with a serious injury); *In re Lakisha M.*, 227 Ill. 2d 259, 280 (2008) (upholding mandatory DNA extraction from adjudicated juvenile delinquents, but emphasizing this group's "diminished expectation of privacy," and holding that DNA extraction invades the "*actual* physical body" and thus triggers Privacy Clause scrutiny).

(applying Privacy Clause scrutiny to the seizure of hair and fingerprints); *King*, 153 Ill. 2d 449 (same as to breath); *Lakisha M.*, 227 Ill.2d at 280 (same as to DNA).

The Privacy Clause requires robust judicial scrutiny of bodily invasions like the one here, using such factors as: (1) "the extent of one's expectation of privacy under the circumstances," *Lakisha M.*, 227 Ill. 2d at 279; (2) "the degree of intrusiveness" of the privacy invasion, *Caballes*, 221 Ill. 2d at 49; *Lakisha M.*, 227 Ill. 2d at 279; and (3) "the need for official intrusion," *Will County Grand Jury*, 152 Ill. 2d at 392.

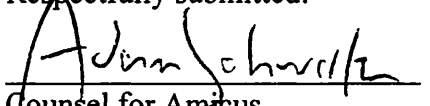
Here, the CHA-approved policy of mandatory suspicionless drug testing greatly intrudes upon reasonable expectations of privacy, without advancing any official objectives. *See supra* pp. 6-10. For all the reasons that the disputed policy violates the U.S. Constitution, it even more clearly violates the more protective Illinois Privacy Clause.

CONCLUSION

For the foregoing reasons, amicus the American Civil Liberties Union of Illinois respectfully requests that this Court dismiss with prejudice the pending eviction motion against Ms. Bloodsaw, because the CHA-approved policy of mandatory suspicionless drug testing of CHA residents at mixed-income developments violates the U.S. and Illinois Constitutions.

DATED: January 18, 2013

Respectfully submitted:



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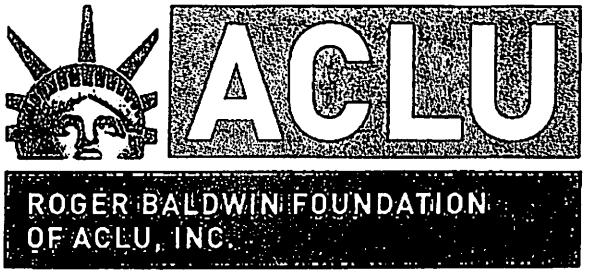

November 1, 2011

VIA U.S. Mail and EMAIL to: FOIArequest@thecha.org

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60 East Van Buren St., 10th Floor
Chicago, IL 60605

Re: FOIA request, nos. 11-069L and 11-119L

Dear Mr. Tortora:

Thank you for speaking with me this morning. I've attached my correspondence of October 14, 2011, which we discussed. Thank you for confirming that both of the charts, attached as Exhibit A and B to my letter, only show data for CHA residents, and not non-CHA residents, at the mixed income communities.

Sincerely,

Karen Sheley
Staff Counsel

EXHIBIT
1

THE
ROGER
BALDWIN
FOUNDATION
OF ACLU,
INC.

SUITE 2300
180 NORTH MICHIGAN AVENUE
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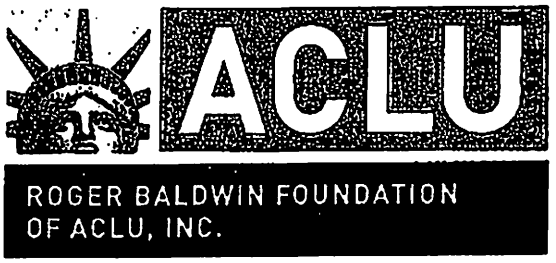

October 14, 2011

VIA U.S. Mail and EMAIL to: FOIArequest@thecha.org

Nathaniel Tortora
Research, Reporting and Communications
Chicago Housing Authority
60 East Van Buren St., 10th Floor
Chicago, IL 60605

Re: FOIA request, nos. 11-069L and 11-119L

Dear Mr. Tortora:

Thank you for speaking with me this afternoon. I am writing to confirm that that the CHA chart (Att. A), which you disclosed in response to our first FOIA request of June 1, 2011, covers the entire time that the drug testing policies have been in effect at the CHA mixed income communities. In our conversation, you also explained that the CHA chart (Att. B) which you provided in response to our FOIA request of September 14, 2011 shows the total number of residents who are 18 and older in each development as of September 2011 and that the date range indicates a search by birth year of residents.

If you disagree with any portion of this, or have any questions, please call me at 312-201-9740 ext. 325.

Yours truly,

Karen Sheley
Staff Counsel

Development	# Sites	Positive Tests	Households Evicted
Legends South	4	9	0
Hilliard Homes	4	20	0
North Town Village	2	10	0
Oakwood Shores	5	7	0
Parkside	2	5	0
Lake Park Crescent	1	0	0
TOTAL	18	51	0

EXHIBIT
A

Development	# Sites	1990-1993
Legends South	4	383
Hilliard Homes	4	427
North Town Village	2	118
Oakwood Shores	4	385
Parkside	2	191
Lake Park Crescent	1	85

EXHIBIT
B

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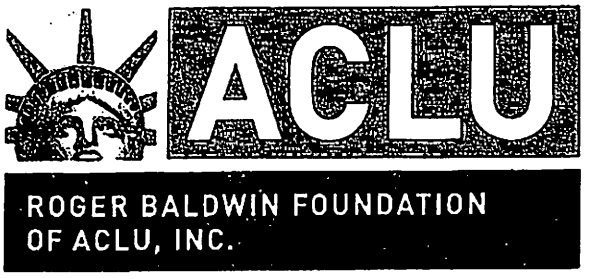


November 15, 2011

Charles Woodyard
Chief Executive Officer
Chicago Housing Authority
60 East Van Buren Street
Chicago, IL 60605

Re: Suspicionless drug testing of CHA residents at mixed-income developments

Dear Mr. Woodyard:

I write on behalf of the ACLU of Illinois, including our 10,000 members and supporters in Chicago. We urge the CHA to end the ongoing suspicionless drug testing of CHA residents who live at certain mixed-income developments. This testing comprises government action, and it violates federal and state constitutional guarantees of freedom from unreasonable searches and seizures. Below, we offer policy and legal reasons to end this testing.

In June of this year, the CHA correctly decided to withdraw its proposal to require suspicionless drug testing of all adult CHA residents and applicants. The ACLU supported that decision, and further urged the CHA to end the testing of CHA residents at mixed-income developments. *See* Letters from the ACLU to the CHA of June 3 and June 22, 2011. Today we renew this request, in light of three recent developments. First, according to CHA records recently disclosed to the ACLU pursuant to FOIA, very few CHA residents fail these drug tests. Second, it appears that this suspicionless drug testing of CHA residents might soon expand to a seventh mixed-income development: Lakefront Properties, Phase II. Third, a federal judge recently struck down suspicionless drug testing as a condition of receiving cash public aid. *Lebron v. Wilkins*, 2011 WL 5040993, *11 (M.D. Fla. Oct. 24, 2011).

A. Policy reasons

First, very few of the CHA residents living in mixed income communities have tested positive for drug use, according to information provided by the CHA to the ACLU pursuant to a Freedom of Information Act request. *See* Att. 1. CHA residents have been subjected to suspicionless drug testing at six mixed-income developments over the course of several years. As of September 2011, there were 1,589 CHA residents aged 18 or older living at these developments. During all of the years of suspicionless drug testing at these developments, there were only 51 positive test results involving CHA residents. Therefore, the overall rate of positive tests of CHA residents,

EXHIBIT
2

inclusive of all years of testing, is only 3.2%. Obviously, the annual rate of positive tests is much lower, because the 51 positive tests occurred over multiple years. CHA has not advised the ACLU of the number of positive tests per year. This shows that CHA residents have a low rate of drug use, and that drug testing CHA residents is unnecessary as a matter of policy. This finding is consistent with social science research which shows that low income persons do not use or abuse illegal drugs at rates significantly higher than persons in other income groups. *See, e.g.*, U.S. National Institutes of Health, *NIAAA Researchers estimate alcohol and drug use, abuse, and dependence among welfare recipients* (Oct. 23, 1996) ("Proportions of welfare recipients using, abusing, or dependent on alcohol or illicit drugs are consistent with proportions of both the adult U.S. population and adults who do not receive welfare . . . .").[1]

Second, drug testing invades privacy and bodily autonomy. Drug testing by means of urinalysis is humiliating for many people, and embarrassing or unpleasant for many others. Drug testing in the absence of individualized suspicion is stigmatizing: it creates a presumption of guilt that can only be rebutted by a negative test result.

Third, there are more effective and direct alternative methods to address problems which arise from any drug use in mixed-income communities. Disruptive or destructive residents can be evicted based on their conduct.

B. Legal reasons

Suspicionless drug testing as a condition of CHA residency in mixed income communities violates the privacy guaranty of the Fourth Amendment to the U.S. Constitution. Under that guaranty, drug tests are searches. *See, e.g., Chandler v. Miller*, 520 U.S. 305, 313 (1997). "To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. . . . But particularized exceptions to the main rule are sometimes warranted based on special needs, beyond the normal need for law enforcement. . . . When such special needs . . . are alleged . . . , courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Id.*

In the particular context here – suspicionless drug testing as a condition of residency in CHA mixed-income developments – the relevant factors to be balanced weigh heavily against testing.

First, suspicionless drug testing by means of urinalysis is a significant intrusion on privacy. *Pottawatomie Sch. Dist. v. Earls*, 536 U.S. 822, 841 (2002) (Breyer, J., concurring) (for some people monitored urination is "seriously embarrass[ing]" and not a "negligible" privacy invasion); *Taylor v. O'Grady*, 888 F.2d 1189, 1197-98 (7th Cir. 1989) ("[a]ll urinalysis programs implicate serious privacy concerns," because monitored urination "is intrusive and often embarrassing and uncomfortable").

Second, CHA residents and other mixed-income development residents do not have a diminished expectation of privacy, in comparison to the general population. They are just like the tens of

[1] Available at: http://www.niaaa.nih.gov/NewsEvents/NewsReleases/Pages/welfare.aspx.

millions of other people who live in rental property in exchange for paying rent and behaving lawfully. They are adults, they have broken no laws, and they are not engaged in dangerous activities that can directly harm other people. In this regard, residents in CHA mixed-income developments are fundamentally unlike the narrow classes of people that have been found by courts to have a diminished expectation of privacy for purposes of suspicionless drug testing. *See Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602, 627 (1989) (train operators); *NTEU v. Von Raab*, 489 U.S. 656, 672 (1989) (armed drug interdiction personnel); *Pottawatomie Sch. Dist. v. Earls*, 536 U.S. 822, 829-30 & n.3 (2002) (children in public school custody); *Bates v. Davis*, 116 Fed. Appx. 756, 757-58 (7th Cir. 2004) (inmates in prison custody).

Third, there is at best only an attenuated, indirect nexus between public safety and suspicionless drug testing of CHA residents in mixed income developments. The CHA has not explained why it allows drug testing in mixed income communities. This summer, the justification for the proposed testing of all CHA residents was apparently to reduce illegal drug dealing on and about CHA property. *See* Maudlyne Ihejirika, *CHA plan for required drug testing of residents called 'a slap in the face,'* Chi. Sun-Times (May 27, 2011) (a CHA spokesperson stated: "Drug dealers won't come where there are no buyers. If you remove the folks who are interested in drugs, hopefully it will remove some of the problems."). There is no doubt that public safety is an important government interest, and the presence of drug dealers can diminish public safety. The question, however, is whether suspicionless drug testing will actually advance public safety. *See Chandler*, 520 U.S. at 323 ("Where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."). *See, e.g., Taylor*, 888 F.2d at 1197 (because jail safety was "not furthered by" suspicionless drug testing of jail employees who lacked access to inmates or firearms, such testing was unlawful).

Here, it is highly doubtful that suspicionless drug testing of CHA residents meaningfully advances public safety at CHA mixed income developments. Other methods can much more directly and effectively advance the CHA's public safety interests. Drug dealers can be removed from mixed income communities pursuant to trespass rules. They can be arrested and prosecuted by means of traditional police techniques like controlled purchase stings. Destructive or disruptive residents can be evicted for cause. Drug testing of residents might be required where there is individualized suspicion of illegal drug use. The availability of workable alternatives, as here, weighs against suspicionless drug testing. *See, e.g., Willis v. Anderson Sch. Corp.*, 158 F.3d 415, 420-21, 423-24 (7th Cir. 1998) (striking down suspicionless drug testing of public school students based on a suspension for fighting, in part because of the workability of suspicion-based testing in this context).

While the "special needs" balancing of government and privacy interests is highly fact specific, it bears emphasis that courts have struck down suspicionless drug testing in many contexts. *See, e.g., Chandler*, 520 U.S. 305 (candidates for elected office); *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (jail employees without access to inmates or firearms); *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000) (poor persons seeking cash public aid), *aff'd*, 60 Fed. Appx. 601 (6th Cir. 2003) (en banc);[2] *Lebron v. Wilkins*, 2011 WL 5040993, at *11 (M.D. Fla.

[2] Notably, in *Marchwinski*, more than a dozen leading drug research and treatment organizations filed an *amici curiae* brief that opposed suspicionless drug testing of public aid beneficiaries.

Oct. 24, 2011) (finding that "the State has not demonstrated a substantial special need to justify the wholesale, suspicionless drug testing of all applicants for TANF benefits").

Finally, suspicionless drug testing as a condition of CHA residency would also violate the Privacy Clause of the Illinois Constitution. *See* Ill. Const. Art. I, sec. 6. That liberty guaranty "goes beyond" the protections of the U.S. Constitution. *In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381, 391 (1992) (requiring probable cause for a grand jury to seize head or pubic hair, and individualized suspicion for it to seize thumb prints).

* * *

The ACLU urges the CHA to end this suspicionless drug testing of CHA residents at mixed income developments. If you have any questions, please do not hesitate to call me at (312) 201-9740, extension 316, or to email me at aschwartz@aclu-il.org.

Sincerely,

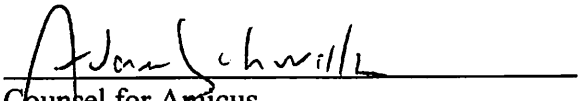
Adam Schwartz
Senior Staff Counsel

cc: James Reynolds, CHA Board Chairman
Deverra Beverly, CHA Commissioner
Adela Cepeda, CHA Commissioner
Mark Cozzi, CHA Commissioner
Dr. Mildred Harris, CHA Commissioner
Myra King, CHA Commissioner
M. Bridget Reidy, CHA Commissioner
Zaldwaynaka Scott, CHA Commissioner
Sandra Young, CHA Commissioner

These organizations are: the American Public Health Association, the National Association of Social Workers, Inc., the National Association of Alcoholism and Drug Abuse Counselors, the American College of Obstetricians and Gynecologists, the National Council on Alcoholism and Drug Dependence, the Association of Maternal and Child Health Programs, the National Health Law Project, the National Association on Alcohol, Drugs and Disability, Inc., the National Advocates for Pregnant Women, the National Black Women's Health Project, the Legal Action Center, the National Welfare Rights Union, the Youth Law Center, the Juvenile Law Center, and the National Coalition for Child Protection Reform. This *amici* brief is available at: http://www.aclu.org/files/FilesPDFs/marchwinskiamicusbrief1_22_01.pdf

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January, 2013, I caused true and correct copies of the foregoing **Motion of the American Civil Liberties Union of Illinois for Leave to File an Amicus Brief in Support of Defendant Mortisha Bloodsaw** and **Notice of Motion** to be served upon each party to whom it is directed by U.S. Mail, First Class, postage prepaid.



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