Commonwealth of Massachusetts

Supreme Judicial Court

SUFFOLK, ss. SJC-11532

TRENEA FIGGS
Plaintiff-Appellee

v.

BOSTON HOUSING AUTHORITY
Defendant-Appellant

BRIEF OF CHARLES HAMILTON HOUSTON INSTITUTE AND AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

AMICUS CURIAE
IN SUPPORT OF APPELLEE

Esme Caramello
BBO #600896

On the brief:
Deena Greenberg
Melanie Zuch
Student Attorneys
SJC Rule 3:03

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INTEREST OF AMICI CURIAE

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (CHHIRJ) was launched in September 2005 by Professor Charles J. Ogletree, Jr. The Institute honors and continues the unfinished work of Charles Hamilton Houston, who engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, *Brown v. Board of Education*, repudiating the doctrine of "separate but equal" schools for black and white children. By facilitating a dialogue between practitioners and scholars, he ensured that legal scholarship would resonate outside the academy, and that new legal strategies would be immediately incorporated into the training of lawyers.

CHHIRJ addresses contemporary civil rights challenges in our increasingly multi-racial society. Its long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities and privileges of membership in the United States. One of the most critical mechanisms to fulfill this mission is to assure equal housing opportunity regardless of race. We are concerned in

this case because the imposition of such harsh penalty as the loss of housing for the possession of a relatively small amount of marijuana has destabilizing effects on neighborhoods, in particular in communities of color.

The American Civil Liberties Union of Massachusetts ("ACLUM") is a statewide membership organization dedicated to the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. It is an affiliate of the national American Civil Liberties Union. ACLUM has longstanding interests in combatting the overzealous prosecution of marijuana offenses and in ensuring that the Commonwealth's decriminalization law achieves its purpose of protecting Massachusetts residents from harsh consequences for possessing small quantities of marijuana. *See Com. v. Craan*, No. SJC-11436 (amicus brief submitted); *Com. v. Pacheco*, 464 Mass. 768 (2013); *Com. v. Cruz*, 459 Mass. 459 (2011).

STATEMENT OF THE CASE

Amici adopt the statement of the case and the facts set forth in the Brief of Amici Curiae Massachusetts Coalition for the Homeless, Boston Tenants Coalition, and City Life/Vida Urbana.

SUMMARY OF THE ARGUMENT

> "[W]hites and Blacks use marijuana at comparable rates, and many residents of middle- and upper-class white communities use marijuana without legal consequence… yet, Blacks were arrested for marijuana possession at almost four times the rate as whites, with disparities even more severe in several states and counties…."
>
> --American Civil Liberties Union, "The War on Marijuana in Black and White" (2013)
>
> "It's important for [marijuana legalization] to go forward because it's important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished."
>
> -- President Barack Obama

The racial impact of America's decades-old "War on Drugs" is well-documented. In her groundbreaking 2010 book *The New Jim Crow*, Professor Michelle Alexander presents a disturbingly compelling portrait of African-American communities being emptied out and torn apart by drug arrests and imprisonment while White drug dealers and users go largely unpunished. When it comes to cocaine and heroin, this disparate impact may at least arise from the understandable goal of keeping dangerous substances off the streets. But severe racial disparities exist in the context of marijuana arrests as well. Fortunately, the federal government has stopped prosecuting marijuana

possession, and many states are moving towards various forms of legalization, with Massachusetts having recently legalized medical use of marijuana and decriminalized possession of one ounce or less. As these developments in federal and state law and policy illustrate, possessing a small amount of marijuana is not particularly harmful or dangerous, and it is certainly not on a par with the distribution of addictive and deadly controlled substances. Yet if the Boston Housing Authority is permitted to proceed with its current practice of terminating Section 8 vouchers for possession of an ounce or less of marijuana, Trenea Figgs and the rest of the largely Black and Hispanic population of Section 8 voucher holders stand to become homeless over it.

The good news for these tenants of color is that Massachusetts voters in 2008 rendered such voucher terminations a clear violation of state law. Under G. L. c. 94C, § 32L, a public housing authority cannot deny anyone "public housing or any form of public financial assistance" based on his possession of an ounce or less of marijuana. And unlike in *Boston Housing Authority v. Garcia*, 449 Mass. 727, 733 (2007), where the Court held the state common law

"innocent tenant" defense to be preempted by an "unambiguous" federal statute to the contrary, § 32L does not run contrary to any federal statute; there is no congressional mandate that housing authorities must terminate Section 8 vouchers, or retain discretion to do so, based on marijuana possession. Voucher termination is governed by regulations issued by the U.S. Department of Housing and Urban Development (HUD), but those regulations are not in conflict with § 32L, and if they are, it is not clear that HUD intends them to preempt state laws that deem family and neighborhood stabilization - and racial justice - to be more important local goals than stamping out minor marijuana possession. (Pages 24-33)

Indeed, with popular opinion swinging towards marijuana legalization and the recent success of decriminalization and legalization efforts in many states, HUD and the rest of the federal government have chosen *not* to use federal criminal law to interfere with the states' local decisions on the costs and benefits of penalizing marijuana possession. Instead, the federal government is encouraging and actively accommodating the states' marijuana experiments. A holding that Massachusetts's

prohibition on using homelessness to penalize marijuana possession is preempted by HUD regulations would run counter to the federal government's own deferential approach to the states' legal reforms in this area. (Pages 33-34)

While the federal government has taken a laissez-faire approach towards states' marijuana reforms, it has shown no tolerance for policies or practices that have racially discriminatory effects. In the past year, HUD reaffirmed its commitment to fair housing by issuing a long-awaited regulation establishing that a practice with a disparate racial impact violates the Fair Housing Act, 42 U.S.C. § 3604, unless it is supported by a substantial, legitimate interest that cannot be served by a practice with a less discriminatory effect. Terminating a housing voucher for possession of an ounce or less of marijuana in a state where the law expressly prohibits such terminations - and in a national popular, political, and governmental landscape that is supportive of the state law - cannot possibly pass this test. For this reason, federal law cannot be read to *require* termination (or permission to terminate) in every minor marijuana possession case; doing so would place

the federal government in the awkward position of obliging local housing authorities to take actions that have unlawful discriminatory effects. And finding § 32L preempted would merely expose BHA and other housing authorities in the state to strong fair housing challenges every time they chose to terminate a voucher for mere possession of an ounce or less of marijuana. (Pages 34-39)

The same factors that make marijuana possession terminations a fair housing issue - the racially discriminatory impact of withdrawing housing benefits for minor marijuana offenses and its contravention of evolving state and federal law and policy - also render them an abuse of any discretion the HUD regulations may reserve to the housing authority in this area. Thus even if federal preemption insulated BHA's practice from illegality under G. L. c. 94C, § 32L, and even if the practice were not illegal under the Fair Housing Act, terminating a Section 8 voucher for possession of an ounce or less of marijuana would still be a per se abuse of discretion and unlawful as a matter of administrative law. (Pages 40-42)

ARGUMENT

I. State and federal government policy is in harmony with regard to scaling back penalties for marijuana use in states where it is legal and eliminating housing practices - like withdrawing a low income tenant's Section 8 voucher for minor marijuana possession - that have disparate racial impacts and no substantial, legitimate governmental justification.

The question of whether federal objectives will be frustrated by enforcement of G. L. c. 94C, § 32L, and thus whether that statute is preempted, should be viewed in the context of recent law and policy developments that reveal harmony, rather than conflict, between state and federal goals and efforts. Allowing Massachusetts to instruct its housing authorities not to terminate assistance to Massachusetts families caught with small amounts of marijuana would promote the goal of eradicating unnecessary housing practices that have discriminatory effects - a goal to which both HUD and Massachusetts have recently recommitted themselves. It would also be consistent with the federal government's intentional policy of minimizing friction between federal law and the states' marijuana experiments, a federalist approach that recognizes the traditional role that states have played, and are well-suited to

play, in the areas of housing and criminal law. Amici suggest that the Court consider this overall background in assessing whether preemption is warranted and whether it would actually be serving - as opposed to undermining - the totality of federal policies and objectives impacted by such a decision.

A. Allowing termination of a housing subsidy for simple possession of an ounce or less of marijuana would disproportionately penalize people of color.

Despite facial neutrality, BHA's policy of terminating vouchers for possession of one ounce or less of marijuana is insidiously discriminatory. A flood of recent scholarship has shown that federal drug enforcement policies of the past 45 years, including HUD's requirements for BHA leases, have perpetuated racial injustice in the United States by vastly increasing the incarceration rate of Black men, entrenching racial stereotypes and destroying families and communities through widespread conviction and its civil consequences.[1] One of the most devastating of

[1] *See* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 1-16, (2010) (a comprehensive exploration of the ways in which drug enforcement policies in the United States have perpetuated racial injustice), *citing, e.g.*, Human Rights Watch, "Punishment and Prejudice: Racial

these consequences is revocation of and/or ineligibility for affordable housing. While BHA's policy does not involve criminal apprehension per se, the effect of the policy is analogous to that of the trove of statutes comprising the federal government's War on Drugs: because of a small-scale drug offense, an individual faces a severe penalty that has deep, long-term effects on her health, safety, and economic opportunity[2].

National studies have repeatedly shown that Black and White populations use marijuana at equal rates.[3]

Disparities in the War on Drugs," 12 *HRW Reports* (2000), Donald Braman, *Doing Time on the Outside: Incarceration and Family Life in Urban America* 3 (2004), and Jason Ziedenberg, "Tipping Point: Maryland's Overuse of Incarceration and the Impact on Community Safety," *Justice Policy Institute* 3 (2005).

[2] *See, e.g.*, Margaretta E. Homsey, "Procedural Due Process and Hearsay Evidence in Section 8 Housing Voucher Termination Hearings," 51 *Boston College L. Rev.* 517, 518 (2010); *see also* "Impacts of sequestration on section 8 vouchers", *Center on Budget and Policy Priorities* (2013), *available at http://www.cbpp.org/files/PHA-Sequestration-Stories_updated-4-22-13.pdf*.

[3] American Civil Liberties Union (ACLU), "The War on Marijuana in Black and White" 21 (2013), available at https://www.aclu.org/criminal-law-reform/war-marijuana-black-and-white-report (Add. 53); Amanda Geller & Jeffrey Fagan, "Pot as pretext: Marijuana, race, and the new disorder in New York City street policing", 7 *J. Empirical Legal Stud.* 591, 593 (2010). (Add. 54); *See also* Substance Abuse and Mental Health Services Administration, "Results from the 2009 National Survey on Drug Use and Health: Volume I.

Yet, nationwide, Blacks are more likely to be stopped and searched for marijuana than Whites, even when controlling for differing crime conditions in the neighborhoods in which they are stopped.[4] Blacks are also 3.73 times more likely to be arrested for possession of marijuana than Whites. In Suffolk County, Massachusetts, that multiplier increases to 4.8. In the most egregiously offending counties, Blacks are up to 30 times more likely to be arrested than Whites for marijuana possession.[5]

If Whites are using marijuana at equal rates to Blacks, why are Blacks so much more frequently punished for it? Many social scientists point to heightened policing of inner-city neighborhoods, which are disproportionately populated by people of color.[6] Increased deployment of law enforcement to these neighborhoods leads to increased contact between police and civilians, giving the former more

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Summary of National Findings", *Department of Health and Human Services* (2010) (showing that Black and white populations use illicit drugs at similar rates).

[4] Geller, *supra* note 3 at 595.

[5] ACLU, *supra* note 3 at 9.

[6] Gregory D. Squires and Charis E. Kubrin, "Privileged Places: Race, Opportunity and Uneven Development in Urban America", 147 *National Housing Institute* (2012).

opportunities to detect misconduct.[7] Increased deployment to urban areas has been justified based on '*broken windows*' social theory, whereby if police address quality-of-life offenses and minor incidents of disorder in a given area, they will send a message of civility and social control and prevent more serious crime from occurring.[8] But even the United States Department of Justice, once a proponent of the *broken window* policing model, now acknowledges its folly: what started as a well-intentioned effort to clean up poor neighborhoods through intensive patrolling has led to discriminatory apprehension of its predominantly minority inhabitants.[9]

The story on the other side of the tracks is, of course, that inhabitants of affluent, safer neighborhoods - most of whom are White[10] - experience decreased levels of police surveillance. That is, even

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[7] Robin S. Engel, Michael R. Smith & Francis T. Cullen, "Race, Place, and Drug Enforcement", 11 *Criminology & Pub. Pol'y* 604 (2012).
[8] U.S. Dep't of Justice, "Community Policing", http://cops.usdoj.gov/html/dispatch/January_2009/nugget.htm
[9] *Id.*
[10] *See, e.g.*, John Logan, "Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America", *US2010 Project* (2011), *available at* http://www.s4.brown.edu/us2010/Data/Report/report0727.pdf.

if these populations engage in the exact same behavior as their peers in low-income, minority-populated areas, the former are much less likely to be caught. This *de facto* protection from police apprehension is particularly apparent when it comes to small-scale marijuana possession, because it is an activity that most often takes place individually and indoors.[11] Unless they are looking for it, police will not find it.

By maintaining a policy that punishes tenants for possession of one ounce or less of marijuana, BHA is perpetuating and exacerbating the disparate impact of heightened police surveillance on its program participants. In Boston and nationwide, Blacks are disproportionately represented in subsidized housing: while Blacks comprise 24% of the population of Boston, they make up 44% of the population receiving section 8 vouchers in Boston, and 44% of the population housed through BHA in general.[12] Blacks and Latinos together

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[11] Harry Levine, *The Scandal of Racist Marijuana Arrests—and What To Do About It*, *The Nation* (Nov. 18, 2013), http://www.thenation.com/article/176915/scandal-racist-marijuana-arrests-and-what-do-about-it#. (Add. 59)

[12] U.S. Dep't of Hous. and Urban Dev., *Resident Characteristics Report, http://portal.hud.gov/hudportal/HUD?src=/*

comprise 41.5% of the population of Boston,[13] but they make up 52% of the population receiving Section 8 vouchers and 55% of the population living in public housing.[14]

Not only are people of color disproportionately represented in the population of voucher recipients; Black and Latino voucher holders are also three times more likely to live in high poverty neighborhoods than White voucher holders,[15] while the population of voucher holders in general already disproportionately live in such neighborhoods, compared to the population of tenants as a whole.[16] Thus, people of color who receive Section 8 vouchers are subjected to especially high rates of stops, searches and arrests for marijuana possession, as their susceptibility to

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program_offices/public_indian_housing/systems/pic/50058/rcr (last visited Jan. 4, 2014).

[13] United States Census Bureau, *available at* http://quickfacts.census.gov/qfd/states/25/2507000.html.

[14] U.S. Dep't of Hous. and Urban Dev., *Resident Characteristics Report, http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/systems/pic/50058/rcr* (last visited Jan. 4, 2014).

[15] National Low Income Housing Coalition, "Who Lives in Federally Assisted Housing?" 2 *Hous. Spotlight* (2012). (Add. 65)

[16] Rolf Pendall, "Why Voucher and Certificate Users Live in Distressed Neighborhoods", 11 *Housing Policy Debate* 881 (2000). (Add. 67)

police scrutiny is exacerbated by race, socioeconomic status, and geography alike.

Like stops, searches and arrests, voucher terminations for possession of one ounce or less of marijuana have a discriminatory impact on tenants of color in Massachusetts.

B. The states are scaling back penalties for marijuana possession, and the federal government has chosen not to interfere with their efforts.

In 2008, the voters of Massachusetts passed Ballot Question 2, "An Act Establishing a Sensible Marihuana Policy." The popular initiative, codified at G. L. c. 94C, § 32L, decriminalized possession of an ounce or less of marijuana. The voters also took steps to ensure that marijuana users[17] would not suffer other types of government penalties - expressly including the deprivation of housing subsidies - for their now decriminalized activity. Specifically:

> [N]either the Commonwealth nor any of its political subdivisions or their respective agencies, authorities or instrumentalities may impose any form of penalty, sanction or disqualification on an offender for possessing an ounce or less of marihuana. By way of illustration rather than limitation, possession

[17] The presence of cannabis in the blood, urine, hair, etc. is expressly defined as "possession" and decriminalized. G. L. c. 94C, § 32L.

> of one ounce or less of marihuana shall not provide a basis to deny an offender… public housing or any form of public financial assistance….

G. L. c. 94C § 32L. To the extent that the Boston Housing Authority seeks to terminate Trenea Figgs's Section 8 Housing Choice Voucher based on a guest's possession of an ounce or less of marijuana, this termination is, without question, an attempt by an "agenc[y], authorit[y], or instrumentalit[y]" of the Commonwealth to "impose [a] penalty, sanction, or disqualification" on her and "to deny… public housing or [a] form of public financial assistance" to her in direct violation of this law.

The Commonwealth's law is fully in line with both public opinion and the trend in state legislative reform across the country. According to 2013 polls by both Gallup and the Pew Research Center, the majority of Americans favor legalization of marijuana.[18] Sixteen states have done as Massachusetts has and

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[18] "Majority Now Supports Legalizing Marijuana", *PewResearch* (Apr. 4, 2013), http://www.people-press.org/2013/04/04/majority-now-supports-legalizing-marijuana/. (Add. 72); "For First Time, Americans Favor Legalizing Marijuana," *Gallup*, http://www.gallup.com/poll/ 165539/first-time-americans-favor-legalizing-marijuana.aspx (October 27, 2013). (Add. 73)

decriminalized small-scale possession of marijuana;[19] last year, Colorado and Washington legalized it.[20] Twenty states have recently legalized medical marijuana;[21] Massachusetts joined their number last year. *See* Chapter 369 of the Acts of 2012, G. L. c. 94C, App. § 1.

Faced with the increasing societal acceptance of marijuana use and the growing awareness of the significant costs of punishing it - costs borne disproportionately by members of historically oppressed racial and ethnic groups - the federal government has decided *against* a federal crackdown on marijuana possession that complies with state law. In an August 2013 memorandum applicable "to all federal enforcement activity, including civil enforcement,"

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[19] *States That Have Decriminalized,* NORML, http://norml.org/aboutmarijuana/item/states-that-have-decriminalized (accessed Feb. 17, 2014) (Oregon, Alaska, California, Colorado, Connecticut, Maine, Massachusetts, Minnesota, Misssissippi, Nebraska, Nevada, New York, North Carolina, Ohio, Rhode Island and Vermont).

[20] Colo. Const. Amend. 64, § 6(a); Wash. Rev. Code Ann. § 69.50.401 (West).

[21] *Medical Marijuana*, NORML, http://norml.org/legal/medical-marijuana-2 (accessed Feb. 17, 2014)(Alaska, Arizona, California, Colorado, Connecticut, Delaware, Washington, D.C., Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington)

Deputy Attorney General James M. Cole confirmed that the Department of Justice, which "has not historically devoted resources to prosecution of individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property," would not interfere with states' legalization efforts unless those efforts jeopardized federal priorities like keeping marijuana out of the hands of minors and barring it from entering interstate commerce.[22] Rather, Cole announced, "In jurisdictions that have enacted laws legalizing marijuana in some form… enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity."[23]

Similar efforts and pronouncements are being made across the federal government. Last Friday, the Treasury Department issued guidance clearing major banks to do business with marijuana dispensaries that have state authority to sell,[24] and the Justice

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[22] Memorandum to all U.S. Attorneys re: *Guidance Regarding Marijuana Enforcement*, Aug. 29, 2013. (Add. 68)

[23] *Id.*

[24] Danielle Douglas, "Obama administration clears banks to accept funds from legal marijuana dealers," *The*

Department instructed federal prosecutors to allow banks to do business with marijuana dealers who meet the guidelines set forth in the Department's August 2013 marijuana enforcement memo.[25] Even the President now believes that "[i]t's important for [legalization] to go forward," in large part because of the racial disparities in penalties for possession of small amounts of marijuana.[26] As President Obama explained, "it's important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished."[27]

HUD, too, has formally expressed an intent to defer policy decisions on the consequences of minor marijuana use to the states, who are in a better position to assess local conditions. In a memorandum to all HUD Field Offices and Public Housing Agencies (including BHA) addressing state medical marijuana

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Washington Post, Feb. 14, 2014 (Add. 75); Department of the Treasury Financial Crimes Enforcement Unit, "BSA Expectations Regarding Marijuana Related Businesses," Feb. 14, 2014 (Add. 79)

[25] Department of Justice, "Guidance Regarding Marijuana Related Financial Crimes," Feb. 14, 2014 (Add. 86)

[26] David Remnick, "Going the Distance: On and Off the Road with Barack Obama," *The New Yorker*, Jan. 27, 2014. (Add. 89)

[27] *Id.*

laws, Assistant Secretary for Public and Indian Housing Sandra B. Henriquez[28] took the position that federal law preempted more permissive state marijuana laws only in the context of new admissions.[29] With regard to terminating housing subsidies for existing participants, on the other hand, Henriquez emphasized HUD's desire to let local laws govern:

> PHAs have discretion to determine continued occupancy policies that are most appropriate for their local communities…PHAs in states that have enacted laws legalizing the use of medical marijuana must therefore establish a standard and adopt written policy regarding whether or not to allow continued occupancy or assistance for residents who are medical marijuana users. **The decision of whether or not to allow continued occupancy or assistance to medical marijuana users is the responsibility of PHAs, not of the Department.**[30]

HUD is not imposing federal standards on local decisions about whether marijuana users should be permitted to keep their Section 8 vouchers. Instead, it is encouraging local housing authorities to calibrate their policies to state law. BHA can, and should, adopt standards that comply with § 32L.

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[28] Before her appointment at HUD, Henriquez was the Administrator at the helm of BHA.

[29] Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing, "Medical Marijuana Use in Public Housing and Housing Choice Voucher Programs," Feb. 10, 2011 (Add. 92)

[30] *Id.* (emphasis added)

The states may be leading the charge on marijuana reform, but the federal government has actively decided not to stand in their way. It has instead opted to work with and around the states, as it traditionally has in the areas of housing and law enforcement,[31] allowing them to pursue the marijuana policies they deem "most appropriate for their local communities" and removing federal barriers to smooth implementation of local laws where necessary. A decision finding Section 32L preempted by more restrictive federal laws would thwart the federal government's own efforts to permit the states' marijuana experiments to proceed.

C. Meanwhile, HUD has recently reaffirmed its commitment to stopping housing practices that have discriminatory racial effects, even in the absence of discriminatory intent.

The federal Fair Housing Act makes it unlawful "[t]o refuse to… rent… or otherwise make unavailable or deny, a dwelling to any person because of race, color,… or national origin." 42 U.S.C. § 3604(a); *see also* 42 U.S.C. § 3604(b). For years, this law – which applies equally to the administration of the Section 8

[31] See Part II.B. *infra*.

voucher program, *see* 24 C.F.R. § 903.2(d) - has stood for the principle that housing practices shown to have a disparate impact on the basis of race, color, national origin, or other protected characteristics are unlawful unless they are supported by strong nondiscriminatory justifications. *See, e.g., Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49-50 (1st Cir. 2000). Last year, HUD issued long-awaited regulations both confirming the viability of disparate impact claims brought under the Fair Housing Act and establishing a clear burden-shifting framework for those claims. *See* 78 Fed. Reg. 11,460 (Feb. 15, 2013)(codified in scattered subsections of 24 C.F.R. § 100). According to the new regulations:

> Liability may be established under the Fair Housing Act based on a practice's discriminatory effect, as defined in paragraph (a) of this section, even if the practice was not motivated by a discriminatory intent…. **A practice has a discriminatory effect where it actually or predictably results in a disparate impact** on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.

24 C.F.R. § 100.500. A practice with such a discriminatory effect is unlawful unless its proponent

can prove "that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" of the proponent. *Id.* Even then, the challenged practice may still be illegal if "the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." *Id.*

HUD took this step at a time when the "discriminatory effects" doctrine was under attack; a petition for certiorari had been filed in the United States Supreme Court in the case of *Township of Mt. Holly v. Mt. Holly Gardens Citizens in Action Inc.*, and certiorari was ultimately granted. *See* 658 F.3d 375 (3rd Cir. 2011), *cert. granted*, 2133 S. Ct. 2824 (June 17, 2013). The case settled before argument, but not before the Massachusetts Attorney General, in collaboration with California, Connecticut, Delaware, Hawaii, Illinois, New Mexico, New York, Oregon, Utah, Vermont and Washington, filed an amicus brief affirming their support for HUD's position. *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 2013 WL 5835710 (2013). (Add. 94) That brief urged the Court to "uphold the unanimous opinion

of the circuit courts that disparate impact discrimination claims are cognizable under the FHA," further stating, "[w]e know from experience that the ability to bring disparate impact claims is essential to combating discrimination and segregation in housing - the principal purposes of the FHA, and matters of considerable concern for state and local governments." *Id.*[32]

In sum, in 2013 HUD made the express public decision not to interfere with states' decisions to roll back racially discriminatory penalties for marijuana use and to focus its resources instead on correcting historic racial injustice that is perpetuated through housing practices having disparate impact on people of color. The Amici suggest that the Court's ruling on preemption and the purpose and meaning of the federal housing statutes at issue take this background into account.

II. The federal government has not manifested an intent to preempt local application of state marijuana laws to state agencies.

[32] The United States, unsurprisingly, also filed an amicus brief in support of recognizing disparate impact claims under the FHA. *See* 2013 WL 5798699 (2013).

A. Section 32L does not conflict with a federal statute, because there is no statute governing Section 8 voucher terminations.

No federal statute governs the termination of a Section 8 voucher holder's participation in the voucher program. Administration of the voucher program is governed by 42 U.S.C. § 1437f(o), which contains eighteen subparts and includes details on topics ranging from rent calculation to tenant selection, and permissible grounds for eviction of voucher holders by the private landlords from whom they rent their apartments. Nothing in § 1437f(o) sets forth the bases on which a local housing authority may terminate a voucher holder's participation in the Section 8 program. There is thus no federal statute in conflict with the Massachusetts law prohibiting a Massachusetts housing authority from terminating such participation for possession of an ounce or less of marijuana.

That makes this case fundamentally distinct from *Boston Housing Authority v. Garcia*, 449 Mass. 727 (2007), where this Court considered the preemptive effect of a federal statute that expressly instructed local housing authorities to retain discretion to evict violent families from public housing on a state

common law defense that enabled a tenant to avoid eviction by showing that she could neither predict nor control the criminal activity. *Id.* (citing 42 U.S.C. § 1437d(l)(6)("Each public housing agency shall utilize leases which…(6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity… *shall* be cause for termination of tenancy")). The Supreme Court had recently held that the statute "unambiguously" required lease terms "that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity." *Garcia* at 729, quoting *Department of Hous. & Urb. Dev. v. Rucker*, 535 U.S. 125, 130 (2002). The state innocent tenant defense was therefore in direct conflict with an "unambiguous" federal statute as interpreted by the U.S. Supreme Court, and consequently preempted.

Congress required that the leases of voucher tenants, like those of public housing tenants, contain clauses giving their landlords discretion to evict them for "drug-related criminal activity." 42 U.S.C. §

1437f(o)(7). Each housing assistance payment contract entered into by the public housing agency and the owner of a dwelling unit…(D) *shall* provide that during the term of the lease, any…drug-related criminal activity…shall be cause for termination of tenancy") (emphasis added). No such Congressional mandate exists with regard to the termination of tenants' participation in the Section 8 program. *See* 42 U.S.C. § 1437f(o)(7)(omitting any statutory requirements for, or limitations on, voucher termination).

B. The relevant HUD regulations, and HUD's interpretation of their application to marijuana legalization by the states, show an intent to accommodate tenant-friendly state reforms.

In the absence of a federal statutory mandate, voucher terminations are governed, at the federal level, only by HUD regulations. *See* 24 C.F.R. § 982.553. These regulations clearly instruct public housing authorities, or PHAs, to *refuse admission* to the program to an applicant whose household member has recently been evicted from federally assisted housing for drug-related criminal activity of any kind. 24 C.F.R. § 553(a)(1)(i)("The PHA *must* prohibit admission to the program of an applicant for three years from

the date of eviction if a household member has been evicted from federally assisted housing for drug-related criminal activity"). And a PHA "must" terminate ongoing assistance if the voucher holder is evicted for a "serious violation" of the lease, which for the reasons set forth in the Brief of Amici Curiae Massachusetts Coalition for the Homeless, *et al.*, and outlined in Part I, *supra*, possession of an ounce or less of marijuana is not. 24 C.F.R. § 982.552(b)(2). But with regard to *withdrawing housing assistance* based on an eviction for "drug-related criminal activity," the regulations grant PHAs leeway to establish standards that fit local conditions and priorities. 24 C.F.R. § 553(b)(1)(iii)("The PHA must establish standards that allow the PHA to terminate assistance under the program for a family if the PHA determines that any family member has violated the family's obligation under § 982.551 not to engage in any drug-related criminal activity"). *Contrast* 24 C.F.R. § 982.553(b)(1)(ii)("The PHA must immediately terminate assistance for a family under the program if the PHA determines that any member of the household has ever been convicted of drug-related criminal activity for manufacture or production of

methamphetamine on the premises of federally assisted housing"). By using more permissive language than in other contexts, and allowing a local PHA - in most cases, including this one, a state instrumentality - to establish its own standards governing voucher terminations for minor drug offenses, HUD has indicated a greater flexibility and a lack of intent to preempt state law in this area.

This is precisely the interpretation HUD has given these regulations in the medical marijuana context. As discussed above in Part I.B., *supra*, Assistant Secretary for Public and Indian Housing Sandra Henriquez has differentiated between admissions to the Section 8 program, where the Congressional mandate and HUD regulations are clearly mandatory and preemptive, and the voucher termination context, where the absence of a statutory mandate and more permissive regulatory language allow PHAs to make locally-based decisions. *See supra* n. 28. HUD has placed a federal stake in the ground with respect to new admissions to subsidized housing, saying, "State laws that legalize marijuana directly conflict with the admission requirements set forth in [42 U.S.C. § 13661] and are thus subject to federal pre-emption." *Id.* With regard

to current voucher holders, on the other hand, the Assistant Secretary suggests no preemption and instead emphasizes the importance of local decisionmaking. *Id.* It is for local authorities, the Assistant Secretary reminds PHAs, "not the Department," to decide "whether or not to allow continued... assistance" to users of marijuana in states where that use is legal. PHAs must adopt policies "that are most appropriate for their local communities." *Id.* HUD is not dictating how local PHAs must handle medical marijuana, at least, and there is no legally significant difference with regard to possession of small amounts for non-medical use.

HUD's interpretation and approach to marijuana legalization is consistent with its historical cooperation with and accommodation of housing policies of the states. Housing is a fundamentally local issue, and it is thus "admittedly a field subject to parallel regulation by both sovereigns." *Garcia*, 449 Mass. at 733. It is not unusual for the states, including the Commonwealth, to pass valid legislation applicable to federally-subsidized tenancies. *See Kargman v. Sullivan*, 552 F.2d 2, 11 (1st Cir. 1977) ("The federal legislation creating the network of subsidized housing

laws is superimposed upon and consciously interdependent with the substructure of local law relating to housing."); *Garcia* at 733, n. 11, *citing* G. L. c. 121B, §§ 3, 25-33 (setting forth rules governing housing authorities within Commonwealth, including eligibility for and termination of tenancies); G. L. c. 186, § 13A ("Foreclosure shall not affect the tenancy agreement of a tenant whose rental payment is subsidized under state or federal law and the foreclosing entity shall assume the lease and rental subsidy contract with the rental subsidy administrator"); *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1211 (9th Cir. 2009)(federal law allowing termination of Section 8 tenancy for "good cause" is subject to limitations on good cause found in Los Angeles rent stabilization ordinance). As the 9th Circuit has observed, "Congress and HUD never explicitly rejected the application of more protective local standards to assisted tenants, and, in certain cases, expressly allowed for it." *Barrientos* at 1211. *See also* U.S. Department of Housing and Urban Development, Public Housing Occupancy Guidebook, p. 185 ("In the case of any conflict between the proposed

HUD lease and state law, the lease adopted must follow the rule that is the most beneficial to the tenant").

Preemption, in general, "'is not to be lightly presumed.'" *Garcia* at 733 (quoting *Attorney Gen. v. Brown*, 400 Mass. 826, 829 (1987)). When determining whether federal law preempts state law, "courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 241 (2d Cir. 2006)(citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984))("The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power."). In the case of federal regulations, in particular, the Court should find preemption only if the agency clearly intends to preempt state law. *See Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982); *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583 (1987) ("it is appropriate to expect an

administrative regulation to declare any intention to pre-empt state law with some specificity"); *Hillsborough County, Fla. v. Automated Medical Laboratories*, 471 U.S. 707, 718 (1985) ("because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive").

If HUD sought to depart from the tradition of permitting states to impose additional tenant protections onto federal regulations with regard to small amounts of marijuana, it could and would have clearly said so. With respect to terminating Section 8 vouchers for conduct made legal under states' new marijuana laws, HUD has not indicated a clear intent to preempt state law - quite the opposite. It has instructed BHA to set the policy that is "most appropriate" in its location. The "most appropriate" policy for Massachusetts is the one that complies with state law: Section 8 assistance should not be terminated based on possession of one ounce or less of marijuana.

HUD's deference to local decisionmaking with regard to voucher termination is consistent with the Obama Administration's overall approach to the states' marijuana experiments. *See* Part II.B., *supra*. It is also consistent with HUD's formal recommitment, in 2013, to eliminating housing policies with racially discriminatory effects. *See* Part II.C., *supra*. Separately and together, these recent Executive Branch developments highlight the fact that there is no clear federal intent to preempt state efforts to reduce the penalties associated with minor marijuana use. A finding that HUD's regulations preempt G.L. c. 94C, § 32L, would run counter to the federal government's own deferential approach to state law on possession of one ounce or less of marijuana.

C. Because terminating the housing subsidy of a low income person for an ounce or less of marijuana has a disparate racial impact and is unsupported by any substantial, legitimate interest, a finding of preemption would put the federal government at odds with its own work against discriminatory housing practices and would subject BHA to liability under the Fair Housing Act in every case.

As outlined in Part I.A., *supra*, BHA's practice of terminating Section 8 vouchers based solely on

possession of an ounce or less of marijuana has a racially discriminatory effect: marijuana penalties are suffered disproportionately by people of color, who also make up a disproportionate share of the participants in the Section 8 program. *See* 24 C.F.R. § 100.500 (a practice has an unlawful discriminatory effect within the meaning of the Fair Housing Act, 42 U.S.C. § 3604, if it "actually or predictably results in a disparate impact on a group of persons…because of race, color,…or national origin"). Allowing BHA to perpetuate this discriminatory practice because the state law seeking to eliminate it was preempted would pit HUD against itself at a time when it is redoubling its efforts to combat housing practices with discriminatory effects. *See* 24 C.F.R. § 100.500 (2013); Brief for the United States as Amicus Curiae Supporting Respondents in *Township of Mt. Holly*, 2013 WL 5798699, *supra* n. 31. It would also have the impractical result of subjecting BHA to liability under the federal Fair Housing Act in every termination proceeding based on possession of an ounce or less of marijuana.

The Fair Housing Act prohibits a housing authority from adopting a policy that has a

discriminatory effect unless the agency can demonstrate that the policy is **necessary** to achieve a **substantial, legitimate, nondiscriminatory** interest. 24 C.F.R. § 100.500; 24 C.F.R. 903.2(d) (Section 8 admission and continued occupancy policies must comply with the Fair Housing Act, and "PHA must carry out its PHA Plan in conformity with the nondiscrimination requirements in…the Fair Housing Act"). No such substantial, legitimate interest can possibly exist here in light of the Massachusetts electorate's express disallowance of the BHA's conduct, the federal government's decision to back away from enforcing stricter federal marijuana standards in the criminal, banking, and housing contexts, and the undeniable trend in Massachusetts and across the country towards lessening the penalties for marijuana possession.[33]

There are good reasons for the states' marijuana reform efforts, even aside from the concern – shared

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[33] In this way, marijuana possession penalties are legally distinct from BHA policies targeting serious crimes like drug trafficking and distribution to minors, or use of drugs proven to be harmful and addictive, such as heroin and cocaine. Where BHA policies apply to those federal drug-enforcement priority areas, whatever disparate impact they may have is not illegal. But when it comes to small-scale marijuana use, the impact of the policy becomes both discriminatory *and* without substantial, legitimate state purpose, and is thus illegal under FHA.

by President Obama - that the racial disparities in punishing marijuana offenses outweigh the benefits of enforcement. In addition, studies show that punishing marijuana possession does not make neighborhoods safer.[34] There is no correlation between increased arrests for marijuana and decreased crime rates, no connection between marijuana use and involvement in crime, and no evidence that marijuana users are more likely to turn to harder drugs.[35]

In Massachusetts, support for the 2008 decriminalization referendum was further based on the fact that decriminalization would save the state about $24.3 million annually in law enforcement resources, which could be redirected towards tackling violent crime.[36] Support also came from an acknowledgement that allowing people to lose access to employment, housing and educational opportunities for possessing minor amounts of marijuana is socially costly and

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[34] Am. Civil Liberties Union, *supra* note 3. (Add. 46)
[35] Geller, *supra* note 3. (Add. 54)
[36] Jeffrey A. Miron, "The Effect of Marijuana Decriminalization on the Budgets of Massachusetts Governments, With a Discussion of Decriminalization's Effect on Marijuana Use," *Drug Policy Forum of Mass.* (2002), available at http://blogs.chicagotribune.com/files/decrim.pdf.

fundamentally unfair.[37] This point was stressed in television ad campaigns launched by the Committee for Sensible Marijuana Policy, a major proponent of the decriminalization referendum. In one such commercial, Lieutenant Tom Nolan, a 27 year veteran of the Boston Police Department, described the injustice of the civil consequences attending marijuana convictions, concluding, "I entered law enforcement to catch bad guys, not to deny someone an education for life just because they made a mistake."[38] The Justice Department, in stating its intention to leave states' marijuana legalization decisions unchallenged, has agreed. *See* Cole Memorandum, *supra* n. 21. (Add. 68) At a minimum, it has declared that using federal law enforcement resources to get in the way of states' marijuana experiments is wasteful and unnecessary.

Unlike the Justice Department, BHA is not primarily a law enforcement agency. Its mandate is to address local housing needs, including "the shortage of safe or sanitary dwellings available for families or elderly persons of low income at rentals which they

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[37] Laura Crimaldi, "Marijuana measures head to voters," *Boston Herald* (Jan. 27, 2008).
[38] *Lt. Tom Nolan,* http://www.youtube.com/watch?v=-00FVeU4_T8 (Oct. 21, 2008).

can afford." G. L. c. 121B, § 3. *See also Boston Hous. Auth. v. Howard*, 427 Mass. 537 (1998) (relieving BHA of liability for claims brought by tenants under G. L. c. 93A because of its public purpose to supply affordable housing). Its current policy does not make that housing safer. Instead, it punishes tenants to discriminatory effect, prescribing a major consequence for a minor offense.

There is no substantial, legitimate, nondiscriminatory reason for BHA, a state instrumentality, to violate a state law that merely allows someone with a small amount of marijuana to keep her housing subsidy and avoid homelessness.[39] Given the racially disparate impact of that practice, declaring it permissible under preemptive federal regulations would put HUD and the rest of the federal government in the untenable position of mandating a

[39] Because of the income limits of the Section 8 program, the very limited availability of other affordable housing, and the fact that market rents are out of reach for most Section 8 participants, termination of a section 8 voucher often means homelessness. *See* Homsey, *Procedural Due Process and Hearsay Evidence in Section 8 Housing Voucher Termination Hearings*, supra n. 2 at 518; *see also* "Impacts of sequestration on section 8 vouchers," *Center on Budget and Policy Priorities* (2013), available at *http://www.cbpp.org/files/PHA-Sequestration-Stories_updated-4-22-13.pdf.*

policy that violates a fair housing law to which they have recently rededicated themselves. It would also yield absurd results for housing authorities like the BHA, as any termination decision based on possession of an ounce or less of marijuana would give rise to a meritorious fair housing challenge and, ultimately, reversal of the termination decision.

III. Given the national and local landscape, the severe consequences of withdrawal of Section 8 assistance, and the racial justice implications of imposing penalties for minor marijuana possession, BHA's termination decision was an abuse of discretion.

The Commonwealth, HUD, the Justice Department, the President, popular opinion, and almost half the states are all moving away from penalizing possession of one ounce or less of marijuana. Only the Boston Housing Authority is moving in the other direction. To the extent that its termination practices do not directly violate G. L. c. 94C, § 32L, or the federal Fair Housing Act, they are nonetheless illegal, when employed in a case like Trenea Figgs's, as an abuse of BHA's discretion.

In deciding whether to terminate a voucher, a housing authority's "hearing officer must hear evidence and find facts relating to 'all relevant

circumstances.'" *Carter v. Lynn Hous. Auth.*, 450 Mass. 626, 634 (2008) (citing *Wojcik v. Lynn Hous. Auth.*, 66 Mass. App. Ct. 103, 112 (2006)). "Relevant circumstances" include "the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure." 24 C.F.R. § 982.552(c)(2)(i). "[T]he decision of a hearing officer must, at a minimum, reflect factual determinations relating to the individual circumstances of the family . . . demonstrate that he is aware of his discretionary authority under 24 C.F.R. § 982.552(c)(2)(i), to take all relevant circumstances (including mitigating circumstances) into account; and indicate whether he either did or did not choose to exercise that discretion in favor of mitigating the penalty (here termination of Section 8 benefits) in a particular case." *Carter*, 450 Mass. at 636. Once the hearing officer makes a voucher termination decision, the public housing authority can review "whether the decision of the hearing officer was '[c]ontrary to HUD

regulations or requirements, or otherwise contrary to federal, State, or local law.'" *Wojcik,* 66 Mass. App. Ct. at 114 (citing 24 C.F.R. § 982.555(f)(2)).[40]

Given that Massachusetts law prohibits *any form of penalty* for an ounce or less of marijuana, there is a *de facto* lack of seriousness to such a case. The Department of Justice's stated position of enforcing federal drug laws in states that have legalized marijuana also suggests that such low-level possession cases are not serious when deciding whether they are a basis to terminate a federal voucher. The hearing officer must also consider whether terminating the voucher is contrary to state law, which it clearly is in this case. Finally, the disparate impact on racial minorities of choosing to pursue voucher terminations for an ounce or less of marijuana, particularly given the questionable benefits of such a practice, should factor into BHA's decisionmaking regardless of whether there is an actual violation of the Fair Housing Act. These factors –the "relevant circumstances" – considered individually and in conjunction with one

[40] That HUD intentionally included a requirement that voucher terminations *also* comply with state law lends further support for the argument that no preemption of Seciton 32L is intended or appropriate.

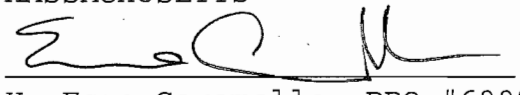
another, all make choosing to terminate a Section 8 voucher for an ounce or less of marijuana an abuse of discretion under any circumstances.

CONCLUSION

For the foregoing reasons, Amici suggest that this Court affirm the trial court's decision not to terminate Ms. Figgs's Section 8 voucher. Amici also urge the Court to find that G. L. c. 94C, § 32L, alone or in conjunction with the Fair Housing Act or HUD regulations governing voucher termination, bar a housing authority from terminating a voucher for possession of one ounce or less of marijuana.

Respectfully submitted,

CHARLES HAMLITON HOUSTON INSTITUTE FOR RACE AND JUSTICE and THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS



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MASS. R.A.P. 16(K) CERTIFICATION

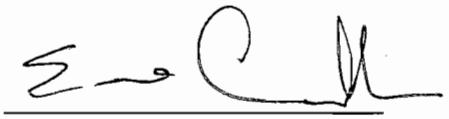
I certify to the best of my knowledge this Brief complies with court rules pertaining to filing of briefs, including, but not limited to: Mass. R.A.P.16(a)(6) (findings and memorandum of decision); Mass. R.A.P. 16(e) (references to the record); Mass. R.A.P.16(f) (reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h) (length of briefs); Mass. R.A.P. 18 (appendix to briefs); and Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

Date: February 19, 2014

Esme Caramello

CERTIFICATE OF SERVICE

I certify that on this the 19th day of February, 2014, I caused two copies of this Brief to be served on counsel for each party of record, and for the original and seventeen (17) copies of the brief to be filed with the Court.



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