COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, SS.

SJC-11872

BURBANK APARTMENTS TENANT ASSOCIATION, SATISHA CLECKLEY, EN CI GUAN, RICHARD WEBSTER, BYRON ALROD, MASSACHUSETTS COALITION FOR THE HOMELESS, and FENWAY COMMUNITY DEVELOPMENT CORPORATION

Plaintiffs-Appellants

v.

WILLIAM M. KARGMAN, individually and in his capacity as principal of the Burbank Apartments Corporation and First Realty Management Corporation, ROBERT M. KARGMAN, individually and in his capacity as principal of Burbank Apartments Corporation, BURBANK APARTMENTS COMPANY, BURBANK APARTMENTS CORPORATION, as general partner of Burbank Apartments Company, and FIRST REALTY MANAGEMENT CORPORATION

Defendants-Appellees

ON APPEAL FROM A JUDGMENT OF THE BOSTON HOUSING COURT

BRIEF OF *AMICI CURIAE* THE NATIONAL APARTMENT ASSOCIATION AND THE NATIONAL MULTIFAMILY HOUSING COUNCIL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Massachusetts Supreme Judicial Court Rule 1:21, *Amicus Curiae* the National Apartment Association ("NAA") and the National Multi Housing Council ("NMC") hereby make the following disclosures: (1) The NAA and NMC are nonprofit trade associations that have no parent corporation; (2) no publicly held company owns 10% or more of the stock of the NAA, RHA or NMC.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

The National Apartment Association ("NAA") is a federation of 170 affiliated associations with more than 68,000 members, which are responsible for more than 7.86 million apartment units in the United States, Canada, and Europe. The NAA provides professional industry support, education services, and advocates for fair governmental treatment of multi-family residential businesses nationwide. In that regard, the NAA is the leading national advocate for quality rental housing and is the largest broad-based organization dedicated solely to rental housing.

The National Multi Housing Council ("NMHC") is a national association representing the interests of the

largest and most prominent apartment firms in the United States. Based in Washington, D.C., the NMHC's membership is comprised of principal officers of firms engaged in all aspects of the apartment industry, including ownership, development, management, and financing. As part of its business practice, the NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living.

Amici constitute a broad and diverse group of member firms that represent a multitude of interests in the rental housing industry. Members of *Amici* range in size from owners and managers of single and dual unit properties to international Real Estate Investment Trusts, many of which are subject to subsidized programs created under the National Housing Act of 1934 or have entered into contracts to receive rent subsidies under Section 8 of the U.S. Housing Act of 1937 (collectively "Affordable Housing Project").

As the members of *Amici* are operators of Affordable Housing Projects subject to federal and state anti-discrimination statutes and regulations,

Amici and their members are directly impacted by the issues presented in this case, which address the boundaries of "disparate impact" theory and its intersection with fair housing law.

INTRODUCTION

Rental subsidy programs, be they project-based or voucher-based, are premised on decades-long voluntary, cooperative, and non-coercive relationships between the federal government, rental property owners and prospective residents. These relationships uniquely combine the resources of the federal government and the management skills and resources of private housing developers, owners, and managers, for the purposes of creating rental opportunities for low-income tenants.

The legal and technical requirements associated with an Affordable Housing Project are already ample. Nevertheless, Appellants seek to add further complexity to these arrangements by essentially redrafting law that defines when owners may terminate Affordable Housing Projects with an analysis of whether doing so creates a disparate racial impact.

Appellants' position is troubling for several reasons. It contravenes the express terms of

Affordable Housing Project agreements which define when contract expiration may occur. It also alters the voluntary nature of agreements creating subsidized housing into one of coercion, whereby owners would be forced to continue to operate an Affordable Housing Project until the demographics of tenants of the building have shifted to such a degree that no racially disparate impact could conceivably result from expiration of a project. Should the Court find that there is an actionable disparate impact by virtue of the Appellee's exercise of its contractual right(s), or otherwise upon expiration/termination of the regulatory agreement applicable to the subject property, this would/could result in a project based subsidy in perpetuity. Such a determination would not only be against the intention(s) of the contracting parties, but also against public policy whereby (at least some of) the program incentive(s) - or consideration under contract law - in utilizing the rental subsidy program(s) would be effectively eliminated.

Perhaps most importantly, Appellants' position fails to comport with the end goal of rental subsidy

programs, which is to entice owners to participate in subsidized projects. Clearly, this interest is not served by substituting duration-specific federal program agreements with perpetual Affordable Housing Projects. Nor is such a result justified by the consequences of expiration of the project underlying this appeal, as each tenant affected by expiration of the project received enhanced Section 8 vouchers that allowed them to continue to reside in their units. Finally, the Appellants' argument regarding the effect upon applicants currently on waitlists must fail whereby said applicants have no standing if/when the specific program expires and/or is terminated. By the same reasoning in the Appellants' argument, the federal government may also be liable if/when subsidy programs fail to obtain future funding, and are thus terminated by legislature - leaving applicants on waitlists without prospective housing.

Ultimately, Appellants can point to no law supporting their claim that an owner may be subject to a discrimination claim for no reason other than the natural expiration of an Affordable Housing Project. Nor does the imposition of liability in absence of any

evidence of discriminatory intent further the interest of housing providers, tenants in need of affordable housing or even the federal government. For these reasons, *Amici* respectfully request that this Court affirm the ruling of the Boston Housing Court.

FACTUAL BACKGROUND

The National Housing Act of 1934 ("NHA") has given rise to a wide array of federal programs designed to entice developers to build affordable housing for low-income citizens, which are implemented and administered by the United States Department of Housing and Urban Development ("HUD").

Appellees took advantage of one such NHA program, the § 221(d)(3) BMIR Federal Housing Program, in order to obtain a HUD insured and subsidized loan. 12 U.S.C. § 1715l(d)(3). The purpose of the loan was to complete renovations to the Burbank Apartments ("Burbank"), a five building development located in the Fenway neighborhood of Boston. On March 16, 1970, Appellees executed a Regulatory Agreement in connection with this loan under which Appellees agreed to keep rents at Burbank at HUD-approved levels, and to rent only to low or moderate income families, but

only for so long as their federally subsidized loan remained in effect.

Importantly, loans obtained under the § 221(d)(3) program could be prepaid without HUD approval after 20 years. In such event, owners could terminate their Regulatory Agreements and withdraw from their regulated rent program. Congress, realizing this, enacted several statutes to entice owners to continue to participate in affordable housing subsidy programs.

First, Congress enacted the Emergency Low-Income Housing Preservation Act of 1987 ("ELIHPA"), Pub. L. No. 100-242, §§ 201 *et seq. 101 Stat. 1815, 1877-78* (previously codified at *12 U.S.C. § 17151* note (1988)). ELIHPA, which authorized HUD to offer incentives to discourage prepayment of subsidized loans, permitted HUD to set conditions of prepayment for those electing to forego incentives and prepay.

In 1990, ELIHPA was replaced by the Cranston-Gonzales National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (1990) (codified at *42 U.S.C. §§ 12701-898* (2000)), a portion of which included the Low-Income Housing Preservation and Resident Home Ownership Act ("LIHPRHA"). Pub. L. No. 101-625, title

VI, 104 Stat. 4249 (codified at *12 U.S.C. §§ 4101 et seq. (2000)*).

Under LIHPRHA, HUD retained authority to offer incentives to entice owners to continue to participate in project-based rent subsidy programs, and to the extent owners rejected those incentives, they were required to face strict conditions to prepay their federally subsidized mortgages. 12 U.S.C. §§ 4101, 4108 & 4114. In doing so, LIHPRHA permitted, as a replacement for project-based Section 8 subsidies, rental vouchers which owners were required to accept from existing tenants. *Id.* at § 4113. LIHPRHA also included incentives to entice owners to continue participation in Affordable Housing Projects after their Regulatory Agreements expired. *Id.* at § 4109

In 1994, based on these enactments, Appellees elected not to prepay their subsidized loan. Instead, Appellees executed a Use Agreement under which they continued low-income affordability restrictions for Burbank for the remaining term of the original loan. However, the Use Agreement further provided that Appellees were not required to renew or extend any assistance contract beyond the term of the Use

Agreement, which expired on April 1, 2011, the same date as the expiration of Appellees' subsidized loan.

From 1982 through April 1, 2011, low-income tenants of Burbank received rental assistance under a multi-year project-based Section 8 contract from HUD, pursuant to the U.S. Housing Act of 1937. 42 U.S.C. 1437f. This was in accordance with the Use Agreement, which required Appellees to enter into a Housing Assistance Payment Contract ("HAP Contract") and to renew the contract for the life of the Use Agreement, which expired April 1, 2011. As a result, upon expiration of the Use Agreement, Appellees decision as to whether or not to renew their HAP Contract, as well as their conduct in the event of non-renewal, was governed by 42 U.S.C. § 1437f(c)(8)(A).

While these HAP Contracts were outstanding, in 1997, Congress enacted the Multifamily Assisted Housing Reform and Affordability Act ("MAHRAA"). Pub. L. No. 105-65 (codified at *42 U.S.C. § 1437f* (1997)). MAHRAA sought to protect tenants in project-based subsidized developments in the event of expiration of an underlying subsidized loan agreement. In doing so, the MAHRAA permitted tenants of terminated Affordable

Housing Projects to receive individual enhanced rental vouchers which they could present to their existing housing provider or use elsewhere, at their option. 42 U.S.C. §§ 1437f(r) & (t)(1)(B).

Ancillary with this, in 1996, Congress enacted the Housing Opportunity Program Extension Act ("HOPE"), Pub. L. No. 104-120, 110 Stat. 834, which removed the prepayment restrictions of ELIHPA and LIHPRHA. Thus, under federal law owners may prepay subsidized mortgages and terminate a project-based Section 8 rental subsidy program, so long as termination is predicated on notice being issued a year in advance to HUD and the tenants of the project. 42 U.S.C. §§ 1437f(c)(8)(A).

By 2009, the Massachusetts Legislature also enacted legislation mandating notice requirements for publicly assisted housing agreements that would soon expire. G.L. c. 40T, § 2. These requirements, while similar to their federal counterparts, also permit tenants who do not receive enhanced vouchers to remain in their units for three years and enjoy caps on their rental increases. *Id.* at § 7.

Yet, Massachusetts law contains no restrictions on the ability of owners to terminate Affordable Housing Project agreements. Instead, and quite the opposite, it is explicitly stated that nothing "shall prohibit the owner from taking actions to terminate an [Affordable Housing Project agreement] … ; provided, however, that the owner shall comply with all notice terms and restrictions…" *Id.* at § 2(a).

In that regard, prior to the April 1, 2011 expiration of Appellees' subsidized loan, Appellees elected not to renew their project-based Section 8 contract. Appellees submitted notices to this effect to Burbank tenants as well as other required entities. Afterward, the Boston Housing Authority obtained funding for new Section 8 enhanced vouchers, with the result that 129 Burbank tenants now enjoy individual enhanced Section 8 vouchers, a 62 unit increase from the 67 tenants that originally only enjoyed project-based rental subsidies.

This increase in assistance is not an aberration. Rather, HUD has provided a great deal of assistance to residents of Massachusetts through Section 8 Contracts and/or other forms of multifamily assistance. UNITED

STATES DEPT. OF HOUSING & URBAN DEV. MULTIFAMILY ASSISTANCE AND SECTION 8 CONTRACTS DATABASE (2015), available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/exp/mfhdiscl.

In fact, as of August 25, 2015, 874 properties located within the State of Massachusetts were subject to Section 8 contracts, 244 of which are located in Suffolk County. *Id.* This number is approximately 3.6% of the total number of HUD-subsidized properties nationwide, each of which represent a collective 1.4 million residential units. *Id.* Considering this, even if Appellees decision to terminate their HAP Contract had reduced the availability of affordable housing in the Burbank, more than ample opportunities would have remained for any tenants affected thereby.

In addition to the foregoing, Appellees' election to allow its project-based Section 8 contract to lapse enables Appellees to determine rents for the Burbank annually, as opposed to a project-based determination made every five years. This not only ensures the rents are more in keeping with current market value, but also allows rental values for the Burbank to more expeditiously fund improvements and renovations.

Absent this benefit, Appellees would be forced to wait to obtain funding to make these improvements and renovations, which would ultimately harm both parties.

Notwithstanding the foregoing, reversal of the ruling of the Boston Housing Court would also further burden tenants. As set forth (On page 226) in the record of this matter, there are several tenants that have already signed enhanced voucher leases for the Burbank. These would unnecessarily be placed on hold absent affirmance of the lower court's ruling.

ARGUMENT

I. Appellants' Position Contravenes Appellees' Regulatory Agreements and Frustrates the Purpose of Federally Subsidized Housing Programs

In 1970, the owners of Burbank undertook a substantial renovation of the property. To accomplish this, they obtained federally subsidized and insured loans to fund these renovations. In exchange, the owners agreed to provide housing at below-market rates for persons of moderate income. Importantly, this agreement, embodied within extensive regulatory and financing documents, only contemplated a maximum term

of 40 years. Indeed, the financing documents even permitted prepayment after only 20 years.[1]

There is no dispute that the owners of Burbank complied with the various terms of their regulatory Use Agreement with HUD. Moreover, their Use Agreement explicitly provided that it "… shall not require the owner to renew or extend any assistance beyond the Term of this Agreement and shall not subject the Owner to more onerous requirements than those which exist under the Section 8 program."

Thus, it is apparent that HUD foresaw and consented to the ability of owners to withdraw from the project-based Section 8 program. The contractual requirements of providing advance notice to HUD, the Public Housing Authority, and the tenants all reflect this fact.

In any business transaction, there is an implicit expectation that each party will expect the other to

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[1] There remains an ongoing concern about the adequacy of the supply of low income housing, irrespective of whether it is available through Affordable Housing Projects or the Section 8 voucher program. HUD has studied the factors that influence the decisions of owners to participate in or withdraw from various Section 8 Programs. Anne Ray, *et al.*, *Opting In, Opting Out a Decade Later*, U.S. DEPT. OF HOUSING AND URBAN DEV., OFFICE OF POLICY AND RESEARCH (May 8, 2010), at p. 45.

adhere to the terms of the contract. To meet the challenges associated with the goal of providing affordable housing, the federal government has constructed an elaborate regulatory framework that creates economic incentives in order to achieve social goals over a fixed period of time. Maggie McCarty, *An Overview of the Section 8 Housing Programs: Housing Choice Vouchers and Project-Based Rental Assistance*, CRS Report for Congress RL 32284 (2014). Investors rely on these contract terms in making their decision to place properties in the program or to accept vouchers.

Appellants' theory would eliminate an investor's legitimate reliance on the explicit terms of a federal program. By introducing a "disparate impact" challenge to the owners' rational decision to withdraw from the project based Section 8 Program, after 40 years, appellants paradoxically undermine the entire program because they introduce uncertainty into a market that is dependent upon certainty.

What housing provider would enter into an agreement that has no end despite explicit contractual language to the contrary? One author described such a

theory as an "absurd" result. Michael Quick, Note *Preserving Project-Based Housing in Massachusetts: Why the Voucher Discrimination Law Falls Short*, 30 Rev. Banking & Fin. L. 651 (2010 - 2011), at p. 675. Moreover, why introduce this uncertainty when ample housing options remain? *See supra* at p. 11.

Amici respectfully urge the court to reject this dangerous theory and affirm the trial court's ruling.

II. Plaintiffs Failed to Adequately Plead a Claim of Disparate Impact

In 1970, the owners of the Burbank Apartments engaged in a substantial renovation of their property. The renovation was financed by the Federal Housing Administration using a mortgage with a 40 year term that required the owners to provide below market rents for moderate income families.

Throughout the 1980s and 1990s Congress continued to pass housing related legislation that regulated the operation of properties that participated in federally assisted housing. Jane Smith, *Possible Legal Issues Facing Landlords who Choose Not to Accept Federal Housing Vouchers*, CRS Report for Congress R 42151

(2012); McCarty *supra* at pp. 1-2. Among these items of legislation are ELIHPA, LIHPRHA, and MAHRAA. *Id.*

In that context the owners of the Burbank signed a series of agreements that contemplated a termination date of April 1, 2011. Significantly, one such agreement provided "that it shall not subject an owner to renew or extend any assistance contract beyond the Term of this Agreement and shall not subject the owner to more onerous requirements than those which exist under the Section 8 program."

As the term of the contract grew to a close, the ownership decided to let it expire. Proper notices were sent to the Boston Housing Authority and residents of the apartment complex. In the years since the owners entered into the mortgage agreement, the regulatory landscape changed. Individual housing vouchers became available that did not exist in 1970. McCarthy *supra;* Smith *supra* at pp. 1-2.

The appellants accuse the owners of housing discrimination based upon the owners' refusal to enter into another HAP Contract, notwithstanding their willingness to accept Section 8 housing vouchers. They argue this decision was illegal discrimination because

it had a disparate impact on existing and prospective residents who are members of a protected class.

In its written ruling on this issue, the trial court referenced (p. 15, n. 16) a disparate impact case then pending before then US Supreme Court. That case, *Texas Dept. of Housing and Cmty. Affairs v. The Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (June 25, 2015), set a high bar for plaintiffs who file discrimination lawsuits based upon theories of disparate impact on protected classes. David Carpenter, *Disparate Impact Claims Under the Fair Housing Act*, CRS Report for Congress R44203 (2015). Appellants here have made no such showing.

Specifically, the *Inclusive Communities Project* ruling made clear plaintiffs must prove a challenged policy has "a disproportionately adverse effect on minorities" and is otherwise unjustified by a legitimate rationale. *Id.* at 2533. In doing so, the opinion cautioned against a narrow focus on the first statistical analysis, and instead noted "disparate-impact liability has always been limited in key respects that avoid serious constitutional questions that might arise under the [Fair Housing Act], for

instance if such liability were imposed solely on a showing of statistical disparity." *Id.* at 2512.

The *Inclusive Communities Project* case was remanded to the district court at which time the Court noted it could be seen "simply as an attempt to second guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion in allocating tax credits for low income housing." *Id.* at 2522. Considering this, the Court observed it would be paradoxical to construe the Fair Housing Act to impose "onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable." *Id.* at 2523.

This is precisely the same situation in which the owners of the Burbank Apartments found themselves: after having participated in the provision of housing to a largely minority population for 40 years and a continued willingness to continue that practice under the voucher system, they stand accused of housing discrimination because "some other priority might be available" despite the fact that regulatory and business changes had occurred.

Notably, while the *Inclusive Communities Project* case was pending before the Supreme Court, HUD issued regulations bearing on the analytical approach for disparate impact claims. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (2013). Essentially plaintiffs bear the burden of proving that the challenged practice "caused or predictably will cause a discriminatory effect", at which point the defendant would have the burden to prove that the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests. If satisfied, the burden then returns to the plaintiff to show that the defendant's interests could be served by a practice that has a less discriminatory effect. The appellants in the instant action are unable to meet even the initial burden of proof chiefly due to the willingness of the owners to continue to accept individual vouchers issued by the Boston Housing Authority.

As Justice Kennedy observed, "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy

or policies causing that disparity. A robust causality requirement ensures that '[r]acial imbalance ... does not, without more, establish a prima facile case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create. *Texas Dept. of Housing and Cmty. Affairs v. The Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2523 (2015) citing *Wards Cove Packing Co. v Atonio*, 490 U.S. 642,653 (1989).

Similarly, in *City of L.A v. Wells Fargo, C.D. Cal. (2015),* the court held that Wells Fargo could not be held liable for racial disparities that they did not create, whereby certain federal loan programs resulted in adverse results upon minority families. *Id. At 25.* The court reasoned that the any potential disparate impact was a result of purposeful federal action, and not the result of Wells Fargo's decision to participate in the specific federal lending program. *Id.* As in the instant action, the federal government engaged in purposeful action via the aforementioned acts - related to federal lending to entice developers to build affordable housing - each of which provided the owner with a right to prepay

said loans and withdraw from their regulated rent programs. Notwithstanding the foregoing, the Appellee in this case did not pre-pay or withdraw from the program prior to the expiration of the term(s). Rather, Appellee allowed its contract to expire and, in accordance with *HUD's Implementation of the Fair Housing Act's Discriminatory Effects Standard* as well as the court's holding in *City of L.A v. Wells Fargo,* maintains a substantial, legitimate, and nondiscriminatory interest whereby it can now determine rents for its property annually, rather than every five (5) years under a project-based program.

III. Application of G.L.C. 151B is Preempted by Federal Law

Appellants also contend G.L. 151B § 4, which prohibits discrimination in housing, compels Appellees to renew their HAP Contract for the Burbank. However, even assuming this statute were applicable to a decision to *renew* a HAP Contract, it still would be inapplicable to this dispute as it is preempted by the Supremacy Clause of Article VI of the Constitution. *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458, 472-473 (1st Cir. 2009).

In that regard, preemption may be express or implied. Preemption is express if a federal statute explicitly confirms Congress's intent to preempt state law and defines the extent of that preclusion. *Grant's Dairy-Maine, LLC v. Comm'r of Me. Dept. of Agric. Food & Rural Res.*, 232 F.3d 8, 15 (1st Cir. 2000). Preemption is implied where application of state and federal law creates a conflict or where the disputed subject matter is one completely subsumed by a federal scheme. *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d at 472-473.[2]

Considering the foregoing, there can be no doubt that G.L. 151B § 4 is preempted by the comprehensive scheme of federal programs underlying financing and management of the Burbank for the past four decades. First, the express provisions of LIHPRHA preempt state law to the extent the law inhibits prepayment of

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[2] Conflict preemption results in state law being pre-empted to the extent it "actually conflicts with federal law, that is … when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress. *Id.* quoting *Good v. Altria Group, Inc.*, 501 F.3d 29, 47 (1st Cir. 2007). Thus, implied preemption occurs where congress enacts a pervasive scheme of regulation which makes "reasonable the inference that Congress left no room for the States to supplement it…" *Id.* quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

subsidized mortgages and termination of insurance under 12 U.S.C. § 1715t. 12 U.S.C. § 4122. This easily includes Appellees' HAP Contract, which is inextricably linked to Appellees' Use Agreement under LIHPRHA and their Regulatory Agreement, each of which expired April 1, 2011 under 12 U.S.C. § 1715t.

In fact, application of G.L. 151B § 4 to Appellees' decision not to renew its HAP Contract is also impliedly prohibited. This is by virtue of the fact that the § 221 BMIR Loan program, ELIHPA, LIHPRHA, MAHRAA, HOPE, Appellees' financing documents and Appellees' Regulatory Agreement and Use Agreement with HUD all contemplated and defined the conditions by which Appellees could exit the rental subsidy program and end the Affordable Housing Project.

Substituting both federal law governing exits from rental subsidy programs and the terms of Appellees' contracts with HUD with a subjective disparate impact analysis frustrates implementation of federal law, and thus is preempted. *Forrest Park, II v. Hadley*, 336 F.3d 724, 733 (8th Cir. 2003). This is because a state law that "forces owners to remain in a federally subsidized program from which Congress has

authorized withdrawal would eviscerate the method Congress chose to implement the federal low-income housing scheme." *Id.* at 733 - 734; *see also Mother Zion Tenant Assoc. v. Donovan*, 55 A.D. 3d 333 (N.Y. App. Div. 1st Dep't 2008).

Appellants can no more force Appellees to renew HAP Contracts with HUD than they can force HUD to continue to provide Appellees with the opportunity to participate in subsidy programs. Rather, even if G.L. 151B § 4 applies to renewal of the HAP Contract, it is countervailed by G.L. c. 40T, § 2(a)'s express notation that it does not "prohibit the owner from taking actions to terminate an [Affordable Housing Project]" and otherwise preempted under federal law.

In the alternative, Amici reiterates that M.G.L 40T, § 2(a) provides that "nothing herein shall prohibit the owner from taking actions to terminate an affordability restriction during any notice period provided herein. As such, state legislature has, similar to the court's ruling in *City of L.A v. Wells Fargo,* engaged in purposeful action, and any alleged disparate impact is a result of said state action - and not the result of Appellee's decision to

participate in the subsidized program(s) and to allow said program to lapse after forty (40) years of participation.

CONCLUSION

The foregoing premises considered, *Amici* respectfully request that this Court affirm the ruling of the Boston Housing Court.

Dated: October 23, 2015

Respectfully submitted,

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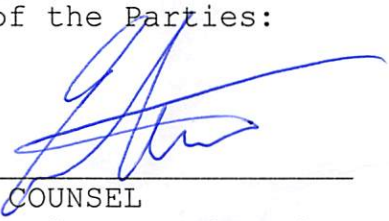
CERTIFICATE OF SERVICE

I, Eleftherios S. Papadopoulos, hereby certify under the pains and penalties of perjury that I have complied with the Mass. Rules of Appellate Procedure regarding the form and submission of appellate briefs The original of this Brief of *Amici Curiae* by the National Apartment Association and National Multifamily Housing Council, and seventeen copies are being delivered to the Court, and copies of the brief are being sent to counsel for each of the Parties:



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CERTIFICATE OF COMPLIANCE

PURSUANT TO RULE 16(K) OF THE

MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I, ELEFTHERIOS S. PAPADOPOULOS, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision);

Mass. R. A. P. 16(e) (references to the record);

Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations);

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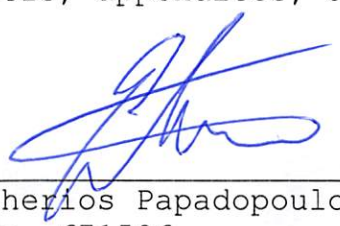

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ADDENDUM (STATUTES CITED)