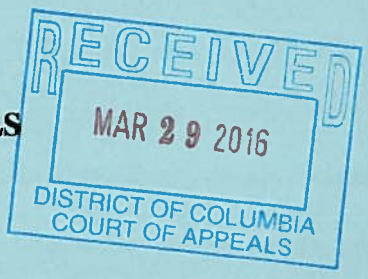
No. 15-AA-386

DISTRICT OF COLUMBIA COURT OF APPEALS



NELSON BOSTIC,

Petitioner

v.

DISTRICT OF COLUMBIA HOUSING AUTHORITY,

Respondent.

ON PETITION FOR REVIEW FROM
THE DISTRICT OF COLUMBIA HOUSING AUTHORITY

BRIEF OF PETITIONER

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RULE 28(a)(2)(A) STATEMENT

The parties to the case are petitioner Nelson Bostic, the complainant below, and respondent District of Columbia Housing Authority, the respondent below. In the D.C. Housing Authority informal hearing process, Mr. Bostic was represented by Matthew Sullivan and Beth Mellen Harrison, of the Legal Aid Society of the District of Columbia. On appeal, Mr. Bostic is represented by Ms. Harrison and Jonathan H. Levy, also of Legal Aid. In the D.C. Housing Authority informal hearing process, the respondent was represented by Mario Cuahutle. Respondent is represented in this Court by Frederick A. Douglas, Curtis A. Boykin, and Alex M. Chintella of Douglas & Boykin PLLC. No intervenors or amici have appeared.

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BRIEF OF PETITIONER

STATEMENT OF THE ISSUES PRESENTED

1. Whether 14 DCMR § 5804.1(b), a regulation promulgated by the District of Columbia Housing Authority that authorizes termination from the Housing Choice Voucher Program for a ground not authorized under applicable federal law, and specifically rejected by Congress, is preempted?

2. Whether 14 DCMR § 5804.1(b) was intended to apply retroactively to circumstances such as those present here (where both the conduct at issue and entry into the Voucher Program preceded the promulgation of the regulation), and whether DCHA was authorized to engage in such retroactive rulemaking?

STATEMENT OF THE CASE

In June 2014, the District of Columbia Housing Authority (DCHA) recommended termination of Nelson Bostic from the Housing Choice Voucher Program, citing his status as a former sex offender subject to a lifetime registration requirement, based on his conviction for rape over 30 years ago. DCHA did not cite any federal statute or regulation authorizing Mr. Bostic's termination from the Voucher Program on this basis, instead relying solely on a local regulation, 14 DCMR § 5804.1(b), which mandates termination from the Voucher Program of any household that includes a lifetime sex offender registrant. That regulation was promulgated in 2013, five years after Mr. Bostic entered the Voucher Program and more than 30 years after the criminal conviction at issue.

Mr. Bostic contested his termination and requested an informal hearing. His principal argument was that the governing federal statute and regulations provide an exclusive list of permissible bases for termination from the Voucher Program and do not authorize termination based on his lifetime registration status, and that 14 DCMR § 5804.1(b) is therefore invalid. Following an informal hearing, the hearing officer issued a decision in December 2014 upholding Mr. Bostic's termination and rejecting Mr. Bostic's arguments. Mr. Bostic timely appealed this determination to the Executive Director of DCHA, who issued a decision in March 2015 affirming the termination. This appeal followed.

STATUTORY & REGULATORY FRAMEWORK

A. The Housing Choice Voucher Program.

Congress created the Section 8 Housing Choice Voucher Program under the Housing and Community Development Act of 1974. The Voucher Program is one of several rent subsidy programs aiding low-income families known commonly as "Section 8," enacted as

Chapter 8 of the United States Housing Act of 1937 and codified at 42 U.S.C. § 1437f. The United States Department of Housing and Urban Development (HUD) has promulgated regulations implementing the Voucher Program at 24 C.F.R. pt. 982.

The purpose of the Voucher Program, like all Section 8 rent subsidy programs, is to "aid[] low-income families in obtaining a decent place to live and of promoting economically mixed housing." 42 U.S.C. § 1437f(a) (2012). Participants in the Voucher Program receive Section 8 Housing Choice Vouchers from a local public housing agency, which the participants use to rent an existing unit on the private housing market. *See id.* § 1437f(o); 24 C.F.R. § 982.1 (2015). The tenant is required to pay approximately thirty percent of his or her income toward the rent each month, with the local public housing agency paying the remainder directly to the landlord. 42 U.S.C.§ 1437f(o). The federal government, through HUD, allocates funds to local public housing agencies throughout the nation to administer the Voucher Program. *Id.* § 1437f(o)(1). DCHA administers the local Voucher Program in the District. *See* D.C. Code § 6-202 (2012).

The Housing Act of 1937 and implementing regulations promulgated by HUD establish requirements for the Voucher Program, including policies on eligibility and admission, the calculation of tenant rent and the amount of the government subsidy, inspection of rental units for compliance with federal housing quality standards, and participant termination from the program for non-compliance. *See* 42 U.S.C. § 1437f(o); 24 C.F.R. pt. 982. The Housing Act delegates limited authority to local public housing agencies to administer the program pursuant to these federal regulations and requirements. *See* 42 U.S.C. § 1437f; 24 C.F.R. §§ 982.1, 982.51, 982.52.

A local public housing agency exercises this delegated authority by adopting an administrative plan, which "establishes local policies for administration of the program in accordance with HUD requirements." 24 C.F.R. § 982.54(a). The administrative plan is limited to "matters for which the [public housing agency] has discretion to establish local policies." *Id.* HUD's regulations set forth a list of 23 discrete areas in which public housing agencies are permitted to adopt local policies. *See id.* § 982.54(d)(1)-(23); *see also* U.S. Dep't of Hous. & Urban Dev., *Housing Choice Voucher Program Guidebook 7420.10G*, at 3-1 (Apr. 2001) (noting that Voucher Program regulations specify the areas in which a public housing agency may adopt local policies). The regulation in question lists areas such as admissions preferences, 24 C.F.R. § 982.207, requirements for reporting changes in family income and household composition, *id.* § 982.516, and the procedures for conducting informal hearings for participant grievances, *id.* § 982.555. Termination from the Voucher Program, including determination of the grounds for termination, is not among the designated areas in which public housing agencies are authorized to adopt local policies. *See id.* § 982.54(d).

DCHA is an independent authority of the District of Columbia government charged with implementing the Housing Act of 1937 in the District, including the Housing Choice Voucher Program. *See* D.C. Code § 6-202. DCHA, through its Board of Commissioners, has the power "[t]o make and implement rules, by-laws, and policies and regulations necessary or appropriate for the effective administration of the Authority and the fulfillment of the purposes of this chapter." *Id.* § 6-211(v)(2). DCHA has codified its Voucher Program policies in local regulations. *See* 14 DCMR Chs. 49-59, 61, 74, 76, 83, 85, 89. These regulations, which constitute DCHA's Administrative Plan for the Voucher Program, "outline[] how DCHA shall implement the requirements found in the applicable federal laws, regulations, and notices," *id.*

§ 4901.3 and "shall be consistent with all federal, state, and local laws," *id.* § 4900.3, including specifically "section 24 of the Code of Federal Regulations, other applicable sections of the Code of Federal Regulations, and applicable HUD notices and guidance," *id.* § 4901.1.

B. Termination Proceedings in the Voucher Program.

Federal regulations list 19 specific grounds on which a public housing agency may (or in some cases, must) terminate assistance in the Voucher Program. *See* 24 C.F.R. §§ 982.552, 982.553.[1] Five of these grounds are mandatory; the public housing agency *must* terminate assistance if, for example, a family has been "evicted from housing assisted under the program for serious violation of the lease." *Id.* 982.552(b)(2); *see also id.* §§ 982.552(b)(3)-(5), 982.553(b)(1)(ii). The remaining 14 grounds are discretionary. *Id.* §§ 982.552(c)(1)(i)-(xi), 982.553(b)(1)(i), (b)(1)(iii), (b)(2)-(3). As to those discretionary grounds for termination, the public housing agency "may consider all relevant circumstances" in weighing whether termination is warranted, including factors such as "the seriousness of the case" and "mitigating circumstances related to the disability of a family member." *Id.* § 982.552(c)(2).

C. The Quality Housing & Work Responsibility Act.

The Quality Housing and Work Responsibility Act (QHWRA), enacted in 1998, contained a variety of reforms to federally-subsidized housing programs, including the Housing Choice Voucher Program. *See* Quality Housing and Work Responsibility Act of 1998, Pub. L No. 105-276, 112 Stat. 2461-2680 (1998). Relevant to this case, QHWRA created new rules regarding the receipt of federal housing assistance for three groups: 1)

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[1] Among the grounds listed is violation of a family obligation. 24 C.F.R. § 982.552(c)(1)(i). HUD has established 13 specific family obligations such as supplying true and accurate information to the public housing agency and promptly providing the public housing agency with a copy of any eviction notice. *Id.* § 982.551(b)-(n).

individuals currently using illegal drugs or with a pattern of doing so; 2) individuals currently abusing alcohol or with a pattern of doing so; and 3) former sex offenders subject to a lifetime registration requirement under state or local law. *See id.* §§ 575-579, 112 Stat. 2634-43. As to illegal drug users and alcohol abusers, Congress required public housing agencies to establish standards both to bar their admission to any federally-subsidized housing program *and* to terminate their ongoing participation in any such program. *See* 42 U.S.C. §§ 13661(b)(1)(A),(B), 13662(a)(1),(2).[2] For both of these groups, the Housing Act now requires public housing agencies both to limit admission and to terminate ongoing participation in federally-subsidized housing programs.

The statute treated sex offenders subject to a lifetime registration requirement differently. QHWRA created a mandatory bar to their *admission* into federal housing programs, parallel to the admission bar for illegal drug users and alcohol abusers:

> Notwithstanding any other provision of law, an owner of federally assisted housing shall prohibit admission to such housing for any household that includes any individual who is subject to a lifetime registration requirement under a State sex offender registration program.

Id. § 13663(a)). QHWRA did not, however, permit *termination* of such individuals from ongoing participation in any federally-subsidized housing program. Congress determined that termination would not be authorized for long-past criminal conduct or resulting sex offender registration requirements; it would be permitted instead for violent criminal activity engaged in while in the program.

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[2] QHWRA also added requirements to bar admission for individuals currently or recently engaged in drug-related or violent criminal activity or criminal activity that threatens the health, safety, or peaceful enjoyment of others, and for individuals evicted from federally-subsidized housing for violent or drug-related criminal activity. *See* 42 U.S.C. § 13661(c)). The Housing Act already required policies authorizing termination for these groups. *See* 42 U.S.C. §§ 1437f(d)(1)(B)(iii), 1437f(o)(7)(D).

HUD promulgated final regulations implementing QHWRA's provisions on admissions and termination in 2001. *See* Dep't of Hous. & Urban Dev., *Screening and Eviction for Drug Abuse and Other Criminal Activity*, 66 Fed. Reg. 28776 (May 24, 2001). The regulations, like the statute, draw a distinction between illegal drug users and alcohol abusers, on the one hand, and former sex offenders on the other. Individuals currently using illegal drugs, or whose alcohol abuse or pattern of illegal drug use presents a current threat to the health, safety, or right to peaceful enjoyment of others, are barred from admission *and* are subject to termination on those same grounds. *See* 24 C.F.R. §§ 982.553(a)(1)(ii), (a)(3), (b)(1)(i),(c).

Sex offenders subject to a lifetime registration requirement are similarly barred from admission. *Id.* § 982.553(a)(2)(i).[3] However, sex offender status is *not* a basis for terminating an individual already enrolled in the Voucher Program. *See id.* §§ 982.552(b)-(c), 982.553(b). The regulatory preamble also reflects this dichotomy; sex offenders subject to a lifetime registration requirement are discussed in detail in the portions of the comments relating to admissions and are omitted entirely from the discussion of termination. *See* 66 Fed. Reg. 28776.

HUD has issued several policy notices that provide conflicting guidance on the termination of lifetime sex offender registrants from the Voucher Program.[4] HUD's initial

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[3] DCHA adopted QHWRA's bar to admission of former sex offenders subject to a lifetime registration requirement in final regulations published in November 2002. *See* D.C. Hous. Auth., *Final Rulemaking*, 49 D.C. Reg. 10308 (Nov. 15, 2002) (currently codified at 14 DCMR § 6109.7(e)).

[4] HUD issues policy directives, including these types of notices, to provide practical guidance to owners and public housing agencies. *See* U.S. Dep't of Hous. & Urban Dev., *Handbook No. 000.2 Rev-3 HUD Directives System*, 1 (Mar. 2012). Notices must be consistent with governing statutes and regulations and cannot establish new requirements unless the statute or regulation itself expressly provides for such details to be established through such directives. *See id.* at 1, 8. As HUD explains, "directives are not intended, for example, to establish new eligibility requirements for a program or

notice, issued shortly after HUD's implementing regulations, focused strictly on barring admission to lifetime sex offender registrants. *See* U.S. Dep't of Hous. & Urban Dev., *Notice No. H 2002- 22 Screening and Eviction for Drug Abuse and Other Criminal Activity - Final Rule* 8 (Oct. 29, 2002).[5] The notice observed that "[n]either the statutory nor regulatory requirements specifically address sex offenders currently living in Federally-assisted housing." *Id.*

HUD's notices began to shift in 2009, following an internal audit performed by the Inspector General finding that several thousand lifetime sex offender registrants continued to reside in federally-subsidized housing, in part because "current laws do not include a provision prohibiting continued subsidy of lifetime registered sex offenders, including those improperly admitted." *See* U.S. Dep't of Hous. & Urban Dev., Office of Inspector General, *Audit Report 2009-KC-0001 HUD Subsidized an Estimated 2,094 to 3,046 Households That Included Lifetime Registered Sex Offenders* 1-2, 5-8 (Aug. 14, 2009).[6] HUD responded with a new notice stating that the Department was "currently exploring regulatory and legislative changes to ensure that individuals subject to lifetime registration requirements do not continue to reside in federally assisted housing" and recommending that owners and public housing agencies pursue termination or eviction for lifetime sex offender registrants "to the extent allowed by their lease and state or local law." U.S. Dep't of Hous. & Urban Dev., *Notice No. H 2009-11 State Lifetime Sex Offender Registration* 1 (Sept. 9, 2009). In 2012, with no intervening change

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other significant program requirements that are intended to be binding on program participants or regulated entities, unless, again, the underlying regulation or statute provides the authority to do so." *Id.* at 1.

[5] *Available at available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/notices/hsg/02hsgnotices.

[6] *Available at* https://www.hudoig.gov/reports-publications/audit-reports/hud-subsidized-estimated-2094-3046-households-included-lifetime.

in the law, HUD issued a new notice modifying the wording of its recommendation to state that owners and public housing agencies "*must* pursue eviction or termination of assistance" for erroneously-admitted lifetime sex offender registrants. U.S. Dep't Hous. & Urban Dev., *Notice No. PIH 2012-28 State Registered Lifetime Sex Offenders in Federally Assisted Housing* 1 (June 11, 2012) (emphasis added).[7] The notice cited no legal basis for terminating erroneously-admitted sex offenders based on their registration status. To the contrary, HUD recognized that "there is currently no HUD statutory or regulatory basis to evict or terminate the assistance of the household solely on the basis of a household member's sex offender registration status." *Id.* at 3.

D. The District of Columbia Housing Authority's Local Regulations.

Prior to 2012, DCHA published its Administrative Plan with local Voucher Program policies as a stand-alone document, with only a limited set of policies codified as regulations. From 2008 until 2013, covering the first five years that Mr. Bostic was a participant in the Voucher Program, termination of participants was governed by Chapter 17 of the DCHA Administrative Plan, which authorized termination of Voucher Program participants based on current or recent violent or drug-related criminal activity, but not based on past criminal history or status as a lifetime sex offender registrant. *See* D.C. Hous. Auth., *Administrative Plan for the Housing Choice Voucher Program, "Ch. 17 Denial or Termination of Assistance"* 102-107 (Apr. 2009 ed. & Nov. 2003 ed.) (requiring proof of a conviction for violent or drug-related criminal activity within the past five years, two arrests for such activity within the past year, eviction from subsidized housing for such activity, or evidence of current such activity).

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[7] *Available at* http://portal.hud.gov/hudportal/documents/huddoc?id=pih2012-28.pdf.

Beginning in 2012, DCHA undertook a lengthy rulemaking process to codify all remaining portions of its Administrative Plan for the Voucher Program. In September 2013, as part of this project, DCHA published final regulations on termination for various types of criminal activity by program participants. *See* D.C. Hous. Auth., *Final Rulemaking*, 60 D.C. Reg. 13167 (Sept. 20, 2013) (codified at 14 DCMR § 5804). For the first time, DCHA added a participant's status as a former sex offender subject to a lifetime registration requirement as a basis for termination from the program:

> DCHA shall terminate participation of a Family if... [a]ny member of the household is subject to a lifetime registration requirement under a state or District of Columbia sex offender program.

Id. (codified at 14 DCMR § 5804.1(b)). That regulation, which was the basis for Mr. Bostic's termination from the Voucher Program, is the regulation at issue in this case.

STATEMENT OF FACTS

This appeal concerns Appellee District of Columbia Housing Authority (DCHA)'s attempt to terminate Appellant Nelson Bostic from the Housing Choice Voucher Program, based solely on his status as a former sex offender subject to a lifetime registration requirement because of his conviction for rape 30 years ago, acting under a local regulation enacted over five years after Mr. Bostic entered the Voucher Program.

Mr. Bostic was born and raised in North Carolina. J.A. 13. He dropped out of school and came to the District of Columbia as a young man. *Id.* In 1982, he was convicted of raping an acquaintance. *Id.* at 13-14. He served 18 years in prison and was released in 2000. *Id.* at 14.

Under the District's Sex Offender Registration Act of 1999, enacted in July 2000, Mr. Bostic is subject to a lifetime requirement that he remain registered as a sex offender. Mr.

Bostic promptly registered with the Metropolitan Police Department's Sex Offender Registry after his release from prison in 2000. *Id.* at 1, 14. He has complied with all conditions of his parole, including providing regular updates to the Sex Offender Registry on his status. *Id.* At 14. Mr. Bostic has not had any further contact with the criminal justice system. *Id.*

Shortly after his release from prison, Mr. Bostic applied for housing assistance from DCHA and was placed on the Housing Authority's waiting list. *Id.* Mr. Bostic remained homeless and in the shelter system until 2008, when he was approved to receive a tenant-based subsidy under DCHA's Housing Choice Voucher Program. *Id.* At the time, DCHA did not ask Mr. Bostic specifically about his criminal history but instead required him to provide a police clearance from the Metropolitan Police Department. *Id.* Mr. Bostic provided this clearance. *Id.* Because his conviction was over 25 years old, it did not appear on his police clearance, and he was approved for entry into the Voucher Program. *Id.* at 14-15. Mr. Bostic used his new voucher to rent a unit located at 1140 Owen Place, NE, #102, Washington, DC, where he lives today. *Id.* at 15.

In 2014, DCHA conducted an internal audit to determine if any of the participants in its housing programs were lifetime sex offender registrants. *Id.* at 7. Through this audit, DCHA became aware of Mr. Bostic's status. *Id.* On June 19, 2014, DCHA issued a Recommendation for Termination to Mr. Bostic, which reads in relevant part:

> As a result of your failure to comply with certain Family Obligations under the Housing Choice Voucher Program "HCVP", this serves as a formal notice that you are being recommended for termination.
>
> Regulation References:
> 14 DCMR § 5804.1(b). DCHA shall terminate participation of a Family if any member of the household is subject to a lifetime registration requirement under a state or District of Columbia sex offender program.

> Summary of Facts: On or about November 20, 2000, HCVP participant Nelson Bostic registered with the MPD as a Class A sex offender.

Id. at 1-2.

Mr. Bostic requested an informal hearing to challenge his termination. *Id.* at 2. That hearing was held before a DCHA hearing officer on November 5, and December 2, 2014. *Id.* at 3-19. The parties stipulated that Mr. Bostic is a former sex offender subject to a lifetime registration requirement. *Id.* at 5. Mr. Bostic did not challenge his sex offender status but presented evidence mitigating against termination. Mr. Bostic testified that he is 64 years old and lives alone. *Id.* at 13. He suffers from a number of debilitating health problems, including heart disease, high blood pressure, and arthritis, and he requires assistance from a home health aide five days per week. *Id.* at 15. Mr. Bostic is unable to work because of his disabilities, leaving him with limited income and unable to secure housing without a subsidy. *Id.* at 13.[8] Mr. Bostic also testified about the circumstances surrounding his offense, including his past problems with alcohol abuse. *Id.* He shared his own fears that he will not be able to survive without access to stable housing and home health assistance. *Id.* at 15.

DCHA reiterated its reliance on the local regulation referenced in the Recommendation for Termination, 14 DCMR § 5804.1(b), and specifically disavowed reliance on any federal law as the basis for Mr. Bostic's termination. *Id.* at 15-16. Mr. Bostic argued that the local regulation at issue is preempted by federal law, because federal law establishes an exclusive list of bases for termination from the Voucher Program, does not authorize public housing agencies to add to that list, and specifically does not authorize termination from the Voucher Program based on a participant's status as a lifetime sex offender registrant. *Id.* at 16-18.

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[8] His only sources of income are Supplemental Security Income of $721 per month and Food Stamps of $336 per month. J.A. at 13.

On December 16, 2014, Hearing Officer Belinda Matlock issued an Informal Hearing Decision affirming DCHA's recommendation for termination. *Id.* at 20-41. Concluding that the local regulation "speaks to an area not covered by, and to which federal law does not direct its actions nor decisions," the hearing officer found that 14 DCMR § 5804.1(b) is within the "discretionary authority of DCHA" under federal law, is consistent with federal law, and therefore is valid. *Id.* at 28, 31-32. Because the regulation purports to establish a mandatory ground for termination, the hearing officer concluded that she had "no discretion with respect to an analysis of mitigating factors," and would not consider them. *Id.* at 13, 38.

Mr. Bostic appealed this determination to the Executive Director of DCHA. On March 16, 2015, Executive Director Adrianne Todman issued a Final Informal Hearing Decision that affirmed without explanation the hearing officer's decision, stating simply that, "[t]he Hearing Officer did not make an error of law or fact." *Id.* at 42. The Executive Director's decision is final agency action from which Mr. Bostic now seeks this Court's review.

SUMMARY OF ARGUMENT

Petitioner Nelson Bostic faces termination from the Housing Choice Voucher Program based solely on a local regulation promulgated by the District of Columbia Housing Authority, 14 DCMR § 5804.1(b), which mandates termination for program participants, like Mr. Bostic, who are former sex offenders subject to a lifetime registration requirement. That regulation is preempted by federal law, and thus invalid, for two independent reasons.

First, federal regulations promulgated by the U.S. Department of Housing and Urban Development create an exclusive and exhaustive list of the grounds for termination from the Voucher Program and do not include lifetime sex offender registrant status among those grounds. These same federal regulations delegate limited authority to local public housing

agencies to administer the Voucher Program and carry out termination of individual program participants, but also bar local agencies from adding to the grounds for termination set forth in federal law. By promulgating a local regulation creating a new ground for termination from the Voucher Program, DCHA has attempted to regulate in a field of exclusive federal governance and created a direct conflict with federal law. 14 DCMR § 5804.1(b) therefore is preempted.

Second, by authorizing termination of lifetime sex offender registrants, 14 DCMR § 5804.1(b) is in direct conflict with a deliberate choice by Congress and HUD not to do so. Under the Quality Housing and Work Responsibility Act of 1998 (QHWRA), Congress required public housing agencies to bar admission to lifetime sex offender registrants. Congress chose not to allow for the termination of lifetime sex offender registrants currently in the Voucher Program, however, despite authorizing termination *and* barring admission of current illegal drug users and alcohol abusers in the same Act. Implementing regulations issued by HUD follow this same dichotomy, barring admission to lifetime sex offender registrants but declining to permit their termination from the Voucher Program. 14 DCMR § 5804.1(b) overrules this federal policy choice, standing as a direct obstacle to the careful balance struck by QHWRA and its implementing regulations, and thus is preempted.

Moreover, 14 DCMR § 5804.1(b) cannot be applied retroactively to Mr. Bostic, whose conduct and entry into the Voucher Program came many years before the regulation was enacted. Rulemaking is considered retroactive if it attaches a new legal disability to conduct that occurred before the rule's enactment. In this case, 14 DCMR § 5804.1(b) was enacted over 30 years after Mr. Bostic's conviction and five years after he first entered the Voucher Program. For DCHA to apply its new regulation retroactively to Mr. Bostic it must show that

the legislature expressly and specifically delegated authority for retroactively rulemaking to the agency, and that the rule at issue includes a clear statement by DCHA of its intention to apply the rule retroactively. 14 DCMR § 5804.1(b) fails both tests; DCHA cannot point to any grant of retroactively rulemaking authority, and the regulation itself does not purport to apply retroactively. For this additional reason, this Court should reverse Mr. Bostic's termination.

ARGUMENT

I. DCHA'S REGULATION MANDATING TERMINATION OF LIFETIME SEX OFFENDER REGISTRANTS CONFLICTS WITH AND IS PREEMPTED BY FEDERAL LAW.

A state or local statute or regulation may be preempted where it is "in conflict or at cross purposes" with federal law. *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). Preemption will be found where a local authority attempts to regulate in a field where federal law governs exclusively – referred to as field preemption – or where a local provision conflicts with federal law – known as conflict preemption. *See id.* at 2500-2501; *Murray v. Motorola, Inc.*, 982 A.2d 764, 771-772 (D.C. 2009). Conflict preemption arises when compliance with both sets of laws is impossible, or when the state or local law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). "[T]he categories of preemption are not rigidly distinct," and "field pre-emption may be understood as a species of conflict pre-emption." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 n.6 (2000). For purposes of preemption analysis, federal law includes federal regulations, and state or local law includes local regulations. *See Murray*, 982 A.2d at 772 (citing *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870-71, 873-86 (2000) (holding that federal

regulations allowing auto manufacturers to choose among safety features to install preempts state tort lawsuit based on manufacturer's failure to install airbags); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes.").

In this case, DCHA has exceeded the authority delegated to it under federal law, and in so doing has created a direct conflict with governing federal law. By creating a new termination ground for lifetime sex offender registrants in the Voucher Program, DCHA's local regulation, 14 DCMR § 5840.1(b), conflicts with federal law embodying two closely-tied federal policies. First, DCHA's regulation intrudes into an area of exclusive federal governance, directly conflicting with HUD's adoption of a uniform, comprehensive, and exhaustive list of all bases for termination from the Voucher Program. Federal law thus denies local public housing agencies any role in determining the grounds for termination. Second, 14 DCMR § 5804.1(b) disrupts Congress' deliberate choice under the Quality Housing & Work Responsibility Act (QHWRA), implemented by HUD, as to how to regulate lifetime sex offender registrants in federally-subsidized housing. Congress chose to bar these former sex offenders from admission to the Voucher Program but chose *not* to permit termination of those same individuals if they have already been admitted. By mandating termination of lifetime sex offender registrants, DCHA impermissibly attempts to overrule this careful balancing of competing interests.

A. 14 DCMR § 5804.1(b) Is Preempted Because It Conflicts with Federal Law Limiting the Grounds for Termination From the Voucher Program and Barring Local Public Housing Agencies from Adding New Grounds.

DCHA argued below that federal law grants public housing agencies discretion and authority to adopt a local policy authorizing (or, in this case, mandating) termination on a basis

not authorized under federal law. That argument fails for two reasons. First, HUD's regulations are expressly intended to create an exhaustive and exclusive list of the grounds for termination from the Voucher Program. Second, and related, while the United States Housing Act and HUD's implementing regulations give public housing agencies discretion to establish local policies on administration of the Voucher Program in limited areas, that discretion does not extend to establishing the bases for termination from the program. As a result, DCHA's regulation directly conflicts with federal law in an area of exclusive federal governance and therefore is preempted.

The plain language of the applicable federal regulations indicates that they provide a complete and exhaustive list of allowable grounds for termination from the Housing Choice Voucher Program. The principal regulation on termination, 24 C.F.R. § 982.552, opens with an explanation that, "A [public housing agency] may deny assistance for an applicant or terminate assistance for a participant under the programs because of the family's action or failure to act *as described in this section or § 982.553*." *Id.* § 982.552(a)(1) (emphasis added). The regulation then lists four mandatory and 10 discretionary grounds for termination, ending with a cross-reference to section 982.553, which in turn lists one mandatory and four discretionary termination grounds related to criminal activity. *Id.* § 982.552(b)-(c), 982.553.[9]

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[9] The mandatory bases for termination are (1) eviction from a federally-assisted housing program for a serious lease violation, (2) failure to submit certain consent forms, (3) failure to establish citizenship or eligible immigration status, (4) failure to meet eligibility requirements for individuals enrolled in higher education institutions, and (5) conviction for manufacturing or producing methamphetamine on a federally-assisted housing project. 24 C.F.R. §§ 982.552(b)(2)-(5), 982.553(b)(1)(ii). The discretionary bases for termination are (1) failure to comply with a family obligation; (2) eviction from federally-assisted housing in the past five years; (3) prior termination of assistance for any member of the family; (4) fraud, bribery, or other criminal acts committed in connection with a federally-assisted housing program; (5) currently owing any amounts to a public housing agency in connection with a federally-assisted housing program; (6) failing to reimburse a public housing agency for amounts owed in connection with a federally-assisted housing program; (7) failing to comply with a repayment agreement entered with a public housing agency; (8) failing to

The regulations provide no other bases for termination. The lists of termination grounds in sections 982.552 and 982.553 do not include any catch-all provision or any language suggesting an illustrative list. *See, e.g., Krupski v. Costa Crociere S.P.A.*, 560 U.S. 538, 553 (2010) (interpreting Rule 15(c)(1) of the Federal Rules of Civil Procedure, listing three specific scenarios in which an amended pleading relates back, as "plainly set[ting] forth an exclusive list of requirements for relation back"); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499-1500 (11th Cir. 1991) (noting that "Congress could easily have used 'such as' or 'for example' to indicate that its list was not exhaustive, and its failure to do so demonstrated that the list was exclusive), *followed by United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992). The plain language of the regulations reads as an exhaustive and complete listing of all grounds for termination.

The fact that the federal regulations include both mandatory and discretionary grounds for termination lends further support to this plain reading. This inclusion of both mandatory and discretionary grounds only makes sense if any basis not included in the list is entirely foreclosed. Under DCHA's reading of the regulation, by contrast, HUD went to the trouble to list 14 specific, discretionary bases for termination, even though public housing agencies retain discretion to terminate on any basis they see fit, whether included in HUD's regulation or not. Such a reading of the regulation makes little sense.

To the extent the regulations are in any way unclear, HUD has eliminated any doubt. The current termination regulations in 24 C.F.R. § 982.552 and § 982.553, formerly found at

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comply with requirements under the Family Self-Sufficiency program, where applicable; (9) having engaged in or threatened abusive or violent behavior toward public housing agency personnel; (10) failing to comply with requirements of the welfare-to-work program, where applicable; (11) current illegal drug use or a pattern of such use that currently interferes with others; (12) engaging in drug-related criminal activity; (13) engaging in violent criminal activity; or (14) a pattern of alcohol abuse that may interfere with others. *Id.* §§ 982.552(c)(i)-(ix), 982.553(b)(1)-(3).

24 C.F.R. § 882.210 (1984), were promulgated by HUD in March of 1984. *See* U.S. Dep't of Hous. & Urban Dev., *Section 8 Housing Assistance Payments Program; Existing Housing*, 49 Fed. Reg. 12215 (Mar. 29, 1984). HUD's commentary in the final rulemaking demonstrates that the comprehensive regulatory list of grounds for termination was intended to be complete and exhaustive:

> [T]he Department believes . . . that the regulations should set out a *comprehensive statement* of the grounds not only for denial of initial selection for participation, but for termination or denial of further assistance to a current program participant because of an action or inaction by the family. The final rule includes therefore a new and *complete statement*, in a separate regulatory section (§ 882.210) [now 24 C.F.R. § 982.552 & 982. 553], of the bases for denial or termination of assistance because of the family's behavior.

Id. (emphasis added).[10] This statement must be understood in the context of the prior regulations, which provided that public housing agencies could, with HUD approval, impose additional criteria for tenant eligibility beyond those enumerated in federal regulations. *See* 24 C.F.R. § 882.209(a)(3) (1983). That regime created uncertainly and ultimately engendered litigation. *See, e.g., Baker v. Cincinnati Metro. Hous. Auth.*, 675 F.2d 836, 839-40 (6th Cir. 1982) (affirming dismissal of class action challenging local eligibility policy, holding that § 882.209(a)(3) grants public housing agency discretion to adopt its own eligibility criteria and that HUD tacitly approved the local criteria at issue); *Vandermark v. Hous. Auth. of City of York*, 663 F.2d 436, 439-40 (3d Cir. 1981) (same). The 1984 regulations rejected this ad hoc,

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[10] HUD subsequently placed termination grounds concerning criminal activity in a separate regulation, 24 C.F.R. § 982.553, as part of a comprehensive rulemaking to conform the rules for tenant-based vouchers and certificates into a combined Housing Choice Voucher Program. *See* U.S. Dep't of Hous. & Urban Dev., *Section 8 Certificate and Voucher Programs Conforming Rule Part III*, 60 Fed. Reg. 34660 (July 3, 1995). But consistent with the approach of delineating all grounds for termination in one place, HUD added a cross-reference in 24 C.F.R. § 982.552(c)(1)(xi) to § 982.553, so that the list in section § 982.552 remains complete.

discretionary approach, instead adopting an exhaustive statement of grounds for both denial of admission and termination of participation that remains in the current regulations.

Subsequent rulemakings by HUD, which have added new grounds for termination over the years, only reinforce HUD's determination that the provisions in 24 C.F.R. § 982.552 (and later § 982.553) reflect a comprehensive and complete statement of all grounds for termination from the Housing Choice Voucher Program. In the rulemaking moving termination grounds from § 882.210 to the current §§ 982.552 and 982.553, HUD explained: "The rule *defines* when the [public housing agency] may deny or terminate assistance because of an action or failure by a member of the family." U.S. Dep't of Hous. & Urb. Dev., *Section 8 Certificate and Voucher Programs Conforming Rule Part III*, 60 Fed. Reg. 34660 (July 3, 1995) (emphasis added). HUD simultaneously adopted a new requirement that the public housing agency provide all participants with "a written description of . . . [t]he grounds on which the PHA may deny or terminate assistance because of family action or failure to act." *Id.* at 34687, 34715 (currently codified at 24 C.F.R. § 982.552(d)(2)). In its commentary to the rule, HUD explained that it was adding this requirement to ensure "that [public housing agencies] should help program families know their obligations, and the grounds for termination of assistance." *Id.* at 34687. This new requirement provides further evidence that HUD intended the grounds for termination under federal law to remain exclusive; such notice would have little meaning if public housing agencies remained free to add new grounds for termination under local law.

Examining the plain language of these regulations and HUD's accompanying guidance, courts have agreed that the federal regulations form a comprehensive and exhaustive list of all allowable bases for termination from the Voucher Program. *See, e.g.*, *Hill v. Richardson*, 740 F. Supp. 1393, 1397-99 (S.D. Ind. 1990) ("HUD's interpretation that the regulation provides

an exclusive list for denying or terminating Section 8 assistance is consistent with the language of the regulation and is also consistent with the entire [voucher program] regulatory scheme."); *Cain v. Allegheny Hous. Auth.*, 986 A.2d 947, 950-51 (Pa. Commw. Ct. 2009) ("We agree with Tenant and the decisions of our sister courts that the [public housing agency] cannot expand the basis for terminating assistance . . ."). These and other courts have rejected attempts by public housing agencies to terminate Voucher Program participants for reasons not included in the federal list of grounds for termination. *See, e.g.*, *Ellis v. Ritchie*, 803 F. Supp. 1097, 1101-05 (E.D. Va. 1992) ("[The public housing agency's] discretion to deny or terminate Section 8 assistance to a participant is defined and limited by federal regulations . . . Termination decisions must be made in accordance with these regulations."); *Hill*, 740 F. Supp. at 1397-99; *Holly v. Hous. Auth. of New Orleans*, 684 F. Supp. 1363, 1367-68 (E.D. La. 1988) (rejecting termination based on a participant's failure to report her marriage, because the alleged conduct did not violate any of the requirements listed in the federal regulations); *Cain*, 986 A.2d at 950-51.

HUD regulations separately and expressly provide that while public housing agencies are delegated authority to adopt local policies in specific areas, the allowable grounds for termination of assistance is not one of these areas. Public housing agencies only may adopt local policies in areas designated by HUD. *See* 24 C.F.R. § 982.54 (limiting the local administrative plan to "matters for which the [public housing agency] has discretion to establish local policies"); *Housing Choice Voucher Program Guidebook*, *supra*, at 3-1 (explaining that Voucher Program regulations set forth the areas in which public housing agencies have discretion to establish local policies). HUD regulations list 23 specific, discrete

areas in which public housing agencies are allowed to adopt local policies, and termination of assistance is not among them. 24 C.F.R. § 982.54(d)(1)-(23).

While the Housing Choice Voucher Program is not an area in which federal law occupies an entire field, neither is the Voucher Program one in which both the federal and state governments have shared authority and both can regulate equally. Instead, the Voucher Program is a comprehensive federal scheme governing federally-subsidized housing, but one that, by federal statute, allows for local public housing agencies to play the role of administrators carrying out federal policy, with limited authority to create local variations. In such a scheme, local government participation is not just limited by basic constitutional principles of preemption but is also limited by the federal statutory scheme itself. In the federal statutory scheme governing federally-subsidized housing, public housing agencies play the role delegated to them by federal law (statutory and regulatory) and nothing more. HUD regulations expressly set forth the areas in which local public housing agencies are granted limited authority to adopt local policies, and adding grounds for termination from the Voucher Program is not among them. DCHA's attempt to add to the federal list of grounds for termination thus fails not only because the federal government has spoken to this precise issue, but also because state action in this area would require a specific delegation that does not exist.

DCHA's regulation here also stands as a "pronounced obstacle" to federal policy and thus presents a classic case of conflict preemption. *Scarborough v. Winn Residential, LLP/Atl. Terrace Apartments*, 890 A.2d 249, 257 (D.C. 2006). The main objective of HUD's approach to termination is uniformity, evidenced by HUD's deliberate rejection of a prior system in which local discretion and choice created uncertainty. HUD opted instead to exercise federal control over termination, creating a "comprehensive statement . . . of the bases for . . .

termination of assistance" from the Voucher Program in its regulations. 49 Fed. Reg. 12215. Where a federal agency has opted to create a uniform national policy – even in a program that may involve federal and local cooperation – a local law or regulation to the contrary is preempted. *See, e.g., Arizona v. Inter Tribal Council of Ariz.*, Inc., 133 S. Ct. 2247, 2251-57, 2260 (2013) (holding that a state law requiring a voter to provide documentation not called for on a uniform federal voter registration form is preempted). By creating local policy contrary to a uniform federal policy embodied in HUD's regulations, 14 DCMR § 5804.1(b) directly conflicts with federal law.

This conflict is even starker because 14 DCMR § 5804.1(b) creates a mandatory ground for termination. In this respect, the local regulation purports to overrule not one but two additional federal policies: first, it has upset HUD's choice that all but a handful of termination grounds are discretionary; second, it has violated the federal requirement that a public housing agency consider mitigating evidence when exercising discretionary authority. *See* 24 C.F.R. § 982.552(c)(2) (2015) (instructing the public housing agency to consider "all relevant circumstances," including "the seriousness of the case" and "mitigating circumstances related to the disability of a family member"); *see also Wojcik v. Lynn Hous. Auth.*, 845 N.E.2d 1160, 1162, 1166-69 (Mass. 2006) (reversing termination where housing authority overruled hearing officer's consideration of mitigating evidence and proceeded with termination); *Gaston v. CHAC, Inc.*, 872 N.E.2d 38, 43-45 (Ill. App. 2007) (reversing and remanding termination decisions where hearing officer did not make any findings as to mitigation and "treat[ed] the violations as mandatory, rather than discretionary"); *Moreta v. Cestero*, 926 N.Y.S.2d 258, 264-67 (Sup. Ct. 2011) (reversing termination where public housing agency "wholly failed" to

consider the circumstances and "termination of the subsidy was shockingly disproportionate to the offense").

The mandatory nature of DCHA's regulation has significant practical consequences in this case. Mr. Bostic presented the hearing officer with substantial mitigating evidence, including testimony about the circumstances surrounding his offense, the long period of time since his offense, his remorse and rehabilitation, his current disabilities and health challenges, his inability to pay rent on the private market without his voucher, his reliance on the voucher, and the devastating consequences he would suffer should he lose his voucher. J.A. 13, 15. DCHA objected to any consideration of this evidence. *Id.* at 13. The hearing officer ultimately concluded that she could not and would not consider mitigating evidence, because under the local regulation Mr. Bostic's termination is mandatory, and therefore no longer subject to the federal requirement to consider mitigation. *Id.* at 38 (hearing officer concluding she had "no discretion with respect to an analysis of mitigating factors"). Had the hearing officer considered the mitigating evidence that Mr. Bostic presented, the outcome might very well have been different in this case.

B. 14 DCMR § 5804.1(b) Is Preempted Because Federal Law Bars Termination from the Voucher Program Based on a Former Sex Offender's Status as a Lifetime Registrant.

Under the Quality Housing and Work Responsibility Act of 1998 (QHWRA) and its implementing regulations, sex offenders subject to a lifetime registration requirement are barred from admission to any federally-subsidized housing program. But the prohibition ends there. Neither the statute nor the regulations provide any basis for terminating a former sex offender from the Voucher Program once admitted. And, indeed, DCHA specifically disclaimed any reliance on federal law in its attempt to terminate Mr. Bostic. Federal law thus

reflects an affirmative decision not to permit termination from the Voucher Program based on a former sex offender's status as a lifetime registrant. 14 DCMR § 5804.1(b), which mandates termination based on a former sex offender's status as a lifetime registrant, directly conflicts with the careful balance struck under federal law.

In enacting QHWRA, Congress sought to target three populations. Section 576(b), entitled "Ineligibility of Illegal Drug Users and Alcohol Abusers," requires public housing agencies to adopt admissions policies barring individuals currently using illegal drugs, or those with a pattern of illegal drug use or alcohol abuse that affects others. 42 U.S.C. §13661(b)). Section 578, entitled "Ineligibility of Dangerous Sex Offenders for Admission to Public Housing," requires a similar, mandatory bar to admission for former sex offenders subject to a lifetime registration requirement. *Id.* § 13663(a). As to illegal drug users and alcohol abusers (but not lifetime sex offender registrants), QHWRA goes one step further. Section 577, entitled "Termination of Tenancy and Assistance for Illegal Drug Users and Alcohol Abusers in Federally Assisted Housing," requires public housing agencies to adopt policies for terminating assistance to participants who engage in illegal drug use or in alcohol abuse that currently affects others. *See id.* § 13662(a)(1),(2). Notably absent is any parallel section addressed to the termination of former sex offenders.[11]

Not only the plain language but the very structure of these provisions – drawing sharp lines between the two groups of individuals and the two processes of admission and termination – demonstrate a choice by Congress not to subject former sex offenders to

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[11] QHWRA also specifically requires public housing agencies to add a provision to their form lease allowing for termination of tenancy, i.e. eviction, for "any occupancy in violation of section 576(b) of the Quality Housing and Work Responsibility Act of 1998 (relating to ineligibility of illegal drug users and alcohol abusers) or the furnishing of any false or misleading information pursuant to section 577 of such Act (relating to termination of tenancy and assistance for illegal drug users and alcohol abusers)." 42 U.S.C. § 1437d(l)(7). Again, there is no parallel provision for former sex offenders.

termination based on their prior criminal history. This distinction in language in companion statutory provisions "must be assumed to be deliberate." *Doe v. Burke*, No. 15-690 (D.C. Mar. 10, 2016). In *Burke*, this Court considered two companion provisions governing the award of attorney's fees under the District's Anti-SLAPP Act, which guards against lawsuits filed to silence public critics. *Id.*, slip op. at 2-3, 9-10. The Act allows a trial court to award attorney's fees, without qualification, to a party prevailing on a special motion under the Act to quash a subpoena; the Act's very next section authorizes an award of attorney's fees to the responding party on such a motion "if the court finds that [the] motion . . . is frivolous or is solely intended to cause unnecessary delay." *Id.*, slip op. at 9-10 (citing D.C. Code § 16-5504). This Court held that the difference in language in the two companion statutory provisions must be interpreted as the Council's deliberate choice to draw a distinction – in this case, not to require a party prevailing on such a motion to make the additional showing of frivolousness or wrongful motivation required for a responding party. *Id.*, slip. op. at 9-13.

The same is true of the companion provisions in QHWRA. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion . . . We would not presume to ascribe this difference to a simple mistake in draftsmanship." *Id.*, slip op. at 10-11 (quoting *Russello v. United States*, 464 U.S. 16, 32 (1983)) (internal quotation omitted). QHWRA's provisions barring admission *and* requiring termination of illegal drug users and alcohol abusers, 42 U.S.C. §§ 13661, 13662, while only barring admission for lifetime sex offender registrants, *id.* § 13663, must be read as a deliberate policy choice rejecting termination of lifetime sex offender registrants based solely on their registration status.

This differential treatment under QHWRA draws a line between current circumstances and past criminal history, particularly when it comes to termination. The termination provisions for illegal drug users and alcohol abusers focus on current conduct or effects, authorizing termination for *current* illegal drug use, or a pattern of illegal drug use or alcohol abuse that *currently* is interfering with the health, safety, or right to peaceful enjoyment of the premises by other residents. *See* 42 U.S.C. § 13662(a). The admission standards under QHWRA are different. The statute authorizes public housing agencies to bar admission not only for current illegal drug use or alcohol abuse, but also for criminal conduct during a reasonable time prior to admission, as well as past eviction from federally-subsidized housing based on criminal conduct. *See id.* § 13661. Sex offenders subject to a lifetime registration requirement are placed where they fit in this scheme, in the admission category, which includes some past conduct, rather than in the termination category focused on current circumstances.[12]

Congress also may have been concerned about ousting former sex offenders already in the Voucher Program, affirmatively choosing to avoid any requirement that public housing agencies search them out for termination. As one federal district court observed in rejecting termination of lifetime sex offender registrants:

> The law restricting Section 8 benefits was necessarily prospective and presumably when it was enacted, there were Section 8 beneficiaries who were drug users, alcohol abusers, and lifetime registrants. For drug users and alcohol abusers, it was predictable they would use or abuse again, and thus subject themselves to termination under the new legislation by their own actions. For lifetime registrants, however, except in rare circumstances, once a lifetime registrant always a lifetime registrant. Congress could well have determined

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[12] This distinction between past criminal history and current circumstances also is reflected in HUD's termination regulations on criminal conduct generally. *See* 24 C.F.R. § 982.553(b). The notable exception to this general rule is the provision allowing for termination if "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." *Id.* § 982.553(b)(1)(ii).

> that the new law should not apply retroactively to past lifetime registrants, who were already participants in the program, and the most effective means of protecting the public would be to assure that no additional lifetime registrants were admitted to the Section 8 program. *If so, this determination avoided the unnerving prospect of administrative searches to root out participants who were lifetime registrants.*

Miller v. McCormick, 605 F. Supp. 2d 296, 312-13 (D. Me. 2009) (emphasis added).

HUD endorsed and adopted this same reading of QHWRA, implementing regulations that bar all three groups from admission but require termination only of current illegal drug users and alcohol abusers and not of lifetime sex offender registrants. *See* 24 C.F.R. §§ 982.553(a)(1)(ii), (a)(2)(i), (a)(3), (b)(1)(i),(c). HUD's interpretation of the statute via these regulations is reasonable and thus is entitled to deference. *See, e.g., Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 427, 430 (1987) (deferring to HUD regulation interpreting the Brooke Amendment to the United States Housing Act as requiring "rent" to include a reasonable allowance for utility costs).

Those courts that have considered the issue have concluded that QHWRA's provisions and HUD's implementing regulations bar termination from the Voucher Program based on a participant's status as a sex offender subject to a lifetime registration requirement. *See Miller*, 605 F. Supp. 2d at 306-313 (rejecting a local public housing agency's termination of a Voucher Program participant on the basis of his lifetime sex offender registrant status); *Perkins-Bey v. Hous. Auth. of St. Louis Cty.*, 2011 U.S. Dist. LEXIS 25438, *7-11 (E.D. Mo. Mar. 14, 2011) (granting preliminary injunction blocking termination on this basis); *Bonseiro v. N.Y. City Dep't Hous. Pres. & Dev.*, 950 N.Y.S.2d 490, *2-5 (Sup. Ct. 2012) (reversing termination of lifetime sex offender registrant); *see also Hous. Auth. of City of Hartford v. Ali Kenyatta Bros.*, 2013 WL 3766903, at *4-8 (Conn. Super. Ct. June 21, 2013) (denying eviction of public housing tenant on the basis of sex offender status). Analyzing the plain language of the statute

and HUD's implementing regulations, these courts have concluded that Congress deliberately chose to treat former sex offenders differently from illegal drug users and alcohol abusers, barring them from admission but declining to terminate their participation once admitted to a federally-subsidized housing program. As the *Bonseiro* court concluded:

> A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended.

950 N.Y.S.2d 490, at *4 n.12.

The context of the legislation and Congress's and HUD's differential treatment of former sex offenders versus illegal drug users and alcohol abusers in the same statute demonstrate that the choice not to permit termination of former sex offenders reflects a deliberate balancing of policy interests. Where Congress and federal agencies have struck such a balance, a local law that upsets or seeks to change that balance is preempted. *See Arizona*, 132 S. Ct. at 2505. That is so even when the local law "attempts to achieve one of the same goals as federal law . . . [but] involves a conflict in the method of enforcement." *Id.* While DCHA's policy of terminating former sex offenders superficially might appear to be in line with federal policy barring their admission to the Voucher Program in the first place, that does not end the analysis. In *Arizona*, the Supreme Court struck down elements of an Arizona state law aimed at preventing the employment of undocumented immigrants and facilitating their removal from the United States – the very same goals furthered by Congress in adopting the Immigration Reform and Control Act of 1986. *See id.* at 2502-04. But because the Arizona law imposed criminal penalties on employees and authorized the arrest of removable aliens, while Congress had deliberately limited criminal penalties to employers only and refrained from authorizing the arrest of removable aliens, those portions of the Arizona law conflicted

with the "careful balance struck by Congress," *id.* at 2505, and were preempted, *see id.* at 2505-07. Where Congress has chosen to regulate or penalize certain groups and not others, "a state law to the contrary is an obstacle to the regulatory system Congress chose." *Id.* at 2505. 14 DCMR § 5804.1(b) stands as exactly this type of obstacle to the careful balance struck by Congress in its treatment of lifetime sex offender registrants under federal law.

II. 14 DCMR § 5804.1(B) CANNOT BE APPLIED RETROACTIVELY TO NELSON BOSTIC, WHOSE CONDUCT AND ENTRY INTO THE VOUCHER PROGRAM PRE-DATE THE REGULATION.

The application of DCHA's local regulation authorizing termination of lifetime sex offender registrants to Mr. Bostic was improper, because it fails to meet two fundamental requirements for retroactive rulemaking: express authority for DCHA to engage in such rulemaking and a clear statement from DCHA of its intention to do so. A law or regulation is retroactive if it "attaches new legal consequences to events completed before its enactment." *Peterson v. D.C. Lottery & Charitable Games Control Bd.*, 673 A.2d 664, 669 (D.C. 1996) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 255 (1994) (declining to apply new regulation barring assignment of lottery winnings to agreement that pre-dated regulation). In the instant case, Mr. Bostic faces termination from the Housing Choice Voucher Program for his status as a lifetime sex offender registrant, which in turn is based on conduct that occurred in 1982, over 30 years ago. While the retroactive application of the lifetime registration requirement has been upheld by this Court in *In re W.M.*, 851 A.2d 431 (D.C. 2004), this case presents a second layer of retroactivity.[13] 14 DCMR § 5804.1(a), was not enacted until September 2013, nearly six year after Mr. Bostic was admitted to the Voucher Program. *See*

[13] The registration requirement was enacted in The District of Columbia Sex Offender Registration Act of 1999, D.C. Law No. 13-137 (codified at D.C. Code §§ 22-4001 through 22-4017), which went into effect in July 2000, shortly before Mr. Bostic was released from prison.

60 DCR 13167. Applying the regulation to Mr. Bostic "would thus attach 'a new disability' to conduct over and done well before the provision's enactment." *Vartelas v. Holder*, 132 S. Ct. 1479, 1487 (2012) (rejecting retroactive application of new travel restriction on lawful permanent residents guilty of certain crimes, where individual had pled guilty to qualifying crime years before the new travel restriction was enacted).

Retroactive legislation is not impermissible per se, but "statutes are to be construed as having only a prospective operation, unless there is a clear legislative showing that they are to be given a retroactive or retrospective effect." *Wolf v. D.C. Rental Accommodations Comm'n*, 414 A.2d 878, 880 n.8 (D.C. 1980); *see also Landgraf*, 511 U.S. at 270 ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent."); *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) ("[R]etrospective operation will not be given to a statute . . . unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.") (internal quotation omitted). The presumption against retroactive legislation is rooted in the "unfairness of imposing new burdens on persons after the fact." *Wash. Gas Energy Servs. Inc. v. D.C. Public Serv. Comm'n*, 893 A.2d 981, 990 (D.C. 2006) (internal quotation omitted). In particular, this Court "has recognized a fundamental unfairness when new regulations are applied retroactively." *Id.* (internal quotation omitted). Because the presumption against retroactivity is a rule of legislative intent and statutory interpretation, an individual invoking the doctrine need not show actual reliance on prior law to prevail. *See Vartelas*, 132 S. Ct. at 1491.

The presumption against retroactive legislation extends to rulemaking in two respects. Regulations, like statutes, must be read with the presumption that they are only intended to

apply prospectively, absent a clear statement requiring retroactive application. In addition, agencies are strictly forbidden from promulgating retroactive regulations absent specific and express delegation of the legislative authority to do so. "A statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by the legislature in express terms." *Wash. Gas Energy Servs.*, 893 A.2d at 990 (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)) (internal quotation omitted); *see also Peterson*, 673 A.2d, at 669-70. "Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an *express statutory grant*." *Bowen*, 488 U.S. at 208–09 (emphasis added).

The regulation at issue in this case fails both tests. The statute authorizing DCHA's administration of the Housing Choice Voucher Program does not provide any kind of authorization for retroactive rulemaking. It simply states that DCHA, through its Board of Commissioners, has the authority "[t]o make and implement rules, by-laws, and policies and regulations necessary or appropriate for the effective administration of the Authority." D.C. Code § 6-211(v)(2); *cf. Bowen*, 488 U.S. at 209 (finding no authority for broad retroactive rulemaking where Medicare Act provided only limited authority to make retroactive cost adjustments on a case-by-case basis); *Wash. Gas Energy Servs.*, 893 A.2d at 990 (same where statute authorizes Public Service Commission to "annually determine the amount of the reimbursement fee to be paid by [utility providers] and the formula by which the amount shall be determined" and Commission sought to impose an assessment for a prior fiscal year). Nor does the plain text of 14 DCMR § 5804.1(b) contain even a hint that DCHA intended the provision to apply retroactively:

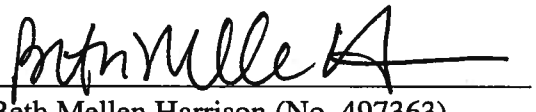
> DCHA shall terminate participation of a Family if: . . . (b) Any member of the household is subject to a lifetime registration requirement under a state or District of Columbia sex offender program.

14 DCMR § 5804.1(b). The only legislative history to speak of is DCHA's statement that this and the surrounding regulations are intended "to provide guidance on the policy for terminating assistance for participants based on criminal activity." 60 D.C. Reg. 13167. Absent express legislative authorization to engage in retroactive rulemaking and a clear statement by DCHA of its intent to apply the new regulation retroactively, this Court should decline to apply 14 DCMR 5804.1(b) retroactively to Mr. Bostic.

CONCLUSION

For the foregoing reasons, the Final Informal Hearing Decision of the District of Columbia Housing Authority Executive Director affirming Petitioner Nelson Bostic's termination from the Housing Choice Voucher Program should be reversed, and this case should be remanded with instructions to dismiss the Recommendation for Termination.

Respectfully submitted.



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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Petitioner to be delivered by first-class mail, postage prepaid, this 29th day of March 2016, to:

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