No. 15-50186

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AUSTIN APARTMENT ASSOCIATION,

Plaintiff-Appellant

v.

CITY OF AUSTIN,

Defendant-Appellee

DORIS LANDRUM; DIMPLE SMITH; GLORIA MIDDLETON; LATORIE DUNCAN,

Intervenor Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING DEFENDANT-APPELLEE AND INTERVENOR DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

VANITA GUPTA
Principal Deputy Assistant
Attorney General

MICHELLE ARONOWITZ
Deputy General Counsel for
Enforcement and Fair Housing

AYELET R. WEISS
Attorney
Department of Housing and
Urban Development
Washington, D.C. 20410

MARK L. GROSS
LISA J. STARK
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-4491

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INTEREST OF THE UNITED STATES

The Housing Choice Voucher (HCV) program provides subsidies to aid low income individuals and families in obtaining decent housing. This case presents the important, recurring question whether a local law that prohibits discrimination based on source of income is preempted by the HCV program. The Department of

Housing and Urban Development (HUD) administers the HCV program and has promulgated regulations implementing it. The United States thus has a vital interest in ensuring that the HCV program is properly construed.

In addition, the HCV program requires compliance with all equal opportunity requirements imposed by federal law, including the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, which prohibits discrimination based on race, color, sex, religion, disability, familial status, and national origin. See 24 C.F.R. 982.53. The Department of Justice and HUD share responsibility for enforcing the FHA, and they regularly conduct investigations and bring enforcement actions when private housing providers or municipalities unlawfully discriminate against a protected class. These responsibilities give the Department of Justice and HUD an additional interest in ensuring that the HCV program is properly construed.

The Department of Justice and HUD also have a substantial interest in ensuring that the criteria and process for certifying state and local laws as "substantially equivalent" to the FHA is properly construed by the courts. State and local laws certified by HUD as "substantially equivalent," in concert with the Department of Justice's and HUD's enforcement of the FHA, play a vital role in the nationwide effort to combat housing discrimination. HUD also has rulemaking authority and provides funds to approved state and local agencies to conduct

investigations and bring enforcement actions under state and local laws that HUD has certified as "substantially equivalent" to the FHA.

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Whether a city ordinance that prohibits landlords from discriminating against prospective tenants based on "source of income," including federal housing subsidies, is preempted by the HCV program, 42 U.S.C. 1437f.

STATEMENT OF THE CASE

1. Facts And Statutory Background

The HCV program authorized under 42 U.S.C. 1437f, sometimes referred to as the Section 8 voucher program, operates in accordance with regulations issued by HUD. See 24 C.F.R. Pt. 982. The HCV program requires compliance with all equal opportunity requirements imposed by federal law, including the FHA, which prohibits discrimination based on race, color, sex, religion, disability, familial status, and national origin. 24 C.F.R. 982.53. Public housing agencies (or contract administrators acting as such) receive federal funds from HUD to administer the voucher program, which includes screening applicants and issuing vouchers to eligible individuals and families. See 42 U.S.C. 1437f(b)(1); 24 C.F.R. 982.101. Voucher holders secure rental housing from landlords, and must contribute at least

30% of their adjusted monthly income for rent. 42 U.S.C. 1437a(a)(1). The public housing agency pays the remaining rent (up to a fixed payment standard) directly to the landlord on behalf of the voucher holder. See 24 C.F.R. 982.1(a); ROA.387.[1]

HUD's regulations do not compel landlords to participate in the program or rent to voucher holders. The program rules do not prohibit a landlord from rejecting voucher holders, and a participating landlord is permitted to screen and select voucher holders before renting to them. 24 C.F.R. 982.307(a)(3). A landlord may reject a prospective voucher holder due to, for example, prior problems relating to payment of rent and utility bills, care of premises, respect for neighbors, and compliance with the conditions of tenancy. *Ibid*. Landlords receiving rent from the public housing agency must comply with basic program requirements to ensure that the federal funds are not subsidizing unsafe housing and are not subject to fraud. See 24 C.F.R. 982.305(a), .306; ROA.388-389.

The FHA provides for a cooperative federal-state system for investigating fair housing complaints and enforcing fair housing rights. See 42 U.S.C. 3610(f). The FHA tasks HUD with determining whether the substantive rights and enforcement procedures of state or municipal fair housing laws are "substantially

[1] "ROA.___" refers to the page number of the electronic record on appeal filed with this Court in this case. "Br. ___" refers to the page number of plaintiff's opening brief filed with this Court.

equivalent" to the FHA. 42 U.S.C. 3610(f)(3). When HUD receives a complaint of discrimination violating the FHA occurring in a jurisdiction with laws that HUD has determined are "substantially equivalent," HUD refers the complaint to the local jurisdiction for investigation and enforcement. 42 U.S.C. 3610(f)(1).

The City of Austin has had a fair housing ordinance since 1977. The ordinance originally prohibited housing discrimination based on race, color, sex, religion, national origin, physical disability, and student status. See ROA.291. It was amended in 1982 to prohibit discrimination based on sexual orientation, age, marital status and parenthood, and subsequently to bar discrimination based on creed, mental disability, and gender identity. See ROA.291. In 1996, HUD certified Austin's ordinance, which at the time prohibited discrimination based on the seven classes protected by the FHA and five additional groups, as "substantially equivalent" to the federal law. See ROA.291, 346. A HUD regulation expressly provides that "[i]f a state or local law is different than the [Fair Housing] Act in a way that does not diminish coverage of the Act, *including, but not limited to, the protection of additional prohibited bases*, then the state or local law may still be found substantially equivalent." 24 C.F.R. 115.204(h) (emphasis added). As a result, the fact that Austin's fair housing ordinance has long prohibited discrimination against classes not protected by the FHA is fully

consistent with HUD's determination that the local law is "substantially equivalent" to the federal law.

2. Procedural History

On December 11, 2014, the Austin City Council passed Ordinance No. 20141211 (Ordinance), amending its fair housing code. ROA.18, 261-262, 277-280. The Ordinance prohibits landlords in the City of Austin from refusing to rent to prospective tenants because of "source of income." ROA.277-278. "Source of income" is defined to include "housing vouchers and other subsidies provided by the government or non-government entities." ROA.278. This Ordinance prohibits landlords from rejecting otherwise qualified tenants because they are voucher holders and part of their rent will be paid subject to the HCV program's requirements. ROA.278. Its purpose is to increase housing choice and the availability of decent affordable housing for low-income tenants. ROA.349, 362-363.

On January 5, 2015, HUD confirmed in a letter to Austin that its fair housing ordinance remains certified as "substantially equivalent" to the FHA, [2] explaining that under HUD's regulation, "[i]f a state or local law is different than the Act in a way that does not diminish coverage of the Act, including, but not limited to, the

[2] Letter from Sara Pratt, Deputy Assistant Sec'y for Enforcement & Programs, HUD, to Jonathan Babiak, Adm'r, City of Austin Equal Emp't/Fair Hous. Office (Jan. 5, 2015) (Attachment).

protection of additional prohibited bases, then the state or local law may still be found substantially equivalent." 24 C.F.R. 115.204(h). On December 12, 2014, the day after the Ordinance was passed, plaintiff (the Austin Apartment Association, a local trade association that represents landlords, management companies and other rental housing industry participants) filed a lawsuit in Texas state court challenging the validity of the Ordinance and seeking declaratory and injunctive relief, including a preliminary and permanent injunction. ROA.15-16. Plaintiff alleged that the Ordinance is inconsistent with and preempted by the HCV program because it effectively makes landlords' participation in the HCV program mandatory rather than voluntary. ROA.18-19, 24. Plaintiff also argued that the Ordinance was unenforceable and preempted by Texas law that authorizes municipalities to adopt fair housing laws only if they are "substantially equivalent" to federal law.[3] ROA.23. Following removal of the case to federal court, four current HCV holders were granted intervention as defendants. ROA.119, 325, 372.

On February 27, 2015, the district court denied plaintiff's motion for a preliminary injunction because the Association failed to demonstrate a substantial

[3] Plaintiff also argued that the Ordinance impermissibly burdens the right to contract under the Texas Constitution, violates due process, and constitutes an unlawful taking under the Texas and United States Constitutions. ROA.26-28. We address only plaintiff's federal preemption claim in this brief.

likelihood of success on the merits on any of its claims. ROA.385-409. The district court held that the Ordinance is not preempted by the HCV program because the Ordinance does not conflict with or "stand as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal law. ROA.395 (quoting *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 281 (1987)). Both laws, the court explained, were enacted to expand the opportunities for affordable housing to low income tenants, and the Ordinance furthers that objective by increasing the number of properties available to voucher holders. ROA.397.

The court also held that the two laws do not "actually conflict" merely because landlord participation is voluntary under the HCV program but somewhat mandatory under Austin's Ordinance. ROA.395-397. The district court emphasized that every court that has confronted the issue has rejected the argument that federal law preempts a local law that protects prospective tenants based on source of income. ROA.396 (citing cases). The district court also pointed to a HUD regulation that expressly provides that the federal statute was not intended "to pre-empt operation of State and local laws that prohibit discrimination against a Section 8 voucher-holder because of status as a Section 8 voucher-holder." ROA.398 (quoting 24 C.F.R. 982.53(d)). The court explained (ROA.398-399) that when, as here, a reasonable regulation is promulgated after notice-and-comment

and pursuant to express statutory authority, it is entitled to the full measure of *Chevron* deference. See *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Thus, the district court ruled that plaintiff was not entitled to a preliminary injunction on the ground that the HCV program preempted Austin's Ordinance. ROA.399.

The district court also rejected plaintiff's argument that the Austin Ordinance is not "substantially equivalent" to the FHA and thus is preempted by Texas law. ROA.391-394. Relying on the dictionary definition of "substantially," the district court concluded that because the Ordinance prohibits discrimination against "all of the classes protected under federal law and then some," it exhibits "the essential features" of, and thus is substantially equivalent to, the FHA. ROA.393. The district court also emphasized that because the Ordinance protected a number of classes not covered by the FHA even before prohibiting discrimination based on source of income, to conclude that the Ordinance is preempted "would mean the City has long been violating the [Texas] statute." ROA.392-393.

ARGUMENT

THE HCV PROGRAM DOES NOT PREEMPT AUSTIN'S ORDINANCE

The federal preemption doctrine arises from the Supremacy Clause of the United States Constitution. That provision provides that federal law "shall be the

supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2.

"Consideration under the Supremacy Clause starts with the basic assumption that Congress did *not* intend to displace state law." *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981) (emphasis added). "The presumption against preemption applies" to the Section 8 program, and state law is "not to be superseded" by the program "unless that [is] the clear and manifest purpose of Congress." *Barrientos* v. *1801-1825 Morton LLC*, 583 F.3d 1197, 1209 (9th Cir. 2009) (quoting *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009)). Accordingly, plaintiff has the burden of persuasion on its federal preemption claim. See *Texas Centr. Bus. Lines Corp.* v. *City of Midlothian*, 669 F.3d 525, 529 (5th Cir. 2012).

Under the Supremacy Clause, a federal statute or regulation can preempt a state or local law by express language or impliedly through "field" or "conflict" preemption. See *Oneok, Inc.* v. *Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015); *Wyeth*, 555 U.S. at 576. Under "'field' pre-emption," intent "to foreclose any state regulation in the *area*" is presumed where the federal scheme is so dominant or comprehensive that it leaves no room "in the *field*" for supplementary state or local regulation. *Oneok*, 135 S. Ct. at 1595 (quoting *Arizona* v. *United States*, 132 S. Ct. 2492, 2502 (2012)). By contrast, conflict preemption occurs where "compliance with both federal and state" law "is a physical impossibility" or the local "law

stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 132 S. Ct. at 2501, 2515 (citation omitted). Thus, while Congress's purpose "is the ultimate touchstone" for all forms of preemption, a "high threshold must be met" if a state or local law "is to be preempted for conflicting with the purposes of a federal Act." *Wyeth*, 555 U.S. at 565 (citation omitted); *Chamber of Commerce of United States* v. *Whiting*, 131 S. Ct. 1968, 1985 (2011) (citation omitted).

In this case, plaintiff does not allege (Br. 32 n.10) that Congress expressly preempted Austin's Ordinance. Nor does plaintiff argue that Congress impliedly preempted the Ordinance through field preemption or because compliance with both the local law and the HCV program would be a physical impossibility. Rather, plaintiff's sole claim as to federal preemption is that Austin's Ordinance is impliedly preempted because it "make[s] the Section 8 program – which [Congress] intended to be voluntary – mandatory for property owners" and thus, "stands as an obstacle to the accomplishment * * * of the ***full*** purposes and objectives of Congress in enacting the federal law." Br. 5-6, 32. Plaintiff's argument fails for multiple reasons.

A. A federal regulation dictates the result in this case and expressly defeats plaintiff's federal preemption claim. See Br. 32-42. Since 1999, a HUD regulation has expressly provided that the HCV program is not "intended to pre-empt

operation of State and local laws that prohibit discrimination against a Section 8 voucher-holder because of status as a Section 8 voucher-holder." 24 C.F.R. 982.53(d). Plaintiff does not dispute that HUD has authority to administer and implement the HCV program and to promulgate implementing regulations. See 42 U.S.C. 1437f(o), 3531 *et seq*. As a result, the aforementioned regulation is entitled to deference under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). See, *e.g.*, *Ivy* v. *Williams*, 781 F.3d 250, 255 n.6 (5th Cir. 2015); *BNSF Ry. Co.* v. *United States*, 775 F.3d 743, 750 (5th Cir. 2015). Accordingly, because HUD's regulation is directly on point, entitled to deference, and "dispositive" of the issue, plaintiff's federal preemption claim fails. *Hillsborough Cnty., Fla.* v. *Automated Med. Labs., Inc.*, 471 U.S. 704, 714-715, 721 (1986) (applying *Chevron* deference to conclude that county ordinance was not preempted by federal law in part because federal agency "contemplated additional state and local requirements").

Plaintiff nonetheless argues (Br. 42) that HUD's regulation is not entitled to *Chevron* deference because the "doctrine only applies when the intent of Congress is not clear" and "[t]he plain language of the [federal] statute, as well as the legislative history * * * make clear that the [HCV] program," unlike Austin's Ordinance, is intended to be "voluntary" for landlords. Plaintiff's claim misses the point since the issue to be decided is not whether the HCV program is voluntary

for landlords (which it indisputably is), but rather whether the HCV program preempts a local law that prohibits discrimination against voucher holders. A HUD regulation expressly provides that it does not. That regulation is entitled to deference and defeats plaintiff's federal preemption claim.

B. Even if that were not the case, plaintiff's federal preemption claim would fail. Contrary to plaintiff's argument (Br. 32-42) and consistent with binding precedent, the HCV program does not impliedly preempt Austin's Ordinance because the Ordinance requires landlords to participate in the federal program.[4] In *Whiting*, 131 S. Ct. at 1985, the Supreme Court rejected a similar argument and held that an Arizona law that requires employers to use a federal verification (E-Verify) system to confirm that new hires are legally employable in the United States was not impliedly preempted by a federal law that made use of the system entirely voluntary. The Court ruled that Arizona's requirement that employers use E-Verify "does not conflict" and is "entirely consistent with the federal law." *Ibid*.

[4] To the extent that plaintiff suggests (Br. 33-34) that the Austin Ordinance denies landlords the opportunity to screen their tenants and requires owners to rent to all Section 8 voucher holders, the local law does neither. The Ordinance, consistent with federal regulations, allows landlords to screen, select, and refuse to rent to voucher holders provided they do so for valid, nondiscriminatory reasons. See 24 C.F.R. 982.307(a)(3). Thus, the Austin Ordinance requires landlords to participate in the HCV program only to the extent that a voucher holder is otherwise qualified to rent a property.

The decision also provides that the federal law did not supplant the state statute because Arizona's mandatory requirement to use E-Verify "in no way obstructs" Congress's objectives to develop and ensure the reliability of its employment verification system and the federal government's "consistent[] [efforts to] expand[] and encourage[] the use of E-Verify." *Whiting*, 131 S. Ct. at 1986 (plurality opinion). Consequently, so long as a state or local law that requires the use of a voluntary federal program does not actually conflict with federal law or impede achievement of the aims of Congress, the state or local law is not impliedly preempted.[5] See, *e.g.*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 65 (2002) (state tort suit alleging negligent lack of propeller guards on a boat not preempted by federal regulations that did not require such guards); *Fellner* v. *Tri-Union Seafoods, LLC*, 539 F.3d 237, 254-255 (3d Cir. 2008) (FDA's decision to refrain from requiring mercury warning labels on seafood packaging did not preempt State from imposing a duty to warn), cert. denied, 556 U.S. 1182 (2009).

[5] Plaintiff's reliance (Br. 40-41) on *Salute* v. *Stratford Greens Garden Apartments*, 136 F.3d 293 (2d Cir. 1998) or *Knapp* v. *Eagle Property Management Corp.*, 54 F.3d 1272 (7th Cir. 1995) is misplaced. Neither is a preemption case. As a result, they provide no reasoned guidance as to whether a federal statute, generally, or the HCV program, here, preempts Austin's Ordinance. To the extent that either in dicta suggests that a State cannot make a voluntary federal program mandatory without violating the Supremacy Clause, *Whiting* (decided after the cited decisions) establishes otherwise.

It is also well settled that a federal statute does not impliedly preempt state or local enactments simply because they are stricter or impose additional requirements over and above those mandated by federal law. See *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 290-292 (1987) (federal law prohibiting pregnancy discrimination did not preempt a state law requiring employers to provide pregnancy leave). Absent express preemption language to the contrary, a federal statute that establishes "only a floor" or minimum requirements "does not stand in the way of a stricter standard that the laws of some States provide." *Atherton* v. *F.D.I.C.*, 519 U.S. 213, 227 (1997). Thus, so long as a federal program merely sets a minimum "below which protections for tenants c[an]not drop, [and] not a ceiling above which they could not rise," it does not supplant state or local statutes that impose greater or more extensive safeguards. *Barrientos*, 583 F.3d at 1211 (HUD regulation for HCV program that allowed "no cause" terminations at the end of lease did not preempt local ordinance that prohibited landlords from refusing to renew lease to raise the rent).[6]

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[6] See, *e.g.*, *Atherton*, 519 U.S. at 227 (federal law that imposes gross negligence standard did not supplant state law with stricter requirement); *Hillsborough Cnty.*, 471 U.S. at 720-722 (federal regulation that governed the collection of blood plasma did not preempt local ordinance that imposed stricter requirements for the retrieval and collection of the same); *Housing & Redevelopment Auth. of Duluth* v. *Lee*, 832 N.W.2d 868, 874-876 (Minn. Ct. App. 2013) (HUD regulation under HCV program that allowed reasonable late fees did not preempt Minnesota law that capped overdue late fees at eight percent).

Precedent establishes that the HCV program does not impliedly preempt the Austin Ordinance. First, the Ordinance does not "actually conflict" with the HCV program. An "actual conflict" exists only "where it is impossible for a private party to comply with both [local] and federal law." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000). See *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 884 (2000). Plaintiff cannot satisfy that standard because landlords can easily comply with the requirements of both. In addition, nothing in the federal law provides landlords with the right to reject tenants solely because of their status as voucher holders. Nor does the Ordinance compel, much less encourage, landlords to violate the federal law. Thus, Austin's Ordinance "does not conflict with" and is "entirely consistent" with the HCV program. *Whiting*, 131 S. Ct. at 1985.

Austin's Ordinance also does not stand as an obstacle to enforcement of the federal program even though, unlike the HCV program, the Ordinance's prohibition against discrimination based on source of income may in some respects mandate landlord participation. Both the federal and local laws have the same "purposes" and accomplish the same "objectives." *Guerra*, 479 U.S. at 281 (citation omitted). The HCV program was created to "ai[d] low-income families in obtaining a decent place to live," to "address the shortage of housing affordable to low-income families," and to promote economically mixed housing. *Cisneros* v.

Alpine Ridge Grp., 508 U.S. 10, 12 (1993) (quoting 42 U.S.C. 1437f(a)) (alteration in original); 42 U.S.C. 1437(a)(1)(B). Austin's Ordinance was enacted to do the same. ROA.349, 362-363. And prohibiting discrimination against voucher holders, as the Ordinance does, is intended to advance those same objectives. Accordingly, plaintiff's federal preemption claim fails.

Plaintiff's preemption argument should also be rejected because the Austin Ordinance is entirely consistent with the structure and operation of the federal program. The HCV program aids low-income families to obtain housing in accordance with "a uniform federal floor below which protections for tenants c[an]not drop" and partners with state and local housing authorities to achieve that objective through the enforcement of federal, state, and local laws. *Barrientos*, 583 F.3d at 1211. See *Housing & Redevelopment Auth. of Duluth* v. *Lee*, 832 N.W.2d 868, 875 (Minn. Ct. App. 2013).[7] Consistent with that mandate, HUD has repeatedly issued regulations that rely on or defer to state and local laws to establish the program's requirements.[8] Thus, acceptance of plaintiff's preemption

[7] See, *e.g.*, 42 U.S.C. 1437f(o)(7)(B)(ii)(I) (tenant's lease must contain terms that are "consistent with State and local law"); 42 U.S.C. 1437(a)(1)(C) ("It is the policy of the United States * * * to vest in [local] public housing agencies * * * the maximum amount of responsibility * * * in the program administration" of their housing plans); 42 U.S.C. 1437f(b) and (d).

[8] See, *e.g.*, 24 C.F.R. 982.308(a), .313(c), .4(b) (deferring to state or local law to determine a tenant's legal capacity to enter into a lease, permissible uses of

(continued…)

argument is fundamentally inconsistent with Congress's creation of a federal housing program that relies on state and local laws for its operation.

Contrary to plaintiff's contention (Br. 35-37), Congress's decision in 1996 (made permanent in 1998) to eliminate the requirements in the HCV program that landlords accept all voucher-holder tenants once they participate in the program and must renew voucher holders' leases, absent good cause does not dictate a contrary conclusion. See Omnibus Consolidated Rescissions and Appropriations Act, 1996, Pub. L. No. 104-134, § 203, 110 Stat. 1321, 1321-281 (temporarily repealing 42 U.S.C. 1437f(t) and amending 42 U.S.C. 1437f(d)(1)(B)); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, § 554, 112 Stat. 2461, 2611 (1998) (making the repeal and amendment permanent). The legislative history of those amendments belies plaintiff's claim (Br. 37-40) that they were intended to impliedly preempt *any* state or local statute, and more particularly, a law like Austin's Ordinance that prevents discrimination based on source of income. The Senate Reports expressly state that "*protections will be*

(…continued)
a security deposit, and a head-of-household's legal domicile); 24 C.F.R. 982.310(e)(2)(i) (eviction notice must be the warning "used under State or local law"); 24 C.F.R. 982.509 (relying on state and local rent control laws to determine the amount of rent a voucher holder is to pay). See also 24 C.F.R. 982.308(c) (housing authority "may decline to approve the tenancy if [it] determines that the lease does not comply with State or local law").

continued under State, and local tenant laws." S. Rep. No. 21, 105th Cong., 1st Sess. 36 (1997) (emphasis added); see also S. Rep. No. 195, 104th Cong., 1st Sess. 32 (1995). They likewise explain that "[t]he intent of the repeals [was] not to excuse discrimination against section 8 holders." *Ibid.*

In addition, the fact that Congress sought to encourage landlord participation when it eliminated the "take one take all" and "endless lease" provisions does not, contrary to plaintiff's contention (Br. 36-37), suggest that Congress's intent was to assist landlords rather than increase the availability of affordable housing. In fact, the Ninth Circuit rejected and characterized such an argument as "illogical" and explained that although "HUD and Congress have deemed owner participation an important means to the ultimate end of providing housing," it is "not a goal in itself." *Barrientos*, 583 F.3d at 1210. In any event, "[i]mplied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" because "such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law." *Whiting*, 131 S. Ct. at 1985 (plurality opinion) (citation and internal quotation marks omitted). Consequently, because there is nothing to indicate, much less establish that Congress intended the HCV program and its amendments to supplant state and local laws that protect low-income tenants, and a dispositive regulation

exists that establishes precisely the contrary, plaintiff's implied preemption argument fails.[9]

Finally, every court to have squarely addressed the issue has rejected the claim that the HCV program preempts a local law, like Austin's, that prohibits discrimination based on source of income. See, *e.g.*, *Bourbeau* v. *Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 88 (D.D.C. 2008); *Montgomery Cnty.* v. *Glenmont Hills Assocs. Privacy World*, 936 A.2d 325, 336 (Md. 2007); *Franklin Tower One, LLC* v. *N.M.*, 725 A.2d 1104, 1113 (N.J. 1999); *Commission on Human Rights & Opportunities* v. *Sullivan Assocs.*, 739 A.2d 238, 245-246 (Conn. 1999); *Attorney General* v. *Brown*, 511 N.E.2d 1103, 1106 (Mass. 1987). Consequently, this Court should do the same and reject plaintiff's federal preemption claim.

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[9] See *Barrientos*, 583 F.3d at 1207-1213; *Lee*, 832 N.W.2d at 875; *Rosario* v. *Diagonal Realty, LLC*, 872 N.E.2d 860, 865 (N.Y. 2007); *Stevenson* v. *San Francisco Hous. Auth.*, 29 Cal. Rptr. 2d 398, 404-406 (Cal. Ct. App. 1994). Cf. *Independence Park Apartments* v. *United States*, 449 F.3d 1235, 1244 (Fed. Cir. 2006) (explaining that even though "[t]he National Housing Act [(NHA)] provided certain benefits and imposed certain burdens on owners of subsidized low-income housing," it did not preempt local rent ordinance because federal law failed to "provide * * * any protection against the application of a variety of state and local laws that could affect the profitability of their investments"); *Kargman* v. *Sullivan*, 552 F.2d 2, 11 (lst Cir. 1977) (NHA did not preempt local rent control ordinances because federal law "creating the network of subsidized housing laws is superimposed upon and consciously interdependent with the substructure of local law relating to housing"); see also *Geier*, 529 U.S. at 885 ("[A] court should not find pre-emption too readily in the absence of clear evidence of a conflict.").

CONCLUSION

This Court should affirm the district court's decision that the HCV program does not preempt Austin's Ordinance.

Respectfully submitted,

VANITA GUPTA
Principal Deputy Assistant
Attorney General

MICHELLE ARONOWITZ
Deputy General Counsel for
Enforcement and Fair Housing

AYELET R. WEISS
Attorney
Department of Housing and
Urban Development
Washington, D.C. 20410

MARK L. GROSS
LISA J. STARK
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-4491

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING DEFENDANT-APPELLEE AND INTERVENOR DEFENDANTS-APPELLEES AND URGING AFFIRMANCE with the Clerk of the Court using the appellate CM/ECF system on July 13, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Lisa J. Stark
LISA J. STARK
Attorney

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure, that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING DEFENDANT-APPELLEE AND INTERVENOR DEFENDANTS-APPELLEES AND URGING AFFIRMANCE:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 4,639 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14-point Times New Roman font.

s/ Lisa J. Stark
LISA J. STARK
Attorney

Dated: July 13, 2015

ATTACHMENT

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-2000

OFFICE OF FAIR HOUSING
AND EQUAL OPPORTUNITY

January 5, 2015

Mr. Jonathan Babiak
Administrator
City of Austin Equal Employment/ Fair Housing Office
1050 East 11th Street
Austin, TX 78702

Subject: Austin City Ordinance No. 20141211-050

Dear Mr. Babiak:

Thank you for the information regarding the City of Austin's recent amendment to its fair housing law (Housing Ordinance No. 940210-A). The Department has reviewed the amendment, Ordinance No. 20141211-050 (effective January 12, 2015), which added source of income to the list of protected characteristics under Austin's law.

I am writing to confirm that Austin's fair housing law remains substantially equivalent to the federal Fair Housing Act (the Act). Neither the Act nor HUD's implementing regulations for the Fair Housing Assistance Program (FHAP) prohibit a State or local jurisdiction from adopting additional protected characteristics, including source of income. HUD's regulations governing the FHAP explicitly allow State or local laws to be determined to be substantially equivalent when they include protected characteristics beyond those provided in the Act (see 24 C.F.R. § 115.204(h)).

Thank you for your efforts to extend Austin's fair housing law to all of her citizens.

Sincerely,

Sara Pratt
Deputy Assistant Secretary
for Enforcement and Programs

cc: Garry Sweeney