SECTION 8, SOURCE OF INCOME DISCRIMINATION, AND FEDERAL PREEMPTION: SETTING THE RECORD STRAIGHT

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INTRODUCTION

In enacting the Section 8 housing voucher program in 1974, 42 U.S.C. § 1437f, Congress sought to help low-income families obtain a “decent place to live” and promote “economically mixed housing.”1 Section 8 marked a federal effort to reduce dependency on public housing by injecting low-income individuals into the private rental market.2 To make the Section 8 program attractive for landlords, Congress intended to leave management decisions, including tenant screening and selection, to the private owner.3 Thus, Congress designed Section 8 to be a voluntary program for landlords;4 that is, under the federal law, landlords may lawfully decline tenancy to a Section 8 voucher holder.5

Yet since the mid 1980s, a number of state and local governments have passed legislation mandating participation in the Section 8 program in an attempt to combat what they perceive to be “source of

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4 While Congress did not expressly state in the statute that Section 8 is a voluntary program, as discussed infra Part II, the legislative history of Section 8 demonstrates Congress’s intent to make Section 8 voluntary.

5 Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 296 (2d Cir. 1998) (noting that landlords “lawfully may refuse to accept applications from Section 8 beneficiaries”); Franklin Tower One, L.L.C. v. N.M., 725 A.2d 1104, 1113 (N.J. 1999) (“That 42 U.S.C.A. § 1437f does not mandate landlord participation in the Section 8 program is undisputed.”). For the purposes of this Note, declining tenancy to a Section 8 tenant means either declining tenancy initially or declining to renew a Section 8 tenant’s lease agreement.
income discrimination” by landlords.\textsuperscript{6} By amending state and local fair housing statutes to prohibit discrimination based on source of income—a category that lawmakers and courts have defined to include Section 8 vouchers\textsuperscript{7}—these state and local governments have left landlords virtually no choice but to accept a Section 8 tenant or face a discrimination action.\textsuperscript{8}

When confronted with discrimination claims premised on such a mandatory state or local law, landlords have challenged those laws on the ground that federal law, to the extent that it makes Section 8 participation voluntary, preempts any state or local law purporting to make participation mandatory.\textsuperscript{9} The highest courts in four states, however, have concluded that the federal law does not preempt such state and local laws.\textsuperscript{10} This Note argues that these decisions run counter to federal preemption doctrine and stand in violation of the Supremacy Clause of the United States Constitution.\textsuperscript{11} While this Note acknowledges that a voluntary federal housing voucher program has significant drawbacks and may not be an effective means of increasing the availability of affordable housing in the United States, a flawed federal program is not a license for states and municipalities to enact legislation that conflicts with the federal law.

Part I reviews the purpose and history of the Section 8 legislation, discusses the obstacles facing Section 8 voucher holders today, and reviews the legislation that federal, state, and local governments have passed to combat these problems. Part II summarizes the state cases that have rejected landlords’ preemption defense, outlines federal preemption doctrine, applies preemption law to the state and local anti-discrimination regulations, and explains why the highest courts in Massachusetts, New Jersey, Connecticut, and Maryland reached the

\textsuperscript{6} Landlords who are accused of such discrimination routinely deny such intent. Instead, they claim that any refusal to accept a Section 8 voucher holder was due to an unwillingness to take on the burdensome administrative costs of the program. See discussion infra Part I.B.


\textsuperscript{8} In certain states that have amended their fair housing statutes to prohibit source of income discrimination, landlords may decline to rent to a Section 8 tenant for a legitimate business reason. See, e.g., Montgomery County v. Glenmont Hills Assocs., 936 A.2d 325 (Md. 2007). But see DiLiddo v. Oxford Street Realty, Inc., 876 N.E.2d 421, 429 (Mass. 2007) (reading the current version of Massachusetts’s source of income discrimination statute to refuse to “allow landlords to reject a participant in any housing subsidy program [on the ground that participation] could cause the landlord ‘substantial economic harm’”).


\textsuperscript{10} See Sullivan Assocs., 739 A.2d 238; Glenmont Hills, 936 A.2d at 327; Brown, 511 N.E.2d 1103; Franklin Tower One, 725 A.2d 1104.

\textsuperscript{11} See infra Part II.
wrong result in holding that such state and local laws do not violate the Supremacy Clause.

I. BACKGROUND

A. History and Current Operation of the Section 8 Housing Choice Voucher Program

As the Great Depression swept across the United States in the 1930s, America witnessed for the first time a substantial portion of the population become unemployed, homeless, or forced into overcrowded and unsanitary living situations. Housing suddenly became a national crisis and a Congressional priority. In 1937, Congress initiated a major effort to provide decent and affordable housing for low-income citizens by enacting the United States Housing Act. The statute provided federal funds to assist local public housing agencies (PHAs) in constructing and managing public housing projects. For roughly thirty years, public housing facilities funded by the federal government and owned and operated by PHAs were the primary source of governmental housing assistance for low-income families.

An alternative solution to the housing crisis—using public funds to subsidize the rental of apartments in privately owned buildings—emerged in the mid-1960s when Congress passed the Housing and Urban Development Act of 1965. A decade later, Congress enacted

14 42 U.S.C. § 1437f (2006); Williams, supra note 13, at 427 (“The 1937 Housing Act provided for federal funding of local public housing agencies to develop, construct, and manage housing for low income people.”).
16 Id.; Freedman, supra note 2, at 741-42 (“From the New-Deal era through the 1970s, the federal government played a major role in providing affordable housing to the nation’s poor and low-income communities through the creation of large, project-based subsidy programs that provided incentives to owners to build and maintain affordable housing projects.”).
17 Glenmont Hills, 936 A.2d at 328. The court explains that this program authorized “PHAs, through contracts with private owners, to lease apartment units in existing private apartment buildings and then sublease those units to current public housing tenants.” Id. The PHA paid “the negotiated market rent to the landlord, the low-income tenant [paid] a minimum rent based on an income formula to the PHA, and the Government [covered] the difference.” Id. Despite this trend, public housing projects continued to dominate the affordable housing scheme.
the Housing and Community Development Act of 1974, which created the first version of the housing voucher program commonly known today as Section 8.¹⁸

The Section 8 Housing Choice Voucher Program provides eligible¹⁹ low-income individuals with vouchers equal to thirty percent of their adjusted income.²⁰ Tenants may apply the vouchers toward rent for a privately owned dwelling advertised at or below a locally established Fair Market Rent (FMR).²¹ The legislation authorizes the federal Department of Housing and Urban Development (HUD) to enter into annual contribution contracts with local public housing authorities, which subsidize the remainder of tenants’ rent.²² Landlords who choose to accept a Section 8 tenant are obligated to maintain units rented by Section 8 tenants in compliance with HUD’s Housing and Quality Standards (HQS).²³

In practice, the program functions as follows. A tenant applies for a voucher at the PHA, which selects prospective low-income tenants who meet the federal eligibility criteria. The PHA provides a chosen tenant with “a list of landlords or other parties known to the PHA who may be willing to lease a unit to the family, or help the family find a unit.”²⁴ The PHA then gives the tenant a HUD voucher, which is good for at least sixty days and may be renewed, and sends the tenant into the rental market.²⁵ At this point, it is up to the tenant to locate an apartment—that is, an apartment with a landlord willing to comply with

throughout the 1960s and 1970s. As Michael Freedman notes, “more than two million units were built under project-based programs” during these two decades alone. Freedman, supra note 2, at 742.

¹⁸ See Glenmont Hills, 936 A.2d at 328-29. The court notes that while the 1974 Act “is often viewed as the progenitor of the Section 8 voucher program, it was more in the nature of, and was referred to as, a rental certificate program,” and that “until 1998, HUD had at least two alternative programs operating at the same time—the certificate program . . . and the voucher program emanating from the Housing and Community Development Act of 1987.” Id. The court explains that the Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2461, merged the certificate and voucher programs, and what survives is the current Housing Choice Voucher Program codified at 42 U.S.C. § 1437f. Id.

¹⁹ 24 C.F.R. § 982.201(a)-(b) (2008) (listing the income requirements for eligibility under Section 8).

²⁰ 24 C.F.R. § 982.503 (2008); Glenmont Hills, 936 A.2d at 329.


²² 24 C.F.R. § 982.503(a)(1) (2008) (“HUD publishes the fair market rents for each market area in the United States . . . . The PHA must adopt a payment standard schedule that establishes voucher payment standard amounts for each FMR area in the PHA jurisdiction.”); 24 C.F.R. § 982.505(a) (2008) (“A payment standard is used to calculate the monthly housing assistance payment for a family. The ‘payment standard’ is the maximum monthly subsidy payment.”); see Franklin Tower One, L.L.C. v. N.M., 725 A.2d 1104, 1107-08 (N.J. 1999).


the federal Section 8 regulations. In 1987, Section 8 vouchers became “portable,” meaning that a voucher holder has an enforceable right to use the voucher to move to any city or town nationwide where a PHA maintains a voucher program.

Once a tenant finds a qualifying landlord and negotiates lease terms, the process has only just begun. To be eligible for rent to a Section 8 tenant, the landlord’s apartment must first pass an examination administered by the PHA that ensures that the unit meets HUD’s HQS. If a unit passes inspection, the PHA must then determine (1) that the rent is reasonable, i.e., that it falls within certain HUD-established guidelines, and (2) that the lease conforms to HUD requirements, i.e., it must either be the standard lease used by the landlord for non-assisted tenancies or a model lease written by HUD, and it must include a HUD-prepared addendum that outlines certain rights of both the tenant and the landlord.

There is no direct requirement in the federal law or in the HUD regulations that mandates landlord participation. In fact, the legislation and its history make clear that participation was intended to be voluntary. Under HUD regulations, the landlord is responsible for screening prospective Section 8 tenants and may consider a family’s background and tenancy history with respect to payment of rent and utility bills, caring for the apartment, showing consideration for the rights of other residents, drug related or other criminal activity, and compliance with other essential conditions of tenancy.

B. Problems Facing Section 8 Voucher Holders: Source of Income Discrimination

In enacting Section 8, Congress intended to devise a solution to the shortage of affordable housing in the United States by creating a program that used government funding to enable low-income individuals to enter the private housing market. But the program has
met with mixed success, and the task of locating decent housing remains a burdensome endeavor for low-income citizens. The principal difficulty facing such prospective tenants is what has been called “source of income discrimination.”

Source of income discrimination refers to the practice whereby a landlord refuses to rent to a tenant on the sole ground that the tenant plans to pay a portion of her rent with a government-funded housing voucher or subsidy, including a Section 8 voucher. Housing reform advocates argue that source of income discrimination acts as a proxy for discrimination based on race, gender, or other family characteristics, as many Section 8 tenants exhibit those protected traits. These forms of discrimination are made illegal in the Fair Housing Act. Landlords, on the other hand, argue that Section 8 is a voluntary program and that declining to participate is simply a business decision. Especially in a thriving housing market, landlords can rent to unassisted tenants and avoid extra paperwork and compliance with government regulations.

On a case-by-case basis, it is difficult to discern whether a landlord’s decision to decline tenancy to a prospective Section 8 tenant shows discriminatory animus or merely an unwillingness to engage in an onerous administrative relationship with the government. What is certain, though, is that many low-income individuals find themselves with vouchers, but without apartments.
For example, in October 2007, The New York Times reported the story of Omayra Cruz, a thirty-five-year-old Bronx, New York resident and a Section 8 voucher holder. At the time the article was published, Ms. Cruz had spent almost six months searching for a new apartment. Eager to move out of her old apartment due to its dilapidated conditions—namely, a missing chunk in the ceiling and large patches of asthma-inducing black mold on the doors—Ms. Cruz was rejected by about thirty Bronx landlords upon presentation of her Section 8 voucher.

Ms. Cruz’s story is typical of voucher holders in New York City and in other urban areas across the country. As gentrification has transformed low-income neighborhoods, housing advocates and voucher holders say property owners have been turning away more Section 8 tenants. In newspapers and on websites like Craigslist, landlords and real estate agents often add the phrase “No Section 8” to their rental listings.

C. Federal Response: 1987 Amendments and Their Subsequent Repeal

By the mid-1980s, Congress realized that a downside of a

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42 Id.
43 Id.
44 See generally Diane K. Levy et al., In the Face of Gentrification: Case Studies of Local Efforts to Mitigate Displacement, 16 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 238 (2007) (explaining how a rise in housing prices in low-income neighborhoods since the 1990s has led to the displacement of low-income residents whose income has not kept pace).
45 A study authored in April 2007 by the New York City branch of the Association for Community Organizations for Reform Now (ACORN) revealed:

  Less than 21% of property management companies in New York City’s five boroughs have apartments available within Section 8 rent limits. Less than half of these apartments accept Section 8. Only 13% of apartments available on Craigslist, The Daily News, and The New York Times accept Section 8 vouchers. Over 40% of apartments on [the New York City’s Housing Authority]’s own list intended to guide Section 8 recipients to find an available apartment were, in fact, unavailable.

N.Y. ACORN, HOUSING FOR EVERYONE: NEW YORK CITY, SECTION 8, AND SOURCE OF INCOME DISCRIMINATION (2007), http://acorn.org/SourceOfIncome.doc; see also Beck, supra note 21; Fernandez, supra note 41.
voluntary Section 8 program was that a significant number of landlords were simply declining to participate. As a result, Section 8 voucher holders had trouble locating suitable housing and allegations of discrimination started to arise. In the hopes of encouraging participation in Section 8, Congress inserted two, more restrictive provisions into the 1987 Act: the “take one, take all” provision and the “endless lease” provision. In enacting these new rules, Congress intended to increase the extent of a landlord’s commitment to the Section 8 program once he had accepted at least one Section 8 tenant. In turn, Congress believed that more Section 8 tenants would be able to successfully locate and retain affordable housing.

The “take one, take all” provision provided that any landlord who had entered into a rental agreement with at least one Section 8 tenant could not deny any future applicants based on Section 8 status alone. According to the Second Circuit in *Salute v. Stratford Greens Garden Apartments*, the purpose of the provision was to “prevent landlords from picking and choosing from the pool of Section 8 applicants who apply to rent apartments, and thereby to promote access to decent and affordable housing for lower income households.”

The “endless lease” provision provided that at the end of a lease period, landlords could not refuse to renew the leases of Section 8 tenants “except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause.” Under this provision, then, the owner was required to continue the rental relationship indefinitely or go through a lengthy and costly eviction process to end it.

Contrary to Congress’s intent, the “take one, take all” provision and the “endless lease” provision together had a chilling effect on landlord participation in Section 8, and as a result left a significant

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49 H.R. REP. No. 100-122(I).
50 Id.
51 Id.
52 Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 297 (2d Cir. 1998).
53 42 U.S.C. § 1437f(d)(1)(B)(ii) (1994) (repealed 1996). The “endless lease” provision marked a departure from traditional market based landlord-tenant relations. At the end of a non-Section 8 tenant’s lease term, either the landlord or the tenant has the right to decide not to renew the lease. Under the “endless lease” law, the mere expiration of a lease term was not considered good cause.
54 Tenant-Based Rental Assistance, supra note 39 (presenting the findings of a report conducted by Abt Associates, a Massachusetts-based housing policy research firm, consisting of “in-depth, candid interviews with apartment managers to assess how to improve private sector interest in the tenant-based program”).
55 Id. As Garcia testified, the overwhelming response was that “private owners will be more likely to welcome Section 8 recipients to their buildings when the program is amended to operate as much as possible within the bounds of the private marketplace.” Id.
number of Section 8 voucher holders unable to secure rental housing.\(^{56}\)

Because landlords knew that “the take one, take all” rule would force
them to accept any and all Section 8 tenants after they accepted one
Section 8 tenant, many landlords simply refused to accept that initial
Section 8 tenant.\(^{57}\)

Similarly, the idea of being bound in an “endless
lease”—and consequently involved in a perpetual “marriage with the
government”\(^{58}\)—caused landlords to shy away from Section 8
participation altogether.

Congress understood that the restrictive nature of the 1987
legislation was undermining the fundamental goals of the Section 8
program,\(^{59}\) and by the mid-1990s, arguments emerged for the removal
of both provisions. In 1996, Congress repealed both the “endless lease”
provision and the “take one, take all” requirement from the Section 8
program.\(^{60}\)

The Senate Report in connection with the 1996 amendments
expresses Congress’s awareness that for landlords, the primary deterrent
from participation in Section 8 was the program’s burdensome
requirements.\(^{61}\)

Congress re-voiced these concerns when the time came

\(^{56}\) According to Abt’s 2001 report, voucher holders’ success rates in the largest metropolitan
areas increased from sixty-nine percent in 1958-1987 to eighty-one percent in 1993. Abt
attributes this rise primarily to a loosening of rental markets, not to the influence of the
Congressional amendments. STUDY ON SECTION 8 VOUCHER SUCCESS RATES, supra note 40.

As Garcia testified in a 1994 statement to the House of Representatives:

[O]rdinary statistics may tend to hide the problems with the current voucher and
certificate programs and make it seem like the programs are working well. . . . But
those figures probably tell more about the recession’s impact than about the success of
vouchers and certificates. Obviously, it is easier to find available housing when a local
rental market collapses and vacancy rates soar. That happened in many local markets
when the unprecedented building boom of the mid-1980s was followed by deep
recession.

Tenant-Based Rental Assistance, supra note 39.

\(^{57}\) In Salute, an interesting § 1437f(t) issue arose. The question was whether § 1437f(t)
applied where a landlord’s only Section 8 participation was the acceptance of payments on behalf
of existing tenants who became Section 8 certificate holders during their tenancies. The Salute
court answered in the negative, and explained that to hold otherwise would provide an incentive
for landlords to evict the very people that Section 8 was designed to protect. The court noted that
“landlords have a statutory right to avoid Section 8 participation,” and concluded that the “‘take
one, take all’ provision is best read and understood in tandem with the voluntary nature of the
Section 8 program.” Salute, 136 F.3d at 298.

\(^{58}\) Id.

\(^{59}\) As mentioned supra Part I, these goals were: to increase the availability of affordable
housing, to promote economic integration, and to maintain landlord autonomy in the selection of
tenants and management decisions.

\(^{60}\) In 1997, the repeals became permanent. Omnibus Consolidated Rescissions and

\(^{61}\) S. REP. NO. 104-195, at 31-32 (1995) (“The history of section 8 has shown . . . that private
owners have been reluctant to participate in large part because of time-consuming and costly
program requirements which conflict with normal market practices. Some program requirements
have constrained the ability of owners to make rational business decisions.”). These “time-
consuming and costly program requirements” were the “take one, take all” provision and the
to vote to make the repeals permanent in 1997. The spokesman for the Committee on Banking, Housing and Urban Affairs noted that a key factor to the success of Section 8 is the ability to attract landlords to the program, but that the evolution of Section 8 had demonstrated owners’ reluctance to participate due to the program’s burdensome requirements. The Committee explained that the purpose of the bill was not to excuse owners from discrimination against Section 8 tenants, but to rid Section 8 of disincentives for owner participation. Congress approved the permanent repeal of both the “take one, take all” and the “endless lease” provisions in 1997. Since that time, Congress has not imposed any new requirements upon landlords.

D. State and Local Response to Source of Income Discrimination

In 2007, New York City councilman Bill de Blasio of Brooklyn responded to alleged discrimination against tenants like Omayra Cruz by introducing a bill that would have prevented landlords from turning away applicants solely because they have vouchers or other forms of local, state, or federal government assistance. Landlords and landlords’ associations objected to the bill, arguing that it “would turn a voluntary program riddled with bureaucratic problems into a mandatory one” and that building owners have a right to decline to partake in the “overly cumbersome” program. Mayor Bloomberg vetoed de Blasio’s proposed legislation in March of 2008, stating that the bill “fails to recognize that the onus should be on government to make the program more attractive for private sector participation, not the other way.

“endless-lease” rule.

62 Petition for Writ of Certiorari, supra note 60, at 16.

63 S. REP. NO. 105-21, at 36 (1997) (“One of the key factors to the success of the tenant-based rental assistance program is the ability to attract property owners and managers to participate in the program. Owner participation plays a significant role in providing a broad range of housing choices for assisted families.”). In addition to making permanent the removal of the “take one, take all” and “endless lease” requirements, the bill proposed other reforms to encourage owner participation, including “flexibility in resident screening and selection, minimizing housing agency involvement in tenant-owner relations . . . and conforming section 8 leases to generally accepted leasing practices.” Id.

64 Id. The Committee pointed out that protection against housing discrimination could still be found in the federal Fair Housing Act and under state and local law: “The Committee, however, does not anticipate that the repeal of these rules will adversely affect assisted households because protections will be continued under State, and local tenant laws as well as Federal protections under the Fair Housing Act and the Americans with Disabilities Act.” Id. State courts have taken this statement by Congress as evidence that Congress supported the passage of state laws banning source of income discrimination.


66 Fernandez, supra note 41.

67 Id.
around.”68

However, New York City’s City Council overrode Bloomberg’s veto in March, 2008,69 and the City joined the list of nearly twenty-five municipalities and fourteen states throughout the country that have approved laws in the same vein as de Blasio’s.70 An example of such legislation is section 46a-64c(a)(1) of the Connecticut General Statutes, passed in 1989, which prohibits landlords from denying tenants on the basis of a “lawful source of income.”71 Under the statute, such a refusal qualifies as a discriminatory practice no different from racial or ethnic discrimination.72 Some statutes expressly state that a government-funded housing subsidy constitutes a lawful source of income. Where legislatures have not expressly specified that Section 8 vouchers are a lawful source of income (such as in Connecticut), courts have typically found an intent to include them in the statutory definition.73

E. Judicial Treatment of the Remedial State and Local Laws

As the law currently stands in New York City, Ms. Cruz probably has more recourse in the judicial system than she did last year.74 She

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68 Manny Fernandez, Mayor Vetoes Bill Protecting Section 8 Tenants from Landlord Bias, N.Y. TIMES, Mar. 1, 2008, at B4.
69 Press Release, Council of the City of New York, Preserving Access to Affordable Housing, Council Votes on Override to Protect Low-Income Renters From Discrimination (Mar. 26, 2008), http://council.nyc.gov/html/releases/024_032608_prestated_sec8override.shtml. With this vote, the City Council amended New York City’s Human Rights Law to make it unlawful to refuse to rent an apartment based on a tenant’s “lawful source of income.” The law also makes it illegal “to declare, print or circulate . . . any statement, advertisement or publication . . . which expresses, directly or indirectly, any limitation, specification or discrimination as to . . . any lawful source of income.” N.Y. CITY, N.Y., ADMIN. CODE, § 8-107(5)(a)(1), (3) (2008); see also FREIBERG & HOUK, supra note 46.
70 Fernandez, supra note 68. For a partial list of the various states and municipalities that have enacted laws banning source of income discrimination, see KEEPING THE PROMISE, supra note 7.
71 CONN. GEN. STAT. ANN. § 46a-64c(a)(1) (West 2009).
72 The statute provides: “It shall be a discriminatory practice in violation of this section: (1) to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, creed, color, national origin, ancestry, sex, marital status, age, lawful source of income . . . .” Id.
74 As Beck explains, Section 8 voucher holders have also tried suing landlords, “alleging that, because a majority of subsidy holders are people of color, landlords’ refusals to accept Section 8 subsidies have had a discriminatory effect on minorities. . . . These [disparate treatment] claims have met with limited success.” Beck, supra note 21, at 170; see also Knapp, 54 F.3d at 1280.
would fare even better if she lived across the Hudson, in New Jersey. Not only has New Jersey amended its fair housing act to ban source of income discrimination, Section 8 tenants in New Jersey who have been denied an apartment or a renewal of a lease agreement due to Section 8 status have prevailed against landlords in court. When faced with statutory source of income discrimination claims, landlords have challenged the state and local laws on federal preemption grounds. They have argued that in enacting § 1437f, Congress intended to make Section 8 a voluntary program; therefore, any move by states and municipalities to require a landlord to rent to a Section 8 voucher holder is preempted by the federal legislation.

While the New York Appellate Division supported the preemption argument in Mother Zion Tenant Association v. Donovan, the highest courts in New Jersey, Massachusetts, Connecticut, and Maryland have heard and rejected the landlords’ preemption defense, thereby leaving state and local mandatory participation laws in effect.

II. ANALYSIS

A. State Supreme Court Decisions

The high courts of four states—New Jersey, Massachusetts, Connecticut, and Maryland—have declined to find that the federal Section 8 legislation preempts state and local statutes that prohibit landlords from rejecting tenants on the basis of a lawful source of income. These courts have reached the wrong result.

The first court to tackle the preemption issue was the Supreme Judicial Court of Massachusetts, in Attorney General v. Brown, decided in 1987. In that case, Massachusetts’s attorney general sued landlord

(“Owner participation in the section 8 program is voluntary and non-participating owners routinely reject section 8 voucher holders. We assume that their non-participation constitutes a legitimate reason for their refusal to accept section 8 tenants and that we therefore cannot hold them liable for racial discrimination under the disparate impact theory.”).

75 See N.J. STAT. ANN. §10:5-12(g)(1) (West 2009).
76 See Franklin Tower One, 725 A.2d 1104.
78 See, e.g., id.
79 Mother Zion Tenant Ass’n v. Donovan, 865 N.Y.S.2d 64 (App. Div. 1st Dep’t 2008). The New York Supreme Court declined to follow the Mother Zion court’s reasoning on the preemption issue in Tapia v. Successful Management Corp., No. 400563/08, 2009 WL 2163595, at *1 (N.Y. Sup. Ct. Jul. 20, 2009). The Seventh Circuit has indicated support for a preemption argument in Knapp, 54 F.3d at 1282, explaining that one reason for refusing to hold that the category “lawful source of income” encompasses Section 8 vouchers is that “owners could be held liable for rejections on the basis of the vouchers” and then stating that “[i]t seems questionable, however, to allow a state to make a voluntary federal program mandatory.”
80 Brown, 511 N.E.2d 1103.
Brown in Housing Court for violating a Massachusetts law forbidding source of income discrimination. Brown defended the attorney general’s claim with a federal preemption argument: The state statute mandated a landlord’s participation in a voluntary federal program and thus violated the Supremacy Clause. The attorney general countered that nothing in the federal statute prohibited states from requiring landlord participation, so long as they offered apartments that fell within the Section 8 FMRs.

The court focused its inquiry on whether the Massachusetts statute stood as “an obstacle to the accomplishment of the Federal purpose.” In reaching its conclusion that no preemption existed, the Brown court began with two premises: First, that “preemption is not to be lightly presumed,” and second, that “exclusive federal power is less likely to be intended in areas of local, rather than national, importance.” The court then concluded that no conflict existed between the state law and § 1437f. According to the court, because the state and federal statutes shared the common objective of providing affordable housing to low-income individuals, the state statute did not obstruct any Congressional purpose. In order to arrive at this result, the court necessarily rejected defendant’s contention that voluntary participation lay at “the heart of the federal scheme,” and instead characterized voluntary participation as an incidental aspect of the legislation.

After Brown was decided, the high courts of Connecticut, New Jersey, and Maryland followed suit. Most recently, in 2007, the Court of Appeals of Maryland decided Montgomery County v. Glenmont Hills

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81 The statute provides: “[I]t shall be an unlawful practice . . . to discriminate against any individual who is a recipient of federal, state or local public assistance . . . or who is a tenant receiving federal, state or local housing subsidies, including . . . rent supplements, solely because the individual is such a recipient.” Id. at 1105 n.1 (quoting MASS. GEN. LAWS ch. 151B, § 4(10) (1984)).

82 Id. at 1106.

83 Id.

84 Id.

85 Id. Housing is certainly an area of local importance, and this Note does not contend that state and local governments should play no role in Section 8. In fact, the Brown court was correct in finding that “the Federal scheme envisions State and Federal coordination.” Id. at 1107. However, the fact that Congress called for state and local participation in carrying out the Section 8 program does not give states a license to enact laws that conflict with a primary federal objective.

86 Id. at 1106.

87 In the Brown court’s words, “that terminology [the heart of the federal scheme] would more appropriately be applied to the goals and purposes of the scheme which are aiding lower-income families in obtaining a decent place to live and promoting economically mixed housing.” Id.

Associates, a case with a similar fact pattern to that of Brown.\textsuperscript{89} As in Brown, the landlord in Glenmont Hills argued that the Maryland statute\textsuperscript{90} violated the Supremacy Clause by mandating landlord participation in Section 8 because voluntary participation lay at the heart of Congress’s purpose in enacting the federal law. The Maryland court dismissed this argument, calling it an assumption “belied” by the federal legislation, illogical, and counter to any “rational notion of public policy and existing case law.”\textsuperscript{91} The court concluded that the sole “declared objective” of Section 8 is to aid states and municipalities in expanding affordable housing opportunities, which laws like the contested Maryland statute “advance rather than denigrate.”\textsuperscript{92} Additionally, the court repeatedly mentioned the “presumption against preemption” and emphasized its particular relevance in an area of law traditionally occupied by the states.\textsuperscript{93}

B. Federal Preemption Doctrine Dictates that the State Courts Reached the Wrong Result

In drafting the Supremacy Clause of the United States Constitution, the Framers made clear that the laws of Congress are the country’s supreme laws and that contrary state laws must give way.\textsuperscript{94} Thus, while the Constitution grants the states significant legislative power, the Supremacy Clause acts as a check, precluding states from passing laws that undermine federal legislation. In light of the Supreme Court’s preemption doctrine, the Brown and Glenmont Hills courts’ reasoning\textsuperscript{95} is unsound for a variety of reasons.

\textsuperscript{89} Glenmont Hills, 936 A.2d 325.
\textsuperscript{90} MONTGOMERY, MD., CODE § 27-12 prohibits discrimination based on “source of income.”
\textsuperscript{91} Id. at 331.
\textsuperscript{92} Id. at 336.
\textsuperscript{93} Id. at 335.
\textsuperscript{94} The Supremacy Clause states:
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
U.S. CONST. art. VI, cl. 2. For the purposes of the Supremacy Clause, an analysis of the constitutionality of local ordinances is approached in the same manner as that of state laws. See Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).
\textsuperscript{95} This reasoning is representative of the Connecticut and New Jersey courts’ reasoning in
1. Express and Field Preemption

The Supreme Court has found three ways in which federal preemption can operate. First, a federal law can expressly preempt state law; in that case, Congress’s intent to be the ultimate authority in the area is “explicitly stated in the statute’s language.”\textsuperscript{96} The Brown and Glenmont Hills courts were correct in holding that § 1437f does not expressly preempt states from mandating participation in Section 8: Congress did not include any express preemption clause in § 1437f.

The second two forms of preemption are not based on an express statement of Congress; as a result, they are each referred to as instances of implied preemption. The first variety of implied preemption exists where federal law so wholly occupies a legislative field “as to make reasonable the inference that Congress left no room for the States to supplement it.”\textsuperscript{97} An example of field preemption can be found in United States v. Locke.\textsuperscript{98} In that case, the Supreme Court invalidated a series of Washington state laws that regulated interstate navigation.\textsuperscript{99} Federal preeminence in this field, the Court reasoned, “has been manifest since the beginning of our Republic.”\textsuperscript{100} Thus, the Court concluded that Congress and the United States Coast Guard possess sole legislative and regulatory authority in the area.\textsuperscript{101} The Brown and Glenmont Hills courts were also correct in finding that Congress did not intend for § 1437f to preempt the entire field of affordable housing. As the Brown court points out, “the Federal statute envisions participation by States in the implementation of the program.”\textsuperscript{102}

\footnotesize
\textsuperscript{96} Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). For a recent case dealing with an express preemption clause, see Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001). In Lorillard, the Supreme Court held that a federal law regulating the advertising and promotion of cigarettes preempted a set of Massachusetts state regulations that imposed a variety of restrictions on certain types of tobacco advertising. Id. at 551. The federal law contained an express preemption provision that precluded states from imposing restrictions on tobacco advertising that exceeded the requirements of the federal law. The express preemption clause stated: “No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.” 15 U.S.C. § 1334 (2006). The Court concluded that the Massachusetts regulations impermissibly imposed additional advertising restrictions on tobacco companies that already complied with federal regulations. Lorillard, 533 U.S. at 550-51.

\textsuperscript{97} Cipollone, 505 U.S. at 516 (citations omitted).

\textsuperscript{98} 529 U.S. 89 (2000).

\textsuperscript{99} Id.

\textsuperscript{100} Id. at 99.

\textsuperscript{101} “Congress did not intend its reporting obligations to be cumulative to those enacted by each political subdivision whose jurisdiction a vessel enters.” Id. at 116.

2. Conflict Preemption: Impossibility

Third, and at issue here, a state law may be preempted if that law “actually conflicts with federal law,” creating an “irreconcilable conflict.” The doctrine of conflict preemption recognizes that when state and federal laws regulate the same subject matter, there is a potential that Congressional purposes will be frustrated by the coexisting regimes. While preemption is ultimately a question of Congressional intent, conflict preemption turns on the identification of an actual conflict. A specific preemptive statement by Congress or a federal agency is not required in order to conclude that such a conflict in fact exists. Instead, where a state law poses an actual conflict, courts may infer that Congress or a federal agency would have intended to preempt the actually conflicting state law.

The Supreme Court has found conflict preemption to exist in two situations. The first is where it is impossible for a party to comply with both state and federal law. A conclusion that compliance with both the state and federal laws is physically impossible means that there exists an “inevitable collision between the [state and federal] schemes of regulation.” On the other hand, where a state law prohibits what federal law merely permits but does not require, compliance with both statutes is possible.

In the context of Section 8, there is a potential argument that it is physically impossible to comply with the federal Section 8 legislation—which makes the program voluntary—and, at the same time, obey state and local source of income discrimination laws that render the program

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103 Cipollone, 505 U.S. at 516 (citations omitted).
106 Id.
107 Id. at 884-85.
110 Letter from Donald S. Clark, Sec’y, Fed. Trade Comm’n, to John P. Burke, Comm’r, Conn. Dep’t of Banking (June 7, 2002), available at http://www.ftc.gov/privacy/glbact/conn020607.htm; see also Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n, 461 U.S. 190, 218-19 (1983). The paradigmatic case of impossibility preemption is Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); see Garrick B. Pursley, The Structure of Preemption Decisions, 85 Neb. L. Rev. 912, 923 (2007). In Gibbons, a New York statute gave a steamboat operator the exclusive right to navigate the New York waterways, but a competing operator received a federal license to travel in those same channels. Gibbons, 22 U.S. (9 Wheat.) 1. The Gibbons court explained that since the New York law deprived the competing operator of a federally granted right, the New York law had to give way. Id. In contrast stands Barnett Bank, where the Supreme Court found that a statute authorizing national banks to engage in activities that a state statute expressly forbade did not create a physical impossibility. 517 U.S. at 31. The court explained that a physical impossibility would have existed “if the federal law said, ‘you must sell insurance,’ while the state law said, ‘you may not.’” Id.
mandatory. However, the Brown court was quick to dismiss this argument, and rightly so. Here, the state and local laws in question prohibit landlords from denying Section 8 tenants, and the federal law permits, but does not require, landlords to accept them. Thus, under the Supreme Court's impossibility doctrine, it is physically possible to comply with both legislative schemes.

3. Conflict Preemption: Frustration of Purpose

The strongest argument that the state and local source of income discrimination laws are preempted by the federal Section 8 legislation relies on the second prong of the Supreme Court's conflict preemption doctrine—namely, that a state law is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." State law may be preempted if it prohibits activities that the federal law promotes, or if it mandates behavior that interferes with the aims of the federal law. What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.

a. The Supreme Court Relies on Legislative History as Proof of Congressional Intent

The Glenmont Hills court held that because Congress did not expressly state its intent for Section 8 to be a voluntary program, state source of income discrimination laws do not conflict with the goals of the federal law. The court implied that Congressional intent can only be elucidated in a "declared" goal—as opposed to gleaned from implication, statutory structure, or legislative history.

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112 Id.
115 Crosby, 530 U.S. at 363 (emphasis added). As Mary J. Davis explains, "use of the doctrine known as 'obstacle' preemption causes the most doctrinal difficulty because of the inherent uncertainty in determining Congress's intent to preempt based on an ex post judicial assessment of congressional objectives." Mary J. Davis, Unmasking the Presumption in Favor of Preemption, 53 S.C.L. REV. 967, 970 (2002).
116 As discussed supra, the Supreme Court emphasizes that ";the purpose of Congress is the ultimate touchtone of preemption analysis." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516
The voluntary nature of the Section 8 program does, in fact, lie “at
the heart of the federal law.”117 Although Congress did not expressly
state in § 1437f its intention to make Section 8 voluntary, certain
language in the statute and its legislative history confirms that
voluntariness was a fundamental mechanism by which Congress
believed that its “declared objectives” would be most effectively
realized.118 The initial version of § 1437f stated that “the selection of
tenants shall be the function of the owner.”119 Leaving landlords with
the responsibility of tenant selection underscores Congress’s desire not
to force landlords into contracts with any and every tenant who presents
a Section 8 voucher. The Brown and Glenmont Hills courts
acknowledged that this statutory language reflects Congress’s intent to
design Section 8 as a voluntary program, but argued that the provision
does not preclude states from turning it into a mandatory one.120

Implicit in the Glenmont Hills court’s argument is a failure to
acknowledge that in creating Section 8, Congress intended to build a
subsidized housing system that mirrored the private market—where
private owners retain sole discretion over tenant selection. If Congress
had wanted to mandate landlord participation in Section 8, Congress
could have easily done so. In fact, Congress moved in that direction,
albeit for a brief period of time, with the passage of the Housing and
Community Development Act of 1987, which added the “take one, take
all” and “endless lease” rules to the federal law.121

In examining Congressional intent, the Maryland court122 completely ignored the legislative history behind the repeals of the

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117 Montgomery County v. Glenmont Hills Assocs., 936 A.2d 325, 332 (Md. 2007).
118 See 42 U.S.C. § 1437f(d)(1)(a) (2006); see also discussion of Congress’s repeal of the 1987
amendments supra Part II.C.
119 § 1437f(d)(1)(a). This intent is echoed in the HUD regulations on tenant screening: “The
owner is responsible for screening and selection of the family to occupy the owner’s unit. At or
before PHA approval of the tenancy, the PHA must inform the owner that screening and selection
for tenancy is the responsibility of the owner.” 24 C.F.R. § 982.307(a)(2) (2008). In its original
form, § 1437f allowed landlords to contract directly with HUD (as an alternative to contracting
with a local PHA that received HUD funding). The statute contained an additional provision for
contracts directly between a landlord and HUD, stating “all ownership, management, and
maintenance responsibilities, including the selection of tenants . . . shall be assumed by the
owner.” 42 U.S.C. § 1437f(e)(2), repealed by Cranston-Gonzalez National Affordable Housing
120 “It does not follow that, merely because Congress provided for voluntary participation, the
States are precluded from mandating participation . . . .” Attorney Gen. v. Brown, 511 N.E.2d
1103, 1106 (Mass. 1987); see also Comm’n on Human Rights & Opportunities v. Sullivan
June 8, 1998) (stating that “nothing in the federal [Section 8] program prevents a state from
mandating participation”), rev’d, 739 A.2d 238 (Conn. 1999).
Congress repealed this more restrictive legislation in 1996, understanding that the legislation
discouraged landlord participation in Section 8.
122 Brown was decided before the amendments were repealed.
“take one, take all” and “endless lease” provisions—history that elucidates Congress’s desire to make Section 8 “operate like the unassisted market as much as possible while maintaining the program goals of providing low-income families with decent and affordable housing.” The Senate Report makes clear that affording landlords the choice to opt in or out of Section 8 is a methodology integral to Congress’s goal of expanding housing opportunities. The two go hand in hand; simply because Congress did not expressly state landlord choice as a “declared objective” does not lead to the conclusion that Congress was ambivalent about making Section 8 voluntary.

Under the Supreme Court’s conflict preemption doctrine, a court must examine not only the language and structure of a statute, but also its legislative history, to glean Congressional intent. In Michigan Canners & Freezers Association v. Agricultural Marketing and Bargaining Board, the issue facing the Supreme Court was whether a Michigan law granting agricultural cooperative associations sole bargaining power for the sale of agricultural products conflicted with the federal Agricultural Fair Practices Act of 1967 (AFPA), which was designed to protect a farmer’s freedom to choose whether to market his products himself or through a cooperative association. Appellants argued that while Congress’s chief objective in enacting the AFPA was to encourage the growth of agricultural cooperative associations, “an equally important congressional objective was to preserve the free choice of producers to join associations or to remain independent.” They contended that the Michigan act deprived producers of that choice, effectively allowing associations to force producers into association membership.

To determine whether a central Congressional purpose behind the AFPA was in fact ensuring producers’ free choice, the Court first examined the wording of the statute. In that case, the statutory language revealed strong evidence of Congress’s intent to safeguard producer

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123 S. REP. NO. 105-21, at 36 (1997).
124 Id.
125 Concededly, there may have been a weaker basis for a conflict preemption argument at the time the Massachusetts Supreme Court decided Brown. That case was decided in 1987, well before the “take one, take all” and “endless lease” provisions were repealed. However, the repeals had been passed by the time the Maryland Supreme Court decided Glenmont Hills. At that point, a thorough analysis of legislative history would have revealed Congress’s intent to ensure that Section 8 remain voluntary for landlords. As the Court of Appeals for the Second Circuit explained in Salute, a case that interpreted the “take one, take all” rule but was decided after the provision was repealed, “the landlord is not required to articulate any justification for a policy of refusing Section 8 certificates. Under the [federal] Act, that refusal is a landlord’s prerogative.” Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 301 (2d Cir. 1998).
127 Id. at 463.
128 Id. at 470.
129 Id.
choice. As the Court explained, the Act states that voluntariness is an essential means of preserving the bargaining power of individual farmers, and “the theme of voluntariness” runs throughout the sections of the Act that specify which practices by producers are impermissible.\textsuperscript{130} While the AFPA’s language and structure provided the Court with substantial evidence of Congress’s intent to preserve voluntariness, the Court proceeded to extensively scrutinize the legislative history of the statute,\textsuperscript{131} which confirmed that “the question of the producer’s free choice was a central focus of congressional attention during the passage of the Act.”\textsuperscript{132}

\textit{Michigan Canners} may have been an easy case, since the language and structure of the statute itself quite clearly revealed Congress’s intent to preserve voluntariness. However, the Court has also found frustration of purpose to exist where the express statutory language does less to elucidate Congressional intent. In \textit{Geier v. American Honda Motor Co.},\textsuperscript{133} a federal regulation issued by the Department of Transportation (DOT)\textsuperscript{134} required auto manufacturers to equip some but not all of their vehicles with air bags.\textsuperscript{135} The Court concluded that this standard preempted a state tort claim in which plaintiff argued that the defendant auto manufacturer, who was in compliance with the federal standard, should nevertheless have included airbags in a particular model of automobile.\textsuperscript{136} The \textit{Geier} Court found that imposing tort liability where the defendant had complied with the federal standard would frustrate the federal objective of gradually phasing in airbags.\textsuperscript{137} The text of the National Traffic and Motor Vehicle Safety Act of 1966—the statute that granted the DOT power to regulate automobile safety—shed little light on whether Congress intended to preempt common law tort claims.\textsuperscript{138} In reaching its decision, the Court

\begin{footnotes}
\item[130] Id. at 470-71 (“We turn first to the wording of the AFPA. The Act begins with a finding that ‘the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law.’ More significantly, however, the theme of voluntariness is carried through to the provisions of the Act that define those practices that are prohibited.” (citation omitted)).
\item[131] Id. at 471-77.
\item[132] Id. at 471.
\item[133] 529 U.S. 861 (2000).
\item[135] \textit{Geier}, 529 U.S. at 864-65.
\item[136] Id. at 865.
\item[137] See id. at 879; id. at 881 (“[P]etitioners’ tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the 1987 Honda Accord. Such a . . . rule of state tort law . . . by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems . . . . It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought.”); see also Calvin Massey, “Joltin’ Joe Has Left and Gone Away”: The Vanishing Presumption Against Preemption, 66 ALB. L. REV. 759, 761 (2003).
\item[138] See \textit{Geier}, 529 U.S. at 869-71.
\end{footnotes}
extensively examined the history behind the promulgation of the DOT safety standard at issue,\textsuperscript{139} noting that this history “helps explain why and how DOT sought [to achieve its] objectives.”\textsuperscript{140}

Similarly, in \textit{Crosby v. National Foreign Trade Council}, the Supreme Court held that Massachusetts’s Burma law, which restricted the authority of its agencies to buy goods or services from companies engaged in business with Burma,\textsuperscript{141} stood in conflict with a federal statute that imposed “a set of mandatory and conditional sanctions on Burma”\textsuperscript{142} and “intended to limit economic pressure against the Burmese Government to a specific range.”\textsuperscript{143} In its search for Congressional intent, the Court emphasized that in deciding whether a state law is preempted, “the entire scheme of the [federal] statute must . . . be considered,” and that what is “implied is of no less force than that which is expressed.”\textsuperscript{144} Thus, in addition to examining the statutory language itself\textsuperscript{145}—which provided some, albeit ambiguous, evidence of Congressional intent—the Court reviewed and analyzed the legislative history behind the statute, citing various House and Senate Reports and noting that Congress’s consideration and ultimate rejection of certain, more restrictive provisions shed light on the fundamental objectives behind the law.\textsuperscript{146}

Unlike the Supreme Court in \textit{Michigan Canners, Geier}, and \textit{Crosby}, the \textit{Glenmont Hills} court ignored the legislative history of § 1437f in its search for Congressional intent. By solely scrutinizing the text of the statute, the court stopped short of a complete frustration-of-purpose analysis. A proper review of the legislative history reveals that voluntary participation in Section 8 was one of the program’s fundamental goals.

\textsuperscript{139} See \textit{id.} at 875-77.
\textsuperscript{140} \textit{id.} at 875.
\textsuperscript{142} \textit{id.} at 368.
\textsuperscript{143} \textit{id.} at 377.
\textsuperscript{144} \textit{id.} at 373. The Court made clear that preemptive force does not turn on an express statement to preempt state law: “If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.” \textit{id.} (quoting \textit{Savage v. Jones}, 225 U.S. 501, 533 (1912)).
\textsuperscript{145} \textit{id.} at 377-78 (“Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range. The federal Act confines its reach to United States persons, § 570(b), imposes limited immediate sanctions, § 570(a), places only a conditional ban on a carefully defined area of ‘new investment,’ § 570(f)(2), and pointedly exempts contracts to sell or purchase goods, services, or technology, § 570(f)(2). These detailed provisions show that Congress’s calibrated Burma policy is a deliberate effort ‘to steer a middle path[,]’” (citation omitted)).
\textsuperscript{146} \textit{id.} at 378 n.13 (“The fact that Congress repeatedly considered and rejected targeting a broader range of conduct lends additional support to our view.”).
b. The Supreme Court May Find Conflict Preemption Where the State and Federal Laws Share a Common Goal

The Brown and Glenmont Hills courts also erred in concluding that no frustration of purpose exists because the challenged state laws and § 1437f share a common goal: providing affordable housing for low-income individuals. In reaching this conclusion, the courts acknowledged that Congress provided for voluntary participation. Even so, they argued that the state laws mandating participation are merely a better method of effectuating the common goal. Thus, the courts concluded, no conflict exists.

This reasoning is unpersuasive. The observation that both states and Congress want to increase the supply of affordable housing is likely true, but not controlling in a conflict preemption analysis. As the Supreme Court has opined, a state may share an ultimate goal with the federal government, but it may not seek to accomplish that goal in a way that would frustrate a related Congressional purpose or conflict with Congress’s desired means to achieve that end. In Michigan Canners, even though the Michigan law and the AFPA shared a common goal—to augment the producer’s bargaining position—the Court held that the Michigan law nevertheless conflicted with the AFPA by giving associations the power to coerce producers to sell their goods according to terms set by the association. As a result, the Court struck down the Michigan law as impliedly conflicting with the AFPA.

Similarly, in Gade v. National Solid Wastes Management Association, a plurality of the Supreme Court found obstacle preemption to exist despite the fact that the ultimate goal of both the

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147 Montgomery County v. Glenmont Hills Assocs., 936 A.2d 325, 338 (Md. 2007) (“Both the State and Federal law . . . share a common goal, i.e., affordable, decent housing for those of low income[].”) (quoting Attorney Gen. v. Brown, 511 N.E.2d 1103, 1106 (Mass. 1987))).

148 See Glenmont Hills, 936 A.2d 337; Brown, 511 N.E.2d at 1106.

149 See Mother Zion Tenant Ass’n v. Donovan, 865 N.Y.S.2d 64, 67 (N.Y. App. Div. 1st Dep’t 2008) (“The fact that Local Law 79 and the federal laws pertaining to Section 8 have as their general aim the provision of affordable housing for low-income people does not . . . resolve the preemption question.”).

150 The Supreme Court supported this argument in Gade v. National Solid Wastes Management Association, 505 U.S. 88, 103 (1992). The Court stated: “In determining whether state law ‘stands as an obstacle’ to the full implementation of a federal law . . . ‘it is not enough to say that the ultimate goal of both federal and state law’ is the same . . . ‘A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach that goal.’” Id. (citations omitted). In that case, the Court found obstacle preemption to exist where the challenged state law shared the federal objective of promoting worker safety. See id.


152 Id. at 477-78.
federal and state laws was the same—to promote worker safety. In that case, the Occupational Safety and Health Act of 1978 did not prohibit a state from enacting its own worker safety laws, but the statute did restrict the ways in which the state could do so. The Court held that a state could not act to achieve the common goal through variant means. Under Michigan Canners and Gade, notwithstanding the existence of a common goal, a state law may be preempted if it interferes with the methods by which the federal statute was designed to reach that goal.

Following this rule, the Crosby Court rejected Massachusetts’s argument that no conflict existed between the state and federal laws because the two statutes shared common goals. The Court reiterated its prior doctrine: Even if a state’s objectives align with those of Congress, a state may not use any means to implement those goals to the extent that the state’s means conflict with those envisioned by Congress.

As was discussed supra, as a corollary to the goal of increasing affordable housing, Congress intended that Section 8 mirror the private market. Here, the mandatory participation laws stand in the way of Congress’s intent that Section 8 be voluntary. The fact that the states and Congress share the goal of supplying affordable housing is not determinative of whether or not a conflict exists.

c. The Supreme Court Analyzes Conflict Preemption and Field Preemption Separately

The Supreme Court has emphasized that conflict preemption and field preemption are two separate realms of analysis. Yet the Brown and Glenmont Hills courts both relied on the fact that field preemption does not exist in the context of Section 8 to prove that there is no frustration of purpose. The courts argued that the federal law merely set

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153 505 U.S. at 103.
154 As the Gade Court stated, under section 18 of the Act, “[i]f a State wishes to regulate an issue of worker safety for which a federal standard is in effect, its only option is to obtain the prior approval of the Secretary of Labor." Id. at 103-04.
155 Id. at 103; see also Wis. Dep’t of Indus., Labor, & Human Relations v. Gould, Inc., 475 U.S. 282, 286 (1986) (“[C]onflict is imminent’ whenever ‘two separate remedies are brought to bear on the same activity . . . .” (quoting Garner v. Teamsters, 346 U.S. 485, 498-99 (1953)).
156 Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 379-80 (2000) (“The fact of a common end hardly neutralizes conflicting means . . . and the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ.” (citation omitted)).
157 Id.
158 Id. & n.14.
out a statutory scheme to govern Section 8, but that it left the door open for state regulation.\footnote{See Montgomery County v. Glenmont Hills Assocs., 936 A.2d 325, 338 (Md. 2007) ("The Federal statute merely creates the scheme and sets out the guidelines for the funding and implementation of the program by [HUD] through local housing authorities. It does not preclude State regulation." (quoting Attorney Gen. v. Brown, 511 N.E.2d 1103, 1106 (Mass. 1987))).} Again, the courts’ observation is true, but hardly relevant in the context of obstacle preemption. No landlord has argued,\footnote{See, e.g., Glenmont Hills, 936 A.2d at 335 (Glenmont did not argue that the statutes in question “constitute such a pervasive regulation of public housing assistance for low-income families as to evidence an intent to exclusively occupy the field and exclude the States from participation in it.”).} nor does this Note contend, that Congress has preempted the field of affordable housing.\footnote{It is clear that Congress designed Section 8 to be a cooperative program between federal, state, and local governments. See 42 U.S.C. § 1437(a)(1) (2006).} States may regulate Section 8—\textit{insofar as their laws do not conflict with the federal law or stand as an obstacle to Congressional objectives.}\footnote{The Supreme Court emphasized the distinction between field preemption and conflict preemption in \textit{Gade}, discussed supra. There, the Court held that the federal act in question “does not foreclose a State from enacting its own laws to advance the goal of worker safety, but it does restrict the ways in which it can do so.” Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 103 (1992); see also Mich. Canns & Freezers Ass’n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 469, 470 (1984) (finding obstacle preemption existed even though the federal act in question did not “reflect a congressional intent to occupy the entire field of agricultural-product marketing” and despite the fact that “the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern” (quoting Fla. Lime & Avocado Growers, Inc., 373 U.S. 132, 144 (1963))); Mother Zion Tenant Ass’n v. Donovan, 865 N.Y.S.2d 64, 67 (N.Y. App. Div. 1st Dep’t 2008) (“[T]he historical exercise of state and local powers to regulate housing is not dispositive on the issue of actual conflict.”).}
Traffic Safety Administration (NHTSA) pursuant to the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act). The safety standard (Standard 121) imposed minimum stopping distances for trucks. In order to comply, some truck manufacturers had to equip vehicles with anti-lock brake systems (ABS). Subsequently, a federal court suspended Standard 121 due to concerns about the safety of ABS. The standard remained suspended at the time of plaintiffs’ suit.

Plaintiffs, who had been injured by defendant’s trucks, alleged that the absence of an ABS in the trucks was a negligent design that made the vehicles defective. Defendant Freightliner argued, inter alia, that plaintiffs’ common law claims were impliedly preempted “because the state-law principle they [sought] to vindicate stood as an obstacle to Congressional objectives behind the federal law.” The Court disagreed. First, neither the suspended standard nor the Safety Act itself addressed the need for ABS devices at all. Moreover, the NHTSA had not prohibited truck manufacturers from installing an ABS, despite concerns over the device’s safety. Thus, “a finding of liability against [defendant for not using ABS] would undermine no federal objective . . . with respect to ABS devices, since none exist[ed].”

In Sprietsma v. Mercury Marine, a case with a similar fact pattern to Geier, the Supreme Court also found no frustration of purpose. Prior to the lawsuit, the United States Coast Guard had declined to issue a regulation requiring propeller guards on motorboats. The survivor of a boat passenger killed by a collision with the boat’s unprotected propeller guard brought a tort action against the boat’s engine designer.

The Supreme Court held that plaintiff’s claim did not conflict with the Coast Guard’s decision not to regulate propeller guards. According to the Court, the Coast Guard’s inaction was “fully consistent with an intent to preserve state regulatory authority pending
the adoption of specific federal standards.” An examination of the legislative and regulatory history revealed that the primary reason behind the Coast Guard’s decision not to regulate was the absence of a standard propeller guard that would be equally effective on all types of boats on the market. Because the Coast Guard’s decision not to mandate propeller guards “[did] not convey an ‘authoritative’ message of a federal policy against propeller guards,” the state tort claims posed no obstacle to federal objectives.

Unlike the regulations involved in Freightliner Corp. and Sprietsma, the state and local source of income discrimination laws at issue in Brown and Glenmont Hills do conflict with a federal objective behind the Section 8 legislation. Thus, the Supreme Court’s preemption doctrine dictates a finding of frustration of purpose.

e. The Presumption Against Preemption Is Overcome

Both the Brown and Glenmont Hills courts ground their arguments on the well-known “presumption against preemption” in areas of traditional state and local regulation. Whether the presumption against preemption remains a thriving and meaningful doctrine is highly contested, but for argument’s sake, this Note assumes that the

177 Id. at 65.
178 Id. at 67. The Court did not take this explanation to preclude a tort verdict establishing “that some type of propeller guard should have been installed on this particular kind of boat equipped with respondent’s particular type of motor.” Id.
179 Id. The Sprietsma Court distinguished this case from Geier:

The Coast Guard’s decision not to impose a propeller guard requirement presents a sharp contrast to the decision of the Secretary of Transportation that was given preemptive effect in Geier . . . . As the Solicitor General had argued in that case, the promulgation of Federal Motor Vehicle Safety Standard (FMVSS) 208 embodied an affirmative “policy judgment that safety would best be promoted if manufacturers installed alternative protection systems in their fleets rather than one particular system in every car.”

Id. at 67 (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 881 (2000)).

180 Montgomery County v. Glenmont Hills Assocs., 936 A.2d 325, 335 (Md. 2007); Attorney Gen. v. Brown, 511 N.E.2d 1103, 1106 (Mass. 1987). Housing is an area in which state and local governments have traditionally assumed significant regulatory control.

181 For example, in Geier v. American Honda Motor Co., a case that involved motor vehicle safety, which is an area traditionally occupied by state law, the Court virtually ignored the presumption against preemption in holding that the federal statute preempted plaintiff’s common law claims. 529 U.S. 861, 867 (2000). Various scholars have argued that the presumption against preemption does not exist in practice. See, e.g., Davis, supra note 115, at 968 (“There is no . . . presumption [against preemption] any longer, if, indeed, there ever really was one.”); Susan Raeker-Jordan, A Study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?, 17 BYU J. PUB. L. 1 (2002); Juliet P. Stumpf, States of Confusion: The Rise of State and Local Power over Immigration, 86 N.C. L. REV. 1557, 1605 (2008) (“The vitality of the rule resisting federal preemption in areas of traditional state concern has been widely called into question.”); Note, New Evidence on the
Supreme Court has not altogether abandoned it. Operating under this assumption, the Massachusetts and Maryland courts start off on the right foot: Standard Supreme Court doctrine dictates that the presumption applies most strongly where Congress has legislated in a field historically occupied by the states,182 and housing is undoubtedly such a field. However, the presumption against preemption can be overcome,183 even in cases dealing with areas of traditional state regulation.184 The Massachusetts and Maryland courts fail to acknowledge the ways in which the presumption may be overridden.

The Glenmont Hills court reasons that when the state’s police powers are implicated, the presumption against preemption can be overcome only by an express statement of preemptive intent from Congress.185 Yet the Supreme Court has held that express Congressional intent to preempt is not required to overcome the presumption.186 In Rice v. Santa Fe Elevator Corp., after stating that

Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions, 120 Harv. L. Rev. 1604, 1604 (2007) (noting that the application of the presumption has been “remarkably inconsistent”). See generally Viet D. Dinh, Reassessing the Law of Preemption, 88 Geo. L.J. 2085 (2000) (arguing that the presumption against preemption is an ineffective attempt by the Supreme Court to “patch jurisprudential cracks, caused by the want of . . . a solid theoretical foundation for legislative federalism”). At the outset, then, it is wise to remember that the presumption is simply a presumption—it is the starting point of an analysis, not a conclusion.

182 See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), and Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996), for the Supreme Court’s modern statement of the presumption against preemption. In Medtronic, the federal statute in question contained an express preemption provision. 518 U.S. at 481-82. Still, the Court found that the presumption against preemption precluded a finding that plaintiff’s common law claims were preempted. In so holding, the Court gave great weight to the fact that “[s]tates have exercised their police powers to protect the health and safety of their citizens.” Id. at 475. Conversely, the presumption against preemption is weakest in areas in which the federal government has exerted comprehensive regulatory control. For example, in Buckman Co. v. Plaintiff’s Legal Committee, the Court found such a presumption lacking:

Policing fraud against federal agencies is hardly “a field which the States have traditionally occupied,” such as to warrant a presumption against finding federal pre-emption of a state-law cause of action. To the contrary, the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law. . . . Accordingly—and in contrast to situations implicating “federalism concerns and the historic primacy of state regulation of matters of health and safety”—no presumption against pre-emption obtains in this case.

531 U.S. 341, 347-48 (2001) (citations omitted); see also United States v. Locke, 529 U.S. 89, 108 (2000) (“The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.”).

183 See, e.g., Geier, 529 U.S. 861; see also Raeker-Jordan, supra note 181.

184 See, e.g., Geier, 529 U.S. 861; see also Raeker-Jordan, supra note 181.

185 Glenmont Hills, 936 A.2d at 335 (interpreting Rice and Medtronic’s pronouncement that “the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress” to mean that “when Congress does not expressly state its intent, there is a presumption against preemption”) (emphasis added).

186 Rice, 331 U.S. at 230.
“the historic police powers of the States” should not be superseded by federal law “unless that was the clear and manifest purpose of Congress,” the Court explained that Congress’s purpose “may be evidenced in several ways,” including the situation where “the state policy [produces] a result inconsistent with the objective of the federal statute.”187 Thus, in cases of implied preemption such as the present case, where Congress has not explicitly stated its intent to preempt state law, the presumption against preemption may be overcome by demonstrating that the state statute frustrates federal objectives.188 As this Note argues, state source of income discrimination laws frustrate the means by which Congress aimed to execute § 1437f. The Brown and Glenmont Hills courts fail to acknowledge that the presumption against preemption can be overcome in cases of implied preemption.

f. HUD’s View of the Preemption Issue Is Contrary to Congressional Intent

Finally, the Glenmont Hills court supports its argument against preemption by referencing 24 C.F.R. § 982.53(d), adopted in 1999.189 Section 982.53(d) provides in part that “[n]othing in Part 982 is 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.”190 The Glenmont Hills court cites this provision as proof that the federal government placed its stamp of approval on source of income discrimination laws.191 The court looks to Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.192 as support for the proposition that the Supreme Court gives “considerable weight” to an executive agency’s interpretation of a statute.193 Yet Chevron makes clear that “[t]he judiciary is the final authority on issues of statutory construction, and must reject

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187 Id.
188 As Susan Raeker-Jordan argues:
   Under the doctrine as applied in Rice, once it is determined that state action would obstruct “federal purposes,” Congress’s intent to pre-empt... becomes “clear and manifest.” The result is pre-emption of the state law, even if that law involves historic state police powers and in spite of the caution against lightly inferring pre-emption of traditional state law domains.

189 24 C.F.R. § 982.53 (2008) was promulgated to implement the merger of the certificate and voucher programs. The merger of these two programs is discussed supra note 18.
190 24 C.F.R. § 982.53(d).
191 Montgomery County v. Glenmont Hills Assocs., 936 A.2d 325, 337 (Md. 2007).
193 936 A.2d at 337 (quoting Chevron, 467 U.S. at 844).
Administrative constructions which are contrary to clear congressional intent.”

Here, the case for rejection is strong. HUD’s view that state or local laws prohibiting source of income discrimination are not preempted by § 1437f is contrary to Congress’s intent that Section 8 remain a voluntary program. The Glenmont Hills court, therefore, erred in deferring to HUD’s interpretation of the federal legislation.

CONCLUSION

To date, the New York Appellate Division is the only state appellate court that has held in favor of a landlord’s obstacle preemption argument. The Seventh Circuit Court of Appeals has expressed its support for the argument in dictum. One reason that landlords have not been highly successful thus far may come down to the tenants’ choice of forum. Plainly stated, state courts have a strong interest in upholding state laws, and federalism concerns likely deter state judges from invalidating state laws on preemption grounds. Federal courts, on the other hand, are more likely to safeguard Congressional action and may be more sympathetic to a landlord’s preemption argument. Ultimately, preemption challenges to source of income discrimination
laws would likely have a higher success rate if brought in federal court.200

Landlords across the country are likely to continue to challenge state and local source of income discrimination laws in the coming years. Whether the preemption arguments are heard in state or federal court, judges should decline to follow the Brown court’s line of reasoning, as there is no sound basis in preemption law for upholding the state legislation. States may disagree with the federal government’s approach at combating the low-income housing shortage—and there may be significant drawbacks to a voluntary Section 8 program201—but state lawmakers, legislators, and judges alike have a responsibility under the United States Constitution to ensure that state law does not undercut federal legislation. Courts should invalidate the state and local laws on the ground that mandating participation in Section 8 runs counter to federal preemption doctrine and violates the Supremacy Clause. If tenants believe that the federal government should mandate landlord participation in Section 8, tenants’ associations can lobby Congress to change the federal law. However, the doctrine of federal preemption should not be distorted and misapplied.

200 Getting to federal court may pose a problem, however. If the landlord and tenant are citizens of different states (which is unlikely), landlords may be able to remove the case to federal court under 28 U.S.C. § 1441 (2006). If diversity jurisdiction does not apply, landlords will only be able to remove if the tenant has also raised a federal claim, such as under the federal Fair Housing Act. See Beck, supra note 21, at 158; Fernandez, supra note 41; see also STUDY ON SECTION 8 VOUCHER SUCCESS RATES, supra note 40, at 3-17 (“[A]ll else equal, enrollees in programs that are in jurisdictions that bar discrimination based on source of income . . . had a statistically significantly higher probability of success over 12 percentage points.”). The fact that landlords may legally decline to participate in Section 8 has also undermined Congress’s goal of “promoting economically mixed housing.” See THE FUTURE OF FAIR HOUSING, supra note 37; Margery Austin Turner & Dolores Acevedo-Garcia, The Benefits of Housing Mobility: A Review of the Research Evidence, in KEEPING THE PROMISE, supra note 7, at 9; see also S. REP. NO. 105-21 (1997), at 33 (“Studies have also found that recipients of tenant-based rental assistance were less likely than public housing residents or unassisted low-income families to live in concentrated poor urban communities; however, the Committee is concerned that concentration of poor and minority households has also occurred in the tenant-based [Section 8] program.”); cf. 42 U.S.C. § 1437f(a) (2006). Landlord non-participation is not the only reason why Section 8 has not achieved widespread economic integration. As explained in THE FUTURE OF FAIR HOUSING, supra note 37, ch. VI:

The Section 8 program has fallen short of its potential for a number of reasons. There is insufficient counseling and information about the full range of choices families have; low maximum rents restrict tenants to certain areas; landlord discrimination occurs in some areas; and bureaucratic impediments can make moving from one “jurisdiction” to another more difficult than it needs to be.