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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Debora Barrientos et al., Plaintiffs, vs. 1801-1825 Morton, LLC, Defendant.	CASE NO. CV 06-06437 ABC (FMOx) Joint Memorandum Of *Amici Curiae* The City of Los Angeles And The Housing Authority Of The City Of Los Angeles In Support Of Plaintiffs' Motion for Summary Judgment; [Appendix of Non-Federal Authorities lodged herewith] Judge Audrey B. Collins Date: August 20, 2007 Time: 10:00 a.m. Courtroom 680

Amicus curiae the City of Los Angeles, and *amicus curiae* the Housing Authority of the City of Los Angeles (an independent agency chartered by the State of California), jointly file this Memorandum in support of Plaintiffs' Motion for Summary Judgment, as authorized by the minute order issued by this Court following the April 9, 2007 Scheduling Conference (docketed 4/14/07).

I. INTRODUCTION

In Los Angeles, tenants in rent control buildings cannot lose their homes simply because their landlord no longer wishes to abide by the original terms of the tenancy, or wishes to escape the limits on annual rent increases imposed by law. Defendant landlord asserts, however, that both federal and California law require that the most vulnerable renters -- those who qualify for assistance under the Section 8 program -- must be denied this protection that their unassisted next-door neighbors undisputedly enjoy. Not surprisingly, neither federal nor California law in fact commands such a discriminatory result.

II. BACKGROUND AND STATEMENTS OF INTEREST BY *AMICI*

A. The Section 8 Housing Choice Voucher Program

Section 8 of the Housing Act of 1937 provides for federally financed rent subsidy programs for low income citizens to be administered by local housing agencies ("PHAs"). Under the "voucher program" at issue, a Section 8 family is expected to pay a specified minimum portion of its income as rent, and is eligible to receive an additional maximum amount as a subsidy. The family then is free to rent an apartment for whatever amount the landlord requires, so long as (a) the family' actual share of the initial rent does not exceed 40 percent of its adjusted income, and (b) the initial rent does not exceed the rents charged unassisted tenants for comparable units. The family also may remain in the unit, even if subsequent rent increases raise the family's share above 40% of its adjusted income, so long as the family is willing and able to pay its share, and the overall rent remains comparable to unassisted rents. *See* 42 U.S.C. § 1437f(o)(2); 24 C.F.R. §§ 982.1, .503-.508.

The Housing Authority of the City of Los Angeles ("HACLA"), a PHA chartered by the State of California in 1938, administers the Section 8 program in Los Angeles (the second largest local program in the nation). According to HACLA records, 26,507 families in the Voucher program currently reside in units subject to Los Angeles rent control. Close to 60% of those families (14,884) are headed by an elderly or disabled person, and close to 40% (9,753) include minor children. The average annual family income is just $13,441.

B. The Los Angeles Rent Stabilization Ordinance

The Los Angeles Rent Stabilization Ordinance ("LARSO") was adopted in response to the "shortage of decent, safe and sanitary housing in the City of Los Angeles resulting in a critically low vacancy factor." L.A.M.C. § 151.01.

> Tenants displaced as a result of their inability to pay increased rents must relocate but as a result of such housing shortage are unable to find decent, safe and sanitary housing at affordable rent levels. Aware of the difficulty in finding decent housing, some tenants attempt to pay requested rent increases, but as a consequence must expend less on other necessities of life. This situation . . . especially creat[es] hardships on senior citizens, persons on fixed incomes and low and moderate income households.

Id.

Under LARSO, landlords and tenants generally remain free to agree on the *initial* terms of tenancy, including the rent amount. Thereafter, however, the landlord may only increase rents (absent special circumstances) by 3% to 8% each year (depending upon inflation), *see* L.A.M.C. § 151.06, and may not impose unilateral changes in the other terms and conditions. *See* L.A.M.C. § 151.09A.2(c).

Under LARSO, the landlord may terminate the tenancy if the tenant violates material terms, damages the property, or engages in or permits criminal or drug activity. The landlord also may terminate the tenancy for certain business reasons

(including to renovate the unit, to remove the unit from the rental market, or to place a family member or resident manager in the unit), so long sufficient notice is provided and specified amounts are paid to compensate the tenant for the costs of relocation. However, neither unspecified economic reasons, nor expiration of the lease term, is a ground for terminating a tenancy. *See* L.A.M.C. § 151.09A, G.

C. HACLA's Statement Of Interest

HACLA seeks judicial vindication of the right of its more than 26,000 client families living in rent control units to enjoy the same security in their homes as their unassisted next-door neighbors enjoy. Hundreds of recipient families -- either unable or unwilling to fight in court -- already have given up their homes in response to notices similar to those at issue in this case. These forced relocations not only disrupt lives, but impose substantial economic hardship as these low income families must come up with move in costs for a new apartment (typically, first and last month's rent), must pay moving costs (which are even higher for the elderly and disabled families, who can do little of the work themselves), and often must pay new higher rents or accept inferior housing (especially long term tenants whose old rent often was held by LARSO below today's initial rent levels).

D. The City Of Los Angeles' Statement Of Interest

The City of Los Angeles seeks judicial vindication of its right to provide the protections of LARSO equally to all families in rent control units, as the duly elected representatives of the citizens of Los Angeles have determined is proper.

III. FEDERAL LAW DOES NOT PREEMPT LARSO'S BAN ON EVICTIONS FOR UNSPECIFIED ECONOMIC REASONS

Defendant's primary contention is that LARSO's ban on tenancy terminations for unspecified economic reasons is preempted because it "conflicts" with the HUD regulation implementing the "good cause" tenancy termination provision in the Section 8 statute. Opp. at 1, 6-12. This contention is wholly without merit.

A. Defendant Cannot Prevail On Its "Conflict" Preemption Claim Unless It Clearly Demonstrates That Enforcement Of LARSO Would So Undermine The Section 8 Program As To Overcome The Strong Presumption Against Preemption

As the Supreme Court has consistently declared, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' we 'start with the assumption 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.'" *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1995) (ellipsis in original) (citations omitted). A party asserting "conflict" preemption "must thus present a showing . . . of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation . . . can constitutionally coexist with federal regulation." *Hillsborough County v. Automated Med. Labs., Inc.,* 471 U.S. 707, 716, (1985). Absent a claim that it is physically impossible to comply with both federal and state law, "the 'pertinent question [ ]' is whether the state law 'sufficiently injure[s] the objectives of the federal program to require nonrecognition.'" *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065, 1071 (9th Cir. 2003) (brackets in original) (citation omitted). "The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power." *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219, 241 (2nd Cir. 2006), *citing Silkwood v. Kerr-McKee Corp.*, 464 U.S. 238, 256 (1984).

These principles are fully applicable here. *See Hillsborough County*, 471 U.S. at 712, 715-16, (1985) (same principles apply to claims that either federal statutes or regulations preempt either state laws or local ordinances). Indeed,

because LARSO regulates "in fields of traditional state regulation,"[1] this case is indeed one in which "preemption is even less readily found." *Independence Park Apartments v. U.S.*, 449 F.3d 1235, 1243 (Fed. Cir. 2006) (applying this principle in case asserting preemption of LARSO's rent controls). Accordingly, defendant cannot prevail on its claim of "conflict" preemption unless it clearly demonstrates that application of LARSO in this case would so injure federal goals for the Section 8 program as to require displacement of the traditional police powers of the City of Los Angeles to regulate landlord-tenant relations within its borders. *See Kargman v. Sullivan*, 552 F.2d 2, 6 (1st Cir. 1977) ("Our task on review is to determine whether the [city ordinance] ... so significantly frustrated federal interests in the operation of the [NHA] program that [the city's] traditionally strong interests in local rent control must yield"), *quoted in Topa Equities*, 342 F.2d at 1071.

B. Defendant Has Not Met Its Burden To Clearly Demonstrate That There Is A Conflict Between LARSO And The Section 8 Program Sufficient To Warrant A Finding Of Preemption

Defendant has failed to identify a sufficient reason, even under federal law, for terminating plaintiffs' tenancies. Defendant's bare desire to exit the Section 8 program for these units simply is not enough. *See* 49 F.R. 12234 (columns 2-3) (refusing to adopt exception to regulatory requirement of "good cause" for owners withdrawing from Section 8 program).[2] A finding of preemption therefore is improper because "any conflict between state and federal law, on the facts of this case, is entirely speculative." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1049 (9th Cir. 1981). Even if a conflict did exist,

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[1] *See generally Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) ("This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular").

[2] The only other potential reason identified in defendant's termination notice is a desire to lease the units at a higher rental rate. *See* Stipulated Facts ¶ 43. Defendant's desire to escape LARSO's rent control provisions cannot constitute federal good cause, however, given HUD's express authorization for local rent control to limit the rents charged Section 8 tenants. *See* 24 C.F.R. § 982.509.

however, it would be insufficient to support preemption.

1. LARSO's Ban On Terminating Tenancies For Unspecified Economic Reasons Is Not Preempted Simply Because The Section 8 Regulations May Permit Such Terminations

Defendant landlord first argues that "conflict" preemption applies simply because "24 CFR 982.310(D)(1)(iv) [sic] gives Section 8 landlords the right to terminate tenancy for an economic reason" while "LARSO takes that right away." *See* Opp. at 1:9-28. This argument lacks merit, however, because it is well established that -- by itself -- "proscription by [a state] of conduct that federal law might permit is not sufficient to warrant preemption."[3] *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 498 (9th Cir. 1984) (upholding Alaska statute prohibiting type of oil tanker deballasting in state waters that is permitted by Coast Guard regulations implementing federal statute) (brackets in original) (internal quotation marks omitted); *seeKargman*, 552 F.2d at 7 ("mere fact that Boston's [maximum permissible] rents were lower [than HUD's maximum permissible rents] does not, of itself, present an impermissible actual conflict with federal law").

2. LARSO's Ban On Terminating Tenancies For Unspecified Economic Reasons Does Not Frustrate National Housing Policy And Therefore Is Not Preempted

Defendant next argues that "conflict" preemption is established because LARSO's ban on terminating tenancies for unspecified economic reasons "interferes with the methods" selected by HUD to effectuate the affordable housing goals of the Section 8 program. According to defendant, "HUD has deemed the

[3] *Ayers v. Philadelphia Housing Auth.*, 908 F.2d 1184 (3rd Cir. 1990) -- the only case defendant cited as authority for its first argument, *see* Opp. at 1:9-28 -- does not support a different conclusion. *Ayers* involved a claim that HUD regulations governing the "Turnkey III" program -- in which the local housing authority itself is the landlord -- preempted Pennsylvania statutes that could delay commencement of an eviction action for 120 days after a notice of default. While *Ayers* did find "conflict" preemption, it did not do so on the simple ground that state law prohibits what federal law permits. Rather, the Third Circuit found preemption because "the application of Pennsylvania law . . . would frustrate many of the specific objectives of the Turnkey III housing program," and could "forestall foreclosure far beyond the times *mandated* by federal regulation." *Id*. at 1192 (italics added). As none of these further indicia of "conflict" preemption are present here, *Ayers* is irrelevant.

best method to attract owners into the Voucher Program is to protect the landlord's right to opt out when it is no longer in their economic interest to rent to a Section 8 tenant," and LARSO therefore cannot eliminate that "right". *See* Opp. at 7.

This argument likewise lacks merit. Defendant has not produced any evidence (much less the requisite *clear* evidence[4]) that HUD ever determined that it was necessary or proper to permit landlords to terminate Section 8 tenancies for unspecified economic reasons where, as in Los Angeles, those reasons would not be sufficient to terminate unassisted tenancies. In addition, HUD lacks the statutory authority in any event to strip from local Section 8 tenants the protections against such terminations provided by LARSO to all rent control tenants.

a. HUD Never Determined That It Is Necessary Or Proper To Permit Terminations Of Section 8 Tenancies For Unspecified Economic Reasons Where Local Law Generally Precludes Such Terminations

Defendant correctly notes that in 1984, and again in 1995, HUD expressed the general view that permitting landlords to terminate Section 8 tenancies for legitimate business or economic reasons might be necessary -- and certainly was proper -- in order to encourage landlord participation in the Section 8 program. However, a full review of the content and context of HUD's statements reveals that its only concern was to encourage participation by those landlords who would have the right to effectuate such terminations under local law if they chose instead to rent to unassisted tenants. Put another way, HUD acted to avoid the disincentive that would be created if landlords had fewer rights to terminate Section 8 tenancies than unassisted tenancies for economic reasons, but HUD had no intention to give landlords greater rights to terminate Section 8 tenancies than unassisted tenancies.

[4] *See Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 498 (9th Cir. 1984) ("if we are left with a doubt as to congressional purpose, we should be slow to find preemption, '[f]or the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden'") (citation omitted).

(1) HUD's 1984 Statements Regarding Its "Good Cause" Regulation

Prior to 1981, HUD regulations provided that a Section 8 lease had to have a term of between one and three years, but could contain a clause allowing lease termination on 30 days notice. Notwithstanding Congressional intent to the contrary (as expressed in the then statutory requirement that PHAs had to approve any evictions),[5] the HUD regulations did not impose any "good cause" limitation on the landlord's right to refuse to renew the lease, or on the landlord's exercise of any provision for termination on 30 days notice. *See* 47 F.R. 33497, 33499 (column 2).

In 1981, Congress amended the Section 8 statute to eliminate PHA approval of evictions, and to add the original "good cause" statutory provision: "the owner shall not terminate the tenancy 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." *See* 47 F.R. 33497 (column 2). HUD then issued new interim regulations requiring that a Section 8 lease provide that the landlord could not terminate the tenancy during the term of the lease, or refuse to renew a lease, except for the reasons stated in the "good cause" statutory provision. HUD declined to provide guidance regarding application of this standard, however. *See* 47 F.R. 33498 (column 3) to 33499 (column 1). And, because "a provision for termination of the tenancy without cause on thirty days notice during the lease term would not be consistent with the new statutory grounds for termination of the tenancy," HUD barred such provisions. 47 F.R. 33498 (column 1).

In 1984, HUD issued final regulations that modified its interim "good cause" regulation in response to:

> [c]omments from PHAs and from the National Association of Housing and Redevelopment Officials emphasiz[ing] that operation of the

[5] *See Swann v. Gastonia Housing Auth.*, 502 F.Supp. 362, 364-65 (W.D.N.C. 1980), *aff'd in pertinent part* 675 F.2d 1342, 1345 (4th Cir. 1982).

> Section 8 Existing Housing Program depends on the voluntary participation of private landlords. The comments state that owner willingness to rent units to Certificate holders will be hurt by elimination of provision for termination by the owner on 30 days notice without cause, and by creation of a "perpetual tenancy" terminable only for cause.

49 F.R. 12231 (columns 1-2). These comments, however, only envisioned the disincentive that would arise in the typical local jurisdiction where the landlords would have these unfettered rights of termination if they rented to unassisted tenants. Thus, with respect to concerns about elimination of termination on 30 days notice, HUD noted PHA comments "that allowing termination on notice is closer to *local* landlord tenant practice." 49 F.R. 12231 (column 2) (italics added). Similarly, with respect to concerns about the requirement that landlords have good cause for non-renewal, HUD noted PHA comments "that the good cause requirement interferes with *normal* relationships between a landlord and a tenant," and that "[t]he regulations should reflect the requirements of the *private* rental market, and should recognize the right of the owner to terminate the tenancy without cause at the end of the lease." *Id*. (italics added).

In other words, the PHA comments merely repeated the argument that the Senate found compelling when it passed the original version of the 1981 statutory amendment (a version which did not include a federal good cause requirement); namely, that owner participation would be encouraged by making Section 8 tenancy terminations the same as unassisted tenancy terminations under local law:

> The provision of housing opportunities for assisted families depends on voluntary participation by private owners of existing housing. The proposal would assure owners that the procedural and substantive rights of the assisted tenant are *the same as those applicable to non-subsidized tenants*. The amendment is expected to encourage more

owners to participate in the Section 8 existing housing program.

S. Rep. 97-144, *reprinted in* 1981 U.S.C.C.A.N. Vol. 2 at 552 (italics added).

It was in response to *this* argument that HUD amended its "good cause" regulation to state that the "other good cause" category could include "a business or economic reason for termination of the tenancy (such as sale of the property, renovation of the unit, desire to rent the unit at a higher rental)." As HUD stated:

> The good cause concept should be flexible and open to application in concrete cases, but there is a critical need to provide explicit regulatory assurance to prospective Section 8 owners that *legitimate* owner concerns will be recognized as grounds for termination of tenancy. With the provision for automatic and indefinite extension of the tenancy, without any predefined limit, this assurance may be essential to promote broad participation by owners.
>
> . . .
>
> The explicit regulatory statement that a business or economic reason is good cause for termination of tenancy should help PHAs in responding to owner concern, *as described in the public comment*, with the good cause requirement for termination of tenancy, and in particular with elimination of the provision for termination on 30 day [sic] notice.

49 F.R. 12233 (column 3) to 12234 (column 1) (italics added).

In short, HUD's explicit recognition that economic reasons could constitute "other good cause" for terminating a tenancy was a response to the concern that the statutory "good cause" requirement otherwise might deter participation by those owners who would be free under local law to terminate the tenancies of unassisted tenants for these reasons (or no reason at all). Indeed, this was only one of several actions taken by HUD in 1984 to assure that Section 8 tenancies impose "minimal demands on the owner *beyond the normal requirements of an unsubsidized*

tenancy." 49 F.R. 12233 (column 3) (italics added) (rejecting proposal to require advance notice to tenants of what conduct is ground for termination); *accord* 49 F.R. 12235 (rejecting proposal to specify form of termination notice because "the owner is and *should be subject only to the same tenant notice requirements which apply to an unassisted tenant*) (italics added). Contrary to defendant assertions, there is absolutely no evidence that HUD considered, much less decided, that it should go further and strip from Section 8 tenants any greater rights that all tenants may enjoy in particular local jurisdictions (such as Los Angeles), thereby turning Section 8 recipients into second class citizens.

(2) HUD's 1995 Statements Regarding Its "Good Cause" Regulation

In 1993, HUD proposed new regulations, principally to create a single set of rules to govern most aspects of both the original "certificate program" and the subsequently added "voucher program." *See* 58 F.R. 11292 (columns 2-3). In July 1995, after receiving comments, HUD issued a new "good cause" regulation that was "largely the same as the provisions promulgated by the Department in 1984 for the certificate program." 60 F.R. 34673 (column 2).

When issuing this new regulation, HUD noted comments that "claim that the rule provides for a perpetual lease, and discourages owner participation"; that "state that the rule should allow termination of tenancy without cause by the family or the owner after the first year of the lease term"; and that "assert that the owner is locked in, whereas the family can terminate the lease on 60 days notice at the end of the first year." 60 F.R. 34674 (column 1). In response, HUD stated:

> HUD believes that the rule reflects a reasonable balance between the interest of the assisted tenant and the owner within the context of existing law. On the one hand, the lease protects the tenant against arbitrary and ungrounded termination by the owner. On the other hand, the owner is not locked in, but may terminate the tenancy for

lease violation or other good cause.

After the initial year, the family may terminate the tenancy on notice to the owner. After the initial year, the owner may terminate the tenancy for other good cause -- specifically including a "business or economic reason" for termination of the tenancy.

60 F.R. 34674 (column 1).

HUD also noted that some comments "recommend that HUD give more definition of 'other good cause' and suggest that the existing provisions have been used as 'legal loopholes' for owner eviction of tenants." 60 F.R. 34673 (column 1). As part of its response, HUD then quoted its 1984 statements that "[t]he good cause concept should be flexible and open to application in concrete cases, but there is a critical need to provide explicit regulatory assurance to prospective Section 8 owners that legitimate owner concerns will be recognized as grounds for termination of tenancy," and that "[t]his assurance may be essential to promote broad participation by owners." 60 F.R. 34673 (column 2).

Contrary to defendant's assertion, there is absolutely no evidence that any of these statements by HUD reflect a decision to give landlords *greater* rights to evict Section 8 tenants than those landlords would have under local law to evict unassisted tenants. Rather, HUD's only apparent concern was to minimize the disincentive to owner participation that could be created where the federal "good cause" standard is more restrictive of landlord rights than local law. Three contextual facts make this plain.

First, HUD statements in connection with the 1993 proposed regulations confirm that its focus was on the typical jurisdiction in which the federal "good cause" requirement is more restrictive of landlords' eviction rights than local law:

For all program tenancies, the owner may only terminate the tenancy for statutory good cause grounds, whether during the course of the initial or extended term, or at the end of the initial or any extended

term. In this respect, tenancies in the Section 8 tenant-based programs differ from private unassisted tenancies, where the owner may typically evict the tenant without cause at the end of the lease term.

58 F.R. 11305 (columns 2-3). Nowhere did HUD mention jurisdictions, like Los Angeles, where local law imposes on all landlords "good cause" requirements as restrictive or more restrictive than the federal "good cause" standard.

Second, the only concern being raised by landlords at the time was (as it had been in 1984) that the federal "good cause" requirement discouraged participation to the extent it *differed* from local law. Thus, in February 1995 (five months before issuance of the new "good cause" regulation), a representative of the National Multi Housing Council and the National Apartment Association testified before Congress in favor of various proposals "to make tenant-based assistance more widely accepted by private apartment owners."[6] *Downsizing Government and Setting Priorities of Federal Programs: Hearing Before Subcommittees of the Committee on Appropriations*, U.S. House of Reps., 104th Cong., 1st Sess.(2/9/95 Testimony of Ron Ratner) (hereafter, "1995 Hearings") at 1152. These proposals included a proposal "to repeal the 'endless lease' provision which takes away private owners' *usual* option to not renew a lease at the end of the term," as well as others that "are similar . . . in that they make the relationship between Section 8 tenant and owner *more like a private market relationship*." 1995 Hearings at 1160 (italics added); *accord id*. at 1152. In support of these proposals, the national landlords' representative placed into the record a 1994 consulting report that concluded that "*the key to making the program more attractive to these owners is to make Section 8 operate as much like the unassisted market as possible*." 1995 Hearings at 1165 (italics in original).

Third, by quoting its 1984 statements in its 1995 rulemaking, HUD made

[6] These landlord groups actively pressed these same proposals before Congress in 1994 as well. *See* 1995 Hearings at 1160.

clear its intent to accomplish nothing more than what it sought to accomplish in 1984; namely, avoidance of the disincentive to participation that would occur if landlords had fewer rights to terminate Section 8 tenancies for economic reasons than they had under local law to terminate unassisted tenancies.

In sum, the application of LARSO's ban on tenancy terminations for unspecified economic reasons to *both* unassisted tenants *and* Section 8 tenants is fully consistent with the method HUD has selected to encourage landlord participation in the Section 8 program (i.e., minimizing the differences between Section 8 and unassisted tenancies). Therefore, there is no preemption of LARSO.

b. Congress Did Not Authorize HUD To Strip From Local Section 8 Tenants The Tenancy Termination Protections LARSO Provides To All Tenants

As stated in the Supreme Court case regarding preemption by regulation cited by defendant: "[I]f the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it *unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned*.'" *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (italics added) (citation omitted). Therefore, even if HUD had decided to preempt more expansive local protections against tenancy terminations for unspecified economic reasons, preemption would not follow because the Section 8 statute and its legislative history demonstrate that Congress would not have sanctioned such preemption.

As noted above, in 1994 the National Multi Housing Council and the National Apartment Association commissioned a consulting group to study potential improvements to the Section 8 program. The report produced a series of recommendations "aimed at making the Section 8 program more attractive to owners of good-quality properties in the private rental market. The way this should be accomplished is by making the Section 8 process *as similar to regular market operations as possible*." 1995 Hearings at 1169 (italics added). Thus, the report

recommended, *inter alia*, that the federal "good cause" requirement for non-renewal of a lease should be eliminated. *See* 1995 Hearings at 1182, 1196. However, the report also stated that under its proposals "the Section 8 resident *would retain the protections provided to all renters in the local jurisdiction*." 1995 Hearings at 1187 (italics added).

The landlord groups turned the consulting report recommendations -- including the specific proposal to eliminate the "good cause" for renewal requirement (i.e., the so-called "endless lease" provision) -- into legislative proposals, and lobbied Congress to adopt them as a means of encouraging owner participation in the Section 8 program (including by placing the consulting report into the record at the hearings on the proposals). *See* 1995 Hearings at 1152, 1160; 1995 WL 602577 (F.D.C.H.) (Oct. 13, 1995 Testimony of Christina Garcia). Congress adopted these proposals on a temporary basis in 1996. *See, e.g.*, Pub. L. No. 104-134, § 203(c)(2), 110 Stat. 1321, 1321-281 (Apr. 26, 1996) (temporary elimination of requirement of good cause for non-renewal of Section 8 lease).

In 1997, the landlord groups returned to Congress to urge permanent adoption of their various proposals. In the testimony of their representative, the landlord groups reminded Congress that the 1994 consulting group study "found that owners of multifamily housing would be more likely to participate in the program if it were amended *to operate as much as possible within the bounds of the private marketplace*." 1997 WL 165570 (F.D.C.H.) (Apr. 9, 1997) (Testimony of Thomas Schuler) ("1997 Hearings"). This meant that "Section 8 recipients *should receive the same protections as their nonsubsidized neighbors* but no more." *Id.* (italics added). Accordingly, while the landlords groups urged Congress to eliminate permanently the federal requirement for a landlord to have "good cause" to fail to renew a lease, they also assured Congress that doing so:

> will in no way deny Section 8 recipients the rights and protections provided to non-subsidized residents. All residents are protected under

> the Fair Housing Act, the Americans with Disabilities Act, *and state and local resident protection laws*. These laws provide a comprehensive set of protections *for all residents, both subsidized and non-subsidized*.

1997 Hearings (italics added). Congress then permanently amended the statute in 1998 in accordance with the landlord groups' recommendations.[7] *See* P.L. 105-276 § 545, 112 Stat. 2461, 2599-2600 (Oct. 21, 1998). *See generally McNabb v. Bowen*, 829 F.2d 787, 791 (9th Cir. 1987) ("Statements made by parties integral to the considered bill at committee hearings shed some light on legislative intent").

Three aspects of the 1998 amendments, and their legislative history, firmly establish that Congress would not authorize HUD to preempt the protections against tenancy terminations for unspecified economic reasons that LARSO provides to both Section 8 and unassisted tenants. First, Congress adopted the landlord groups' position that the way to encourage landlord participation is to make Section 8 tenancies as much like unassisted tenancies as possible:

> The Committee bill recognizes that the lease conditions under the current section 8 programs have deterred private owners from participating in the programs because they require owners to treat assisted residents differently from unassisted residents. The Committee bill reforms the lease conditions *to make the new voucher program operate as much like the unassisted market as possible*.

S. Rep. 97-105 at 36, 1997 WL 282462 (Leg. Hist.) (italics added).

Second, Congress also adopted the landlord groups' position that -- even where federal law does not specifically constrain a landlord's actions against Section 8 tenants -- landlords still are bound by generally applicable tenant

[7] A representative of the same landlord groups gave almost identical testimony prior to adoption of the temporary amendments in 1996. *See* 1995 WL 602577 (F.D.C.H.) (Oct. 13, 1995 Testimony of Christina Garcia).

protection laws, including local tenant protection laws:

> The Committee recognizes that rules such as . . . the "endless lease" were created to protect assisted households from owner discrimination. 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.

S. Rep. 97-105 at 36, 1997 WL 282462 (Leg. Hist.) (italics added).

Third, Congress expressly provided that evictions must comply with both the procedural *and substantive* requirements of applicable state and local law. In particular, the 1998 amendments added 42 U.S.C. § 1437f(o)(7)(E), which provides that "any termination of tenancy under this subsection shall be preceded by the provision of written notice by the owner to the tenant specifying the grounds for that action, *and any relief shall be consistent with applicable State and local law*" (italics added). This provision and the other amendments:

> allows owners to terminate the tenancy *on the same basis* and in the same manner as they would for unassisted tenants in the property. Lease terminations would have to comply with applicable State, and local law.

S. Rep. 97-105 at 37, 1997 WL 282462 (Leg. Hist.) (italics added).

In short, even when Congress determined that encouraging owner participation requires that landlords be free under federal law to terminate Section 8 tenancies for *any* reason at the end of the lease term, Congress also determined that more protective local tenant protection laws should *not* be displaced. *See Rosario v. Diagonal Realty, LLC*, Slip Op. at 5-8 (N.Y. July 2, 2007). *A fortiori*, Congress has not authorized HUD to displace LARSO's more protective provisions when -- as in the case of mid-term terminations -- HUD has determined that encouragement

of owner participation only requires that landlords be permitted under federal law to act on "other good cause". Rather, HUD must respect the express statutory command (added in 1998) that any relief following a purported notice of termination (such as the evictions defendant seeks) "shall be consistent with applicable State and local law." *See McNabb*, 829 F.2d at 791 ("We must reject administrative regulations which are inconsistent with the statutory mandate or that frustrate the policies which Congress sought to implement").

3. LARSO's Ban On Terminating Tenancies For Unspecified Economic Reasons Is Not Preempted Simply Because There Is No Provision Expressly Preserving Local Eviction Controls In The Section 8 Statute Or Regulations

Defendant next argues that because Congress and HUD have at times expressly preserved local authority to regulate Section 8 tenancies, the absence of an express provision preserving local eviction controls in the Section 8 statute and regulations demonstrates the intent of Congress and HUD to preempt such controls. Opp. at 8-10. This argument is legally and factually unsound.

a. The Section 8 Statute And Congressional Intent

In early 2006, Congress passed the Violence Against Women and Department of Justice Reauthorization Act of 2005. Among its numerous provisions, this Act added language to 42 U.S.C. § 1437f(o)(7)(D) -- the provision expressly authorizing evictions for criminal and drug activity -- to limit its application with respect to Section 8 recipients who are the victims of domestic violence.[8] *See* P.L. 109-162 § 606(4)(C), ___ Stat. ___, ___ (Jan. 5, 2006). The added language states that these new provisions do not supersede any greater protections provided to domestic violence victims by other federal, state or local law. *See* 42 U.S.C. § 1437f(o)(7)(D)(vi).

Defendant landlord argues that the absence of a similar express preservation

[8] Defendant mistakenly cites to 42 U.S.C. § 1437f(0)(20)(D). *See* Opp. at 8:11-23. That provision deals only with the termination of assistance by a PHA.

of local regulation in the 1981 general "good cause" statute (and its 1998 revision), *see* 42 U.S.C. § 1437f(o)(7)(C), demonstrates Congressional intent to preempt more protective local eviction laws outside the domestic violence context. In support of this contention, defendant landlord misquotes *Russello v. United States*, 464 U.S. 16, 23 (1983) for the proposition that "[w]here Congress includes *specific consent*[9] [sic] in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Opp. at 9:10-14 (italics added).

Defendant's argument fails for three reasons. First, defendant's misquotation of *Russello*, while undoubtedly inadvertent, highlights the inapplicability of that case to preemption analysis. *Russello* did *not* involve the issue of Congressional consent to local regulation. And, as the Supreme Court later made clear, the *Russello* presumption does not constitute the type of "clear and manifest" evidence of Congressional intent necessary to overcome the strong presumption against preemption of a local government's traditional police powers. *See City of Columbia v. Ours Garage and Wrecker Service, Inc*., 536 U.S. 424, 425-26, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002) (refusing to use *Russello* presumption to find preemption of local authority from express preservation of such authority in other provisions of same statute). Indeed, in *Franklin National Bank v. New York*, 347 U.S. 373, 74 S.Ct. 550, 98 L.Ed. 767 (1954) -- a case cited by defendant (*see* Opp. at 9:22-26) and involving a statute containing express preservation provisions -- the Supreme Court stated that "*[e]ven in the absence of such express language*, national banks may be subject to some state laws in the normal course of business *if there is no conflict with federal law*." *Id*. at 378 n.7 (italics added).

Second, the basis for *Russello* presumption -- which is nothing more than a specific application of the *expressio unius est exclusio alterius* maxim, *see U.S. v.*

[9] In *Russello*, the words "particular language" appear in place of the italicized words. *See* 464 at 23.

Councilman, 418 F.3d 67, 74 (1st Cir. 2005) (*en banc*) -- is "pretty weak" in this case. This is because a quarter century separates the adoption of the general "good cause" provision in 1981, and the adoption of the amendments to the separate criminal and drug activity "good cause" provision upon which defendant purports to rely. *See Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 373 (3rd Cir. 1999) (rejecting argument that scope of express preemption provision adopted 20 years after initial enactment precludes finding of broader preemption, *inter alia*, because *expressio unius* maxim "is pretty weak when applied to acts of Congress enacted at widely separated times"); *see also Councilman*, 418 F.3d at 74 ("where the history of the two provisions is complex, the canon may be a less reliable guide to Congressional intent. For example, if the first provision was already part of the law, whereas the second is entirely new").

Third, any *Russello* presumption is rebutted by the clear Congressional intent to preserve more protective local tenant laws governing demonstrated by the 1998 amendments and their legislative history, as set forth above. *See Councilman*, 418 F.3d at 75 (*Russello* presumption may be rebutted).

b. <u>The Section 8 Regulations And HUD's Intent</u>

In 1998, HUD adopted 24 C.F.R. § 982.509, a regulation expressly stating that "the amount of rent to owner also may be subject to rent control limits under State or local law." *See* 63 F.R. 23830, 23863 (Apr. 30 1998). In 1999, HUD amended 24 C.F.R. § 982.53 by adding a subpart expressly stating 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." *See* 64 F.R. 56896-97, 56911 (Oct. 21, 1999). These regulations merely confirmed prior court decisions that already had concluded that HUD had not preempted more protective state and local law in these areas.[10]

[10] *See Rosario v. Diagonal Realty, LLC*, 803 N.Y.S.2d 343, 354-55 (N.Y. Sup. Ct. 2005) (discussing pre-regulation antidiscrimination decisions); *Mott v. New York State Div. Of Housing & Community Renewal*, 628 N.Y.S.2d 712 (N.Y. App. Div.

Defendant nevertheless argues that the absence of a similar provision in the 1984 "good cause" regulation (and its successors) demonstrates HUD's intent to preempt more protective local eviction controls. Defendant again errs.

First, as just demonstrated, a *Russello* presumption is not "clear and manifest" evidence sufficient to overcome the presumption against preemption. Second, any *Russello* presumption is "pretty weak" in this case given that (a) the express preservation provisions were adopted with respect to different aspects of the HUD rules more than a decade after HUD adopted its original "good cause" regulation, and (b) one could just as easily argue that HUD's express preemption of certain aspects of local rent control in other programs supports a presumption of no HUD preemption absent an express provision. *See generally City of Boston v. Harris*, 619 F.2d 87, 93 (1 st Cir. 1980) (discussing regulations governing scope of preemption of local rent control for HUD financed and insured projects). Third, any *Russello* presumption is rebutted by (a) HUD's express statement -- *four years before* it adopted its express preservation regulation at 24 C.F.R. § 982.53(d) --that state and local antidiscrimination laws are *not* preempted by its regulations, *see* 60 F.R. 34662, and (b) HUD's express refusal to generalize whether its confidentiality of criminal records regulation preempts more protective local laws (notwithstanding the absence of any express preservation provision). *See* 66 F.R. 28788 (May 24, 2001). Fourth, as demonstrated above, HUD lacks the authority in any event to preempt LARSO's ban on tenancy terminations for general economic reasons.

4. LARSO's Ban On Terminating Tenancies For Unspecified Economic Reasons Is Not Preempted By The HUD Mandated Tenancy Addendum

Defendant finally argues that the HUD tenancy addendum preempts LARSO's ban on terminating tenancies for unspecified economic reasons. *See* Opp. at 11-12. However, as defendant acknowledges, the tenancy addendum does

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1995) (upholding local rent control pre-regulation).

no more than repeat the provisions of the HUD's "good cause" regulation (i.e., a ban on landlord terminations during the term of the lease except for, *inter alia*, those based on a legitimate economic reason). Given that the HUD "good cause" regulation does not and could not preempt LARSO, as demonstrated above, the tenancy addendum likewise does not and can not do so.

IV. CALIFORNIA LAW LIKEWISE DOES NOT PREEMPT LARSO'S BAN ON EVICTIONS FOR UNSPECIFIED ECONOMIC REASONS

Citing *Apartment Assn. of L.A. County v. City of Los Angeles*, 136 Cal.App.4th 119 (2006), defendant alternatively argues that California Civil Code § 1954.535[11] precludes application to Section 8 tenants of LARSO's eviction controls. *See* Opp. at 12:14-13:28. This argument likewise lacks merit.

A. The Express Preservation Of Local Eviction Controls In The Costa-Hawkins Rental Housing Act Precludes A Finding That LARSO's Eviction Controls Are Preempted By Section 1954.535

The Costa-Hawkins Rental Housing Act, Civil Code §§ 1954.50 *et seq*., generally provides for so-called "vacancy decontrol"; that is, the right of a landlord to set the initial rental rate for a rent control unit at whatever amount he or she chooses after an old tenant vacates the unit and a new tenancy begins. *See* Civil Code §§1954.53(a). As amended in 1999, Costa-Hawkins also provides two types of additional protections for assisted tenants. First, Section 1954.53(a)(1) and (a)(1)(A) provide that vacancies following an "owner's termination or nonrenewal of a contract or recorded agreement with a governmental agency that provides for a rent limitation to a qualified tenant"[12] are not entitled to full vacancy decontrol.

[11] "Where an owner terminates or fails to renew a contract or recorded agreement with a governmental agency that provides for rent limitations to a qualified tenant, the tenant or tenants who were the beneficiaries of the contract or recorded agreement shall be given at least 90 days' written notice of the effective date of the termination and shall not be obligated to pay more than the tenant's portion of the rent, as calculated under the contract or recorded agreement to be terminated, for 90 days following receipt of the notice of termination of nonrenewal of the contract."

[12] Under Section 8, the landlord and the PHA enter into a contract whereby the PHA agrees to make the rent subsidy payments to the landlord in exchange for its agreement to abide by the terms of the program. *See* 24 C.F.R. §§ 982.451-52.

Rather, a landlord who effectuates the termination of such a contract entered into prior to 2000 in a rent control jurisdiction cannot raise the rent for the vacated unit for a 3 year period. This provision was adopted as a partial disincentive to "prevent landlords from arbitrarily terminating their Section 8 tenants in order to get a [rent] decontrolled unit." *See Apartment Assn.*, 136 Cal.App.4th at 131 n.3 (3rd para.) (quoting legislative history). Second, Section 1954.535 provides that, where a landlord is terminating a government assistance contract anywhere in California (including non-rent control jurisdictions), it must provide 90 days notice to the affected tenant, and cannot change the tenant's obligation to only pay her portion of the rent as specified in the government assistance contract during that 90-day period. This provision was adopted because the standard 30 day notice period provided by California law did not provide sufficient time for Section 8 recipients to secure replacement housing. *See Apartment Assn.*, 136 Cal.App.4th at 131 n.3 (4th para.) (quoting legislative history).

The California Legislature intended that these special provisions would provide *minimum* protections to assisted tenants. Critically, Costa-Hawkins further provides that "[n]othing in this section shall be construed to affect any authority of a public entity that may otherwise exist to regulate or monitor the grounds for eviction." Civil Code §§ 1954.53(e). The policy behind this express preservation of local eviction controls was to allow *additional* protection of tenants by municipal governments against evictions motivated by a desire to circumvent rent control. As explained in *Bullard v. San Francisco Residential Rent Stabilization Bd.*, 106 Cal.App.4th 488 (2003):

> There can be no doubt the Legislature was well aware of the incentive for eviction created by vacancy decontrol. Civil Code section 1954.53, subdivision (e) is a strong statement that the state law establishing vacancy decontrol *is not meant to affect the authority of local governments to monitor and regulate the grounds for eviction*, in order

to prevent pretextual evictions.

Id. at 492 (italics added).

Nothing in the 1999 amendments to Costa-Hawkins -- including the addition of Civil Code § 1954.535 -- altered in any way this strong legislative policy of preserving local eviction control authority for all tenants, including Section 8 recipients. Indeed, any contrary conclusion is inconsistent with the clear intent of the 1999 amendments to provide *additional* statewide protections for Section 8 tenants, not to strip away from these assisted tenants local protections enjoyed by all other tenants. Therefore, LARSO's eviction controls are not preempted.

A. Nothing In *Apartment Assn*. Indicates That Costa-Hawkins Preempts LARSO Eviction Controls For Section 8 Tenancies

Defendant asserts that *Apartment Assn.* is authority for the right of landlords to terminate Section 8 tenancies without interference by local law. It is not.

In *Apartment Assn*. (a case in which HACLA was not a party), the California Court of Appeal only considered whether Civil Code § 1954.535 preempted a provision of LARSO providing that "[i]t shall be unlawful for any landlord to terminate or fail to renew a rental assistance contract with the Housing Authority of the City of Los Angeles (HACLA), and then demand that the tenant pay rent in excess of the tenant's portion of the rent under the rental assistance contract." L.A.M.C. 151.04B. Both of those provisions only come into play by their plain language once the landlord "terminate[s] or fail[s] to renew a rental assistance contract," and do not purport to define the circumstance under which an owner lawfully could so terminate or fail to renew. *See* footnote __ above. Indeed, because the landlords' association challenged the validity of the LARSO provision on its face, *Apartment Assn.* did not involve any actual termination of a rental assistance contract. The Court of Appeal therefore had no occasion to consider at all the question of under what circumstances such a termination *could* occur, let

alone whether an attempt to terminate a Section 8 tenancy[13] without good cause under LARSO is sufficient[14]

Rather, the Court of Appeal simply compared the language of the two provisions – both of which, as noted, presume a situation in which the termination by a landlord is substantively valid -- and their legislative histories, and then concluded that Civil Code § 1954.535's requirement of 90 days notice was intended fully to occupy the field of rent freezes following notices of termination, and so superseded LARSO to the extent it inconsistently suggested a freeze of indefinite duration. *Apartment Assn.*, 136 Cal.App.4th at 125, 132.

Therefore, the statement in *Apartment Assn.* regarding "a landlord's recognized right to terminate or refuse to renew a Section 8 contract" without undue interference by local law, 136 Cal.App.4th at 133, is not authority regarding the validity of LARSO's eviction controls. *See Chevron U.S.A., Inc. v.. Workers' Comp. Appeals Bd.*, 19 Cal. 4th 1182, 1195 (1999) ("It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered"); *Martin v. City & County of San Francisco*, 135 Cal.App.4th 392, 400 n.4 (2005) (assumption in prior case that CEQA applied to building interiors not relevant precedent because "Questions which merely lurk in the record, neither brought to

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[13] A valid termination of the underlying tenancy also terminates the contract between the landlord and the PHA. *See* 24 C.F.R. §§ 982.309(b)(2), .311(b).

[14] Indeed, this latter question could not even have occurred to the Court of Appeal as a potential issue. This is because, in its 2005 brief to the Court of Appeal on behalf of the City, the City Attorney stated that "[d]wellings subject to the federal Section 8 rental assistance program are exempt from RSO rent limitations." Appellant's Opening Brief, 2005 WL 1305124 at 4. The Court of Appeals thus had no occasion even to speculate whether a landlord could terminate a Section 8 tenancy *in violation of applicable local eviction control laws.* In 2006, the City Council amended LARSO expressly to clarify that its provisions *do apply* to rental units in the Section 8 voucher program, *see* L.A.M.C. § 151.02; Ordinance No. 177587, in accordance with the position taken by both the Rent Adjustment Commission and HACLA long before the City's brief and the subsequent clarifying amendment. Thus, there is no question that LARSO's eviction controls apply to plaintiffs in this case.

the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents") (internal quotation marks omitted) Moreover, it is a statement about federal law that simply is incorrect, as demonstrated above.

In short, as other California appellate decisions have recognized with respect to standard landlord notice provisions, there simply is nothing inconsistent between *Apartment Assn.*'s conclusion that Section 1954.535's 90 day notice requirement preempts local efforts to extend the length of time a tenant's rent obligation can remain unchanged following notice that the landlord is effecting a substantively valid termination, and the conclusion that Section 1954.535 *does not* preempt the LARSO's "good cause" requirements that directly regulate what constitutes a substantively valid termination of rent control tenancies, including Section 8 tenancies. *Cf. People v. Tannenbaum*, 23 Cal.App.4th Supp. 6, 10 (1994) (while Civil Code § 827's 30 day notice provision for changing the terms of month-to-month tenancies preempts local efforts to extend required notice period, it does not preempt provision of LARSO restricting changes that can be demanded through such a notice); *People v. Lucero*, 114 Cal.App.3d 166, 173-174 (1981) (recognizing that LARSO requirement of good cause for eviction constitutes an "exception[] to the general rule that month-to-month tenancies are terminable on 30 days' notice with or without cause" pursuant to Section 1946). Indeed, Costa-Hawkins' express preservation of local eviction controls precludes any other conclusion.

V. CONCLUSION

For all the foregoing reasons, the Court should grant summary judgment.

DATED: July _____, 2007

By: _____

Attorneys for *Amicus Curiae* The City Of Los Angeles

DATED: July _____, 2007

By: _____

Attorneys for *Amicus Curiae* The Housing Authority Of The City Of Los Angeles