

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBORA BARRIENTOS, ARMANDO BRISENO, BERTHA CARDENAS,
MARTA CHAJON, MANUEL CUEVAS, FRANCISCO A. DEL CID,
MIGUEL GONZALEZ, JEONG SOON HWANG, BONG CHA KIM, JAE
OK KIM, LEANNA KIM, NONG-SOON KIM, YOUNG SUK KIM, MARIA
LANDAVERDE, JANE LEE, JEONG LEE, SUSAN LEE, YOUNG HEAN
LEE, JIN M. PARK, NORMA ANGELICA PENNA, MARIA RODRIGUEZ
and HELEN H. YU,

Plaintiffs-Appellees,

v.

1801-1825 Morton LLC,

Defendant-Appellee.

On Appeal from a decision of the United States District Court
for the Central District of California (Western Division-Los Angeles)
The Honorable Audrey B. Collins
Case No. 06-CV-06437

**BRIEF *AMICUS CURIAE* OF AARP SUPPORTING
PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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AARP CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Service, Inc., Legal Counsel for the Elderly, AARP Financial, AARP Global Network, and Focalyst.

AARP has no parent corporation nor has it issued shares or securities.

Julie Nepveu

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

AARP is a nonpartisan, nonprofit membership organization of 40 million people aged 50 and older dedicated to enhancing the quality of life for older Americans. AARP has approximately 3.3 million members in California, with over 675,000 members residing in Los Angeles County. AARP is authorized to file this brief under FRAP 29(a) because it has the consent of all parties.

One of AARP's key social impact goals is to promote livable communities. Livable communities offer affordable, accessible housing, mobility options, and the availability of supportive services. For many, successful aging means "aging in place," i.e., remaining in one's home, making it possible to maintain social networks and community connections.

People with high housing costs living on low or fixed incomes are most vulnerable to rising home costs and may have difficulty aging in place. If they can no longer afford their housing, they must either reduce expenditures on other basic needs, including food and medicine, or move. Loss of one's home may result in a loss of important community ties, or in institutionalization, which has been linked to a decline in physical and mental health.

AARP regularly engages in advocacy related to promoting and preserving federally subsidized housing, which is critical to support the health and well being of low-income older people. Housing subsidies support many older people who

are aging in place: approximately 40% of the families living in privately-owned federally subsidized housing are headed by a person over age 65. Approximately 28% of the 274,000 Section 8 vouchers issued in California, 38,000 of which are issued in Los Angeles, are used by a family headed by a person over 62 years old.

STATEMENT OF FACTS

Amicus curiae AARP adopts the statement of facts provided in Plaintiffs-Appellee's brief.

SUMMARY OF ARGUMENT

A severe shortage of affordable housing combined with rising rental costs have had a particularly harsh impact on older people with limited or fixed income who cannot absorb the increase, and face the choice of either sacrificing basic necessities or moving. Loss of one's home can be traumatic, and finding affordable housing can be very difficult, especially for older people.

State and local governments have broad plenary police powers over their local housing market. Congress intended to preserve local control when it streamlined the Section 8 statute. Courts should reconcile state and local laws, such as LARSO, with the Section 8 statute because they have the same purpose: providing decent affordable housing to low income people.

ARGUMENT

I. THE NATION'S SEVERE HOUSING AFFORDABILITY CRISIS HAS A SIGNIFICANT DETRIMENTAL IMPACT ON OLDER PEOPLE

A. The Shortage Of Affordable Housing Is Severe

The United States is currently facing a housing crisis, which has been characterized as “acute, growing, and deadly.” See W. Paul Farmer, Am. Planning Ass’n, *Affordable Housing Crisis: The “Silent Killer”* (2004), available at <http://www.planning.org/affordablereader/domesticpolicy/apr04.htm>. The United States has approximately three million fewer housing units affordable to people with low incomes than are needed to house them. U.S. Dep’t. of Hous. & Urban Dev., Office of Policy Dev. & Research, *Affordable Housing Needs 2005; Report to Congress* 37, 43 (May 2007), available at <http://www.huduser.org/Publications/pdf/AffHsgNeeds.pdf>. In 2005, there were only 77 affordable units for every 100 people with very low incomes (down from 80 in 2003) and 40 affordable units for people with extremely low income (down from 43 in 2003). *Id.* Moreover, nearly half of those units are occupied by higher income renters and are not available to the lowest income renters. *Id.* at 4, 23. As a result, nearly nine million lowest income households must compete for just three million affordable and available housing units. Joint Ctr. for Hous. Studies of Harvard Univ., *The State of the Nation’s Housing 2008* 31 (2008), available at

<http://www.jchs.harvard.edu/publications/markets/son2008/son2008.pdf>. This shortage is a significant problem for older people, since approximately 25% of renters over 50 years old live in poverty. See Andrew Kochera, AARP Pub. Policy Inst., *State Housing Profiles: A Special Analysis of the Census Bureau's American Community Survey 9* (March 2007), available at http://assets.aarp.org/rgcenter/il/d18637_housing.pdf.

There are “nearly six times as many seniors with unmet housing needs as are currently served by rent-assisted housing.” Comm’n on Affordable Hous. & Health Facility Needs for Seniors in the 21st Century, *A Quiet Crisis in America 5* (2002), available at http://govinfo.library.unt.edu/seniorscommission/pages/final_report/pdf_Index.html. The severe shortage of affordable housing directly contributes to the homelessness experienced by up to 744,000 people nationally every night. Joint Ctr. for Hous. Studies of Harvard Univ., *The State of the Nation's Housing 2008* at 27. Additionally, approximately six million households in the United States with incomes of less than 50% of the local area median are forced either to live in substandard (e.g. too small, unsafe, unsanitary) housing, or spend more than half of their income on rent—well above the 30% recommended by HUD to ensure sufficient money for food, medicine, medical care, transportation and other basic necessities. See U.S. Dep’t. of Hous. & Urban Dev., *Affordable Housing Needs*, at 85. Such “worse case housing needs” increased over

16%, or 800,000 households, between 2003 and 2005. *Id.* at 1. Moreover, the housing cost burden increases with age: 33% of people aged 50-64 pay more than 30% of their income for housing costs, while 54% of people over age 85 pay more than half their income for housing. *See* Kochera, at 6.

California currently ranks as the second most expensive state in the nation for housing. *See* Danilo Pelletiere *et al.*, Nat'l Low Income Hous. Coal., *Out of Reach (2008)*, available at www.nlihc.org/oor/oor2008/mostexpensivetable.pdf. This disturbing trend is only becoming worse: percentage increases in rent in Los Angeles have generally been among the highest in the nation. *See* Joint Ctr. for Hous. Studies of Harvard Univ., *The State of the Nation's Housing 2008* at 23; Joint Ctr. for Hous. Studies of Harvard Univ., *The State of the Nation's Housing 2004* 21 (2004), available at <http://www.jchs.harvard.edu/publications/markets/son2004.pdf>. Over 30% of older Californians who rent their homes pay more than half of their income toward rent, and 56.6% spend at least 30% of their income on rent. *See* Kochera, at 31.

The Los Angeles Rent Stabilization Ordinance (“LARSO”) was enacted in 1979 to help ameliorate, over time, “the shortage of decent, safe and sanitary housing in the City of Los Angeles resulting in a critically low vacancy factor,” which has had a “detrimental effect on substantial numbers of renters in the City,”

but especially on “senior citizens, persons on fixed incomes and low and moderate income households.” L.A., Cal., Municipal Code § 151.01.

B. Older People Suffer Significant Harm When They Lose Their Housing

For older people who live on a fixed or limited income, as well as for people with disabilities and veterans, the rising cost of housing presents a nearly insurmountable problem. Joint Ctr. for Hous. Studies of Harvard Univ., *The State of the Nation’s Housing 2004* 26. Every additional dollar spent on rent and utilities means less money for other critical needs such as food, healthcare, and home care. *Id.* As people age, they also have an increased risk of developing a disability and a concomitant need for health and personal care services. Comm’n on Affordable Hous. at 26-27. Should housing itself become unaffordable, the likelihood of entering a nursing home is greatly increased. *Id.* at 33, 37. Indeed, the loss of one’s home is often the precipitating event that leads to institutionalization. *Id.*

Despite the potential for some people to benefit by moving with a Section 8 voucher, people obviously suffer great harm when they are evicted. *See Estevez v. Cosmopolitan Assocs. LLC*, No. 05 CR 4318(JG), 2005 WL 3164146 at *5, *7 (E.D.N.Y. Nov. 28, 2005) (finding, “it simply is not true that a tenant [using an enhanced voucher] can receive identical benefits in another residence”). First, the cost of moving is an enormous financial and physical burden. It is even greater for

those of advanced age or who have disabilities and may be physically unable to move without significant assistance.

Second, finding alternative housing can be very difficult, particularly in very tight rental markets. Indeed, due to the tight housing market in Los Angeles, only 47% of people who attempted to find housing using a Section 8 voucher in 2000 were successful, compared to 69% nationwide. U.S. Dep't. of Hous. & Urban Dev., Office of Policy Dev. & Research, Study on Section 8 Voucher Success Rates 3-17 (Nov. 2001), *available at* <http://www.huduser.org/Publications/pdf/sec8success.pdf>. “[B]eing [over 65] reduces the probability of success [of finding housing] by 14%” due to difficulty searching for housing. *Id.* at 3-10. Availability of suitable affordable housing is further limited, for those who have disabilities, by inaccessible design features, such as steps or doors that are not wide enough to accommodate a wheelchair. *See* AARP Pub. Policy Inst., *Beyond 50.05: A Report to the Nation on Livable Communities: Creating Environments for Successful Aging* 49 (2005), *available at* http://assets.aarp.org/rgcenter/il/beyond_50_communities.pdf.

Third, moving is stressful and can be traumatic for older people. *See Beyond 50.05*, at 49. “[T]he psychological tasks associated with adjusting to new surroundings and routines can lead to depression, increased irritability, serious illness and even death in the frail elderly.” Victoria Robinson, *A Brief Literature*

Review of the Effects of Relocation on the Elderly 10 (2002), available at http://www.heu.org/~DOCUMENTS/research_reports/HEU_Literature_Review_Sept23_2002.pdf (citations and internal quotations omitted). Those who are forced to relocate suffer “more intense depression, sadness, and negative feelings” than those who chose to move, and hospitalization or institutionalization is associated with greater morbidity rates. See Stanislav V. Kasl, *Physical and Mental Health Effects of Involuntary Relocation and Institutionalization on the Elderly – A Review*, 62 Am. J. Pub. Health 377, 378 (March, 1972).

Recognizing the significant harm to older and other vulnerable low income people in being involuntarily displaced, Congress protected residents living in assisted properties converting to market rates through the use of enhanced vouchers. “[S]tandard vouchers are inadequate in the face of market-rate rents, forcing residents to either find other shelter, or remain in their homes and face the awful choice between paying rent or buying food and medicine.” *Section 8 Housing: Hearing Before the S. Subcomm. on Housing and Transportation*, 106th Cong. (1999) (written testimony of Rep. Rick Lazio, Chairman, H. Subcomm. on Hous. and Cmty.).

II. STATE AND LOCAL GOVERNMENTS HAVE BROAD POWER TO REGULATE HOUSING TO RESPOND TO LOCAL MARKET CONDITIONS

State and local governments are empowered, through their plenary police

power, to promulgate policies or enact laws that further the goals of federal programs or address inequities and distortions in the housing market, unless the federal government has clearly demonstrated a federal interest to the contrary under the Supremacy Clause. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (noting states have “broad power to regulate housing conditions in general and the landlord-tenant relationship in particular”).

A. Congress Intended To Preserve State Plenary Power

In enacting the United States Housing Act, “Congress made abundantly clear . . . that the program was a collaborative effort . . . and that the purpose of the federal program was ‘to assist States and political subdivisions of States to address the shortage of housing affordable to low-income families.’” *Montgomery County v. Glenmont Hills*, 936 A.2d 325, 335 (Md. 2007), *cert. denied.*, 128 S.Ct. 1069 (Jan. 14, 2008) (quoting 42 U.S.C. §1437(a)(1)). In streamlining the Section 8 program, Congress noted a “one size fits all” approach is inappropriate and that it is necessary for federal law to incorporate “additional flexibility” in order for state and local entities to “respond to local market conditions.” S. Rep. No. 104-195, 31-32 (1995), 1995 WL 768616 (Leg. Hist.); S. Rep. No. 105-21, 26, 34 (1997), 1997 WL 282462 (Leg. Hist.).¹ Congress “did not anticipate that the repeal of

¹ These reports accompanied the passage of the Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 549(a)(2)(A), 112 Stat. 2461, 2607 (Oct. 21, 1998), which permanently amended the Section 8 voucher program

these rules [regulating landlord participation and prohibiting certain terminations] will adversely affect assisted households because *protections will be continued under State, tribal, and local tenant laws.*” S. Rep. No. 104-195 at 31-32; S. Rep. No. 105-21 at 36 (emphasis added).

In fact, Congress explicitly intended to “eliminate Federal overregulation [and] to redirect the responsibility for a consolidated [Section 8 voucher] program to the States, localities, and public agencies and their tenants.” S. Rep. No. 105-21 at 6; S. Rep. No. 104-195 at 6. Thus, contrary to Defendant’s assertion that federal law should provide the sole grounds for termination, Congress intended “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. No. 105-21 at 37; S. Rep. No. 104-195 at 32.

B. Courts Must Allow State And Local Governments Considerable Latitude To Respond To Local Market Conditions

As recognized by the U.S. Supreme Court, and by this Court in a similar challenge to LARSO’s rent control provisions, “the problems confronting our society are severe, and state governments, in cooperation with the federal government, must be allowed considerable latitude in attempting their resolution.”

by adding the “during the term of the lease” language that had been temporarily enacted in 1996, *see* Pub. L. No. 104-134, § 203(c)(2), 110 Stat. 1321, 1321-281 (Apr. 26, 1996).

N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973) (finding “[w]here coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one”); *Topa Equities v. City of L.A.*, 342 F.3d 1065, 1072 (9th Cir. 2003) (quoting *Dublino*, 413 U.S. at 413). Shifting housing policy and reduced federal funding for affordable housing make it imperative that state and local governments retain their power to respond to local markets. *See Kargman v. Sullivan*, 552 F.2d 2, 11 (1st Cir. 1977) (noting “the local law here advances significant and uniquely local interests with which the courts should not lightly interfere”).

State or local legislation, to be preempted, must be “absolutely and totally contradictory and repugnant.” *Goldstein v. California*, 412 U.S. 546 (1973). *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 498 (9th Cir. 1984) (finding “proscription by [a state] of conduct that federal law might permit is not sufficient to warrant preemption”) (internal quotations and citations omitted) (alteration in original). It is not impossible to comply with both federal law and LARSO. Defendants are not “stuck between a proverbial rock and a hard place.” *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied by AT&T Corp. v. Ting*, 540 U.S. 811 (2003).

C. LARSO Provisions More Protective Of Tenants Can Be Reconciled With Federal Requirements

Courts have upheld LARSO, which serves, rather than conflicts with the important federal interest of providing decent affordable housing. *See Topa Equities*, 342 F.3d at 1071-1072; *Independence Park Apt's v U.S.*, 449 F.3d 1235 (C.A. Fed. 2006). In rejecting an argument that LARSO rent control provisions are preempted, this Court stated “[t]he federal legislation creating the network of subsidized housing laws is superimposed upon and consciously interdependent with the substructure of local law relating to housing.” *Topa Equities*, 342 F.3d at 1073 (citations omitted). *See Attorney General v. Brown*, 511 N.E.2d 1103, 1106 (Mass. 1987) (“The Federal [Section 8] statute merely creates the scheme and sets out the guidelines for the funding and implementation . . . It does not preclude State regulation.”).

Therefore, “the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973) (reconciling California laws with a New York Stock Exchange Rule) (citations omitted). Under such an approach, and as Plaintiffs urge, “states have the right to impose greater procedural restrictions than those imposed by federal law.” *Kenneth Arms Tenant Ass’n v. Martinez*, No. CIV. S-01-832 LKK/JFM, 2001 U.S. Dist. LEXIS 11470 at *28 (E.D.Cal. July 2, 2001). *See Cal. Fed. Sav. & Loan*

Ass'n v. Guerra, 479 U.S. 272, 278 (1987) (finding Congress intended to establish “a floor beneath which . . . benefits may not drop—not a ceiling above which they may not rise.”).

III. COURTS CONSISTENTLY HAVE UPHELD STATE AND LOCAL LAWS THAT ARE MORE PROTECTIVE OF TENANTS' RIGHTS THAN FEDERAL LAW

Many localities have chosen to adopt protective affordable housing policies to address local market conditions, including a severe shortage of decent and affordable rental housing. These tenant protections have included, *inter alia*, rent and eviction protections, notice requirements for termination of tenancy, and source of income and anti-discrimination protections. Rejecting preemption arguments, many courts have reconciled provisions providing tenants greater protection than provided by federal law.

This Court held that LARSO rent control provisions were not preempted where Congress did not assure landlords that they could raise rents to market rate after leaving the federal program and did not limit states from enacting their own rent control laws. *See Topa Equities*, 342 F.3d at 1071-1072 (citing *Kargman*, 552 F.2d at 11) (holding Boston rent control laws not preempted). In *Rosario v. Diagonal Realty, LLC*, 872 N.E.2d 860 (N.Y. 2007), *cert. denied.*, 128 S.Ct. 1069 (Jan. 14, 2008), the New York Court of Appeals held that it is possible to comply with both federal and state law in this area: under federal law, Section 8 tenants

will not be evicted without good cause during their lease terms, while under state law, rent stabilized tenants' leases will be renewed absent good cause.

Procedural and notice provisions providing tenants with greater protections have been reconciled with federal law and upheld as not preempted. *See Hous. Auth. of the City of Everett v. Terry*, 114 Wash.2d 558, 560 (Wash. 1990) (finding state law not preempted because, *inter alia*, "it is possible to reconcile the two acts by providing a notice which satisfies the requirements of both"); *Kenneth Arms Tenants Ass'n*, 2001 U.S. Dist. LEXIS 11470 at *28 (upholding California notice requirements more extensive than federal law for owners of existing assisted housing programs).

Laws prohibiting discrimination based on source of income have also been upheld against preemption challenges. In Massachusetts, the court reasoned, "[i]t does not follow that, merely because Congress provided for voluntary participation, the States are precluded from mandating participation"). *Brown*, 511 N.E.2d at 1106. Noting that "[n]othing in the Federal law or the HUD regulation 'requires' that landlords be permitted to discriminate" based on source of income, the court upheld the Montgomery County, provision. *Glenmont Hills*, 936 A.2d at 325, 338, n 9. The District of Columbia ordinance was upheld because "a non-discrimination requirement would neither compel nor permit parties to violate any provision of the Housing Choice Voucher Program." *Bourbeau v. Johnathan*

Woodner Co., 549 F.Supp.2d 78, 88 (D.D.C. 2008) (citing *Guerra*, 479 U.S. at 280-281). The New Jersey statute was found not to pose an obstacle to the objectives of the Section 8 program. See *Franklin Tower One, L.L.C. v. N.M.*, 157 N.J. 602, 620 (N.J. 1999). Connecticut’s statute similarly survived a challenge based on preemption. See *Comm’n on Human Rights and Opportunities v. Sullivan Assocs.*, 739 A.2d 238 (Conn.1999).

CONCLUSION

Congress intended that state and local governments would retain their plenary police powers to resolve the severe affordable housing crisis which jeopardizes the health and safety of its citizens. Courts should afford state and local governments considerable latitude to enact regulation that is more protective of tenant rights than the “floor” provided by federal law.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App P. 29(d) and 9th Cir. R. 32-1, the attached *amicus* brief is proportionally spaced, has a typeface of 14 points or more and contains 3224 words. The word processing system software used to prepare this brief was Microsoft Word.

Dated: September 18, 2008

Julie Nepveu

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2008 a true and correct copy of the Brief *Amicus Curiae* of AARP Supporting Plaintiffs - Appellee and Affirmance was served by Overnight Mail to:

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