COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and the PEOPLE OF THE STATE OF CALIFORNIA, by and through DENNIS J. HERRERA, City Attorney for the City and County of San Francisco, Plaintiffs/Respondents, vs. CHUCK M. POST, individually and d/b/a APARTMENTSINSF.COM; LEM-RAY PROPERTIES I DE, LLC; and DOE ONE through DOE FIFTY, Defendants/Appellants.	Case No. A149136 San Francisco Superior Court No. CGC-15-548551

PLAINTIFFS' AND RESPONDENTS' BRIEF

The Honorable Ronald E. Quidachay

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208.

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with person or entity information if necessary.

Dated: July 5, 2017

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INTRODUCTION

San Francisco today faces an affordable housing crisis. After years of skyrocketing rental prices and exceptionally low vacancy rates, the City and County of San Francisco ("San Francisco" or the "City") has one of the tightest and most expensive rental housing markets in the country. As a result, the City has become increasingly unaffordable and inaccessible for many long-time residents and low-wage working families. The current lack of housing options threatens not only the City's unique socio-economic diversity, but also its ability to provide access to economically thriving communities and housing choices free from discrimination to all residents.

As part of San Francisco's past efforts to ensure the availability of affordable housing, the City has enacted a number of measures aimed at making it easier for low-income residents to find and keep housing. One such measure bars landlords from refusing to rent to recipients of government sponsored rental assistance—like Section 8 vouchers—simply because they intend to utilize such vouchers. Defendants Lem-Ray Properties I DE, LLC ("Lem-Ray") and Chuck Post ("Post") (collectively, "Defendants") flagrantly violated San Francisco law by flatly refusing to accept Section 8 vouchers as rental payment at two residential buildings in San Francisco.

Accordingly, The City and County of San Francisco and the City Attorney, acting on behalf of the People of the State of California ("Plaintiffs"), brought suit—and requested a preliminary injunction—to compel Defendants to follow the law and to hold them responsible for their past violations. Defendants' only response was to argue that San Francisco's law is preempted by California anti-discrimination law. Not so. In order to address housing discrimination and protect residents' civil

rights, the California legislature enacted legislation that prohibited discrimination against several categories of people. But that law said nothing about landlords' right to refuse to rent to Section 8 voucher holders. Separately, the San Francisco Board of Supervisors enacted legislation aimed at addressing displacement of low income City residents by prohibiting landlords from rejecting prospective tenants based on their voucher recipient status. Under well-established case law, there is simply no preemption in these circumstances. San Francisco's law is valid and the preliminary injunction prohibiting Defendants from continuing to violate it should be upheld.

STATEMENT OF FACTS

A. The Housing Choice Voucher Program (Section 8).

The Housing Choice Voucher program (also known as "Section 8") is a partnership between the federal Department of Housing and Urban Development ("HUD") and local Public Housing Authorities ("PHAs") aimed at assisting low income families find affordable housing. 24 C.F.R. § 982.1. "HUD pays rental subsidies [to PHAs] so eligible families can afford decent, safe, and sanitary housing." *Id.* The PHA grants a voucher to a qualifying individual, who selects a unit, and "[i]f the PHA approves a family's unit and tenancy, the PHA contracts with the owner to make rent subsidy payments on behalf of the family." *Id.*

The local PHA is responsible for all aspects of program implementation: they determine if program applicants are eligible to receive vouchers; select program participants; approve the housing units chosen by participants; enter into contracts with recipients' landlords; make payments to landlords; terminate payments, when warranted; and perform a range of other activities necessary to operate the program. *See* 24 C.F.R. Part 982.

And core elements of the Section 8 program design—including program eligibility, voucher payment amounts, and PHA preference policies—differ depending on the local housing conditions of particular communities.[1] *Id.*

B. California State And Local Section 8 Housing Laws.

An additional way that local communities try to ensure that the Section 8 program is responsive to their particular housing market is through laws that prohibit landlords from refusing to rent to a prospective tenant simply because the tenant intends to use a voucher to cover part of the rent. Nationally, ten states and over thirty-five municipalities have adopted such laws. *See* U.S. Dep't of Housing and Urban Development, Office of Policy Development and Research, *The Impact of Source of Income Laws on Voucher Utilization and Locational Outcomes* (Feb. 2011) at vii-viii & Table A1, https://www.huduser.gov/publications/pdf/Freeman_ImpactLaws_AssistedHousingRCR06.pdf.[2]

1. San Francisco Law Prohibits Landlords From Refusing To Rent To Voucher Recipients.

In 1998, San Francisco was facing a local housing crisis. In response, the San Francisco Board of Supervisors ("Board") passed three measures aimed at making it easier for low-income residents to find and

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[1] For example, the income requirements for program eligibility vary based on cost of living in a particular area. 24 C.F.R. § 982.201, 42 U.S.C. § 1437a(b)(2) (noting that eligibility is a function of family income for the area, a figure set by the federal government). Additionally, the amount of housing assistance provided by the program varies depending on the fair market rent for each market area in the United States. 24 C.F.R. § 982.503. Finally, under Section 8, HUD empowers PHAs to establish local preferences for selecting applicants from a waiting list. 24 C.F.R. § 982.207. This discretion allows PHAs to tailor the program to more effectively to respond to "local housing needs and priorities." *Id.*

[2] And, according to a recent HUD study, these local laws are having their intended effect: in areas with such laws, voucher utilization rates increase by 4 to 11 points. *Id*. at iii.

keep housing in the City by improving the housing options of Section 8 recipients. *See* pp. 16-17, *infra*. Among them was an amendment to local law—specifically, to Police Code Section 3304—to prohibit landlords from refusing to rent to prospective tenants on the basis of their "source of income." Clerk's Transcript on Appeal ("CT") at 95 (Legislative History for Ordinance No. 251-98); S.F. Police Code § 3304. The Board specifically defined "source of income" to mean "all lawful sources of income or rental assistance from any federal, State, local, or nonprofit-administered benefit or subsidy program . . . [and] a rental assistance program, homeless assistance program, security deposit assistance program or housing subsidy program." S.F. Police Code § 3304(a)(5). The amendment also made it unlawful to advertise or disseminate information that "unlawfully indicates preference, limitation or discrimination based on" source of income. *Id.*

When San Francisco considered the amendment to San Francisco Police Code Section 3304 ("Section 3304"), the SFHA estimated that 34% of first time Section 8 voucher holders left San Francisco to locate housing in other jurisdictions due to the lack of affordable housing in San Francisco. *See* CT at 108. The primary purposes of the source-of-income provision of the ordinance was to increase the available housing options for low income renters who qualify for housing subsidies, because the tight rental market in San Francisco made it difficult for them to locate suitable housing. *See id.* at 107.

To be clear, Section 3304 does not require landlords to accept any and all Section 8 voucher holders. To the contrary, a landlord can reject an applicant based on any other lawful consideration—such as ability to meet minimum income requirements, prior evictions, or prior failure to pay

rent/utility bills—as long as this is the *actual* reason for rejecting the applicant, not just a pretext. All Section 3304 prohibits is refusing to rent a housing unit (or apply different terms to an applicant) wholly or partially because an individual seeks to use a Section 8 or other housing assistance voucher.

2. Several Other California Cities Prohibit Landlords From Refusing To Rent To Voucher Recipients.

At least four other California cities have enacted laws similar to San Francisco's Ordinance. *See* Santa Clara County Ordinance Code § B37 (unlawful to, *inter alia*, "interrupt, terminate, or fail or refuse to initiate or conduct any transaction in real property" based wholly or partially on "receipt of housing assistance"); East Palo Alto Housing Code, Chapter 14.16 (unlawful to "interrupt, terminate, or fail or refuse to initiate or conduct any transaction in real property" on basis of source of income, which "means all lawful sources of income or rental assistance program, homeless assistance program, security deposit assistance program or housing subsidy program."); Corte Madera Business Licenses and Regulations § 5.30.020 ("unlawful for the owner or manager of rental housing to discriminate against an existing tenant on the basis of that tenant's use of a Section 8 rent subsidy"); Santa Monica Municipal Code § 4.28.030 (unlawful to refuse to rent to a tenant based on source of income, which "includes any lawful source of income or rental assistance from any federal, State, local or non-profit-administered benefit or subsidy program including, but not limited to, the Section 8 voucher program.").

Last year, the Apartment Association of Los Angeles County filed a lawsuit arguing, *inter alia*, that Santa Monica's ordinance is preempted by state law. Respondent's Request for Judicial Notice ("RJN") Exh. A at 1-2.

The Los Angeles Superior Court disagreed. The court rejected plaintiff's argument and granted summary judgment to Santa Monica upholding its local law. *Id.* Exh. B at 2-9. The case is currently pending on appeal before the Second Appellate District.

3. California Law Does Not Prohibit Refusal To Rent To Voucher Recipients.

Similar to San Francisco law, the California Fair Employment and Housing Act ("FEHA") makes it unlawful for the "owner of any housing accommodation to discriminate against or harass any person because of . . . source of income . . . ." Gov't Code § 12955(a). But, unlike San Francisco's Ordinance, the state statute defines "source of income" to *exclude* Section 8 and other housing vouchers. Specifically, it defines the term to include "lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant," but specifies that "a landlord is not considered a representative of a tenant." Gov't Code § 12955(p)(1). In *Sabi v. Sterling*, 183 Cal. App. 4th 916 (2010), the Court of Appeal confirmed that since Section 8 vouchers do not constitute a "source of income" within the limited definition of that statute because the government pays rent money directly to the landlord of a voucher holder and, under the express language of FEHA, landlords are not representatives of the tenant. *Sabi*, 183 Cal. App. 4th at 933-34.

C. Defendants Refused To Accept Section 8 Vouchers In Violation of Section 3304.

Despite the clear and express terms of Section 3304, Defendants Lem-Ray and Chuck Post have a business practice of refusing to accept Section 8 vouchers as rental payment for residential units in San Francisco. Lem-Ray owns residential buildings at 935 Geary Street and 81 Ninth

Street in San Francisco. *See* CT at 389. Chuck Post is a real estate agent who leases apartments at 935 Geary Street and 81 Ninth Street. *See id.* at 302-03, 307-20.

Prior to issuance of the preliminary injunction in this case, Lem-Ray would not accept Section 8 vouchers as rental payment for units at 935 Geary Street and 81 9th Street. *Id.* at 302-03. Chuck Post stated to persons inquiring regarding vacant apartments in both buildings that Section 8 vouchers were not an acceptable form of payment. *Id.* In the past, advertisements for vacant apartments at both buildings posted on craigslist.org expressly stated "No Section 8 or Subsidy Vouchers Accepted." *Id.* at 313-20. The Craigslist ads directed interested individuals to text or call Chuck Post. *Id.* Similar advertisements were posted on apartmentsinsf.com, a website that previously purported to be the website of Chuck Post. *Id.* at 307-11.

Mr. Post admitted in Appellants' brief to this Court that he posted seven advertisements on Craigslist for units at 935 Geary Street in which he states that the landlord would not accept Section 8 vouchers. Appellants' Opening Brief ("AOB") at 6. And Lem-Ray admitted that Mr. Post was acting as the company's agent in posting the advertisements. *Id.* There is no dispute that Defendants violated Section 3304.

PROCEDURAL HISTORY

In October 2015, Plaintiffs filed a complaint alleging that Defendants were in violation of San Francisco Police Code Section 3304 and Business and Professions Code Section 17200. CT at 9-50. In February 2016, Defendants filed a demurrer arguing that Plaintiffs' complaint should be dismissed because Section 3304 is preempted by state law. *Id.* at 61-63, 64-70. The San Francisco Superior Court overruled the

demurrer, concluding that Defendants "failed to sustain [their] burden and show preemption either under the 'contradiction' or 'field of exclusivity' tests." *Id.* at 276 (internal citations omitted). Shortly thereafter, Plaintiffs moved for a preliminary injunction prohibiting Defendants from, *inter alia*, refusing to rent to a prospective tenant wholly or in part because the applicant intends to utilize rental assistance payments to cover all or part of the rent. *Id.* at 287-88. The trial court granted Plaintiffs' motion on May 20, 2016. *Id.* at 250-52. This appeal followed.

ARGUMENT

Defendants' sole contention on appeal is that Plaintiffs cannot establish a likelihood of success on the merits because Section 3304 is preempted by FEHA.[3] Not so.

As the party claiming that state law preempts a local ordinance, Defendants have the burden of demonstrating preemption. *Browne v. Cty. of Tehama*, 213 Cal. App. 4th 704, 719 (2013). And that burden is particularly heavy here. It is "well established" that "under the California Constitution a municipality has broad authority, under its general police power, to regulate the development and use of real property within its jurisdiction to promote the public welfare." *California Bldg. Ind. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 455 (2015) (citing Cal. Const., art. XI, § 7). Section 3304 is an example of a land use regulation enacted pursuant to the City's police power. *See id.* at 457 (concluding that San Jose's inclusionary housing ordinance, which required residential developments of

[3] Defendants do not make any other argument on the merits or concerning the trial court's finding of irreparable harm. Accordingly, any argument on these points has been waived. *See, e.g.*, *Dieckmeyer v. Redevelopment Agency of City of Huntington Beach*, 127 Cal. App. 4th 248 (2005) ("An appellant's failure to raise an argument in its opening brief waives the issue on appeal.")

20 or more units to set aside 15% of those units as affordable, was "an example of a municipality's permissible regulation of the use of land under its broad police power"). Preemption of such local regulations by state law "is not lightly presumed." *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.* ("*Inland Empire*"), 56 Cal. 4th 729, 738 (2013). Indeed, where—as here—"there is a significant local interest, the presumption favors the validity of the local ordinance against an attack of state preemption." *Garcia v. Four Points Sheraton LAX*, 188 Cal. App. 4th 364, 373 (2010); *see also Browne*, 213 Cal. App. 4th at 719 ("There is a particular reluctance to find preemption of a local regulation covering an area of significant local interest that differs from one locality to another, such as land use regulation.").

Defendants have not met their heavy burden of demonstrating that San Francisco's law prohibiting landlords from refusing to rent apartments in the City to Section 8 voucher holders is preempted. A local ordinance may be preempted by state law "if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993) (internal quotation marks omitted). Defendants argue that Section 3304 is both expressly and impliedly preempted. Both arguments fail.

I. Section 3304 Is Not Expressly Preempted By FEHA Because It Is Not Within FEHA's Field Of Exclusivity.

Defendants first argue that the source-of-income provision of Section 3304 is expressly preempted because it attempts to enter an area fully occupied by the state through FEHA. AOB at 8. Defendants point to FEHA's express preemption provision—in which the State legislature

expressed its intent to "occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of this part" (Gov't Code § 12993(c))—and contend that *ipso facto* San Francisco's law is preempted. AOB at 8-10. Defendants are incorrect.

As an initial matter, the only case Defendants cite to support their argument regarding the preemptive scope of FEHA—*Rojo v. Kliger*, 52 Cal. 3d 65 (1990)—does not stand for the proposition that FEHA preempts all local housing discrimination laws, regardless of the purposes of such laws. The question at issue in *Rojo* was whether FEHA provides the exclusive remedy for injuries relating to sex discrimination in employment. The Court concluded that it does not—*i.e.*, that FEHA does *not* supplant other state laws, including claims under the common law, relating to employment discrimination. *Id.* at 71, 73-82. The Court was not asked to—and did not—consider whether FEHA's field of exclusivity extends to local laws that serve a different purpose and/or that regulate a practice not covered by FEHA's provisions. It is well established that "cases are not authority for propositions not considered." *People v. Alvarez*, 27 Cal. 4th 1161, 1176 (2002).

Moreover, Defendants essentially ignore the actual test for determining whether a local law is expressly preempted. "Express field preemption turns on a comparative statutory analysis." *California Grocers Ass'n v. City of Los Angeles*, 52 Cal. 4th 177, 188 (2011). A court conducting this analysis must determine "[w]hat field of exclusivity . . . the state preemption clause define[s]," and then ask whether the local law falls within it. *Id.* at 188-89.

As to the first part of this analysis, FEHA's field of exclusivity is the protection of civil rights through regulation of the discriminatory housing

and employment practices covered by FEHA. *See* Gov't Code § 12993(c) (defining the field as "regulation of discrimination in employment and housing encompassed by the provisions of this part"); *Citizens for Uniform Laws v. Cty. of Contra Costa*, 233 Cal. App. 3d 1468, 1470 (1991) (defining FEHA's field of exclusivity as "the field of protecting civil rights by prohibiting some of the same discriminatory practices [covered by a county ordinance]"); *id.* at 1471 (discussing the "field of civil rights protection occupied by FEHA").

San Francisco's source-of-income provision in Section 3304 does not fall within this field for two independent reasons. First, it is not a civil rights regulation. It was proposed, debated and adopted as a *local housing regulation*, the purpose of which was to make the Section 8 program more responsive to San Francisco's housing conditions and to improve the ability of Section 8 recipients to secure and maintain housing. Because it serves a different purpose, it occupies a different field. *See* Part I(A), *infra*. Second, San Francisco's source-of-income provision addresses a practice that is not covered by FEHA. *See* Part (I)(B), *infra*.

A. San Francisco's Source-Of-Income Provision Is Not Within FEHA's Field Of Exclusivity Because It Serves A Different Purpose.

When a local law serves a different purpose than a state statute, that different purpose "removes it from the field occupied by the state legislation." *Citizens for Unif. Laws*, 233 Cal. App. 3d at 1475; *see also Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 149 (1976) (holding that a local ordinance is not preempted by a state statute when the two laws serve distinct purposes). Such is the case here.

FEHA is a broad civil rights measure intended to protect Californians from certain types of arbitrary discrimination in various

housing and employment contexts. *See* Gov't Code § 12921(b); *Citizens for Unif. Laws*, 233 Cal. App. 3d at 1474 (holding that the purpose of FEHA "is to protect civil rights") (citing Gov't Code §§ 12920, 12921).

By contrast, San Francisco's source-of-income provision was *not* enacted to protect civil rights. Rather, as the legislative history makes clear, its purpose was to address the impact of a local housing crisis by improving local housing options for low income Section 8 voucher recipients. In 1998, the San Francisco Board of Supervisors passed three measures aimed at making the Section 8 program more responsive to local conditions and making it easier for voucher recipients to find and keep housing in the City:

- First, the Board added the source-of-income provision at issue in this case. CT at 94.
- Second, they added a requirement that landlords consider a potential tenant's entire income—including government assistance—when making determinations as to whether to rent to that tenant. *See id.*; S.F. Police Code § 3304(b).
- Finally, the Board modified the San Francisco Rent Stabilization and Arbitration Ordinance (the "Rent Ordinance") to more effectively serve Section 8 recipients. *See* CT at 116. At the time, the Rent Ordinance regulated rental units in San Francisco, but did not cover units controlled by a governmental agency. This exception was interpreted to exempt units occupied by Section 8 recipients. *See id.* at 105. The Board ended this exemption and brought Section 8 units under the control of the Rent Ordinance. *See id.* at 116. This change meant that landlords faced new limitations on the degree to which they could raise rents on units occupied by Section 8 tenants. It also prevented landlords from terminating Section

8 leases for "economic reasons," which they had previously been able to do, and instead allowed landlords to terminate a Section 8 lease only if they could cite one of the fourteen "just cause" reasons that were allowed by the Rent Ordinance. *See id.* at 131-38.

According to the Legislative Analysis that accompanied these ordinances, the City was facing one of the tightest rental housing markets in the country—with exceptionally low vacancy rates and high rents. *Id.* at 106. As a result, Section 8 recipients were often unable to locate housing. *Id.* at 108. As reported in the Legislative Analysis, "[t]he Housing Authority states that between May 1997 to December 1997, due to a lack of affordable housing for Section 8 tenants, 34 percent of the 208 households that were issued Section 8 vouchers for the first time, left or 'ported out' of San Francisco to locate housing in other jurisdictions." *Id.* The three measures would "help reduce th[is] displacement of Section 8 recipients." *Id.* at 107. The text of the Legislative Analysis, as well as its overall tenor, make clear that San Francisco's source-of-income provision and the companion legislative changes were designed—not as sweeping civil rights or anti-discrimination measures—but with the purpose of making the Section 8 program more responsive to the City's unique housing needs.

Defendants claim this difference in purpose is a "distinction without a difference." AOB at 13. Defendants are wrong. In fact, this difference in the underlying purpose of San Francisco's law is critical to the preemption analysis. California courts have repeatedly held that local laws enacted for different purposes are not preempted by FEHA.[4]

[4] To the extent Defendants are asserting that there is no legally meaningful difference between the state and local provision because both FEHA and San Francisco's source-of-income ordinance employ prohibitions against certain forms of discrimination to advance their respective (and distinct) policy goals, this too is wrong. "The mere fact that

In *Rental Housing Association of Northern Alameda County v. City of Oakland*, 171 Cal. App. 4th 741 (2009), for example, the First District Court of Appeal considered a preemption challenge to an Oakland law that made it "unlawful for a landlord to refuse to rent or lease or otherwise deny to or withhold from any person any rental unit because the age of a prospective tenant would result in the tenant acquiring rights under" other provisions of the ordinance. The court found that the purpose of the Oakland ordinance was "to defend and nurture the stability of housing" and to "address housing problems in the City of Oakland so as . . . to advance the housing policies of the City." *Id.* at 749-50. Accordingly, the court concluded that even though the ordinance and FEHA both regulated housing discrimination, FEHA did not preempt the Oakland law, because the age discrimination provision did not "have the same purpose as FEHA and [did not] occupy the same field." *Id.* at 761 (citation omitted).

The court in *Citizens for Uniform Laws*, 233 Cal. App. 3d 1468, reached a similar conclusion. In that case, the challenged law prohibited housing discrimination against individuals with HIV. The court found that while "[t]he purpose of FEHA is to protect civil rights," the local ordinance "was proposed, debated and adopted as public health legislation, the purpose of which is to combat the AIDS epidemic by promoting HIV testing." *Id.* at 1474-75. Accordingly, the court held that the local

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the two sets of legislation employ similar regulatory tools (i.e., proscriptions against certain types of discrimination) does not mean they occupy the same field." *Citizens for Unif. Laws*, 233 Cal. App. 3d at 1475. Rather, "[t]he pivotal issue is whether the ordinance occupies the same 'field' or 'subject matter' as that regulated by FEHA. If not, there is no preemption." *Id.* at 1474 (citation omitted). Because the San Francisco ordinance does not occupy FEHA's broad field of civil rights, it is immaterial that both laws make use of antidiscrimination measures to accomplish their distinct objectives.

ordinance was not preempted by FEHA, despite the fact that both laws employed antidiscrimination protections in housing to realize their respective purposes. *Id*. at 1475.

Just as Contra County officials crafted and passed their ordinance to address challenges identified by public health officials, the San Francisco Board of Supervisors passed three provisions, including the source-of-income amendment to Section 3304, in order to address the San Francisco Housing Authority's findings regarding local housing market conditions. CT at 108. Further, in the same way that Oakland found age discrimination on the part of landlords had created a housing shortage among certain groups of residents, so too did the San Francisco Board of Supervisors conclude that landlords' refusal to rent to Section 8 voucher holders was a major contributing factor to the housing crisis among low-income renters.

In sum, because San Francisco's source-of-income provision serves a different purpose than FEHA, the local law is not within FEHA's field of exclusivity and, therefore, is not preempted.

B. San Francisco's Source-Of-Income Provision Is Not Within FEHA's Field Of Exclusivity Because It Addresses A Practice Not Covered By State Law.

San Francisco's source-of-income provision falls outside FEHA's field of exclusivity for another reason as well: it covers a practice (refusal to rent to Section 8 recipients) that is not covered by the state law.

FEHA's preemption provision states that the Legislature intends to occupy "the field of regulation of discrimination in employment and housing *encompassed by the provisions of this part*." Gov't Code § 12993(c) (emphasis added). The italicized language indicates that FEHA's field of exclusivity does not extend to *all* regulation of housing and employment discrimination—only to those that address the specific

forms of discrimination covered by its provisions. If, as Defendants suggest, FEHA preempts all local housing laws banning *any* kind of discrimination, these words would have no effect. This would run afoul of the established principle that "whenever possible, significance must be given to every word in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage." *Agnew v. State Bd. of Equalization*, 21 Cal. 4th 310, 330 (1999).

Accordingly, the Court of Appeal has held that FEHA's "preemptive reach" is limited to "discrimination on the basis of the grounds explicitly covered by the FEHA." *Rental Housing Ass'n*, 171 Cal. App. 4th at 762 n.15. In *Rental Housing Association*, the Court upheld Oakland's age discrimination ordinance on the grounds that it served a distinct purpose from FEHA. *See* p. 18, *supra*. However, the Court also noted that it would have upheld the law even if the age discrimination provision did not serve a distinct purpose, because "age discrimination is not prohibited by [FEHA], and FEHA preempts only 'the field of regulation of discrimination in employment and housing encompassed by the provisions of [that statute].'" *Rental Housing Ass'n*, 171 Cal. App. 4th at 762 n.15 (quoting Gov't Code, § 12993(c)).

The Court of Appeal reached a similar conclusion in *Citizens for Uniform Laws*, explaining that even absent the distinct purpose of Contra County's HIV ordinance, the law might nevertheless have been upheld due to the category of discrimination it addressed. Because "FEHA does not forbid housing discrimination based on physical handicap," the court concluded, "it is . . . arguable that FEHA does not occupy the field of housing discrimination based on physical handicap." *Citizens for Unif. Laws*, 233 Cal. App. 3d at 1473.

Defendants argue that *Citizens for Uniform Laws* and *Rental Housing Association* are irrelevant because the local ordinances in those cases regulated classifications not covered by FEHA, whereas FEHA "expressly covers source of income discrimination." AOB at 14. But as Defendants correctly note in their papers (*see id.* at 11-12), refusal to rent to Section 8 voucher holders is *not* covered by FEHA's provisions. Indeed, as the language of FEHA makes clear and as the court confirmed in *Sabi*, FEHA's "source-of-income" discrimination and the type of Section 8 discrimination banned by the source-of-income provision of Section 3304 are wholly distinct concerns. *See Sabi*, 183 Cal. App. 4th at 942. Moreover, "[t]he mere fact that the two sets of legislation employ similar regulatory tools (i.e., proscriptions against certain types of discrimination) does not mean they occupy the same field." *Citizens for Unif. Laws*, 233 Cal. App. 3d at 1475.

Like physical disability and age discrimination, FEHA does not regulate discrimination based on Section 8 voucher status. Therefore, under FEHA's plain language and the relevant case law, San Francisco's source-of-income provision falls outside FEHA's field of exclusivity and is not preempted.

II. Section 3304 Is Not Impliedly Preempted Because It Does Not Contradict FEHA.

Defendants next argue that the source-of-income provision of Section 3304 is impliedly preempted because it contradicts FEHA. AOB 10-13. Again, Defendants are incorrect.

A local law "contradicts" a state law for purposes of preemption when the local ordinance in "inimical" to the state statute, meaning that the local law "directly requires what the state statute forbids or prohibits what

the state enactment demands." *Inland Empire*, 56 Cal. 4th at 743. Under this test, there is no preemption "where it is reasonably possible to comply with both the state and local law." *Id.* Or, put conversely, an inimical contradiction exists only where "it is impossible to simultaneously comply with both" the state and local law. *Id.* at 754-55. Thus, in *Inland Empire*, the California Supreme Court concluded that there was no contradiction between California's medical marijuana statutes, which permit the cultivation and distribution of marijuana under certain circumstances, and a seemingly contradictory local ordinance that prohibited medical marijuana dispensaries within the City of Riverside. *Id.* The Court explained:

> Neither [state law at issue] *requires* the cooperative or collective cultivation and distribution of medical marijuana that Riverside's ordinance deems a prohibited use of property within the city's boundaries. Conversely, Riverside's ordinance requires no conduct that is forbidden by the state statutes. Persons who refrain from operating medical marijuana facilities in Riverside are in compliance with both the local and state enactments. (*Id.* at 755.)

Similarly here, the impossibility-of-simultaneous-compliance test is simply not met. FEHA allows, but does *not require*, landlords to refuse to rent to Section 8 tenants. And San Francisco's law does not require landlords to do anything that FEHA forbids (certainly, FEHA does not forbid renting to Section 8 voucher holders). Landlords who do not disqualify Section 8 voucher holders from renting their apartment are in compliance with both Section 3304 and FEHA. Accordingly, although FEHA does not prohibit individuals from refusing to rent to Section 8 vouchers holders and the source-of-income provision of Section 3304 does, there is no "contradiction" and no preemption. *See id.*; *see also Kirby v. Cty. of Fresno*, 242 Cal. App. 4th 940, 955-56 (2015).

Writing in concurrence in *Inland Empire*, Justice Liu set forth a slightly different contradiction-preemption test—under which the local law could be preempted even if it is possible for a party to comply with both the state and local law by refraining from the activity—as long as the state law "clearly authorizes or intends to promote" the activity that the local law forbids. *Inland Empire*, 56 Cal. 4th at 763-65 (Liu, J., concurring). Justice Liu made clear, however, that he agrees with the majority that "'state law does not "authorize" activities, to the exclusion of local plans, simply by exempting those activities from otherwise applicable state prohibitions.'" *Id.* at 764 (quoting majority opinion). Similarly here, the Legislature did not affirmatively authorize landlords to refuse to rent to Section 8 voucher holders simply by exempting this type of discrimination from the reach of the law. Rather, FEHA leaves the issue of Section 8 vouchers unregulated. As the *Sabi* court noted, the 1999 and 2004 Amendments to FEHA that added source of income as a protected class "addressed a whole host of issues and problems that do not even relate to the Section 8 program." *Sabi*, 183 Cal. App. 4th at 938. As such, FEHA does not "clearly authorize or promote" a landlord's refusal to rent to a Section 8 voucher holder. Accordingly, even under Justice Liu's more lenient test, Defendants have not carried their burden of proving that San Francisco's source-of-income provision in Section 3304 is preempted.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's decision to grant Plaintiffs' motion for a preliminary injunction.

Dated: July 5, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 5,575 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on July 5, 2017.

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PROOF OF SERVICE

CITY AND COUNTY OF SAN FRANCISCO v. POST; ET. AL.
CT. OF APPEAL 1ST APPELLATE DIST. DIV. 2
Case No. A149136
[Superior Court Case No. CGC-15-548551

I, Alison Lambert, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Sixth Floor, San Francisco, CA 94102.

On July 5, 2017, I served the following document(s):

RESPONDENTS' BRIEF

in the manner indicated below:

☒ Electronically, through the TrueFiling system, on counsel for appellants, pursuant to rule 8.71(c), California Rules of Court.

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[Via E-submission pursuant to Rule 8.212(c)(2)]

Honorable Ronald E. Quidachay
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[Via U.S. Mail])

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed July 5, 2017 at San Francisco, California.

Alison Lambert

ALISON LAMBERT