

No. 17-782

IN THE
Supreme Court of the United States

CHATEAU FOGHORN LP,
Petitioner,
v.

WESLEY HOSFORD,
Respondent.

**On Petition for a Writ of Certiorari to the
Court of Appeals of Maryland**

**BRIEF FOR THE NATIONAL
APARTMENT ASSOCIATION
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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December 28, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court of the United States, *amicus curiae* the National Apartment Association (“NAA”) hereby makes the following disclosures: (1) The NAA is a nonprofit trade association which has no parent corporation; (2) no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE INTERESTS OF *AMICUS CURIAE*¹

The National Apartment Association (“NAA”) is a trade association for firms in the rental housing industry. The NAA is comprised of 165 state and local affiliated entities. The NAA encompasses over 73,000 members representing more than 9 million apartment homes throughout the United States, Canada, and the United Kingdom. The NAA, which is the leading national advocate for quality rental housing, is also the largest broad-based trade organization dedicated solely to rental housing.

As part of its business, the NAA creates and disseminates educational, operational and advocacy resources to members. In doing so, the NAA advocates for fair governmental treatment of multi-family businesses nationwide, including advocating the interests of the rental housing business community at large in cases of national concern. In that regard, the NAA has many member companies across the nation who participate in federal affordable housing programs. As these issues directly impact NAA members, the NAA is well-suited to address the questions of preemption presented herein.

¹ Pursuant to Sup. Ct. R. 37, *amicus curiae* and its counsel affirm that none of the parties to this case nor their counsel authored this brief in whole or in part, and affirm that none of the parties to this case nor their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus curiae* files this brief with the written consent of all parties, copies of which are on file in the Clerk’s Office. All parties received timely notice of *amicus curiae*’s intention to file this brief.

INTRODUCTION

Rental subsidy programs, be they project-based or voucher-based, are premised on decades-long voluntary, cooperative, and non-coercive relationships between the federal government, rental property owners, and prospective residents. These relationships uniquely combine the resources of the federal government and the management skills and resources of private housing developers, owners, and managers, for the purposes of creating rental opportunities for low-income tenants.

FACTUAL BACKGROUND

The National Apartment Association adopts by reference the Statement of the Case contained in the Petition.

ARGUMENT

I. APPLICATION OF MARYLAND CODE, REAL PROPERTY ARTICLE § 8-402.1(B)(1) IS PREEMPTED BY FEDERAL LAW.

Both 42 U.S.C. Chapter 8 – Low-Income Housing and 24 C.F.R. Part 982 – Section 8 Tenant-Based Assistance: Housing Choice Voucher Program, provide extensive laws and regulations surrounding federally-subsidized housing. Maryland Code, Real Property Article § 8-402.1(b)(1) is preempted by the comprehensive governance and regulation of federally-subsidized housing programs enacted under 42 U.S.C. Chapter 8 and 24 C.F.R. Part 982. In this regard, preemption may be express or implied. Implied preemption encompasses both “field” and “conflict” preemption principles. *Mass. Ass’n of HMOs v. Ruthardt*, 194 F.3d 176, 179 (1st Cir. 1999). The instant case falls under the principles of conflict preemption. Under the

principles of conflict preemption, implementation of Maryland Code, Real Property Article § 8-402.1(b)(1), which provides that a court must determine whether a breach of a lease “is substantial and warrants an eviction” prior to granting judgement for possession of the premises, creates interference and “stands as an obstacle to . . . accomplish[ing] and execut[ing] . . . the full purposes and objectives of Congress”, and is therefore preempted by the Supremacy Clause of Article VI of the Constitution. *Weaver’s Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458, 472-474 (1st Cir. 2009).

Substituting the application of federal laws and regulations under 42 U.S.C. § 1437f (Low-income housing assistance) and 24 C.F.R. § 982.310 (Owner termination of tenancy) that govern evictions in federally-subsidized housing programs with the application of state laws such as RP § 8-402.1(b)(1) frustrates the implementation of these federal laws. *Forest Park, II v. Hadley*, 336 F.3d 724, 733 (8th Cir. 2003). In *Forest Park*, Forest Park, a housing provider in Minnesota, financed an apartment building with a federally subsidized mortgage, and operated it as low-income housing for 25 years. *Id.* at 727. Pursuant to the provisions of federal law, Forest Park sought to prepay its mortgage and withdraw from the federal program. *Id.* However, tenants of the apartment building insisted that Forest Park adhere to two Minnesota statutes prior to withdrawing from the federal program. *Id.* Federal law only required Forest Park to provide between 150 and 270 days’ notice prior to prepayment; however, Minnesota statutes, Minn. Stat. Ann. § 504b.255 and § 471.9997, require the owner to give tenants one year’s prior notice and to submit a tenant impact statement to the tenants at least 12 months prior to ending participation in the

federal program, respectively. *Id.* at 730. Forest Park commenced a declaratory judgment action seeking a declaration that the Minnesota statutes were preempted by federal law, and that the statutes violate the Contracts Clause of the federal Constitution. *Id.* at 727. Forest Park named several individual tenants, the Minnesota Housing Finance Agency, and the Metropolitan Council as defendants. The district court granted the defendants' motion for summary judgment and issued a permanent injunction prohibiting Forest Park from prepaying the mortgage until it fully complied with the state statutes. *Id.* Forest Park appealed. Reversing the district court's ruling, the United States Court of Appeals for the Eighth Circuit held that the Minnesota statutes were preempted by the federal law stating "[w]hen, however, these state programs place additional requirements on federal program participants, restrict the exercise of the participants' federally granted prepayment rights, or create delays in the prepayment process, they are preempted." *Id.* at 734.

In the instant case, the Maryland statute allows judges to make subjective decisions as to whether a tenant's breach of the lease is "substantial and warrants an eviction". RP § 8-402.1(b)(1). However, under the federal laws that govern project-based housing, a housing provider does not have to consider mitigating factors prior to evicting a tenant for a drug-related activity. Both 24 C.F.R. §5.858 and § 982.310(c)(1), which provide regulations for project-based housing, state that "[t]he lease must provide that drug-related criminal activity engaged in, on or near the premises by any tenant, household member, or guest, or such activity engaged in on the premises by any other person under the tenant's control, is grounds for the owner to terminate tenancy." A landlord can evict a

tenant for drug-related activity, such as possession of marijuana, and it does not matter how much marijuana the tenant had in his possession. Regardless of Maryland Code, Criminal Law §5-601, which decriminalizes the possession of small amounts of marijuana, under 21 U.S.C. § 812(c)(10) the possession of marijuana in any amount remains a federal offense. Therefore, because the Maryland statute conflicts with the federal regulations, the Maryland statute restricts the execution of the federal laws. Furthermore, federally-subsidized housing eviction laws have been implemented for decades, and the facts in Appellee's case do not allow for an exception to the long-standing guidelines under 42 U.S.C. § 1437f.

II. APPELLEES' POSITION FRUSTRATES THE PURPOSE OF FEDERALLY SUBSIDIZED HOUSING PROGRAMS.

In any business transaction, there is an implicit expectation that each party will expect the other to adhere to the terms of the contract. To meet the challenges associated with the goal of providing affordable housing, the federal government has constructed an elaborate regulatory framework that creates economic incentives in order to achieve social goals over a fixed period of time. Maggie McCarty, *An Overview of the Section 8 Housing Programs: Housing Choice Vouchers and Project-Based Rental Assistance*, CRS Report for Congress RL 32284 (2014). In exchange for a steady flow of residents, guaranteed payments, and other incentives, rental housing investors and managers agree to enter federal affordable housing programs though they receive lower rent than they could receive in an open market. Meryl Finkel, Charles Hanson, Richard Hilton, Ken Lam, and Melissa Vandawalker, *Multifamily Properties: Opting In, Opting Out and*

Remaining Affordable, Econometria, Inc. and Abt Associates (2006). Additionally, there is an explicit agreement to adhere to the federal regulations regarding how a property operating within the programs will be managed. By contrast, housing providers that do not participate in federal affordable programs are free to include any lease contract clauses they please within the confines of state and local laws. However, those participating in federal affordable programs must agree to include certain lease contract clauses and exclude others. 42 U.S.C. § 1437d(l). One such agreed upon policy is that a resident who violates drug laws must be evicted from the property without exception. 42 U.S.C. § 1437f(d)(1)(B)(iii). Rental housing investors and managers rely on these policy terms in making their decision to place properties in federal affordable housing programs or to accept vouchers. “The very ease of thwarting the landlord’s right to evict for commission of such a crime would frustrate the purpose of an anticrime provision that permits eviction for any criminal activity.” *Hous. Auth. of Norwalk v. Brown*, 19 A.3d 252, 253 (Conn. App. Ct. 2011). Specifically, rental housing operators rely upon the fact that they know they will be able to evict those residents in violation of drug laws because they know that there is a high level of ancillary crime associated with the sale, possession, and use of illegal drugs. Furthermore, rental housing operators are aware that in many jurisdictions, they may be held liable for the foreseeable crimes associated with the sale, possession, and use of illegal drugs on the property. *Hemmings v. Pelham Wood Ltd. Liab. Ltd. P’ship*, 375 Md. 522, 537 (2003) (In this case, the Court of Appeals of Maryland held that the landlord could be liable for a foreseeable injury caused by a known dangerous or defective condition located within the part of

the property over which the landlord retained control). Allowing Maryland courts to supersede the established regulatory structure of a federal program would eliminate an investor's legitimate reliance on the explicit terms of a federal program. Appellee paradoxically undermines the entire program because they introduce uncertainty into a market that is dependent upon certainty. This uncertainty discourages the continued participation of housing providers in such programs. Further, it discourages additional housing providers from entering federal affordable housing programs. This is especially the case with crime and safety policies as landlords face liability concerns when criminal activity impacts residents. Issues that discourage participation in federal affordable housing programs further exacerbate the housing affordability issues currently facing the nation.

Amici respectfully urge the court to reject this dangerous theory.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December 28, 2017