No. 07-1373

In The
Supreme Court of the United States

GLENMONT HILLS ASSOCIATES PRIVACY WORLD
AT GLENMONT METRO CENTER,
Petitioner,

v.

MONTGOMERY COUNTY, MARYLAND,
Respondent.

On Petition for Writ Certiorari to the Court of Appeals for the State of Maryland

MOTION TO FILE AMICUS BRIEF AND BRIEF OF *AMICI CURIAE* NATIONAL APARTMENT ASSOCIATION, NATIONAL MULTI HOUSING COUNCIL, NATIONAL LEASED HOUSING ASSOCIATION, LOUISVILLE APARTMENT ASSOCIATION, APARTMENT AND OFFICE BUILDING ASSOCIATION OF METROPOLITAN WASHINGTON, DELAWARE APARTMENT ASSOCIATION, GREATER LEXINGTON APARTMENT ASSOCIATION, INC., MOBILE BAY AREA APARTMENT ASSOCIATION, AND NEW JERSEY APARTMENT ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2(b), the National Apartment Association, the National Multi Housing Council, the National Leased Housing Association, the Louisville Apartment Association, the Apartment and Office Building Association of Metropolitan Washington, the Delaware Apartment Association, the Greater Lexington Apartment Association, Inc., the Mobile Bay Area Apartment Association, and the New Jersey Apartment Association (collectively, the "*Amici*") move the Court for leave to file the attached brief *amici curiae* in this case. The consent of the attorneys for the petitioner was timely requested and obtained. The consent of the attorney for respondent was timely requested but denied, making this motion necessary.

Nearly eighty-seven million Americans, almost one-third of all Americans, rent their housing.[1] The value of American apartment stock is estimated at $1.3 trillion.[2] Rental revenues from apartments total approximately $120 billion annually[3], and the

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[1] National Multi Housing Council (NMHC) tabulations of 2007 Current Population Survey, Annual Social and Economic Supplement, US Census Bureau.

[2] NMHC calculation based on report by Rosen Consulting Group, November 2001.

[3] NMHC tabulation of 2005 American Housing Survey, US Census Bureau.

management and operation of apartments are responsible for approximately 550,000 jobs[4]. Federal expenditures related to rental housing run into the tens of billions of dollars.

The *Amici* comprise a broad and diverse group of local and national organizations representing virtually all aspects of this large, economically important, and socially essential American rental apartment industry. While rental property owners and managers comprise the primary portion of membership in the *Amici* groups, in a very real way the missions and work of the *Amici* also promote and protect the interests of renters and tenants. Some persons and entities represented by the *Amici* have entered into contracts to receive rent subsidies pursuant to the Housing Choice Voucher Program established by Section 8 of the U. S. Housing Act of 1937, as amended ("Section 8 program"). 42 U.S.C. §1437f. Others represented by the *Amici* have elected not to participate in that program. This case affects them all because it affects the entire residential rental housing industry.

The voluntary Section 8 program has long served as America's primary rental subsidy program and has been largely successful in providing decent, safe and affordable housing for low-income families and the elderly. For over four decades, the Section 8 program has been premised on a cooperative and non-coercive relationship between the federal government, property owners, and prospective renters. As designed by Congress, that relationship combines the financial

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[4] 2002 Economic Census, US Census Bureau.

resources of the federal government, the entrepreneurial spirit, management skills and real estate resources of private housing developers, owners, and managers, and participation of those who benefit from expanded and improved affordable housing opportunities across the country. The continuation of this successful relationship is potentially at stake in this case as certain states and localities attempt to fundamentally alter the voluntary nature of the Section 8 program.

Bolstered by various state court rulings, certain states and localities are now employing so-called "source of income" non-discrimination statutes and ordinances to make participation in the Section 8 program mandatory on the part of rental property owners and managers. Although perhaps well-intended, these state laws and court rulings adversely affect the *Amici* and those they represent in several significant ways. Thus, the *Amici* have a very direct interest in the answer to the question presented by the *Petition for a Writ of Certiorari* in this case: Does the Supremacy Clause of the U. S. Constitution, as applied in this Court's preemption jurisprudence, forbid states and localities from disregarding and overriding the clearly expressed and judicially recognized intent of Congress that participation in the Section 8 federal housing voucher program be voluntary on the part of rental property owners and landlords by enacting and enforcing laws that make such participation mandatory?

In the states and localities that have passed mandatory Section 8 participation laws simultaneous compliance with the federal statute, on the one hand,

and the state and local laws, on the other, has become impossible. Property owner participation in the Section 8 program clearly cannot be voluntary and mandatory at the same time. Accordingly, these state and local laws are in conflict with congressional intent, undermine the methods Congress has chosen to implement federal housing policy, jeopardize a successful program, and impose an unconstitutional burden on those that the *Amici* represent.

Simply put, the Supremacy Clause of the U. S. Constitution compels a conclusion that the voluntary participation provisions of the Section 8 program preempts state and local "source of income" anti-discrimination statutes and ordinances that directly conflict with those provisions. The petitioner has clearly presented the case and effectively explained the legal basis upon which this Court should therefore grant certiorari and reverse the Maryland state court ruling that wrongly rejected the federal preemption argument. However, the *Amici* are particularly well-suited to offer an industry-wide perspective based on the broader, practical, and "real world" implications of this case for those they represent and to supplement the legal argument that should ultimately produce a finding of federal preemption.

This matter obviously involves the balance of power and prerogatives between the federal government and the states generally, but also much more. As evidenced by the statistics set forth above, the rental housing industry occupies a critical place in the national economy. The American housing market currently confronts turbulent times and myriad challenges. Given that the implications of this matter

go well beyond the concerns and interests of the actual parties, it is vitally important and perfectly appropriate that the Court consider input from the industry represented by the *Amici* in determining whether to hear and how to dispose of this case.

For these reasons, the *Amici* respectfully request that the Court grant this motion for leave to file the attached brief, *amicus curiae*.

Respectfully Submitted,

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CORPORATE DISCLOSURE STATEMENT

Although not strictly required by Rule 29.6 or 37.5, the *Amici* submit the following corporate disclosure statement:

Each of the *Amici* is a nonprofit corporation. None has any parent corporation, and none has issued any stock. For this reason, no parent or publicly held company owns 10% or more of the stock of any of the *Amici* entities.

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INTERESTS OF THE *AMICI*[1]

Amicus the National Apartment Association is a federation of nearly 200 state and local affiliates, comprised of more than 51,000 multifamily housing companies representing more than 6.3 million apartment homes throughout the United States and Canada. NAA's mission is to serve the interests of multifamily housing owners, managers, developers and suppliers and maintain a high level of professionalism in the multifamily housing industry to better serve the rental housing needs of the public.

Amicus the National Multi Housing Council is a national association representing the interests of the larger and most prominent apartment firms in the U. S. Its members are the principal officers of firms engaged in all aspects of the apartment industry, including ownership, development, management, and financing. The NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business

[1] The consent of the attorneys for petitioners was requested and obtained. The consent of the attorney for respondent was requested but refused. Thus, a motion requesting leave to file the instant brief precedes this brief and is incorporated herein by reference. Counsel of Record for all parties recieved notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. Rule 37.2(b). No counsel for any party authored this brief in whole or in part, and no one other than the instant *Amici* and their counsel and members made any monetary contribution to the preparation or submission of this brief. *Cf.* Supreme Court Rule 37.6

information, and promotes the desirability of apartment living.

Amicus the National Leased Housing Association is a national organization representing all major participants, private and public, in the affordable multifamily rental housing industry. NLHA is an advocate for 550 housing provider organizations and their consultants, specializing in federally assisted rental housing. Its members include developers, public housing authorities, local governments, owners, managers, state housing finance agencies, non-profit sponsors, attorneys, investment bankers, and syndicators.

Amicus the Louisville (Kentucky) Apartment Association is a trade organization of apartment developers, owners, managers, and their suppliers. Its constituents also include the local housing authority and representatives of the financial and legal communities. The LAA is dedicated to the efficient, professional operation of convenient, comfortable apartment living.

Amicus the Apartment and Office Building Association of Metropolitan Washington is the leading membership organization representing commercial and multi-family residential real estate in the Washington, D. C. area. Formed in 1974, AOBA works to protect and enhance the value of its members' investments through effective leadership and advocacy, information exchange, and professional development.

Amicus the Delaware Apartment Association is a non-profit trade organization representing multi-family housing owners, managers, and developers in New Castle, Kent and Sussex Counties. Formed in 1997, it represents over fifty-two apartment owner/managers who operate approximately 23,000 rental units.

Amicus the Greater Lexington (Kentucky) Apartment Association, Inc. advocates ethical and professional standards in order to best serve the multi-family housing industry for the community, and to enhance the profitability of its members.

Amicus the Mobile Bay Area Apartment Association promotes a high standard of integrity in the performance of all rental obligations and services in the operation of member apartment communities, among other things.

Amicus the New Jersey Apartment Association is a statewide organization of apartment owners, managers, builders and those involved in allied industries, who are dedicated to maintaining and improving existing properties and promoting and producing new and affordable apartments throughout New Jersey.

By virtue of their membership, missions, and work, each of the *Amici* has a direct interest in the question of whether local and state laws can fundamentally change federal law by making mandatory property owner participation in the Section 8 program that Congress expressly made voluntary. Federal courts have recognized that the burdens of participation in

the Section 8 program are so substantial that Congress intended that participation should not be forced on rental property owners. *See*, *e.g.*, *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 300 (2d Cir. 1998). Therefore, it cannot be seriously disputed that the *Amici* are adversely impacted to the extent states and localities are permitted to disregard both this acknowledged burden associated with the Section 8 program and this congressional intent.

Likewise, even state courts that have upheld mandatory participation laws have recognized that the practical result of such rulings could be an increase in rental rates, a reduction in available rental units, or both. These consequences directly impact the *Amici* and those they represent. The interests of the *Amici* in this case are therefore real, substantial, and worthy of the Court's consideration via this brief *amici curiae*.

ARGUMENT IN SUPPORT OF THE PETITION

I. Preliminary Matters

The *Petition for a Writ of Certiorari* (the "Petition") before the Court in this case arises from a final judgment issued pursuant to a mandate of the Court of Appeals of the State of Maryland following its opinion reported at 936 S.2d 325 (Md. 2007). The mandate and the opinion are set forth as Appendices B and C, respectively, to the Petition.

The *Amici* adopt by reference the Statement of the Case set forth at pages 2-10 of the Petition and, in addition to the arguments and discussion herein, join

in the Reasons for Granting the Writ set forth at pages 10-24 of the Petition.

II. This Case Satisfies the Considerations Governing Review on Certiorari

This case satisfies two of the reasons for review on certiorari that the Court considers under Rule 10.

First, as described in Rule 10(b), multiple state courts of last resort, as well as some intermediate state appellate courts, have decided an important federal question in a way that conflicts with a decision of a United States court of appeals. These state courts include not only the Court of Appeals for the State of Maryland here, but also the other state courts identified by that court in its opinion. *See* Petition at App. C, p. 37a (hereafter, "Pet. App. at ____").

These courts concede, as did Maryland's, that "nothing in the Federal law requires landlords to participate in" the Housing Choice Voucher Program established by Section 8 of the U. S. Housing Act of 1937, as amended (the "Section 8 program"). *See*, *e.g.*, Pet. App. at 29a citing 42 U.S.C. §1437f. *See also* 42 U.S.C. §1437f(d)(1)(A); 42 U.S.C. §1437f(o)(6)(B); 24 C.F.R. § 982.302(b). They have nonetheless refused to find that the provisions of the Section 8 program expressly making participation in it by rental property owners entirely voluntary operate to preempt their state or local "source of income" non-discrimination laws that, in sum, forbid property owners from refusing to rent to Section 8 participants on that

basis.[2] To so hold, these state courts have either ignored the clearly expressed congressional intent as to voluntary participation in the Section 8 program, formulated and applied new tests for federal preemption that are neither grounded in nor recognized by this Court's precedents, or, like the Maryland Court of Appeals here, done both.

On the other hand, the federal courts that have had an opportunity to address these issues have been straightforward in acknowledging both the congressional intent as to voluntary participation and its preemptive effect. For example, as to congressional intent that participation in the Section 8 program should be voluntary, the U. S. Court of Appeals for the Second Circuit has stated, "[T]he voluntariness provision of Section 8 *reflects a congressional intent that the burdens of Section 8 participation are substantial enough that participation should not be forced on landlords*, either as an accommodation to

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[2] The record reflects that "seventeen cities[,]" including Los Angeles, New York, Philadelphia, Seattle, St. Louis, and Washington, D.C. and "at least twelve States" have "source of income" anti-discrimination laws similar to the Maryland ordinance giving rise to this case. Pet. App. at 33a, 236a. However, it appears that the number of states now having similar laws is actually thirteen: California (West's Ann. Cal. Gov. Code §12955); Connecticut (C.G.S.A. § 46a-64c); Maine (5 M.R.S.A. § 4582); Maryland (MD Code, Housing & Community Development, § 7-306); Massachusetts (M.G.L.A. 151B § 4); Minnesota (M.S.A. § 363A.09); New Jersey (N.J.S.A. 10:5-4); North Dakota (NDCC, 14-02.5-05); Oklahoma (25 Okl.St.Ann. § 1452(8)); Oregon (O.R.S § 659A.421); Utah (U.C.A. 1953 § 57-21-5); Vermont (9 V.S.A. § 4503); and Wisconsin (Wis. Stat. § 106.50).

handicap or otherwise." *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 300 (2d Cir. 1998) (emphasis added). The *Salute* court thus recognized the undeniably obvious, *i.e.*, that Congress intended that participation in the Section 8 program be voluntary.

Likewise, the U. S. Court of Appeals for the Seventh Circuit expressed considerable skepticism about the ability of states and localities to disregard that congressional intent to make participation in the Section 8 program effectively mandatory. Said that court, "It seems questionable, however, to allow a state to make a voluntary federal program mandatory." *Knapp v. Eagle Property Management Corp.*, 54 F.3d 1272, 1282 (7th Cir. 1995). Thus, rather than rule the local law to be preempted and thus unconstitutional, that court read it so as to put Section 8 vouchers outside its scope.

The U. S. Court of Appeals for the Sixth Circuit has also recently recognized that, "Nothing in the language of Section 8 indicates that, in making the program voluntary, *Congress intended to* do more than *give landlords the option not to participate.*" *Graoch Associates # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Com'n*, 508 F.3d 366, 377 (6th Cir. 2007). However, as with the Maryland local law at issue here, state courts and state and local legislatures across the country are now busily frustrating that clearly expressed congressional intention by taking away from apartment owners "the option not to participate."

Regardless of whether these passages from federal appellate opinions provided either the grounds for decision or the actual holding in the cases, they most definitely do represent the consistent, direct, and unqualified conclusions of all federal courts of appeals that have considered this issue that Congress clearly intended for participation in the Section 8 program to be and remain voluntary because of the burdens associated with such participation and the legislatively chosen means for accomplishing the law's objectives. As such, there is indisputably a conflict between multiple state high courts and multiple federal courts over the relevant congressional intent in particular and, by implication if not necessity, the preemptive force of the voluntary participation provisions of the Section 8 program.

As to federal preemption, the Maryland Court of Appeals rejected the petitioner's amply-supported invocation of federal authority supporting the proposition that a state law is preempted if it conflicts with the methods by which a federal statute was designed to reach its goal or conflicts with the means Congress has chosen to implement federal policy. *See* Petition at 10-11 citing *Gade v. National Solid Wastes Management Assn*, 505 U.S. 88, 103 (1992), *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). Instead, and without so much as a passing citation to any source or supporting authority, the Maryland court invoked a novel decisional basis that the voluntary participation provisions of Section 8 do not lie "at the heart of the Congressional purpose." Pet. App. at 32a.

Even if the conflicting decisions of the state and federal courts do not constitute the kind of direct conflict warranting review on certiorari as contemplated by Rule 10(b), it is nonetheless true that by denying the preemptive effect to the voluntary participation provisions of Section 8 the state courts referred to above have decided important questions of federal law by ruling on the preemptive effect of the voluntary participation provisions of the Section 8 program in particular and the standard for conflict preemption in general. They have done so on a question that has not been, but should be, directly addressed and settled by this Court and in a way that conflicts with relevant decisions of this Court, as is persuasively argued at pages 13-16 of the Petition. Thus, this case indisputably satisfies the criteria of Rule 10(c) for review on certiorari.

This case therefore fully meets the rule-based prerequisites for review on certiorari in one or more respects.

III. The Broader State-Federal Conflict Over Conflict Preemption

This case does not only present a conflict between state and federal courts over the specific issue of whether the voluntary participation provision of Section 8 preempts state and local "source of income" non-discrimination statutes. It also reveals an ongoing and much broader conflict between state and federal courts over the nature of this Court's conflict preemption jurisprudence.

Conflict preemption encompasses situations in which there is an inconsistency between a state or local enactment and either a federal statute or the specific objectives underlying a federal law. Conflict preemption also "covers cases where the regulatory objectives of the two government entities are incompatible" and operates to nullify "state laws that either make federal compliance impossible, or that prevent or frustrate the accomplishment of the federal requirement." James T. O'Reilly, *Federal Preemption of State and Local Law* 72 (2006) citing *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (implied congressional intent to make arbitration agreements relating to interstate commerce enforceable in state or federal court forecloses state efforts to undercut that intent), *Burbank v. Lockheed Air Terminals*, 411 U.S. 624, 639 (1973) (primacy of federal authority required if congressional objectives are to be fulfilled), and *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (Supremacy Clause nullifies state laws that prevent or frustrate the accomplishment of a federal objective and ones that make it impossible for private parties to comply with both state and federal law). It "is based upon the occurrence of a disagreement in practical terms," such as when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." O'Reilly, *supra*, at 16, 73 citing *Fidelity Federal Savings & Loan Assn. v. de la Cuesta*, 458 U. S. 141, 152 (1982) quoting *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941).

It is certainly not surprising that state courts, in which the particular issue presented in this case has most frequently been litigated, would opt for the most restrictive possible interpretation of this Court's

conflict preemption case law. But those state courts are not at liberty to develop and apply their own, much more demanding standard for federal preemption that goes beyond anything found in or reasonably based upon this Court's precedent. By adopting such an aggressively and excessively narrow construction of conflict preemption, such state courts expand state and local authority and prerogatives by usurping federal legislative authority that is the supreme law of the land. U. S. Const., Art. VI, cl. 2. While this provincial tendency to enlarge state power may be understandable, in this instance the state court succumbed to it in an especially superficial manner.

After little more than a cursory nod toward this Court's considerable conflict preemption precedent, and instead of undertaking any actual conflict preemption analysis of its own, the Maryland Court of Appeals sought decisional refuge in a Department of Housing and Urban Development ("HUD") regulation, 24 CFR §982.53(d), and in the decisions of other state courts. Pet. App. at 32a-37a. The HUD regulation states, "Nothing in part 982 is intended to preempt operation of State and local laws that prohibit discrimination against a Section 8 voucher-holder because of status as a Section 8 voucher-holder," but then ambiguously adds that, "However, such State and local laws shall not change or affect any requirement of this part, or any other HUD requirements for administration or operation of the program."

The Maryland court's discussion of 24 CFR §982.53(d) ignored the fact that the regulation refers only to the preemptive effect of other regulations in that part of the Code of Federal Regulations, and not

to the statute, Section 8, itself. The court likewise failed to attach any significance or give any meaningful effect to the federal court decisions discussed above, except to say in passing that it disagreed with the pro-preemption position asserted by the Seventh Circuit in *Knapp*. Pet. App. at 37a.

Moreover, the Maryland court cited *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) as the *only* authority from this Court supporting its decision to place such a disproportionate emphasis on the self-referential and arguably self-contradictory HUD regulation as a basis for rejecting preemption. *See* Pet. App. at 36a. In *Chevron*, however, this Court deferred to the administrative interpretation of the statute in question because it was clear "that Congress did not actually have an intent" as to the issue in question, *i.e.*, treating all pollution-emitting devices within the same industrial grouping as though they were encased within single "bubble" for purposes of the Clean Air Act. In the *absence of any such intention*, this Court held that the administrative agency was free to make a "reasonable policy choice" to which courts should accord deference. *Chevron*, 467 U.S. at 846.

Here, however, as the federal courts have repeatedly recognized, Congress clearly intended that participation in the Section 8 program by rental property owners was burdensome and should therefore be voluntary. There is no basis in the statute, the HUD regulation, or any of the state court decisions for either questioning the absolute nature of this intention or concluding that Congress also intended that the states be left free to effectively amend Section 8 to

make such participation mandatory. In such a situation, the applicable portions of the *Chevron* opinion are actually those which hold that, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress," and "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n. 9.

Neither the Maryland court nor any of the other state decisions ever actually confront, much less persuasively dispose of, the palpable conflict. Congress expressly chose a voluntary participation scheme to effectuate its objectives under the Section 8 program. Some states and localities have negated that congressional choice and substituted their own determination that Section 8 participation should be mandatory regardless of any effect such a *de facto* amendment of the federal statute may have on the attainment of congressional policy objectives.

It is therefore left for this Court to vindicate congressional power and prerogative under the Supremacy Clause of the U. S. Constitution by granting certiorari and reversing the Maryland judgment on the grounds that federal law in the form of the voluntary participation provisions of the Section 8 program preempt state and local "source of income" anti-discrimination statutes and ordinances. U. S. Const., art. VI, cl. 2.

IV. The Maryland Decision Misconstrued the Significance of Administrative and Other Burdens Underlying the Congressional Decision to Make Participation Voluntary

Voluntary participation by rental property owners has been a cornerstone of the Section 8 program since its inception and has remained so as the program has evolved. *See* Petition at 3-4; Pet. App. at 14a-19a. The reason for this is obvious. While the *Amici* are supportive of the Section 8 program's goals and intentions, property owners who participate in the program largely surrender the freedom of contract that they would enjoy in an ordinary private transaction, as well as some legal rights and remedies, and thereby subject themselves and their properties to extensive federal regulation. *See* Pet. App. at 4-6; 24 CFR § 982.

The record in this case reflects some, but not nearly all, of the administrative and regulatory burdens on property owners that participation in the Section 8 program entails. As set forth at pages 8 and 9 of the Memorandum Opinion of the Circuit Court of Montgomery County, Maryland, which the Maryland Court of Appeals reversed in the decision giving rise to the Petition, these burdens and surrenders include:

* Being required to add a non-negotiable three-page HUD addendum to the lease contracts;

* Not being allowed to consider non-payment of rent a lease violation;

* Not being allowed to terminate a Section 8 lease for certain enumerated reasons which limit the landlord's ability to maintain supervision and control over its quality assurance standards;

* Having to comply with maintenance, utilities, and other service standards required by HUD that are not required of non-Section 8 landlords;

* Any failure of any kind, even if unintentional, by the landlord to comply with the contract obligations potentially resulting in termination of the landlord's right to receive voucher funds; and

* Requirements that the landlord act in a quasi-law enforcement capacity to determine if any Section 8 tenant is abusing alcohol or drugs or engaging in other criminal activity.

See Pet. App. at 55a-56a; 278a-296a.

Additionally, Section 8 tenants are allowed to engage in profit-making activities unrelated to residential use of the premises; Section 8 leases can automatically terminate without notice to the landlord; and Section 8 apartments are subject to certain inspections by public housing authority officials. *See* Pet. App. 41a.

These burdens often operate to obscure the actual costs associated with participation in the Section 8 program, which can be considerably higher than those

associated with renting to an unsubsidized tenant. As just one example, the time-consuming unit-by-unit Section 8 inspections by often overloaded public housing agencies unnecessarily duplicate inspections conducted under other programs and result in lengthy delays in actually leasing the units. Units sit empty during such delays, which takes a significant financial toll on an apartment industry that relies on seamless turnover to meet its overhead costs. *See* Testimony of Janet S. Charlton, Triton Advisors, Inc. on behalf of the National Leased Housing Association, National Apartment Association, and National Multi Housing Council before the House Committee on Financial Services Subcommittee on Housing and Community Opportunity, March 9, 2007, copy attached as Appendix A.

By taking on a Section 8 tenant, a rental property owner acquires a powerful partner – the federal government. Making things even more difficult for rental property owners is the fact that in recent years the Section 8 program has suffered from the lack of a permanent and reliable funding formula through the congressional appropriations process. Funding shortfalls jeopardize the Section 8 vouchers used by tens of thousands of low-income families which, in turn, subjects owners to financial costs and operational instability. *See* Testimony of Hector Pinero, Related Management Company, LLC on behalf of the National Leased Housing Association, National Apartment Association, and National Multi Housing Council before the Senate Committee on Banking, Housing and Urban Affairs, March 12, 2008, copy attached as Appendix B.

It is essential that business owners know the rules of engagement with regard to the Section 8 program. Underfunding and burdensome regulations create an atmosphere of uncertainty. Combine these with state and local "source of income" laws and the result is exactly what Congress did not intend: Uncertainty for both tenant and owner.

Upon enumerating some, but certainly not all, of these burdens and issues, and noting that a local hearing examiner had determined them not to be particularly onerous (which is perhaps true from a detached, non-property owner perspective), the Maryland Court concluded that the administrative burden of Section 8 participation is not "substantial," that "administrative burden" is "simply not an allowable defense" unless the property owner "can establish a burden so severe as to constitute a taking of its property or the violation of due process, which so far as we can determine, no landlord has yet been able to do … ." *See* Pet. App. 42a-45a.

But the Maryland court thus missed the point. It is not that administrative burdens in and of themselves preclude enforcement of the "source of income" anti-discrimination statutes and ordinance. It is rather that the magnitude of these administrative and regulatory burdens provided the basis upon which Congress determined that voluntary participation by property owners was the best way to accomplish the federal statutory objectives.

It is therefore not surprising that the Maryland court intentionally omitted or merely overlooked federal judicial determinations to this effect. The

Maryland court's determination did not deal with, but directly conflicts with, the Second Circuit's observation that, "[T]he voluntariness provision of Section 8 *reflects a congressional intent that the burdens of Section 8 participation are substantial enough that participation should not be forced on landlords*, either as an accommodation to handicap *or otherwise*." *Salute*, 136 F.3d at 300 (emphasis added). Thus, the state court cavalierly dismissed as not particularly "onerous" the administrative and regulatory burdens that a federal court of appeal found substantial enough to shape the congressional structure of a core component of the Section 8 statute.

V. The Maryland Court Essentially Acknowledges that the Local Law Conflicts with Congressional Objectives as well as Congressional Methods

Perhaps the crowning irony and contradiction in the Maryland court's instrumentalist consideration of the burdens associated with mandatory Section 8 participation is its assertion that it is "not entirely the case" that the "source of income" anti-discrimination law at issue "effectively makes participation in HCVP mandatory." And why not? Because, reasons the court, "So long as it does so in a non-discriminatory fashion, a landlord is free to set the rent for its apartments high enough to make the apartments unavailable to Section 8 tenants because of the HCVP income and reasonable rent limitations." Pet. App. at 29a fn. 7.

Indeed, property owners can raise rents to a point where their apartments are unavailable to Section 8

tenants, but also to others. This likely result would only undermine Section 8's well-recognized (including by the Maryland court itself) purpose of expanding affordable housing for low-income families. *See* Pet. App. at 32a; *Knapp*, 54 F.3d at 1278 (Section 8 intended to "increase the availability of low-income housing"). Prospective renters of all sorts, not just Section 8 voucher holders, will find housing less available as the rental market becomes more expensive across-the-board. Avoiding such a self-defeating reaction to mandatory participation in the Section 8 program is precisely why Congress made property owner participation voluntary in the first place.

For purposes of the Petition, however, the Maryland court's observation is significant because it shows that the local law not merely conflicts with the methods chosen by Congress in the Section 8 program, but also with the ultimate congressional objective. It therefore constitutes an implicit acknowledgment by the Maryland court that the local "source of income" ordinance and similar state and local laws "act[] as an obstacle" to the achievement of the objectives of Congress in adopting the federal statute and are therefore preempted. *See Gade*, 505 U.S. at 98; *Hines*, 312 U.S. at 67.

Upon "examining the federal statute as a whole and identifying its purpose and intended effects," state and local laws mandating Section 8 participation despite the judicially acknowledged effect of raising rents and reducing the supply of affordable housing present textbook cases of conflict preemption. *Crosby*, 530 U.S. at 373. At minimum, this is an issue appropriate for

nationwide resolution by this Court rather than by a patchwork of conflicting decisions by state and federal courts.

CONCLUSION

The structure and purposes of the federal Section 8 program are endangered by state and local laws forcing rental property owners to accept Section 8 vouchers despite clearly expressed congressional intent to the contrary. It is therefore no wonder that this case presents real and immediate conflicts at multiple levels.

There is a conflict between state and local laws and the clearly expressed intention of Congress in a federal law affecting a large and significant sector of America's economy – the rental housing industry. There is conflict between the state and federal courts that have considered whether the federal law preempts the conflicting state and local laws. There is conflict between the state court preemption jurisprudence and the precedents of this Court in that area.

The issue presented is of constitutional magnitude because it involves the balance of power between state and national legislative authority in our federalist system. Unless this Court acts to clarify the law these conflicts are likely to become more numerous as more and more state and local governments attempt to effectively amend a federal statute and encroach upon congressional authority.

For these reasons, as discussed herein and in the Petition, this Court should grant review in this action and reverse the Maryland Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

TESTIMONY OF JANET S. CHARLTON

TRITON ADVISORS, INC.

ON BEHALF OF THE

NATIONAL LEASED HOUSING ASSOCIATION
NATIONAL APARTMENT ASSOCIATION
NATIONAL MULTI HOUSING COUNCIL

BEFORE THE

HOUSE COMMITTEE ON FINANCIAL SERVICES
SUBCOMMITTEE ON HOUSING AND
COMMUNITY OPPORTUNITY

MARCH 9, 2007

Chairwoman Waters, Ranking Member Biggert and distinguished members of the Subcommittee, my name is Janet Charlton and I am the President of Triton Advisors, Inc. I am here today on behalf of three trade associations—the National Multi Housing Council (NMHC), the National Apartment Association (NAA) and the National Leased Housing Association (NLHA).

NMHC and NAA represent the nation's leading private firms participating in the apartment industry. Their combined memberships include apartment owners, developers, managers, builders and lenders.

The National Multi Housing Council represents the apartment industry's largest and most prominent firms. NMHC members are the principal officers of these organizations. NAA is the largest national federation of state and local apartment associations, with 190 affiliates representing nearly 51,000 professionals who own and manage more than 6.1 million apartments. NMHC and NAA jointly operate a federal legislative program and provide a unified voice for the private apartment industry.

The National Leased Housing Association has represented the interests of housing agencies, developers, owners, lenders, housing managers and others involved in providing federally assisted rental housing for more than 30 years. NLHA's more than 500 members are primarily involved in the Section 8 housing programs—both project-based and tenant-based—and provide or administer housing for over three million households.

We commend you, Chairwoman Waters and Ranking Member Biggert, for your leadership, and we thank the Members of the Subcommittee for your valuable work addressing the nation's need for affordable rental housing. We appreciate the dedication of the Subcommittee on this issue and the opportunity to present our views on the "Section 8 Voucher Reform Act" (SEVRA) as currently drafted.

We begin by saying that we believe the Section 8 voucher program has been largely successful in achieving the goal of assuring decent, safe and affordable housing for low-income families and the elderly. While the program does not need a major

overhaul, it would benefit from changes aimed at reducing administrative burdens, promoting increased landlord participation and expanding housing opportunities.

The areas in greatest need of action include the program's funding formula, its inspection standards, its rent and income standards, its portability features and its ability to be used in concert with the Low-Income Housing Tax Credit (LIHTC) program.

Funding Formula

In recent years the Section 8 program has suffered from the lack of a permanent and reliable funding formula. In 2004, the U.S. Department of Housing and Urban Development (HUD) implemented a new and flawed voucher funding formula that based program funding on local costs from May-July 2004 plus an inflation adjustment. This arbitrary and unworkable formula resulted in unanticipated shortfalls, inadequate or excess reserves and general confusion as the nation's housing agencies attempted to adapt to it, often retroactively. It has negatively impacted applicants, voucher holders, public housing agencies (PHA), apartment owners, lenders and development entities and has resulted in the loss of more than 100,000 vouchers.

We are pleased that H. J. Res. 20 (enacted on February 15, 2007) includes a revised funding formula based largely on the formula outlined in SEVRA. Specifically, H. J. Res. 20 bases program funding on the most recent 12 months of voucher leasing and cost data (adjusted for inflation). This formula is fair and

flexible; it maximizes the amount of dollars provided by the appropriations process and is a major step forward and should restore program stability. We encourage its adoption as the permanent formula for FY08 and beyond.

Inspection Standards

One of the biggest problems with the Section 8 program is that it is not "transparent" to the market. In other words, it costs an apartment owner more to rent to a voucher holder than it does to rent to an unsubsidized resident. One of the reasons for this cost discrepancy is the program's burdensome and often duplicative inspection standards.

Before a Section 8 voucher holder can rent a specific apartment, the administering public housing agency (PHA) must first inspect the unit to confirm that it complies with HUD-prescribed Housing Quality Standards (HQS). Unfortunately, these unit-by-unit inspections cause intolerable leasing delays and do not necessarily satisfy HUD's objective of protecting residents since many of these properties are already inspected under other federal programs.

Even if the PHA conducts its inspection within the required time frame, many apartment owners still report that it can take 30 days or more to be approved due to the extensive workload of most housing agencies. While this approval is pending, the apartment unit remains empty, when the owner could otherwise be collecting rent on it. The apartment industry relies on seamless turnover to meet its overhead costs, and the financial implications of such

delays are enough to deter many owners from participating in the program.

NMHC/NAA and NLHA strongly support provisions that make important reforms to the property inspection process, including addressing a redundancy that exists in federal inspection requirements. Currently, units that receive Low-Income Housing Tax Credits or are FHA-insured are already inspected as a condition of participation in those programs. We encourage Congress to exclude those units that have already passed inspections for other federal programs from a duplicative and time-consuming Section 8 inspection process.

In an effort to streamline the inspection process, we would encourage HUD to allow the PHAs the discretion to lease a unit that has minor defects (i.e., non-life threatening problems) instead of forcing the apartment owner to make the repairs before the lease can be signed. We also support a change allowing PHAs to inspect properties every other year instead of annually. We do, however, recognize that there are many small apartment properties that are not professionally managed that accept Section 8 vouchers. We understand that these smaller properties might require more frequent inspections, and therefore recommend that apartment buildings with fewer than 20 units be inspected every year.

SEVRA 2007 takes steps to improve the program, but we feel that it is necessary to add in additional language further reforming the burdensome inspection process. Specifically, we believe that the changes included in H.R. 5433, the "Section 8 Voucher Reform

Act of 2006," as introduced in the 109th Congress, reduced the leasing delays and repetitive inspections while ensuring that properties continue to meet HUD's Housing Quality Standards.

We have attached language that would accomplish these goals. It has been endorsed by the following groups: the Institute for Real Estate Management, the National Apartment Association, the National Affordable Housing Management Association, the National Association of Home Builders, the National Leased Housing Association and the National Multi Housing Council.

Rent and Income Provisions

We are very encouraged by the draft SEVRA provisions that would streamline the process for calculating income and rent. Such provisions will reduce the administrative burdens on PHAs and participating property owners while ensuring that residents do not pay more for rent than they are paying today. We are particularly pleased that the draft SEVRA legislation proposes a three-year (versus an annual) re-certification of income for residents with fixed incomes.

We are, however, unable to support the bill's provision to terminate assistance and evict residents receiving project-based Section 8 assistance or vouchers when their income reaches 80 percent of area median income (AMI). HUD's income limits are not always accurate and can change greatly from one year to another. For example, as SEVRA is currently written, a resident who is receiving a subsidy and

reports an income of 75 percent of AMI can be evicted when HUD changes the income limits, even if the resident's income remains fixed.

We understand that the intent of this provision is to free-up units for lower-income families, but realistically such a provision would only free-up a very small number of units. Our analysis of 84,877 project-based Section 8 units in three states revealed that less than two-tenths of one percent (198) had over-income residents. While the gain in units would be nominal at best, the change would devastate the affected families, many of whom are elderly or disabled and living on fixed incomes.

Portability

Currently, vouchers are "portable" in that voucher recipients have the ability to move to another approved voucher unit anywhere in the country. Proponents of nationwide portability claim that it allows families to move to new jobs or to be with other family members in other parts of the country without losing their assistance. Opponents argue that nationwide portability results in increased administrative burdens to housing agencies and often creates funding shortfalls.

If portability is to be continued, we strongly recommend that Congress require HUD to provide a mechanism to reduce the administrative burdens posed by portability, particularly as they related to inter-agency billing.

Project-based Vouchers

NMHC/NAA and NLHA are very pleased that the draft legislation provides PHAs the flexibility to set rents in project-based voucher units located in LIHTC properties. The LIHTC program is one of the few federal programs that can be used to preserve existing affordable housing and construct new affordable housing. Therefore, it is critical that there be consistency between the LIHTC and Section 8 programs so they can be used together to further increase the nation's supply of affordable housing.

To that end, we recommend that the Subcommittee consider the following amendments to the Section 8 project-based voucher program to increase flexibility and maximize consistency with the tax credit program:

➢ Change the maximum initial contract term for the Section 8 project-based program from 10 years to 15 years to make it conform with the tax credit compliance period;

➢ Increase the percent of voucher funds that PHAs can use for project-based properties from 20 percent to 25 percent to make it possible for smaller PHAs to effectively use the project-based option;

➢ Amend the current provision that limits project-based vouchers in family properties to 25 percent of the units to allow the "greater of 25 percent of the units in a project OR 25 units;

- ➢ Ensure that expiring project-based "certificate" contracts can be converted to project-based vouchers. (HUD has not authorized such conversions due to a technical deficiency in the statute. A conversion amendment is critical to the preservation of the units);

- ➢ Permit site-based waiting lists (subject to PHA oversight);

- ➢ At the request of a property owner, allow a PHA to provide existing residents with project-based vouchers in lieu of enhanced vouchers when the owner opts out of a subsidy program or prepays a federally subsidized mortgage. This option would protect the residents while ensuring that the actual units are preserved as affordable.

Conclusion

The 2002 Millennial Housing Commission report identified affordability as the "single greatest housing challenge facing the nation." Unfortunately, little progress has been made on the affordability crisis in the intervening five years. According to Harvard University, 35 million households spend 30 percent or more of their annual income on housing.

Affordability problems don't discriminate; they now exist in urban, suburban, and rural counties. The Section 8 program has long served as America's primary rental subsidy program. If it is to continue meeting our nation's growing housing needs, it should be revised so more apartment owners will participate in it. It requires a stable funding source, and it must

be consistent with the LIHTC programs so those resources can be leveraged to produce more housing than either program could produce individually.

We support the goals of SEVRA and are pleased to provide some additional points for consideration that will enable SEVRA to better meet the needs of America's hard working families who cannot find decent, affordable housing. We appreciate the opportunity to express our views, and we stand ready to work with the Subcommittee on the Section 8 program and other critical housing issues.

Proposed language:

H.R. 5443
Section 8 Voucher Reform Act of 2006 (Introduced in House)

SEC. 2. INSPECTION OF DWELLING UNITS.
Section 8(o)(8) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)(8)) is amended--
(1) in subparagraph (A), by inserting `subparagraph (D) of this paragraph and' before `paragraph (11)';
(2) by redesignating subparagraphs (D) and (E) as subparagraphs (E) and (F), respectively;
(3) by inserting after subparagraph (C) the following new subparagraph:
`(D) EXCEPTIONS TO INITIAL INSPECTION REQUIREMENT PRIOR TO OCCUPANCY-
`(i) RECENT INSPECTION UNDER HOUSING CHOICE VOUCHER PROGRAM- In the case of any dwelling unit **[insert - in a property]** that, within the 30-day period ending upon initial occupancy by a family assisted under this subsection, was occupied by

another family so assisted, an inspection pursuant to subparagraph (A) shall not be required if such unit was inspected during the 12-month period ending upon such initial occupancy and was determined to comply with the housing quality standards under subparagraph (B).

`(ii) RECENT INSPECTION UNDER OTHER PROGRAMS- In the case of any dwelling unit **[insert - located in a property]** that, during the 12-month period ending upon such initial occupancy, was inspected pursuant to requirements under a Federal, State, or local housing assistance program (including the HOME investment partnerships program under title II of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12721 et seq.)), an inspection pursuant to subparagraph (A) shall not be required if--

`(I) pursuant to such inspection, the dwelling unit **[insert - or property]** was determined to meet the standards or requirements regarding housing quality or safety applicable to units assisted under such program; and

`(II) the public housing agency certifies to the Secretary that such standards or requirements provide the same protection to occupants of dwelling units meeting such standards or requirements as, or greater protection than, the housing quality standards under subparagraph (B).

`(iii) CORRECTION OF NON-LIFE THREATENING CONDITIONS- In the case of any dwelling unit that is determined, pursuant to an inspection under subparagraph (A), not to meet the housing quality standards under subparagraph (B), assistance payments may be made for the unit notwithstanding subparagraph (C) if failure to meet such standards is a result only of non-life threatening conditions. A

public housing agency making assistance payments pursuant to this clause for a dwelling unit shall, upon the expiration of the 30-day period beginning upon commencement of the period for which such payments are made, suspend any assistance payments for the unit if any deficiency resulting in noncompliance with the housing quality standards has not been corrected by such time, and may not resume such payments until each such deficiency has been corrected.'; and

(4) in subparagraph (E), as so redesignated by paragraph (2) of this section--

(A) by striking `ANNUAL INSPECTIONS' and inserting `BIENNIAL INSPECTIONS';

(B) by striking `shall make an annual inspection of each assisted dwelling unit during the term of the housing assistance payments contract for the unit' and inserting `shall, for each assisted dwelling unit, make biennial inspections during the term of the housing assistance payments contract for the unit'; and

(C) by inserting after the period at the end of the first sentence the following: `In the case of a dwelling unit described in clause (i) or (ii) of subparagraph (D), the first such annual inspection shall take place during the 2-year period beginning upon the most recent inspection conducted with respect to the occupancy of the unit by the family previously residing in the unit.'.

APPENDIX B

TESTIMONY OF HECTOR PINERO

RELATED MANAGEMENT COMPANY, LLC

ON BEHALF OF THE

NATIONAL LEASED HOUSING ASSOCIATION
NATIONAL MULTI HOUSING COUNCIL
NATIONAL APARTMENT ASSOCIATION

BEFORE THE

SENATE COMMITTEE
ON BANKING, HOUSING AND URBAN AFFAIRS

March 12, 2008

Chairman Dodd, Senator Shelby and distinguished members of this committee, my name is Hector Pinero and I am a Senior Vice President of Related Management Company. My firm manages 25,000 apartments of affordable and market-rate housing in 135 locations in 11 states. I am responsible for the affordable housing portfolio, in the NY. Today I am representing the National Leased Housing Association (NLHA) the National Multi Housing Council (NMHC) and the National Apartment Association (NAA).

NLHA represents the interests of 600 member organizations involved in federally assisted rental

housing including developers, owners, lenders, housing agencies and nonprofits. NLHA's members provide affordable rental housing for over three million families.

NMHC represents the interests of the larger and most prominent firms in the multifamily rental housing industry. NMHC's members are the principal officers of these organizations and are engaged in all aspects of the development and operation of rental housing, including the ownership, construction, finance and management of such properties.

NAA is the largest national federation of state and local apartment associations, with nearly 200 affiliates representing more than 51,000 professionals who own and manage more than six million apartments.

We commend you, Chairman Dodd, for your leadership, and we thank the members of the committee for your valuable work addressing the important issue of housing and the federal budget.

Fiscal Year 2009 Proposed Budget

On February 4, the President unveiled his Fiscal Year 2009 budget. The President's plan would fund the U.S. Department of Housing and Urban Development (HUD) at $38.7 billion, which according to the Center on Budget and Policy Priorities, is $330 million above current levels, but insufficient in light of the housing affordability issues plaguing this country. The HUD budget continues to strain efforts to provide decent and safe affordable housing. Over the years, HUD spending has declined significantly, illustrated by the

fact that HUD's budget in 1974 was nearly $70 billion (in today's dollars) as compared to the $38.7 billion being proposed for FY09. Clearly, such cuts are indicative of the reduced commitment of the Federal Government to affordable rental housing in favor of failed homeownership policies.

We would like to focus our testimony on two programs that are the cornerstone of federally assisted housing, the Section 8 tenant-based rental assistance program, also known as the Housing Choice Voucher program and the Section 8 project-based programs.

Project-based Section 8

The project-based Section 8 programs, enacted more than 30 years ago, have provided effective and enduring shelter for millions of low-income families. In addition to making possible the construction or rehabilitation of housing units dedicated to low-income occupancy for extended periods, the program reduces the rent burden for low-income residents living in those properties.

My company, Related Management, has its headquarters in New York City and owns and manages about 26,000 units of multifamily housing in 12 states, spread from New York to California. Our Section 8 project-based inventory totals 11,287 units in 64 projects.

In our opinion, the Section 8 subsidy mechanism is the most effective housing subsidy ever devised by Congress. It is an elastic subsidy that can reach the very poorest families and keep their rent burden

proportionately the same as the rent burden of families with more income.

However, for Section 8 to be an effective program, HUD must comply with its contractual promise to housing providers to make timely monthly assistance payments. These assistance payments cover the difference between tenant rent contributions, generally set at 30 percent of a tenant's adjusted income, and the HUD-approved rents for the property. The tenant rent contribution generally pays for only a small portion of the costs of running a property, including debt service payments. Without assistance payments from HUD a building cannot continue to operate and serve its residents.

While HUD has been late sporadically in making payments over the past several years due to its antiquated computer systems, it was not until last summer that a major disruption in payments occurred. From June through September, late payments were widespread over most of the country. The negative impact of HUD being delayed in meeting its contractual obligations has both short- and long-term consequences, which we will discuss along with our recommendations to the committee for addressing the problem.

In the case of our company, for example, we billed HUD in June of 2007 for $9.8 million in assistance payments for the month of July. Almost one-third of our bill, or $3.1 million, was not paid by July 31, and about 20 percent or $2 million remained unpaid until November. One of our properties, in San Diego, received no funds for the period of July through

November, for a total of $875,000. No doubt many other owners have been hit harder than us, but any late payment at any time is indefensible.

Owners do what they can to cope during these periods of nonpayment, such as drawing funds from a replacement reserve and other reserves if they exist, borrowing funds, delaying payments to vendors, and making personal contributions. However, not all properties have the ability to make ends meet when HUD fails to make timely payments, resulting in notices of default, inability to pay operating expenses, deferred maintenance, etc.

Late Housing Assistance Payments (HAP) not only affect the operations of a project but also make more difficult the preservation of these aging projects through sales, often to nonprofit or other preservation purchasers that commit to long affordability periods, and through rehabilitation, usually with proceeds from the low-income housing tax credit.

Purchasers, lenders, and tax credit investors have been put on alert that the government may not perform under its contracts, and they will act accordingly to protect their interests, assuming they continue to participate at all. We have attached to our testimony a list of 19 adverse consequences of delayed or insufficient HAP funding. We think it will be helpful to explain the circumstances that resulted in the late HAP debacle.

In the mid-to-late 1970s and early 1980s, when the Section 8 project-based programs were first developed, the monies for the HAP contract (be it 20, 30 or 40

years) were funded up front. For example, the costs of a 20-year contract were appropriated during the first year of the contract. Further, the subsidy amounts were based on the total rental costs at the time and did not consider the tenant contribution, which left wiggle room for rent increases during the contract term. When the first of the 20-year contracts started to expire around 1994, it was the first time in twenty years that Congress needed to make an appropriation to subsidize the properties. Congress agreed to fund the renewals, but only at rents not to exceed comparable market rents (hence the Multifamily Assisted Housing Restructuring Act (MAHRA), which provided the Mark-to-Market program and ultimately the Mark-Up-toMarket program).

As the number of HAP contracts renewing under MAHRA continued to increase and more appropriations were needed, instead of HUD requesting additional funds in its budget request, the Department chose to ask for less funding than was actually required to renew the contracts. This approach masked the true costs of contract renewals, but it was successful for a number of years because HUD was able to recapture previously appropriated funds remaining in HAP contracts that were about to expire. When most of the 20-year contracts expired around 2001 and 2002, the availability of recaptured funds diminished. HUD's need for increased funding for Section 8 renewals should have been reflected in its budget proposals around that time, but again HUD chose to mask the true costs.

To enable the renewal of contracts without sufficient appropriations, HUD chose to renew the

HAP contracts with less than one year of funding. For example, if a contract expired in December of 2005, HUD would provide 9 months of funding until September 30 (the end of the fiscal year) instead of providing the full 12 months of funding up front. Essentially, it was bifurcating the 12 months of funding over two fiscal years. In this example the remaining funding for the contract would have been provided after October 1 (the new fiscal year) at which time 3 months of funding would be added to the contract for a total of 12 months. Until last year, this practice was invisible to the owners. However, in the fall of 2006, HUD's Chief Financial Officer (CFO) determined that such partial funding of contracts could not continue as the CFO believed this approach to be a violation of the Antideficiency Act (ADA), a law that is intended to ensure that appropriated funds are not mishandled. This new interpretation of the law by the CFO (which, incidentally, was not put into writing until requested by Members of Congress more than a year later) resulted in HUD reverting to funding renewals for the full twelve months in advance and not in increments.

Because the HUD FY07 budget request was based on its previous practice of partially funding contracts, there were insufficient funds appropriated by Congress, thus creating a large shortfall. The result of the shortfall was a delay in funding to thousands of Section 8 properties. When HUD realized in May of 2007 that it would not have sufficient funding to renew all of the contracts expiring in FY07, HUD's Office of Housing eventually reached a compromise with its CFO office to revert to partial or incremental funding of renewal contracts as long as the renewal HAP

contract was amended to reflect the fact that partial (and not 12-month) funding was being provided at the time the renewal contract is executed. In other words, if HUD disclosed to the owner that only partial funding was being provided, the CFO deemed that HUD was not in violation of the ADA.

HUD's policy of incrementally funding (or funding for less than 12 months) continues in the current fiscal year (FY08) because of insufficient appropriations. Further, the President's FY09 request does not include sufficient monies to put Section 8 contract renewals back on a 12-month funding track. Insufficient funding coupled with HUD's inefficient payment process and questionable disbursement systems is likely to create financial disruptions to Section 8 properties for the foreseeable future.

The perception a partially-funded contract creates is devastating. It is of a government struggling to keep its financial house in order. Until recently, several years of predictability and stability in the Section 8 renewal process have led purchasers, lenders and investors in Section 8 properties to rely on long-term Section 8 renewal contracts, even though they are subject to annual appropriations, as sufficient backing for their investment. They assumed the appropriations risk in these contracts because they thought the risk was minuscule. They are not so sure anymore.

There are other more technical, but serious, concerns with short funding commitments. These contracts purport to bind an owner to providing Section 8 housing for one year. If HUD funding stops after 4 months, is the owner bound to continue to

comply with Section 8 rent and other rules without receiving assistance payments? If the owner can get out of the contract will it be bound by the one-year tenant notice statute, which will prevent the owner from raising rents for one year after an opt-out notice to the tenants? Will the tenants be eligible for enhanced vouchers if the contract is abrogated? Will HUD wait until the one-year notice period has elapsed before awarding enhanced vouchers to the tenants, as has been its recent policy? Will there be sufficient funding for all enhanced vouchers?

All of these concerns will influence an owner's decision to remain in the program or to opt out, as well as decisions about whether to purchase and rehabilitate Section 8 projects. At a minimum, owners will more likely give routine notices to tenants that they intend not to renew a Section 8 contract, in order to reduce their exposure period during which they do not receive assistance payments but can not raise rents. These opt-out notices will cause anxiety among tenants who will be placed in a continual state of uncertainty as to whether they will lose their homes or not.

Unless the industry has confidence that the government is committed to adequate and timely funding, the Section 8 inventory is likely to shrink in size. Nor will it get the new investment needed to preserve these properties as affordable housing and to keep them affordable far into the future.

What can this Committee do to help rectify the damage done to the Section 8 inventory? First, it can exercise close oversight over the process HUD uses to

make Section 8 assistance payments, as well as how budgetary needs are calculated. The Secretary should be directed to use a portion of the appropriated working capital funds for this purpose. Second, legislation should be enacted to: impose a penalty on HUD when its payments are more than thirty days late; remove any requirements that owners receive HUD permission to use reserves to pay their mortgages and employees when HAP payments are late; and require HUD to notify owners when late payments are anticipated. Third, the Committee should urge that sufficient appropriations be provided for fiscal year 2009 to avert the use of a succession of short-term funding obligations by HUD.

Housing Choice Vouchers

We would also like to express our strong support for the Section 8 Voucher Program. Housing Choice Vouchers enable nearly two million households of low- and very-low-income families and the elderly to achieve decent, safe and affordable housing. The program has been successful because it provides choice to families, allowing them to rent decent and safe apartments in the communities that are near their schools, churches and workplaces. It also has the benefit of reducing the concentration of poverty. Vouchers also enable the private sector to partner with housing agencies to improve the housing stock in communities as well as protect tenants during market rate conversions. Vouchers are an essential tool for the provision of housing assistance and are supported by the owner community. Related Management is a strong supporter of this program and currently leases to 1,600 voucher holders.

We are concerned about the future of the program because HUD's budget proposes to reduce funding for the voucher program by nearly half a billion dollars, offsetting the reduction by relying on unused reserves, a move that the Center on Budget and Policy Priorities (CBPP) believes will result in the loss of at least 100,000 vouchers. Further, the proposed budget recommends using a funding formula that would base FY09 funding on the costs per voucher (plus inflation) from FY07 instead of the previous 12 months. This is unacceptable to our members because such an approach will result in additional shortfalls, jeopardizing housing assistance currently in use by tens of thousands of low-income families. It is imperative that the 2009 funding cycle be based on leasing and cost data for the most recent federal fiscal year as provided for FY08 by the Omnibus Appropriations Act (H.R. 2764) that President Bush signed into law on December 26, 2007. This is a fair formula that maximizes the amount of dollars provided by the appropriations process and ensures program stability.

The Broader National Housing Crisis

The current situation in the for-sale housing market is an unfortunate turn of events that is made even more unfortunate by the fact that it was completely foreseeable and preventable. For decades the government has pursued a "homeownership at any cost" housing policy. Many government officials, like other participants in the housing sector, mistakenly assumed that house prices would always go up. So they enticed people into houses they could not afford,

and they forgot the rarely spoken truth that there is such a thing as too much homeownership.

Now we are seeing the consequences of that misguided policy. For years, we and others have been predicting this meltdown. We have been warning policymakers that pushing homeownership so aggressively could be disastrous not only for the hard-working Americans lured into unsustainable homeownership, but also for our local communities and our national economy.

That is exactly what is happening now. People are losing their homes, local communities are struggling with blight and crime, and our national economic growth is at risk. We understand that policy-makers are worried that this situation might spill over into the broader economy, and we support efforts to help our country avoid a housing-induced recession.

The mortgage market meltdown represents a failure of government oversight and regulation. Despite repeated warnings, nothing was done to prevent it. On the contrary, the federal government gave a "green light" to this bubble by trying to push homeownership without limits and even trying to create a federally insured no-downpayment mortgage.

Unfortunately, while there was much the government could have done to prevent this crisis, there isn't much it can reasonably do now to alleviate it. What it can do, however, is recognize its own mistakes and ensure that this doesn't happen again. And that means, among other things, recognizing that homeownership isn't the right housing choice for all

households at all points in their lives. Housing our diverse nation well means having a vibrant rental market along with a functioning ownership market. It's time we adopt a balanced housing policy that doesn't measure success solely by how much homeownership there is.

Conclusion

I thank you for the opportunity to testify on behalf of the National Leased Housing Association, the National Multi Housing Council and the National Apartment Association, and wish to offer our assistance to the committee as you continue your important work.

SOME IMPLICATIONS OF INADEQUATE FUNDING OF PROJECT-BASED SECTION 8 CONTRACTS

NLHA

If Congress fails to appropriate sufficient funds for FY 2008 to make all contractual Section 8 payments, in original and renewal contracts, this failure will be regarded by participants in the Section 8 program, other housing programs, other federal programs, and the capital markets as a default by the United States in its perceived moral obligation. The Section 8 contract has already been devalued even without a default by sustained talk of inadequate funds, widespread late payments in 2007, and the inability of HUD to provide one-year extension contracts because of insufficient funds. A quick and decisive fix may salvage some of the damage.

The following are several specific adverse consequences:

(1) Lenders will be less willing to make long-term loans for refinancings or purchases of Section 8 projects, transactions that help in the rehabilitation and preservation of the projects.

(2) Investors and syndicators will be less willing to purchase low-income housing tax credits, which are key to the sale and rehabilitation of those projects.

(3) To the extent the above players continue to participate, it will be on more onerous terms and with a more rigorous selection process to assist only projects that would be viable if Section 8 payments terminated.

(4) Owners who economically can opt out of the Section 8 program will plan to do so and will do so at the first opportunity.

(5) Owners can also stop providing Section 8 housing even prior to contract expiration if HUD fails to provide assistance payments.

(6) Tenants will become anxious about the potential loss of their subsidy and homes. The elderly are particularly susceptible to those concerns. Some will move out and live with their families, thus losing their eligibility for tenant protection vouchers when an owner opts out.

(7) Owners will select the highest-income tenants they legally can select in order to mitigate the impact of missed or reduced assistance payments.

(8) The cost of enhanced vouchers and other tenant protection vouchers will soar, or, alternatively, all tenants will not be protected if there is an opt-out.

(9) There may be an increase in defaults on FHA-insured mortgages covering Section 8 projects.

(10) Affordability use restrictions for projects that have been restructured in the mark-tomarket program, which run 30 years, would be converted to permit higher-income tenants to be served.

(11) Fifty-year affordability use restrictions for LIHPRH projects and existing use restrictions for ELIPHA projects would be terminated and the projects rented to market tenants if HUD cannot provide all the contractual Section 8 payments.

(12) For those projects remaining in the program, there will be an increase in deferred maintenance, depletion of replacement reserves, and little likelihood of obtaining tax credits for rehabilitation.

(13) Prices realized by HUD in selling foreclosed properties with Section 8 subsidies would decline.

(14) If Congress authorizes the conversion of rent supplement and RAP contracts to Section 8, there will be few takers.

(15) Participation and continued participation in other housing programs involving multi-year subsidies, such as project-based vouchers, tenant-based vouchers, and participation in the

202/811 programs would decline, or the quality of participants would decline.

(16) The lack of sufficient Section 8 funds will also thwart the refinancing of older Section 202 projects for the elderly and disabled that have section 8 subsidies. Many of these projects are 20 to 30 years old and can be preserved for another long period with recapitalization and rehabilitation, but lenders and investors would be wary of participating.

(17) The ability of public housing agencies (PHA) to borrow funds for capital improvements, secured by future appropriations to the capital fund, would be made more difficult and costly.

(18) Participation in non-housing federal programs, dependant on ongoing federal subsidies, would be compromised if participants felt the United States defaulted in the major Section 8 program.

(19) There are broader implications in the capital markets. A default by the United States in any area could send further shock waves to the already shocked markets. Would this be the end of the perceived federal backing of Fannie Mae and Freddie Mac obligations, and if so, would that increase borrowing costs for home purchases and refinancing? Would the hint of default by the United States raise borrowing costs for Treasury?