No. 07-1373

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

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GLENMONT HILLS ASSOCIATES, *et al.*,

*Petitioners*,

*v.*

MONTGOMERY COUNTY, MARYLAND,

*Respondent.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MARYLAND*

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# MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS SUPPORTING PETITIONERS

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DUANE J. DESIDERIO
*(Counsel of Record)*
THOMAS J. WARD
JEFFREY B. AUGELLO
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15TH STREET, NW
WASHINGTON, D.C. 20005
(202) 266-8146

June 2, 2008

## MOTION TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONER

Pursuant to this Court's Rule 37.2(b), the National Association of Home Builders (NAHB) respectfully requests leave of this Court to file its brief *amicus curiae* in support of Petitioner, Glenmont Hills Associates. Petitioner's counsel provided consent to filing this brief through email communication on May 14, 2008. *Amicus* requested consent from Respondent, but on April 16, 2008, its counsel telephonically denied consent.

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent and affordable housing. As "the voice of America's housing industry," NAHB helps promote policies that will keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 235,000 members are home builders and/or remodelers, and its builder members construct about 80 percent of the new homes constructed each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services.

NAHB's Multifamily Council advocates for initiatives that support condominium and rental apartment production and to eliminate regulatory barriers that drive up the cost of multifamily housing.

The Council's priorities include showcasing the benefits of higher-density housing, while promoting smarter approaches to growth, including the revitalization of urban areas across the country.

To effectuate its mission, NAHB strives to create an environment in which all Americans have access to the housing of their choice, and builders have freedom to operate as entrepreneurs in an open and competitive market. Toward this end, NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party litigant and *amicus curiae* to safeguard the rights and interests of its members. NAHB was a petitioner in *NAHB v. Defenders of Wildlife,* 551 U.S. ----, 127 S.Ct. 2518 (2007). It has also participated before this Court as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.[*]

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[*] These include: *Agins v. City of Tiburon,* 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825 (1987); *Pennell v. City of San Jose,* 485 U.S. 1 (1988); *Yee v. City of Escondido,* 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council,* 505 U.S. 1003 (1992); *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or.,* 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001); *Palazzolo v.*

NAHB's organizational policies have long supported the Section 8 Federal Housing Choice Voucher Program, which permits voluntary participation by landlords in the private rental market and provides rental subsidies to low income households. However, NAHB is concerned that the opinion of the Maryland Court of Appeals will subvert the affordable housing goals envisioned by Congress and the U.S. Department of Housing and Urban Development, by construing the Montgomery County "source of income" ordinance to override the voluntary nature of the federal Section 8 program.

The proposed brief demonstrates that the decision below has dire consequences in the national rental market, considering the myriad States and local jurisdictions across the country that have enacted source of income laws. NAHB believes that the survey provided below, regarding source of income laws in effect throughout the Nation, will aid this Court as it deliberates whether to grant the petition.

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*Rhode Island,* 533 U.S. 606 (2001); *Franconia Assocs. v. United States,* 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005); *Kelo v. City of New London,* 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.,* 547 U.S. 370 (2006); *Rapanos v. United States,* 547 U.S. 715 (2006); *John R. Sand and Gravel Co. v. United States,* 128 S.Ct. 750 (2008); and *Summers v. Earth Island Inst.,* No. 07-463, *cert. granted,* 128 S.Ct. 1118 (2008).

Furthermore, the proposed brief illustrates that the lower court's decision, which forces landlord participation in the Section 8 program when a tenant presents a voucher, both undermines affordable housing policies and raises significant constitutional issues under Bill of Rights provisions.

Accordingly, NAHB respectfully requests that this motion, and the petition, be granted.

June 2, 2008

Respectfully submitted,

Duane J. Desiderio
*(Counsel of Record)*
Thomas J. Ward
Jeffrey B. Augello

Attorneys for *Amicus Curiae*
National Association of Home Builders

## QUESTION PRESENTED

The United States Housing Act establishes a federal voucher program, through which local public housing authorities subsidize housing rentals for certain low-income tenants. Under federal law, landlords are not required to participate in the program. Landlords who opt to participate are required to comply with a number of requirements imposed by federal law. Respondents, who were denied housing under this program by petitioner, filed complaints with the Montgomery County Office of Human Rights alleging that, although participation was voluntary under federal law, petitioner's refusal to participate violated a Montgomery County ordinance prohibiting discrimination on the basis of "source of income." MCC § 27-12. The hearing examiner concluded that the ordinance was not preempted by federal law and that petitioner had violated it. The Montgomery County Human Rights Commission Case Review Board upheld the hearing examiner's decision. The Circuit Court reversed and was itself, subsequently, reversed by the Maryland Court of Appeals.

The question presented is whether a local ordinance that fundamentally changes federal law by making a voluntary federal program mandatory is preempted by federal law.

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## ARGUMENT

### I. WHETHER THE VOLUNTARY NATURE OF SECTION 8 PREEMPTS A LOCAL "SOURCE OF INCOME" LAW IS AN ISSUE OF GREAT NATIONAL SIGNIFICANCE.

The question presented, whether a local law is preempted because it mandates participation in a federal program that Congress and the Executive Branch made voluntary, is of great national import. Like Montgomery County's ordinance at issue, numerous jurisdictions throughout the Nation have enacted similar "source of income" laws. As discussed below, twelve states, major metropolitan areas (including Chicago, Los Angeles, New York City, and Washington, D.C.), and a spectrum of localities, all prohibit source of income discrimination in varying degrees. The specter created by the court of appeals' decision is that the otherwise voluntary Section 8 program has been transformed by local fiat into a mandatory system, where private landlords *must* enter into contracts that have non-negotiable terms with public housing authorities, *must* comply with a complicated and onerous maze of federal regulations, and *must* allow government inspections of private property. With respect, the Court should grant *certiorari* to clarify whether the numerous source of income laws across the United States can be construed to compel private property owners to comply with federal Section 8 regulations.

**<u>California:</u>** California's fair housing law provides that it is unlawful to "[t]o otherwise make unavailable or deny a dwelling because of …source of income …."

Cal. Gov't Code § 12955. Several California municipalities also provide varying protections against income source discrimination. The Town of Corte Madera makes it a violation for a property owner to refuse to accept Section 8 vouchers, but that protection only extends to existing tenants qualifying for rental subsidies.[1] Likewise, Los Angeles's rent stabilization ordinance makes it illegal for a landlord "to fail to renew a rental assistance contract and then demand" greater amounts of rent from the existing tenant.[2] In the City of Woodland, owners of multifamily residential rental projects, who enter into inclusionary housing agreements with the City and thereby subject their units to affordability restrictions, are specifically prohibited from discriminating against Section 8 voucher holders.[3] Other California localities confer more broad-based source of income protection, beyond existing tenants and contracted inclusionary

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[1] Town of Corte Madera, CA, Mun. Code § 5.30.020, available at http://municipalcodes.lexisnexis.com/codes/cortem/index.htm ("It is a violation of this prohibition for a property owner or manager to refuse to accept a Section 8 rent subsidy for which an existing tenant qualifies, or to terminate the tenancy of an existing tenant based on the property owner's or manager's refusal to participate in a Section 8 rent subsidy program for which an existing tenant has qualified").

[2] City of Los Angeles, CA, Mun. Code ch. XV, art. 1, § 151.04.B, available at http://www.amlegal.com/nxt/ gateway.dll?f =templates&fn=default.htm&vid=amlegal:lamc_ca.

[3] City of Woodland, Cal., Code ch. 6A, art. IV, § 6A-4-60(c)(1)(C), available at http://www.cityofwoodland.org/municipal_code/ /_DATA/CHAPTER06A/Article_IV__Requirements_for_Renta/index.html.

housing projects. East Palo Alto, for example, generally makes it a "prohibited activity" to refuse to rent real property "wholly or partially based on source of income."[4] Similarly, San Francisco categorically prohibits housing discrimination based on "source of income," which is defined to mean "all lawful sources of … rental assistance from any … federal … subsidy program."[5]

**Connecticut:** The Connecticut General Assembly has made it a prohibited housing practice to "refuse to sell or rent a dwelling to any person because of … lawful source of income." Conn. Gen. Stats. Ann. § 46a-64c(a)(1).

**District of Columbia:** Under Washington, D.C.'s Human Rights Law, it is an "unlawful discriminatory practice" to "refuse or fail to initiate or conduct any transaction in real property" based on "the actual or perceived … source of income." D.C. Code § 1-2515(a)(1).

**Illinois:** Chicago's Fair Housing Ordinance makes it "an unfair housing practice" for any owner

[4] City of East Palo Alto, Cal., Mun. Code § 14.16.010(A)(1), available at http://municipalcodes.lexisnexis.com/codes/epaloalto/.

[5] City and County of San Francisco, Cal., Police Code art. 33, § 3304(a)(1), available at http://www.municode.com/Resources/gateway.asp?pid=14140&sid=5.

renting property to discriminate based on "source of income of the prospective … tenant thereof."[6]

**Iowa:** The Iowa City Code states it is an unlawful discriminatory practice to refuse to rent "to any person because of the … public assistance source of income of that person." However, the definition of "public assistance source of income" specifically excludes "rent subsidies."[7]

**Maine:** The State's legislature deems "unlawful housing discrimination" to include refusal to "rent or impose different terms of tenancy to any individual who is a recipient of federal assistance, including … housing subsidies primarily because of the individual's status as recipient." Me. Rev. Stat. Ann. tit. 5, § 4582.

**Maryland:** In addition to Montgomery County Code § 27-12 at issue in the case at bench, several other Maryland counties provide source of income protection. The Human Relations Commission of Frederick County must "investigate complaints

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[6] City of Chicago, Ill., Fair Housing Ord. § 5-8-030(A), available at http://egov.cityofchicago.org/city/webportal/portalContentItemAction.do?contentOID=536922045&contenTypeName=COC_EDITORIAL&topChannelName=Dept&blockName=Human+Relations%2FChicago+Fair+Housing+Ordinance+(as+amended+Nov.+6%2C+2002)%2FI+Want+To&context=dept&channelId=0&programId=0&entityName=Human+Relations&deptMainCategoryOID=-536891432.

[7] Iowa City, Iowa, City Code tit. 2, ch. 5, §§ 2-5-1(A); 2-1-1, available at http://sterling.webiness.com/codebook/index.php?book_id=320.

alleging discrimination as to source of income in housing," which includes "[t]he condition of being a recipient of federal, state, or local government assistance including … rental assistance, or rent supplements."[8] "Unlawful housing practices" in Howard County encompass "[a]cting or failing to act … because of …source of income … in such a way that [tenants] are adversely affected …."[9]

**Massachusetts:** The legislative branch in Massachusetts, the General Court, prohibits "any person furnishing … rental accommodations to discriminate against any individual who is a recipient of federal … assistance, or who is a tenant receiving federal … subsidies, including rental assistance or rental subsidies …." Mass. Gen. Laws Ann. ch. 15lB § 4(10).

**Michigan:** Under the Grand Rapids code, it is an unlawful "discriminatory practice" to refuse to rent property because of "lawful source of income," which is expressly defined to include "Section 8

[8] Frederick County, Md., Code of Ordinances, ch. 2-2, art. V, §§ 3(ii), 3(i)(3), available at http://www.amlegal.com/nxt/gateway.dll/Maryland/frederickco_md/frederickcountymarylandcodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:frederickco_md.

[9] Howard County, Md., Code tit. 12, sub.2, §§ 12.207 (I)(a),(j); (II), available at http://www.municode.com/resources/gateway.asp?pid=10016&sid=20.

assistance."[10] The City of Kentwood's fair housing ordinance does not define "source of income," but prohibits discrimination based on that classification in the rental context.[11] And the City of Wyoming makes it an "unfair housing practice" to refuse to negotiate or engage in a "real estate transaction with a person because of … source of income …."[12]

**Minnesota:** Under the Minnesota Human Rights Act, it is illegal to "refuse to … rent, or lease ... any real property because of … status with regard to public assistance …." Minn. Stat. Ann. § 363A.09(1)(1). "Status with regard to public assistance" is defined to mean "the condition of being a recipient of federal … assistance, … or of being a tenant receiving federal … subsidies, including rental assistance or rent supplements." *Id.* § 363A.03(47).

**New Jersey:** In New Jersey, "[a]ll persons shall have the opportunity to obtain … real property without discrimination because of … source of lawful income used for rental … payments. This opportunity is recognized as and declared a civil right." N.J. Stat. Ann.,

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[10] City of Grand Rapids, Mich., City Code tit. IX, §§ 9.363-4, available at http://www.municode.com/resources/gateway.asp?pid=12116&sid=22.

[11] City of Kentwood, Mich., Code of Ordinances, sub. B, ch. 74, art. 6 §§ 74-201, 205, available at http://www.municode.com/Resources/gateway.asp?pid=13498&sid=22.

[12] City of Wyoming, Mich., Code of Ordinances, ch. 42, art. II, div. 2, §§ 42-53(1)(2), available at http://www.municode.com/Resources/ClientCode_List.asp?cn=Wyoming&sid=22&cid=12006.

§ 10:5-4. The New Jersey legislature has further made it illegal for any person "[t]o refuse to … lease … any real property … because of … source of lawful income used for rental … payments …" *Id.* § 10:5-12(g)(1).

**New York:** On March 27, 2008, the New York City Council enacted Local Law 10, amending the Administrative Code and making it illegal to refuse to rent to any person "because of any lawful source of income ….," which is defined to include "any form of … housing assistance including section 8 vouchers."[13] The Towns of West Seneca[14] and Hamburg[15] have each made it unlawful to refuse to rent due to "source of income," which is not separately defined.

**North Dakota:** State legislation provides that "[a] person may not refuse to … rent … a dwelling to an individual because of … status with respect to … public assistance." N.D. Cent. Code § 14-02.5-02(1). "'Status with respect to public assistance' means the condition of being a recipient of federal … assistance, … or of being a tenant receiving federal … subsidies, including rental assistance or rent supplements." *Id.* § 14-02.4-02(19).

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[13]New York City Council Local Law 10, available at http://webdocs.nyccouncil.info/textfiles/Int%200061-2006.htm?CFID=466010&CFTOKEN=42889123, to be codified at New York, N.Y., Admin. Code tit. 8, ch. I, § 8-107(5).

[14] Town of West Seneca, N.Y., Code Book, pt. II, ch. 71, § 71-3, available at http://www.e-codes.generalcode.com/codebook_frameset.asp?t=tc&p=0417%2D071%2Ehtm&cn=257&n=[1][86]

[15] Town of Hamburg, N.Y., Code Book, pt. II, ch. 109, § 109-3, available at http://www.e-codes.generalcode.com/codebook_frameset.asp?t=tc&p=0055%2D109%2Ehtm&cn=299&n=[1][94]

**Oklahoma:** The legislative branch in Oklahoma has provided it is an "unlawful discriminatory housing practice … [t]o refuse to consider as a valid source of income any public assistance … because of race, color, religion, gender, national origin, age, familial status, or handicap …." Okla. Stat. Ann. tit. 25, § 1452(A)(8). Thus, Oklahoma's fair housing law does not prohibit source of income discrimination outright, but declares that public assistance must be considered a valid source of income for housing; failure to consider it a valid source of income, if based on race, disability, gender or other protected categories, is unlawful.

**Oregon:** The Oregon Legislature has prohibited "source of income" discrimination in rental housing. Or. Rev. Stat. Ann. § 659A.421(1)(a). However, the State has specifically excluded Section 8 rental subsidies from the "source of income" definition. *Id.* § 659A.421(5) ("For purposes of this section, 'source of income' does not include federal rent subsidy payments under 42 U.S.C. § 1437f ….").  Several local Oregon jurisdictions, namely the City of Portland,[16] Benton County,[17] and Multnomah

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[16] City of Portland, Or., Code § 23.01.060(B) (prohibiting source of income discrimination); *id.* § 23.01.040(B)(4) (excluding Section 8 subsidies from protection), available at http://www.portlandonline.com/auditor/index.cfm?c=28598.

[17] County of Benton, Or., Code § 28.110(2) (prohibiting source of income discrimination); *id.* § 28.020(2)(d) (excluding Section 8 subsidies from protection), available at http://www.co.benton.or.us/boc/county_code.php.

County,[18] have taken a similar approach. Each prohibits source of income discrimination, but each specifically excludes Section 8 subsidies from protection.

**Pennsylvania:** In State College, the fair housing ordinance enumerates as an "unlawful housing practice" to "deny or withhold any dwelling from any person based on …source of income," which is separately defined to include "public assistance."[19]

**Utah:** Utah's legislature has made it a "discriminatory housing practice" to refuse to rent a dwelling "because of a person's … source of income …." Utah Code Ann. § 57-21-5(1)(a). "Source of income" means "the verifiable condition of being a … tenant receiving federal subsidies, including rental assistance or rent supplements." *Id.* § 57-21-2(21).

**Vermont:** Under Vermont law it is an unfair housing practice "[t]o refuse to … rent … a dwelling … because a person is a recipient of public assistance." Vt. Stat. Ann. tit. 9, § 4503(a)(1). "'Public assistance' includes any assistance provided by federal … government, including housing assistance." *Id.* § 4501(6).

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[18] County of Multnomah, Or., Code § 15.344(B) (prohibiting source of income discrimination); id. § 15.346(B)(4) (excluding Section 8 subsidies from protection), available at http://www2.co.multnomah.or.us/counsel/code/index.shtml.

[19] Borough of State College, Penn., Code of Ordinances, ch. V, pt. E, §§ 502, 504, available at http://www.statecollegepa.us/index.asp?NID=108.

**Washington:** Seattle's Municipal Code identifies prohibited housing discrimination to mean conduct that "differentiate[s] among individuals, because of … participation in a Section 8 program."[20] King County follows a similar approach.[21]

**Wisconsin:** The Wisconsin State Legislature has declared that "all persons shall have an equal opportunity for housing regardless of … lawful source of income." Wis. Stat. Ann. § 106.50(1). And, "[m]ember[s] of a protected class" for purposes of housing discrimination includes persons who may be categorized based on "lawful source of income." *Id.* § 106.50(1m)(nm). However, the Seventh Circuit has found that Section 8 vouchers are not clearly encompassed by the term "source of income," and that participation in the Section 8 program remains voluntary. See *Knapp v. Eagle Prop. Mgmt.*, 54 F.3d 1272 (7th Cir. 1995) (discussed at Pet. 17-20).

In light of these numerous source of income laws in effect throughout the Nation, the court of appeals' reasoning throws the Section 8 program into severe disarray. In some areas of the country, landlords can

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[20] City of Seattle, Wash., Mun. Code tit. 14, §§ 14.08.020(M)(HH), and 14.08.040, available at http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?s1=&s2=%22section+8%22&S3=Title+adj+14&Sect4=AND&l=20&Sect3=PLURON&Sect5=CODE1&d=CODE&p=1&u=%2F%7Epublic%2Fcode1.htm&r=7&Sect6=HITOFF&f=G.

[21] King County, Wash., Code tit.12, §§ 12.20.020(D), 12.20.40(A)(1), available at http://www.kingcounty.gov/council/legislation/kc_code.aspx.

still opt-in, but in others their participation is likely compelled. Participation remains voluntary in jurisdictions without source of income laws, those few jurisdictions that legislatively exclude rental subsidies from a protected-income definition (such as Oregon and several of its counties, and Iowa City), and Wisconsin (in light of the *Knapp* opinion). However, under the reasoning of Maryland's highest court and in many of the other jurisdictions listed above, the only thing that separates private lessors from mandatory Section 8 inclusion is an administrative complaint filed by a "tester."

Uniform and consistent application of federal law is a paramount concern to mobilize this Court's intervention. See *Kansas v. Marsh,* 548 U.S. 163, 183 (2006) ("Our principal responsibility under current practice … and a primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions … is to ensure the uniformity and integrity of federal law") (Scalia, J., concurring). "[T]he Supremacy Clause, of course, defines the hierarchy of federalism …. For the very reason that [this] clause[] [is] constitutionally indispensable, judicial review of state and local actions alleged to violate [it] are necessarily robust." Laurence H. Tribe, American Constitutional Law, § 6-1 at 1026 (3d ed. 2000). In short, to avoid random administration of the Federal Housing Choice Voucher Program throughout the United States, this Court's review is necessary.

## II. RAISING RENTS WOULD UNDERMINE THE VERY PURPOSE OF THE SECTION 8 PROGRAM.

The court of appeals suggested that a landlord could circumvent its holding by methodically raising rents just "high enough," to price units out of Section 8 entirely so they no longer satisfy the voucher system's income and rental limits. Pet. App. at 29a n. 7. How absurd. Congress's purpose in creating the program was to aid "low-income families in obtaining a decent place to live and of promoting economically mixed housing." 42 U.S.C. §1437f(a). The court's suggestion will negatively impact *precisely* those families who most need assistance. The ironic synergy between the Section 8 program and a source of income protection ordinance (as interpreted by the court of appeals)—both of which are designed to provide housing opportunities for indigent families—will yield quite the opposite result. In short, there will be fewer opportunities for families of lesser means, because landlords will be encouraged to raise rents so as to avoid mandatory voucher acceptance.

Consider the situation of the complainant in the case at bench, Elaine Walker. Assume she found a home to rent for $850.00 per month. As shown in the Petition's appendix, Ms. Walker would pay 30% of her monthly income or $352.00 of the rent per month; the Public Housing Authority ("PHA") would pay the remaining $498.00. Pet. App. 99a. Now assume the landlord wants to raise the rent so that Section 8 tenants can no longer afford to live in the unit. If he raised the rent to $884.00, Ms. Walker would still pay $352.00, but the PHA would now have to cover a

greater portion from its coffers, or $532.00. The outcome is that Ms. Walker can still lease the unit, but the PHA must pay more of the total rent. Hence, if the landlord raises the rent a certain band-width, the PHA will have less money available to subsidize other low-income families.

Suppose the landlord later raises the rent above the payment standard, to $925.00. Though the PHA would still pay $532.00, Ms. Walker would have to pay an additional $41.00 per month. This instance requires both the PHA to maximize its payment and would also cost Ms. Walker and extra $492.00 per year. Thus, the PHA has less money for other section 8 tenants and Ms. Walker has less money to spend on other necessities.

Next, assume the landlord raises the rent from $850.00 to $1,002.00. The outcome would be that the unit would no longer qualify for Section 8 subsidies and Ms. Walker would need to find another place to live. This is because the new rent, $1,002.00, falls outside the rent guideline as exceeding 40% of her monthly income. Thus, by raising the rent $152.00, the unit does not qualify under Ms. Walker's Section 8 voucher. This outcome certainly does not "aid[] low-income families." 42 U.S.C. § 1437f(a).

These scenarios are tabulated below:

| **Rent ($)** | **Ms. Walker's Payment ($)** | **PHA's Payment ($)** |
|---|---|---|
| 850.00 | 352.00 | 498.00 |
| 884.00 | 352.00 | 532.00 |
| 925.00 | 393.00 | 532.00 |
| 1,002.00 | 1,002.00 | 0.00 |

It is also worthwhile to examine a typical situation based on HUD and Census information, and Montgomery County's current payment standards. Assume a female, head of household (HOH) with two children qualifies for a Section 8 voucher.[22] Suppose that she seeks to lease a two-bedroom apartment, and that she is at the top of the extremely low-income bracket ($26,550).[23] Assume her adjusted gross income equals $17,300.00.[24]

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[22] According to HUD, 47% of Montgomery County vouchers are utilized by female, heads of households. U.S. Dep't of Housing and Urban Development, *Residential Characteristics Report*, available at https://pic.hud.gov/pic/RCRpublic/rcrmain.asp (select "Tenant Based Voucher" option; then follow "County" hyperlink; then select "Within a State" option; then select "MD-Maryland" and follow "County " button' then select "o31-Montgomery County" and press the Reports" button; then choose "TTP" hyperlink) (last visited May 23, 2008). In addition, the average family size in the County is 3.26 people. *American Community Survey Profile, Montgomery County* 2006, available at http://factfinder.census.gov/servlet/STTable?_bm=y&-state=st&-context=st&-qr_name=ACS_2006_EST_G00_S1101&-ds_name=ACS_2006_EST_G00_&-tree_id=306&-_caller=geoselect&-geo_id=05000US24031&-format=&-_lang=en.

[23] Housing Opportunities Commission of Montgomery County, MD, Housing Choice Voucher Program, available at http://www.hocmc.org/housing/HCV/HCV-Income.asp (last visited May 23, 2008).

[24] The standard deduction for a Head of Household is $7,550, and the standard deduction for dependent children is $850 per child. Internal Revenue Service, *Exemptions, Standard Deduction and Filing Information*, Pub. 501, pp. 20-22 (2007). Therefore, $26,550-$7,550-(2*$850)=$17,300.

In Montgomery County, the payment standard for a two-bedroom apartment is $1,456.00. Suppose the female HOH finds an apartment to lease under the payment standard, for $1,300.00. The female HOH would pay $432.50 and the PHA would pay $867.50. If the landlord raised the rent to $1,456.00 so that it is equivalent with the County's payment standard, then the female HOH would still pay $432.50, but the PHA's subsidy obligation would increase by $156.00 to make up the difference, to $1,023.50. The result is that the female HOH still pays the same rent, but the PHA must pay more and thus, has less money to assist other low-income families.

Now suppose at the end of the lease term the rent is raised to $1,500.00. The PHA will still pay the maximum subsidy, $1,023.50. But the female HOH must pay $476.50—an additional $44.00 per month, or $528.00 per year. Though the landlord's increase does not price the female HOH out of the Section 8 program because the rent is still within allowable tenant income limits, her increased portion may mean that she can no longer afford the unit.

Finally, if the landlord were to raise the rent to $1,601.00—only $145.00 more than the County payment standard—then the unit becomes too expensive because it exceeds 40% of the allowable rent guideline, and the female HOH can no longer use the Section 8 voucher to lease the unit unless she finds some way to increase her income to fall back within the guideline.

These scenarios are tabulated below:

| Rent ($) | Tenant's Payment ($)* | PHA's Payment ($) |
|---|---|---|
| 1,300.00 | 432.50 | 867.50 |
| 1,456.00 | 432.50 | 1,023.50 |
| 1,500.00 | 476.50 | 1,023.50 |
| 1,601.00 | 1,601.00 | 0.00 |

* Based on Adjusted Gross Income=$17,300

The math might be simple, but the consequences are profound: rent increases by landlords as a means to avoid mandatory participation in the Section 8 program will have serious, adverse economic impact on indigent households. And, if PHAs are required to pay more in subsidies for individual families, there will be less dollars available to assist other voucher holders. In a climate where there is high demand for Section 8 assistance and long waiting lists for tenants seeking inclusion in the program, [25] the opinion below adds up to a grave and ill-founded housing policy.

[25] As of December 2007, Montgomery County had "5,400 vouchers in use and 15,600 families on the waiting list." Mary Otto, "Md. High Court Upholds Fair-Housing Law in Voucher Cases," The Washington Post, at p. HO03 (Dec. 6, 2007), available at http://www.washingtonpost.com/wp-dyn/content/article/2007/12/05/AR2007120501230.html. Indeed, a Google search with the terms "Section 8" "wait" and "list" quickly reveals that PHAs throughout the country have long waiting lists for persons of lesser means seeking to receive rental subsidies.

## III. IF THE LOWER COURT'S DECISION STANDS AND PROPERTY OWNERS ARE MANDATED TO PARTICIPATE IN THE SECTION 8 PROGRAM, ISSUES REGARDING THEIR CONSTITUTIONAL RIGHTS MUST BE ADDRESSED.

If the court of appeals' decision stands and spreads to other jurisdictions, a series of constitutional questions will be pushed to the fore. A landlord compelled to accept Section 8 vouchers will inevitably argue that certain of his fundamental rights, guaranteed by the Bill of Rights, have been infringed.

Of course, a decision that Section 8 preempts a local source of income law under the Supremacy Clause would preclude analysis of whether individual rights have been denied. Many times, the Court has expressed that needless confrontation of constitutional issues must be avoided. See, *e.g., Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 160 (2001) ("Where an administrative interpretation of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to Congress' intent"); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California,* 155 U.S. 648, 657 (1895)) ("'The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality'"). However, if private participation in a voluntary federal program becomes mandatory, the rights of affected property owners under the Takings Clause of

the Fifth Amendment, and the Search and Seizure Clause of the Fourth Amendment, must be considered.

### A. Takings Clause.

The Fifth Amendment provides that private property shall not be "taken for public use, without just compensation." U.S. Const., amend V. The Court has often referred to "property" as "sticks" in a "bundle of rights," defined by state law. *E.g., Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 127 S.Ct. 1199, 1205 (2007). (quoting *Butner v. United States,* 440 U.S. 48, 55 (1979)). The Fifth Amendment requires government to pay for those property rights when it takes them.

It is hornbook law that, when a landlord and tenant enter into a lease, the tenant obtains certain property rights which are determined by the lease agreement, including the right to possession of the premises. 52 C.J.S. Landlord Tenant § 511 (2008); see also *Neuman v. Travelers Indem. Co.,* 319 A.2d 522, 651 (Md. 1974) ("A leasehold is a property right"); *Middlebrook Tech, LLC v. Moore*, 849 A.2d 63, 76 (Md. Ct. Spec. App. 2004) ("The determination of property rights under a lease, including the right to future rent, is governed by state law and the agreements between the parties"). Furthermore, the "lessee does not acquire any greater rights in property than those held by the lessor." 52 C.J.S. Landlord Tenant § 511 (2008). In other words, whatever property rights the tenant obtains, are obtained from the landlord. By compelling property owners to enter

into leases they would otherwise not enter into, the decision below forces landlords to relinquish valuable property rights and raises Fifth Amendment concerns.

One such property right that landlords may be forced to surrender (under the lower court's decision) is the right to evict a tenant upon lease termination. Cf. *Dolan v. City of Tigard,* 512 U.S. 375, 393 (2005) ("[T]his right to exclude is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'") (citations omitted). In *Green v. Copperstone Ltd. P'ship*, 346 A.2d 686 (Md. Ct. Spec. App. 1975), the court addressed whether a tenant who received rental assistance under Section 236 of the National Housing Act obtained a property right in continued occupancy of the unit after the lease term expired. The *Green* court explained that the question is "whether the state or federal government, or both, have become so involved in the conduct of this otherwise private enterprise" that the private entity becomes the instrumentality of the government. *Id.* at 512 (internal quotations omitted). It held that because the government "insinuated itself into a position of interdependence with the landlord that it must be recognized as a joint participant in the landlord-tenant relationship," the tenant obtained a "property *right of entitlement* to continued occupancy until there exists a cause to evict other than the mere expiration of the lease." *Id.* at 516 (emphasis supplied). See also *Carroll v. Housing Opportunities Comm'n***,** 510 A.2d 540, 545 (Md. 1986) ("[N]umerous cases have held that tenants of federally funded housing projects have a *right or entitlement* to continued occupancy and may not be evicted without

good cause") (emphasis added); *Rosario v. Diagonal Realty, LLC*, 872 N.E.2d 860, 863 (N.Y. 2007) (acceptance of Section 8 rents from a prior lease becomes a term and condition of a renewed lease). Thus, by forcing landlord participation in the Section 8 program, he relinquishes the "stick" to evict the tenant upon the termination of the lease term.

The "element of required acquiescence is at the heart of the concept of [*per se* takings]." *FCC v. Florida Power Corp.,* 480 U.S. 245, 252 (1987). See also *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 440 (1982) (statute required landlords to submit to installation of cables and switching boxes, invading 1½ cubic feet of space). "[T]he Takings Clause requires compensation if the government authorizes a compelled physical invasion of property." *Yee v. City of Escondido,* 503 U.S. 519, 527 (1992). Moreover, in physical takings cases, the Court does not require an actual government intrusion as such, but the practical equivalent to one.[26]

[26] See*, e.g., Kaiser Aetna v. United States,* 444 U.S. 164, 180 (1979) (imposition of navigation servitude did not physically expropriate private property, but invited trespassers to so intrude); *United States v. Causby,* 328 U.S. 256, 261 (1946) (plane flights in airspace overhead private property constituted a compensable taking; invasion was "as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it"); *Pumpelly v. Green Bay Co.,* 80 U.S. (13 Wall.) 166 (1871) (physical taking claim lied where state legislation, allowing construction of dam on navigable river, caused flooding on landowner's property).

Analysis of *Yee* is instructive. The Court decided a mobile park rent control ordinance did not give rise to a physical taking triggering payment of compensation. Central to *Yee*'s reasoning was that:

> Petitioners *voluntarily* rented their land to mobile home owners. At least on the face of the regulatory scheme, *neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so.* To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice. Cal. Civ. Code § 798.56(g). Put bluntly, no government has required any physical invasion of petitioners' property. *Petitioners' tenants were invited by petitioners, not forced upon them by the government.*

*Yee,* 503 U.S. at 527-28 (emphasis supplied). The situation in the case at bench is the polar opposite. As interpreted by the court of appeals, Montgomery County's source of income law *compels* landlords to lease to Section 8 tenants—and Section 8 leases must be renewed, under cases like *Green* and *Rosario.* Accordingly, forcing a landlord to accept Section 8 vouchers has serious long-term consequences for landlords who become trapped in the program, against their wishes.

Thus, issues under the Takings Clause loom.

**B. Search and Seizure Clause.**

The decision below also raises constitutional questions under the Fourth Amendment's protections against warrantless searches and seizures. U.S. Const. amend. IV. "The basic purpose of this Amendment, as recognized by countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Mun. Court of the City and County of San Francisco*, 387 U.S. 523, 528 (1967). "This Court has . . . already held that warrantless searches are generally unreasonable, and that this rule applies to commercial premises as well as homes." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978).

Under the Section 8 program, a landlord must give the PHA access to inspect the proposed unit "prior to initial term of the lease." 24 C.F.R. § 982.405. Hence, inconsistent with the Fourth Amendment, the government will make a warrantless inspection of his property before the unit is turned over to the tenant. The constitutional infraction is patent when the government inspection is the result of the landlord's forced Section 8 compliance due to a local source of income law.

An exception from the search warrant requirement does exist, however, for administrative inspections of "pervasively regulated businesses" and "closely regulated industries." *Id.* at 313. Whether an industry is considered pervasively regulated depends on the "'pervasiveness and regularity of the … regulation' and the effect of such regulation upon

an owner's expectation of privacy," not solely on the duration of the regulatory scheme. *New York v. Burger*, 482 U.S. 691, 701 (1987) (quoting *Donavan v. Dewey,* 452 U.S. 594, 605-06 (1981)). While the Court has held that the auto dismantling, mining, liquor and firearms industries are "closely regulated," it has determined that the plumbing and electric installation industry is not.[27] The Court would be wading into unchartered waters if it must decide whether and under what circumstances landlord-tenant relationships are "closely regulated."

The court of appeals' interpretation that Montgomery County Code § 27-12 mandates landlord participation in the Section 8 program, and its corresponding inspection scheme, needlessly raises the constitutional issue of whether such inspections require a warrant.

## CONCLUSION

For all of the foregoing reasons, the petition should be granted.

June 2, 2008

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[27] See *New York v. Burger*, 482 U.S. 691 (1987) (auto dismantling), *Donavan v. Dewey*, 452 U.S. 594 (1981) (mining), *United States v. Biswell*, 406 U.S 311 (1972) (firearms), *Colonnade Corp. v. United States*, 397 U.S. 72 (1970) (liquor); But see *Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978) (electrical and plumbing installation).

Respectfully submitted,

DUANE J. DESIDERIO*
THOMAS J. WARD
JEFFREY B. AUGELLO
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th Street, NW
Washington, D.C. 20005
(202) 266-8200
*Counsel of Record*