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HOUSING EQUALITY CENTER OF PENNSYLVANIA, et al., Plaintiffs, v. OCF REALTY LLC, et al., Defendants.	PHILADELPHIA COUNTY COURT OF COMMON PLEAS CIVIL DIVISION No: 250200568

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' PRELIMINARY OBJECTIONS

Plaintiffs Housing Equality Center of Pennsylvania ("HEC") and Jennifer Cooper ("Ms. Cooper"), by and through their attorneys, respectfully submit this memorandum of law in support of their response in opposition to the Preliminary Objections of Defendant OCF Realty, LLC ("OCF") and Defendants Watermill Lofts, LLC, Patrick Campbell, Shanley Campbell, Joseph Tan, 1249 S. 21st Street, LLC, PFN Associates, LLC-2, 2115 63rd LLC, Jana Bernstein, and Jason Bernstein (collectively, the "Owner Defendants").

I. MATTER BEFORE THE COURT

OCF and the Owner Defendants' preliminary objections to the Plaintiffs' Complaint are currently before the Court. OCF submitted preliminary objections to the Complaint claiming that Plaintiffs failed to state a claim upon which relief may be granted because (1) the City of Philadelphia does not have authority to create a private right of action for enforcement of its ordinances, and (2) OCF's refusal to accept housing vouchers does not violate Philadelphia's Fair Practices Ordinance ("FPO"), but if it did, then federal and state law preempt the FPO. The Owner Defendants joined OCF's preliminary objections and raised a separate objection that Plaintiffs lack standing as to the Owner Defendants.

The Court should overrule all of these objections. First, both Pennsylvania's Constitution and the First Class City Home Rule Act ("FCCHRA") give Philadelphia broad police power to enact and enforce ordinances for the public good, and the legislature has not stripped Philadelphia of the power to create private rights of action. Second, Defendants' decision to deny prospective tenants access to housing because they wanted to pay with housing vouchers is quintessential discrimination based on "source of income," and neither federal nor state law preempt Philadelphia's ability to legislate in this area. Finally, Plaintiff HEC has organizational standing because it has a substantial, direct and immediate interest in the outcome of the litigation, and Plaintiff Jennifer Cooper has standing because OCF and the Owner Defendants with whom she had contact denied her access to affordable housing based on her source of income.

II. QUESTIONS PRESENTED

1. Should the Court overrule Defendants' preliminary objections claiming that Philadelphia does not have the power to create a private right of action?

   Suggested Answer: Yes.

2. Should the Court overrule Defendants' preliminary objections claiming that the FPO is preempted by state and/or federal law?

   Suggested Answer: Yes.

3. Should the Court overrule the Owner Defendants' preliminary objections based on lack of standing?

   Suggested Answer: Yes.

III. FACTUAL BACKGROUND

Plaintiffs HEC and Jennifer Cooper brought this action against OCF, which manages over 3,000 rental units throughout Philadelphia, Compl. ¶ 10, and against the Owner Defendants, whose properties are managed by OCF, *id.* ¶¶ 11-17.

HEC is a nonprofit organization whose mission is to ensure individuals' equal access to housing and to provide programs in furtherance of this goal, including education, consulting and counseling. *Id.* ¶ 8. After receiving an anonymous tip that OCF was violating the FPO by refusing to accept housing vouchers, HEC employed experienced testers to determine whether this was true. *Id.* ¶ 29. Between June 2022 and November 2022, six separate testers contacted OCF to inquire about renting OCF-managed properties using Housing Choice Vouchers. *Id.* ¶¶ 30-38. And six separate times, representatives from OCF told HEC's testers that none of OCF's properties accept tenants who plan to pay rent with Housing Choice Vouchers. *Id.* OCF's policy of refusing to rent to tenants who plan to use Housing Choice Vouchers violates the FPO, which prohibits housing discrimination based on source of income, defined as "any lawful source of income, and shall include, but not be limited to . . . all forms of public assistance, including Temporary Assistance for Needy Families; and housing assistance programs" like Housing Choice Vouchers. *Id.* ¶¶ 3-6. Because the Defendants violated the FPO, they frustrated HEC's mission of ensuring equal access to housing and forced it to divert its limited resources from its other core activities to

investigate and test the Defendants' discriminatory policies. *Id.* ¶¶ 32-38; 42-47, 57-59.

Jennifer Cooper is a low-income disabled Philadelphia resident who—after waiting approximately 13 years—was finally awarded a Housing Choice Voucher in 2023 and tried to use it to rent properties managed by OCF and owned by some of the Owner Defendants. *Id.* ¶¶ 39, 41-42. Over the course of a week in the summer of 2023, she toured multiple OCF-managed apartments and set up an appointment to tour even more. *Id.* ¶¶ 43-45. But as she progressed in her apartment search, an OCF representative informed her that—in violation of the FPO—it would not rent to her because the source of her rental payments was a Housing Choice Voucher. *Id.* ¶¶ 46-48. Defendants' violation of the FPO thwarted Ms. Cooper's attempt to find affordable housing and caused her to feel humiliated and ashamed, experience temporarily homelessness, and incur unnecessary moving expenses. *Id.* ¶¶ 48-54.

IV. LEGAL STANDARD

When ruling on preliminary objections, this Court accepts as true "all material facts set forth in the challenged pleadings, . . . as well as all inferences reasonably deducible therefrom." *See Godlove v. Humes*, 303 A.3d 477, 481 (Pa. Super. 2023) (quoting *Fiedler v. Spencer*, 231 A.3d 831, 835-36 (Pa. Super. 2020)). When preliminary objections "seek [] dismissal of a cause of action"—as Defendants' do—then the Court should only sustain them "in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief." *Id.* And "[i]f any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections." *Id.*

V. ARGUMENT

Defendants seek to dismiss Plaintiffs' Complaint with a number of legally baseless preliminary objections. The Court should overrule all of them.

A. The City of Philadelphia Has the Power to Create a Private Right of Action.

First, Defendants argue that the Court should dismiss Plaintiffs' Complaint "because the General Assembly did not grant the City of Philadelphia the power to allow for enforcement of its ordinances through a private right of action." Defendant OCF's Mem. of Law in Supp. of OCF's Preliminary Objections ("OCF POs") at 4. That argument is wrong as a matter of law and misunderstands basic principles of home rule.

Defendants have it backwards. The General Assembly does not need to specifically "grant" Philadelphia the power to create private rights of action. By default, under the Pennsylvania Constitution, Philadelphia can "exercise ***any power*** or perform ***any function*** not denied by [the Pennsylvania] Constitution, by its home rule charter, or by the General Assembly . . . " Pa. Const. Art. IX, § 2 (emphasis added). The General Assembly has confirmed this broad grant of power to Philadelphia through the FCCHRA,[1] which explains that—subject to the General Assembly's express limitations on the City's power—the City can legislate "to the full extent that the General Assembly may legislate." 53 P.S. § 13131. The City's Charter mirrors the FCCHRA's language. In fact, the annotations to the City's Charter explain that it does not explicitly list the City's powers "because any list of powers, despite its detail, would inevitably omit some." Philadelphia Home Rule Charter § 1-100.

[1] Philadelphia is classified as a "First Class City" under Pennsylvania municipal law, *see* 11 P.S. § 201, so its home rule authority is subject to the FCCHRA. Philadelphia's large population makes it the only First Class City in Pennsylvania. The General Assembly has curbed the home rule powers of less populous cities under a separate statutory regime. *See* P.S. § 22101 *et seq.*

The upshot is that Philadelphia has the exact same broad powers as the General Assembly, but the General Assembly can claw back and specifically limit any powers it does not want the City to have. *See Warren v. City of Philadelphia*, 115 A.2d 218, 220 (Pa. 1955) (explaining that Philadelphia can "legislate as to municipal functions as fully as could the General Assembly"); *Pub. Advoc. v. Philadelphia Gas Comm'n*, 674 A.2d 1056, 1061 (Pa. 1996) ("An ordinance which is properly adopted by the Philadelphia City Council has the force and effect of an act of the Pennsylvania assembly."). Since the General Assembly clearly has the power to create private rights of action, *see Pennsylvania Nat. Mut. Cas. Ins. Co. v. Dep't of Lab. & Indus.*, 715 A.2d 1068, 1071-72 (Pa. 1998), Philadelphia necessarily has this power unless and until the General Assembly explicitly strips it from the City. To prevail on their argument, then, Defendants need to cite specific legislation taking the power to create private rights of action away from the City.

Defendants cannot point to such legislation because the General Assembly has done no such thing. While the General Assembly has placed certain limitations on Philadelphia's home rule authority via the FCCHRA—for example, Philadelphia cannot exercise its power "beyond the city limits" or pass ordinances that contradict state law, *see* 53 P.S. § 13133—it has said nothing about Philadelphia's ability to create private rights of action. Defendants' brief does not cite to any explicit limitation on this power in Pennsylvania's statutes. Nor does it cite a single case holding that Philadelphia lacks the power to confer private standing.

Defendants' failure to cite any authority supporting their argument is particularly stark given that Philadelphia routinely creates private rights of action through its ordinances, all of which would be invalid under Defendants' cramped view of Philadelphia's power.[2] And even though

[2] *See, e.g.*, Phila. Code § 6-1504 (creating private right of action to remedy wrongful interference with reproductive health decisions); Phila. Code § 9-4305 (same, to remedy wage theft); Phila. Code § 9-2406 (same, to remedy predatory lending); Phila. Code § 17-1309 (same,

several of these ordinances have been heavily litigated, no Court has ever held that Philadelphia lacked the power to enact them. To the contrary, in deciding a separate issue raised under the FPO, Pennsylvania's Supreme Court recognized that Philadelphia had "authority . . . to enact the FPO," which "stems from the FCCHRA['s] . . . grant [of] broad powers to the City to legislate in any non-prohibited field pertinent to its municipal functions." *SEPTA v. City of Philadelphia*, 159 A.3d 443, 453 (Pa. 2017) (citing 53 P.S. §§ 13101–13157). And the Commonwealth Court has held that "it is within Philadelphia's power" to "confer statutory standing by setting forth in . . . legislation those who are aggrieved, i.e., those that have a right to bring a legal challenge." *Soc'y Created to Reduce Urb. Blight (SCRUB) v. Zoning Bd. of Adjustment of City of Philadelphia*, 729 A.2d 117, 122 (Pa. Commw. Ct. 1999). "[S]etting forth in [] legislation . . . those that have a right to bring a legal challenge" is exactly what Philadelphia has done via the FPO (and dozens of other ordinances). It is well within Philadelphia's home rule power.

Defendants' only attempt to cite statutory authority limiting Philadelphia's ability to create private rights of action goes nowhere. They argue that because § 13131 of the FCCHRA says that Philadelphia's ordinances "shall be enforceable by the imposition of fines, forfeitures and penalties" and places caps on the magnitude of the City's fines, it somehow precludes the City

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to remedy violations of Philadelphia's minimum wage ordinance); Phila. Code § 9-3508 (same, to remedy violations of the Fair Criminal Record Screening Standards); Phila. Code § 9-3603 (same, to remedy violations of Philadelphia's Sherrif's sale ordinance); Phila. Code § 10-841 (same, to remedy fraudulent leasing of residential properties); Phila. Code § 9-1605 (same, to remedy violations of Philadelphia's ordinance prohibiting self-help evictions); Phila. Code § 9-5006 (same, to remedy violations of Philadelphia's ordinance establishing employee protections in connection with the City's COVID-19 health order); Phila. Code § 6-1403 (same, to remedy violations of Philadelphia's ordinance protecting private health information); Phila. Code § 9-5702 (same, to remedy violations of Philadelphia's commercial lease disclosure requirements); Phila. Code § 9-3901 (same, to empower tenants to compel compliance with Philadelphia's rental license requirements); Phila. Code § 9-614 (same, to remedy violations of Philadelphia's ordinance governing payment of gratuities to employees); Phila. Code § 9-810 (same, to remedy violations of Philadelphia's ordinance governing prospective tenant screening practices).

from enforcing its ordinances in other ways, including by creating private rights of action. *See* OCF POs at 12. That argument is based on a flawed reading of § 13131 of the FCCHRA and fails for at least three reasons.

First, and most fundamentally, nothing in the language of § 13131 limits the City's power to enforce its ordinances through mechanisms other than fines. The statute is permissive. It says that the City's ordinances "shall be enforceable" through fines, which means that ***one of the ways*** the City can choose to enforce its ordinances is via fines. The statute does not say that the City's ordinances are ***only*** enforceable through fines, or that the City cannot create private rights of action. This permissive reading of § 13131 is consistent with the structure of the FCCHRA, since § 13131 is about confirming—not limiting—the City's home rule power. In fact, that section is titled "General ***grant*** of power and authority." 53 P.S. § 13131 (emphasis added). The FCCHRA's limitations on Philadelphia's power appear in an entirely different section—explicitly titled "Limitations," *see* § 13133—and nothing in that section purports to limit the mechanisms by which the City can enforce its ordinances.

Second, § 13133 is phrased in the passive voice. It says that the City's ordinances "shall be enforceable" via fines, but it does not say ***who*** can enforce them. It does not say that only the City can enforce its ordinances. To the contrary, its phrasing contemplates scenarios where someone other than the City enforces the City's ordinances.

Finally, Defendants' argument is inconsistent with decades of precedent interpreting Philadelphia's home rule authority and would invalidate dozens of ordinances. If Defendants were right that § 13133 limits the City's enforcement devices to "fines, forfeitures, and penalties," then the City could never enforce its ordinances in other ways. But courts have routinely granted relief beyond "fines, forfeitures, and penalties" to remedy violations of the City's ordinances. *See, e.g.*,

City of Philadelphia v. Urb. Mkt. Dev., Inc., 48 A.3d 520, 524 (Pa. Commw. Ct. 2012) (affirming demolition order for violations of Phila. Code § A-401.2). And because Philadelphia's ordinances routinely provide for private rights of action and equitable forms of relief,[3] accepting Defendants' argument would erase all of these ordinances—many of which the Pennsylvania Supreme Court has addressed in other contexts and found to be constitutional. *See, e.g.*, *Nutter v. Dougherty*, 938 A.2d 401, 416 (Pa. 2007) (upholding constitutionality of Phila. Code §§ 20-1000-1011, including § 20-1005, which allows "[a]ny person residing in [Philadelphia] . . . [to] bring an action for injunctive relief . . . to enjoin any violations of . . . the provisions of this Chapter").

B. Neither Federal Nor State Law Preempt the FPO.

1. The FPO Prohibits Defendants' Discrimination Based on Source of Income.

As a threshold argument, Defendants claim that (1) the FPO does not mandate participation in the Housing Choice Voucher ("HCV") program on its face; (2) non-participating landlords do not qualify for the HCV program; and (3) it would be unlawful for non-participating, unqualified landlords to accept vouchers. *See* OCF POs 6-7. This is a fundamental misreading of the FPO and a mischaracterization of the HCV program.

The language of the FPO is clear. It prohibits housing discrimination based on source of income, defined as "any lawful source of income, and shall include, but not be limited to . . . all forms of public assistance, including Temporary Assistance for Needy Families; and housing assistance programs" such as Housing Choice Vouchers. Phila. Code § 9-1102(cc) (2024) (prior

[3] *See, e.g.*, *supra* note 2 (detailing ordinances providing for private right of action); Phila. Code § 6-1504 (providing for injunctive relief as a remedy for violations of lead paint disclosure ordinances); Phila. Code § 9-4110 (same, for violations of Philadelphia's paid sick leave ordinance); Phila. Code § 7-206 (providing for injunctive relief and attorneys' fees for violations of notice and right of first refusal requirements in Philadelphia's fair housing ordinance); Phila. Code § 9-6306 (providing for injunctive relief, compensatory damages, and attorneys' fees and costs for violations of Philadelphia's consumer protection ordinance).

to the amendment by Bill No. 240060). So long as housing satisfies the Philadelphia Housing Authority's ("PHA") requirements—such as passing PHA's Housing Quality Assessment inspection and meeting its payment standards—HCV holders may choose any available unit on the market, and a property manager or owner cannot refuse to rent to a tenant solely because they use a housing voucher. PHA's process for approving the tenancy in a particular unit occurs ***after*** a prospective tenant expresses interest or applies for the apartment, not before. *See* 24 C.F.R. § 982.305 (summarizing the Public Housing Authority's process once the tenant and landlord submit the Request for Tenancy Approval); *see also Montgomery Cnty. v. Glenmont Hills Assocs*., 936 A.2d 325, 333-37 (Md. 2007). Contrary to Defendants' argument, there is no fixed list of "participating" and "non-participating" landlords. Any landlord can seek certification from PHA, and that certification can come ***after*** the prospective tenant expresses interest or applies. *See* Phila. Hous. Auth'y, Housing Choice Voucher Administrative Plan, Owner Certification, Section 14.4, *available at* https://www.pha.phila.gov/housing/housing-choice-voucher/hcv-admin-plan/#:~:text=PHA's%20policies%20for%20the%20Housing,effective%20for%20January%201%2C%202025. Defendants state that their "non-discriminatory reason for refusing to accept housing vouchers" is that they do not qualify, OCF POs at 7, but their circular reasoning—they do not participate because they do not qualify, and they do not qualify because they do not participate—undercuts the very essence of the source of income protection. Here, Plaintiffs were essentially told that voucher-holders need not apply. The FPO prohibits exactly this kind of blanket denial based on source of income.[4]

[4] Notwithstanding the plain meaning of the FPO, numerous courts have found that source of income discrimination protections are not synonymous with a mandate to accept voucher-holders in every instance. *See e.g.*, *Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 87-89 (D.D.C. 2008) (acknowledging that it is wrong to assume that the local law's prohibition of discrimination against voucher holders "is tantamount to 'mandating' participation in the program"); *Attorney*

2. Federal Law Does Not Preempt the FPO.

Next, Defendants argue that federal regulations promulgated by the Department of Housing and Urban Development ("HUD") preempt the FPO's source of income protection. This preliminary objection should also be overruled.

Under the doctrine of preemption, federal law can sometimes supersede state and local law. Congress may preempt state or local laws expressly or impliedly, with implied preemption falling into two categories—field and conflict preemption. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). Importantly, "preemption is not to be lightly presumed," *Cal. Fed'l Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987), and any analysis of preemption "starts with the basic assumption that Congress did not intend to displace state law," *Maryland v. Louisiana*, 451 U.S. 725, 728 (1981).

Defendants do not argue that any federal law expressly preempts the FPO. Instead, they argue that Section 8 of the Housing Act of 1937 ("Section 8") and its implementing regulations preempt the FPO because they are in conflict. In Defendants' view, it is either impossible to comply with both federal and local requirements because the FPO prevents discrimination against tenants participating in Section 8's voluntary HCV program, or the FPO "stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Cal. Fed'l Savings*, 479 U.S. at 280-81 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Defendants are wrong. No conflict exists, and Congress did not intend to preempt local source of income anti-

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General v. Brown, 511 N.E.2d 1103, 1106 (Mass. 1987) (discussing federal conflict preemption, "[i]t does not follow that, merely because Congress provided for voluntary participation, the States are precluded from mandating participation absent some valid nondiscriminatory reason for not participating"); *Montgomery Cnty.*, 936 A.2d at 330 ("There is no direct requirement in the Federal law or HUD regulations that a landlord participate in HCVP or accept Section 8 vouchers . . . Indeed, under HUD regulations, the landlord is responsible for screening prospective Section 8 tenants and may consider [multiple factors].") (citing 24 CFR § 982.307(a)).

discrimination provisions.

Indeed, every court that has examined the question of whether the HCV regulations are in conflict with local source of income protections has rejected this argument, instead finding them harmonious with Congress's objective. *See, e.g.*, *Bourbeau*, 549 F. Supp. 2d at 87-89 (observing that Washington D.C.'s non-discrimination requirement is not an obstacle to the HCV program's "central objective" to "ai[d] low-income families in obtaining a decent place to live") (internal citations omitted); *Montgomery Cnty.*, 936 A.2d at 333-37 ("There is nothing in any of the relevant Federal statutes even to indicate, much less establish, that voluntary participation by landlords was an important Congressional objective."); *Franklin Tower One v. N.M.*, 725 A.2d 1104, 1113 (N.J. 1999) ("We are confident that application of the [state] statute's anti-discrimination provision to protect tenants who are eligible to receive Section 8 vouchers will neither conflict with nor frustrate the objectives of Congress in enacting the Section 8 program."); *Attorney General v. Brown*, 511 N.E.2d 1103, 1106 (Mass. 1987) (reasoning that the goal of the federal scheme is to assist low-income families in obtaining decent housing, not voluntary landlord participation); *Comm'n on Human Rights & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 246 (1999) (superseded by statute on other grounds) ("Requiring landlords to extend rental opportunities to otherwise eligible Section 8 recipients . . . is not an obstacle to the congressional agenda but serves instead to advance its remedial purpose.").

The consistency in court opinion is not surprising. The legislative history of Section 8 and its implementing regulations indicate that Congress was aware of local regulations prohibiting discrimination against voucher holders and found them concordant with the Congressional objective. As explained at length in *Montgomery County*, when HUD adopted an interim regulation concerning voucher programs in 1999, landlord participation remained voluntary but

nothing in that regulation was "intended to pre-empt operation of State laws that prohibit discrimination against a Section 8 voucher-holder." *Montgomery Cnty.*, 936 A.2d at 336-37 (quoting 24 CFR § 982.53(d)). Upon final adoption of the regulation, HUD specifically stated that 24 C.F.R. § 982.53(d) needed to be expanded to include not just State but local ordinances, noting that "*these tools are used increasingly by local communities to promote fair housing.*" *Id*. at 337 (emphasis in original). Thus, fully aware of State and local laws that prohibit discrimination against voucher holders, HUD amended § 982.53(d) to explicitly state that nothing in part 982—including the voluntariness of the program—is intended to preempt State or local laws.[5] *See Sullivan Assocs.*, 739 A.2d at 246.

"Nothing in the text of 42 U.S.C. § 1437f requires participation to be voluntary," *see id*., and the statute explicitly contemplates active local involvement in implementing the HCV program, *see* 42 U.S.C. § 1437f (b) (permitting HUD to enter into contracts with local Public Housing Authorities); 42 U.S.C. § 1437f (d) (authorizing Public Housing Authorities to enter into contracts with landlords). The fact that HUD happened to make the federal program voluntary does not make it "the 'heart' of the Federal scheme," and it does not prevent state and local governments from furthering the goals of Section 8 by prohibiting discrimination against HCV holders. *Brown*, 511 N.E.2d at 1106. As Congress has explained, the true "heart" of Section 8 is to "aid[] lower-income families in obtaining a decent place to live and . . . promot[e] economically mixed housing." *See id.*; *see also* 42 U.S.C. § 1437(a)(4) ("[O]ur Nation should promote the goal of providing decent and affordable housing for all citizens through the efforts and encouragement

[5] Defendants point to the second sentence of § 982.53(b) [*sic*] beginning "However, such State and local laws shall not change or affect any requirement of this part…" for the proposition that the HUD regulations require voluntariness. *See* OCF POs at 10. But as the foregoing makes clear, Congress had the inverse intent.

of Federal, State, and local governments."). Philadelphia—along with approximately 160 other State and local governments—has chosen to further these goals by combating discrimination against HCV holders, which "results in overcrowded, segregated areas, under substandard, unsafe, unsanitary conditions." Phila. Code § 9-1101(c) (2024) (prior to the amendment by Bill No. 240060). Rather than frustrating Congress's objective, Philadelphia's FPO supports Congress's desire to provide more opportunities for low-income individuals to live in safe, healthy homes.

In an attempt to bolster their preemption argument, Defendants point to an inapposite out-of-state case holding that a New York City anti-discrimination ordinance actually conflicted with federal law, but that case involved a different ordinance and different facts. *See Mother Zion Tenant Ass'n v. Donovan*, 865 N.Y.S.2d 64 (N.Y. App. Div. 2008). In *Mother Zion*, New York City passed an ordinance giving tenant associations the right to purchase a building if its owner wanted to sell the building or withdraw it from a federal subsidy program. *See id*. at 66. The court found that federal law preempted this particular ordinance, but in doing so it ***explicitly*** recognized that it was distinguishable from tenant-based source of income anti-discrimination laws like the FPO at issue here. *See id.* at 67. Indeed, in a later challenge to New York City's ordinance prohibiting source of income discrimination protection, the same court, distinguishing *Mother Zion*, held that the ordinance "is not preempted by federal law . . . [and] that the Section 8 program, while voluntary in nature, did not preempt local antidiscrimination laws." *Tapia v. Successful Management Corp.*, 915 N.Y.S.2d 19, 22 (N.Y. App. Div. 2010). In other words, instead of helping Defendants' argument, *Mother Zion* confirms that their argument is wrong. Federal law does not preempt local laws barring source of income discrimination.

Defendants also rely on three federal cases, but none of these cases actually involves federal preemption. Instead, they hold that the HCV program is voluntary. This is not the relevant

question. The relevant question is whether Congress's decision to make the HCV program voluntary is so essential to the federal scheme that the FPO's source of income protection makes compliance with federal law impossible or frustrates Congress's objective. None of the cases even consider this question, let alone answer it.

In *Salute v. Stratford Greens Garden Apts.*, 136 F.3d 293 (2d Cir. 1998), the question before the court was whether the Fair Housing Act requires landlords to accept Section 8 vouchers from disabled individuals as a "reasonable accommodation." Holding it did not, the court examined the "take-one, take-all" provision of the HUD regulations—later suspended for having the "unintended effect of discouraging landlords to accept their first Section 8 tenant"—and determined that Congress intended for the program to be voluntary due in part to the multiple requirements placed on landlords to participate in the program.[6] *See id.* at 302; *see also Franklin*

[6] In applying *Salute* to its preemption analysis, Defendants incorrectly summarize federal regulations mandating certain requirements for landlord participation, such as accepting "reasonable rents" rather than setting "competitive fair market rates." OCF POs at 12. For example, as described in the Complaint, the Philadelphia Housing Authority sets "payment standards" that are known at the time a prospective tenant seeks a rental agreement. *See* Compl. ¶ 5; *see also* Payment Standards, PHILADELPHIA HOUSING AUTHORITY, *available at* https://www.pha.phila.gov/housing/housing-choice-voucher/payment-standards/ (last visited Mar. 23, 2025). Ms. Cooper sought information from Defendant OCF about prospective units, "some of which were in safe and desirable neighborhoods below the payment standard." *Id.* ¶ 45.

Defendants' additional characterizations of the HCV program are not contained in the Complaint or supported by evidence. For example, they claim that "owners . . . lose the opportunity to sell their property for full fair market value while the property is leased through Section 8," OCF POs at 11-12. Such characterizations must be set aside as "speaking demurrers." *See Regal Indus. Corp. v. Crum and Forster, Inc.*, 890 A.2d 395, 398 (Pa. Super. 2005); *see also* Pa.R.C.P. 1029(d) ("Averments in a pleading to which no responsive pleading is required shall be deemed to be denied."). To the extent Defendants raise federal preemption questions that require significant evidentiary foundation, those arguments are also not properly raised as a preliminary objection. *See Commonwealth. ex re. Pappert v. TAP Pharmaceutical Products, Inc.*, 885 A.2d 1127, 1146 (Pa. Commw. Ct. 2005) (analyzing whether federal conflict preemption applies to Commonwealth's claim against pharmaceutical companies for alleged price inflations under Medicaid, and concluding "this issue is not one that we could have determined on the basis of

Tower One, LLC, 725 A.2d at 1109 (distinguishing *Salute* from the question of federal preemption). Simply stated, the *Salute* court never explored the question of federal preemption.

Second, in *Knapp v. Eagle Property Management Corp.*, 54 F.3d 1272 (7th Cir. 1995), the Seventh Circuit considered whether Wisconsin's source of income protection encompassed housing vouchers as a lawful source of income under Wisconsin law. Although the court commented in dicta that "[i]t seems questionable . . . to allow a state to make a voluntary federal program mandatory," *id*. at 1282, the court never analyzed the question of federal preemption. Moreover, the *Knapp* court pointed to *Attorney General v. Brown* as having directly analyzed the federal preemption question and concluded that Massachusetts's source of income protection was not preempted by federal law. *Id.*; *see also Bourbeau*, 549 F. Supp. 2d at 89, n.12 ("The Court disagrees with the Seventh Circuit's suggestion, in dictum, that prohibiting discrimination on the basis of a voucher holder's status as a voucher holder might conflict with federal law.").

Third, Defendants rely on *Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 899 (5th Cir. 2019). The question at issue in *Inclusive Communities* was whether the failure of a landlord to accept Section 8 vouchers violated the Fair Housing Act's prohibition against race discrimination on the basis of either disparate treatment or disparate impact. The Fifth Circuit stated that "[l]andlord participation in the voucher program is voluntary under both federal and Texas state law." *Id*. at 900 (internal citations omitted). But as with *Salute* and *Knapp*, the *Inclusive Communities* court never analyzed—let alone ruled—on the question of federal preemption.

In sum, Defendants are unable to point to a single case that stands for the proposition they

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preliminary objections [because it] require[s] investigation into matters that warrant a greater evidentiary foundation").

seek this Court to endorse. A proper preemption analysis mandates the opposite result: The FPO is not preempted by federal law.

3. State Law Does Not Preempt the FPO.

Defendants also argue that the FPO is preempted by state law, but they do not point to any legal authority for this theory.[7] Instead, they imply that Pennsylvania's Landlord Tenant Act of 1951 (the "Landlord Tenant Act" or the "Act") so dominates the field of landlord-tenant matters that it preempts any local law implicating landlord-tenant "relationships." OCF POs at 12-14 ("Insofar as the Pennsylvania General Assembly enacted the statutes governing the *relationships* between landlords and tenants . . . ") (emphasis added). This is an overreading of the Act and a misapplication of field preemption.

Under the doctrine of field preemption, if the General Assembly has regulated an area so completely that it has occupied the entire field, it "retain[s] all regulatory and legislative power for itself and no local legislation in that area is permitted." *Hydropress Envtl. Servs., Inc. v. Twp. of Upper Mount Bethel*, 836 A.2d 912, 918 (Pa. 2003) (quoting *Council of Middletown Twp., Del. Cnty. v. Benham*, 523 A.2d 311, 313 (Pa. 1987)). The burden to show field preemption in Pennsylvania is exceedingly high, and the Pennsylvania Supreme Court has recognized only four fields that are entirely preempted by state law.[8] "[A]bsent a clear statement of legislative intent to preempt, state legislation will not generally preempt local legislation on the same issue." *Mars*

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[7] *See Umbelina v. Adams*, 34 A.3d 151, 161 (Pa. Super. 2011) ("As the [Appellants] offer no citation to authority or further analysis, we find [their] claims to be waived for lack of development.").

[8] Those field are "alcoholic beverages, anthracite strip mining, and banking," *Hoffman Min. Co., Inc. v. Zoning Hearing Bd. of Adams Twp.*, 32 A.3d 587, 593-94 (Pa. 2011), and public utilities, *PPL Elec. Utils. Corp. v. City of Lancaster*, 214 A.3d 639 (Pa. 2019). Landlord-tenant matters do not fall on this list.

Emergency Med. Servs., Inc. v. Twp. of Adams, 740 A.2d 193, 196 (Pa. 1999).

Defendants do not point to any language invoking the General Assembly's intent to preempt the entire field of landlord-tenant matters.[9] That is unsurprising, since the Commonwealth Court has directly addressed this question and found that "express and field preemption do not apply" to the Landlord Tenant Act. *Berwick Area Landlord Ass'n v. Borough of Berwick*, 48 A.3d 524, 534 (Pa. Commw. Ct. 2012). Moreover, the FPO and Philadelphia's source of income discrimination prohibition is clearly an area in which local legislation is permitted. *See Devlin v. City of Philadelphia*, 862 A.2d 1234, 1248 (Pa. 2004) (recognizing that Philadelphia generally has the authority to enact anti-discrimination measures pursuant to its police powers). Thus, the FPO is not preempted by State law.

C. Plaintiffs Have Standing.

1. Plaintiff HEC Has Standing.

This Court should overrule the Owner Defendants' preliminary objection against HEC for lack of standing. Under Pennsylvania law, an organization is "aggrieved" and has standing to seek relief in court if it has "a substantial, direct and immediate interest in the outcome of the litigation." *See Allegheny Reproductive Health Ctr. v. Pa. Dep't of Human Servs.*, 309 A.3d 808, 832 (Pa. 2024). HEC easily satisfies this standard. Accepting the well-pled facts in the Complaint as true, *see supra*, Defendants' discriminatory housing practices have harmed HEC's mission and forced it to divert its limited resources from other core activities in order to address Defendants' unlawful conduct. Compl. ¶¶ 8, 55-62. That is a "substantial, direct and immediate interest in the outcome of the litigation." *See Allegheny*, 309 A.3d at 832, 838-39 (finding that medical providers had

[9] There is a plethora of ways in which Philadelphia regulates in the field of landlord-tenant matters. *See, e.g.*, Phila. Code § 9-811 (Eviction Diversion Program).

standing to challenge the Abortion Control Act where they were forced to modify their treatment plans and incur additional expenses as a result of the act's coverage exclusion); *see also Disability Rts. Pa. v. Pa. Dep't of Hum. Servs.*, No. 1:19-CV 737, 2020 WL 1491186, at *5 (M.D. Pa. Mar. 27, 2020) (finding an organization has a cognizable injury when the entity must "alter its operations and reroute its resources in response to allegedly unlawful conduct in a way it otherwise would not have").

"An interest is 'substantial when it surpasses the interest of all citizens in procuring obedience to the law;' it is 'direct when the asserted violation shares a causal connection with the alleged harm;' and it is 'immediate when the causal connection with the alleged harm is neither remote nor speculative.'" *Ball v. Chapman*, 289 A.3d 1, 19 (Pa. 2023) (citation omitted). As a fair housing organization, HEC's mission is "to ensure individuals' equal access to housing and to provide programs in furtherance of this cause," Compl. ¶ 8, "to advance fair and equal access to housing opportunities for all Pennsylvanians," *id.* ¶ 56, and to "further[] fair housing and racially integrated communities," *id.* ¶ 57. In furtherance of this mission, HEC provides programming, including "training and testing investigations, education, consulting and counseling." *Id.* ¶ 8. Defendants' discriminatory actions harmed HEC's mission by "reduc[ing] opportunities for safe and affordable housing for low income individuals, [and by] denying them access to fair and equal housing." *Id.* ¶ 57. Accordingly, HEC has a substantial interest in the outcome of this litigation beyond that of the general public. *See Allegheny*, 309 A.3d at 838 (medical providers "have a substantial interest in the outcome of this litigation [challenging the Abortion Control Act] as medical institutions that provide treatment and services to women receiving Medical Assistance, including abortion services").

Moreover, HEC's interest is direct and immediate. "Following an anonymous tip of

discriminatory conduct" by Defendants, Compl. ¶ 29, HEC was forced to expend and divert precious resources by undertaking a six-month investigation and subsequently engaging in community education that included targeted Facebook advertisements and mass mailings to households in mail routes where tests of Defendants' properties revealed source of income discrimination. *Id.* ¶¶ 59-61. None of these activities would have occurred if not for Defendants' discriminatory housing practices. And these activities detracted from other HEC core activities, including "provid[ing] consulting services so that both consumers and providers understand their rights and obligations under local, state and federal housing laws." *Id.* ¶ 56; *see also id.* ¶¶ 8, 55.

None of the cases the Owner Defendants cite support their standing objection, and their arguments mischaracterize the assertions in the Complaint. Relying on *In re Friends of Marconi Plaza*, 287 A.3d 965 (Pa. Commw. Ct. 2022), the Owner Defendants argue that HEC lacks standing because "it is not enough to show that the challenging action implicates the organization's mission in some way." Owner Defendant's Mem. of Law in Supp. of Owner Defendants' Preliminary Objections ("Owner Defs.' POs") at 11. But as discussed *supra*, HEC has done more than simply plead facts implicating its mission. It has pled facts sufficient to establish that its mission has been harmed by Defendants' unlawful conduct.[10] Compl. ¶¶ 55-57.

Likewise, the Owner Defendants' reliance on *Armstead v. Zoning Bd. of Adjustment of City of Philadelphia*, 115 A.3d 390 (Pa. Commw. Ct. 2015) is misplaced. There, an organization whose mission was to improve the quality of life in Philadelphia and prevent illegal billboards did not

[10] In *Marconi Plaza* the court found that the organization which was formed to preserve and beautify a plaza actually had standing to challenge the City's decision to remove a statue from that plaza where removal would fundamentally impact the plaza in which they participate. 287 A.3d. at 978.

have standing to challenge a zoning variance to allow a property owner to replace a vinyl sign with a digital sign. *Id.* at 398. But the organization in *Armstead* had made no significant investment in the neighborhood nor were its offices or members located in the immediate vicinity of the proposed sign. *Id*. at 400. Those facts stand in stark contrast to HEC's demonstration of a cognizable injury. Defendants' discriminatory housing practices go to the heart of HEC's mission and its ability to carry out some of its other work by requiring HEC to mitigate the impact of the Owner Defendants' unlawful actions. Compl. ¶¶ 55-56, 59-61.

The Owner Defendants also cite *Ball v. Chapman* for the proposition that "an organization's expenditure of resources alone ordinarily does not confer standing." 289 A.3d at 19. But the Owner Defendants ignore the actual holding in *Ball*, finding that the organizations had standing because their expenditure of resources went beyond "general grievance[s]" and constituted a "substantial interest," there was a "causal connection" between the defendant's conduct and the alleged harm, and that connection was neither "remote nor speculative." *Id*. at 19-20. Similarly, here, there is nothing remote or speculative about the harm to HEC's mission from Defendants' discriminatory conduct where HEC has already had to shift its limited resources because of Defendants' unlawful actions. Compl. ¶¶ 55-62.

Lastly, although Pennsylvania courts have not specifically addressed whether a fair housing organization like HEC has standing to challenge property owners' discriminatory housing practices, federal courts have regularly held that they do.[11] Just last month, in *United States v. Aion Mgmt.*, No. 23-742, 2025 WL 843620, at *1 (D. Del. Mar. 18, 2025), a federal district court

[11] In Pennsylvania, standing is prudential in nature, and state courts are not bound by the requirements of federal Article III standing. However, Pennsylvania courts "have found federal decisions on standing helpful." *Fumo v. City of Phila.*, 972 A.2d 487, 500 n.5 (Pa. 2009); *see also Hous. Auth. of Cnty. of Chester v. Pa. State Civil Serv. Comm'n*, 730 A.2d 935, 939 n.10 (Pa. 1999) (citing examples).

in Delaware found that HEC had standing in a housing discrimination case under the Fair Housing Act because the alleged discriminatory housing practices "frustrated [HEC and the other organizations'] missions as fair housing organizations and forced them to divert their limited resources from their typical activities, which include a range of education, investigative, counseling and referral services" and "forced [them] to identify and counteract Defendants' discriminatory actions." *Id*. at *6; *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (holding that a fair housing organization had standing to bring housing discrimination claims under the Fair Housing Act when it can show a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitut[ing] far more than simply a setback to the organization's abstract social interests." (citation omitted)). In addition, "[g]enerally speaking, in our Commonwealth, standing is granted more liberally than in federal courts." *Allegheny*, 309 A.3d at 832.

2. Plaintiff Jennifer Cooper Has Standing.

Finally, the Owner Defendants' preliminary objection against Ms. Cooper for lack of standing must also be denied.[12] The Owner Defendants' argument is premised on the idea that Ms. Cooper's discrimination claim is "speculative" because she toured, but did not ultimately apply for, the apartments in question. *See* Owner Defs.' POs at 10-11.[13] The Owner Defendants

[12] Ms. Cooper does not dispute that her standing runs against Defendant OCF Realty, LLC, and the Owner Defendants of the properties she toured, namely: Patrick Campbell and Shanley Campbell (owners of 3719 Calumet Street, Philadelphia, Pennsylvania), and Watermill Lofts, LLC (owner of 4 Leverington Avenue, Philadelphia, Pennsylvania).

[13] Plaintiffs refer the Court to Section V.B, *supra*, in response to the Owner Defendants' argument that Ms. Cooper's source of income discrimination claims against Watermill Lofts, LLC, and Jana and Jason Bernstein are speculative because it was unknown at the time Ms. Cooper toured their properties if they "could have or would have" been able to comply with the HCV program. *See* Owner Defs.' POs at 11.

offer no legal support for this theory. And in fact, both the language of the FPO and Pennsylvania's test to establish a *prima facie* case of housing discrimination demonstrate that Ms. Cooper has pled facts sufficient to maintain an action against Defendants for source of income discrimination.

First, a plain reading of the FPO clearly establishes that Defendants' conduct constitutes housing discrimination against Ms. Cooper. *See* Phila. Code § 9-1108 *et seq*. (2024) (prior to the amendment by Bill No. 240060). The FPO states that "[i]t shall be an unlawful housing and real property practice to deny ***or interfere*** with the housing accommodation . . . based on . . . source of income . . . " *Id*. at § 9-1108(1) (emphasis added). The actions encompassing housing discrimination based on source of income include but are not limited to: refusing to rent, lease, and otherwise discriminating in the terms, conditions or privileges of a housing accommodation, *id*. at 9-1108(1)(a); making oral statements which express limitation or discrimination of a housing accommodation, *id.* at § 9-1108(1)(c); and, establishing, announcing, or following a discriminatory policy of denying or limiting opportunities of voucher-holders to rent property, *id.* at § 9-1108(1)(f); *see* Compl. ¶¶ 63-67.[14]

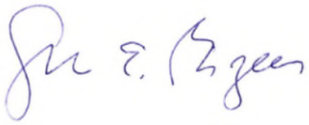
After touring a number of OCF affordable listings below the HCV payment standard, Ms. Cooper called the OCF office to inquire about the use of her voucher as her source of income. Compl. ¶ 45. She spoke with a person named "Rachel" who informed her that OCF does not accept vouchers for any of their properties. *See id.* This conduct is expressly prohibited by the FPO as described above. Based on Ms. Cooper's source of income, Defendants refused to rent to her; made oral statements which expressed limitation, specification or discrimination; established, announced or followed a discriminatory policy of denying or limiting opportunity to rent

[14] And, as it pertains to Defendant OCF, refusing or limiting service to Ms. Cooper on a discriminatory basis as a broker, agent or employee or representative of a broker or agent. *Id*. at § 9-1108(1)(*l*).

properties; and, as broker or agent for the Owner Defendants, refused or limited services to Ms. Cooper on a discriminatory basis. *See id.* In other words, the text of the FPO indicates the Philadelphia City Council imagined exactly this kind of scenario when it prohibited conduct that would discourage a prospective tenant like Ms. Cooper from completing an application for an available rental unit.

Moreover, Pennsylvania courts have allowed Plaintiffs to pursue housing discrimination claims—even when they never made a formal rental application—based on conduct designed to discourage qualified applicants from applying. Defendants "effectively denied" Ms. Cooper "the opportunity to rent the apartment" when they "deliberately [discouraged]" Ms. Cooper from applying by telling Ms. Cooper that her use of a housing voucher "would be a problem." *Allison v. Pennsylvania Hum. Rels. Comm'n*, 716 A.2d 689, 692 (Pa. Commw. Ct. 1998) (holding that landlord denied housing opportunity in violation of Pennsylvania fair housing law by telling black prospective renter that her race "could be a problem"), *pet. for allowance of app. denied*, 1999 WL 105212 (No. 551 W.D. Alloc. Dkt.1998, filed March 3, 1999). So too here. The allegations in the Complaint are that Defendants' representative deliberately discouraged Ms. Cooper from applying for any of its properties because it would not accept housing vouchers. Ms. Cooper undoubtedly maintains standing to challenge her concrete injuries under the FPO.

Respectfully submitted,



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