IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Docket No.

THE CITY OF PITTSBURGH

Petitioner

v.

APARTMENT ASSOCIATION OF METROPOLITAN PITTSBURGH, INC.

Respondent

BRIEF OF *AMICI CURIAE*, THE FAIR HOUSING PARTNERSHIP OF GREATER PITTSBURGH, THE POVERTY RACE RESEARCH AND ACTION COUNCIL AND THE NATIONAL HOUSING LAW PROJECT, IN SUPPORT OF THE CITY OF PITTSBURGH'S PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from the March 12, 2019 Order and Opinion of The Commonwealth Court in Docket No. 528 C.D. 2018

Date: April 11, 2019

Kevin Quisenberry
Pa. I.D. # 90499
Community Justice Project
100 Fifth Avenue, Suite 900
Pittsburgh, PA 15222
Telephone: 412-434-6002
Email: kquisenberry@cjplaw.org

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

CONSTITUTIONAL PROVISIONS

STATEMENTS OF IDENTITY AND INTEREST

Amici curiae are nonprofit organizations that endeavor to promote the civil legal rights of low-income and otherwise vulnerable persons, including with regard to their housing. *Amici* have a special interest in, and substantial expertise regarding, the important municipal power and fair housing discrimination issues presented in this case. The effect of Commonwealth Court's opinion in this case—that 53 Pa. C.S.A Section 2962(f) of the Pennsylvania Home Rule Law prevents the City of Pittsburgh from legislating to address housing discrimination identified within its jurisdiction—raises questions of such substantial public importance as to require prompt and definitive resolution by this Court. Further, the Commonwealth Court's opinion in this case directly conflicts with prior relevant holdings of both this Court and the Commonwealth Court.

Pursuant to Pa.R.A.P. 531(b)(2), *Amici* state that no entity or person, aside from *Amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief or authored this brief in whole or in part.

The Fair Housing Partnership of Greater Pittsburgh ("FHP"), a HUD-qualified Fair Housing Enforcement Organization, is a nonprofit organization devoted to ensuring equal housing choice throughout southwestern Pennsylvania through fair housing education, outreach, analysis and advocacy. FHP's mission

focuses on the enforcement of the federal Fair Housing Act and locally equivalent laws. In FHP's thirty-five years of fair housing experience, one of the key barriers is the prevalence of discrimination against HCV families.

The Poverty & Race Research Action Council (PRRAC) is a civil rights policy organization based in Washington, DC, committed to bringing the insights of social science research to the fields of civil rights and poverty law. PRRAC's housing work focuses on the government's role in creating and perpetuating patterns of racial and economic segregation, the long-term consequences of segregation for low-income families of color in the areas of health, education, employment, and economic mobility, and the government policies that are necessary to remedy these disparities. For over a decade, PRRAC has engaged in research, policy analysis, and advocacy on the barriers facing families using federal Housing Choice Vouchers (HCVs) to move to higher opportunity areas. One of the key barriers is the prevalence of discrimination against HCV families. As part of its work PRRAC has researched best practices in local source of income discrimination laws, and since 2005, has maintained a directory of all state and local statutes and ordinances barring source of income discrimination.

The National Housing Law Project (NHLP) is a nonprofit organization that advances housing justice for poor people and communities, predominantly through technical assistance and training to legal aid attorneys, policy advocacy, and co-

counseling on key litigation. NHLP works to strengthen and enforce tenants' rights, increase housing opportunities for underserved communities, and preserve and expand the nation's supply of safe and affordable homes. Since 1981, NHLP has published HUD Housing Programs: Tenants' Rights (commonly known as the "Greenbook"), the seminal authority on the rights of HUD tenants – including families participating in the Housing Choice Voucher program.

INTRODUCTION

The facts are not in dispute. The City of Pittsburgh has determined that discrimination in rental housing based upon a person's source of income is prevalent in the City and that this source-of-income discrimination has become a proxy for discrimination on the basis of race, national origin, and familial status. Opinion, p. 5.[1] The City also has determined that although federal Housing Choice Vouchers enable many low-income City residents to obtain housing, forty one percent (41%) of the Vouchers awarded in the City go unused, due in part to this source-of-income discrimination. Opinion, p. 2. Consequently, the City enacted an ordinance (the "Ordinance"), adding "source of income" as a protected class under its existing fair housing legislation, "in order to protect its residents from [this] discrimination and to ensure the availability of affordable, safe housing for all residents." Opinion, p. 2, 5-6.

The question before this Court is whether the City's *status* as a "home rule" municipality precluded the City from prohibiting this source-of-income discrimination. The Court below erred by applying §2962(f) of the Home Rule Law to preclude the City's enactment of the Ordinance. It is incumbent upon this Court to correct that error.

---

[1] References to the Commonwealth Court's Opinion in this case will be cited as follows: "Opinion, p. x."

In addition, as applied, to the extent that 53 Pa.C.S. §2962(f) precludes the City from prohibiting this proxy housing discrimination, §2962(f) is preempted by federal law.

ARGUMENT

A. THE CITY OF PITTSBURGH HAD THE MUNICIPAL POWER TO ENACT ITS ORDINANCE PROHIBITING SOURCE-OF-INCOME HOUSING DISCRIMINATION. THAT POWER WAS NOT LIMITED BY 53 PA.C.S. § 2962(f).

The Pennsylvania Constitution vests every municipality with the right and power to frame, adopt and conduct its affairs pursuant to a home rule charter. Pa. Const. Art. IX, § 2. This authorized delegation of the Commonwealth's powers is very broad. Under the Constitution, a municipality that adopts a home rule charter is empowered to exercise any and all powers or functions of government that are not denied by the Constitution, by the home rule charter or by an Act of the General Assembly. Pa. Const. art. 9, § 2; *see generally, e.g., Delaware County v. Middletown Tp.*, 511 A.2d 811, 813 (Pa. 1986).[2]

---

[2] "Whereas previously the law held that municipalities were merely agencies instituted by the sovereign and exercising only those powers specifically granted to them, see e.g. *Philadelphia v. Fox*, 64 Pa. 169 (1870), under the present Constitution and implementing legislation, '[a] municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.' Pa. Const. Art. 9, § 2. See also 53 P.S. § 1-301. Furthermore, '[a]ll grants of municipal power to municipalities governed by a home rule charter under this act, whether in the form of specific enumeration or general terms, shall be liberally

At issue in this case is the specific limitation on home rule municipal powers codified at 53 Pa.C.S. § 2962(f). Section 2962(f) states:

> **§2962 Limitation on municipal powers**
>
> **(f) Regulation of business and employment.** A municipality which adopts a home rule charter shall not determine duties, responsibilities or requirements placed upon businesses…*except as expressly provided by statutes which are applicable in every part of this Commonwealth or which are applicable to all municipalities or to a class or classes of municipalities.* (emphasis added).

This limitation on the powers of home rule municipalities is, by its own terms, *quite* limited.

1. Section 2962(f) does not limit the power of home rule municipalities to determine business duties, responsibilities or requirements when such power is otherwise provided in statutes which are applicable to all municipalities or to a class or classes of municipalities.

Section 2962(f) explicitly does *not* apply whenever municipal power to determine business duties, responsibilities or requirements is "expressly provided by [any] statutes [1] which are applicable in every part of this Commonwealth or [2] which are applicable to all municipalities or [3 which are applicable] to a class

---

construed in favor of the municipality.' 53 P.S. § 1-301. In analyzing a home rule municipality's exercise of power, then, we begin with the view that it is valid absent a limitation found in the Constitution, the acts of the General Assembly, or the charter itself, and we resolve ambiguities in favor of the municipality."

or classes of municipalities."[3] In other words, if the power to determine business duties, responsibilities or requirements exists in one of the sources of law enumerated in §2962(f), then a home rule municipality has that power. Stated differently, §2962(f) does not apply when the power to determine duties, responsibilities or requirements placed upon businesses exists in other statutes applicable to municipalities.[4]

Any other interpretation of §2962(f) would be contrary to the plain language of the General Assembly and contrary to "the essential principle underlying home rule," i.e. the transfer of governmental power from the Commonwealth to home rule municipalities that "results in home rule municipalities having *broader powers* of self-government than non-home rule municipalities." Opinion, p. 7 (emphasis original), quoting *Hartman v. City of Allentown*, 880 A.2d 737, 742 (Pa. Cmwlth.

---

[3] Again, §2962(f) is to be narrowly construed, because of the General Assembly's explicitly intention that the grant of home rule powers be liberally construed. 53 Pa.C.S. 2961.

[4] This Court has further limited the scope of §2962(f) even beyond its plain language. In *Bldg. Owners and Managers Ass'n of Pittsburgh v. City of Pittsburgh ("BOMA")*, in affirming the *en banc* Commonwealth Court, this Court held that §2962(f)'s limitation on home rule power is triggered *only if* a home rule municipality imposes "affirmative duties" upon businesses. 985 A.2d 711, 713, 715-716 (Pa. 2009). This Court reached this determination in recognition of the breadth of the Constitutionally-authorized delegation of power to home rule municipalities and the General Assembly's explicit intention that this delegation of power be liberally construed by the Courts in favor of municipalities. *Ibid.*

2005); *see also Ziegler v. City of Reading*, 142 A.3d 119, 132 (Pa. Cmmw. 2016); *accord BOMA*, 985 A.2d at 715 n. 12 (Pa. 2009).

2. Both this Court and the Commonwealth Court have recognized that home rule municipalities retain the police powers they possessed prior to enacting a home rule charter.

It is no surprise, then, that the Commonwealth Court repeatedly has found, as this Court has recognized, that home rule municipalities retain, at minimum, all powers that they possessed under applicable law before enacting a home rule charter. Opinion, pp. 1-2, n. 1; *Hartman*, 880 A.2d at 742; *Ziegler*, 142 A.3d at 132; *accord BOMA*, 985 A.2d 715 n. 12.

In this case, the City of Pittsburgh retains, at minimum, all powers previously provided by the Second Class Cities Law and by the General Municipal Law. *E.g. Ziegler*, 142 A.3d at 132–34. Given "the essential principle underlying home rule," the General Assembly's explicit intention that this delegation of power be liberally construed in favor of municipalities,[5] and the plain language of §2962(f), any other result would be unreasonable and would produce an absurd result the General Assembly could not have intended. *Ibid.;* 1 Pa.C.S.A. § 1922(1) (When interpreting statutes, Courts are to presume that the General Assembly did not intend a result that is unreasonable or absurd).

---

[5] 53 Pa.C.S. 2961

3. The Second Class Cities Code, 53 P.S. §§ 23103 and 23158, expressly empowered the City to enact its Ordinance.

As a (former) City of the Second Class, the Second Class Cities Code (SCCC) expressly "authorized and empowered" the City of Pittsburgh "[t]o make all such ordinances…not inconsistent with the Constitution and laws of this Commonwealth, as may be expedient or necessary…for…the maintenance of the peace…and welfare of the city, and its trade [and] commerce…." 53 P.S. §§ 23103 and 23158.

These statutory police powers, as they are called, are the equivalent of those repeatedly recognized by this Court and the Commonwealth Court as empowering all municipalities to enact anti-discrimination ordinances for the protection of their residents. *E.g. Devlin v. City of Phila.*, 580 Pa. 564, 862 A.2d 1234, 1248 (2004) (holding that all municipalities have authority to enact anti-discrimination laws pursuant to their police powers); *Hartman.* The City did not forfeit or otherwise lose these municipal powers when it enacted a home rule charter. *E.g. Ziegler*, 142 A.3d at 132–34.

And, again, §2962(f) explicitly does not apply when the power to determine duties, responsibilities or requirements placed upon businesses exists in other statutes applicable to municipalities. Because the SCCC expressly provides

municipal authority for the regulation of trade and commerce, i.e. business, §2962(f) did not apply. Therefore, the City was empowered to enact its Ordinance.

4. The General Municipal Law, 53 P.S. § 4101, also expressly empowered the City to enact such an Ordinance.

The General Municipal Law (GML) provides:

> In addition to other remedies provided by law, and *in order to promote the public health, safety, morals, and the general welfare, all cities of the* first, *second,* and second *class* A, incorporated towns, boroughs, and townships in this Commonwealth *are hereby authorized and empowered to enact and enforce suitable ordinances to govern and regulate the…occupation [and] use…of all buildings and housing.*

53 P.S. § 4101 (emphasis added).

This grant of explicit and broad municipal power to regulate housing also empowered the City enact its SOI Ordinance. *See, e.g. Hartman,* 880 A.2d at 734-735; *Devlin,* 862 A.2d at 1248. The City retained these police powers following its enactment of a home rule charter. *E.g. Ziegler*, 142 A.3d at 132–34. And, again, because this law expressly empowers classes of non-home rule municipalities to determine duties, responsibilities and requirements placed upon housing providers, §2962(f) did not preclude enactment of the City's Ordinance.

5. This Court has recognized the difference between ordinances that "regulate business" and police power ordinances which, ancillary to their purpose, impact businesses.

As this Court noted in *BOMA*, there is a difference between ordinances that "regulate business" within the meaning of §2962(f) and police power ordinances

which affect businesses. 985 A.2d at 715 n. 12. In *BOMA*, this Court analyzed the ordinance at issue in *Taylor,*[6] which had been challenged because of it tremendous impact on the business of certain logging companies. Despite its effect on the logging business, this Court found the ordinance not to be a regulation of business within the meaning of §2962(f) because "it was passed pursuant to the non-home rule municipality's specific *statutorily enumerated* police power." *BOMA*, 985 A.2d at 715 (emphasis original). In the same way, Pittsburgh's Ordinance is not a "regulation of business" within the meaning of §2962(f).[7]

Anti-discrimination requirements often result in ancillary duties that could be characterized as affirmative. In *Hartman*, for instance, the prohibition against sexual orientation and gender identity discrimination in employment, housing and public accommodations undoubtedly imposed affirmative duties upon regulated entities, such as a requirement to provide equal benefits to same-sex couples as provided to other couples, or a responsibility to review and revise relevant policy documents, for instance. Such ancillary duties, which are affirmative in nature, were not discussed by the Commonwealth Court or this Court when analyzing *Hartman*, presumably because both Courts understood the difference between

---

[6] *Taylor v. Harmony Tp. Bd. of Com'rs*, 851 A.2d 1020 (Pa. Cmmw. 2004).

[7] The source of the statutory police power in *Taylor* was the First Class Township Code, 53 P.S. § 56552, which is nearly identical to §23158 of the SCCC and similar, though less specific, to §4101 of the GML, applicable in this case.

ordinances that regulate business and police power ordinances that may affect businesses. *BOMA*, 985 A.2d at 715 n. 12.

6. The City's use of its police powers to ban source-of-income housing discrimination is neither new nor unusual.

In Pennsylvania, the Borough of State College and the City of Philadelphia also have enacted ordinances, equivalent to Pittsburgh's Ordinance, to ban source-of-income housing discrimination in their communities. In Pittsburgh's case, the City determined this necessary "to protect its residents from [this] discrimination and to ensure the availability of affordable, safe housing for all residents." Opinion, p. 2, 5-6. These important interests are squarely within the zone the City is constitutionally and statutorily authorized police powers.

In passing these ordinances, these home rule municipalities have joined eleven states, the District of Columbia, and more than 70 other cities and counties around the Country that have restricted or prohibited housing discrimination based either on the use of a voucher subsidy to pay rent, or, more broadly, on a tenant's source of income. See generally *Amicus Curiae* PRRAC's guide to state and local source-of-income non-discrimination laws, available at https://prrac.org/state-and-local-source-of-income-nondiscrimination-laws_protections/ (last checked on April 10, 2019).

B. TO THE EXTENT IT WOULD PREVENT THE CITY FROM BANNING SOURCE-OF-INCOME DISCRIMINATION IN HOUSING, §2962(f) IS PREEMPTED AS APPLIED TO THIS CASE.

If, as the Commonwealth Court determined, the City of Pittsburgh was precluded by §2962(f) from legislating to protect its residents against source-of-income discrimination—which the record established has become a proxy for discrimination on the basis of race, national origin and familial status—then the application of §2962 in this case is preempted by the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601 et seq., and the Housing and Community Developments Act of 1974 ("HCDA"), 42 U.S.C. §§ 5301 et seq.

The Supremacy Clause of the U.S. Constitution provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Accordingly, "Congress has the power to preempt state law." *Arizona v. United States*, 567 U.S. 387, 399 (2012). In every preemption case, Congress' purpose is the "touchstone." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). See generally *Dooner v. DiDonato*, 971 A.2d 1187, 1193–94 (Pa. 2009).

Congress intends to preempt state law when: 1) Congress expressly provides that a federal statute overrides state law (express preemption); 2) Congress legislates so comprehensively in one area as to occupy the field; or 3) state law

conflicts with the structure and purpose of a federal statute (conflict preemption). *Ibid.* Conflict preemption occurs when "compliance with state and federal law is an impossibility" or "when state law stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress." *Dooner*, 971 A.2d at 1194. For 200 years "it has been settled that state law that conflicts with federal law is without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

Both express preemption and conflict preemption are at issue in this case.

1. As applied in this case, §2962(f) is expressly preempted by, and it conflicts with the structure and purpose of, the Fair Housing Act, 42 U.S.C.A. § 3601 et seq.

Congress enacted the FHA "to eradicate discriminatory practices within [the housing] sector of our Nation's economy." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, —— U.S. ——, 135 S.Ct. 2507, 2511 (2015). As Congress stated in the Act, "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601; *see also* H.R. Rep. No. 100-711, at 15, (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2176 (explaining that the FHA "provides a clear national policy against discrimination in housing").

Section 3615 of the Act states: "…any law of a State…that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. § 3615. Therefore, to

the extent that a state law requires or permits a discriminatory housing practice, that state law is expressly preempted by §3615. *See, e.g.*, *Larkin v. State of Mich. Dept. of Soc. Services*, 89 F.3d 285, 289 (6th Cir. 1996); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500 (10th Cir. 1995); *Astralis Condo. Ass'n v. Sec., U.S. Dept. of Hous. and Urb. Dev.*, 620 F.3d 62, 69–70 (1st Cir. 2010).[8] Under §3604(a) the Act, the denial of housing to any person "because of race, …familial status, or national origin" is a "discriminatory housing practice." 42 U.S.C. § 3604(a).

In this case, the City of Pittsburgh determined that source-of-income discrimination against Voucher holders and others is prevalent in its housing market. The City determined that forty one percent (41%) of Vouchers go unused due, in part, to this discrimination. Worse, the City determined that this source-of-income discrimination has become a proxy for discrimination based on race, national origin, and familial status. The City enacted its Ordinance to prohibit this proxy discrimination. Opinion, pp. 2, 5-6.

---

[8] *See also, e.g., McKivitz v. Township of Stowe*, 769 F. Supp. 2d 803, 814 and n. 8 (W.D. Pa. 2010); *Nevada Fair Hous. Ctr., Inc. v. Clark County*, 565 F. Supp. 2d 1178, 1182–83 (D. Nev. 2008); *Human Resource Research and Mgt. Group, Inc. v. County of Suffolk*, 687 F. Supp. 2d 237, 242 (E.D.N.Y. 2010); *Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F. Supp. 2d 941, 952 (E.D. Wis. 1998); *Baggett v. Baird*, CIV.A.4:94CV0282-HLM, 1997 WL 151544, at *6 (N.D. Ga. Feb. 18, 1997).

The effect the Commonwealth Court's holding in this case is that the ban on source-of-income discrimination in the City of Pittsburgh has been lifted. Therefore, as applied in this case, §2962(f) is expressly preempted by §3615 of the FHA. *E.g. Nevada Fair Hous. Ctr., Inc.*, 565 F. Supp. 2d at 1182 (D. Nev. 2008) ("The FHA[] expressly preempts state laws requiring or permitting violations of § 3604" and finding Nevada state law to be preempted by §3615.)

Furthermore, the Fair Housing Act is devoted not only to prohibiting discrimination but also to requiring affirmative steps to eradicate its past vestiges. *See* 42 U.S.C. § 3608; 24 C.F.R. § 5.150-5.168.[9] To the extent that §2962(f) precludes the City from taking such affirmative steps, as the City took in this case, §2962(f) stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the FHA and is, therefore, preempted. *See, e.g., S & R Dev. Estates, LLC v. Town of Greenburgh, New York*, 336 F. Supp. 3d 300, 314 (S.D.N.Y. 2018) (holding NY state law preempted by the FHA pursuant to the conflict preemption).

---

[9] "Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development." 24 C.F.R. § 5.152

2. In addition, as applied in this case, §2962 conflicts with the Housing and Community Developments Act, 42 U.S.C. § 5301 et seq.

Section §5304(b)(2) of the HCDA specifically requires the City of Pittsburgh, as an entitlement jurisdiction for Community Development Block Grant (CDBG) funds, to "affirmatively further fair housing." 42 U.S.C. §5304(b)(2); 24 C.F.R. §§ 570.601 and 91.225(a)(1). See also 24 C.F.R. § 5.150-5.168. This obligation also requires that HUD block grant recipients like the City (and the State) not take actions that are "materially inconsistent" with its obligations to affirmatively further fair housing. *Id.*; *see also U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester County, New York*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007).[10]

Because the City of Pittsburgh has identified source-of-income discrimination as an impediment to fair housing (proxy discrimination), it is obligated to address the discrimination. *E.g. Westchester.* To the extent that §2962(f) prohibits the City from complying with its obligation, §2962(f) must be found to be preempted.

---

[10] Note that as a condition of settlement in *Westchester*, the United States required Westchester County to enact legislation to ban source-of-income discrimination, and when the county executive vetoed that legislation, the United States pursued legal recourse for that breach and prevailed. *U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester County, N.Y.*, 712 F.3d 761 (2d Cir. 2013).

Furthermore, the applicable Pennsylvania laws—§2962(f), as well as 53 P.S. §§ 23103, 23158, and 4101—must be construed so as to comport with the important purposes of Congress set forth in the HCDA, rather than to impede them. As applied in this case, §2962(f) stands as an obstacle to the accomplishment of Congress' full purposes. The primary objective of the HCDA is "the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. § 5301(c). A secondary objective is the accomplishment of the first objective in a manner which removes barriers to fair housing, including discrimination on the basis of race, national origin and familial status. 42 U.S.C.A. § 5309; 24 C.F.R. §§ 570.601 and 91.225(a)(1).

As interpreted by the Commonwealth Court in this case, §2962 stands as an obstacle to the accomplishment and execution these objectives, for the same reasons articulated in the preceding section of this brief.

3. Because federal preemption is jurisdictional, it may be raised, even sua sponte, at any point in this judicial proceeding.

"Federal preemption is a jurisdictional matter for a state court because it challenges subject matter jurisdiction and the competence of the state court to reach the merits of the claims raised…. Federal regulations have no less preemptive effect than federal statutes." *NASDAQ OMX PHLX, Inc. v. PennMont Securities,* 52 A.3d 296, 315 (Pa. Super. 2012), citing *Werner v. Plater–Zyberk,*

799 A.2d 776, 787 (Pa.Super. 2002) and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984); *see also, e.g.*, *Fetterman v. Green*, 455 Pa.Super. 639, 689 A.2d 289, 291–92 (1997).

Since federal preemption is an issue of subject matter jurisdiction, it may be raised at any time, by the parties or by this Court *sua sponte*. *E.g. Daly v. Sch. Dist. of Darby Tp.*, 252 A.2d 638, 640 (Pa. 1969); *Com. v. Little*, 314 A.2d 270, 272 (Commw. Ct. 1974), aff'd, 359 A.2d 788 (Pa. 1976); *Werner v. Plater-Zyberk*, 799 A.2d at 787.

Amici respectfully submit that the City has sufficiently raised federal preemption as a basis for this Court to reverse the Commonwealth Court's opinion, by consistently briefing to the Courts below the importance of addressing source-of-income discrimination, in part because it has become a proxy for race, national origin and familial status discrimination. In the alternative, *Amici* respectfully request that this Court address this important issue *sua sponte*. Because §2962(f), as applied, was preempted, the Court(s) below erred in exercising jurisdiction over the Apartment Association's claims.

CONCLUSION

For the foregoing reasons, this Court should grant the City of Pittsburgh's Petition for Allowance of Appeal.

Date: April 11, 2019

Respectfully submitted,

/s/ *Kevin Quisenberry*
Kevin Quisenberry
Pa. I.D. # 90499
Community Justice Project
100 Fifth Avenue, Suite 900
Pittsburgh, PA 15222
Telephone: 412-434-6002
Email: kquisenberry@cjplaw.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify pursuant to Pa.R.A.Ps. 531 and 2135 that this brief does not exceed 4,500 words.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document will be served upon the parties at the addresses and in the manner listed below:

Via USPS

William L. Stang, Esquire
PA Id. No. 33221

Richard L. Holzworth, Esquire
PA Id. No. 313893

Fox Rothschild LLP
BNY Mellon Center
500 Grant Street, Suite 2500
Pittsburgh, PA 15219
(412) 391-1334

Counsel for Respondent

Date: April 11, 2019

Respectfully submitted,

/s/ *Kevin Quisenberry*
Kevin Quisenberry
Pa. I.D. # 90499
Community Justice Project
100 Fifth Avenue, Suite 900
Pittsburgh, PA 15222
Telephone: 412-434-6002
Email: kquisenberry@cjplaw.org

Counsel for Amici Curiae