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IN THE

Supreme Court of the United States

TERESA DAVIS, OSCAR HARRIS, HELEN DIRKANS, ELVIS FOSTER, RICHARD STREJC, AND BRENDA STREJC (EVERGREEN TERRACE TENANTS),

Petitioners,

v.

CITY OF JOLIET, ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under the Supremacy Clause of the United States Constitution (U.S. Const. Art. VI Cl. 2), the City of Joliet may condemn certain federally subsidized, low-income, multifamily housing, when federal law explicitly requires the property to be maintained for at least 30 years as housing for low-income families.

PARTIES TO THE PROCEEDING

Petitioners are Teresa Davis, Helen Dirkans, Oscar Harris, Elvis Foster, Richard Strejc and Brenda Strejc (Evergreen Terrace Tenants). Respondent is the City of Joliet, Illinois (Plaintiff-Appellee in the underlying proceeding). The United States Department of Housing and Urban Development is a Defendant-Appellant in the underlying proceeding. New West, L.P., and New Bluff, L.P. are Defendants-Appellants in the underlying proceeding. These parties are also being served as Respondents.

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PETITION FOR WRIT OF CERTIORARI

Teresa Davis, Helen Dirkans, Oscar Harris, Elvis Foster, Richard Strejc and Brenda Strejc respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (Seventh Circuit) in this case. Appendix to Petition ("Pet. App.") 1a-18a.

OPINIONS BELOW

The Seventh Circuit order denying Petitions for Rehearing *En Banc* by the United States Department of Housing and Urban Development, New West and New Bluff, and Teresa Davis, Helen Dirkans, Oscar Harris, Elvis Foster, Richard Strejc and Brenda Strejc is not reported (Pet. App. 56a-57a). The opinion of the Seventh Circuit affirming the district court is reported as *City of Joliet v. New West, et al.*, 562 F.3d 830 (7th Cir. 2009) (Pet. App. 1a-18a). The Seventh Circuit order granting interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is not reported (Pet. App. 19a-22a). The District Court opinion and order granting the Petitions for Interlocutory Appeal is not reported (Pet. App. 23a-29a). The District Court opinion and order denying HUD's and New West's Motions for Summary Judgment are not reported. (Pet. App. 30a-40a). The District Court opinion and order granting Joliet's Motion for Judgment on the Pleadings and subsequent order denying reconsideration are not reported (Pet. App. 41a-55a).

JURISDICTION

The Seventh Circuit granted Petitions for Interlocutory Appeal pursuant to 28 U.S.C. § 1292(b) on July 16, 2008. Pet. App. 19a-22a. The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 9, 2009 and Petitions for Rehearing and Rehearing *En Banc* were denied on July 14, 2009. Pet. App. 1a-18a; 56a-57a. The jurisdiction of this court in invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Supremacy Clause*, U.S. Const. art. VI, cl. 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.

Relevant provisions of the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA"), Pub. L. No. 105-65, Title V, 111 Stat. 1384 (42 U.S.C. § 1437f note) are set forth in an appendix to this petition. Pet. App. 58a-113a.

STATEMENT OF THE CASE

The City of Joliet ("Joliet") is seeking to condemn Evergreen Terrace, a project-based Section 8[1] housing development in Joliet, Illinois. Evergreen Terrace has undergone financial restructuring under the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA"), Pub. L. No. 105-65, Title V, 111 Stat. 1384 (42 U.S.C. § 1437f note), and is therefore subject to mortgages held by the United States Department of Housing and Urban Development ("HUD") and statutorily required use agreements maintaining the property as affordable rental housing for 30 years. Prior to the restructuring, Evergreen Terrace was subject to a HUD-insured mortgage under section 221 of the National Housing Act ("NHA"), 12 U.S.C. § 1715*l*.

Notwithstanding the HUD-held mortgages and statutorily required use agreements, the Seventh Circuit, on interlocutory appeal, affirmed the district court decision that the condemnation was not preempted by federal law. In doing so, the Seventh Circuit held that

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[1] The Section 8 program provides decent, affordable housing to low-income families. *See* 42 U.S.C. § 1437f (2006). Section 8 assistance programs are either project-based or tenant-based. Under the project-based programs, a subsidy for some or all of a property's units is provided under a contract, called a Housing Assistance Payments Contract ("HAP Contract") typically between HUD and the private owner of the property. Tenants pay 30% of their adjusted incomes as rent and HUD provides a subsidy to pay the difference between the tenant's payment and the owner's rent. 42 U.S.C. §§ 1437f(c)(3), 1437a(a)(1). The subsidy remains with the building when a tenant moves.

(a) federal law only preempts state law under the doctrine of implied conflict preemption if there is a federal preemptive regulation with the force of law, or the federal and state laws are in direct conflict, and (b) a federal law that makes initial participation in a federal program voluntary does not preempt state law. These holdings misapply the decisions of this Court and conflict with decisions of the Fifth and Ninth Circuits that have held that a state condemnation may be preempted by federal law when there is no express preemptive regulation, and decisions of the Eighth, Fifth, and Ninth Circuits, which recognize that the voluntary nature of federal programs is irrelevant for purposes of preemption.

Statutory and Regulatory Framework

In 1997, Congress enacted the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA"), Pub. L. No. 105-65, Title V, 111 Stat. 1384 (42 U.S.C. § 1437f note), "to preserve low-income rental housing affordability and availability while reducing the long-term costs of [federal] project-based assistance." *Id.* § 511(b)(1). MAHRA also was meant "to encourage owners of eligible multifamily housing projects to restructure their FHA-insured mortgages"; "to resolve the problems affecting financially and physically troubled federally insured and assisted multifamily housing projects through cooperation with residents, owners, State and local governments, and other interested entities"; and "to protect the interest of project owners and managers, because they are partners of the Federal Government in meeting the affordable housing needs of the Nation." MAHRA §§ 511(b)(3),(6),(7).

MAHRA creates a complex scheme under which owners of certain federally subsidized low-income housing developments may restructure the financing of those developments through the Mark-to-Market ("M2M") Program. Under the M2M Program, above-market Section 8 rents for multifamily housing are reduced to comparable market rents. At the same time, HUD-insured and HUD-held financing is restructured so that the mortgagor's monthly payments can be paid from the reduced rental income. MAHRA restructuring also facilitates the rehabilitation of the multifamily housing development, ensures competent management of the properties, and extends the life of the development as affordable housing for low-income families. *See* MAHRA Interim Rule, 63 Fed. Reg. 48,926, 48,926 (Sept. 11, 1998).

HUD administers the M2M program through public agencies, nonprofit organizations, or other entities that it selects based on statutory criteria, called Participating Administrative Entities ("PAEs"). *See* MAHRA, §§ 512(10) (defining PAE), 513(b) (selection criteria). PAEs negotiate with owners and develop a Mortgage Restructuring and Rental Sufficiency Plan ("Restructuring Plan") according to "such terms and conditions as [HUD] shall require." *Id.* § 514(a)(2).

The M2M program carves out a specific role for local governments in the development of the Restructuring Plan: local governments and other interested parties are consulted regarding the plan and are provided the opportunity to comment. MAHRA §§ 511(b)(6) and 514(f)(1),(2); 24 C.F.R. § 401.500 (2008).

A final HUD-approved M2M Restructuring Plan must satisfy numerous requirements. For example, the Plan must restructure the assisted rents and provide for future rent adjustments under HUD guidelines. *Id.* §§ 514(e)(1), (2); *see also Id.* § 514(g). Likewise, the Plan must require the owner to evaluate the property's rehabilitation needs and to take whatever action may be necessary to maintain the project "in decent and safe condition," per standards set by HUD or local housing codes. *Id.* §§ 514(e)(3), (5).

In furtherance of MAHRA's objective to preserve the low-income housing affordability and availability, section 514(e)(6), provides that the Restructuring Plan "shall * * * require the owner or purchaser of the project to maintain affordability and use restrictions in accordance with regulations promulgated by [HUD] for a term of not less than 30 years." *Id.* § 514(e)(6). These restrictions "shall be * * * contained in a legally enforceable document recorded in the appropriate records" and shall be "consistent with the long-term physical and financial viability and character of the project as affordable housing." *Id.* § 514(e)(6)(A), (B). Nothing in MAHRA or its implementing regulations allows the owner to end their obligations under the use agreements prior to the expiration of the 30-year term.

MAHRA also authorizes HUD to become the holder of a restructured mortgage through payment of a non-default claim under the prior mortgage insurance contract. *Id.* § 523(b) (codified at 12 U.S.C. § 1735f-19(b)). Finally, Congress has authorized HUD to issue regulations that implement MAHRA. *Id.* § 522(a). Those regulations are codified in 24 C.F.R. pts. 401 and 402. *See* 65 Fed. Reg. 15,452.

A backdrop of M2M restructuring, Section 221 of the National Housing Act (NHA), 12 U.S.C. § 1715*l*, is a mortgage insurance program administered by HUD "designed to assist private industry in providing housing for low and moderate income families and displaced families." 12 U.S.C. § 1715*l*(a) (2006). Participants in the section 221 program are typically subject to a contract, or "regulatory agreement" with HUD in order to effectuate HUD-established restrictions on the subject property. *See* 12 U.S.C. § 1715*l*(d)(3). Such a contract, or "Regulatory Agreement," typically incorporates by reference any HAP contract (*see supra* n. 1) to provide project-based Section 8 rental assistance at the development. *See e.g.*, 12 U.S.C. § 1715*l*(f). Such Regulatory Agreements remain in effect so long as HUD insures or holds the mortgage. *See* 24 C.F.R. § 200.105(a) (2008); *see also* 12 U.S.C. § 1713(b)(2) (2006).

Background

Evergreen Terrace is a 356-unit housing complex comprised of two low-income multifamily housing developments, known as Evergreen Terrace I ("ET I") and Evergreen Terrace II ("ET II") in Joliet, Illinois. During the early 1980s, HUD acquired both Evergreen Terrace properties through foreclosure on earlier section 221 loans and sold them to their current owner for $1 each. *See* Contracts for Sale and Purchase, Joint Appendix[2] (JA) at 265-281. As per the sales contracts,

[2] Citations herein, other than to the Appendix filed with this petition, are to record documents contained in the Joint Appendix (JA) filed by the appellants in the Seventh Circuit.

New West and New Bluff ("the Owners"),[3] owners of Evergreen Terrace I and II respectively, took out long-term mortgages on the developments and used the proceeds to rehabilitate Evergreen Terrace. *See* 1981 ET I Mortgage at ¶ 16, JA 284; and 1982 ET II Mortgage at ¶ 16, JA 290. These mortgages were insured by HUD under section 221 of the NHA, 12 U.S.C. § 1715*l*, and the development became subject to 20-year HAP contracts to provide project-based Section 8 rental assistance. *See* Herb Halperin Affidavit ¶¶ 14, 17, 18, JA 109-11.

1. *The Evergreen Terrace Restructuring.*

Beginning in 2001, when the HAP contracts for Evergreen Terrace were nearing expiration, the Owners applied for financial restructuring under the M2M program. *See* Herb Halperin Affidavit ¶ 21, JA 106. HUD selected the Illinois Housing Development Authority ("IHDA") as PAE for the development and negotiation of the M2M Restructuring Plan. *See* Harry West Affidavit ¶ 4, JA 100. IHDA determined that there was a "critical need to preserve" Evergreen Terrace. *Id.* Accordingly, as early as May 2003 HUD offered its initial approval for an Evergreen Terrace I Restructuring Plan, signaling its intent to preserve Evergreen Terrace I as a project-based Section 8 development under MAHRA. *See* Herb Halperin Affidavit ¶ 22, JA 111. After the City of Joliet contested

[3] Evergreen Terrace is owned by Illinois land trusts of which defendants New West and New Bluff, Illinois limited partnerships, are the primary beneficiaries. *See* Herb Halperin Affidavit at ¶ 3, JA 106.

IHDA's findings, however, HUD appointed Heskin Signet Partners as PAE to replace IHDA, and final approval of the restructuring was delayed until 2006. *See* Harry West Affidavit ¶¶ 4, 7-9, JA 100-02; Herb Halperin Affidavit ¶ 22, JA 111.

HUD approved a final Restructuring Plan for Evergreen Terrace in September 2006 based on two PAE analyses, and after significant consultation with City officials and the Owners. *See* Harry West Affidavit ¶¶ 7, 8, JA 100-02. HUD then paid off the original mortgages that it had insured and executed new mortgages with the Owners in November 2006. *See* 2006 ET I Mortgage Restructuring Mortgage, JA 114-27; 2006 ET II Mortgage Restructuring Mortgage, JA 128-141.

Pursuant to section 514(e)(6) of MAHRA, 30-year Use Agreements also were executed in November 2006, requiring that during the 30-year term, Evergreen Terrace "shall be used solely as rental housing with no reduction in the number of residential units unless approved in writing by HUD," and that a certain percentage of the units be occupied by low-income tenants financially eligible for the project-based Section 8 program. *See* Evergreen Terrace I and II Use Agreements, ¶¶ 4, 5, JA 144, 163. Accordingly, the Owners entered into new 20-year HAP contracts to provide project-based Section 8 rent subsidies for Evergreen Terrace. *See* 2006 ET I and ET II HAP contracts, JA 232-64. HUD and the Owners also entered into new Regulatory Agreements preserving HUD's ability to control and monitor the improvement,

maintenance, and operation of Evergreen Terrace. *See* 2006 ET I Regulatory Agreement, JA 180-207; 2006 ET II Regulatory Agreement, JA 208-231.

Finally, substantial escrow funds for the immediate repair, rehabilitation, and long-term maintenance of Evergreen Terrace were established as a part of the final restructuring. *See* Harry West Affidavit ¶¶ 9, 10, JA 102-03.

2. *The Evergreen Terrace Lawsuits.*

In March 2005, prior to the completion of the MAHRA restructuring and before Joliet filed this eminent domain action, the Owners filed a civil rights lawsuit against Joliet in federal court alleging, among other things, that the Joliet's actions in opposing the MAHRA restructuring violate the Fair Housing Act. *See New West v. City of Joliet*, No. 05 C 1743 (N.D. Ill., filed Mar. 24, 2005).

Several months after the Owners filed suit, the Joliet City Council declared Evergreen Terrace a public nuisance and blighted area. *See* Resolution 5655 (August 17, 2005), JA 312-14. On October 4, 2005, the Joliet City Council passed Ordinance No. 15298, directing corporation counsel to initiate eminent domain proceeding to take Evergreen Terrace. *See* Ordinance 15298 (October 4, 2005), JA 315-21. Shortly thereafter, Joliet filed this condemnation action seeking to take Evergreen Terrace by eminent domain. *See* Notice of Removal, JA 61-79.

The condemnation complaint was originally filed in state court and named the Government National Mortgage Association ("GNMA"), as well as the Owners, as defendants. *See* Notice of Removal, JA 61-79. No tenants were named in the condemnation complaint. GNMA removed this matter to federal court in November 2005 pursuant to 28 U.S.C. §§ 1442(a) and 1444. *Id.* After removal, the condemnation lawsuit was reassigned to the judge presiding over the Owners' civil rights lawsuit. In February 2006, GNMA was dismissed as a defendant in the condemnation and HUD was joined as a necessary party. *See* February 27, 2006 District Court Order Dismissing GNMA, JA 80; March 9, 2006 District Court Order Joining HUD as Defendant, JA 81; Joliet's Amended Complaint, JA 83-98.

In September 2006, the district court dismissed the Owners' civil rights lawsuit on jurisdictional and other grounds. *See New West v. City of Joliet*, 491 F.3d 717, 719 (7th Cir. 2007). The Owners appealed, and Seventh Circuit reversed and remanded. *Id.* at 722. Nonetheless, the panel suggested, in *dictum*, that "it is hard to see any obstacle [to the condemnation] in federal law," citing the United States Housing Act, 42 U.S.C. 1437f and the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, but not the NHA or MAHRA. *Id.* at 721. The Seventh Circuit instructed the district court that its "first order of business" on remand should be to resolve the condemnation suit. *Id.*

3. *Motions for Judgment on the Pleadings and Summary Judgment.*

Immediately following the Seventh Circuit ruling in the civil rights lawsuit, Joliet moved for, and was granted, judgment on the pleadings with respect to HUD's and the Owners' affirmative defenses relating to federal preemption of the condemnation under the *Supremacy Clause*. Pet. App. 43a-55a. HUD's and the Owners' subsequent motions to reconsider were also denied. Pet. App. 41a-42a. In addition, HUD and the Owners filed motions for summary judgment arguing that the condemnation is preempted by federal law and prohibited under the *Property Clause* (U.S. CONST. art. IV, Sect. 3, cl 2) the *Contracts Clause* (U.S. CONST. art. I, § 10), and the doctrine of intergovernmental immunity. The district court also denied these motions. Pet. App. 30a-40a.

4. *The Tenants Intervene in the Condemnation.*

In early 2008, after the motions for judgment on the pleadings and summary judgment had been fully briefed, residents of Evergreen Terrace Teresa Davis, Oscar Harris, Helen Dirkans, Elvis Foster, Richard Strejc and Brenda Strejc, (the Tenants) were granted leave to intervene in the condemnation action. JA 323-24. The Tenants' Answer also raises affirmative defenses that the condemnation was preempted by federal law and barred under the *Property Clause*, *Contracts Clause*, and the doctrine of Intergovernmental Immunity. At about the same time, the Tenants filed a fair housing lawsuit against the City of Joliet. *See Davis et al. v. City of Joliet*, No. 07 C 7214 (N.D. Ill. filed Dec. 21, 2007).

5. *Petitions for Interlocutory Appeal.*

Shortly after the district court issued its orders granting judgment on the pleadings, denying reconsideration, and denying summary judgment, HUD and the Owners filed timely petitions requesting the district court to certify these orders for interlocutory appeal.[4] On June 13, 2008, the district court granted these petitions. Pet. App. 23a-29a.

Subsequently, HUD and the Owners filed timely Petitions for Interlocutory Appeal with the Seventh Circuit, which were granted pursuant to 28 U.S.C. § 1292(b) on July 16, 2008. Pet. App. 19a-22a. In addition to any other argument the appellants sought to raise, the Seventh Circuit specifically asked the parties to address the question "whether a contract between a private developer and a federal agency can curtail a government's power of condemnation." *Id.* The Tenants, parties in the proceeding below, were allowed to participate in the Seventh Circuit appeal as appellants.

6. *Proceedings at the Seventh Circuit.*

The Seventh Circuit heard arguments in this matter on January 12, 2009 and issued its opinion on April 9, 2009. Pet. App. 1a-18a. The Seventh Circuit affirmed the district court's rulings on the issues of preemption, the *Property Clause*, the *Contracts Clause*, and

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[4] HUD only sought certification for interlocutory appeal on the district court's decisions about preemption; the Owners also sought certification regarding the *Property Clause*, *Contracts Clause*, and Intergovernmental Immunity decisions.

Intergovernmental Immunity. The Seventh Circuit held that (a) federal law only preempts state law under the doctrine of implied conflict preemption if there is a federal preemptive regulation with the force of law, or the federal and state laws are in direct conflict, and (b) a federal law that makes initial participation voluntary does not preempt state law. Pet. App. 8a – 11a.

HUD, the Owners, and the Tenants each filed Petitions for Rehearing and Rehearing *En Banc*, which were denied on July 14, 2009. Pet. App. 56a-57a. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important question of federal law that has not been but should be settled by this Court, and on which the circuits are in conflict: Does the Supremacy Clause prohibit a local government from condemning federally subsidized low-income housing when federal law expressly requires that housing to be maintained as low-income housing for the next 30 years? The answer to that question is of paramount importance to the future of federal housing programs and the power of eminent domain in this country.

I. THE QUESTION WHETHER, UNDER THE SUPREMACY CLAUSE, A FEDERAL HOUSING PRESERVATION LAW CONFLICTS WITH AND IMPLIEDLY PREEMPTS A LOCAL CONDEMNATION ORDINANCE IS AN IMPORTANT QUESTION WARRANTING REVIEW BY THIS COURT.

The undoubted legal and practical importance of this question, both to conflict preemption jurisprudence and the federal housing laws aimed at preserving affordable housing for this nation's low-income households, warrants review by this Court. The Seventh Circuit's decision here in favor of the local condemnation ordinance diverges markedly on two key preemption principals from the sound decisions of sister circuits and this Court.

First, the Seventh Circuit concluded that the City of Joliet's attempt to acquire the low-income housing development of Evergreen Terrace by eminent domain was not barred by the Supremacy Clause of the U.S. Constitution because HUD had not issued "a preemptive regulation with the force of law." *City of Joliet v. New West*, 562 F.3d 830, 835 (7th Cir. 2009). As is described in greater detail below, it did so even though the federal law, MAHRA, expressly requires the housing at Evergreen Terrace be maintained as low-income multifamily housing for the next 30 years. In any other circumstance, this obvious and irreconcilable conflict would have been considered as a quintessential case of implied conflict preemption. Remarkably, despite the federal law and these facts, the Seventh Circuit held that the condemnation was not barred by MAHRA. In

doing so, the Seventh Circuit has turned MAHRA on its head and given the City of Joliet, and other jurisdictions who wish to eliminate federal low-income housing, the unilateral power to veto a property preserved and restructured under MAHRA. The Seventh Circuit's view here is at odds with the Fifth and Ninth Circuits, as well as this Court's recent decision in *Wyeth v. Levine,* 129 S. Ct. 1187 (2009).

Second, the Seventh Circuit further damaged preemption jurisprudence when it suggested that federal programs, such as the federal housing programs at issue here, which make initial participation voluntary, lack the power to preempt conflicting state or local laws. The Seventh Circuit's tacit requirement that the federal program *must* be mandatory to have preemptive force lacks *any* support and is in direct conflict with the Fifth, Ninth, and Eighth Circuits and this Court's decision in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta,* 458 U.S. 141 (1982).

The legal and real life import of the question presented here, and the conflict between the Fifth, Seventh, Eighth, and Ninth Circuits, provide ample grounds for this Court to grant review. Exempting the City of Joliet's actions from longstanding principles of implied preemption usurps Supremacy Clause and the myriad of federal laws and programs which rely upon its preemptive protections.

A. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A SPLIT IN THE CIRCUITS ON WHETHER "A FEDERAL PREEMPTIVE REGULATION WITH THE FORCE OF LAW" IS REQUIRED TO IMPLIEDLY PREEMPT A STATE OR LOCAL LAW THAT DIRECTLY INTERFERES WITH THE FEDERAL LAW.

There is a pressing need for this Court to clarify what is required for a finding of implied conflict preemption. The Seventh Circuit's decision that "a preemptive regulation with the force of law" is required before "preemption [can be] inferred from a clash of goals and objectives" diverges markedly from the law of the Fifth and Ninth Circuits on this core issue. *New West*, 562 F.3d at 835. Left to stand, the Seventh Circuit's decision here poses a grave threat to other statutorily created federal programs that substantively conflict with state or local law, but are without the benefit of a "preemptive regulation with the force of law."

Under the Supremacy Clause of the Constitution, Congress has the power to preempt state law. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land"). *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (state and local laws that "interfere with, or are contrary to," federal law are invalid and preempted.) Federal legislation may expressly preempt state law, or it may do so implicitly in at least two other ways – where Congress intends the federal law to "occupy the field," and where state law conflicts with federal law. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372

(2000). Conflict preemption exists "where it is impossible for a private party to comply with both state and federal law," or where, as is the situation here, the challenged law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 372-73 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941)). To determine whether a state or local law is a "sufficient obstacle" to federal law to trigger preemption the federal law should be examined as a whole while identifying "its purposes and intended effects." *International Paper Co. v. Ouellette, et al.*, 479 U.S. 481, 494 (1987); *Crosby*, 530 U.S. at 373. Ultimately, congressional intent is the dispositive factor in a preemption analysis. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992); *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004).

In step with this Court's view of implied conflict preemption, the Fifth and the Ninth Circuits recognize — in condemnation cases — the long standing view that a specific federal agency regulation with the force of law is not required in conflict preemption analysis. Rather, the operative focus is a substantive review of the state and federal law and not a stated agency position on preemption. In *City of Morgan City v. South La. Elec. Coop. Ass'n*, 31 F.3d 319 (5th Cir. 1994), *as modified*, 49 F.3d 1074, *cert. denied*, 516 U.S. 908 (1995), the Fifth Circuit focused on how the city's proposed condemnation of all of the property of a rural power cooperative financed by the federal government would frustrate the objectives of the Rural Electrification Act ("REAct"), 7 U.S.C. §§ 901 *et seq.* The REAct aimed to

encourage rural electrification through low-interest, federally insured loans and loan guarantees to power cooperatives. *Id.* at 322. The Fifth Circuit determined that, under the *Supremacy Clause*, a state municipal public utility could not condemn property owned by a federally subsidized public utility because the condemnation would frustrate and "stand as an obstacle" to the objectives of the statutorily created federal rural electrification program. *Id.* at 324.

Likewise, in *Public Utility District No. 1 of Pend Oreille v. United States*, 417 F.2d 200 (9th Cir. 1969), the Ninth Circuit barred a similar taking under the *Supremacy Clause*, finding that the proposed condemnation of property owned by a federally subsidized public utility would frustrate the objectives of the statutorily created federal rural electrification program. *Id.* at 201. The Ninth Circuit also expressly recognized that the objectives of the statutorily created federal program are still frustrated, and therefore preempted, even if the federal government was compensated. *Id.*

Here, as in *Morgan City* and *Pend Orielle*, there is a significant risk that the local condemnation action could seriously impair a cohesive federal program *See City of Morgan*, 31 F.3d 319 (5th Cir. 1994); *Pend Oreille*, 417 F.2d 200. In *Morgan City*, the Fifth Circuit noted that although the particular condemnation affected only a few hundred individuals, permitting such condemnation would result in "piecemeal erosion" in other "areas" and "other cities" and would threaten the "financial viability"

of the federal program. 31 F.3d at 324. Here, local condemnation not only affects Evergreen Terrace but also would result in "piecemeal erosion" of the federal housing in Joliet and other cities throughout the United States. This would not only reduce the supply of federal affordable housing, but also increase the cost of and strain on the limited remaining affordable housing supply. Just as local condemnation of federally subsidized utilities threatened federal programs to provide and increase the supply of affordable utilities, here local condemnation of federally subsidized housing threatens to seriously frustrate the federal purpose of providing and increasing the supply and affordability of low-income housing.

In spite of this backdrop, the Seventh Circuit concluded that "a preemptive regulation with the force of law" is required before "preemption [can be] inferred from a clash of goals and objectives." *New West*, 562 F.3d at 835. The Seventh Circuit purported to derive its flawed approach to implied preemption from this Court's decision in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). Contrary to the Seventh Circuit's interpretation, *Wyeth* manifestly did not dictate the result the Seventh Circuit reached and does not require a federal "regulation with the force of law" for a finding of implied preemption. *Wyeth*, 129 S. Ct. at 1190. Indeed, the Seventh Circuit's regulation mandate was firmly rejected by this Court in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 884-85 (2000). *Wyeth* did not overrule *Geier*. *Wyeth, Geier,* and *Hines*, all recognize that conflict preemption exists where a challenged state or local law stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Wyeth, 129 S. Ct. at 1201 (quoting *Hines*, 312 U.S. at 67). Thus, the Seventh Circuit's decision is an unwarranted and drastic departure from longstanding principles of implied conflict preemption.

In reaching its conclusion, the Seventh Circuit largely ignored MAHRA's stated purposes and objectives and most importantly, its operative provisions. When Congress enacted MAHRA in 1997, its stated intent was, *inter alia*, "to preserve low-income rental housing affordability and availability while reducing the long-term costs of project-based [federal] assistance"; "to encourage owners of eligible multifamily housing projects to restructure their FHA-insured mortgages"; "to resolve the problems affecting financially and physically troubled federally insured and assisted multifamily housing projects through cooperation with residents, owners, State and local governments, and other interested entities"; and "to protect the interest of project owners and managers, because they are partners of the Federal Government in meeting the affordable housing needs of the Nation." MAHRA § 511(b)(1), (3),(6),(7).

The operative provisions of MAHRA, which were not even acknowledged by the Seventh Circuit, provide the clearest evidence of Congress's intent to preempt a city condemnation of housing that HUD preserved under MAHRA. To carry forth this objective to preserve and rehabilitate privately-owned, federally subsidized and insured low-income housing, Congress created an elaborate and detailed scheme through which these owners refinance their debt and, in return, make certain statutorily required commitments. HUD has

promulgated extensive regulations governing that process. *See* 24 C.F.R. pts. 401 & 402. In fact, as required by MAHRA and the regulations, HUD develops the restructuring plan for the owners' refinancing. MAHRA § 514(a)(1); *see also* 24 C.F.R. §§ 401.100, 401.101 (eligibility criteria). HUD hires a "Participating Administrative Entity ("PAE") to undertake that project, *see* MAHRA §§ 512(10), 513, and the PAE assesses whether there is "adequate[,] available and affordable" alternative housing in the particular market should this project not be preserved, *id.* § 515(c)(1)(A). A final MAHRA restructuring plan requires the owner to rehabilitate the property as necessary and to provide adequate reserves to maintain it in decent and safe condition pursuant to established standards. MAHRA § 514(e)(5).

Most importantly, MAHRA requires that the restructuring plan mandate that the project owner (and the owners of Evergreen Terrace) "maintain affordability and use restrictions in accordance with regulations promulgated by [HUD], for a term of not less than 30 years," and place those agreements in recorded and legally enforceable documents. MAHRA § 514(e)(6).[5] HUD or the PAE are responsible for

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[5] Contrary to MAHRA, the Seventh Circuit concluded that the MAHRA required-use restriction was in effect only as long as the federally insured loan and that the restriction could be eliminated if the low-income housing owner simply paid off the federally insured loan. The Seventh Circuit's position relied upon 24 C.F.R. pt. 248, which deals with two distinct and defunct federal housing programs and not MAHRA housing projects. Unlike Part 248, MAHRA and its implementing regulations,

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ensuring "long-term compliance" with MAHRA and the "binding contractual agreements with owners" executed thereunder. MAHRA § 519(a); *see also* 24 C.F.R. § 401.550.

Congress therefore fully expected that, once a property has undergone extensive restructuring, it will remain in the nation's housing stock for low-income families for at least 30 years. These operative provisions show that the City's initiation of condemnation proceedings against Evergreen Terrace presents a clear obstacle to the accomplishment and execution of the full purposes and objectives of Congress when it enacted MAHRA. No "preemptive regulation with the force of law" is necessary to see the obvious conflict here — the City of Joliet seeks to tear down what Congress seeks to preserve. Yet, under the Seventh Circuit's restrictive view of implied preemption, without such a regulation, a property that has undergone a MAHRA restructuring could still be taken through the exercise of eminent domain and diverted to a use fundamentally at odds with Congress's objectives under MAHRA section 514(e)(6).

Allowing the Seventh Circuit's decision to stand poses a grave threat to the low-income federal housing programs subject to MAHRA, which carry out Congress's explicit intent to facilitate the private ownership of multifamily properties that provide decent,

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24 C.F.R. pt. 401) have no provisions regarding mortgage prepayment. The prepayment of Evergreen Terrace's mortgage would *not* extinguish the 30-year use restriction mandated by MAHRA section 514 (e)(6).

affordable rental housing for low-income families and to ensure long term preservation of that housing. MAHRA §§ 511(b)(1), (3), (6). Permitting the condemnation to move forward, absent HUD approval, directly frustrates the purposes and objectives that Congress sought to achieve when it created the MAHRA program — namely the preservation of affordable multifamily housing. *Id.*

Left untouched, the Seventh Circuit's decision could also embolden local governments throughout this country to eliminate federally-created low-income housing programs through condemnation. Such actions would plainly frustrate Congress's intent with MAHRA, to provide affordable housing to low-income families throughout the nation. A fair examination of the proposed condemnation here, and its effects on Congress's objectives, leads to the undeniable conclusion that the City's condemnation action frustrates Congress's objectives and therefore is implicitly preempted by federal housing law. *See e.g. Perez v. Campbell*, 402 U.S. 637, 651-52 (1971) (determining that any "state legislation which frustrates the full effectiveness of federal law is rendered invalid by the *Supremacy Clause*").

If statutorily constructed federal programs can *only* preempt state or local law if there is a "federal regulation with the force of law" — even in cases confronting a direct conflict between the two laws, then this Court should make that test clear for the circuits.

B. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A SPLIT IN THE LOWER COURTS ON WHETHER OR NOT STATUTORILY CREATED FEDERAL HOUSING PROGRAMS, WHICH MAKE INITIAL PARTICIPATION VOLUNTARY, CAN PREEMPT CONFLICTING STATE OR LOCAL LAWS.

Breaking from its sister circuits, the Seventh Circuit erroneously concluded that there could be no "conflict between federal and state goals" because participation in MAHRA-related low-income housing programs is not "compulsory." *New West, L.P.,* 562 F.3d at 835. The Seventh Circuit's view that only federal laws that mandate a particular activity can be preemptive and that federal programs that make participation voluntary lack preemptive force is at odds with the decisions of the Fifth, Ninth, and Eighth Circuits. Those circuits recognize that the voluntary or mandatory nature of a federal program is irrelevant to the question of preemption. *City of Morgan City,* 31 F.3d at 324; *Pend Oreille County,* 417 F.2d at 202-03 (9th Cir. 1969) (finding that the central issue in preemption is the goal of Congress, not the program's mandatory or voluntary nature); *Forest Park II v. Hadley,* 336 F.3d 724 (8th Cir. 2003) (finding that Congress's decision to create certain federal low-income housing programs which permitted owners to voluntarily enter and exit the programs preempted a state law requiring these owners to do more.)

In contrast to the value the Seventh Circuit placed on whether or not the federal program's participation was voluntary, the Ninth, Fifth, and Eighth Circuits all determined that the key focus is whether or not the state or local law conflicts with the purposes and objectives of the Congress's goals, not any level of voluntariness in the program. *See also de la Cuesta*, 458 U.S. at 155 ("[t]he conflict does not evaporate because the Board's regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions when the secur[ed] property is transferred").

The Seventh Circuit's decision also overlooks the important fact that, while the initial decision to enter the low-income housing program is voluntary, once a private owner enters the federal housing programs involved here, federal law mandates and regulates the private owner's ongoing participation. MAHRA § 514(e)(6).

The Seventh Circuit's tacit requirement that federal programs be mandatory in order to preempt state or local law has potentially damaging implications for the many federal housing incentive-based programs, such as under MAHRA, in which the federal government and the private sector work as partners to achieve national goals set by Congress. If the Seventh Circuit's approach to preemption remains untouched, local governments in this circuit will be permitted to directly interfere with and render obsolete MAHRA, a program constructed by Congress to ensure long term preservation of federally insured low-income housing benefitting from a considerable federal investment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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