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PREEMPTION OF MUNICIPAL CRIME-FREE HOUSING ORDINANCES

Mishan Wroe*

In 2006, in response to the unforeseen consequences of the Clinton administration's "One Strike Policy," Congress amended the Fair Housing Act (FHA) through the Violence Against Women Act (VAWA) to prevent eviction of domestic violence victims based on the violence committed against them. Since then, victims of domestic violence who live in private housing have continued to be evicted under crime-free housing ordinances and lease provisions which punish victims for the acts of their abusers. Until now, the only defenses offered to these evictions were brought under theories of disparate treatment and disparate impact. Courts have yet to decide the legality of these crime-free housing ordinances but commentators have mistakenly read the FHA to protect only those domestic violence victims living in public housing, leaving victims living in private housing with no protection under the FHA. This article explains why the provision in the FHA, by its plain meaning, applies to domestic violence victims in private and public housing. Moreover, I argue municipal crime-free housing ordinances are preempted, as a result of the express preemption provision in the FHA, and cannot be used to evict domestic violence victims. This new reading of 42 U.S.C. §1437f and the preemption argument outlined in the article are timely arguments because the reliability of disparate treatment and disparate impact claims under the FHA has been questioned following the Supreme Court's grant of certiorari in Magner v. Gallagher.

INTRODUCTION

This comment considers whether municipal crime-free housing ordinances, as applied to the class of cases involving domestic violence, are preempted by the Fair Housing Act[1] (FHA), as amended by the Violence Against Women Act[2] (VAWA). Municipal crime-free housing ordinances, much like the crime-free housing provisions in the FHA, are designed to prevent and limit crime in residential areas by allowing, and sometimes requiring, landlords to evict tenants when a crime occurs in or around the tenant's home. Unfortunately, municipal crime-free housing ordinances have been used to evict victims of domestic violence who call the police and file orders of protection when their abuser attacks them in or around their home. In 2006, Congress added a provision to VAWA that amends the FHA and makes it illegal to evict a tenant because of domestic-violence-related incidents. Since this enactment in 2006, no court has yet addressed the validity of crime-free housing ordinances or the breadth of the FHA's prohibition on eviction based on domestic violence, but commentators have suggested the protection against eviction for domestic violence victims only applies to people living in federally subsidized housing.[3]

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[1] 42 U.S.C. § 3604(a) (2013); 42 U.S.C. § 1437f (c)(9)(B) - (c)(9)(C)(i) (2013).

[2] Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, 119 Stat 2960.

[3] *See* Meris L. Bergquist, *After the Violence: Using Fair Housing Laws to Keep Women and Children Safe at Home*, 34 VER. B. J. & L. DIG. 46, 47 (2008); Jenifer Knight & Maya Raghu, *Advancing Housing Protections for Victims of Domestic Violence*, 36 COLO. LAW. 77, 79 (2007); Rebecca Licavoli Adams, Note, *California Eviction Protections for Victims of Domestic Violence: Additional Protections or Additional Problems?*, 9 HASTINGS RACE & POVERTY L.J. 1, 14 (2012); Elizabeth M. Whitehorn, Comment, *Unlawful Evictions of Female Victims of Domestic Violence: Extending Title VII's Sex Stereotyping Theories to the Fair Housing Act*, 101 NW. U. L. REV. 1419, 1449 (2007).

As a result women in private housing have continued to be evicted because of incidents of domestic violence.[4]

Domestic violence is a serious and ongoing problem in the United States. Although both men and women are victims of domestic violence, women constitute the vast majority of victims. "Women account for approximately 85 percent of the victims of domestic violence, and they account for about 80 percent of the some 10.2 million people who have been stalked at some point in their lives."[5] It is hard to know exactly how many people suffer from domestic violence because of underreporting, but it is estimated that domestic violence "potentially affects the lives of an astonishing number of American women[. R]esearch estimates there are four million incidents of domestic violence in the United States each year, and one in three women will experience domestic violence in their lifetime."[6] Additionally, although rates of domestic violence do vary by race and socio-economic status, women of all races and income levels report experiencing domestic violence.[7] Since crime-free housing ordinances were developed by the Mesa Arizona Police Department in 1992, they have spread to over 2,000 cities in 44 states.[8] Given that domestic violence continues to plague many citizens and crime-free housing ordinances, which can be used to evict these victims, are spreading, something must be done to ensure domestic violence victims are not victimized a second time through eviction as a result of their abusers' actions.

Currently, lawyers and advocates attempt to protect these victims from eviction through claims of disparate treatment and disparate impact. However, this approach is inadequate both because of the uncertainty of the legality of these arguments[9] and because it is extremely difficult to prove these claims given the high burden the petitioner carries under these legal theories. Additionally, the current academic interpretation of the FHA, as amended by VAWA, and the

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[4] *See, e.g.*, Metro N. Owners, LLC v. Thorpe, 870 N.Y.S.2d 768 (NY. Civ. Ct. 2008).

[5] Knight & Raghu, *supra* note 3, at 77.

[6] Adams, *supra* note 3, at 1.

[7] Shannan Castalano, *Intimate Partner Violence in the U.S.*, BUREAU OF JUSTICE STATISTICS, www.bjs.gov/content/pub/pdf/ipuvs.pdf (last modified Dec. 19, 2007).

[8] *See* INTERNATIONAL CRIME FREE ASSOCIATION, www.crime-free-association.org (last visited Nov. 21, 2012).

[9] The Supreme Court agreed to hear a case deciding the validity of disparate impact analysis in the Fair Housing Act context in *Magner v Gallagher*, 132 S. Ct. 548 (2011), but it was dismissed by *Magner v. Gallagher,* 132 S. Ct. 1306 (2012).

prevalent argument that protections for domestic violence victims apply only to those victims living in public housing is problematic.[10]

First, this limited reading of the VAWA amendment to the FHA reflects biases about the occurrence of domestic violence. Domestic violence occurs regardless of race or socio-economic status, and by assuming Congressional protections for domestic violence only reach those families living in public housing, there is an inaccurate assumption that domestic violence only occurs in those homes. Second, this reading of the FHA requires domestic violence victims living in private housing to bring individual claims of discrimination rather than offering them broad protection under the FHA. Requiring each individual victim to show discrimination rather than using a broad legal attack on crime-free housing ordinances through the FHA involves putting the same type of burden on the domestic violence victims that the 2006 VAWA amendments to FHA tried to avoid. Most importantly, the plain text of the FHA suggests it applies to all housing, not just public housing. This comment proposes an alternative and superior solution to prevent evictions of domestic violence victims.

This comment analyzes the interaction between the federal law provisions of the FHA, as amended by VAWA, and a set of municipal crime-free housing ordinances in circumstances of domestic violence where the likely effect of applying the crime-free ordinance will be the eviction of domestic violence victims. The relevant, operative provision in the FHA, 42 U.S.C. §1437f, should be read to apply to the entire breadth of housing covered by the FHA, both private and public. Although the provision is under a heading referencing low-income housing, the plain text of the provision does not distinguish public from private housing. Therefore, even in the absence of a crime-free housing ordinance, eviction because of domestic violence is illegal in private and public housing under the FHA. Additionally, the FHA has an express preemption provision triggered by §1437f; therefore, it preempts the local crime-free housing ordinances in question.

However, given commentators' interpretations[11] of 42 U.S.C. §1437f and the Supreme Court's recent difficulty articulating a clear rule for interpreting express preemption provisions[12], it is not enough to simply say the express preemption provision prevents municipal crime-free housing ordinances from evicting victims of domestic

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[10] *See* Bergquist, *supra* note 3, Knight & Raghu, *supra* note 3, Adams, *supra* note 3, Whitehorn, *supra* note 3.
[11] *Id*.
[12] *See* Altria Group, Inc. v. Good, 555 U.S. 70, 91 (2008) (Thomas, J. dissenting).

violence. In this comment, I will explain why the express preemption provision should apply, but also, why, even without it, the municipal crime-free housing ordinances should fail under conflict preemption. That is, it is impossible to comply with both a municipal crime-free housing ordinance and the FHA. Therefore, the federal regulation preempts the municipal ordinance using the theory of conflict preemption.

At a minimum, crime-free housing ordinances and the FHA, as amended by VAWA, work toward divergent purposes. The FHA prohibits criminal activity relating to domestic violence as a basis for eviction while municipal crime-free housing ordinances allow, and sometimes require, this same activity to cause eviction.

I. BACKGROUND

The FHA makes it unlawful "[t]o refuse to sell or rent … or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[13] These prohibitions extend to private[14] and public housing, as well as rented or owned property.[15] The FHA "prohibits discrimination by direct providers of housing, such as landlords and real estate companies as well as other entities, such as municipalities, banks, . . . and homeowners insurance companies whose discriminatory practices make housing unavailable. . . ."[16]

Alleged violations of the FHA can be brought through several different mechanisms. The Department of Justice (DOJ) may bring lawsuits where there is reason to believe a landlord or other entity is engaged in a pattern or practice of discrimination or where a denial of rights to a group of persons raises an issue of public importance.[17] Individuals are also able to bring complaints through the Department of Housing and Urban Development (HUD) if they believe they have been the victims of illegal housing practices.[18] It is not clear whether

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[13] 42 U.S.C. § 3604(a) (2013).

[14] There is an exception whereby the FHA does not apply to rooms or units in dwellings containing living quarters occupied by no more than four families if the owner maintains and occupies one of the living quarters as his/her residence. This is known as the "Mrs. Murphy exception" and is an affirmative defense against a claim of discrimination. *See* 42 U.S.C. § 3603(b)(2) (2013).

[15] 42 U.S.C. § 3604(a) (2013).

[16] *Fair Housing Act,* DEP'T OF JUSTICE, http://www.justice.gov/crt/about/hce/housing_coverage.php (last visited July 8, 2012).

[17] *See* 42 U.S.C. § 2000a-5 (2013).

[18] *See* 42 U.S.C. § 1404a (2013).

an individual could raise an express preemption claim in a HUD complaint. That said, individuals might also file their own lawsuit in federal or state court. Finally, DOJ may bring cases on behalf of individuals based on referrals from HUD.[19]

In 1988, Congress added a zero tolerance policy to housing laws as a response to the problem of rampant drug activity in public housing.[20] The policy gave "housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity."[21] Eight years later, President Clinton urged Congress to strengthen the crime-free housing provisions by enacting a one strike policy.[22] With a "one strike and you're out" policy, landlords would be able to more quickly evict tenants based on either their own criminal conduct or the conduct of other persons under their control.[23] The One Strike Law[24] provided public housing authorities with discretion to evict tenants for the drug or criminal activity of household members or guests that occurs on, in, or around the housing unit.[25] Importantly, this law allowed no-fault evictions following drug-related crime or *any* criminal activity by any member of the family.[26] This policy was immediately challenged by individuals who argued the FHA could only be used to evict tenants who themselves participated in or encouraged criminal activity.

In *Department of Housing and Urban Development v. Rucker*,[27] the Court held that the FHA in "42 U.S.C. §1437d(l)(6) unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity."[28] Because 42 U.S.C. §1437d(l)(6) is not limited to drug-related criminal activity, post-

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[19] *See* 42 U.S.C. § 2000a-5 (2013).
[20] *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300.
[21] Adams, *supra* note 3, at 13.
[22] President William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union (Jan. 23, 1996), *available at* http://www.Presidency.ucsb.edu/ws/?pid=53091.
[23] Whitehorn, *supra* note 3, at 1421.
[24] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300.
[25] *Id*.
[26] The statute includes "any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants. . . ." 42 U.S.C. §1437f(o)(7)(D) (2013).
[27] 535 U.S. 125 (2002).
[28] *Id*. at 130.

Rucker courts have condoned no-fault evictions for criminal activity beyond drug-related activity such that, "[a]ny violent criminal activity on or near the premises by a tenant, household member, or guest, or any such activity on the premises by any other person under the tenant's control" is grounds for eviction.[29]

The Supreme Court's decision in *Rucker* opened the door for municipal crime-free housing ordinances that allow no-fault evictions and provided a model for municipalities who wanted to mimic these provisions of the FHA in an attempt to reduce crime related activity in their municipalities. Just as Congress, in enacting the Anti-Drug Abuse Act of 1988, strived to create public housing that was "decent, safe, and free from illegal drugs," so too did municipalities that wanted to eliminate drug use and drug sales in their neighborhoods and housing complexes.[30] In enacting municipal crime-free housing ordinances, municipalities sought to extend the FHA's no-fault eviction policies to private housing. Implicit in *Rucker* is the idea that no matter the level of culpability, tenants who cannot control the criminal activities of household members or guests can lose the privilege of public housing. For example, "[b]ecause of rampant drug abuse and criminal activity in public housing complexes, Congress provided housing authorities with discretion to reduce crime through harsh measures, such as evicting whole families."[31] Now, private landlords and municipalities "have emulated federal law, utilizing zero tolerance lease provisions that similarly allow them to evict tenants for the criminal actions of their guests or others under their control."[32] Importantly, these municipal ordinances often require landlords to have a no-fault eviction policy in order to operate rental properties within the municipality.[33] As applied to domestic violence victims, this means the victim of abuse is sanctioned for the crime committed by her abuser.

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[29] 24 C.F.R. § 982.310 (2010); s*ee* Whitehorn, *supra* note 3, at 1421; s*ee also* Walter Reed Mews Ltd. P'ship. v. Wilkins, No. 2005-LTB-29799, 2006 WL 3043114, at *10-11 (D.C. Super. Ct. Apr. 27, 2006) (stating that if a lease addendum prohibits specific behavior, that behavior is cause for eviction, and "on or near" includes shared areas like lobbies, lawns, hallways, etc.).

[30] 42 U.S.C. § 11901 (West 1999).

[31] Eliza Hirst, Note, *The Housing Crisis for Victims of Domestic Violence: Disparate Impact Claims and Other Housing Protection for Victims of Domestic Violence*, 10 GEO. J. ON POVERTY L. & POL'Y 131, 140 (2003).

[32] Whitehorn, *supra* note 3, at 1421.

[33] *See, e.g.*, COUNTRY CLUB HILLS, ILL. MUNI. CODES ch. 13, art. 36, § 11 (2008), *available at* http://www.countryclubhills.org/uploadedFiles/13-Business%20Licensing.pdf#page=119; ORLAND PARK, ILL., VILLAGE OF ORLAND PARK VILLAGE CODE § 5-8-3-2 (2013), *available at* http://www.amlegal.com/nxt/gateway.dll/Illinois/orlandpark_il/villageoforlandparkvi

Although the type of crime one-strike policies seek to limit is typically not domestic violence related, "one-strike policies and zero tolerance lease provisions have been used by public and private landlords across the country to evict female domestic violence victims because of the criminal actions of their abusers."[34] Following *Rucker*, there were several nationally publicized no-fault evictions of domestic violence victims who violated their lease agreements as a result of being abused.[35] "Landlords defend their right to evict victims of domestic violence by citing the need to protect the health and safety of neighboring tenants and the right of these neighbors to peaceful living."[36] Property managers claimed fellow residents suffer from being surrounded by violent acts and that "victims of domestic violence do not take steps to prevent a recurrence of violent acts," which in turn causes other tenants to witness the violence again and again.[37] Property managers also claim victims of domestic violence allow dangerous people (their abusers) onto the premises which puts their fellow tenants at risk.[38]

Congress sought to address the unintended consequence of allowing no-fault evictions of domestic violence victims by amending the FHA through VAWA and prohibiting eviction based on domestic violence. In 1994, Congress passed VAWA, which recognized and addressed for the first time the problem of violence against women (domestic violence, sexual assault, and stalking) on a national level. The new legislation appropriated federal funding for the investigation and prosecution of violent crimes against women.[39] Additionally, "it strengthened criminal laws and penalties, and provided funding for various grant programs to train police and prosecutors, to create and support shelters, to support victim assistance programs and service providers, and to create and maintain the National Domestic Violence Hotline." [40] VAWA was reauthorized in 200041 and 200542.

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llagecode?f=templates$fn=default.htm$3.0$vid=amlegal:orlandpark_il; OAK FOREST, ILL., CODE OF ORDINANCES § 117.42 (2013), *available at* http://www.oak-forest.org/UserFiles/File/Police_Files/Crime_Free_Housing/Crime_Free_Ordinance_Update_09-18-13.pdf.

[34] Whitehorn, *supra* note 3, at 1421.

[35] *See, e.g*., Bouley v. Young-Sabourin, 394 F. Supp. 2d 675 (D. Vt. 2005); Alvera v. CBM Consent Decree, CV 01-857-PA1 (D. Or. Nov. 5, 2001), *available at* http://www.aclu.org/womens-rights/alvera-v-cbm-group-federal-consent-decree.

[36] Whitehorn, *supra* note 3, at 1421.

[37] *See id.* at 1421-22.

[38] *Id*. at 1422.

[39] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40605, 108 Stat. 1952 (1994).

[40] Knight & Raghu, *supra* note 3, at 79.

Although it was delayed, VAWA was most recently reauthorized in 2013.43 Leading up to the 2005 amendments, there was concern about the number of women being evicted or denied housing because of their status as domestic violence victims.

In 2005, the Anti-Discrimination Center of Metro New York investigated discriminatory practices in several New York state private housing markets including Staten Island, Brooklyn, and Queens.[44] Testers searched for available units through various advertisements. When a tester called to inquire about the unit, she would first verify the advertised unit was available and then would explain she was a housing coordinator for a survivor-assistance organization and that a survivor of domestic violence would be renting the unit. The study found that twenty percent of those contacted voiced "stereotypical concerns with questions and comments such as to the potential renter's mental stability and concern for safety of the renter, other tenants, and the housing providers themselves."[45] An additional twenty-seven percent of those contacted refused to rent a unit to a survivor of domestic violence or failed to follow up as promised.[46] The testers noted that a typical response was, "We don't want her husband to come and beat her up."[47] Owners and landlords who refused to rent to survivors of domestic violence or who evicted tenants after incidents of domestic violence in the home typically were concerned about

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[41] *See* Violence Against Women Act of 2000, Pub. L. No. 106-386, Div. B, 114 Stat. 1491. In *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court struck down the civil rights remedy of VAWA on federalism grounds. The majority opinion suggests domestic violence is a problem for the states, but it seems illogical to claim the federal government has no interest in protecting domestic violence victims from harsh or unfair treatment because of their status as domestic violence victims.

[42] *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960.

[43] *See* Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 54.

[44] The study was conducted in response to Mayor Bloomberg and City Council blocking legislation that would make it illegal for New York City housing providers to discriminate against domestic violence victims. *See* Anti-Discrimination Center of Metro New York, Adding Insult to Injury: Housing Discrimination Against Survivors of Domestic Violence 1 (Aug. 2005), http://www.antibiaslaw.com/sites/default/files/files/DVReport.pdf.

[45] Kristen M. Ross, *Eviction, Discrimination and Domestic Violence: Unfair Housing Practices Against Domestic Violence Survivors*, 18 HASTINGS WOMEN'S L.J. 249, 250 (2007).

[46] Anti-Discrimination Center of Metro New York, *supra* note 44, at 2.

[47] *Id*. at 3.

victims endangering the safety of other tenants and believed domestic violence victims were more likely to cause property damage.[48]

Evictions of domestic violence victims and reports of housing discrimination fed the growing concern that because "many victims of domestic violence who leave their abusers have no alternative place to live, they often become homeless."[49] When Congress reauthorized VAWA in 2005 they made a legislative finding that, "[t]here is a strong link between domestic violence and homelessness. Among cities surveyed, forty-four percent identified domestic violence as a primary cause of homelessness."[50] Importantly, nothing in the legislative record suggests that this finding was limited to domestic violence victims who are eligible for public housing. Based on the legislative history, it seems clear that Congress's concern in amending the FHA through VAWA extended to domestic violence victims in public and private housing.

To address these concerns, when VAWA was reauthorized in 2005, Congress added specific provisions regarding housing issues for victims of domestic violence. VAWA 2005 provided housing resources to help prevent victims from becoming homeless and to ensure victims could access the criminal justice system without jeopardizing their current or future housing options.[51] The 2005 amendments expressly forbid "applying the zero tolerance policy to criminal activity directly relating to domestic violence engaged in by a member of a tenant's household or any guest or other person under the tenant's control."[52] Congress believed no-fault eviction was especially harsh because victims of domestic violence generally have very little control over the actions of their abusers. Notably, the amendments did not prohibit landlords from terminating tenancy if repeated violence created an "actual and imminent threat" to other tenants or housing employees.[53]

Domestic violence victims often find it can be incredibly difficult to sever ties with an abuser. The cycle of abuse makes it difficult to permanently end an abusive relationship and so violence may continue

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[48] Ross, *supra* note 45, at 251 *noted in* Wendy R. Weiser & Geoff Boehm, *Housing Discrimination Against Victims of Domestic Violence*, 35 CLEARINGHOUSE REV. 708, 709 (2002).
[49] Hirst, *supra* note 31, at 132.
[50] *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960.
[51] *See* The Violence Against Women and Department of Justice Reauthorization Act of 2005 H.R. 3402, NATIONAL TASKFORCE TO END DOMESTIC VIOLENCE AGAINST WOMEN, *available at* http://nnedv.org/downloads/Policy/VAWA2005Summary.pdf.
[52] *Id*. at 14.
[53] Whitehorn, *supra* note 3, at 1423.

in the home for a long time. Even when the abuser no longer lives at the home, they may come by to visit for a number of reasons such as picking up and dropping off children, picking up and dropping off toys or clothes, or discussing children's medical or school decisions.[54]

In recent years, several municipalities across the United States have passed crime-free housing ordinances which require lease addendums that allow, and sometimes require, landlords to evict tenants when criminal activity occurs in or around their home.[55] Some of these ordinances specifically list domestic violence as "criminal activity" that could give rise to eviction.[56] The text of these ordinances varies from city to city, but they are generally based on a Crime-Free Housing program developed at the Mesa Arizona Police Department in 1992.[57] Since then, crime-free programs have spread to nearly 2,000 cities in 44 states.[58] Given the increasing popularity of crime-free housing ordinances and their potentially harmful consequences for domestic violence victims,[59] federal preemption analysis is a critical defense against these laws, as applied to domestic violence victims. Moreover, the degree of federal protection from eviction for domestic

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[54] Adams, *supra* note 3, at 22.

[55] *See, e.g., COUNTRY CLUB HILLS, ILL. MUNI. CODES ch. 13, art. 36, § 11 (2008), available at http://www.countryclubhills.org/uploadedFiles/13-Business%20Licensing.pdf#page=119; ORLAND PARK, ILL., VILLAGE OF ORLAND PARK VILLAGE CODE § 5-8-3-2 (2013), available at http://www.amlegal.com/nxt/gateway.dll/Illinois/orlandpark_il/villageoforlandparkvillagecode?f=templates$fn=default.htm$3.0$vid=amlegal:orlandpark_il; OAK FOREST, ILL., CODE OF ORDINANCES § 117.42 (2013), available at http://www.oak-forest.org/UserFiles/File/Police_Files/Crime_Free_Housing/Crime_Free_Ordinance_Update_09-18-13.pdf.*

[56] *See, e.g.*, RICHTON PARK, ILL., CODE OF ORDINANCES § 1467.12(c)(3)(O) (2010) *available at* http://www.amlegal.com/nxt/gateway.dll/Illinois/richtonpark_il/villageofrichtonparkillinoiscodifiedordi?f=templates$fn=default.htm$3.0$vid=amlegal:richtonpark_il; Fort Worth, Tex., Ordinance 19998-12-2011 (Dec. 2012) *available at* http://fortworthtexas.gov/uploadedFiles/City_Secretary/City_Council/Official_Documents/2011_Ordinances/19998-12-2011.pdf.

[57] The example lease addendum includes a zero tolerance policy for violations of the lease regardless of whether the violation is committed by a tenant or guest. Among the reasons for eviction are "threatening or intimidating" and "assault," as well as "any breach of the lease agreement that otherwise jeopardizes the health, safety and welfare of the landlord, his agent, or other tenant, or involving imminent or actual serious property damage…" *Crime Free Lease Addendum Arizona Version*, CRIME FREE ASSOCIATION, www.crime-free-association.org/lease_addendums_az_english.htm.

[58] *See* CRIME FREE ASSOCIATION, www.crime-free-association.org (last visited Nov. 21, 2012).

[59] *See infra* Part II.

violence victims is of acute importance because of the legal uncertainty of disparate impact liability under the FHA.

II. THE CURRENT STATE OF THE LAW AND CURRENT LEGAL ARGUMENTS

In January 2006, President Bush signed the Violence Against Women Act and Department of Justice Reauthorization Act of 2005 (VAWA 2005) which amended the statute to prohibit landlords from evicting or otherwise denying housing to victims of domestic violence, dating violence, and stalking.[60]

The FHA, as amended by VAWA, now includes a provision prohibiting eviction of domestic violence victims. The Reauthorization Act states:

> An incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking shall not be construed as a serious or repeated violation of a lease for housing assisted under a covered housing program by the victim or threatened victim of such incident.[61]

It goes on to state:

> No person may deny assistance, tenancy, or occupancy rights to housing assisted under a covered housing program to a tenant solely on the basis of criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking that is engaged in by a member of the household of the tenant or any guest or other person under the control of the tenant, if the tenant or an affiliated individual of the tenant is the victim or threatened victim of such domestic violence, dating violence, sexual assault or stalking.[62]

Currently, domestic violence victims who are evicted from private housing as a result of the violence they suffer in their home turn to

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[60] *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

[61] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 41411(b)(1)-(2)(A), 127 Stat. 54, 102-03.

[62] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 41411(b)(3), 127 Stat. 54, 103.

either disparate treatment or disparate impact theories under the FHA to fight their eviction.[63] These theories can be arduous for the plaintiff because of the burden-shifting approach and the requirement of showing either discriminatory intent or discriminatory treatment. Additionally, because the Supreme Court has not addressed the issue of disparate impact and disparate treatment claims under the FHA, there is no clear standard to apply.[64] Finally, disparate impact, the more lenient of the two approaches, may not be an acceptable standard under the FHA. The Supreme Court granted *certiorari* but did not hear a case that would have decided this matter.[65] Therefore, plaintiffs face uncertainty in bringing these claims. This section explains how disparate treatment and disparate impact theories have been used in fighting evictions of domestic violence victims. However, given the uncertainty of the validity of these arguments, statutory interpretation and preemption arguments (discussed in the next section) may be more persuasive.[66]

A. Disparate Treatment

The FHA's core provision makes it illegal to "refuse to sell or rent. . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[67] While this language does not explicitly protect survivors of domestic violence from discriminatory housing practices, courts have recognized that victims may have a case for sex discrimination under

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[63] It is not clear why this has been the dominant approach. It may be because the protections in the FHA for domestic violence victims are under the heading "Low-income housing" and advocates have therefore, incorrectly, assumed these protections are not available to domestic violence victims in private housing.

[64] Three circuits use a burden-shifting approach, four circuits use balancing test, and two circuits use a hybrid approach. *See, e.g.*, Resident Advisory Bd. v Rizzo, 564 F.2d 126, 148–49 (3d Cir. 1977) (using the burden-shifting approach); Arthur v. City of Toledo, 782 F.2d 565, 574–75 (6th Cir. 1986); Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982); Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290–92 (7th Cir. 1977) (using a balancing test). The Supreme Court agreed to hear a case deciding the validity of disparate impact analysis in the Fair Housing Act context in Magner v. Gallagher, 132 S. Ct. 548 (2012) (Mem.) but it was dismissed by *Magner v. Gallagher*, 132 S. Ct. 1306 (2012) (Mem.).

[65] *See* Magner v. Gallagher, 132 S. Ct. 548 (2011) (Mem.) *cert. dismissed* Magner v. Gallagher, 132 S. Ct. 1306 (2012) (Mem.).

[66] *See infra* Part IV.

[67] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 41411, 127 Stat. 54.

the theory of disparate treatment and/or disparate impact because domestic violence disproportionately affects women.[68]

Plaintiffs can bring discrimination cases under the FHA using a theory of disparate treatment as long as they can demonstrate a discriminatory motive based on sex.[69] A prima facie case is made, under the McDonnell Douglas framework[70], in a disparate treatment case if the plaintiff can demonstrate that (a) he or she is a member of a protected class and (b) he or she was treated differently (c) because of their status as a member of a protected class.[71] Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to prove a legitimate, nondiscriminatory reason for its action.[72] If the defendant is able to do so, the burden shifts back to the plaintiff to demonstrate that the reason asserted by the defendant is mere pretext.[73] In the case of domestic violence, the victim would need to show she was evicted because she is a woman or that she was denied housing because she is a woman.[74] Since proving discriminatory motive is difficult and often requires so-called "smoking gun" evidence, using disparate treatment is not a very common strategy.

Disparate treatment theory was used however in *Bouley v. Young-Sabourn*[75] where Ms. Bouley filed a complaint against her landlord after she was evicted. Her complaint alleged unlawful termination of her lease under the FHA on the basis of sex. The complaint argued "the termination was initiated because she was a victim of domestic violence."[76] Bouley's husband had assaulted her in their apartment, which led Bouley to call the police and apply for a restraining order.

> Three days later, Bouley's landlord, Jacqueline Young-Sabourin, with whom Bouley had no previous problems, served her with an eviction notice requiring her to leave her apartment within 30 days. The notice stated that Bouley violated the following clause in her lease: "Tenant will not use or allow said premises or

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[68] *See* Michael R. Rand, National Crime Victimization Survey: Criminal Victimization, 2007, BUREAU OF JUSTICE STATISTICS (Dec. 2008), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf.
[69] Austin K. Hampton, *Vouchers As Veils*, 1 U. CHI. LEGAL F. 503, 507 (2009).
[70] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
[71] Gamble v. City of Escondido, 104 F.3d 300, 305 (9th Cir. 1997).
[72] *Id*. at 305.
[73] *Id*. at 305; Harris v. Itzhaki, 183 F.3d 1043, 1051 (9th Cir. 1999).
[74] *See* Ross, *supra* note 45, at 264–65.
[75] Bouley v. Young-Sabourn, 394 F. Supp. 2d 675, 678 (D. Vt. 2005).
[76] *Id*.

> any part thereof to be used for unlawful purposes, in any noisy, boisterous or any other manner offensive to any other occupant of the building."[77]

This evidence was sufficient for the court to make out the prima facie case of disparate treatment.

The district court in Vermont found the plaintiff demonstrated a prima facie case because throughout the case "it became clear that the landlord had acted intentionally, based on her belief in several false stereotypes about female victims of domestic violence, including belief that the victim was to blame for the violence."[78] The court reached this conclusion largely because of statements the landlord made to the domestic violence victim in the course of the eviction. Victim blaming often involves gender stereotyping because it centers on the belief that women provoke violence in men or "ask for it" by exhibiting behavior inconsistent with traditional gender roles. The evidence strongly supported the argument that Bouley was evicted because of her status as a victim of domestic violence and the belief that as a woman she was not doing enough to prevent the violence. "This was an important decision because it was the first time a federal court recognized the right of a female victim of domestic violence to pursue a claim of sex discrimination under the FHA."[79]

Although this legal approach worked in Bouley's case, it is unlikely to be effective for the majority of domestic violence victims. Proving discriminatory intent is very difficult and landlords are unlikely to be as blatant about their discriminatory intentions as the landlord in the Bouley case. Additionally, with respect to the crime-free housing ordinances, the intent is to prevent crime and therefore landlords have a legitimate argument that their intention was never based on sex discrimination but rather based on eliminating crime in their rental units.

B. Disparate Impact

Under the disparate impact theory of sex discrimination, a plaintiff would argue that the defendant's actions had a discriminatory effect.[80] Unlike disparate treatment, disparate impact does not require any proof of discriminatory intent or motive to establish a claim. A prima facie case of disparate impact is established by showing the defendant's

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[77] Whitehorn, *supra* note 3, at 1419–20.
[78] *Id*.
[79] Bergquist, *supra* note 3, at 47.
[80] *Gamble*, 104 F.3d at 306.

practices actually or predictably results in discrimination.[81] To make out a prima facie case of discrimination under "disparate impact theory the plaintiff must show (1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices."[82] In the case of domestic violence, an evicted tenant could either claim the disproportionate impact is on domestic violence victims as a class or, more commonly, the disproportionate impact is on women as a class. It is more typical to argue there is a discriminatory effect on women because women are more likely than men to be victims of domestic violence and sex is a historically recognized class under disparate impact theories.[83]

Several courts and agencies across the country have concluded that housing policies and practices that discriminate against victims of domestic violence disparately impact women and violate the sex discrimination provisions of the fair housing law.[84] The National Housing Law Project, in its manual for attorneys and advocates, describes disparate impact theory as being especially effective in challenging eviction related to domestic violence because advocates can argue these policies have a disparate impact on women since most of the victims of domestic violence are women.[85] One potential

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[81] *Id*.

[82] Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 745 (9th Cir. 1996).

[83] "Women account for approximately 85 percent of the victims of domestic violence, and they account for about 80 percent of the some 10.2 million people who have been stalked at some point in their lives." Knight & Raghu, *supra* note 3, at 77. It is hard to know exactly how many people suffer from domestic violence because of underreporting but it is estimated that domestic violence "potentially affects the lives of an astonishing number of American women; research estimates there are four million incidents of domestic violence in the United States each year, and one in three women will experience domestic violence in their lifetime." Adams, *supra* note 3, at 1.

[84] *See e.g.*, Winsor v. Regency Property Mgm't, Inc., No. 94 CV 2349 (Wisc. Cir. Ct. Oct. 2, 1995) (under Wisconsin fair housing law, modeled after the federal Fair Housing Act, a landlord's single decision to refuse to rent an apartment to prospective tenants because they were victims of domestic violence was sufficient to state a sex discrimination claim under a disparate impact theory); O'Neil v. Karahlais, 13 M.D.L.R. 2004 (Mass. Comm'n Against Discrim. Oct. 21, 1991) (same with respect to Massachusetts law); Formal Op. No. 85-F15, 1985 N.Y. Op. Att'y Gen. 45 (1985) (denial of rentals to persons based on their status as domestic violence victims has a discriminatory impact on women and therefore violates sex discrimination provisions of New York State Human Rights Law); Knight & Raghu, *supra* note 3, at n. 27.

[85] *See* Meliah Schultzman, NATIONAL HOUSING LAW PROJECT, *Maintaining Safe and Stable Housing for Domestic Violence Survivors: A Manual for Attorneys and Advocates,* at 26 (2012), *available at*

weakness in this argument is that disparate impact could be difficult to demonstrate when a landlord has only a few properties and therefore may have only ever evicted one or two tenants. Additionally, a defendant landlord will likely give some pre-textual reason for eviction once it becomes generally known that eviction based on domestic violence is not allowed. Finally, it would be impossible for a petitioner to make a disparate impact claim if she was the only female tenant the landlord had ever evicted.

Disparate impact theory was used in 2001 in a case in Oregon. In *Alvera v. CBM Group*[86], Ms. Alvera filed a complaint with HUD after being evicted from her home following an incident of domestic violence. After an investigation, HUD issued a finding of discrimination in violation of the FHA. HUD reasoned that since women constitute a vast majority of domestic violence victims, policies targeted at domestic violence survivors have a disproportionate impact on women and therefore such policies constitute discrimination and are illegal under the FHA.[87] The parties settled the matter and CBM Group (the owners of the apartment complex) agreed not to evict or discriminate against tenants because of the domestic violence committed against them.[88] "The hearing officer found that the landlord's policy of evicting the victim as well as the perpetrator of an incident of violence between household members had a disparate impact based on sex, due to the disproportionate number of female victims of domestic violence."[89]

Until now, domestic violence victims like Ms. Alvera have resorted to disparate impact theories of liability under the FHA as a shield against eviction but, most of the time, such an argument was not successful.[90] Some victims of domestic violence may not be able to

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http://www.nhlp.org/files/NHLP%20Domestic%20Violence%20and%20Housing%20Manual%202.pdf.

[86] Consent Decree, Alvera v. C.B.M. Group, No. CV 01-857-PA (D. Or. Nov. 5, 2001).

[87] *See* Complaint in Intervention and Demand for Jury Trial at 9, Alvera v. CBM Group, Inc., No. CV 01-857-PA (D. Or. Nov. 5, 2001).

[88] *See* Consent Decree at 5, Alvera v. CBM Group Inc., No. CV 01-857-PA (D. Or. Nov. 5, 2001).

[89] Adams, *supra* note 3, at 29 (internal quotations omitted).

[90] *See, e.g.*, Winsor v. Regency Property Mgm't, Inc., No. 94 CV 2349 (Wisc. Cir. Ct. Oct. 2, 1995) (under Wisconsin fair housing law, modeled after the federal Fair Housing Act, a landlord's single decision to refuse to rent an apartment to prospective tenants because they were victims of domestic violence was sufficient to state a sex discrimination claim under a disparate impact theory); O'Neil v. Karahlais, 13 M.D.L.R. 2004 (Mass. Comm'n Against Discrim. Oct. 21, 1991) (same with respect to Massachusetts law); Formal Op. No. 85-F15, 1985 N.Y. Op. Att'y Gen. 45 (1985) (denial of rentals to persons based on their status as domestic

bring disparate impact claims "because they may be unable to find other such victims in their apartment buildings who were similarly evicted and thus unable to fulfill the usual requirement for statistical analysis in disparate impact cases."[91] The victim would instead have to prove under disparate treatment that "she was treated differently than similarly situated male tenants, or that the housing provider's action stemmed from gender based stereotypes about battered women."[92] Additionally, there is reason to believe the Supreme Court may see the law differently. Although every circuit court considering the issue has found disparate impact theory to be a valid claim, the Supreme Court has not addressed a case of disparate impact discrimination under the FHA. Therefore, the exact standards governing the theory are still unknown. Moreover, the Supreme Court recently decided to hear a case arguing that theories of disparate impact are not available under the FHA.[93] In *Magner v. Gallagher,*[94] the Supreme Court was going to consider whether disparate impact claims are cognizable under the FHA and, if such claims are cognizable, whether they should be analyzed under a burden-shifting test, a balancing test, or some sort of hybrid approach. However, the case was dismissed on February 14, 2012 and the matter remains unresolved.[95] Although the Supreme Court will no longer hear *Magner*, the possibility that disparate impact claims may be unavailable under Title VII makes the preemption issue addressed by this comment extremely relevant.[96] If advocates for domestic violence victims are no longer able to use disparate impact theory to fight evictions, it is not clear what legal theory they have available to them. Therefore, applying either express or conflict preemption to allow victims of domestic violence, particularly those living in private housing, to challenge the validity of their eviction is even more important at this time.

To date, there has been no litigation regarding whether or not the FHA, as amended by VAWA, preempts crime-free housing

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violence victims has a discriminatory impact on women and therefore violates sex discrimination provisions of New York State Human Rights Law). Knight & Raghu, *supra* note 3, at n. 27.

[91] Knight & Raghu, *supra* note 3, at n. 27.

[92] *Id*. at 30.

[93] *See supra* note 64. It is worth noting the Supreme Court has become more hostile to disparate treatment claims more generally. *See*, *e.g.*, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (illustrating the Court's hostility to disparate treatment in the employment context and Justice Scalia's concurrence which seems to cast doubt on the constitutionality of disparate impact, at least in the context of race).

[94] *Magner*, 132 S. Ct. 548 (2011) (Mem.).

[95] *See Magner*, 132 S. Ct. 1306 (2012) (Mem.).

[96] *See id*.

ordinances.[97] The preemption theory is more likely to be raised if advocates believe they are unable to use disparate impact liability under the FHA, since the preemption theory need not rely on disparate impact. Moreover, the preemption argument requires fewer resources than a disparate impact argument since it does not necessitate any inquiry into the motives of landlords who evict domestic violence victims.[98]

III. STATUTORY INTERPRETATION AND PREEMPTION ANALYSIS AS A LEGAL DEFENSE TO EVICTION

This article imagines two circumstances in which a victim of domestic violence, living in private housing, might be evicted as a result of the abuse committed against her. In the first circumstance, the municipality has no crime-free housing ordinance and the landlord evicts the tenant pursuant to the landlord's own lease requirements, which were not required by the municipality. In the second circumstance, the municipality has passed a crime-free housing ordinance that expressly allows or requires the landlord to evict tenants if there is a crime committed, including domestic violence, in or around the tenant's home. In the first circumstance, without a crime-free housing ordinance, the eviction is illegal by the plain terms of the FHA as amended by VAWA. In the second circumstance, the crime-free housing ordinance is preempted by the express preemption clause of the FHA and alternatively under the theory of conflict preemption.

A. Eviction Without a Crime-Free Housing Ordinance

In the absence of a crime-free housing ordinance, if a victim of domestic violence is evicted from his or her home as a result of domestic violence occurring in the home, the eviction is illegal by the plain meaning of 42 U.S.C. §1437f (c)(9)(C)(i). The text of the provision does not specify its application to certain types of housing. Rather, the language added to the FHA by this amendment simply states that, "[c]riminal activity directly relating to domestic violence … engaged in by a member of a tenant's household or any guest… shall not be cause for termination of … assistance, tenancy, or

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[97] It is less clear whether the issue has been raised in the course of public housing litigation, but no case has been filed where the main complaint is a preemption argument.

[98] For example, inquiring into the motive of the landlord may involve extensive discovery and interviewing other tenants about their experiences.

occupancy rights…."[99] Although the provision is under the heading "Low-income housing assistance," there is no reference to public housing in the text of the provision. To limit the application of this protection to domestic violence victims living in federally subsidized housing simply because of the section heading would be to diminish what Congress intended. If Congress were concerned about this protection applying only to public housing, they would have specified that by adding a phrase such as, "section 8 tenant." Moreover, the use of the general noun, "the victim" suggests Congress was considering all victims of domestic violence, not just victims in public housing.[100] For example, they could have specified that domestic violence is not concerned a "violation of the lease by the section 8 tenant" rather than "by the victim or threatened victim."[101]

Additionally, the text of the provision lists separately "assistance," "tenancy," or "occupancy rights." This enumeration suggests these are three separate things that may be in jeopardy under the zero tolerance policy of the FHA. If "assistance" covers the domain of public housing, it seems Congress included the addition of "tenancy," to cover private housing as well as public housing. Finally, it seems strange to assume members of Congress, in their concern about domestic violence, would leave out the potential victims who live in private housing. Members of Congress, who are concerned about domestic violence, are likely concerned about the issue for all people, not just low-income people. The legislative history includes floor statements in support of amending the FHA to protect domestic violence victims in this way, and none of the comments refer exclusively to domestic violence victims in public housing. Rather, they reference domestic violence victims more broadly.[102]

There are several administrative reasons Congress would have included this provision under the heading of "Low-income housing assistance." For example, one of the factual findings Congress made in passing this legislation related specifically to the discrimination and

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[99] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 41411(b)(3), 127 Stat. 54, 103.

[100] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

[101] *Id.*

[102] *See* 151 Cong. Rec. H8401-02 (daily ed. Sept. 28, 2005) (statement of Gingery), 2005 WL 2384768, at *9 (stating that the reauthorization "creates stiffer penalties for abusers, and it gives more rights to the victims of domestic violence"); 151 Cong. Rec. H8401-02 (daily ed. Sept. 28, 2005) (statement of Roybal-Allard), 2005 WL 2384768, at *9 (stating that "domestic violence is recognized as a crime committed by the abuser, and not the fault of the victim).

eviction of women in public housing as a result of their status as domestic violence victims.[103] Given this finding, Congress may have thought it logical to include this protection in the "Low-income housing assistance" subheading. But that does not change the fact that the provision itself, by its plain text, does not distinguish between public and private housing. There is a cannon of construction which states that "[t]itles do not control meaning; preambles do not expand scope; section headings do not change language."[104] Therefore, this provision should be read as applying to the entirety of the statute – applying to both public and private housing.

B. Eviction With a Crime-Free Housing Ordinance

If a tenant living in private housing is evicted because of domestic violence, pursuant to a crime-free housing ordinance, the tenant can argue the crime-free housing ordinance is invalid because the FHA preempts it.

Article VI of the Constitution provides the laws of the United States "shall be the supreme Law of the Land."[105] The Supreme Court

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[103] "Women and families across the country are being discriminated against, denied access to, and even evicted from public and subsidized housing because of their status as victims of domestic violence. A recent survey of legal service providers around the country found that these providers have responded to almost 150 documented eviction cases in the last year alone where the tenant was evicted because of the domestic violence crimes committed against her. In addition, nearly 100 clients were denied housing because of their status as victims of domestic violence." Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162 § 41401 119 Stat. 2960 (2006).

[104] Otto J. Hetzel et al., Legislative Law and Process 693 (1980); *see also*, Bhd. of R.R. Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 528 (1947) ("…the title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretive purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain."); Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998); Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2216 (2012) ("Notwithstanding its colloquial title, therefore, the QTA plainly allows suit in circumstances well beyond 'bread-and-butter quiet title actions…'"); Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 242 (2004) (holding that although the caption seems to be limited to "litigants," "[s]ection 1782(a) plainly reaches beyond the universe of persons designated 'litigant.'"); I.N.S. v. St. Cyr, 533 U.S. 289, 308 (2001) ("While the title of § 401(e)—"Elimination of Custody Review by Habeas Corpus"—would seem to support the INS' submission, the actual text of that provision does not. As we have previously noted, a title alone is not controlling.").

[105] U.S. CONST. art. VI, cl. 2.

has held that "state law that conflicts with federal law is without effect."[106] When the Court considers an issue arising under the Supremacy Clause, there is a presumption that federal law should not supersede the historic police powers of the States unless that is the "clear and manifest purpose of Congress."[107] Congress' purpose in enacting a law, which may conflict with state or local law, is the touchstone of preemption analysis.[108]

Congressional intent may be explicitly stated in the statute's language (i.e. explicit preemption) or implicitly contained in its structure and purpose (i.e. implicit preemption). Express preemption analysis has focused on finding the meaning of the language Congress used in drafting the preemption clause.[109] Where Congress has considered and explicitly addressed the issue of preemption by including a specific provision, the Court does not need to infer Congressional intent to preempt state law that conflict with federal

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[106] *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (internal quotations omitted). It is important to note that recently the Court has failed to articulate a clear standard for preemption. Ernest Young has described the Court's failure to implement a consistent standard on preemption as a result of the Justices approaching preemption cases "as a mass of largely unrelated issues of statutory construction arising under different regulatory regimes." However, Young believes the 2010 Roberts Court demonstrates the Justices beginning to "think about preemption as a matter of general principle" which he argues will result in a more consistent standard. Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 Sup. Ct. Rev. 253, 283 (2011).

[107] *Cipollone*, 505 U.S. at 516 (internal quotations omitted); *see also* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

[108] *See Medtronic,* 518 U.S. at 485. However, this is complicated by the so-called "presumption against preemption" from the Court's decision in *Rice v. Santa Fe Elevator*, 331 U.S. 218 (1947). S*ee e.g.*, Williamson v. Mazda Motor, 131 S. Ct. 1131 (2011) (although the court has not applied this presumption consistently); AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011) (applying the presumption in both express and implied preemption settings). *See* Young, *supra* note 106, at 278.

[109] Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1156 (1998). However, it is not always as simple as understanding the plain meaning of the express preemption provision. If there is any ambiguity in Congress' intention, the Court may look further than the express preemption provision. In his concurring opinion, Justice Blackmun explained, "[t]he principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find preemption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not *whether* Congress intended to preempt state regulation, but to what *extent*. We do not, absent unambiguous evidence, infer a scope of preemption beyond that which is clearly mandated by Congress' language." *Cipollone*, 505 U.S. at 533.

law.[110] Rather, the Court need only give the preemption clause "its ordinary meaning."[111] Preemptive intent may be inferred "if there is an actual conflict between the state and federal law."[112]

Implied preemption can occur when there is a conflict between federal and state law. This analysis focuses on whether it is possible for a party to comply with both federal and state requirements, "or whether a state law would sufficiently frustrate the objectives underlying federal law."[113]

1. Express Preemption Clause

The FHA has an express preemption clause, which forbids state and local laws that permit discrimination against domestic violence victims. 42 U.S.C. § 3615 reads:

> Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.[114]

This express preemption provision indicates that municipal crime-free housing ordinances, which permit and sometimes require eviction of domestic violence victims because of violence committed by their abusers in their home, are preempted by 42 U.S.C. §§ 1437f (c)(9)(B) and (c)(9)(C)(i). If the preemption provision is given its ordinary meaning, as Justice Scalia instructs in his concurrence in *Cipollone*, municipal crime-free housing ordinances are invalid, as applied to domestic violence victims, because they conflict with the FHA.[115]

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[110] *See Cipollone*, 505 U.S. at 517.
[111] *Id*. at 548 (Scalia, J. concurring in part and dissenting in part).
[112] *Altria Group*, 555 U.S. at 76-77.
[113] Jordan, *supra* note 109. This is known as conflict preemption.
[114] 42 U.S.C. § 3615 (2013).
[115] Although the Court has not explicitly embraced Justice Scalia's position and has applied the presumption against preemption even where Congress has included an express preemption clause in the relevant statute, Justice Roberts recently wrote, "When a federal law contains an express preemption clause, we focus on the plain

VAWA amends the FHA to explicitly protect victims of domestic violence from eviction as a result of the violence perpetrated against them, and the FHA preempts municipal crime-free housing ordinances that allow such eviction.

Recently, the Supreme Court has struggled to articulate a clear and concise test for evaluating preemption clauses.[116] In particular, Justice Scalia's concurrence in *Cipollone*[117] and Justice Thomas's dissent in *Altria*[118] outline the Court's internal disagreement regarding whether or not there is a presumption against preemption and the extent to which express preemption clauses should be evaluated narrowly or broadly. This paper does not seek to resolve those disputes or advocate one position over the other. Rather, I argue that regardless of the Court's internal debate, express preemption clauses are interpreted first by their plain meaning.[119] The FHA's express preemption clause clearly prohibits eviction of domestic violence victims because they are a protected class within the FHA.

That said, commentators have assumed the FHA's protection of domestic violence victims exists only in low-income housing.[120] Moreover, attorneys have failed to raise the preemption issue in cases involving the eviction of domestic violence victims. To rebut the claim that VAWA amended the FHA to protect only victims of domestic violence residing in low-income housing, I will further argue that municipal crime-free housing ordinances are also preempted under theories of implied preemption as well, particularly conflict preemption. That is, even if the protections VAWA added to the FHA apply only to public housing, preemption may still apply.

2. Conflict Preemption

Conflict preemption exists when a federal statute is irreconcilable with a state or federal law, such that it is impossible to comply with both of them.[121] In other words, conflict exists if a "state law 'stands as

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wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1977 (2011).

[116] *See e.g.*, *Cipollone*, 505 U.S. at 516; *Altria*, 555 U.S. at 76-77.

[117] *See Cipollone*, 505 U.S. at 544.

[118] *See Altria*, 555 U.S. at 91.

[119] *See* Jordan, *supra* note 112.

[120] *See Bergquist, supra note 3, Knight & Raghu, supra note 3, Adams, supra note 3, Whitehorn, supra note 3.*

[121] *See* Jones v. Rath Packing Co., 430 U.S. 519 (1977); *see also,* Southland Corp. v. Keating, 465 U.S. 1 (1984).

an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'."[122] Even if a federal statute does not contain an express preemption clause, it implicitly repeals whatever state law it contradicts. That is, when the "application of state law would inhibit the accomplishment of federal objectives" the state law is preempted through conflict preemption.[123]

The plain meaning of 42 U.S.C. §§ 1437f (c)(9)(B) and (c)(9)(C)(i) makes it impossible to evict a domestic violence victim pursuant to a municipal crime-free housing ordinance and still be in compliance with federal law under the FHA. The statute explicitly states that "an incident or incidents of actual or threatened domestic violence … shall not be good cause for terminating … tenancy or occupancy rights of the victims of such violence."[124] Compliance with both the municipal and federal law is technically possible but enforcement of the municipal law would obstruct the purpose of the federal statute.[125]

Landlords can accept Section 8 and private tenants within the same building. Thus, even if the protections against eviction for domestic violence victims apply only to Section 8 Housing Voucher recipients, enforcing a municipal crime-free housing ordinance against one tenant and not another despite both being domestic violence victims would obstruct the purpose of the protections the FHA creates for domestic violence victims. One of the motivating factors of amending the FHA to protect domestic violence victims from eviction was the concern that domestic violence victims and their children would face homelessness if evicted.[126] Therefore, evicting a tenant, in public or private housing, as a result of the domestic violence she experiences, would obstruct the FHA's purpose in protecting domestic violence victims.

No court has yet addressed the validity of crime-free housing ordinances or the breadth of the FHA's prohibition on eviction based on domestic violence. In the limited literature on this topic, the

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[122] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000). This is also sometimes referred to as obstacle preemption.

[123] Sarah Clinton, *Evicting the Innocent: Can the Innocent Tenant Defense Survive a* Rucker *Preemption Challenge?*, 85 B.U. L. REV. 293, 313 (2005).

[124] 42 U.S.C. § 1437f (c)(9)(B) (2013).

[125] *See* Hines v. Davidowitz, 312 U.S. 52 (1941); *see also,* Boggs v. Boggs, 520 U.S. 833, 841 (1997) ("We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of [federal law]. We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the statutory phrase "relate to" provides further and additional support for the pre-emption claim. Nor need we consider the applicability of field pre-emption.").

[126] *See generally* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 119 Stat. 2960 (2006).

amendment of the FHA through VAWA has been described by commentators as not extending to private housing and therefore not a prohibition of eviction as a result of domestic violence under municipal crime-free housing ordinances.[127] Because the relevant sections of the FHA are under the heading of "Low-income housing assistance," they have been interpreted by a handful of commentators as applying to only women who reside in public housing.[128] These commentators describe VAWA's 2005 amendments and simply state, without citation or explanation, that their benefits are only applicable to domestic violence victims living in public housing.[129] They posit that VAWA 2005's "reach is limited to tenants living in public housing and government-assisted housing,"[130] such that, "[v]ictims of domestic violence who reside in non-Section 8, private rentals are not covered by VAWA 2005."[131]

But, this interpretation is inaccurate. To interpret the relevant portions of the FHA as applying only to public housing is to misread the text of the provisions. The plain text does not require its application be limited to public housing. Additionally, this interpretation would create a perverse incentive for potential victims of domestic violence to remain in Section 8 housing for additional protections. Moreover, this interpretation ignores the express preemption provision at work in the FHA which invalidates crime-free housing ordinances.[132] Finally, even if the statute only expressly protects domestic violence victims living in public housing, the municipal crime-free housing ordinances should still be preempted under the theory of conflict preemption.

IV. COUNTER ARGUMENTS

There are several counterarguments to the argument presented in this paper including legitimate concerns about reducing violence in shared housing areas. Some may argue that the amendment to the FHA should be construed as applying only to public housing because of the

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[127] *See Bergquist, supra note 3, Knight & Raghu, supra note 3, Adams, supra note 3, Whitehorn, supra note 3*.
[128] *See supra* note 3.
[129] Knight & Raghu, *supra* note 3, at 79 (stating "[i]n VAWA 2005, Congress created significant new housing protections that cover any victim of domestic violence … who resides in, or seeks to reside in, federal public housing…").
[130] Bergquist, *supra* note 3, at 47. *See also*, Knight & Raghu, *supra* note 3, at 79; Adams, *supra* note 3, at 14; Whitehorn, *supra* note 3, at 1449.
[131] Bergquist, *supra* note 3 at 47.
[132] 42 U.S.C. § 3615.

sub-section's heading. Alternatively, others may argue that local municipalities, rather than courts, should be responsible for amending crime-free housing ordinances to protect domestic violence victims if they deem that to be the appropriate course of action.

A. Motivations of Crime-Free Housing

The motivations behind the crime-free housing policies suggest that domestic violence may be precisely the type of crime Congress sought to keep out of housing situations. After all, domestic violence is a crime and can cause disturbance for other residents and potentially put them in danger.[133] In enacting the One Strike policy, Congress and President Clinton seemed particularly interested in reducing drug related crime in public housing. But, arguably, reducing all crime, including domestic violence, was a motivating factor.[134] Although safety concerns are legitimate, by passing VAWA, Congress has already made the judgment that protecting domestic violence victims' housing rights was more important than the potential safety concerns they pose to other tenants. Such congressional determination should be respected.

Additionally, domestic violence victims who lose housing are at increased risk of homelessness and Congress was particularly concerned about victims of domestic violence who are evicted because of crime-free housing policies and then become homeless as a result.[135] It could be argued that low-income women are at particular risk of homelessness, and the exception to the One Strike policy for domestic violence victims was aimed at protecting these economically vulnerable domestic violence victims from eviction. Therefore, the economic concerns, which motivated the amendment, may not apply to women in private housing.[136] However, as previously mentioned, the legislative history suggests that Congress was not exclusively considering women in public housing. Although Congress referred to public housing and voucher programs while considering VAWA 2005, the legislative history also includes references to HUD materials that

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[133] Though, the FHA allows eviction of domestic violence victims if there is "an actual and imminent threat to other tenants or those employed at or providing service to the property…" Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 41411(b)(3)(C)(iii) 127 Stat. 54 (2013).

[134] *See, e.g.*, *Rucker*, 535 U.S. at 127.

[135] *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162, 119 Stat. 2960 (2006).

[136] However, there is little reason to think that women living in private housing would not be concerned about their economic stability if they were to be evicted.

are applicable to both private and public housing. The legislative history also includes references to landlords as "housing or subsidy provider[s]" indicating some housing providers would not be receiving subsidies.[137] Moreover, in floor statements supporting the 2005 reauthorization of VAWA, several members of Congress referred to victims of domestic violence broadly, either as women or victims, and there is no record of victims being referred to by their economic status.[138]

B. Emphasis on the Heading

The amendment to the FHA preventing eviction based solely on domestic violence incidents was put under the heading "Low-income Housing Assistance" and presumably this is why commentators have read the amendment as applying only to victims in low-income housing.[139] However, the text of the statute itself does not mention low-income housing or any particular type of housing. It simply refers to the tenant's lease agreement. Additionally, as previously mentioned, there is a cannon of construction which states "[t]itles do not control meaning; preambles do not expand scope; section headings do not change language."[140] Therefore, reading the amendment to apply to the entire statute, and therefore to both public and private housing, is a legitimate reading.

C. Municipalities Can Protect Domestic Violence Victims From Eviction

While it is true that municipalities can pass their own exceptions to their crime-free housing ordinances, that does not change the ability of domestic violence victims evicted under this policy to raise the argument that they are protected under the FHA. Congress was concerned with the alarming correlation between homelessness and

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[137] *See* Pub. L. 109-162, 119 Stat. 2960 (2006).

[138] *See generally* 151 Cong. Rec. H8401-02 (daily ed. Sept. 28, 2005).

[139] See Bergquist, supra note 3, Knight & Raghu, supra note 3, Adams, supra note 3, Whitehorn, supra note 3.

[140] Otto J. Hetzel et al., *Legislative Law and Process* 693 (1980); *see also*, *Trainmen*, 331 U.S. at 528 ("…the title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretive purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.").

domestic violence[141] and chose to prevent all victims of domestic violence from being evicted based on the crime that was their abuse. A municipality is welcome to amend their crime-free housing ordinance to offer protection from eviction for domestic violence victims, but their failure to do so does not change the fact that Congress has already acted.

Moreover, there is reason to believe municipalities would not make these changes. Some municipalities specifically list domestic violence as a trigger of the crime-free housing policy, so they are highly unlikely to make an exception for public housing.[142] Additionally there may be collective action problems in organizing domestic violence victims and their advocates to successfully lobby each of the over 2,000 municipalities that have enacted crime-free housing ordinances.

CONCLUSION

In 2006, in response to an unforeseen consequence of the One Strike policy, Congress amended the FHA through VAWA to prevent victims of domestic violence from being evicted as a result of the crimes committed against them. Unfortunately, the provision has been misread by commentators, though not courts, to apply only to domestic violence victims living in low-income housing. This article explains why the provision, by its plain meaning, applies to domestic violence victims in both private and public housing. Moreover, this paper argues that municipal crime-free housing ordinances are preempted as a result of the express preemption provision in the FHA and cannot be used to evict domestic violence victims. This new reading of the new Reauthorization Act of 2013 and the preemption argument outlined in the article are timely arguments because the reliability of disparate treatment and disparate impact claims under the FHA has been

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[141] *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 § 41401, 119 Stat 2960 (2006) ("There is a strong link between domestic violence and homelessness. Among cities surveyed, 44 percent identified domestic violence as a primary cause of homelessness.").

[142] *See, e.g., COUNTRY CLUB HILLS, ILL. MUNI. CODES ch. 13, art. 36, § 11 (2008), available at http://www.countryclubhills.org/uploadedFiles/13-Business%20Licensing.pdf#page=119; ORLAND PARK, ILL., VILLAGE OF ORLAND PARK VILLAGE CODE § 5-8-3-2 (2013), available at http://www.amlegal.com/nxt/gateway.dll/Illinois/orlandpark_il/villageoforlandparkvillagecode?f=templates$fn=default.htm$3.0$vid=amlegal:orlandpark_il; OAK FOREST, ILL., CODE OF ORDINANCES § 117.42 (2013), available at http://www.oak-forest.org/UserFiles/File/Police_Files/Crime_Free_Housing/Crime_Free_Ordinance_Update_09-18-13.pdf.*

questioned following the Supreme Court's grant of *certiorari* in *Magner v. Gallagher*.[143]

[143] 132 S. Ct. 548 (2011) (Mem.); *certiorari* dismissed by Magner v. Gallagher, 132 S. Ct. 1306 (2012) (Mem.).