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CASE NUMBER: DG-2023-CV-000161
PII COMPLIANT

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS

LANDLORDS OF LAWRENCE, Plaintiff, v. THE CITY OF LAWRENCE, KANSAS, Defendant.	CASE NO. DG-2023-CV-000161

MEMORANDUM DECISION AND JOURNAL ENTRY GRANTING THE CITY'S MOTION FOR SUMMARY JUDGMENT AND DENYING THE LANDLORDS OF LAWRENCE'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the court upon the parties' competing motions for summary judgment. Plaintiff Landlords of Lawrence appears by Adam Hall. Defendant the City of Lawrence appears by Michelle Stewart and Lindsay Freihoff. Both parties filed motions for summary judgment and incorporated their statements of fact from their respective summary judgment motions into their responses to the other party's summary judgment motion. The parties agree that only issues of law remain.

Summary

Plaintiff, the Landlords of Lawrence, challenges the constitutionality of City Ordinance 9960 ("the Ordinance") which prohibits housing discrimination based on a person's source of income or immigration status. Plaintiff seeks a judgment declaring that the source of income and

immigration status provisions of the Ordinance violate the United States Constitution and are preempted by federal law. Plaintiff seeks a permanent injunction enjoining enforcement of the Ordinance.

After careful consideration, the court determines that the Ordinance is not unconstitutionally overbroad, and that federal law does not preempt the Ordinance. Additionally, Plaintiff does not have standing to assert that the Ordinance violates the Fourth Amendment prohibition on unreasonable searches and seizures. For these reasons, summary judgment is granted in the City's favor and the Amended Petition is dismissed.

The court's findings of fact and conclusions of law are below.

Findings of Fact

1. Chapter 10 of the City Code of Lawrence, Kansas ("the Code") provides regulations for unlawful housing and real property practices in the City.

2. The Code prohibits discrimination in housing without distinction to persons based on their race, sex, religion, color, national origin, age, ancestry, familial status, sexual orientation, disability, or gender identity.

3. Ordinance No. 9960 ("the Ordinance") amended Chapter 10 of the Code.

4. The Ordinance prohibits discrimination in housing for the additional classes of protection for a person's "source of income" or "immigration status."

5. The Ordinance § 10-102.32 defines "source of income" as:

Any source of money paid to an individual or family or in behalf of an individual or family, including, but not limited to:

(A) Money derived from any lawful profession, occupation or activity;

(B) money derived from any contract, agreement, loan, settlement, court order (such as court-ordered child support or alimony), gift, grant, bequest, annuity, or life insurance policy; and

(C) money derived from any assistance, benefit, or subsidy program.

(1) Assistance, benefit, or subsidy programs include, but are not limited to: Any housing assistance, such as Housing Choice Vouchers, Veterans Affairs Supportive Housing (VASH) Vouchers, tribal grants or vouchers, or any other form of housing assistance payment or credit, whether or not paid or distributed directly to a landlord or other owner of land; public assistance; emergency rental assistance; tribal or Native American benefit programs; veterans benefits; Social Security or other retirement programs; supplemental security income; or other assistance program administered by any federal, state or local agency or nonprofit entity.

6. Section 10-111 of the Code applies to unlawful housing and real property practices.

7. Ordinance 9960 adds prohibitions on discrimination based on "source of income" and "immigration status" to existing Sections of the City Code: 10-111.1; 10-111.2; 10-111.3; 10-111.4; 10-111.5: 10-111.7; and Ordinance 9960 includes prohibitions on discrimination based on "source of income" to existing Sections of the City Code: 10-111.8; 10-111.9; 10-111.10.

8. Section 10-111.21 states that these "prohibitions against discrimination based on immigration status established in this Article shall not apply when any federal, state, or City law requires lawful immigration status as a requirement or condition for receiving any contract, benefit, or service."

9. Section 10-111.13 establishes that the following is an unlawful housing/real property practice: "To refuse to comply with the administrative requirements of any assistance, benefit, or subsidy program, including but not limited to housing quality inspections for Housing Choice Vouchers."

10. Chapter 10 of the Code existed prior to passage of Ordinance 9960 and contained a complaint process.

11. A complaint based on a violation of Chapter 10 of the City Code can be submitted to the City's Human Relations Division, which will attempt to resolve the situation through a conciliation process before litigation of any alleged violation.

12. The Ordinance did not amend the enforcement procedure already in place for a violation of the Chapter 10 of the Code.

13. The Ordinance amends Sections 10-102, 10-110, and 10-111 of the City Code, in addition to Section 10-101.

14. Plaintiff is an unincorporated association of residential landlords in Lawrence, Douglas County, Kansas.

15. Plaintiff's membership includes Billy Williams.

16. Ordinance 9960's "source of income" and "immigration status" discrimination provisions limit Mr. Williams' ability to choose (or decline) a tenant, or tenants.

17. For Mr. Williams, certain immigration statuses are relevant to his determination of how likely it is that a tenant is going to be able to pay their rent for his standard lease term of 1 year.

18. If a tenant is unlawfully present within the United States, that tenant may be apprehended and/or removed from the Country by immigration enforcement officials.

19. In Mr. Williams' business judgment, a heightened potential for a tenant's apprehension and/or removal creates a significant risk of non-payment of rent over the lease term that is a direct result of the tenant's immigration status.

20. Moreover, in Mr. Williams' business judgment, because federal law limits employment opportunities based on immigration status, he believes he needs to consider and weigh the likelihood that a tenant who is unlawfully within the U.S. will lose their income and, as a result, their ability to pay rent.

21. During tenant screening, Mr. Williams has historically considered a tenant's source of income in his business judgments because he believes source of income is an indicator of: (1) the general stability of the tenant's income, (2) legal and regulatory risks associated with the income; and (3) seasonal or temporary risks associated with the income.

22. Mr. Williams has historically chosen to participate in the Housing Choice Voucher Program ("HCV") with some, but not all, of his rental units.

23. Mr. Williams has chosen to participate in the HCV, and other housing programs, on a case-by-case basis, depending on business considerations including administrative burdens imposed by the program.

24. Plaintiff's membership includes Sue Herynk.

25. On September 12, 2023, Deborah Barnes, City Prosecutor and Human Relations Investigator, sent Ms. Herynk a letter notifying her that a source of income discrimination

complaint had been filed against her, her husband, and their businesses with the Lawrence City Attorney's Office, Human Relations Commission, and Human Relations Division.

26. Ms. Barnes' letter advised Ms. Herynk that the Complaint was under investigation, and that an "Investigative Materials Request" would be forthcoming, demanding documentation regarding the Complaint.

27. The basis of the Complaint was that Ms. Herynk allegedly told the complainant by phone that Herynk was not willing to participate in the Housing Choice Voucher Program because participation would leave the landlord with uncovered liability in the case that the tenant were to abandon or damage the property.

28. On September 25, 2023, Ms. Barnes sent Ms. Herynk a documentation request, requiring that Ms. Herynk produce numerous business records including corporate governance documents, property lists, policies, advertising materials, applications for rent, current leases, and an answer to the Complaint.

29. On October 2, 2023, Ms. Herynk sent Ms. Barnes a copy of one of her business' written disqualification policies, and the policy states, inter alia, that it is a disqualification when a prospective tenant is "[i]n the United States illegally."

30. All landlords who participate in the HCV must sign a Housing Assistance Program ("HAP") Contract with the local housing authority.

31. The current HCV Housing Assistance Program Contract form can be accessed online from the Department of Housing and Urban Development website, at: https://www.hud.gov/sites/dfiles/OCHCO/documents/52641ENG.pdf.

32. The HAP Contract instructions state:

Use of this form

Use of this HAP contract is required by HUD [Department of Housing and Urban Development]. Modification of the HAP contract is not permitted. The HAP contract must be word-for-word in the form prescribed by HUD. . . .

33. Regarding the lease agreement between an HCV-participating landlord and tenant, the HAP Contract states:

2. Lease of Contract Unit

* * * *

c. The lease for the contract unit must include word-for-word all provisions of the tenancy addendum required by HUD (Part C of the HAP contract).

* * * *

e. The owner is responsible for screening the family's behavior or suitability for tenancy. The PHA [Public Housing Agency] is not responsible for such screening. The PHA has no liability or responsibility to the owner or other persons for the family's behavior or the family's conduct in tenancy.

34. Regarding the term and termination of government assistance under the HCV program, the HAP Contract states:

4. Term of HAP Contract

* * * *

b. When HAP contract terminates.

* * * *

(2) The PHA may terminate program assistance for the family for any grounds authorized in accordance with HUD requirements. If the PHA terminates program assistance for the family, the HAP contract terminates automatically.

(3) If the family moves from the contract unit, the HAP contract terminates automatically.

* * * *

(5) The PHA may terminate the HAP contract if the PHA determines, in accordance with HUD requirements, that available program funding is not sufficient to support continued assistance for families in the program.

* * * *

(7) The PHA may terminate the HAP contract if the PHA determines that the contract unit does not provide adequate space in accordance with the HQS because of an increase in family size or a change in family composition.

(8) If the family breaks up, the PHA may terminate the HAP contract, or may continue housing assistance payments on behalf of family members who remain in the contract unit.

35. Regarding the amount of rent that may be charged under the HCV program, the HAP Contract states

6. Rent to Owner: Reasonable Rent

a. During the HAP contract term, the rent to owner may at no time exceed the reasonable rent for the contract unit as most recently determined or redetermined by the PHA in accordance with HUD requirements.
b. The PHA must determine whether the rent to owner is reasonable in comparison to rent for other comparable unassisted units. To make this determination, the PHA must consider: (1) The location, quality, size, unit type, and age of the contract unit; and (2) Any amenities, housing services, maintenance and utilities provided and paid by the owner.
c. The PHA must redetermine the reasonable rent when required in accordance with HUD requirements. The PHA may redetermine the reasonable rent at any time.
d. During the HAP contract term, the rent to owner may not exceed rent charged by the owner for comparable unassisted units in the premises. The owner must give the PHA any information requested by the PHA on rents charged by the owner for other units in the premises or elsewhere.

36. Regarding the housing authority's payment of rental assistance to the landlord, the HAP Contract states:

7. PHA Payment to Owner

a. When paid
* * * *

(4) Housing assistance payments shall only be paid to the owner while the family is residing in the contract unit during the term of the HAP contract. The PHA shall not pay a housing assistance payment to the owner for any month after the month when the family moves out.

* * * *

e. Limit of PHA responsibility
(1) The PHA is only responsible for making housing assistance payments to the owner in accordance with the HAP contract and HUD requirements for a tenancy under the voucher program.
(2) The PHA shall not pay any portion of the rent to owner in excess of the housing assistance payment. The PHA shall not pay any other claim by

the owner against the family.

37. Regarding the housing authority's access to the rental premises and the landlord's records, the HAP Contract states:

11. PHA and HUD Access to Premises and Owner's Records

a. The owner must provide any information pertinent to the HAP contract that the PHA or HUD may reasonably require.
b. The PHA, HUD and the Comptroller General of the United States shall have full and free access to the contract unit and the premises, and to all accounts and other records of the owner that are relevant to the HAP contract, including the right to examine or audit the records and to make copies.
c. The owner must grant such access to computerized or other electronic records, and to any computers, equipment or facilities containing such records, and must provide any information or assistance needed to access the records.

38. Regarding the payment of rent to the landlord by the tenant, the HAP Contract's mandatory tenancy addendum states:

4. Rent to Owner

a. The initial rent to owner may not exceed the amount approved by the PHA in accordance with HUD requirements.
b. Changes in the rent to owner shall be determined by the provisions of the lease. However, the owner may not raise the rent during the initial term of the lease.
c. During the term of the lease (including the initial term of the lease and any extension term), the rent to owner may at no time exceed:

(1) The reasonable rent for the unit as most recently determined or redetermined by the PHA in accordance with HUD requirements, or
(2) Rent charged by the owner for comparable unassisted units in the premises.

39. Regarding the payment of damage to the premises by the tenant, the HAP Contract's mandatory tenancy addendum states:

15. Security Deposit

* * * *

d. If the security deposit is not sufficient to cover amounts the tenant owes under

the lease, the owner may collect the balance from the tenant.

40. Regarding changes of rent by agreement of the tenant and landlord, the HAP Contract's mandatory tenancy addendum states:

> **18. Changes in Lease or Rent**
> * * * *
> d. The owner must notify the PHA of any changes in the amount of the rent to owner at least sixty days before any such changes go into effect, and the amount of the rent to owner following any such agreed change may not exceed the reasonable rent for the unit as most recently determined or redetermined by the PHA in accordance with HUD requirements.

41. There are a multitude of government and non-government housing programs in addition to the HCV.

42. Each of the housing programs has different requirements for property owners and tenants.

43. As documented in the City Commission's meeting minutes, on February 14, 2023, the City of Lawrence passed Form B of Ordinance 9960, with an effective date of June 1, 2023.

Conclusions of Law

Summary Judgment

The standard for summary judgment is as follows:

> "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor

> of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and when we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied."

Bank v. Parish, 298 Kan. 755, Syl. ¶ 1, 317 P.3d 750 (2014). See also K.S.A. 60-256.

Plaintiff demonstrates standing to challenge the Ordinance on preemption and vagueness grounds; however, Plaintiff does not establish standing to challenge the Ordinance as violative of the Fourth Amendment.

"The burden to establish standing is on the party asserting it." *Kansas Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 746, 387 P.3d 795, 801 (2017). "Under the traditional test for standing in Kansas, "'a person must demonstrate that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct.'" [Citation omitted]" *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196, 1210 (2014). "[I]n order to establish a cognizable injury, a party must show 'a personal interest in a court's decision and that he or she personally suffers some actual or threatened injury as a result of the challenged conduct.'[Citation omitted]" *Solomon v. State*, 303 Kan. 512, 521, 364 P.3d 536, 543 (2015).

"[A]n association has standing to sue on behalf of its members when: (1) the members have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested require participation of individual members. [Citation omitted]" *NEA-Coffeyville v. Unified Sch. Dist. No. 445, Coffeyville, Montgomery Cnty.,* 268 Kan. 384, 387, 996 P.2d 821, 824 (2000).

Plaintiff is an unincorporated association of residential landlords in Lawrence, Douglas County, Kansas. Mr. Williams and Ms. Herynk are individual members of the association. Mr. Williams considers a prospective tenant's source of income in determining whether to rent to that person. The Ordinance prohibits that. Ms. Herynk is not willing to rent to tenants whose rent is paid by the Housing Choice Voucher program. The Ordinance prohibits Ms. Herynk from declining to rent to HCV tenants. Ms. Herynk does not rent to tenants who are not lawfully present in the United States. The Ordinance prohibits Ms. Herynk from excluding such tenants.

Both Mr. Williams and Ms. Herynk have had to change their established business practices because of the Ordinance. Ms. Herynk is subject to a pending complaint for alleged violation of the Ordinance for declining to participate in the Housing Choice Voucher program. Mr. Williams and Ms. Herynk have a personal interest in the lawfulness of the Ordinance because it rendered their standard business practices unlawful and subject to penalties. Both suffered injury as a result of the Ordinance sufficient to establish individual standing to challenge the Ordinance on vagueness and preemption grounds.

The purpose of the Landlords of Lawrence is to represent the interests of landlords; therefore, the interests Plaintiff seeks to protect are germane to the organization's purpose. Plaintiff's declaratory judgment and permanent injunction claims do not require participation of individual members. Plaintiff has established standing to challenge the constitutionality of the ordinance on vagueness and preemption grounds.

Plaintiff also challenges the Ordinance in the context of the Housing Choice Voucher program as an unlawful search and seizure. There is no evidence in the summary judgment record that Plaintiff's members have been subject to search or seizure due to involuntary

participation in the HCV program required by the Ordinance. Future injury can establish standing in certain circumstances:

> A party establishes a cognizable injury—i.e., an injury-in-fact—when they " 'suffer[ ] some actual or threatened injury as a result of the challenged conduct.' " *State v. Stoll*, 312 Kan. 726, 734, 480 P.3d 158 (2021). The injury must pose " 'adverse legal interests that are immediate, real, and amenable to conclusive relief.'" *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 678, 359 P.3d 33. An allegation of future injury can satisfy the injury in fact component of the standing inquiry if there is a threatened "impending, probable injury," as a plaintiff is not required to "expose himself to liability before bringing suit to challenge the basis for the threat." *Sierra Club*, 298 Kan. at 33, 310 P.3d 360; *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007); see also *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) ("When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law.").
>
> The United States Supreme Court has referred to this as a "pre-enforcement" challenge and has held that a plaintiff satisfies the injury-in-fact component in such a challenge when they allege " 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.' " 573 U.S. at 159, 134 S.Ct. 2334. A high threshold is required to demonstrate standing on a pre-enforcement challenge. The challenger must show an imminent threat of prosecution that is not speculative or imaginary. 573 U.S. at 160, 134 S.Ct. 2334.

League of Women Voters of Kansas v. Schwab, 317 Kan. 805, 813–14, 539 P.3d 1022, 1028 (2023).

The Housing Choice Voucher Program requires the landlord to allow PHA and HUD to access the rental unit, examine records, and access electronic devices and facilities containing such records.

Mr. Williams already participates in the HCV program with some, but not all of his units. In some instances, Mr. Williams has agreed to participate in the HCV program. In others he determined the administrative burden is too high. Ms. Herynk does not participate in the HCV program because she believes participation leaves her with uncovered liability if a tenant damages the property.

The record does not indicate that Mr. Williams or Ms. Herynk have been subjected to a search pursuant to the HCV program stemming from their involuntary participation in the HCV program because of the Ordinance. Since there has been no search or attempted search, the record is also silent about what type of search is at issue or the parameters and procedure for that search. The record does not indicate that Mr. Williams or Herynk are facing an imminent threat of search authorized by the HCV due to involuntary participation in the HCV because of the Ordinance.

The reason Plaintiff must demonstrate a threat of injury that is imminent and not speculative or imaginary is so the court can properly analyze a real dispute. The court cannot do so without the details of exactly what actions Plaintiffs allege are an unlawful search. The HCV program requirements encompass any number of possible searches or seizures. Different legal analyses likely apply to, for example, an unannounced search of a landlord's home office as compared to a letter from HUD requesting documentation of a rental record or a planned visit to a rental unit. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321, 98 S. Ct. 1816, 1825, 56 L. Ed. 2d 305 (1978) ("The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute."), *Delaware v. Prouse*, 440 U.S. 648, 649, 99 S. Ct. 1391, 1393, 59 L. Ed. 2d 660 (1979) (analysis of discretionary spot check traffic stops), *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 1731, 18 L. Ed. 2d 930 (1967) (analysis of lawfulness of home inspection and holding that a warrant is required).

Plaintiff does not have standing to challenge the Ordinance as a violation of the Fourth Amendment in the context of the Housing Choice Voucher program because Plaintiff has not

demonstrated an impending, probable injury. Summary judgment is granted in Defendant's favor on Plaintiff's Fourth Amendment challenge to the Ordinance.

The source of income definition is not unconstitutionally vague.

Plaintiff argues that the source of income definition is unconstitutionally vague because it is overly broad and delegates basic policy matters to enforcement agents. There are two prongs to a vagueness analysis. "First, the ordinance must give adequate notice to those tasked with following it." *City of Lincoln Ctr. v. Farmway Co-Op, Inc.*, 298 Kan. 540, 545, 316 P.3d 707, 711 (2013). Second, "[A]n ordinance's terms must be precise enough to adequately protect against arbitrary and discriminatory action by those tasked with enforcing it." *Id.* Plaintiff's challenge to the ordinance is based on the second prong.

The Ordinance defines "source of income" as "any source of money paid to an individual or family or in behalf of an individual or family…" The Ordinance then provides a non-exclusive list of examples. The Ordinance prohibits denying housing to a prospective tenant "because of… source of income."

The Ordinance's definition of "source of income" is easily understood. Literally any money paid to an individual or family or paid on their behalf meets the definition of "source of income." While there are examples of sources of income in the Ordinance, the language of the ordinance does not exclude any money paid to or on behalf of a tenant from the definition of "source of income." Likewise, the prohibited conduct is entirely clear. A landlord cannot decline to rent to a person, or otherwise discriminate against them, solely because of their source of income and the Code provides for enforcement against any landlord who does so.

Certainly, the Ordinance covers a wide range of factual scenarios; however, the prohibited conduct is simple and clear: a landlord shall not consider the source of a prospective tenant's rent payments in determining whether to rent to that person. The Ordinance is easily enforced because the prohibited conduct is precisely described. The Ordinance is not unconstitutionally vague.

Plaintiff argues that the Ordinance means a landlord would have to rent to a drug dealer, a human trafficker, or even an "assassin." There is nothing in the ordinance that prevents a landlord from declining to rent to someone who is engaged in dangerous, illegal conduct that might make them a risky tenant. In that instance, it is the illegality of the prospective tenant's conduct that is legitimately considered by a landlord, not the source of their income. The Ordinance does not prohibit landlords from making common sense decisions about risk due to criminal behavior of a prospective tenant.

The administrative requirements section is not unconstitutionally vague.

Plaintiff asserts that the Ordinance is unconstitutionally vague because it requires landlords to comply with the requirements of any benefit, assistance, or subsidy program. The Ordinance establishes that it is an unlawful housing practice to "refuse to comply with the administrative requirements of any assistance, benefit, or subsidy program, including but not limited to housing quality inspections for Housing Choice Vouchers." Code § 10-111.13.

As noted above, there are two prongs to a vagueness analysis. "First, the ordinance must give adequate notice to those tasked with following it." *City of Lincoln Ctr. v. Farmway Co-Op, Inc.*, 298 Kan. 540, 545, 316 P.3d 707, 711 (2013). Second, "[A]n ordinance's terms must be

precise enough to adequately protect against arbitrary and discriminatory action by those tasked with enforcing it." *Id.* Section 10-111.13 gives notice to landlords that they must follow the administrative requirements of any assistance, benefit, or subsidy program that pays rent for a tenant.

The Ordinance does not attempt to delineate the exact requirements that are to be followed for any specific program, nor does it need to in order to put those subject to the Ordinance on notice of what the Ordinance requires. Quite simply, if a landlord receives payment from an assistance, benefit, or subsidy program then the landlord must comply with the requirements of that assistance, benefit, or subsidy program. While broad, the Ordinance is clear and gives adequate notice of what a landlord must do to avoid enforcement actions. The administrative requirement rules in Section 10-111.13 are not unconstitutionally vague.

The source of income provisions are not preempted by federal law.

Plaintiff argues that the Ordinance is pre-empted by federal law. One instance of conflict pre-emption is "where 'the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."' [Citation omitted.]" *Bluestem Tel. Co. v. Kansas Corp. Comm'n,* 52 Kan. App. 2d 96, 109, 363 P.3d 1115, 1125 (2015).

Plaintiff argues the Ordinance is pre-empted because it interferes with the methods Congress chose to accomplish federal housing policy. Specifically, Plaintiff asserts that Congress decided that participation in the Housing Choice Voucher Program must be voluntary, and that the Ordinance makes participation mandatory. Plaintiff points to the legislative history of the

Housing Choice Voucher program, the US Code, and the Code of Federal Regulations in support of its position.

Plaintiff's argument has been considered by numerous courts and largely rejected. *See Bourbeau v. Jonathan Woodner Co.*, 549 F.Supp.2d 78, 88–89 (D.D.C.2008), *Montgomery Cnty. v. Glenmont Hills Assocs. Privacy World*, 402 Md. 250, 936 A.2d 325, 336 (2007), *Franklin Tower One, L.L.C. v. N.M.,* 157 N.J. 602, 725 A.2d 1104, 1113 (1999), *Comm'n on Human Rights & Opportunities v. Sullivan Assocs.,* 250 Conn. 763, 739 A.2d 238, 246 (1999), and *Austin Apartment Ass'n v. City of Austin*, 89 F. Supp. 3d 886, 895 (W.D. Tex. 2015). The court finds the above authority to be persuasive.

The United States Code encourages governmental action that promotes housing: "our Nation should promote the goal of providing decent and affordable housing for all citizens through the efforts and encouragement of Federal, State, and local governments..." 42 U.S.C.A. § 1437(a)(4). Additionally, "It is the policy of the United States... to assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families;" 42 U.S.C.A. § 1437(a)(1)(A).

The Ordinance's source of income provisions are consistent with the purposes and objectives of Congress because they are designed to prevent discrimination that would reduce the availability of decent and affordable housing. The source of income provisions are not federally preempted.

The immigration status provisions are not preempted by federal law due to field preemption.

Plaintiff argues that the Ordinance's immigration status provisions are subject to field preemption by federal law. "In rare cases, the Court has found that Congress 'legislated so comprehensively' in a particular field that it 'left no room for supplementary state legislation,' [Citation omitted]." *Kansas v. Garcia*, 589 U.S. 191, 208, 140 S. Ct. 791, 804, 206 L. Ed. 2d 146 (2020).

In *Kansas v. Garcia* the United States Supreme Court did not find that the Kansas statute was field preempted even though it dealt with immigration related matters. To find field preemption there must be thorough federal regulation indicating that "Congress occupies an entire field..." *Arizona v. United States*, 567 U.S. 387, 401, 132 S. Ct. 2492, 2502, 183 L. Ed. 2d 351 (2012). While federal law addresses many aspects of immigration, federal law does not evidence "a framework of regulation 'so pervasive ... that Congress left no room for the States to supplement it' [Citation omitted]" where housing discrimination and immigration status intersect. The Ordinance's immigration status provisions are not field preempted.

The immigration status provisions are not preempted by federal law due to conflict preemption.

Plaintiff alleges that the Ordinance's immigration status provisions conflict with federal law. "[S]tate laws are preempted when they conflict with federal law. [Citation omitted] This includes cases where 'compliance with both federal and state regulations is a physical impossibility,' [Citation omitted]". *Arizona v. United States*, 567 U.S. 387, 399, 132 S. Ct. 2492, 2501, 183 L. Ed. 2d 351 (2012).

Plaintiff argues that the Ordinance's immigration status provisions conflict with 8 U.S.C.A. 1324(a)(1)(A)(iii) which makes it a crime to "harbor" an "alien" who is "in the United States in violation of law..." Plaintiff's argument rests largely on the interpretation of "harbor" in *United States v. Lopez*, 521 F.2d 437 (2d Cir. 1975). In that case from the Second Circuit Court of Appeals, the defendant provided housing for 27 people who were not lawfully present in the United States; however, the defendant was not involved in smuggling those people into the country. The defendant's actions were not limited to providing housing:

> In addition to providing lodging to large numbers of aliens with knowledge of their illegal entry, appellant had assisted many of them in other ways designed to facilitate their continued unlawful presence in the United States. He had helped some to obtain employment by personally filling out job applications on their behalf and by transporting them in vans to and from work. In return for payment to him of substantial sums of money by others Lopez, as a means of enabling them to assume the guise of an apparently lawful status in the United States, had arranged sham marriages, i. e., ceremonies for marriages that were not consummated, with the participants parting immediately after the ceremony.

United States v. Lopez, 521 F.2d 437, 439 (2d Cir. 1975).

The Court held "[W]e are persuaded by the language and background of the revision of the statute that the term [harbor] was intended to encompass conduct tending substantially to facilitate an alien's 'remaining in the United States illegally,' provided, of course, the person charged has knowledge of the alien's unlawful status." *Id. at* 440–41. The Court then reviewed the defendant's conduct and held it warrants "the inference that Lopez was engaged in providing shelter and other services in order to facilitate the continued unlawful presence of the aliens in the United States, which amounts to harboring within the meaning of the statute." *Id.* at 441. The Court also noted "Indeed such a large-scale operation would appear to establish a sufficient link with the aliens' illegal entry even to satisfy the stricter interpretation of § 1324 advanced by Lopez." *Id.*

Plaintiff argues that *Lopez* supports the view that following the Ordinance by not discriminating based on immigration status could constitute "harboring" in violation of federal law. The *Lopez* decision does not clearly establish that providing housing constitutes harboring in violation of federal law because Mr. Lopez was involved in a large-scale operation that went far beyond providing housing to persons who were not lawfully present in the country.

Certainly, the Second Circuit did not read Lopez in the way that Plaintiff does. *See United States v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999) ("In Lopez, we noted a number of such acts, including providing unlawful aliens with housing, transportation, and sham marriage ceremonies, and assisting them in obtaining employment.") and *United States v. Vargas-Cordon*, 733 F.3d 366, 380 (2d Cir. 2013) ("We note, moreover, that in our decisions arguably applying a broader conception of "harboring" that does not require that a defendant aim to assist an alien in remaining undetected by authorities, the defendants did more than merely provide shelter.")

The Ordinance prohibits discrimination based on immigration status. A landlord's compliance with the Ordinance does not constitute harboring under federal law. The Ordinance's immigration status provisions are not conflict preempted by federal law.

The immigration status provisions are not preempted by federal law as they are not obstacles to the full accomplishments of federal housing law.

Plaintiff argues the immigration status provisions are preempted because they are obstacles to the objectives of Congress. This type of preemption occurs "where 'the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."' [Citation omitted.]" *Bluestem Tel. Co. v. Kansas Corp. Comm'n*, 52 Kan. App. 2d 96,

109, 363 P.3d 1115, 1125 (2015). "Conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge,* 403 U.S. 274, 287, 91 S. Ct. 1909, 1918, 29 L. Ed. 2d 473 (1971).

Plaintiff does not establish that it is the clear objective of Congress that landlords can, or must, discriminate against potential tenants based on immigration status. For that reason, the immigration status provisions of the Ordinance do not frustrate the objectives of Congress and are not preempted by federal law.

Plaintiff lacks standing to challenge the Ordinance as violative of the Fourth Amendment.

Plaintiff argues that the Ordinance violates the Fourth Amendment's prohibition on unreasonable searches and seizures in the context of mandatory participation in the HCV program. As discussed above, Plaintiff lacks standing to challenge the Ordinance on Fourth Amendment grounds.

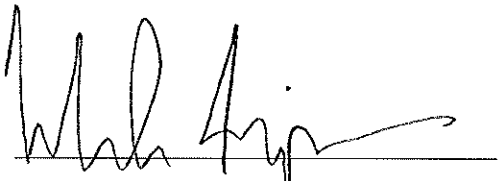
Plaintiff's Request for permanent injunction is denied.

"[T]o receive a permanent injunction, 'the plaintiff must actually succeed on the merits.'[Citation omitted]" *Steffes v. City of Lawrence,* 284 Kan. 380, 395, 160 P.3d 843, 853 (2007). Since Plaintiff has not succeeded on the merits, the request for a permanent injunction is denied.

Conclusion

Defendant City of Lawrence established it is entitled to summary judgment on all of Plaintiff's claims as a matter of law. Defendant's Motion for Summary Judgment is granted. Plaintiff's Motion for Summary Judgment is denied.

It is so ordered.



Mark Simpson

District Court Judge