IMPLIED PREEMPTION IN THE REGULATION OF LAND

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INTRODUCTION

The subject of preemption by one unit of government over another is a fundamental issue precedent to the exercise of regulatory authority by state and local government. While preemption—in particular state and local preemption by the federal government—has been the subject of considerable discussion in the literature,[1] there has not been much recent discussion of preemption in the context of real property. The subject is treated more or less the same by most courts, whether the case involves federal preemption of state (and occasionally local) government law, or whether it involves state preemption of local government law.[2] The only critical difference—and it is critical—with respect to federal preemption is the need to carefully evaluate and analyze the federal government's authority to exercise the allegedly preemptive statutory or regulatory authority in the first place, since the federal government is one of enumerated powers with virtually no independent regulatory authority beyond that conveyed by an admittedly generous interpretation of the U.S. Constitution's Commerce Clause. The 11th Amendment also forbids the federal government from commanding states to regulate its citizens under the so-called anticommandeering doctrine. Both of these principles are fully and

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1. Michael T. Flannery, *Social Security, Divorce, and the Scope of Federal Preemption*, 66 BUFF. L. REV. 1 (2018); Amelia Raether, *Commandeering, Preemption, and Vehicle Emissions Regulation Post*-Murphy v. NCAA, 1014 NW. U.L. REV. 1015 (2020); Rachel Rothschild, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENV'T L.J. 412 (2019); *Federalism—Preemption—Massachusetts District Court Finds Portion of Local Drone Ordinance Preempted by FAA Regulation*—Singer v. City of Newton, No. CV 17-10071, 20017 WL 4176477 (D. Mass. Sept. 21, 2017), 131 HARV. L. REV. 2057 (2018); Jason A. Kurtyka, *Flying First Class: The Third Circuit Establishes a Methodology for Implied Preemption Analysis of Federal Premarket Approval Regulations in* Sikkelee v. Precision Airmotive Aircorp, 62 VILL. L. REV. 527 (2017).

2. NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 3 (2018).

clearly discussed and articulated in *Murphy v. National Collegiate Athletic Association*.[3] Since states have all the powers not granted to the federal government, reserved specifically to the states by the 10th Amendment, the only needful fundamental preliminary investigation with respect to state preemption of local government authority is the extent of limitations in the relevant state constitution, since state constitutions are limits, not grants, on otherwise plenary authority to regulate and govern.[4]

The standards—if not their application—are relatively straightforward and articulated in any number of recent cases. Virtually all commence with the fairly obvious statement that a superior level of government—subject to the limitations set out in the preceding paragraph—can always expressly preempt an inferior level, as the U.S. Supreme Court recently noted.[5] Absent such express preemption, the analysis and discussion generally passes on to the most difficult and arguably troublesome type: implied preemption. The elements of preemption are nicely set out by the Supreme Court in *Murphy*:

> Our cases have identified three different types of preemption . . . "conflict preemption". . . [where] state law imposed a duty that was inconsistent—*i.e.*, in conflict—with federal law . . . "[e]xpress preemption". . . illustrative [by the Airline Deregulation Act of 1978 which provided] that "no State or political subdivision thereof . . . shall enforce or enact any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any [covered] air carrier,". . . and "[f]ield preemption [which] occurs when federal law occupies a 'field' of regulation 'so comprehensively that it has left no room for supplementary state legislation.'"[6]

As the Court observed, express preemption is usually not difficult to apply. It is implied preemption that most often leads to litigation. A relatively recent magistrate order in Hawai'i[7] best illustrates the primary factors favoring such implied preemption in a property law context:

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3. 138 S. Ct. 1461 (2018).

4. DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM (8th ed. 2014).

5. Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894 (2019).

6. *Murphy*, 138 S. Ct. at 1480.

7. Syngenta Seeds, Inc. v. Cnty. of Kauai, 2014 WL 4216022, at *1 (D. Haw. Aug. 25, 2014).

1. Does the superior government occupy the field?
2. Does the superior government evince a comprehensive plan or scheme?
3. Is there a need for statewide or federal uniformity?
4. Does the inferior government forbid what the superior government permits?
5. Does the inferior government permit what the superior government prohibits?

In *Syngenta Seeds v. County of Kauai*, the county passed an ordinance regulating the growing of genetically modified organisms ("GMO")[8] agricultural products. Concerned primarily with the spreading of pesticides, the ordinance:

1. Imposed various notification requirements on commercial agricultural entities, including mandatory disclosure of the use of certain restricted pesticides and the possession of GMO by commercial agricultural entities;
2. Created pesticide buffer zones;
3. Required the county to complete an Environmental and Public Health Impact Study to address environmental and public health questions related to large-scale commercial agricultural entities using pesticides and GMO; and
4. Placed a penalty provision providing that any firm or corporation violating the ordinance shall be assessed a civil fine of $10,000 to $25,000 per day, per violation and shall be guilty of a misdemeanor and upon conviction be punished by a fine of not more than $2,000 or imprisoned for not more than one year, or both, for each offense.[9]

Syngenta Seeds challenged the ordinance on a motion for summary judgement.[10]

While noting that Hawai'i's four counties have authority to enact laws pertaining to agriculture, both as a matter of state enabling statutes and broad state constitutional power, the court noted that

8. In this Article, GMO is used to describe any organism whose genetic material has been altered using genetic engineering techniques.

9. *Syngenta Seeds*, 2014 WL 4216022, at *1–2.

10. *Id.* at *1.

such power was not unlimited.[11] After dismissing plaintiffs' claims that the county ordinance prohibited certain disclosure requirements under a state statute governing disclosure and that a statutory right to farm law precludes the county from regulating nuisance—in other words, finding no direct conflict—the court then addressed implied conflict.[12]

It held that such a conflict existed and so the ordinance was impliedly preempted.[13] Finding that the ordinance legislated in an area already staked out by the legislature for exclusive use and statewide statutory treatment, the court found the ordinance impermissibly entered an area of such use and treatment because of the comprehensive nature of the state's statutory scheme.[14] First, the court held that the ordinance covered the same subject matter embraced by state law and regulation.[15] The ordinance imposed various pre- and post-application reporting requirements and established buffer zones in which no crops to which pesticides would be applied could be planted.[16] However, the state pesticide law already addressed pesticide use and granted extensive rulemaking authority to State of Hawai'i Department of Agriculture ("HDOA").[17] The court found these to be so extensive as to cover the same subject matter as the ordinance.[18] The court found the same to be true with respect to licensing, sales and enforcement.[19] Therefore, this "evidences the legislature's intent that the state law be both uniform and exclusive."[20] The court also found the same to be true with respect to annual GMO reporting requirements.[21] In sum, the court determined:

> [T]hat these statutory provisions, in the context of art. XI § 3, the comprehensive administrative system established under the HDOA, and the complete absence of reference to counties or local governments therein, evidence the legislature's intent that the

11. *Id.* at *3–4.
12. *Id.* at *5–7.
13. *Id.* at *9.
14. *Id.*
15. *Syngenta Seeds*, 2014 WL 4216022, at *8.
16. *Id.* at *7.
17. *Id.*
18. *Id.* at *8.
19. *Id.*
20. *Id.*
21. *Syngenta Seeds*, 2014 WL 4216022, at *8–9.

> state scheme for the regulation of specific potentially harmful plants be both uniform and exclusive preempting the imposition of local regulations on this specific issue.[22]

Accordingly, the court held the GMO notification provision of the ordinance was preempted by state law and barred from taking effect.[23] The court then turned to federal preemption.[24]

Plaintiffs also claimed that the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA") preempted some of the informational requirements of the county ordinance and that a federal coordinated framework comprehensively regulated GMO, thereby impliedly preempting both state and county regulation.[25] Noting that Congress has the constitutional power to preempt state law either expressly or implicitly within the sphere of federal power and authority, the court further explained that in the absence of express preemptive language, preemption may be "inferred" (presumably the same as implied) first under either field preemption, "where federal law 'so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it' or 'where the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject'"; or second, where the state law actually conflicts with federal law such that "compliance with both . . . is a physical impossibility" or the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[26]

Turning first to the ordinance's reporting requirements, the court held there was neither express nor implied preemption by FIFRA.[27] According to the court, FIFRA imposes only informational restrictions on records maintained under FIFRA and the county ordinance imposed record-keeping requirements pursuant to a separate and independent state power, and so FIFRA's restrictions do not apply.[28] As to GMO regulations, since the county ordinance did not deal with movement in interstate commerce which would conflict with the

22. *Id.* at *9.
23. *Id.*
24. *Id.*
25. *Id.* at *10.
26. *Id.*
27. *Syngenta Seeds*, 2014 WL 4216022, at *11–12.
28. *Id.* at *12.

Federal Plant Protection Act ("PPA"), there was no preemption in the GMO notification provision of the county ordinance, nor do the county reporting requirements interfere with Animal and Plant Health Inspection Service regulations dealing with the conduct of field trials.[29] The federal district court's decision was affirmed by the Ninth Circuit on appeal on all accounts.[30]

What follows is a longer discussion of preemption in the area of GMO regulation and a summary of other property cases by subject matter which deal with implied preemption standards mostly as set out in *Syngenta Seeds*.

I. THE CASE LAW: A SURVEY BY SUBJECT

A. Transgenic Agriculture (GMO and GE)

Recently, Americans have become increasingly concerned about how food is grown and produced. With the trends in farm-to-table dining and organic farming, attention becomes focused on the seasonless American supermarket with year-round strawberries and tomatoes grown halfway around the world. Given the continuing debate on transgenic agriculture, which includes use of genetic engineering techniques ("GE") and GMO, there has been surprisingly little litigation of state-local preemption of transgenic agriculture regulation, even though regulation of land use and agriculture are traditionally areas of local concern.

GMO are achieved through a GE process in which a laboratory technician extracts genes from the DNA of one species and combines them with the genes of another.[31] According to the Federal Drug Administration ("FDA"), genetic modification uses a biotechnological method to manipulate an organism's genome.[32] Foreign genes are not necessarily extracted from like species and may originate in "bacteria, viruses, insects, animals, or even humans."[33] GE has been used

29. *Id.* at *12–14.

30. Syngenta Seeds, Inc. v. County of Kauai, 842 F.3d 669 (9th Cir. 2016).

31. *What is a GMO?*, INST. FOR RESPONSIBLE TECH., http://responsibletechnology.org/gmo-education (last visited June 21, 2021).

32. *Genetic Engineering, Agricultural Biotechnology Glossary*, U.S. DEP'T OF AGRIC., https://www.usda.gov/topics/biotechnology/biotechnology-glossary (last visited June 21, 2021).

33. INST. FOR RESPONSIBLE TECH., *supra* note 31.

to increase nutritional benefits or crop productivity,[34] disease resistance,[35] herbicide tolerance, and the ability of the plant to produce its own pesticide.[36] While selective breeding to achieve certain desirable traits has been practiced by farmers for centuries, modern technology permits giant strides in improved crop yields, enhanced nutritional value, and improved drought-resistance and tolerance to cold temperatures and insects.[37]

However, some critics claim that trait manipulation may cause unforeseen effects to the global ecosystem and ecological processes,[38] or that the prevalence of GMO will result in less biodiversity and increase the development of pesticide-resistant insects and weeds.[39] As a result, the federal government has enacted a comprehensive framework of regulation for transgenic agriculture. The U.S. Department of Agriculture's ("USDA") Animal and Plant Health Inspection Service ("APHIS") and Environmental Protection Agency ("EPA") consider potential environmental impacts of pest-resistant biotechnology on other species like honeybees and earthworms, through testing.[40] The EPA and FDA also test for potential toxicity and potential to cause an allergic response to regulate food safety of GMO.[41] Because GMO are heavily regulated by the federal government, it is unsurprising that most preemption claims relating to GMO are of the federal-state type. Nevertheless, a few recent cases evaluating claims of state-local preemption suggest that some local governments continue to regulate GMO.

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34. *Biotechnology Frequently Asked Questions (FAQs)*, U.S. DEP'T OF AGRIC., https://www.usda.gov/topics/biotechnology/biotechnology-frequently-asked-questions-faqs (last visited June 21, 2021) ("Biotech crops may provide enhanced quality traits such as increased levels of beta-carotene in rice to aid in reducing vitamin A deficiencies and improved oil compositions in canola, soybean, and corn.").

35. *Id.*

36. INST. FOR RESPONSIBLE TECH., *supra* note 31.

37. *Genetically Modified Crops*, CASE STUDIES IN AGRICULTURAL SECURITY, https://fas.org/biosecurity/education/dualuse-agriculture/2.-agricultural-biotechnology/genetically-engineered-crops.html (last visited June 21, 2021).

38. Joel Achenbach, *Are GMO Crops Safe? Focus on the Plant, Not the Process, Scientists Say.*, WASH POST (May 17, 2016), https://www.washingtonpost.com/news/speaking-of-science/wp/2016/05/17/ge-crops/?utm_term=.b5f81185fce2.

39. Julie M. Muller, *Naturally Misleading: FDA's Unwillingness to Define "Natural" and the Quest for GMO Transparency Through State Mandatory Labeling Initiatives*, 48 SUFFOLK U. L. REV. 511, 516–17 (2015).

40. U.S. DEP'T OF AGRIC., *supra* note 34.

41. *Id.*

Hawai'i remains ground zero in the debate over local regulation of GMO.[42] Beyond the discussion of *Syngenta Seeds* in the Introduction above, it is therefore worth summarizing two other GMO cases from Hawai'i.

In an unreported case, a federal magistrate judge found a Hawai'i County ordinance restricting "the open air cultivation, propagation, development, or testing of genetically engineered crops or plants" preempted by state law and, in part, expressly preempted by federal law.[43] Though unreported, it has been relied on by federal courts in subsequent decisions.[44] The challengers argued that state law preempted the ordinance based on the state constitution vesting the state with exclusive authority over agriculture and the HDOA and Hawai'i Board of Agriculture ("HBOA") exercising such exclusive authority by establishing a comprehensive framework for regulating plants that present the same risk of environmental impacts the ordinance claimed to address.[45] The magistrate judge noted these were the same arguments for state preemption before the court in *Syngenta Seeds*.[46] Applying the "comprehensive statutory scheme test" from *Richardson v. City and County of Honolulu*, the magistrate noted the "critical determination . . . is whether the statutory scheme . . . indicates a legislative intention, express or implied, to be exclusive and uniform throughout the state."[47] Upon finding overlapping subject matter in the statutory scheme and municipal ordinance, the magistrate proceeded to analyze the uniformity and exclusivity of a statutory scheme.[48] Based on the HBOA receiving input on statewide agricultural problems from members who reside in each county and the HBOA chair's position on a state advisory committee with

42. David L. Callies, *GMO Regulation*, 38 No. 10 ZONING & PLANNING L. REPORT 1 (2015). There is a recent, unreported case of note where a federal district court in Oregon upholding a county ordinance approved by ballot measure, finding no preemption under Oregon's Right to Farm Act and additional, recent state law authorizing such ordinance. Schultz Family Farms LLC v. Jackson Cnty., 2015 WL 3448069, at *1 (D. Or. May 29, 2015).

43. Haw. Floriculture & Nursery Ass'n v. Cnty. of Haw., 2014 WL 6685817, at *1 (D. Haw. Nov. 26, 2014).

44. Robert Ito Farm, Inc. v. Cnty. of Maui, 111 F. Supp. 3d 1088, 1104, 1108, 1111–12 (D. Haw. 2015); Atay v. Cnty. of Maui, 842 F.3d 688, 704 n. 9 (9th Cir. 2016).

45. *Haw. Floriculture*, 2014 WL 6685817 at *3.

46. *Id.*

47. *Id.* at *4 (citing Richardson v. City & Cnty. of Honolulu, 868 P.2d 1193, 1208–09 (Haw. 1994)).

48. *Id.* at *6.

"extensive and broad responsibilities over agricultural problems spanning the various counties to form a coherent and comprehensive statewide agricultural policy," the magistrate concluded "legislative intent for a . . . comprehensive state statutory scheme . . . pre-empt[ed] the County's ban on genetically engineered organisms."[49] Accordingly, the ordinance was invalidated by virtue of implied preemption by state law.[50]

The magistrate also reviewed the different standards for federal implied preemption that applied.[51] For federal field preemption to apply, federal law must either "so thoroughly occup[y] a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it," or "the federal interest [must be] so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[52] For federal conflict preemption to apply, "compliance with both federal and state regulations [must be] a physical impossibility, or when the state law [must stand] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[53] Thus, the magistrate also found that the ordinance's ban on open air field testing of GE is expressly preempted under the PPA by parsing the statutory language to identify the domain expressly preempted.[54]

In its 2015 decision of *Robert Ito Farm, Inc. v. County of Maui* 2015, a federal court for the District of Hawai'i found a Maui County GMO ordinance preempted by state and federal law, thereby in excess of the county's ability to regulate.[55] The court found the Maui ordinance was expressly preempted by federal regulation of plant pests and noxious weeds.[56] The stated purpose of the Maui ordinance was to "protect against transgenic contamination caused by [genetically engineered] operations and practices . . . (including pesticide use and testing); to preserve the right of the County to reject [genetically

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49. *Id.*

50. *Id.* (citing Richardson v. City & Cnty. of Honolulu, 868 P.2d 1193, 1207, 1209 (Haw. 1994)).

51. *Id.* at *9–10.

52. *Id.* at *9 (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) and Hawaiian Navigable Waters Pres. Soc'y v. State of Hawaii, 823 F. Supp 766. 771 (D. Haw. 1993)).

53. *Id.* (quoting Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985)).

54. Id. at *7–8.

55. Robert Ito Farm, Inc. v. Cnty. of Maui, 111 F. Supp. 3d 1088 (D. Haw. 2015).

56. *Id.* at 1104.

engineered] operations and practices based on health-related, moral, or other concerns, and to preserve Maui County's environment and public trust resources."[57]

The court examined the plain language of the ordinance to determine whether it was preempted by the PPA.[58] The PPA expressly preempts any "State or political subdivision of a State" from regulating plants pests and noxious weeds, among other plant types.[59] According to the findings and purpose of the Maui ordinance, which included preventing contamination of and damage to non-GE papaya and banana crops, the court found:

> The Ordinance inherently considers [genetically engineered] organisms to be 'noxious weeds' and/or 'plant pests' as defined in [the Plant Protection Act].
>
> According to the Ordinance, GE plants directly and indirectly injure or damage crops, agriculture interests, public health and the environment. The Ordinance therefore seeks to regulate what it sees as a 'noxious weed' as defined by federal law.[60]

In finding the Maui ordinance expressly preempted by federal law, the court rejected the argument by proponents of the ordinance that "because the Ordinance has an alleged purpose other than governing 'plant pests,'" preemption does not apply.[61]

The court did not stop there. The court continued to find the ordinance invalid by implied conflict preemption under federal law.[62] A purpose of the PPA is to set "a national standard governing the movement of plant pests and noxious weeds in interstate commerce based on sound science."[63] The Maui ordinance ban on GE organisms, including some plant pests, "causes the ordinance to run afoul" of the purpose of the PPA, thereby frustrating its purpose.[64]

The court then turned to the issue of preemption under state law, applying the test for "exclusive and statewide statutory treatment"

57. *Id.* at 1103 (citing the ordinance).
58. *Id.* at 1104.
59. *Id.* at 1102.
60. *Id.* at 1104.
61. *Robert Ito Farm, Inc.*, 111 F. Supp. 3d at 1105.
62. *Id.* at 1107.
63. *Id.* (internal citations omitted).
64. *Id.*

from *Syngenta Seeds*.[65] Following the two-step analysis, the court first "determine[d] whether an ordinance impermissibly legislates in an area of exclusive and statewide statutory treatment"—the "comprehensive statutory scheme" test—was applied.[66] The court found the "state statutes and regulations create a comprehensive scheme" that reflect the authority of the state over plants that may harm agriculture, the environment, or the public.[67] Thus, the ordinance attempted "to regulate the same subject matter that the [existing] state framework addresses."[68] The argument by a proponent of the ordinance that the state framework addressed a "statewide concern" while the ordinance "addresse[d] local health and safety concerns . . . within the County," failed because "preemption of a county ordinance by state law does not turn on whether the ordinance addresses local, rather than statewide, concerns."[69] The court stated that GE organisms may be "embraced within a comprehensive state statutory scheme" "absent explicit mention of GE organisms in a particular state law," and in this case, "the scope of [the state framework] reaches GE organisms" and the absence of explicit mention of "GE organisms in no way precludes preemption."[70]

Second, the court considered "whether the statutory scheme disclose[d] an express or implied intent to be exclusive and uniform throughout the state."[71] The court noted the network of state agencies created by the state legislature that have "extensive and broad responsibilities over agricultural problems spanning the various counties to form a coherent and comprehensive statewide agricultural policy" sufficient to "disclose[] an intent to be the exclusive and uniform [regulating bodies] throughout the state."[72]

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65. *Id.* at 1109. "Any ordinance that 'conflict[s] with the intent of a state statute or legislate[s] in an area already staked out by the legislature for exclusive and statewide statutory treatment' is preempted by state law." *Id.* (citing Richardson v. City & Cnty. of Honolulu, 868 P.2d 1193, 1207 (Haw. 1994); and *Syngenta Seeds*, 2014 WL 4216022, at *1 (D. Haw. Aug. 25, 2014)).

66. *Robert Ito Farm, Inc.*, 111 F. Supp. 3d at 1109.

67. *Id.* at 1110.

68. *Id.*

69. *Id.* at 1110–11.

70. *Id.* at 1109, 1011.

71. *Id.* at 1109.

72. *Robert Ito Farm, Inc.*, 111 F. Supp. 3d at 1112 (quoting *Haw. Floriculture*, 2014 WL 6685817, at *1, *6 (D. Haw. Nov. 26, 2014)). The court took great care to note that its decision does not pass judgment on the merit, benefit, or harm posed by GMO.

The Ninth Circuit affirmed the decisions below, finding the Maui ordinance expressly preempted by federal law as applied to GE plants federally regulated as plant pests, but neither expressly nor impliedly preempted as applied to GE plants that have been deregulated.[73] The Ninth Circuit further found the ordinance impliedly preempted by state law in its application to federally deregulated, commercialized GE plants, thereby affirming the invalidation of the ordinance.[74] The court first identified three conditions in the express preemption provision in the PPA that "must be met for a local law to be preempted."[75] The court looked at the express design and purpose of the ordinance and the scope of the federal regulation to conclude that all three conditions for express preemption under the PPA were met to the extent the ordinance sought to regulate GE plants that are federally regulated as plant pests.[76]

The appellate court did, however, disagree with the finding of the court below that the ordinance was "impliedly preempted by the PPA in its application to deregulated, 'commercialized' GE crops."[77] The court began its "search for implied preemptive intent by [noting] the PPA's express preemption creates a 'reasonable inference' that Congress did not intend to preempt state and local laws that do not fall within [the scope of its preemption clause]."[78] While this inference can be overcome by proof that the ordinance creates an "actual conflict" with any federal statutory or regulatory provision, or more broadly that the ordinance impermissibly "frustrates any federal objective," the court found the opponents of the ordinance failed to do both.[79] Following the Supreme Court's "warn[ing] that obstacle preemption analysis does 'not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives[, because] such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law,'" the

73. Atay v. Cnty. of Maui, 842 F.3d 688, 710 (9th Cir. 2016). Note that the Ninth Circuit's unpublished decision of *Syngenta Seeds* was filed on the same day. 2014 WL 4216022, at *1 (D. Haw. Aug. 25, 2014).

74. *Id.*

75. *Id.* at 701.

76. *Id.* at 702–03.

77. *Id.* at 703–04 (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995)) (internal citations omitted).

78. *Atay*, 842 F.3d at 704.

79. *Id.*

Ninth Circuit maintained a high threshold for conflict preemption and found nothing in the PPA or its "implementing regulations suggest[] a local government could not choose to" ban commercialized, deregulated GE crops.[80] Regulation of commercialized crops that have been federally deregulated therefore remains within the authority of state and local governments.[81]

The Ninth Circuit, however, affirmed the finding of the court below that the ordinance's "remaining application to [deregulated,] commercialized GE plants" was preempted by state law.[82] The court used the three-part test from *Richardson*, evaluating each of the three "overlapping elements": "(1) [that] state and local laws address the same subject matter, (2) that state law comprehensively regulates that subject matter, and (3) that the legislature intended the state law to be uniform and exclusive."[83] The court found that "the pervasiveness of the . . . statutory scheme" as well as "[s]everal specific provisions of the . . . scheme . . . evidence[d]" the legislature's intent that "the State's regulatory oversight of potentially harmful plants . . . be uniform and exclusive of supplemental local rules," concluding that "the [o]rdinance impermissibly intrudes into this area of exclusive State regulation" and thereby impliedly preempted.[84]

B. Cannabis

The growing legalization of cannabis use at the state level has resulted in preemption challenges on the federal-state level, because the Federal Controlled Substances Act still plainly criminalizes all use of cannabis and related activities. However, as of November of 2020, thirty-six states and Washington, D.C. have legalized the use and cultivation of cannabis for medical and/or recreational use.[85] State authorization, however, does not prevent local attempts at regulation or exclusion of cannabis-related land use within a municipality. Most of the existing state statutes limit local authority to

80. *Id.* at 705.
81. *Id.*
82. *Id.* at 705–06.
83. *Id.* at 706.
84. *Atay*, 842 F.3d at 710.
85. Jeremy Berke, Shayanne Gal & Yeji Jesse Lee, *Marijuana legalization is sweeping the US. See every state where cannabis is legal.*, BUSINESS INSIDER (Apr. 14, 2021), https://www.businessinsider.com/legal-marijuana-states-2018-1.

regulate land use pertaining to cannabis within their jurisdictions.[86] The ability of local governments to regulate cannabis within its boundaries differs from state to state: some states expressly preempt local regulation of marijuana while others are silent on the subject, leaving open the issue of whether the statutory scheme impliedly preempts such regulation by imposing statewide regulation.[87]

1. Zoning

An obvious means of excluding cannabis cultivation and dispensaries from a municipality is through zoning. As the statutes legalizing certain cannabis activities vary from state to state, so do the local attempts to curtail such activities that are legalized at the state level. Generally, total bans achieved through local zoning have been upheld, though a recent appellate decision in Arizona discussed below offers a minority approach to the preemption issue of excluding legalized use of cannabis through zoning.

The Township of Byron, Michigan passed a zoning ordinance requiring medical marijuana caregivers to obtain a permit and "cultivate marijuana as a 'home occupation' at a full-time residence."[88] The ordinance was challenged by a licensed qualifying patient and registered primary caregiver who grew cannabis without a permit "on rented commercially zoned property" in an enclosed, locked facility.[89] The township sent the caregiver's landlord a cease and desist letter, which "asserted that violations of the zoning ordinance were a nuisance per se."[90] The caregiver challenged the permit requirement and locational restriction, claiming that the "zoning ordinance was preempted . . . and . . . therefore, unenforceable."[91] The trial court found the "ordinance impermissibly subjected . . . caregivers to penalties," which state law prohibits and that the "[t]ownship could not prohibit what [state law] explicitly authorized—the medical use of [cannabis]."[92] The court of appeals affirmed.[93]

86. Martha H. Chumbler, *Land Use Regulation of Marijuana Cultivation: What Authority is Left to Local Government*, 49 URB. LAWYER 505 (2017).

87. *Id.* at 506.

88. DeRuiter v. Twp. of Byron, 949 N.W.2d 91, 93 (Mich. 2020).

89. *Id.* at 94.

90. *Id.* at 95.

91. *Id.*

92. *Id.*

93. *Id.*

In 2020, the Supreme Court of Michigan addressed only conflict preemption on appeal, finding no preemption and upholding the validity of the ordinance.[94] The court defines conflict preemption narrowly: only where "its additional requirements do not contradict the requirements . . . in the statute."[95] So long as the municipality does not prohibit or penalize all medical cannabis cultivation or "impose regulations that are 'unreasonable and inconsistent with regulations established by state law[,]'" there is no conflict.[96] The court also found the permit requirement did not impermissibly infringe on the caregiver's medical use of cannabis, because "the permit requirement does not effectively prohibit medical use . . . ."[97]

In 2015, the Supreme Court of Washington found state law permitting patients to grow medical marijuana in "collective gardens" did not preempt a city from banning collective gardens in the city through its zoning ordinance.[98] The original purpose of the statute was to provide "an affirmative defense to criminal prosecution" of medical cannabis users.[99] The same statute permitting collective gardens also grants cities and towns the power to zone the "production, processing, or dispensing of medical [cannabis]."[100] Under this authority, the City of Kent enacted the zoning ordinance described by the court as follows: "Styled as a zoning ordinance, it prohibits collective gardens . . . in every zoning district within the city and deems any violation a nuisance per se that shall be abated by the city attorney. The city may enforce the Ordinance with criminal and civil sanctions."[101]

Despite this zoning ordinance banning a land use legalized by state law and defeating the purpose of protection of medical use from criminal prosecution, the Supreme Court of Washington upheld the ordinance as "a valid exercise of the [city's] zoning authority . . . because the [o]rdinance merely regulates land-use activity."[102] The court characterized the statute as clarifying that "local governments

94. *DeRuiter*, 949 N.W.2d at 101.
95. *Id.* at 100.
96. *Id.*
97. *Id.* at 101.
98. Cannabis Action Coal. v. City of Kent, 351 P.3d 151, 152, 155 (Wash. 2015) (en banc).
99. *Id.* at 153.
100. *Id.* at 153.
101. *Id.* at 153–54 (internal citations omitted).
102. *Id.* at 152.

retain authority to regulate . . . medical marijuana through zoning."[103] Local prohibition on cannabis in Washington has expanded since the state supreme court upheld a ban on what the statute permits. In 2014, the Attorney General's Office "opined that state law did not preempt local government[s]" from enacting local bans on cannabis sales.[104] In 2018, an appellate court upheld a "county ordinance that banned the retail sale of recreational [cannabis]."[105] The applicant seeking a cannabis retailer license argued that the ordinance "irreconcilably conflict[s] with state law" legalizing recreational cannabis.[106] The court determined "the ordinance does not prohibit what state law permits," does not "thwart legislative purpose," and that "the county did not exercise unauthorized power."[107] The applicant's "implied preemption argument assert[ed] that allowing piecemeal county-level bans would render the [legislative] intent to establish a regulated [cannabis] market 'meaningless.'"[108] The court disagreed, finding "a closer reading" of the statute and interpretation of legislative history "indicat[ing] the legislature intended to leave local governments' zoning authority undisturbed."[109] In sum, total bans of medical and recreational cannabis by zoning or other local ordinance appear immune from preemption.

In *Inland Empire*, the Supreme Court of California reached the same conclusion: its medical cannabis statutes do not preempt a local ban on facilities that distribute medical cannabis.[110] The City of Riverside amended its zoning ordinances to provide that medical cannabis dispensaries are "a prohibited land use within the city and may be abated as a public nuisance."[111] "The . . . ordinance also bans, and declares as nuisance, any use that is prohibited by federal . . . law."[112] Under this ordinance, the city brought a nuisance action against a distribution facility that argued "the local ban . . . conflict[s]

103. *Id.* at 153.
104. Emerald Enterprises, LLC v. Clark Cnty., 413 P.3d 92 (Wash. Ct. App. 2018).
105. *Id.*
106. *Id.* at 97.
107. *Id.* at 98–103.
108. *Id.* at 104.
109. *Id.* at 104–05.
110. City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc., 300 P.3d 494, 496 (Cal. 2013).
111. *Id.* at 496.
112. *Id.*

with, and is thus preempted by," state law.[113] The court found that "[n]othing in [the medical cannabis statutes] expressly or impliedly limits the inherent authority of a local jurisdiction . . . to regulate the use of its land, including the authority to prohibit distribution facilities within its borders."[114] Because some counties might come to the reasonable conclusion that a dispensary "facilit[ies] within its borders, even if carefully sited, well managed, and closely monitored, would present unacceptable local risks and burdens"; the court could not "lightly assume the voters or the [state legislature] intended a one size fits all policy" under which "each and every one of California's [local governments] must allow the use of land for" dispensary facilities.[115] The court characterized state law as "merely removing state law criminal and nuisance sanctions from" certain conduct, leaving local governments "free to accommodate [or prohibit] such conduct" within their borders, finding no conflict and no implied preemption.[116] Because state law merely "remove[s] state-level criminal and civil sanctions from specified medical [cannabis] activities," and does *not* "establish a comprehensive state system of legalized medical [cannabis,] . . . grant a 'right' of convenient access to [cannabis] for medicinal use[,] . . . override the zoning, licensing, and police powers of local [governments,] or mandate local accommodation of medical [cannabis] cooperatives, collectives, or dispensaries[,]" the court found local prohibition of cannabis use legalized at the state level was not preempted.[117] Similar county ordinances severely restricting cannabis businesses have been upheld under this decision.[118]

An appellate court in Arizona reached the opposite conclusion on the permissiveness of a total ban through local zoning. In 2010, Arizona voters passed a state law "decriminaliz[ing] and provid[ing] protection . . . for the medical use, possession, cultivation, and sale of [cannabis]."[119] The statute permits local jurisdictions "to 'enact reasonable zoning regulations that limit the use of land for [medical

113. *Id.*
114. *Id.*
115. *Id.* at 508.
116. *City of Riverside*, 300 P.3d at 512.
117. *Id.* at 513.
118. *E.g.*, Safe Life Caregivers v. City of Los Angeles, 197 Cal. Rptr. 3d 524 (Cal. Ct. App. 2016) (upholding an ordinance regulating medical cannabis businesses).
119. White Mountain Health Ctr., Inc. v. Maricopa Cnty., 386 P.3d 416 (Ariz. 2016).

marijuana dispensaries] to specified areas.'"[120] Maricopa County publicly opposed the statute and amended its zoning ordinance text to restrict industrial use that conflicts with federal law.[121] In 2012, the county "refused to issue the necessary zoning documents" to establish a medical marijuana dispensary.[122] The Arizona state appellate court affirmed the court below, which struck the text amendment.[123] The county argued the zoning issue turned on "whether [state law] preempts local jurisdictions from regulating . . . the location" of dispensaries, but the appellate court rejected this argument, stating the real issue was "whether a local jurisdiction can ban [dispensaries] under the guise of 'reasonable zoning' by authorizing [dispensaries] in an area but then adding a poison pill to that use, prohibiting [a dispensary] from conducting business in violation of [federal] law."[124] The court concluded that a county "cannot adopt . . . zoning . . . that is self-defeating by banning [dispensaries]" because "a ban . . . cannot be a 'reasonable zoning regulation.'"[125]

2. Nuisance

In the City of Claremont, California, the city planning director told a citizen seeking to open a medical cannabis dispensary that such use was not enumerated in the city zoning code and "could not be easily [included] under any existing permitted use," and that the dispensary "would not be permitted at any location within the city" and a code amendment would be necessary to permit such use.[126] Accordingly, the city denied the application for a business permit and business license for a dispensary.[127] The city then "impos[ed] a forty-five-day moratorium preventing the approval or issuance of any permit, variance, license, or other entitlement [to establish] a medical [cannabis] dispensary in the [c]ity" by ordinance.[128] The moratorium rendered the citizen's appeal of the city's denial of his business

120. *Id.* at 435 (internal citations omitted).
121. *Id.* at 420.
122. *Id.* at 418.
123. *Id.* at 423.
124. *Id.* at 435.
125. *White Mountain Health Ctr., Inc.*, 386 P.3d at 435.
126. City of Claremont v. Kruse, 100 Cal. Rptr. 3d 1 (Cal. Ct. App. 2009).
127. *Id.* at 6–7.
128. *Id.* at 7.

license and permit applications moot.[129] The moratorium was later extended for ten and a half months, and again for an additional year.[130] Meanwhile, the applicant opened a dispensary without a business license, prompting the city to direct him to cease and desist.[131] Upon the applicant's refusal to cease operation of the dispensary, the city sought "a temporary restraining order and a preliminary and permanent injunction to abate a public nuisance."[132]

An appellate court in California found state law neither expressly nor impliedly preempted the city's actions.[133] The court declined to find implied preemption for three reasons. First, "[n]either statute addresses, [let alone] completely covers the areas of land use, zoning, and business licensing[,]" so the court determined "[n]either statute imposes comprehensive regulation demonstrating that the availability of medical [cannabis] is a matter of 'statewide concern.'"[134] Second, there was no indication that local action should be precluded, except in a few areas enumerated by the statute, and there is simultaneously legislative intent to permit local regulations consistent with state law.[135] Finally, since state law does not "compel the establishment of local regulations to accommodate medical [cannabis] dispensaries; the City's enforcement of its licensing and zoning laws and its temporary moratorium on medical cannabis dispensaries do not conflict with [state law permitting dispensaries]."[136]

A medical cannabis user sought to invalidate an ordinance banning cannabis dispensaries, medical cannabis cultivation, and medical cannabis storage in Fresno County.[137] The county classified violations of the ordinance as both public nuisances and misdemeanors.[138] Among other challenges, the user alleged the ordinance's criminalization of cultivation and storage conflicted with state law that expressly states qualified users "shall not be subject to arrest for possession or cultivation of medical cannabis pursuant to [state law]."[139]

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129. *Id.* at 7–8.
130. *Id.* at 8.
131. *Id.*
132. *City of Claremont*, 100 Cal. Rptr. 3d at 8.
133. *Id.* at 19–20.
134. *Id.* at 20.
135. *Id.*
136. *Id.* at 20–21.
137. Kirby v. Cnty. of Fresno, 195 Cal. Rptr. 3d 815, 819 (Cal. Ct. App. 2015).
138. *Id.* at 819.
139. *Id.*

The California appellate court found the provision of the ordinance criminalizing violations preempted by state law protecting against arrests relating to medical use of cannabis.[140] The court found the legislature intended to protect medical users from prosecution on a number of grounds. The Legislature's reference to "arrest and prosecution" indicated to the court an intent to preclude local law enforcement agencies and officers "from taking subsequent steps in the criminal justice process, including prosecuting protected persons under a local ordinance."[141] Another indication of legislative intent was derived "from the absence of limiting phrases deemed significant to the interpretation of statutory provisions at issue in *Inland Empire*" decided by the state supreme court.[142] The court concluded the state law "prohibition of arrests manifest the legislature's intent to fully occupy the area of criminalization and decriminalization of activity directly related to [cannabis]."[143] The criminalization provision of the ordinance, therefore, conflicts with state law and was severed from the ordinance by the court.[144]

3. Statutory Text Matters

Cases on other subject matter convey how preemption issues are a matter of statutory interpretation, and the scope of the statutory text is crucial. For example, an Oregon appellate court recently found that a local ordinance requiring homegrown cannabis for personal use be grown indoors was not preempted by state law prohibiting local government regulation on the production and use of plant seeds.[145] The court rejected the plaintiff's contention "that homegrown [cannabis] plants are grown for their [flowers] . . . and that therefore their seeds are 'flower seeds'" because the statute clearly defines flowers as those "grown for ornamental purposes, not flowers grown for medical or recreational consumption or processing."[146] The court also rejected the plaintiff's contention that her plants were

140. *Id.* at 830.
141. *Id.* at 829.
142. *Id.*
143. *Kirby*, 195 Cal. Rptr. 3d at 830.
144. *Id.*
145. Brown v. City of Grants Pass, 414 P.3d 898 (Or. Ct. App. 2018).
146. *Id.* at 901.

"nursery stock" simply "because they are botanically classified[,]" because "the requirement . . . that the plants be kept '*for* propagation or sale' suggests a commercial use[,]" for which home grown medical cannabis do not qualify.[147] Finding "[cannabis] seeds from plants grown at home do not fall within the [statutory] text[,]" the court found "they are not subject to the statute's preemptive effect "and affirmed the trial court below.[148]

4. Exclusion of an Initiative by Preemption

An appellate court in Minnesota, where cannabis has not been legalized, offers an example of how preemption has been used to bar the inclusion of an invalid initiative on a general election ballot for Minneapolis.[149] A citizen group filed a signed petition for a proposed charter amendment to legalize and protect medical use of cannabis in the City of Minneapolis.[150] After the city council conducted a hearing on the petition, it ruled against inclusion of the petition.[151] The council also found the amendment (1) violates the Supremacy Clause of the federal constitution and is therefore preempted by federal law; (2) "contravenes state public policy and is preempted by Minnesota law"; and (3) is an "unauthorized, [illegal] initiative that addresses specific operations of municipal government rather than a valid charter amendment [addressing] general form and structure of municipal government."[152] The county district court and state appellate court upheld the council's refusal to place the proposed amendment on the ballot, finding the initiative preempted by both state and federal law.[153]

C. Fracking

Hydraulic fracturing, also known as "fracking," has emerged as a valuable contributor to profitable oil and gas development in the United States. Fracking has been credited with reducing the country's

147. *Id.* at 902–03.
148. *Id.* at 903.
149. Haumant v. Griffin, 699 N.W.2d 774 (Minn. Ct. App. 2005).
150. *Id.* at 776.
151. *Id.*
152. *Id.*
153. *Id.* at 780–81.

dependence on foreign oil and gas while giving way to the possibility that the United States may soon be a future net exporter of natural gas.[154] Fracking is a necessary step to unlock oil and natural gas reserves embedded in shale and other tight, underground rock formations found across the country.[155] The process entails the injection of water and chemicals into rock at high pressure to release oil and gas.[156] Fracking was "[f]irst used commercially in 1949 and is now a process [used] common[ly] worldwide."[157] Such valuable technology, however, does not come without controversy. Proponents of fracking tout the tremendous amounts of natural gas that can now be economically extracted, and the resulting effect on natural gas prices.[158] Opponents, however, warn of reported "poisoned drinking water, polluted air, animal deaths, and industrial disasters and explosions" linked to fracking accidents.[159]

Every step of the way, including site preparation, well drilling, and waste disposal, is subject to regulation,[160] typically by state government.[161] State regulatory programs vary.[162] While some states require disclosure of chemicals and practices used during fracking, other states protect this information as confidential or make exceptions for trade secrets.[163] The expansion of fracking however, has caused some local governments to seek greater control over the industry within its jurisdictional lines.[164]

A New Mexico county board voted to adopt an ordinance seeking to ban fracking and in doing so, purporting to strip all challengers

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154. *Hydraulic Fracturing*, AM. PETROLEUM INST., https://www.api.org/oil-and-natural-gas/wells-to-consumer/exploration-and-production/hydraulic-fracturing (last visited June 21, 2021).

155. *Id.*

156. *Id.*

157. City of Longmont Colo. v. Colo. Oil & Gas Ass'n, 369 P.3d 573, 576 (Colo. 2016) (en banc).

158. Fred Dews, *The economic benefits of fracking,* BROOKINGS (March 23, 2015), https://www.brookings.edu/blog/brookings-now/2015/03/23/the-economic-benefits-of-fracking/.

159. *Stopping Fracking*, EARTHJUSTICE, https://earthjustice.org/climate-and-energy/oil-gas/fracking (last visited June 21, 2021).

160. *Unconventional Oil and Natural Gas Development*, ENV'T PROT. AGENCY, https://www.epa.gov/uog (last visited June 21, 2021).

161. *Fracking: Regulatory Failures and Delays*, GREENPEACE, https://www.greenpeace.org/usa/ending-the-climate-crisis/issues/fracking/regulatory-failures-and-delays/ (last visited June 21, 2021).

162. James Knight & Bethany Gullman, *The Power of State Interest: Preemption of Local Fracking Ordinances in Home-Rule Cities*, TUL. ENV'T L. J. 297, 300 (2015).

163. *Id.*

164. *Id.* at 298.

of "the authority to enforce state or federal preemptive law."[165] The ordinance also included provisions stripping challengers of their rights under the First and Fifth Amendments, Commerce Clause, and Contract Clause.[166] Among a host of other issues, a federal district court found "state law impliedly preempts the [o]rdinance, because it conflicts with state law."[167] The court determined that the "[s]tate law does not [impliedly] preempt the entire oil and gas field" because there is "room for concurrent regulation."[168] However, the court found the ban on fracking was "antagonistic to state law" by "prohibit[ing] activities that . . . state law permits."[169] Since New Mexico has an extensive statutory and regulatory scheme to "regulat[e] oil-and-gas production in a manner intended to prevent waste," the court concluded that "the [s]tate has indicated oil-and-gas extraction is permitted."[170] But because "state law specifically allows certain activities or is of such a character that local prohibitions on those activities would be inconsistent with or antagonistic to that state law or policy," the court invalidated the ordinance because it was impliedly preempted by state law by virtue of the conflict created.[171]

Local regulation of fracking in Colorado, the state with the fourth highest number of gas and oil wells in the United States,[172] also provides a pair of cases that deal with state-local preemption in the area of fracking. In *City of Longmont Colorado v. Colorado Oil & Gas Association*, the court found the Longmont ban on fracking and the storage and disposal of fracking waste within the city limits "materially impede[d]" the application of state law and was thereby impliedly preempted.[173] In *City of Fort Collins v. Colorado Oil*, the court found the city's "five-year moratorium on fracking . . . operationally conflict[ed] with . . . state law" and was thereby impliedly preempted.[174] These decisions are especially noteworthy coming from a state supreme court in a strong home-rule state.

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165. SWEPI, LP v. Mora Cnty., 81 F. Supp. 3d 1075, 1094 (D.N.M. 2015).
166. *Id.* at 1093–94.
167. *Id.* at 1193.
168. *Id.* at 1197.
169. *Id.* at 1198.
170. *Id.* at 1199.
171. *SWEPI, LP*, 81 F. Supp. 3d 1199–1200 (quoting Stennis v. City. of Santa Fe, 176 P.3d 309, 315 (2008)).
172. Knight & Gullman, *supra* note 162, at 299.
173. City of Longmont v. Colo. Oil & Gas Ass'n, 369 P.3d 573 (Colo. 2016) (en banc).
174. City of Fort Collins v. Colo. Oil, 369 P.3d 586 (Colo. 2016).

In 2012, residents of the home-rule municipality of Longmont voted to add an article to the city charter banning hydraulic fracking and the storage and disposal of fracking waste within the city.[175] The Supreme Court of Colorado began its preemption analysis by acknowledging confusion caused by its prior preemption cases before clarifying the applicable test for preemption.[176] The *Longmont* court then turned to the preemption issue. "To determine whether a regulatory matter is one of statewide, local, or mixed state and local concern, '[the court] weighs the relative interests of the state and the municipality in regulating the particular issue in the case,' making the determination on a case-by-case basis considering the totality of the circumstances."[177] The court considered "the need for statewide uniformity[,]" "extra-territorial impact of local regulation, . . . whether the state or local governments . . . traditionally regulate[] the matter, and . . . whether the [state] [c]onstitution specifically commits the matter to either state or local regulation[,]" to determine that fracking is a matter of mixed state and local concern.[178]

Next, the *Longmont* court reviewed the three forms of preemption it recognizes, all of which are "primarily matters of statutory interpretation."[179] Colorado's definition of express preemption and implied preemption have common distinguishing features: "[e]xpress preemption applies when the legislature clearly and unequivocally states its intent to prohibit local government from exercising authority over the [regulatory] matter[,]" and implied preemption applies when the language used and the scope and purpose of the legislative scheme "evince[] a legislative intent to completely occupy a field given by reason of a dominant state interest."[180] The third kind of preemption, operational conflict, is "whether the effectuation of a local interest would materially impede or destroy a state interest, recognizing that a local ordinance that authorizes what state law forbids or that forbids what state law authorizes will necessarily satisfy this standard."[181] The court noted that this is "a facial evaluation of the . . . statutory

175. *City of Longmont Colo.*, 369 P.3d at 577.
176. *Id.* at 578–83.
177. *Id.* at 580.
178. *Id.* at 581.
179. *Id.* at 582 (quoting Colo. Mining Ass'n v. Bd. of Cnty. Comm'rs of Summit Cnty., 199 P.3d 718 ,723 (2009)).
180. *Id.* (internal citations omitted).
181. *City of Longmont Colo.*, 369 P.3d at 582.

and regulatory schemes, and not a factual inquiry" as to how those schemes work in effect.[182]

Despite the state's arguments that implied preemption is at issue, the court disagreed based on prior cases finding state law does not preempt a local government's authority to enact land-use regulations of oil and gas and legislative recognition of the propriety of local land use ordinances that relate to oil and gas development.[183] The court rejected the state's "argument that preemption may be implied when state law manifests a 'sufficiently dominant' state interest[,]" because dominant state interest alone does not prove intent to exclude all local regulation.[184] The dominance of a state interest is instead "more appropriate [in determining] whether a regulatory matter involves an issue of local, statewide, or mixed concern than it is to the question of implied preemption."[185]

The only remaining theory for preemption was operational conflict. The pervasive state rules and regulations, "evinc[ing] state control over numerous aspects of fracking, . . . convince[d] [the court] that the state's interest in the efficient and responsible development of oil and gas resources includes a strong interest in the unfirm regulation of fracking."[186] The charter amendment banning fracking within Longmont "prevents operators from . . . fracking . . . even if the operators abide by state rules and regulations, rendering those rules and regulations superfluous."[187] Such a result led the court to conclude that "by prohibiting fracking and the storage and disposal of fracking waste, [the charter amendment] materially impedes the effectuation of the state's interest."[188] Because the charter amendment "materially impedes the application of state law," the court found the charter amendment was impliedly preempted by state law.[189]

In 2013, citizens of Fort Collins voted to enact a citizen-initiated ordinance imposing a five-year moratorium prohibiting fracking and storing fracking waste in the city.[190] The municipal charter was amended accordingly, allowing "[c]ertain wells that existed prior to

182. *Id.*
183. *Id.* at 583.
184. *Id.*
185. *Id.*
186. *Id.* at 585.
187. *City of Longmont Colo.*, 369 P.3d at 585.
188. *Id.*
189. *Id.*
190. City of Fort Collins v. Colo. Oil, 369 P.3d 586, 589 (Colo. 2016).

the amendment" an exemption from the prohibition.[191] Fort Collins argued "a five-year moratorium [was] sufficiently different from a perpetual ban" and "a valid exercise of zoning authority" because "the . . . moratorium affects only a nonessential phase of production" and creates "a temporary 'time-out'" giving the city time "to study the impact of fracking and waste disposal on public health."[192] The court found "the availability of alternatives to fracking" does not save the moratorium from preemption because the prohibition interferes with fracking for production which many operators have deemed necessary to ensure productive recovery, which in turn "materially impedes the state's goal" of maximum, efficient production.[193] The argument that the purpose and limited duration of the moratorium save it from preemption failed because the moratorium was not merely a regulation, but a length prohibition that "(1) deleteriously affects what is intended to be a state-wide program of regulation and (2) impedes the goals of the Oil and Gas Conservation Act . . . as well as the state's interest in fracking as reflected in the Act and the rules and regulations promulgated pursuant thereto."[194]

Applying the framework established in *Longmont*, the court stated that a home-rule city's ordinance seeking to regulate fracking involves a matter of mixed state and local concern and that the validity of the local regulation "turns on whether it conflicts with state law."[195] The court found the Fort Collins "moratorium renders the state's statutory and regulatory scheme superfluous" and thereby creates an operational conflict.[196] Expressing no views on the propriety of a moratorium of a materially shorter duration, the court invalidated the five-year moratorium as preempted by operational conflict with the Act.[197]

D. Inclusionary Zoning/Rent Control

State rent control laws arose as a reaction to economic distortions caused by the nationalization of our economy during World War I.[198]

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191. *Id.*
192. *Id.* at 593.
193. *Id.*
194. *Id.* (citation omitted).
195. *Id.* at 591.
196. *Id.* at 593.
197. *Id.* at 594.
198. R. S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?*, 21 SW. U. L. REV. 1019, 1028 (1992).

As early as 1921, Justice Holmes explained the U.S. Supreme Court's decision to uphold rent control:

> [A] public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. . . . The regulation is put and justified only as a temporary measure. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.[199]

Today, a formal declaration of emergency is no longer a precondition to the constitutional validity of a rent control scheme.[200] Means of rent control have become more creative, including complicated systems of incentives, grants, in-lieu fees, among other sticks and carrots. While landlords are constitutionally entitled to a fair rate of return on their property,[201] the appropriate measure of that return is less clear. However, a number of jurisdictions agree that the appropriate standard is fair return on investment.[202]

As described in a 2020 treatise on local government law, local rent control ordinances are vulnerable to preemption:

> Landlords are entitled as a matter of procedural due process to a reasonably flexible and expeditious rent adjustment mechanism. A rent control ordinance must set forth standards and criteria

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199. Block v. Hirsch, 256 U.S. 135, 156–57 (1921) (citations omitted).

200. *See, e.g.*, Birkenfeld v. City of Berkeley, 550 P.2d 1001 (Cal. 1976) (holding that the existence of an emergency is not necessary for rent control when such regulation is reasonably related to the furtherance of a legitimate governmental purpose); Berman v. Downing, 229 Cal. Rptr. 660 (Cal. App. Dep't Super. Ct. 1986) (justifying rent control based on housing shortage); *and* Colonial Arms Apartments v. Vill. of Mount Kisco, 104 A.D.2d 964 (N.Y. App. Div. 1984) (invalidating resolution based on housing emergency declared that lacked factual basis).

201. Adamson Co. v. City of Malibu, 854 F. Supp. 1476 (C.D. Cal. 1994); Baker v. City of Santa Monica, 226 Cal. Rptr. 755 (Cal. Ct. App. 1986); Oceanside Mobilehome Park Owners' Ass'n v. City of Oceanside, 204 Cal. Rptr. 239 (Cal. Ct. App. 1984); Hemsley v. Borough of Ft. Lee, 411 A.2d 203 (N.J. 1980); Niles v. Bos. Rent Control Adm'r, 374 N.E.2d 296 (Mass. Ct. App. 1978).

202. *See, e.g.*, Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851 (Cal. 1997) (finding twelve percent annual limit on rent increases deprived landlord of a fair return); Steinbergh v. Rent Control Bd. of Cambridge, 571 N.E.2d 15 (Mass. 1991) (upholding rational basis for regulating allowing small-scale landlords to recoup capital investments at a higher rate of return than large-scale landlords because large-scale landlords have greater ability to obtain finance capital); Cromwell Assoc. v. Mayor & Council of City of Newark, 511 A.2d 1273 (N.J. Super. Ct. App. Div. 1985) (maximum limit on annual return is facially unconstitutional since it precludes a case-sensitive determination of what is "fair and just" return).

> by which parties, administering agency, and reviewing court can be guided in determining adequacy of return on landlord's investment. The protections afforded to a tenant attach only to the primary place of residence, and cannot be assigned by the tenant. Contracts made by the tenant purporting to waive rent control protection are against public policy and unenforceable.
>
> The administrative mechanism for the enforcement of rent control does not violate state separation-of-powers principles, but a locality cannot prescribe a rule of evidence as by creating a presumption that a controlled tenant was evicted in retaliation for exercise of his rights. . . Rent control and condominium conversion ordinances are vulnerable to claims that the state has preempted local regulation. Local rent control of federally subsidized housing projects is subject to preemption by the Department of Housing and Urban Development. The Sherman Act does not tacitly preempt an ordinance requiring landlords to rent vacant apartments to would-be tenants.[203]

Unsurprisingly, many of the preemption cases in this category discussed below come from the state of California, which is rife with local land use controls on rent and housing. As of October of 2020, approximately fifteen California municipalities had enacted local residential rent control laws.[204]

1. Rent Restrictions

Simple rent restrictions appear to be declining in popularity as creative ways of achieving the same effects as rent control become more commonplace. Nevertheless, remaining rent control ordinances burdening properties result in landowners continuing to rely on preemption to avoid such controls. As rent-controlled buildings are transferred to new owners, so run the obligations and legal status of rent controllability, as the next three cases demonstrate.

In *Baychester Shopping Center v. San Francisco Residential Rent Stabilization and Arbitration Board of City and County of San Francisco*, the issue was whether the successor landlord was liable for rent charges exceeding the local ordinance controls charged by

203. JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 14:30 (2020) (footnote omitted).
204. TERRY B. FRIEDMAN ET AL., CALIFORNIA PRACTICE GUIDE: LANDLORD-TENANT 5-A (2020).

the predecessor landlord.[205] The successor landlord argued state law precluding a landowner from being held liable for a breach committed by a predecessor landlord preempted liability for the rent overcharges under the county ordinance.[206] The court disagreed, finding the successor's obligations under the rent ordinance, arising by operation of law, materially different from implied covenants that run with the land, arising out of a contract between parties, and that the state law therefore did not apply.[207]

Another successor landlord to a building on Central Park subject to below-market rent control under an agreement with HUD sought to avoid liability for his predecessor landlord's overcharging of rent.[208] The successor landlord argued that the use agreement, entered between the landlord and HUD, federally preempts local rent regulation.[209] The preemptive clause in the use agreement was explicit, so the question before the court was whether a private contract between HUD and a landlord can have the same preemptive effect as federal law.[210] Because "the critical question in any federal preemption analysis is . . . whether Congress intended that federal regulation supersede state law . . . any preemption of local rent regulation by the National Housing Authority must have been intended by Congress."[211] The court found that a contractual preemption provision "fails to withstand constitutional scrutiny" because the federally authorized contracts themselves are not "Laws of the United States."[212] The court concluded that because "Congress did not explicitly authorize the Use Agreement's contractual preemption of local rent regulation," local rent regulation still applies to the subject units.[213]

Just as liability for overcharge under a rent control ordinance can transfer to a subsequent landowner, so can an exemption from rent control ordinances. In *Block 268, LLC v. City of Hoboken Rent Leveling*

205. Baychester Shopping Ctr., Inc. v. S.F. Residential Rent Stabilization & Arb. Bd. of City & Cnty. of S.F., 81 Cal. Rptr. 3d 341 (Cal. Ct. App. 2008).

206. *Id.* at 345.

207. *Id.* at 345–46.

208. 435 Cent. Park W. Tenant Ass'n v. Park Front Apartments, LLC, 58 N.Y.S.3d 898 (N.Y. App. Div. 2017).

209. *Id.* at 904.

210. *Id.*

211. *Id.* at 908–09.

212. *Id.* at 910.

213. *Id.* at 911.

and Stabilization Board, a successor landlord successfully argued that its buildings were exempt from rent control ordinances, affirmed on appeal by a New Jersey state appellate court.[214] The court found the prior landlord legally obtained a rent control exemption under the state rent control statute and the exemption could not be nullified by either a transfer in title or by a conversion from rental units to condominiums due to a "hypertechnical omission or oversight."[215] The trial court found (and the appellate court affirmed), "that the [l]egislature had preempted the [county rent stabilization] [b]oard from taking any action that would impair the exception."[216] The statutory langue made it clear that the county rent stabilization board could not limit or impair an exemption, preempting the field, so that the city and board could not exercise a power that contradicts the state legislature's policy.[217]

In *Herzberg v. County of Plumas*, landowners upset by "their neighbor's cattle [coming] onto their property, eating the vegetation, defecating, and trampling the ground and sensitive creek beds . . . sued their neighbors" and the county.[218] A county ordinance regarding open range lands gives owners "of unfenced land within the designated open range the right to 'a reasonable rental fee from any person who pastures livestock thereon.'"[219] The plaintiff-landowners' general issue with this ordinance was that it "improperly shifted the burden of animal grazing from cattle ranchers to private [landowners] . . . within the open ranges."[220] The plaintiffs also complained that the burden of determining who the cattle belonged to, "collecting a reasonable rental fee, and erecting a lawful fence if the owner wanted to exclude the cattle, fell on the [land]owner."[221] In part, the plaintiffs sought to invalidate the ordinance due to conflict preemption with state law allowing commercial rent control.[222] The ordinance constituted illegal commercial rent control, according to the plaintiffs, "because it 'interferes with [landowners'] ability to negotiate

214. 952 A.2d 473, 479 (N.J. App. Div. 2008).
215. *Id.* at 477.
216. *Id.* at 476.
217. *Id.* at 478.
218. 34 Cal. Rptr. 3d 588 (Cal. Ct. App. 2005).
219. *Id.* at 591 (citing the ordinance).
220. *Id.* at 592.
221. *Id.*
222. *Id.* at 603.

rent from graziers at a price dictated by market conditions.'"[223] The court disagreed, finding no preemption under the state rent control law because the ordinance merely "place[s] a floor, not a ceiling, on the reasonable rent for pasturage" in the open range lands.[224]

In *Apartment Association of South Central Wisconsin v. City of Madison*, an appellate court in Wisconsin found the City of Madison had no authority to enact its inclusionary housing ordinance because such ordinance was preempted by state law.[225] A non-profit corporation of members of the rental housing industry challenged the city ordinance, which imposed a requirement that developers "charge no more than a specified amount of rent for no less than a specified percentage of rental dwelling units."[226] The statute prohibited certain governmental entities from "regulat[ing] the amount of rent or fees charged for the use of a residential dwelling unit."[227] The appellate court read the statute closely, concluding that "the legislature ha[d] expressly withdrawn the power of the City to enact [the ordinance]" because it "regulates the amount of rent that property owners . . . may charge for rental dwelling units[,]" which is the type of regulation the legislature expressly prohibited.[228] Therefore, the ordinance was void because it is preempted by state law.[229]

2. Eviction Controls

Relatively recently, the Ninth Circuit found a "good cause" regulation by HUD did not preempt Los Angeles County from enacting a local eviction control.[230] The county ordinance "restricts possible grounds for eviction to thirteen enumerated reasons, including violation of material terms of the lease, property damage, and criminal activity."[231] "The only business-related reasons [(economic justifications)] are renovation, removal of the unit from the rental market, or placement of a family member or resident manager into the

223. *Id.* at 604.
224. *Id.*
225. 722 N.W.2d 614 (Wis. Ct. App. 2006).
226. *Id.* at 616–18.
227. *Id.* at 618 (quoting Wis. Stat. § 66.1015).
228. *Id.* at 625.
229. *Id.* at 625–26.
230. Barrientos v. 1801–1825 Morton LLC, 583 F.3d 1197 (9th Cir. 2009).
231. *Id.* at 1206.

unit."[232] The relevant rule of HUD provided that "good cause" is required "for all mid-lease terminations and nonrenewals."[233] While the district court found the ordinance "conflict[ed] with the [federal] regulation because 'it takes away a right specifically granted by the HUD regulation[,]'"[234] the Ninth Circuit disagreed, finding no conflict because "[t]he HUD regulation does not create a 'right' to evict tenants to raise the rent . . . [but] merely creates a floor of protection which local laws may enhance."[235]

San Francisco's rent control ordinance was adopted in 1979 because "the lack of affordable rental housing was creating hardships . . . ."[236] The ordinance recites a number of purposes, including "the limitation of rent increases for tenants in occupancy, the arbitration of rental increase adjustments, and the restriction on the grounds on which landlords can evict tenants from their rental units."[237] The ordinance includes and has been amended to include a number of creative protections for its tenants, which sometimes appear to abut state law protecting landlords from rent control by local governance. The following two cases illustrate the particular tension created by local eviction controls in San Francisco, which are carefully drafted to elude preemption by state law.

In *Small Property Owners of San Francisco Institute v. City and County of San Francisco,* careful drafting was not sufficient to evade preemption under state law.[238] California's Ellis Act "allows property owners who seek to exit the rental business to evict residential tenants and prohibits local governments from 'compell[ing] the owner of any residential real property to offer, or continue to offer, accommodations in the property for rent or lease.'"[239] San Francisco adopted an ordinance that allowed property owners to make changes to nonconforming housing units—including expansion, alterations, and reconstruction—that were not previously allowed.[240] The ability to make such changes on units where tenants are evicted under "no-fault"

232. *Id.*
233. *Id.* at 1204.
234. *Id.* at 1207.
235. *Id.*
236. Foster v. Britton, 195 Cal. Rptr. 3d 800, 803 (Cal Ct. App. 2015).
237. *Id.* (internal citations omitted).
238. 231 Cal. Rptr. 3d 225 (Cal. Ct. App. 2018).
239. *Id.*
240. *Id.* at 226.

provisions, including tenants evicted in accordance with the Ellis Act, were subject to waiting periods of five to ten years under the ordinance.[241] Units from which tenants evicted in accordance with the Ellis Act were subject to a ten-year waiting period.[242] The ordinance was challenged, in part, "on the grounds that the ordinance imposes a prohibitive price on property owners exercising their right to exit the rental business and therefore conflicts with and is preempted by the Ellis Act."[243] The trial court denied the challengers petition for writ of mandate and complaint for declaratory relief in its entirety.[244] The appellate court, however, agreed with the challengers that the ordinance, on its face, penalizes a landlord exercising Ellis Act rights, and is therefore preempted.[245] The court "focused broadly on whether [the ordinance] 'duplicates, contradicts, or enters an area fully occupied by general law[.]'"[246]

The Ellis Act completely occupies the field of substantive eviction controls over landlords' desiring to exist the residential market.[247] The San Francisco ordinance does not merely regulate the particulars of remodeling a nonconforming unit, but instead prohibits changes for ten years after the property owner exists the rental business.[248] By imposing such a prohibition, the ordinance improperly attempts to regulate within the field of substantive eviction controls over such property owners.[249] The court found that "an inevitable burden of exercising Ellis Act [evictions] rights is a prohibition against" remodeling for ten years, which "far exceeds the scope of permissible local governance [permitted] by the Ellis Act."[250]

In *Foster v. Britton*,[251] the challenged ordinance provided that "a tenant may not be evicted for violating an obligation that was not included in the tenant's original rental agreement unless the change is authorized by San Francisco's rent control ordinance, is required

241. *Id.*
242. *Id.* at 227.
243. *Id.*
244. 231 Cal. Rptr. 3d at 230.
245. *Id.* at 230–31.
246. *Id.* at 232 (citing S.F. Apartment Ass'n v. City & Cnty. of S. F., 207 Cal. Rptr. 3d 684, 702 (Cal. Ct. App. 2016)).
247. *Id.*
248. *Id.* at 233.
249. *Id.*
250. 231 Cal. Rptr. 3d at 235.
251. Foster v. Britton, 195 Cal. Rptr. 3d 800 (Cal. Ct. App. 2015).

by law, or accepted by the tenant in writing."[252] "State law[, however,] provides that a landlord may change the terms of a month-to-month lease after giving [thirty] days' notice" and that the changed terms must be incorporated into the lease so long as the tenant continues to hold the premises after the notice takes effect.[253] Upon its acquisition of a multi-unit apartment building, the new landlord gave its tenants thirty days' notice of new house rules pursuant to state law.[254] A tenant refused to agree to the "unilateral changes to her rental agreement" and in the following dispute, the landlord took the position that state law preempted the city ordinance restricting eviction based on a tenant's refusal to acquiesce to a change in terms from the original lease agreement.[255]

The appellate court disagreed, finding the ordinance did not conflict with state law. Relying on the Supreme Court of California's decision of *Birkenfeld v. City of Berkeley*,[256] the court held that while a municipality cannot interfere with the procedural protections offered by the state, it retains its authority to limit the substantive grounds for eviction.[257] The court found that the "purpose of [the statute] is to establish procedural safeguards for tenants when landlords . . . change [the] terms of the tenancy, and does not prevent local governments from regulating the substantive grounds for eviction."[258] The ordinance does not interfere with any procedural protections conferred by state law but regulates the substantive grounds on which a landlord may evict a tenant.[259] Accordingly, the court concluded there was no conflict or preemption by state law.[260]

The City of Oakland, California's rent control ordinance, first enacted in 1980, differed from many other cities' rent control laws by virtue of not requiring landlords to show good cause to evict tenants.[261] A voter initiative was adopted by ordinance. In 2002, the Oakland Just Cause For Eviction ordinance required a landlord "to plead and

252. *Id.* at 803.
253. *Id.*
254. *Id.* at 804.
255. *Id.*
256. 550 P.2d 1001 (Cal. 1976),
257. Foster v. Britton, 195 Cal. Rptr. 3d 800, 809 (Cal. Ct. App. 2015).
258. *Id.*
259. *Id.*
260. *Id.* at 809–10.
261. Rental Hous. Ass'n of N. Alameda Cnty. v. City of Oakland, 90 Cal. Rptr. 3d 181 (Cal. Ct. App. 2009).

prove a specified ground for any eviction."[262] A group of landlords in the city sought a writ of mandate to prohibit enforcement.[263] The trial court found certain provisions of the ordinance preempted by state law.[264] The appellate court affirmed, additionally finding a portion of the ordinance that was not challenged also preempted.[265]

3. Mobile Homes

In California alone, approximately ninety jurisdictions regulate rents in mobile home parks, many of which go beyond classic "rent stabilization" to impose severe eviction controls as well.[266] The unique characteristics of mobile and manufactured home ownership—namely the difficulty and cost of moving the homes—gives the community operator tremendous leverage in establishing rent levels, fees, rules and other terms of tenancy.

A manufactured home park resident who received notice from the City of Burnsville, Minnesota of alleged property maintenance and zoning code violations brought a class action against the city, alleging the city's enforcement in the manufactured home park was preempted by federal and state law.[267] The county court granted summary judgment and permanent injunctive relief.[268]

On appeal, the court found the city's enforcement of its code was neither expressly preempted by the National Manufactured Housing Construction and Safety Standards Act,[269] nor preempted by express or field preemption by state law.[270] Federal law expressly preempted "construction or safety of the manufactured home itself."[271] "The city attempted to regulate carports, awnings, zoning setbacks, trash screening, and exterior storage within a manufactured home park."[272] Because these do not relate to the construction or safety of the

262. *Id.* at 186–88.
263. *Id.* at 186.
264. *Id.*
265. *Id.* at 190–91.
266. FRIEDMAN ET AL., *supra* note 204, at 5-k.
267. Eich v. City of Burnsville, 906 N.W.2d 867 (Minn. Ct. App. 2018).
268. *Id.*
269. *Id.* at 875–76.
270. *Id.*
271. *Id.* at 875.
272. *Id.* at 876.

manufactured home itself, the city code does not fall within the scope of the Act's express preemption.[273] Minnesota adopted state standards concerning the safety and construction of manufactured homes that are identical to the federal standards, so there was no express preemption under state law of the city codes for the same reasons that there was no express preemption under federal law.[274]

In *Cacho v. Boudreau*, mobile home park residents sued park owners in San Diego in small claims court, challenging a monthly pass-through charge for property taxes imposed on park land that was separate from and in addition to space rent.[275] The case was transferred to county court, where the park owners sought declaratory relief and residents asserted the local ordinance was preempted by state law.[276] The county court entered summary judgment for residents and imposed statutory penalties against the park owners for their willful violation of state law.[277] The Court of Appeals affirmed.[278] The Supreme Court of California reversed, finding the ordinance was not preempted by state law.[279]

The state Mobile Home Residency Law provides that "[a] homeowner shall not be charged fees other than rent, utilities, and incidental reasonable charges for services actually rendered"; "parks subject to local rent collection laws" must still be allowed to "separately charge park residents for certain government-imposed fees, assessments, and other charges" (except for ad valorem property taxes); and that a trial court has discretion to impose civil penalties up to "$2,000 for each 'willful violation' of the law."[280] The supreme court addressed whether this "state . . . law preempt[s] a local rent control ordinance that allows a mobile home park owner to separately charge park residents for property taxes imposed on the land on which the park is situated[.]"[281] To determine whether there was "an actual and irreconcilable conflict between state and law," which

273. *Eich*, 906 N.W.2d at 876.
274. *Id.* at 876–77.
275. Cacho v. Boudreau, 149 P.3d 473, 476 (Cal. 2007).
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.* at 474–75.
281. *Cacho*, 149 P.3d at 475.

the court of appeals concluded, or merely "an immaterial difference in terminology," as the park owners argued, the court used statutory analysis to harmonize the provisions of state law that restrict rental fees while permitting a park owner to separately charge residents for governmental fees or assessments.[282] Using legislative history, the court determined "the aim of the legislation was to [allow] park owners to pass through to park [tenants] the costs of new or increased fees and assessments imposed on the [rental units]."[283] The purpose is to relieve the park owner of the "unfair burden" otherwise imposed on them in rent-controlled areas where they could not increase rent to accommodate increased fees.[284] Because the ordinance treats property taxes as a component of the rental rate formula, it is treated as a rental charge, and not a fee prohibited by state law.[285]

In *Griffiths v. County of Santa Cruz*, tenants who occupied mobile home sites complained that the community operator violated a county mobile home rent control ordinance by failing to reduce rent commensurate to his discontinuance of garbage collection services.[286] The operator challenged the ordinance, in part on the grounds that state law preempts the County's ordinance.[287] The operator argued that because state law "excludes recreational vehicles from the definition of a mobile home," the County is preempted from including "recreational vehicles within its definition of mobile home."[288] The court disagreed, finding the state law relied on by the operator does not apply to the ordinance, where "the relevant purpose implicates the operator's landlord-tenant relationship with his . . . tenants."[289] Further, the county's "inclusion of recreational vehicles within the definition of 'mobile home' . . . is consistent with" the state law that does apply.[290] Thus, the court found that state law did not preempt the county ordinance and affirmed the court below.[291]

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282. *Id.* at 477.
283. *Id.* at 480.
284. *Id.*
285. *Id.* at 483.
286. Griffith v. Cnty. of Santa Cruz, 94 Cal. Rptr. 2d 801, 802 (Cal. Ct. App. 2000).
287. *Id.* at 804.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.* at 804–05.

4. Relocation Assistance

Another mechanism of rent control is relocation assistance: financial assistance landlords are required to provide to tenants to relieve relocation costs when the tenant is permanently or temporarily displaced from a residential unit. Because displacement precedes the need for relocation assistance, it is often improperly understood as "rent control." Nevertheless, many rent control state and local laws seek to regulate the way landlords conduct their evictions, including requiring a landlord to set aside financial aid for relocation services in an escrow account upon providing notice of displacement.

In July of 2020, an appellate court in Oregon considered whether a provision in a Portland "ordinance . . . requir[ing] landlords to pay relocation assistance to tenants following a rent increase of [ten] percent or more if the tenant responds by terminating the tenancy," is "rent control" and therefore expressly preempted by state law prohibiting local rent control.[292] The City of Portland added tenant protections to address a city housing emergency, including a requirement that "landlords pay relocation assistance to tenants under certain circumstances."[293] The landlords challenging the ordinance argued that the statutory "text expresses an intention to preempt '[a]ny local enactment that has the *effect* of "controlling"—that is, restraining or exercising influence over to limit—the rent that may be charged.'"[294]

The appellate court disagreed, finding that the text of the statute, when read in context, demonstrates "the legislature did not intend to broadly prohibit any [local] regulation that could" affect a restraint on rent, but instead "is solely directed at prohibiting 'rent control'" as in the direct regulation of the amount of rent to be paid to a landlord.[295] Finding "nothing in the statut[ory] text, context, or legislative history" that would support finding the legislature intended to preempt other types of restrictions than direct regulation of rent charged to tenants, the court found no express or implied preemption.[296]

The court also disagreed with the landlords' argument "that the ordinance falls within the statute's prohibitory scope" because it

292. Owen v. Cty. of Portland, 470 P.3d 390 (Or. Ct. App. 2020).
293. *Id.* at 392–93.
294. *Id.* at 396 (citing plaintiff's brief).
295. *Id.*
296. *Id.* at 397.

regulates the "same area" as state law.[297] Instead, the court found the relocation assistance "does not fall within the common understanding of 'rent control' that the legislature intended when it enacted" the statutory prohibition on rent control.[298] The court also declined to find implied preemption by conflict, because "operation of the ordinance does not make it impossible to comply with the statute."[299] Concluding that the ordinance is not "in truth incompatible" with state law, the court found the ordinance was not preempted by state law.[300]

5. Affordable Housing Mitigation Requirements

The Town of Telluride enacted an ordinance "which imposes an 'affordable housing' requirement on [most] . . . new developments" in town.[301] Under the ordinance, property owners must "create affordable housing for forty percent of the employees generated by new development."[302] The ordinance provides four options to satisfy the affordable housing requirement, which can also be combined to meet the requirement: (1) "constructing new housing units with fixed rental rates," (2) "imposing deed restrictions on free market units in order to fix rental rates," (3) "paying fees in lieu of housing," or (4) "conveying land to the [t]own for affordable housing."[303] The Supreme Court of Colorado found the ordinance "fall[s] within the commonly understood meaning of rent control," therefore conflicting with the state's broad prohibition on local measures controlling rents.[304] The court further held that the statute addressed a matter of mixed local and statewide concern, concluding that the conflicting ordinance was invalid.[305]

The statute does not explicitly define rent control, but the court found it to be "clear on its face."[306] The ordinance "operates to suppress

297. *Id.* at 398.
298. *Owen*, 470 P.3d at 398.
299. *Id.* at 400
300. *Id.* at 401.
301. Town of Telluride v. Lot Thirty-Four Venture, LLC, 3 P.3d 30 (Colo. 2000) (en banc).
302. *Id.* at 33.
303. *Id.* at 32.
304. *Id.*
305. *Id.* at 40.
306. *Id.* at 35.

rental values below their market values[,]" thereby "restrict[ing] [a] property owner's ability to develop his land as he sees fit."[307] Therefore, the ordinance "violates the plain language of the state prohibition on" "any ordinance or resolution which would control rents."[308]

Developers in Los Angeles were issued a writ of mandate that precluded the city from enforcing an affordable housing ordinance against developers' mixed-use project.[309] In the as-applied challenge, the county court found "the affordable housing ordinance conflicts with[,] and is [accordingly] preempted by vacancy decontrol provisions" of state law, which permits "residential landlords to set the initial rental levels" at the beginning of a tenancy term.[310] The challenged ordinance required applicants for a multifamily residential or mixed-use project to comply with one of two options for "replacement and inclusionary dwelling requirements," whichever results in more affordable housing units.[311] The ordinance also provided a third option: if the applicant does not wish to build inclusionary housing, the applicant can pay an "'in-lieu' fee."[312] After the developer's administrative appeal was denied, it filed for writ of mandate, alleging the application of the ordinance's housing requirements to the project violated state law.[313]

The trial court agreed, issuing the developer such a writ to prevent the application of the ordinance to its project. State law clearly states that residential landlords "establish the initial rental rate for a . . . unit."[314] The ordinance, on the contrary, "require[d] [the developer] to provide [sixty] affordable housing units at regulated rent levels that must be preserved either of the life of the units or [thirty] years, whichever is greater."[315] Finding the ordinance's affordable housing requirements hostile to state law "by denying [the developer] its right to establish the initial rental rates for affordable

307. *Town of Telluride*, 3 P.3d at 35.

308. *Id.* (citing the statute).

309. Palmer/Sixth Street Properties, L.P. v. Cty. of L.A., 96 Cal. Rtpr. 3d 875, 877 (Cal. Ct. App. 2009).

310. *Id.* at 878–79.

311. *Id.* at 879.

312. *Id.* "The in lieu fee for a required Very Low Income Dwelling Unit shall be $100,576.14 per unit. The in lieu fee for a required Low Income Dwelling Unit shall be $78,883.41 per unit." *Id.*

313. *Id.* at 881.

314. *Id.* at 886.

315. *Palmer/Sixth Street Properties, L.P.*, 96 Cal. Rtpr. 3d at 886.

housing units[,]" the ordinance conflicted with state law and was therefore preempted.[316] The appellate court affirmed.[317]

6. Other Regulatory Burdens on Landlord

In *Lake Valley Associates, LLC v. Township of Pemberton*, a corporate owner of a 450-unit apartment complex challenged a township ordinance imposing "registration obligations and other regulatory requirements on landlords on landlords within the town."[318] The owner challenged "the ordinance [as] preempted because [its] registration is overseen by state agency and that the additional information [required] by the ordinance is forbidden" from being collected under other law.[319] Specifically, the owner argued "there is conflict between the ordinance and [state] law" pertaining to Hotel and Multiple Dwellings and that the state law "was intended to be exclusive in its field and is so pervasive that it precludes coexistence of a [local] ordinance."[320] The appellate court adopted the analysis of the court below, finding the explicit statement of legislative intent in both state laws cited by the owner did not "preclude the right of any municipality to adopt and enforce ordinances, or regulations, *more restrictive than the statutes any rules and regulations promulgated thereunder*" could not be clearer.[321] The court found the ordinance in some ways more restrictive and expansive than the state law, which is specifically allowed by the statute itself.[322] For these reasons, the appellate court affirmed the finding of no preemption under state law, upholding the validity of the ordinance.

Recently, a California appellate court found the state's Fair Employment and Housing Act ("FEHA") does not preempt a San Francisco ordinance banning discrimination based on tenant's participation in Section 8 housing program.[323] In 1998, San Francisco amended its "existing housing discrimination ordinance to [ban] discrimination based on a person's 'source of income,' . . . defined broadly to include

316. *Id.* at 886–88.
317. *Id.* at 888.
318. Lake Valley Assoc., LLC v. Twp. of Pemberton, 987 A.2d 623, 624 (N.J. App. Div. 2010).
319. *Id.* at 625.
320. *Id.* at 625–26.
321. *Id.* at 627.
322. *Id.*
323. City & Cnty. of S.F. v. Post, 231 Cal. Rptr. 3d 235 (Cal. Ct. App. 2018).

government rent subsidies" (like Section 8 housing vouchers).[324] The California legislature expanded FEHA the following year "to prohibit discrimination based on a tenant's 'source of income,'" but used a much narrower definition that "does not reach government rent subsidies."[325] An agent for a San Francisco landlord advertised available units "on Craigslist and ApartmentsInSF.com[,]" stating in each posting "that the landlord would not accept Section 8 vouchers."[326] The city sued, alleging such discrimination violated its ordinance prohibiting discrimination based on source of income.[327] The landlord filed a motion to dismiss "on the ground[s] that FEHA preempts the source-of-income provision" of the ordinance, which the court overruled.[328] The court then granted the city's motion for a preliminary injunction to prevent the landlord from continuing to discriminate against Section 8 participants.[329]

On appeal, the landlord argued FEHA preempts the ordinance in two ways.[330] First, that language in FEHA stating it is "the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by provisions of this part . . . expressly occupies the field . . . [and] exclud[es] all local laws."[331] Second, that FEHA impliedly preempts the ordinance's "source-of-income discrimination provision because FEHA leaves [the] landlord free to choose whether to participate in the Section 8 housing," but the ordinance "compels participation[,]" which "directly contradicts the policy choice" made by the state in FEHA.[332] The court rejected the argument that the preemption clause in FEHA preempts the broad field of discrimination in housing, focusing on the language "encompassed by the provisions of this part" to narrowly define FEHA's field of exclusivity to only the areas of discrimination explicitly encompassed by FEHA.[333] The court found FEHA does not cover discrimination against Section 8 participants,

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324. *Id.* at 238.
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *City & Cnty. of S.F.*, 231 Cal. Rptr. 3d at 239.
330. *Id.* at 242.
331. *Id.*
332. *Id.* at 243.
333. *Id.* at 243–46.

whereas the ordinance is aimed at preventing such discrimination, finding no express preemption.[334] For similar reasons, the court found no implied preemption by FEHA.[335] Because FEHA expresses no policy preference toward landlords' decision to participate in the Section 8 program or not, there is no inherent contradiction between FEHA and the ordinance.[336]

7. Other Regulatory Burdens on Tenant

The Supreme Court of Illinois recently upheld a city ordinance as a valid exercise of home-rule authority, despite the condominium's contention that the ordinance conflicts with portions of state statutes pertaining to condominium ownership.[337] A Chicago condominium unit owner sought "production of specific documents and records relat[ing] to the building's management" under a city ordinance.[338] The ordinance permits condominium unit owners to inspect financial books and records of their condominium association within three business days of delivering written request.[339] The unit owner complained upon his request being denied.[340] The condominium association argued the ordinance conflicts with portions of two state statutes and is therefore unenforceable.[341] The "statutes require condominium unit owners to state a proper purpose for obtaining association financial books and records, . . . production of only [ten] years of records, and allow the association [thirty] days to gather and produce records."[342] The ordinance, however, requires no stated proper purpose, does not restrict the age of documents sought, and requires production within three business days of the request.[343]

The unit owner, joined by the city who intervened to defend the validity of its ordinance, argued that "the legislature has not specifically limited the authority of home rule units to regulate condominiums or reserved [such] power for itself, and [that] the state does not have

334. *Id.* at 247.
335. *City & Cnty. of S.F.*, 231 Cal. Rptr. 3d at 248.
336. *Id.*
337. Palm v. 2800 Lake Shore Drive Condo. Ass'n, 988 N.E.2d 75, 79 (Ill. 2013).
338. *Id.* at 77.
339. *Id.*
340. *Id.*
341. *Id.* at 79.
342. *Id.*
343. *Palm*, 988 N.E.2d at 79.

a vital interest in regulating condominiums" sufficient to preempt the city's ordinance.[344] Under the Illinois Constitution, "[c]omprehensive legislation that conflicts with an ordinance is insufficient [alone] to limit or restrict home rule authority."[345] Instead, the legislature must explicitly deny municipal exercise of home-rule power or require its exercise of that power to be consistent with statutory provisions.[346] Since the legislature has not expressly curtailed the city's power to exercise authority over condominium record production, the court concluded that the city's ordinance is a valid exercise of home-rule authority, and upheld the ordinance.[347]

8. COVID-19

In response to the COVID-19 pandemic, the Governor of Pennsylvania imposed a sixty-day moratorium on evictions and foreclosures.[348] The Philadelphia City Council enacted five separate bills temporarily amending the Philadelphia Code, collectively the Emergency Housing Protection Act ("EHPA"),[349] which provides:

> 1) [T]hrough August 31, 2020, landlords cannot evict residential tenants and cannot evict small businesses that can provide a certification of hardship due to COVID-19; 2) landlords must allow tenants who did not timely pay rent between March 1 and August 31, and who can prove that they suffered a COVID-19 financial hardship, to pay past due rent on a set plan through May 31, 2021; 3) through December 31, 2020, before taking steps to evict residential tenants who have suffered a COVID-19 financial hardship, landlords must attend mediation; and 4) through May 31, 2020, landlords are barred from charging late fees and interest to residential tenants who have experienced a COVID-19 financial hardship.[350]

An association of property owners and managers challenged these temporary city code amendments arguing, in part, that the state

344. *Id.* at 79–80.
345. *Id.* at 85.
346. *Id.*
347. *Id.* at 84–85.
348. HAPCO v. City. of Phila., 2020 WL 5095496, at *1 (E.D. Penn. Aug. 28, 2020).
349. *Id.* at *2.
350. *Id.* at *4.

Landlord-Tenant Act preempted conflicting amendments.[351] The challengers alleged state law, which providers a landlord can recover rent and interest from a tenant in an action of assumpsit, "preempts the EHPA's temporary prohibition on late fees and interests on late rent."[352] However, the statutory text allowing interest if "deemed equitable under the circumstances of the particular case," saved the ordinance from preemption, because "[t]he City's determination that it would be inequitable to require a tenant [experiencing] a COVID-19 financial hardship to pay interests or late fees" places those cases falling under the ordinance in the exception to the Landlord-Tenant Act.[353] Despite acknowledging there is "no mention of late fees" where it is inequitable, the court found there was no conflict between the ordinance and statute on these grounds.[354] The challengers also alleged that the section of "the Landlord-Tenant Act, which provides the process for summary eviction proceedings, preempts [local] limitations on evictions."[355] Relying on a state supreme court decision, the court concluded EHPA does not conflict with eviction procedures set forth in state law because it merely regulates *when* landlords have the right to evict.[356]

CONCLUSION

Preemption is an increasingly fundamental precedent issue addressed by state and local government prior to the regulation of real property across a range of subjects. Often as not, the question of whether a state regulation is preempted by federal regulations or a local government is preempted by federal or state regulations ends up in court. This review does not purport to judge which level of government is best suited to regulated across the categories of regulation summarized in the preceding sections. We seek rather to summarize relatively recent significant cases from a number of jurisdictions to demonstrate the factors courts consider in deciding which level of government is entitled to regulate. Few of the cases deal with express

351. *Id.* at *13.
352. *Id.*
353. *Id.*
354. *HAPCO*, 2020 WL 5095496, at *13.
355. *Id.* at *14.
356. *Id.*

preemption for the obvious reason that few cases arise. The question in such cases, if any, is only the source of authority for the preemptive regulation, particularly at the federal level which triggers 10th and 11th Amendment issues. Otherwise, the vast majority of the cases deal with the more difficult question of implied preemption, where the principal question is usually whether the preempting level of government has either occupied the field, promulgated a comprehensive scheme of regulation, or demonstrated a need for uniformity.