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# Conflict Preemption: A Remedy for the Disparate Impact of Crime-Free Nuisance Ordinances

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# CONFLICT PREEMPTION: A REMEDY FOR THE DISPARATE IMPACT OF CRIME-FREE NUISANCE ORDINANCES

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## ABSTRACT

*Thousands of municipalities across the country have adopted crime-free nuisance ordinances—laws that sanction landlords for their tenants' behaviors, coercing them to evict tenants for actions as innocuous as calling 9-1-1 in an emergency. These facially neutral ordinances give wide discretion to municipal officials, leading to discriminatory enforcement of evictions. As a result, these ordinances have a devastating impact on victims of domestic violence and are used as a tool to inhibit integration in majority-white municipalities. Many plaintiffs have brought lawsuits alleging violations of the U.S. Constitution and the Fair Housing Act. However, bringing lawsuits under various anti-discrimination protections presents many challenges. Less than five percent of all discrimination plaintiffs will achieve relief, and eighty-six percent of discrimination claims end in dismissals.[1] Professor Katie Eyer, an anti-discrimination legal scholar, has advocated for increasing the use of "extra-discrimination remedies," litigation-based approaches that are not rooted in anti-discrimination laws.[2] This Note explores one potential extra-discrimination remedy that could be used to challenge crime-free nuisance ordinances: conflict preemption. Crime-free nuisance ordinances that are not tailored to state landlord-tenant laws' grounds for eviction may be in conflict with, and preempted by, state law. This Note also recommends that fair housing advocates collaborate with landlord associations when challenging crime-free nuisance ordinances. Although the interests of landlords and tenants often conflict, both groups are harmed by municipalities that enact crime-free nuisance ordinances.*

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1. Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1276 (2012).

2. *Id.* at 1280.

## INTRODUCTION

On the evening of September 24, 2011, Rosetta Watson was asleep in her bed when her former boyfriend, Robert Hennings, knocked on her door.[3] She awoke and told him that he was not welcome inside.[4] Mr. Hennings then broke down Ms. Watson's door, entered her bedroom, and punched her in the face.[5] Ms.

3. First Amended Complaint ¶¶ 42, 45, Watson v. City of Maplewood, No 4:17-cv-1268 (E.D. Mo. Nov. 17, 2017) [hereinafter First Amended *Watson* Complaint].
4. *Id.* ¶ 45.
5. *Id.*

Watson fled her apartment and called the police.[6] The police arrested Mr. Hennings for assault, but he was released shortly after and the abuse continued.[7] Ms. Watson was a victim of repeated domestic violence; between September 2011 and February 2012, she called the police for help four times.[8] Unbeknownst to her, the municipality where she lived was keeping a tally of these calls.[9]

Ms. Watson lived in Maplewood, a small municipality in St. Louis County. A Maplewood ordinance authorizes the removal of residents from their homes if they are deemed a "nuisance."[10] When Ms. Watson lived in Maplewood, the definition of nuisance encompassed a wide range of activities, including more than two instances in six months of domestic violence resulting in police calls.[11] Though the Maplewood city officials were aware that Ms. Watson was a victim of domestic violence, they deemed her a nuisance, revoked her residency permit, and forced her out of her home.[12] Ms. Watson is not the only domestic violence survivor to be re-victimized by her city's nuisance ordinance.[13] Around 2,000 municipalities across the country have adopted crime-free nuisance ordinances similar to Maplewood's.[14]

Crime-free nuisance ordinances give municipalities the power to interfere with a private lease contract and force landlords to evict certain tenants at the municipalities' discretion. Like Maplewood, municipalities often justify their crime-free nuisance ordinances as necessary to prevent properties from deteriorating and to provide a safe and peaceful community.[15] However, these facially neutral

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6. *Id.* ¶ 46.

7. *Id.* ¶¶ 46–58.

8. *We Live Here: Nuisance, or Nonsense? (Part 1)*, ST. LOUIS PUB. RADIO, at 11:11 (Apr. 26, 2018), https://www.welivehere.show/nuisance-or-nonsense-pt-1 [https://perma.cc/2WCM-XP7G].

9. *Id.* at 11:26.

10. Christine Hauser, *Woman Abused by Boyfriend Sues City for Evicting Her as Nuisance*, N.Y. TIMES (Apr. 11, 2017), https://www.nytimes.com/2017/04/11/us/aclu-domestic-violence-st-louis.html [https://perma.cc/DE3L-U24M].

11. Alisha Jarwala & Sejal Singh, *When Disability Is a "Nuisance": How Chronic Nuisance Ordinance Push Residents with Disabilities Out of Their Homes*, 54 HARV. C.R.-C.L. L. REV. 875, 879–80 (2019).

12. First Amended *Watson* Complaint, s*upra* note 3, ¶¶ 64–75. Maplewood requires residents to obtain "occupancy" or "residency" permits in order to live in the city. *See Applications and Permits*, MAPLEWOOD MO., https://www.cityofmaplewood.com/59/Forms-and-Documents [https://perma.cc/9CFW-CLBL]. Maplewood's municipal code allows the city to revoke individuals' occupancy permits if they are deemed a nuisance. MAPLEWOOD, MO., MUN. CODE §§ 34-240(18); 34-242(2)(e), (h) (2020).

13. *See* discussion *infra* Section I.B.

14. Jarwala & Singh, *supra* note 11, at 878.

15. Jenny Simeone-Casas, *From Complaint to Eviction, Here's How the Maplewood Nuisance Ordinance Works*, ST. LOUIS PUB. RADIO (June 15, 2017, 8:52 PM), https://news.stlpublicradio.org/post/complaint-eviction-heres-how-maplewood-nuisance-ordinance-works#stream/0 [https://perma.cc/5AUX-EBYC].

ordinances create a powerful mechanism for controlling the municipality's demographics. While much of the litigation and media advocacy efforts to combat crime-free nuisance ordinances focus on their disparate impact on domestic violence victims, reform efforts have paid less attention to the potential impact on Black families with children and the use of these ordinances as a tool to prevent integration in majority-white municipalities. In St. Louis County, the problems with crime-free nuisance ordinances do not end with Maplewood and Ms. Watson. A recent study found that sixty-nine of the eighty-eight St. Louis County municipalities have crime-free nuisance ordinances in effect.[16] Some jurisdictions in St. Louis County specifically target renters by excluding owner-occupied homes from the ordinances.[17] Since only twenty-seven percent of white families in St. Louis rent their homes, compared to almost sixty percent of Black families, there is great potential for a racially disparate impact.[18] "[R]acial disparities in the criminal justice system," combined with crime-free nuisance ordinances, have had the "effect of promoting segregation" and "creating housing instability for vulnerable populations."[19]

Part I of this Note discusses the history and discriminatory nature of crime-free nuisance ordinances, highlighting two significant problems: (1) disproportionate eviction of domestic violence survivors, and (2) preventing integration in majority-white municipalities. Part II discusses litigation strategies using anti-discrimination laws to fight crime-free nuisance ordinances and the limitations of these strategies. Part III proposes an extra-discrimination litigation strategy, exploring the possibility of challenging these ordinances under conflict preemption doctrine.

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16. Blythe Bernhard, *Letters Sent to Six St. Louis County Municipalities Over 'Problematic' Nuisance Ordinances*, ST. LOUIS POST-DISPATCH (Jan. 25, 2019), https://www.stltoday.com/news/local/metro/letters-sent-to-six-st-louis-county-municipalities-over-problematic/article_1bf750a7-89d2-567e-9663-10e5c292b8ea.html [https://perma.cc/S4MX-2U8G]. St. Louis has eighty-eight municipalities. *St. Louis County Municipalities and Better Together: 4 Things to Know*, ST. LOUIS MAG. (Mar. 8, 2019), https://www.stlmag.com/news/politics/st-louis-county-municipalities-better-together/ [https://perma.cc/NWC4-TMTH].

17. Kalila J. Jackson, *Dismantling the Divide: Crime Free Nuisance Ordinances Are a Public Menace*, ST. LOUIS AM. (July 26, 2018), http://www.stlamerican.com/news/columnists/guest_columnists/dismantling-the-divide-crime-free-nuisance-ordinances-are-a-public/article_0e8eef4c-8a8f-11e8-92c8-2f9aa8002b90.html.

18. *Id.*

19. *Id.*

## I. BACKGROUND

### A. *History of Crime-Free Nuisance Ordinances*

Thousands of municipalities across the country have adopted crime-free nuisance ordinances.[20] Crime-free nuisance ordinances are laws that sanction landlords for their tenants' behaviors and often coerce landlords to "abate" the nuisance by evicting tenants.[21] These ordinances usually identify certain conditions or conduct that deem a property a "nuisance."[22] "Nuisance" behavior is often vaguely defined and can range from "disruptive conduct"[23] and "lewd and lascivious behavior"[24] to violent crime and drug-related felonies.[25] Crime-free nuisance ordinances can be triggered even without a conviction.[26] In many municipalities, a property with an "excessive" number of 9-1-1 calls will also be deemed a nuisance.[27] Additionally, crime-free nuisance ordinances typically employ a vicarious liability scheme, meaning that the behavior of any member of the household, their guests, or another person under the resident's control can trigger the ordinance.[28] If landlords fail to "abate" the nuisance, they face sanctions including fines, revocation of their renter's license, or even imprisonment.[29]

Crime-free nuisance ordinances are a type of third-party community policing.[30] Third-party policing privatizes police responsibilities by placing the onus on landlords to deal with tenants whom the community deems problematic.[31] Some cities, like Milwaukee, explicitly state that the purpose of crime-free nuisance ordinances is to shift the cost of policing from taxpayers to landlords.[32] Proponents of the ordinances also claim that the policies are "designed

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20. Sandra S. Park, *Stopping Evictions Caused by Nuisance Ordinances*, *in* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, PROTECT TENANTS, PREVENT HOMELESSNESS 28 (2018), https://nlchp.org/wp-content/uploads/2018/10/ProtectTenants2018.pdf.

21. Jarwala & Singh, *supra* note 11, at 877–78.

22. Sandra Park & Michaela Wallin, *Local Nuisance Ordinances: Penalizing the Victim, Undermining Communities?*, MUN. LAW. MAG., May/June 2015, at 6, https://imla.org/wp-content/uploads/2020/03/article-1755.pdf.

23. *Id.*

24. FLORISSANT, MO., MUN. CODE § 605.454 (2019).

25. Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 847 (2015).

26. FLORISSANT, MO., MUN. CODE § 605.461(A)(4) (2019).

27. Jarwala & Singh, *supra* note 11, at 879.

28. FLORISSANT, MO., MUN. CODE § 605.461(A)(4) (2019).

29. Park & Wallin, *supra* note 22, at 7.

30. Anna Kastner, *The Other War at Home: Chronic Nuisance Laws and the Revictimization of Survivors of Domestic Violence*, 103 CALIF. L. REV. 1047, 1063 (2015).

31. *Id.*

32. *Id.* at 1064 (explaining that shifting policing to landlords saves the city money by reducing resources spent in responding to emergency calls).

to reduce crime, drugs, and gangs on apartment properties"[33] and that municipalities enacting these ordinances benefit from "reduced police calls for service, a more stable resident base, and reduced exposure to civil liability."[34]

Using nuisance ordinances to privatize police responsibilities is not a new phenomenon. Nuisance ordinances have regulated tenant behavior since the 1980s, when panic over crime rates and drug usage began to spread across communities.[35] It was then that municipalities began requiring landlords to evict their residents for criminal and noncriminal offenses.[36] Like the 1986 "War on Drugs" legislation, nuisance ordinances are "race neutral" in theory but not in enforcement.[37] The discretionary nature of crime-free nuisance ordinances permits racially-targeted enforcement, leading to disparate racial impact.[38]

Though crime-free nuisance ordinances seem confined to individual municipalities, their pervasive nature has created a national problem.[39] Crime-free nuisance ordinances have spread to forty-eight states[40] and around 2,000 municipalities[41]—over ten percent of all municipalities in the United States.[42] They are not limited to large cities, either; small towns and mid-sized cities across the country have enacted crime-free nuisance ordinances.[43]

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33. *Crime Free Multi-Housing: Keep Illegal Activity Off Rental Property*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/multi-housing.htm [https://perma.cc/E44X-3DLK].

34. *Id.*

35. Kastner, *supra* note 30, at 1060.

36. *Id.*

37. *Id.* at 1061.

38. *Id.*

39. *Id.* at 1056.

40. INT'L CRIME FREE ASS'N, *supra* note 33.

41. Jarwala & Singh, *supra* note 11, at 878. In 2013, the Shriver Center on Poverty Law released a report finding that more than one hundred municipalities in Illinois have enacted crime-free nuisance ordinances. EMILY WERTH, SARGENT SHRIVER NAT'L CTR. ON POVERTY L., THE COST OF BEING "CRIME FREE": LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 1 (2013), http://www.povertylaw.org/files/docs/cost-of-being-crime-free.pdf [https://perma.cc/N95L-G62S]. When the New York Civil Liberties Union surveyed forty of the state's most populous municipalities outside of New York City, it found that twenty-five of those cities had crime-free nuisance ordinances. SCOUT KATOVICH, N.Y. C.L. UNION, MORE THAN A NUISANCE: THE OUTSIZED CONSEQUENCE OF NEW YORK'S NUISANCE ORDINANCES 10 (2018), https://www.nyclu.org/sites/default/files/field_documents/nyclu_nuisancereport_20180809.pdf [https://perma.cc/Z9Z6-PS5T].

42. *See Number of Municipal Governments & Population Distribution*, NAT'L LEAGUE OF CITIES, https://web.archive.org/web/20201013211310/https://www.nlc.org/number-of-municipal-governments-population-distribution (stating that there are 19,492 municipalities in the United States).

43. Kastner, *supra* note 30, at 1056.

### B. *Harmful Impact of Crime-Free Nuisance Ordinances on Domestic Violence Survivors*

Crime-free nuisance ordinances have received national attention for their devastating impact on victims of domestic violence.[44] When the Maplewood City Council enforced its crime-free nuisance ordinance against Ms. Watson, she was forced out of her home[45] and barred from entering Maplewood for six months.[46] With nowhere to go, Ms. Watson had to place her items in storage.[47] But this was only a small part of the harm the ordinance caused her. Ms. Watson's eviction and prohibition from entering Maplewood prevented her from visiting her doctor,[48] caused her to lose her Section 8 Voucher,[49] and left her homeless and seeking shelter in a vacant building.[50] Eventually, Ms. Watson moved back to the City of St. Louis, where she continued to face domestic abuse—the same ex-boyfriend found her at a bus stop and stabbed her.[51] After facing this seemingly endless chain of traumatic events, Ms. Watson filed a federal lawsuit against Maplewood to challenge the ordinance.[52]

Crime-free nuisance ordinances have re-victimized many women like Ms. Watson. In 2012 in Norristown, Pennsylvania, Lakisha Briggs refused to call the police after her former boyfriend stabbed her in the neck because she knew another 9-1-1 call would leave her and her three-year-old daughter homeless.[53] After a neighbor saw her injury and called for an ambulance, Ms. Briggs was airlifted to a trauma unit.[54] Three days later, Norristown city officials re-

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44. *See* ACLU WOMEN'S RIGHTS PROJECT, SILENCED: HOW NUISANCE ORDINANCES PUNISH CRIME VICTIMS IN NEW YORK 4 (2015), https://www.aclu.org/sites/default/files/field_document/equ15-report-nuisanceord-rel3.pdf.

45. ST. LOUIS PUB. RADIO, *supra* note 8, at 13:43–13:48.

46. *Id.* at 14:03–14:17.

47. *Id.* at 13:43–13:48.

48. *Id.* at 14:03–14:17.

49. *Id.* at 14:22–14:36.

50. *Id.*

51. *Id.* at 14:40–14:58.

52. First Amended *Watson* Complaint, *supra* note 3. The § 1983 claim alleged that Maplewood violated Ms. Watson's First and Fourteenth Amendment rights and the Missouri state constitution's equivalent protections. *Id.* ¶¶ 11–13. The parties in *Watson* settled on September 11, 2018. *Rosetta Watson v. City of Maplewood*, ACLU, https://www.aclu.org/cases/rosetta-watson-v-maplewood [https://perma.cc/A6TK-WTQX] (last updated Apr. 10, 2017). Maplewood agreed to pay Ms. Watson $137,000 as compensation for the damages caused to her. Release and Settlement Agreement at 1, Watson v. City of Maplewood, No. 4:17-cv-1268 (E.D. Mo. Aug. 17, 2018), https://www.aclu.org/legal-document/watson-v-maplewood-settlement. The city also agreed to amend the nuisance ordinance. *Id.* at 2. Significantly, Maplewood added an exception for victims and now forbids enforcement against persons who call the police or call for emergency services. *Id.* at Exhibit A, ¶ 18.

53. *See* Kastner, *supra* note 30, at 1048.

54. *Id.*

voked her landlord's rental license and said he must evict Ms. Briggs within ten days.[55] In 2014, in Surprise, Arizona, Nancy Markham called the police after her ex-boyfriend choked her, punched her, and threatened her with weapons. Subsequently, a city police officer enforced the town nuisance ordinance and told Ms. Markham's landlord to evict her.[56]

Because victims of domestic violence call emergency services more frequently than other groups, their calls disproportionately trigger nuisance ordinance enforcement.[57] One study surveyed every nuisance citation distributed in Milwaukee between 2008 and 2009.[58] The study found that 3.8% of all 9-1-1 calls concerned domestic violence, yet domestic violence was the reason for 15.7% of all nuisance designations.[59] These domestic violence incidents resulted in 157 citation letters.[60] Landlords responded in eighty-six of these citations.[61] In over half of their responses, the landlords initiated formal or informal eviction proceedings, and in 83% of cases the landlord "relied on either eviction or threat of eviction for future police calls."[62]

This sort of response from landlords forces domestic violence survivors to choose between their housing and their safety, as they know that calling the police on an abusive partner may lead to eviction and homelessness.[63] Women of color and poor women are more likely to face this impossible choice and experience the negative impacts of these crime-free nuisance ordinances.[64]

### C. *Majority-White Municipalities Use Crime-Free Nuisance Ordinances to Prevent Integration*

In addition to the harm crime-free nuisance ordinances cause domestic violence survivors, the ordinances also harm Black fami-

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55. *Id.* at 1048–49.

56. *Nancy Markham v. City of Surprise*, ACLU, https://www.aclu.org/cases/nancy-markham-v-city-surprise [https://perma.cc/4X37-USEJ] (last updated Jan. 30, 2015).

57. ACLU WOMEN'S RIGHTS PROJECT, *supra* note 44, at 4.

58. Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117 (2012).

59. *Id.* at 131.

60. *Id.* at 132.

61. *Id.* at 133.

62. *Id.*

63. Amanda K. Gavin, *Chronic Nuisance Ordinances: Turning Victims of Domestic Violence Into "Nuisances" in the Eyes of Municipalities*, 119 PA. ST. L. REV. 257, 267 (2014).

64. *See* Kastner, *supra* note 30, at 1053–56. For example, a study in Milwaukee found that the likelihood a property receives a nuisance citation due to domestic violence increases with the percentage of Black residents in the neighborhood. Desmond & Valdez, *supra* note 58, at 137 (detailing that the study controlled for both domestic violence calls made from properties and neighborhoods' domestic violence rates).

lies by preventing integration in predominantly white neighborhoods. As people of color move to smaller cities and suburbs, municipalities have passed crime-free nuisance ordinances to disproportionately police and evict Black families.[65] In Faribault, Minnesota, the Black population nearly tripled between 2000 and 2010 and residents complained about increased criminal activity.[66] Though police records did not support these claims, in 2014 the city passed a crime-free ordinance to get rid of "problem tenants" living in downtown Faribault.[67]

Two common features of crime-free nuisance ordinances make them particularly effective tools to prevent integration. First, they allow discretionary enforcement by police officers and city officials. Second, they make tenants vicariously liable for the actions of others.

Police are often given broad discretion to selectively enforce vague ordinances, resulting in biased implementation that disproportionately impacts communities of color.[68] In Antioch, California, a historically majority-white city with a growing Black population, the city created a police unit to surveil alleged nuisances, particularly on rental properties.[69] Antioch gave officers nearly unlimited discretion to choose the locations to investigate.[70] Rather than solely focusing on nuisances, the unit closely watched Black families, searching their homes without warrants and investigating their private lives.[71] Officers in Antioch disproportionately policed Black tenants receiving Section 8 Vouchers who lived in majority-white neighborhoods.[72] Broad discretionary powers and vague

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65. Rachel Smith, *Policing Black Residents as Nuisances: Why Selective Nuisance Law Enforcement Violates the Fair Housing Act*, 34 HARV. J. RACIAL & ETHNIC JUST. 87, 96 (2018). One Ohio study found that crime-free nuisance ordinances were primarily passed to penalize people of color whose behavior was perceived as disruptive, rather than out of concern for crime. *Id.* at 99 (citing JOSEPH MEAD, MEGAN E. HATCH, J. ROSIE TIGHE, MARISSA PAPPAS, KRISTI ANDRASIK & ELIZABETH BONHAM, WHO IS A NUISANCE? CRIMINAL ACTIVITY NUISANCE ORDINANCES IN OHIO 3 (2017), https://www.clevescene.com/media/pdf/cano_report.pdf [https://perma.cc/3AL8-NTCG] ("Rarely do resident express concern with serious crime. Instead, residents and councilmembers complain about annoying or rude behavior and their wish for a certain community character. Race and class undertones are frequently evident.")).

66. Deborah Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 199 (2019).

67. *Id.* Faribault's crime-free nuisance ordinance specifically targets rental housing, and nearly all of the Black families in downtown Faribault rent their homes. Notably, the ordinance exempts single-family dwellings occupied by a relative of the owner—an exemption that is far more likely to shield white people from the consequences of the crime-free ordinance. *Id.* at 200.

68. Kastner, *supra* note 30, at 1065–66.

69. Smith, *supra* note 65, at 100.

70. *Id.*

71. *Id.*

72. *Id.* at 101.

crime-free nuisance ordinances allow for disproportionate enforcement reflecting the prejudices and implicit biases of individual officials.[73] With the widespread use of discretionary nuisance laws, it is no surprise that Black residents in racially integrated neighborhoods have the highest rates of nuisance citations.[74]

Crime-free nuisance ordinances also disproportionately harm Black families because the ordinances often apply vicarious liability. This means tenants may be evicted for actions they were only tangentially connected to through their social or familial relationships.[75] For example, in Florissant in St. Louis County, the nuisance ordinance states that a landlord's residential rental license "may be suspended or revoked if any member of the household, guest or another person under the resident's control" commits a criminal activity or municipal offense.[76] Littering, possession of marijuana, and violating the city curfew for any person under seventeen are all municipal offenses that could lead to eviction.[77] With the ordinance's broad-sweeping vicarious liability, entire families could be evicted based on the actions of one member.[78]

This expansive vicarious liability overwhelmingly affects low-income households where one woman supports the family and her adolescent son engages in an illegal activity.[79] These families may be forced to exclude their children from the home to minimize the risk of eviction.[80] Black families are especially at risk because Black adolescent males are over-policed and arrested at much higher rates than their white peers.[81] As a result, Black families are more likely to be forced to choose between (a) excluding a child

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73. Kastner, *supra* note 30, at 1066–67.

74. Smith, *supra* note 65, at 99.

75. Swan, *supra* note 25, at 845–46.

76. FLORISSANT, MO., MUN. CODE § 605.461(A)(4) (2019).

77. FLORISSANT, MO., MUN. CODE §§ 605.461(A)(4)(h) (2019), 210.530 (2020) (littering), 210.1800 (2020) (possession of marijuana), 210.1980, (2020) (curfew violations).

78. Theresa Langley, *Living Without Protection: Nuisance Property Laws Unduly Burden Innocent Tenants and Entrench Divisions Between Impoverished Communities and Law Enforcement*, 52 HOUS. L. REV. 1255, 1278 (2015).

79. *Id.* at 1279.

80. *See* Swan, *supra* note 25, at 857–58.

81. *See Who Are You Calling a Nuisance?: How Nuisance Ordinances Discriminate Against Families With Children*, HARV. C.R.-C.L. L. REV.: AMICUS BLOG (Apr. 11, 2018), https://harvardcrcl.org/who-are-you-calling-a-nuisance-how-nuisance-ordinances-discriminate-against-families-with-children/ [https://perma.cc/YZ4Z-KZS5]; *see also* Smith, *supra* note 65, at 99–100 (noting that in 2005, Bedford, Ohio passed a crime-free nuisance ordinance shortly after the population shifted from majority-white to majority-Black. The Mayor stated that the ordinance's purpose was to "police 'predominantly African American kids who bring in [a] mentality from the inner city.' " (citing MEAD, ET AL., *supra* note 65, at 4)).

from the home to avoid eviction and (b) keeping the family together but losing their home.[82]

Preventing integration was likely one of the driving factors behind Maplewood's nuisance ordinance,[83] where the majority white suburb[84] forced Rosetta Watson, a Black woman, out of her home. This rationale also likely explains why Florissant, whose white population dropped from 70.3% in 2010[85] to 57.6% in 2017,[86] enacted its broad-sweeping, vicarious-liability nuisance ordinance in 2016.[87] As more Black families moved into Florissant, the City enacted a sweeping crime-free nuisance ordinance—exemplifying how many majority-white municipalities are dealing with the threat of integration.

## II. CURRENT LITIGATION STRATEGIES CHALLENGING NUISANCE LAWS

Part II of this Note analyzes current litigation strategies advocates use to challenge crime-free nuisance ordinances. These litigation strategies are often based in anti-discrimination protections, like the Equal Protection Clause of the Fourteenth Amendment and the Fair Housing Act. This Section will discuss the limitations of these approaches and highlight why advocates should pivot to extra-discrimination strategies.

### A. *Constitutional Violations*

Advocates often allege that crime-free nuisance ordinances violate the U.S. Constitution. Specifically, advocates typically allege violations of the Fourteenth Amendment and First Amendment.

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82. *See* Swan, *supra* note 25, at 858.

83. *See* Complaint ¶¶ 2, 3, 16, Metro. St. Louis Equal Hous. & Opportunity Council v. City of Maplewood, No. 4:17CV886 RLW, 2017 U.S. Dist. LEXIS 202308 (E.D. Mo. Dec. 8, 2017) [hereinafter *Metro. St. Louis* Complaint].

84. U.S. CENSUS BUREAU, 2017 ACS 5-YEAR POPULATION ESTIMATE: MAPLEWOOD, MISSOURI, https://data.census.gov/cedsci/table?q=maplewood%20missouri&tid=ACSDP5Y2017.DP05 [https://perma.cc/EYA4-7FRP].

85. U.S. CENSUS BUREAU, 2010 ACS 5-YEAR POPULATION ESTIMATE: FLORISSANT CITY, MISSOURI, https://data.census.gov/cedsci/table?q=florissant%20city,%20missouri&tid=ACSDP5Y2010.DP05 [https://perma.cc/636V-RGTV].

86. U.S. CENSUS BUREAU, 2017 ACS 5-YEAR POPULATION ESTIMATE: FLORISSANT CITY, MISSOURI, https://data.census.gov/cedsci/table?q=florissant%20city,%20missouri&tid=ACSDP5Y2017.DP05 [https://perma.cc/MY74-PR7N].

87. *See* FLORISSANT, MO., MUN. CODE § 605.453 n.1 (2019).

### 1. Fourteenth Amendment Equal Protection

The Fourteenth Amendment's Equal Protection Clause prohibits the denial of equal protection of the law.[88] Advocates can bring claims of racial discrimination under the Fourteenth Amendment if a crime-free nuisance ordinance was enacted with the purpose and intent to discriminate against people of color. The ACLU took this approach in 2018 when it filed a lawsuit on behalf of six Black renters and a non-profit organization against Faribault, Minnesota. The Plaintiffs alleged that Faribault enacted its ordinance to reduce the number of Black and Somali residents living in rental housing within its city.[89] To support their claim of intentional discrimination, the Plaintiffs provided direct evidence of racial animus underlying the ordinance's enactment.[90] The Plaintiffs pointed to the legislative record, which documented community concerns about "cultural clashes taking place," the proximity of a "very large diverse population," and ways to handle the growing Somali population and the alleged increasing crime rates.[91] The Plaintiffs also noted the ordinance's severe discriminatory impact ("approximately 90% of Faribault's Black households are renter households, as compared to just 28% of non-Hispanic white households"[92]), plus instances of explicit and coded animus from city officials and community members.[93] If the Plaintiffs successfully prove that there was intentional discrimination, the ordinance will be subject to strict scrutiny analysis and almost certainly struck down.[94]

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88. U.S. CONST. amend. XIV, § 1.

89. Complaint ¶¶ 1, 63, 64, 66, Jones v. City of Faribault, No. 18-cv-01643 (D. Minn. June 13, 2018), https://www.aclu.org/legal-document/jones-et-al-v-city-faribault-complaint [https://perma.cc/TWW7-C96V].

90. *Id.* ¶¶ 142–48.

91. *Id.* ¶¶ 143–45.

92. *Id.* ¶ 150.

93. *Id.* ¶¶ 149–62.

94. *See* Richmond v. Croson, 488 U.S. 469, 493 (1989) (explaining that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool"). While the ordinance could survive strict scrutiny if it is found to be "narrowly tailored to serve a compelling interest," the Supreme Court has only found a "compelling interest" in two situations: World War II and affirmative action. *See* Korematsu v. United States, 323 U.S. 214 (1944) (World War II); Grutter v. Bollinger, 539 U.S. 306 (2013) (affirmative action).

In February 2021, the judge in *Jones v. City of Faribault* granted in part and denied in part cross-motions for summary judgment, finding "that the record supports a reasonable inference that racial animus was either a motivating factor or the but-for cause in the City's decision to implement the Ordinance." Jones v. City of Faribault, No. 18-1643, 2021 WL 1192466, at *1 (D. Minn. Feb. 18, 2021). The court also found that there "remains a genuine dispute of material fact as to whether the City's policy objectives were legitimate or merely pretext to discriminate against Black and Hispanic residents." *Id.* Additionally, the

A municipality may also violate the Equal Protection Clause if the nuisance ordinance treats domestic violence victims—the majority of whom are women—differently than other crime victims.[95] If domestic violence survivors are treated differently than other crime victims, the ordinance's gender-based discrimination is subject to intermediate scrutiny and will be invalid if it is not substantially related to a significant government interest.[96]

Ms. Watson, also represented by the ACLU, raised two gender-discrimination claims in *Watson v. Maplewood*. She argued that (1) "Maplewood intentionally discriminated against women when it *enacted* its nuisance ordinance by singling out . . . domestic violence [calls]," the vast majority of which are placed by women,[97] and (2) Maplewood discriminated against women seeking police help in *enforcing* its nuisance ordinance against domestic violence victims.[98] Ms. Watson alleged that Maplewood's policy of targeting tenants seeking emergency assistance for domestic violence and "treating them differently from other [tenants]" did not "advance an important or legitimate government interest, and is not substantially or rationally related to advanc[ing] such an interest."[99]

Maplewood responded by filing a motion to dismiss.[100] The court dismissed Ms. Watson's second "enforcement" gender-discrimination claim but ruled that her first "enactment" claim survived the motion to dismiss.[101] While this partial victory may have helped Ms. Watson reach a favorable settlement—including changes to Maplewood's ordinance—there are drawbacks to Equal Protection claims. If Maplewood refused to settle, Ms. Watson's Equal Protection claim would have been especially vulnerable to summary judgment. This is because the ordinance did not explicitly reference gender, even though it singled out domestic violence police calls—making it facially neutral. And facially neutral laws that have a disparate impact but were not adopted to advance a

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judge found that a factual dispute remained "as to whether Plaintiffs have shown a discriminatory effect caused by the Ordinance." *Id.*

95. Kastner, *supra* note 30, at 1072.

96. *See* United States v. Virginia, 518 U.S. 515, 570–71 (1996).

97. First Amended *Watson* Complaint, *supra* note 3, ¶ 99 (emphasis added).

98. *Id.* ¶¶ 76–79.

99. *Id.* ¶ 102.

100. Reply Memorandum for Defendant in Support of its Motion to Dismiss, Watson v. City of Maplewood, No. 4:17-cv-1268-JCH, 2018 WL 1638792 (E.D. Mo. Jan. 22, 2018).

101. Watson v. City of Maplewood, No. 4:17CV1268, 2017 WL 4758960, at *6 (E.D. Mo. Oct. 20, 2017). Ms. Watson's second "enforcement" Equal Protection claim was dismissed because she offered "no evidence (or even allegation) that Maplewood enforces it Nuisance Policy differently for men than women." *Id.*

discriminatory purpose do not violate the Fourteenth Amendment.[102]

The court itself alluded to this vulnerability in its ruling on Maplewood's motion to dismiss. While Ms. Watson's allegations (partially) survived the motion, the court warned that the "eventual burden is high."[103] After discovery, Ms. Watson would have needed to "present evidence to support her claim that discrimination against women was a motivating factor in Maplewood's decision to enact the [crime-free nuisance ordinance]."[104] Proving discriminatory purpose is not a simple task, and "requires a showing that the law or practice in question was implemented at least in part because of, not merely in spite of, its adverse effects upon an identifiable group."[105] Since discriminatory intent is exceedingly difficult to prove, Ms. Watson may have been forced to make a non-gender discrimination "rational basis" argument instead, arguing that the ordinance was not rationally related to a legitimate government interest. But Ms. Watson would likely lose this claim because the court would presumably find that the Maplewood ordinance was enacted for the legitimate interest of protecting the safety of the community.[106]

### 2. First Amendment Rights

Compared with a Fourteenth Amendment Equal Protection claim, a First Amendment claim may fare better for plaintiffs alleging constitutional violations. The First Amendment protects freedom of speech and the right "to petition the government."[107] This safeguards the right to communicate with law enforcement, including reporting a crime or seeking emergency assistance.[108] Government retaliation in response to an individual exercising her First

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102. *See* Washington v. Davis, 426 U.S. 229, 242 (1976). However, as Ms. Watson argued in response to a second motion to dismiss, courts have authorized claims of gender discrimination and domestic violence in the past, "even when the challenged policy or custom did not specifically refer to gender." Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss, Watson v. City of Maplewood, No. 4:17-cv-1268-JCH, 2018 WL 1638796 (E.D. Mo. Jan. 10, 2018).

103. *Watson*, 2017 WL 4758960, at *6.

104. Id.

105. *Id.* (quoting Villanueva v. City of Scottsbluff, 779 F.3d 507, 511 (8th Cir. 2015)).

106. *See* Crum v. Vincent, 493 F.3d 988, 994 (8th Cir. 2007) (explaining that, for Equal Protection claims analyzed under rational basis review, courts will presume the legislation is valid and will sustain it if the statute is rationally related to a legitimate government interest, meaning "any state of facts reasonably may be conceived to justify it") (citation omitted).

107. U.S. CONST. amend. I.

108. Kastner, *supra* note 30, at 1071.

Amendment rights forms a basis for § 1983 liability.[109] To establish this claim, a plaintiff must show (1) "she was engaged in a constitutionally protected activity," (2) "that [the government official's] adverse action caused her to suffer an injury which would 'chill a person of ordinary firmness from continuing . . . in that activity,' " and (3) "that the adverse action was motivated in part by . . . [the] exercise of her constitutional rights."[110]

Ms. Watson alleged a First Amendment violation in *Watson v. Maplewood*. When Maplewood enforced its nuisance ordinance, it revoked Ms. Watson's occupancy permit because she made police calls reporting domestic violence.[111] Ms. Watson argued that Maplewood retaliated against her for exercising her freedom of speech and right to petition the government.[112] Ms. Watson also brought a facial challenge against the ordinance, arguing that it violated the First Amendment on its face by imposing penalties for calling the police, "thereby outright burdening tenants' ability to report crime and seek police assistance."[113]

First Amendment claims do not have the same barriers as Equal Protection claims because there is no discriminatory intent requirement.[114] Additionally, any individual whose right to seek emergency services has been burdened can bring a First Amendment challenge, regardless of whether or not they belong to a suspect class. However, First Amendment arguments are strongest when they are used to attack crime-free nuisance ordinances that explicitly sanction police calls. Many crime-free nuisance ordinances do not mention calls to police at all, but instead impose vicarious liability on residents tangentially connected to "criminal" activity under the ordinance.[115]

Furthermore, the Crime Free Association, an organization dedicated to expanding the use of crime-free programs in rental housing, has conveniently posted on its website a list of issues that the ACLU looks for when evaluating the legality of a crime-free nuisance ordinance. The Association puts its viewers on notice that the ACLU challenges nuisance ordinances that penalize tenants who call the police and tenants who are victims of domestic vio-

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109. Naucke v. City of Park Hills, 284 F.3d 923, 927 (8th Cir. 2002).
110. *Id.* at 927–28 (quoting Carroll v. Pfeffer, 262 F.3d 847, 850 (8th Cir. 2001)).
111. First Amended *Watson* Complaint, *supra* note 3, ¶¶ 59–75.
112. *Id.* ¶ 93.
113. *Id.* ¶ 92.
114. Equal Protection claims require a showing of discriminatory intent, but First Amendment retaliation claims only require a showing of retaliatory intent. *See* Watson v. City of Maplewood, No. 4:17CV1268, 2017 WL 4758960, at *5–6 (E.D. Mo. Oct. 20, 2017). Furthermore, a First Amendment facial challenge does not seem to require any showing of a government intent. *See id.*
115. *See supra* notes 76–78 and accompanying text.

lence.[116] In July 2019, the Florissant City Council amended its crime-free nuisance ordinance to add, "[i]t is not the intent of this Article and it shall not be construed or enforced in any manner which would affect the tenancy of a tenant whose only involvement in an incident has been as the victim of a crime."[117]

In some ways, the Crime Free Association's warning and Florissant's carve-out could be viewed as the successful outcome of years of legal efforts to combat harmful nuisance ordinances. It demonstrates that proponents of crime-free nuisance ordinances are paying attention to complaints and making changes to protect domestic violence survivors. While this may mitigate the ordinances' detrimental impact on domestic violence survivors described above, it still leaves municipalities free to use nuisance ordinances to police Black families and prevent integration.

### B. *Fair Housing Act Challenges*

In addition to constitutional challenges, advocates have challenged crime-free nuisance ordinances under the Fair Housing Act (FHA). There are three potential avenues for challenging ordinances under the FHA: intentional discrimination, disparate impact, and segregative effects.

#### 1. Intentional Discrimination

The FHA makes it illegal to deny housing or make housing unavailable "to any person because of race, color, religion, sex, familial status, or national origin"[118] or to discriminate "in the terms, conditions, or privileges" for the rental of a dwelling.[119] When municipalities enforce their nuisance laws by selectively forcing landlords to evict minority groups, they make housing unavailable to these groups.[120] Similar to the Fourteenth Amendment Equal Protection argument, because domestic violence survivors are disproportionately women, nuisance ordinances can be challenged as discriminatorily applied on the basis of sex.[121] The FHA also makes it un-

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116. *Crime Free Certified Trainer*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/trainer_certification.htm [https://perma.cc/6836-F8GC].
117. FLORISSANT, MO., MUN. CODE § 605.453(C) (2019).
118. 42 U.S.C. § 3604(a) (2007).
119. 42 U.S.C. § 3604(b) (2007).
120. Smith, *supra* note 65, at 110.
121. Kastner, *supra* note 30, at 1069.

lawful to discriminate in the sale or rental of housing or to make housing unavailable to those with disabilities.[122]

An FHA claim based on intentional discrimination is called a disparate-treatment claim. Like Fourteenth Amendment discrimination claims, proving disparate treatment under the FHA requires establishing that the defendant acted with a discriminatory intent or motive.[123] To show discriminatory intent or motive, a plaintiff can either rely on direct evidence (e.g., defendant explicitly saying that she treated plaintiff differently because of plaintiff's race) or circumstantial evidence (e.g., plaintiff showing that she was treated differently than a similarly-situated person of a different race).[124] When relying on circumstantial evidence, differential treatment supports the inference that the plaintiff was treated differently because of their race.[125] However, gathering direct or circumstantial evidence of discriminatory intent may be difficult and is a major obstacle to winning disparate-treatment claims.

Around the same time the ACLU and Ms. Watson sued Maplewood, the Metropolitan St. Louis Equal Housing and Opportunity Council (EHOC) also sued Maplewood, alleging its crime-free nuisance ordinance violated the Fair Housing Act.[126] EHOC brought a disparate-treatment claim, alleging that Maplewood intentionally enforced its nuisance ordinance disproportionately based on race, sex, and disability.[127] EHOC also alleged that Maplewood did not enforce its ordinance even-handedly against all eligible residents but instead "enforce[d] the ordinance selectively against those residents whom it deems undesirable for other reasons."[128]

The district court held that EHOC failed to state a disparate-treatment claim under the FHA because EHOC did not identify specific instances where the city enforced the ordinance with discriminatory intent.[129] The court said that EHOC's complaint only pled conclusory allegations that do not give an inference of discriminatory intent, and that the complaint failed to set forth examples, for instance, of white residents receiving more favorable treatment.[130] In order to succeed on a claim of racially discrimina-

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122. 42 U.S.C. § 3604(f)(1).

123. Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 524 (2015).

124. CHARLES SULLIVAN & MICHAEL ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 40 (9th ed. 2017).

125. *Id.*

126. *Metro. St. Louis* Complaint, *supra* note 83, ¶¶ 71–78.

127. *Id.* ¶ 74.

128. *Id.* ¶ 40.

129. Metro. St. Louis Equal Hous. & Opportunity Council v. City of Maplewood, No. 4:17CV886 RLW, 2017 U.S. Dist. LEXIS 202308, at *10–11 (E.D. Mo. Dec. 8, 2017).

130. *Id.* at *8–9.

tory enforcement, EHOC needed not only records showing high enforcement rates against communities of color, but also records showing Maplewood did not enforce the ordinance against white communities for similar behavior.[131]

### 2. Disparate Impact

The FHA also allows for "two distinct types of claims that challenge practices that have a disproportionately adverse effect on minorities: disparate impact and segregative effects."[132] In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*, the Supreme Court held that disparate impact claims are cognizable under the Fair Housing Act.[133] Under the disparate impact theory of liability, a plaintiff "challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale."[134] A prima facie disparate impact case is established by evidence of a statistical disparity between groups and by showing a "robust causality requirement" linking the challenged facially neutral policy to the disparity.[135] Once a plaintiff establishes a prima facie case, the burden shifts to defendants to show that the policy is necessary to achieve a valid interest.[136] Even if the defendant's showing is successful, plaintiffs can still win by proving an available alternative exists that serves the defendant's legitimate interest.[137]

The "robust causality requirement" is an obstacle to fighting nuisance ordinances under disparate impact claims. Since *Inclusive Communities*, courts have interpreted the robust causality requirement as a stringent framework needed to prevent defendants from being "held liable for racial disparities they did not create."[138] For example, the Eighth Circuit held that "robust causality" means that plaintiffs must point to an "'artificial, arbitrary, and unnecessary' policy causing the problematic disparity."[139] In the Seventh Circuit, a plaintiff claimed that a city's adoption of a rental unit inspection

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131. *See* Jarwala & Singh, *supra* note 11, at 901.
132. Archer, *supra* note 66, at 217.
133. 576 U.S. 519, 545–46 (2015).
134. *Id.* at 524 (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009)).
135. *Id.* at 542.
136. *Id.* at 527.
137. *Id.* at 533.
138. *Id.* at 542 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653, *superseded by statute on other grounds*, 42 USC §2000–2k); *see, e.g.*, Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 906 (5th Cir. 2019); Oviedo Town Ctr. v. City of Oviedo, 759 Fed. Appx. 828, 828 (11th Cir. 2018).
139. Ellis v. City of Minneapolis, 860 F.3d 1106, 1114 (8th Cir. 2017).

ordinance violated the FHA because it disproportionately burdened landlords with mostly Black and Latino tenants.[140] The district court, however, ruled that the plaintiff failed to meet the robust causality requirement because the plaintiff did not "lay out a chain of inferences explaining how the Ordinance will *cause* a racially disparate impact, as distinct from just resulting in a disparate impact."[141]

Fair housing advocates may struggle to show the robust causality requirement when litigating against crime-free nuisance ordinances. Often, the reason that crime-free nuisance ordinances have a disproportionate impact on minority groups is because the ordinances' vague language allows for discriminatory enforcement by biased city officials.[142] If courts hold that discriminatory enforcement is not itself *caused by* the nuisance ordinance, plaintiffs will struggle to make a prima facie showing of disparate impact.

In its lawsuit against Maplewood, EHOC alleged that the city's ordinance had a disparate impact on "non-white residents, women, and people with disabilities."[143] EHOC gathered data on forty-three nuisance violation hearings in Maplewood over a five-year period.[144] For hearings where the household's race could be ascertained, more than fifty-five percent of the tenants were Black, despite Black people making up only seventeen percent of Maplewood's population.[145] The court did not find EHOC's statistical evidence sufficient to establish robust causation. The court stated that, "at best," EHOC's evidence showed "an imbalance resulting from *enforcement* of the ordinance."[146] Consequently, EHOC's disparate impact claim was rejected for failing to state a claim under the FHA because it did not plausibly allege that the nuisance ordinance caused a disparity.[147]

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140. TBS Grp., LLC v. City of Zion, No. 16CV5855, 207 U.S. Dist. LEXIS 183060, *3 (N.D. Ill. Nov. 6, 2017).

141. *Id.* at *24–25.

142. *See supra* notes 68–74 and accompanying text.

143. *Metro. St. Louis* Complaint, *supra* note 83, ¶ 74.

144. *Id.* ¶ 25.

145. *Id.* ¶ 26. EHOC also found that sixteen of the forty-three enforcement actions were due to incidents of domestic disturbance, six of which involved a woman being attacked by a man. *Id.* ¶ 29. It found that eleven of the enforcement actions involved tenants seeking emergency services because of mental illness or other disabilities. *See id.* ¶ 35–37.

146. Metro. St. Louis Equal Hous. & Opportunity Council v. City of Maplewood, No. 4:17CV886 RLW, 2017 U.S. Dist. LEXIS 202308, at *14 (E.D. Mo. Dec. 8, 2017) (emphasis added).

147. *Id.* at *13–15.

### 3. Segregative Effects

In addition to prohibiting policies that have a disparate impact on protected groups, the FHA also restricts actions that have segregative effects—policies and practices that create, increase, reinforce, or perpetuate segregated housing patterns.[148] The same burden shifting framework used with disparate impact claims applies to segregative effects claims. To establish a prima facie segregative effects claim, a plaintiff must "(1) challenge a distinct practice or policy of the defendant; (2) use statistical evidence to show that the identified practice creates, increases, reinforces, or perpetuates segregated housing patterns in the relevant community; and (3) establish that the challenged practice is the cause of the segregative effect."[149]

The segregative effects theory is primarily employed against municipalities using their zoning powers to prevent integrated housing developments in predominantly white communities.[150] The segregative effects provision has not yet been tested against crime-free nuisance ordinances, but it has the potential to be more successful than disparate impact claims.[151] Unlike disparate impact claims, which focus on a particular policy, segregative effects claims can challenge both individual housing decisions and broad policies.[152] The *Maplewood* district court dismissed EHOC's disparate impact claim because the disproportionate outcome was a result of the discretionary *enforcement* of the nuisance ordinance, rather than the policy itself.[153] Alleging segregative effects instead of disparate impact would allow the plaintiff to target the discriminatory enforcement of the ordinance by arguing that, cumulatively, this practice perpetuates segregation.[154]

The segregative effects theory may be promising, but it is not a silver bullet. While courts have accepted relatively simple census data to prove a segregative effects claim,[155] showing severe segregation seems to be a prerequisite for a successful claim.[156] In *Avenue*

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148. Archer, *supra* note 66, at 217 (citing 24 C.F.R. § 100.500(a) (2018)).
149. *Id.* at 218–19.
150. Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709, 713 (2017).
151. *See* Archer, *supra* note 66, at 219.
152. *Id.* at 219–20.
153. Metro. St. Louis Equal Hous. & Opportunity Council v. City of Maplewood, No. 4:17CV886 RLW, 2017 U.S. Dist. LEXIS 202308, at *13–14 (E.D. Mo. Dec. 8, 2017).
154. *See* Archer, *supra* note 66, at 220.
155. Schwemm, *supra* note 150, at 738–39; *see, e.g.*, Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1291 n.9 (7th Cir. 1977).
156. Schwemm, *supra* note 150, at 764; *see, e.g.*, *Arlington Heights*, 558. F.2d at 1291 n.9 (finding that a city that is 99% white is evidence of "overwhelming" racial segregation).

*6E Investments, LLC v. City of Yuma*, the Ninth Circuit affirmed a summary judgment ruling against the plaintiffs' segregative effects claim.[157] The district court rejected the plaintiffs' claim that the city's refusal to rezone land for a predominantly Hispanic development had segregative effects because "Hispanics [were] not a minority in Yuma; they actually constitute[d] 55% of the population."[158] Under this reasoning, a segregative effects claim against Florissant's crime-free nuisance ordinance would likely fail because the city's census data reflects increased integration over the last ten years.[159] This suggests that a segregative effects claim may not be the best strategy to preemptively tackle a crime-free nuisance ordinance implemented in a fairly integrated city.

In addition to the legal standards discussed above, advocates must consider the psychological obstacles to bringing claims under anti-discrimination laws. Psychology studies show that even when there is significant evidence of invidious discriminatory intent, most people—including judges and jurors—refuse to attribute the behavior to discrimination.[160] Professor Katie Eyer theorizes that separating the legal inquiry from direct allegations of discrimination will help plaintiffs avoid psychological obstacles preventing successful anti-discrimination claims.[161] Rather than attempting to expand existing anti-discrimination doctrine, advocates should look to extra-discrimination remedies to alleviate the disparate impact of crime-free nuisance ordinances. Part II discussed First Amendment challenges, which is one extra-discrimination remedy used to combat crime-free nuisance ordinances. Part III explores another extra-discrimination litigation strategy: conflict preemption by state laws that protect tenants' rights to their rental housing.

## III. CONFLICT PREEMPTION AND CRIME-FREE NUISANCE ORDINANCES

Crime-free nuisance ordinances are pervasive and deeply problematic. These policies are detrimental to vulnerable communities,

157. 818 F.3d 493, 513 (9th Cir. 2016).

158. Schwemm, *supra* note 150, at 733 (quoting Ave. 6E Invs. v. City of Yuma, No. 2:09-cv-00297 JWS, 2013 WL 2455928, at *7 (D. Ariz. June 5, 2013)).

159. *See supra* notes 85–86 and accompanying text.

160. Eyer, *supra* note 1, at 1278–79.

161. *Id.* at 1280–81, 1346 ("Because the operative issue under [extra-discrimination remedies] is not whether a particular individual has been discriminated against—but rather whether the . . . facts presented can fulfill . . . statutory or judicial requirements—the difficult and psychologically contingent question of whether discrimination truly took place need not be resolved.").

but they are often disguised by a legitimate local need to protect the general welfare of the city and promote safety in rental housing.[162] Without pressure from communities or litigation brought by advocacy groups, it seems that there is not much standing in the way of municipalities creating these laws. As discussed in Part II, there are multiple constitutional and statutory claims advocates use to challenge these ordinances, but there are limitations to each. Part III discusses an overlooked protection that can be used to challenge crime-free nuisance ordinances: state landlord-tenant laws. This Part explores whether excessively broad crime-free nuisance ordinances are preempted by state eviction laws and recommends that tenants' advocates align with landlord associations to fight these ordinances.

### A. *Conflict Preemption Doctrine: The Limits of Municipal Police Power*

Municipalities derive their law-making powers from the state legislature or state constitution. There are two leading doctrines that define the scope of municipal legislative powers: Dillon's Rule and home-rule. Under Dillon's Rule, the powers of a municipality only include powers enumerated by the state's constitution, statutes, or charter.[163] The majority of states, however, have home-rule provisions.[164] Home-rule provisions are state constitutional or statutory provisions that give localities the power to adopt their own municipal charters and regulations, subject to the laws and policy of the state.[165] In contrast to Dillon's Rule, cities governed by home-rule do not depend on the state legislature for authority and instead have power directly from the state constitution.[166]

As part of their home-rule authority, municipalities are often empowered to declare and abate public nuisances by enacting ordinances.[167] This power exists under the municipality's general po-

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162. *See* Simeone-Casas, *supra* note 15.

163. 2A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 10:10 (3d ed., rev. vol. 2019). The powers enumerated include (1) powers expressly conferred, (2) powers necessarily or fairly implied in or incident to the powers expressly granted, and (3) powers essential to the declared objects and purposes of the municipality. *See also* 56 AM. JUR. 2D, MUNICIPAL CORPORATIONS, ETC. § 163 (2020).

164. Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1129 (2012).

165. 1 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 1:43 (3d ed., 2019).

166. 2A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 10:18 (3d ed., 2019).

167. 6A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 24:67 (3d ed., 2019).

lice power.[168] Municipal police power allows for local regulation and legislation to preserve public peace, health, morality, and welfare.[169] Although these are issues of general state concern, they are often local in nature and appropriately dealt with through local laws. However, local control over nuisance abatement is not limitless—municipalities' legislating powers are limited by state and federal laws.[170]

Preemption doctrine establishes a priority between potentially conflicting laws enacted by various levels of government.[171] Municipal ordinances are subordinate to state laws.[172] This means that municipal ordinances must be in harmony with state law, and if there is any conflict between a municipal ordinance and state statute, the statute preempts the ordinance.[173] While preemption doctrine varies by state, generally preemption of a municipal ordinance by a state law can be express or implied.[174] This Note focuses on one type of implied preemption—conflict preemption—which exists if the municipal ordinance irreconcilably conflicts with or stands as an obstacle to the execution of the full purpose of a state statute.[175]

Under conflict preemption doctrine, a municipal ordinance enacted pursuant to local police power is invalid if it conflicts with a general law of the state.[176] For instance, a municipal ordinance is preempted by state law when a right or benefit expressly given by the state law has been curtailed or taken away by the ordinance.[177] Courts examining potential conflict preemption look to the language of the local ordinance and state statute, and ask whether the direct consequences of the local ordinance render illegal what is

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168. *Id.*
169. *Id.* § 24:1.
170. *Id.* § 24:72.
171. 5 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 15:18 (3d ed. 2019).
172. *Id.*
173. *Id.* § 15:19.
174. *Id.* Express preemption occurs where the state statute explicitly bars local government from acting on a particular issue. *Id.* Implied preemption can occur through field preemption or conflict preemption. Field preemption is found where an entire statute is so comprehensive that the general assembly intended to occupy the entire field completely so that no local ordinances on the issue are permitted. *Id.*
175. *Id.*
176. *See* 56 AM. JUR. 2D, *supra* note 163, § 109. In this context, "general law" is defined as "part of a statewide and comprehensive legislative enactment," must "apply to all parts of the state and operate uniformly throughout the state," must "set forth police, sanitary, or similar regulations," rather than only granting or limiting the "legislative power of a municipal corporation to establish those types of regulations," and must "prescribe a rule of conduct on citizens generally." *Id.* at n.4.
177. MCQUILLIN, *supra* note 171, § 15:19.

specifically allowed by state law.[178] This Note discusses whether crime-free nuisance ordinances irreconcilably conflict with and stand as an obstacle to the rights created by state landlord-tenant laws.

### B. *Conflict Preemption Applied to Crime-Free Nuisance Ordinances*

Advocates who use conflict preemption to fight crime-free nuisance ordinances should first review state landlord-tenant statutes to discern tenants' rental protections under state law. Second, advocates must look to the state's constitution and case law to determine whether conflict preemption claims are available in that state, and if so, the applicable conflict preemption test. Finally, advocates must compare state law eviction grounds with crime-free nuisance ordinance eviction grounds to determine potential conflict. This Section performs this analysis using crime-free nuisance ordinances in Iowa and Missouri as an example.

#### 1. State Landlord-Tenant Laws Create Rights for both Landlords and Tenants

The purpose of landlord-tenant laws is to delineate the rights that accompany rental agreements. These laws protect both landlords and tenants, and every state has a landlord-tenant statute that includes the legitimate reasons for evicting tenants.[179] For example, all landlord-tenant laws provide a remedy for landlords when their tenants fail to pay rent.[180]

States diverge, however, regarding procedural protections given to tenants during the eviction process, as well as which tenant behaviors can lead to eviction. In Iowa, for example, state law offers a "notice to cure" provision when a tenant's actions put them at risk of eviction.[181] Landlords must give tenants the opportunity to

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178. *Id.*

179. *See* Richard A. Leiter & William S. Hein & Co., *Leases and Rental Agreements*, *in* 50 STATE STATUTORY SURVEYS (2016); Thompson Reuters, *Unlawful Detainer*, *in* 50 STATE STATUTORY SURVEYS (2020).

180. *See* Thompson Reuters, *Unlawful Detainer*, *in* 50 STATE STATUTORY SURVEYS (2019).

181. AMBER DESMET, IOWA LEGIS. SERVS. AGENCY, LEGISLATIVE GUIDE 24 (2012) (citing IOWA CODE §§ 562A.27A, 562B.25(1)) ("The landlord is required to deliver a written notice to cure the breach to the tenant which also specifies when the rental agreement will terminate if the breach is not remedied."); *see also* IOWA CODE § 562A.27A (2014) (providing that a tenant must be given an opportunity to remedy a violation if criminal activity was committed by a co-tenant or guest).

"cure" the issue before they can pursue an eviction.[182] This state law "notice to cure" provision may be curtailed by municipal crime-free nuisance ordinances.[183] In Missouri, state law provides four ways that a landlord can terminate a tenancy outside those established in a lease.[184] If a St. Louis County ordinance demands the eviction of a tenant for reasons not authorized in the Missouri statute, the ordinance may infringe on tenants' rights and conflict with state law.

### 2. Conflict Preemption Standard

As explained above, conflict preemption occurs when a local law is irreconcilable with a state statute. The precise legal standard for conflict preemption varies state-to-state, but it is generally quite demanding. In both Iowa and Missouri, for example, a municipal ordinance is unavoidably irreconcilable with the statute—and preempted by it—when the ordinance prohibits what the statute permits, or permits what the statute prohibits.[185] However, Iowa courts are required to interpret state law in a manner that renders it harmonious with the ordinance, if at all possible.[186] Furthermore, Iowa courts must presume the ordinance is valid,[187] and the conflict

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182. Some states do not provide an opportunity for tenants to cure the issue before a landlord can pursue an eviction. *See, e.g.*, W. VA. CODE § 55-3A-1 (providing no opportunity for a tenant to remedy a breach prior to a landlord initiating eviction proceedings).

183. *See, e.g.*, Landlords of Linn Cnty. v. City of Cedar Rapids, No. EQCV069920, at 16 (Dist. Ct. Linn Cnty. July 1, 2011), http://landlordsoflinncounty.org/wp-content/uploads/downloads/2011/07/Chapter-29-Ruling-7-6-11.pdf? [https://perma.cc/K368-CWVS] (holding that conflict preemption applies where a crime-free nuisance ordinance lacks a notice to cure provision, thus rendering the ordinance irreconcilable with state law). The court in *Landlords of Linn County* also held that the ordinance's extended grounds for eviction were irreconcilable with state law. *Id.* This particular application of conflict preemption doctrine is discussed in more detail below. *See infra* Section III.B.3.

184. First, landlords can terminate a month-to-month lease by giving the tenant one month's notice, requiring the person in possession to vacate the premises. MO. REV. STAT. § 441.060. Second, landlords can terminate a year-to-year lease by giving notice of intention to terminate at least sixty days before the end of the year. MO. REV. STAT. § 441.050. Third, a landlord can evict a tenant for nonpayment of rent. MO. REV. STAT. § 535.020. Fourth, a landlord can terminate the lease if the tenant uses the property for certain illegal purposes. *See* MO. REV. STAT. §§ 441.020, 441.740. The fourth avenue will be discussed in more detail below.

185. *See* City of Des Moines v. Gruen, 457 N.W.2d 340, 342 (Iowa 1990) (quoting City of Council Bluffs v. Cain, 342 N.W.2d 810, 812 (Iowa 1983)); Coop. Home Care, Inc. v. City of St. Louis, 514 S.W.3d 571, 579 (Mo. 2017) (quoting Cape Motor Lodge, Inc. v. City of Cape Girardeau, 706 S.W.2d 208, 211 (Mo. 1996) (en banc)).

186. *City of Des Moines*, 457 N.W.2d at 342.

187. Iowa Grocery Indus. Ass'n v. City of Des Moines, 712 N.W.2d 675, 680 (Iowa 2006).

must be "obvious, unavoidable, and not a matter of reasonable debate."[188]

The Missouri conflict preemption test is similarly stringent. Ordinances are presumed to be valid and lawful.[189] Furthermore, there is no conflict preemption when a municipal ordinance simply supplements a state statute, such as when the municipality prohibits more than the state prohibits.[190] Although this Note focuses on Iowa and Missouri, similar conflict preemption tests also apply in other states, including Minnesota,[191] Maryland,[192] New York,[193] and Pennsylvania.[194]

### 3. Challenging Crime-Free Nuisance Ordinances with Conflict Preemption Doctrine

In Iowa, a group of landlords successfully challenged a Cedar Rapids crime-free nuisance ordinance, arguing that the ordinance conflicted with state law establishing the grounds for eviction.[195] The Cedar Rapids ordinance required residential rental agreements to include a crime-free lease addendum.[196] The crime-free lease addendum was overly broad, requiring landlords to pursue eviction when residents or anyone affiliated with the residents en-

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188. Landlords of Linn Cnty. v. City of Cedar Rapids, No. EQCV069920, at 1 (Dist. Ct. Linn Cnty. July 1, 2011), http://landlordsoflinncounty.org/wp-content/uploads/downloads/2011/07/Chapter-29-Ruling-7-6-11.pdf? [https://perma.cc/K368-CWVS].

189. *See Coop. Home Care, Inc.*, 514 S.W.3d at 578.

190. *Id.* at 583.

191. Bicking v. City of Minneapolis, 891 N.W.2d 304, 313 (Minn. 2017) (quoting Mangold Midwest Co. v. Village of Richfield, 143 N.W.2d 813, 816 (Minn. 1966)) (stating that conflict preemption "exists between state law and municipal regulation when the law and the regulation 'contain express or implied terms that are irreconcilable with each other,' when 'the ordinance permits what the statute forbids,' or when 'the ordinance forbids what the statute *expressly* permits.' ").

192. Cnty. Council of Prince George's Cnty. v. Chaney Enter., 165 A.3d 379, 395 n.19 (Md. 2017) (stating that conflict preemption exists when a local ordinance prohibits what the state permits or permits what the state prohibits).

193. People v. Torres, 108 N.Y.S. 3d 269, 271 (App. Term 2019), *leave to appeal granted*, 34 N.Y.3d 1163, 2020 WL 1187072 (2020) (stating that if local laws do not prohibit what the state law permits nor allow what the state law forbids, the local law is not inconsistent with state law. There is no conflict preemption when a local law merely provides a greater penalty than the state law.).

194. PPL Elec. Utils. Corp. v. City of Lancaster, 214 A.3d 639, 648 (Pa. 2019) (quoting Harris-Walsh Inc. v. Borough of Dickson City, 216 A.2d 329, 333–34 (Pa. 1966)) (stating that conflict preemption exists, and an ordinance is invalid, if it stands as an obstacle to the execution of the full purpose of a law enacted by the General Assembly). To explore the conflict preemption standards in other states, see MCQUILLIN, *supra* note 171, § 15:19.

195. Swan, *supra* note 25, at 883.

196. Landlords of Linn Cnty. v. City of Cedar Rapids, No. EQCV069920, at 1 (Dist. Ct. Linn Cnty. July 1, 2011), http://landlordsoflinncounty.org/wp-content/uploads/downloads/2011/07/Chapter-29-Ruling-7-6-11.pdf? [https://perma.cc/K368-CWVS].

gaged in certain enumerated crimes, including misdemeanors.[197] The ordinance allowed the city to punish a landlord who did not enforce the crime-free addendum by revoking or suspending their rental license.[198] Iowa's landlord-tenant law, however, permits lease termination when a tenant creates a clear and present danger to others.[199] The court held that the Cedar Rapids ordinance was preempted by state law.[200] Because the grounds for eviction under the ordinance were broader than those found in the state statute, the ordinance interfered with a protection provided by the state, thus rendering the ordinance irreconcilable and unenforceable.[201]

A similar argument could be applied in St. Louis County, where crime-free nuisance ordinances coerce landlords to evict tenants based on certain proscribed behaviors. Parts of Missouri's landlord-tenant statute allow or require landlords to evict tenants when they or someone associated with them engages in illegal acts on the premises. If a tenant uses the property for certain illegal purposes, the lease becomes void and the landlord may take possession of the property after providing a ten-day written notice to vacate.[202] Specific illegal purposes include: using the premises as a brothel; prohibited gaming; or allowing the illegal possession, sale, or distribution of controlled substances on the property.[203] Additionally, the statute allows immediate eviction of a tenant when emergency situations arise that would cause physical injury or extensive property damage, or when drug-related criminal activity occurs.[204] The

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197. *Id.* at 1, 16.
198. *Id.* at 1.
199. *Id.* at 12–13.
200. *Id.* at 16.
201. *Id.*
202. MO. REV. STAT. § 441.020 (2012); MO. REV. STAT. § 441.040 (1997) (providing that landlords may repossess the premises after issuing ten days' notice to violators of § 441.020).
203. *Id.*
204. MO. REV. STAT. § 441.740 (1997). The statute provides for expedited eviction when:

> (1) *An emergency situation* where dispossession of the tenant by other, less expeditious means would . . . cause . . . (a) *Physical injury* to other tenants or the lessor, or (b) *Physical damage to lessor's property* and the reasonable cost to repair such damage exceeds an amount equal to twelve months of rent; . . . (2) *Drug-related criminal activity* has occurred on or within the property leased to the tenant; (3) The *property leased to the tenant was used to further, promote, aid or assist in drug-related criminal activity*; (4) The tenant, a member of the tenant's household or a guest has *engaged in drug-related criminal activity either within, on or in the immediate vicinity of the leased property*.

*Id.* (emphasis added). The statue also provides for expedited eviction when:

> (5) The tenant has given permission to or invited a person to enter onto or remain on any portion of the leased property, and the tenant did so knowing that the person had been removed or barred from the leased property . . . or (6) The tenant has failed to promptly notify the plaintiff that a person whom the plaintiff previously had removed from the property leased by the tenant, with the

statute allows an "interested party" to pursue eviction if the landlord or appropriate prosecuting attorney fails to do so.[205] This part of the statute resembles some crime-free nuisance ordinances because it allows the municipality or neighborhood association to pursue eviction even if a landlord chooses not to. However, the state law allows this in very limited and extreme circumstances.[206]

If a city in St. Louis County, like Florissant, has a crime-free nuisance ordinance that is not closely tailored to the grounds for eviction provided by the Missouri statute, it may be void due to conflict preemption. Determining whether conflict preemption applies requires comparing Missouri law and the municipal ordinance(s). Under Florissant's crime-free nuisance ordinance, a landlord may be required to evict a tenant or have its renter's license suspended if any member of the household, guest, or another person under the resident's control commits (or is believed to have committed) any number of activities.[207] Chapter 210 of the Florissant Municipal code, referenced in Florissant's crime-free nuisance ordinance, includes over one hundred offenses.[208] Any of these offenses, even if committed just once, can trigger the crime-free nuisance ordinance. This is true regardless of whether the offense occurred on or near the property. The triggering offenses range from littering

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> knowledge of the tenant, has returned to, entered onto or remained on the property leased by the tenant.

*Id.*

205. MO. REV. STAT. § 441.730 (2011) (defining an "interested party" as "any incorporated, not-for-profit neighborhood association or community-based organization which represents the well-being and interests of the community where the leased property is located").

206. *See* MO. REV. STAT. § 441.740 (1997) (listing grounds for expedited eviction); MO. REV. STAT. § 441.730 (2011) (defining non-landlord, non-prosecuting attorney "interested parties" who may pursue eviction).

207. FLORISSANT, MO., MUN. CODE § 605.461(a)–(i) (2019). The activities that would require eviction include:

> a. A felony crime . . . on or in the immediate vicinity of the residence; b. A Class A misdemeanor . . . in the immediate vicinity of the premises; c. Any criminal activity that threatens the health or safety of, or the right to peaceful enjoyment of the premises by other residents; d. Any criminal activity that threatens the health or safety of, or the right to peaceful enjoyment of their residents or persons residing in the immediate vicinity of the premises; e. Any violent criminal activity at or in the immediate vicinity of the premises; f. Any drug-related criminal activity on or in the immediate vicinity of the premises; g. Any abuse of drugs or alcohol that threatens health, safety or right to peaceful enjoyment of other residents on the premises or persons residing in the immediate vicinity of the premises; h. Violation(s) of the offenses set forth in Chapter 210 of the Florissant Municipal Code; or i. Violation(s) of nuisance provisions set forth in Chapter 213 of the Florissant Municipal Code.

*Id.*

208. *See* FLORISSANT, MO., MUN. CODE §§ 210.020–210.2290 (2020).

and use of a hand-held wireless communications device while driving to kidnapping and assault.[209]

Still, there are parts of the Florissant crime-free nuisance ordinance that are consistent with Missouri law. Paragraph (f),[210] for instance, almost mirrors the proscribed offense in Missouri Revised Statute § 441.740(2)–(4)—any drug related criminal activity on or in the immediate vicinity of the property. Paragraphs (c)–(e)[211] are also arguably in harmony with Missouri Revised Statute § 441.740(1) (*if* the criminal activity complained of would cause *physical* injury or significant property damage). However, Florissant's inclusion of (a), (b), (h), and (i)[212]—which includes hundreds of offenses—vastly extends the list of tenant behavior beyond what is proscribed by Missouri Revised Statute §§ 441.020 and 441.740. In doing so, the municipal ordinance permits eviction where the statute prohibits it, thus interfering with a state-granted protection.

Florissant might defend its crime-free nuisance ordinance as simply supplemental, arguing that requiring an eviction based on a broader category of disruptive behavior merely prohibits more than what the state prohibits, and is therefore not preempted. There are two issues with this argument. First, municipal expansion of liability on a subject regulated by state law creates an irreconcilable conflict that renders the ordinance void and unenforceable.[213] Nuisance ordinances expand liability by vastly extending the potential grounds for eviction. Second, to supplement state law by prohibiting more than what the state prohibits, the municipal ordinance must serve the same purpose as the state law.[214] Landlord-tenant laws are intended to protect the rights of both landlords and tenants. Crime-free nuisance ordinances contradict this purpose by evicting tenants for a wide range of activities. Crime-free nuisance ordinances do not simply prohibit more activity than

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209. FLORISSANT, MO., MUN. CODE §§ 210.580, 210.530, 210.170, 210.110 (2019).
210. FLORISSANT, MO., MUN. CODE § 605.461(f) (2019).
211. FLORISSANT, MO., MUN. CODE § 605.461(c)–(e) (2019).
212. FLORISSANT, MO., MUN. CODE § 605.461(a), (b), (h), (i) (2019).
213. *See* Edwards v. City of Ellisville, 426 S.W.3d 644, 650, 663 (Mo. App. E.D. 2013) (holding that the city ordinance's strict liability for vehicle owners whose car was recorded running a red-light is in conflict with state law, which only regulates driver and pedestrian conduct. The municipality's expansion of liability permits penalization of persons who are neither drivers nor pedestrians for running a red light, while the state statute prohibits such penalization.).
214. *See* Coop. Home Care, Inc. v. City of St. Louis, 514 S.W.3d 571, 583–84 (Mo. 2017) (holding that a city ordinance setting the minimum wage higher than the state minimum wage is not preempted because it serves the same purpose of the state law: to ameliorate the unequal bargaining power between employer and employee and to protect the rights of workers). Since the state minimum wage was not intended to protect employers, the city's ordinance simply supplements the state law by setting additional local limits on the minimum amount an employer can pay an employee. *Id.*

state law—they contravene tenants' rights to their rental housing as provided by state law.

### 4. Limitations of Conflict Preemption as a Litigation Strategy

Conflict preemption is a promising tool to combat crime-free nuisance ordinances. However, given the stringent requirements for conflict preemption, it would not work as a catchall litigation strategy against crime-free nuisance ordinances. For instance, a nuisance ordinance may be so vague that it could easily coerce an eviction in conflict with state law, yet on its face does not explicitly expand the grounds for eviction.[215] Because the standard for conflict preemption sets a high bar, challenging crime-free nuisance ordinances under conflict preemption will likely be most successful when used against municipalities that require crime-free lease addendums —such as Cedar Rapids—or when the ordinance coerces landlords to evict tenants for minor offenses—like in Florissant.

Furthermore, conflict preemption may not be an option in some states. The home rule provisions in Illinois' and Montana's constitutions effectively rule out implied preemption arguments.[216] In Illinois, the home rule provision states that "[h]ome rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive."[217] The Montana Constitution provides that "a local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter."[218] The Montana Supreme Court interpreted this provision to mean that "only express statutory provisions preempt ordinances of a self-governing municipality."[219]

Even if a state's constitution allows for conflict preemption, the state's courts may be resistant to conflict preemption claims.[220] In Texas, for example, the constitution's home rule provision states that no ordinance "shall contain any provision inconsistent with

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215. *See* UNIVERSITY CITY, MO., MUN. CODE §§ 220.020, 220.040, and 220.060 (2016). Although the nuisance ordinance is very broad and gives city officials unrestrained discretion, it does not expressly target tenants.

216. 1 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 4:13 (2020).

217. ILL. CONST. art. VII, § 6(i).

218. MONT. CONST. art. XI, § 6.

219. MARTINEZ, *supra* note 216, § 4:13 n.6 (citing D & F Sanitation Serv. v. City of Billings, 713 P.2d 977, 982 (Mont. 1986)).

220. *See id.* § 4:13.

the Constitution of the State, or of the general laws enacted by the Legislature of this State."[221] But the Texas Supreme Court held that "[t]he intention of the Legislature to impose limitations" on the power of home rule cities must "appear with unmistakable clarity."[222] This means that while Texas allows conflict preemption on paper, Texas courts do not seem eager to apply the doctrine to strike down municipal laws in practice. Therefore, claims based on conflict preemption may be effective in many places but will not be possible in all states.

### C. *Implementation Recommendations: Opportunity for a Unique Alliance*

This Note has primarily discussed the harms crime-free nuisance ordinances cause vulnerable populations and the ways tenants and civil rights and fair housing advocates can sue municipalities. Tenants, however, are not the only people aggrieved by these ordinances; landlords also have a stake in this fight. Some landlords may support crime-free nuisance ordinances because they provide an excuse to evict "troublesome" renters. But because nuisance ordinances are typically enforced by sanctioning landlords, the ordinances tend to be unpopular among lessors.[223] Landlords may turn to litigation to solve this problem.[224] While tenants have the most to lose—literally their homes—municipalities force the hands of landlords by threatening to revoke their renters' license or fine them if they do not cooperate.[225] Landlords and tenants are unlikely allies, often with conflicting interests. However, crime-free nuisance ordinances create a unique situation where landlords and tenants share a common opponent: the municipality. Tenants' rights advocates should consider collaborating with landlord groups and realty associations to fight these ordinances. Furthermore, rather than selecting individual plaintiffs who have been directly affected by the ordinance, tenants' advocates and landlords' associations should rely on organizational standing to bring suits to dismantle these laws.

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221. TEX. CONST. art. XI, § 5.

222. Lower Colorado River Auth. v. City of San Marcos, 532 S.W.2d 641, 645 (Tex. 1975) (quoting City of Sweetwater v. Geron, 380 S.W.2d 550, 552 (Tex. 1964)).

223. *See* Kastner, *supra* note 30, at 1057; Gavin, *supra* note 63, at 275 ("[T]he ordinances have proven to be unpopular with both tenants and landlords, resulting in a plague of lawsuits against the municipalities that adopt such ordinances.").

224. *See, e.g.*, Landlords of Linn Cnty. v. City of Cedar Rapids, No. EQCV069920 (Dist. Ct. Linn Cnty. July 1, 2011), http://landlordsoflinncounty.org/wp-content/uploads/downloads/2011/07/Chapter-29-Ruling-7-6-11.pdf? [https://perma.cc/K368-CWVS]. *See also supra* notes 195–201 and accompanying text.

225. *See supra* note 29 and accompanying text.

By coordinating their efforts, tenants' advocates and landlords' associations can access more information and fund their litigation more efficiently.[226] Collaboration may also help to avoid working towards contradictory objectives, instead pushing both groups to focus on their common goals.[227] If tenants' advocates take on this fight alone, landlords' associations might move to intervene in lawsuits, seeking different outcomes. For example, landlords may want to fight crime-free nuisance ordinance penalties but may nevertheless voluntarily include crime-free lease addendums. Tenants' advocates should be wary of potential landlord intervention and proactively seek to form early alliances with landlords against municimunicipalities, rather than end up in a three-way legal battle.

In addition to the pragmatic benefits of coordination, joining efforts may put plaintiffs in a better position to mitigate counterarguments to conflict preemption claims. For example, defendant municipalities may argue that conflict preemption claims should not be accepted because they suggest that *any* non-statutory reason for eviction or lease termination is impermissible. This implication seemingly contradicts the state statute's intent. After all, Missouri state landlord-tenant laws do not claim that the enumerated grounds are the *only* grounds for eviction—such an explicit prohibition would prevent landlords from evicting tenants for lease violations. However, landlords and tenants *together* can argue that state law establishes a list of *presumptive* rights—not an exclusive list of eviction/lease termination grounds—and that *they* are free to negotiate a lease modifying their state statutory rights. For example, a landlord and tenant are free to agree that pets are prohibited on the premises and that the lease will be terminated if the tenant does not adhere to this term.

The freedom to contract around presumptive rights poses a problem, however, when landlords *choose* to include a crime-free addendum in their leases. Such an addendum is a place where landlords and tenants' interests diverge, and the fragile alliance may dissolve. Furthermore, a landlord's power over lease terms and a tenant's inability to bargain for more protections in the lease leaves tenants vulnerable to housing instability. Despite these potential conflicts of interest, collaborating may still be the most effective and efficient way to tackle the problem presented in this Note: municipalities enforcing facially neutral crime-free nuisance ordinances in a way that disparately impacts vulnerable populations and inhibits racial integration. Even if landlords and tenants

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226. *See* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386–87 (2000).

227. *Id.*

cannot overcome their differences to form an alliance, both groups should explore conflict preemption as an extra-discrimination legal doctrine to challenge burdensome crime-free nuisance ordinances.

## CONCLUSION

Crime-free nuisance ordinances are facially neutral laws that have been discriminatorily enforced by municipalities. Because there are many obstacles to using anti-discrimination protections to challenge these laws, advocates should expand their strategies to include creative, extra-discrimination solutions to tackle these ordinances. Advocates across the country should examine their state's landlord-tenant laws and preemption doctrine to determine whether conflict preemption is a viable option to combat crime-free nuisance ordinances in their cities.